**SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL**

**In the matter of section 27A and section 20C of the Landlord & Tenant Act 1985 (as amended)**

**and of section 24 of the Landlord & Tenant Act 1987 (as amended)**

**and in the matter of The Village, Grange Road, Gosport, Hampshire**

**Case Number:** CHI/24UF/LSC/2004/0001

**Between**

Rowner Estates Limited — Applicant

and

Lesses of The Village, Rowner — Respondents

**and**

**Case Number:** CHI/24UF/LSC/2004/0008

**Between**

Mr & Mrs Munch — Applicants

and

Rowner Estates Limited — Respondent

**and**

**Case Number:** CHI/24UF/LAM/2004/0012

**Between**

Mr V Burt — Applicant

and

Rowner Estates Limited — Respondent

**and**

**Case Number:** CHI/24UF/LSC/2004/0070

**Between**

Rowner Estates Limited — Applicant

and

Lesses of The Village, Rowner — Respondents

**Hearing:** -9th 10th and 12th May 2005

**Appearances :**

Mr N Faulkner FRICS of Labyrinth Properties Limited for Rowner Estates Limited

Mr Munch in person for the applicants in case number CHI/24UF/LSC/2004/0008

Mr T Concannon of Counsel (instructed by Messrs Reynolds & Hetherington) for some of the lessees, members of Village Residents' Association

**Decision of the Tribunal**

Issued: 15th July 2005

**Tribunal**

Mr R P Long LLB (Chairman)
Mr J H S Preston JP FRICS
Mrs C Newman JP

## The applications

1. There were four applications before the tribunal relating to the estate known as "The Village" at Gosport ("the property") that were before the tribunal. Each of them was accompanied by an application (whether made at the time of the application or at the hearing) to the tribunal under section 20(C) of the Landlord & Tenant Act 1985 ("the Act") to limit the amount of the landlord's costs of the proceedings in question that may be regarded as relevant costs to be taken into account in determining the service charge in the relevant year. In the order in which the applications were made, they were:

    a. an application by Rowner Estates Limited ("Rowner") under section 27A of the Act to determine service charges for 2004;
    b. an application by Mr & Mrs Munch under section 27A of the Act to determine service charges for the year 2003 and 2004;
    c. an application by Mr V Burt under Part II of the Landlord & Tenant Act 1987 ("the 1987 Act") for the appointment of a receiver and manager of the property; and
    d. an application by Rowner Estates Limited under section 27A of the Act to determine service charges to be charged in the year 2005.

## Decisions

2. Paragraphs 3 to 8 are intended to form only a brief indication of the tribunal's decisions in the matters in dispute. Any inconsistency between anything contained in them and in the detailed descriptions of the tribunal's findings that appear from paragraph 9 onwards is to be resolved by giving preference to the terms of those later descriptions. The numbers in square brackets in paragraphs 3-8 refer to the number(s) of the paragraph(s) in this decision that deal(s) with the point in question. For the purposes of the summary, and where it appears in the same context in this decision, the expression "allowed" indicates that this is a sum that the tribunal found to be a reasonable cost for the work done to the standard to which it was done. It was not suggested before the tribunal that any of the costs in question are presently irrecoverable by reason of any limitation imposed by section 20 of the Act, and the tribunal's decisions are made on that basis.

3. In respect of the year 2003, the tribunal has decided in respect of the points in issue before it:
    a. that it has no jurisdiction to deal with Mr Munch's points concerning his wish for a management audit. [25]
    b. that the proportion of the service charge payable by the residential leaseholders should be 86.3% of the total cost [30]
    c. that a sum of £2000 plus VAT should be invested initially in investigating the matter of the "cash difference" £142490-01 mentioned in the 2003 accounts, to enable a more informed view to be taken before any subsequent funds are committed. It is not a matter for the tribunal to decide which accountants should undertake that work. [74(g)]

d. that the balance to be shown in the 2003 accounts as payable for service charges in respect of the occupation of the estate office (including arrears from earlier years) is £10948-68 [37], and the amount to be shown there for rent in the same period is £ 2250 [39]
e. that a sum of £117-50 including VAT is to be included in the 2003 accounts for the work undertaken by Friars Secretariat Limited in lieu of the sum of £339-50 presently included. [42]
f. that the telephone charges for 2003 are to be reduced by £30 to allow for private use of the telephone that seems to have occurred. [46]
g. that the tribunal rejects Mr Munch's arguments for reduction in service charges in respect of the land whose reversion has been acquired by Caseacre Limited from Focushawk Limited arising from the fact of that transfer [47 – 49]
h. That Mr & Mrs Munch's service charges are to be reduced by one third of the amount that would otherwise be payable from the date when the last of the lifts was damaged until the date when a lift is once more available and in service that will allow them proper access to their flat. It expresses an informal view only that a similar reduction may be appropriate in respect of their rent [57]

The tribunal has been unable to provide amended schedules of the service charges payable for the reasons given at paragraph [84]. It will be necessary for the accountants to prepare these for the reasons given there.

4. In respect of the year 2004, the tribunal has decided

a. of the list of items in the 2004 accounts that Mr Munch challenged (all of which are also referred to here in round brackets by reference to the page in his bundle on which they appeared) Mr Faulkner conceded [61] that certain of them should not have been included as follows:

i. (176) cost of security fence £105-75
ii. (179) repairs to waste and water pipes in car park £253-80
iii. (180) work to steps at what was the NAAFI £188-00
iv. (182-3) roof repairs £475-00

b. of the same list of items the tribunal has <u>disallowed</u> from the service charge account [62]:

i. (166) cost of repairs at 19 Hillary Court, a sum of £2831-75 [62(c)]
ii. (170) materials at Unit 8. £211-35 [62(e)]
iii. (184) cost of roof repairs £940-00 [62(h)]
iv. (187-8) cost of tenancy agreement £293-75 [62(k)]
v. (189-193) service charges for units 8 and 12, a sum of £2676-88 [62(l)]

c. the remaining items specifically challenged by Mr Munch and similarly dealt with at [62] are allowed. Of those at [62(m)] relating to

management, it appears that a sum of £19452-12 is attributable to the 2003 account, and the balance of £40293-65 is attributable to 2004

d. that the telephone charges for 2004 are to be reduced by £40 to allow for private use of the telephone that seems to have occurred. [46]

e. the sum of £3628-21 for "sundry expenses" is allowed [66-67]

f. of the amount of £86224-78 charged in the accounts for cleaning and landscaping, the sum of £70,000 is allowed [71]

g. the cost of new locks (£3960-50 plus VAT, which the tribunal calculates as a total of £4653-59 including VAT) is allowed [72]

The same provisions apply to the calculation of the charges payable as are set out in paragraph [3] above and are more fully described in paragraph [84].

5. In respect of the budget for the year 2005, the tribunal has decided:

a. that the 2004 costs of asphalting related to staircases only and that the further provision in the 2005 budget does not amount to a duplication [74(b)]

b. the tribunal has no power to compel production of the asbestos survey, although it accepts that it is desirable that the leaseholders should have the opportunity of seeing it [74(c)]

c. that the matter of the nature of the security devices is one that lies with the insurers and is not a matter upon which the tribunal can dictate to them. [74(d)]

d. that the figure for landscaping and cleaning to be substituted in the 2005 budget is £72,100 [74(e)].

e. that the tribunal accepts the level of management fees contained in the budget [74(f)]

f. that it is a matter for the parties to pursue a management audit by giving the appropriate notice if they so wish. That is not a procedure in which the tribunal has a part to play [74(h)]

g. that if a loan by the landlord is necessary then a rate of 4% above base rate from time to time in force would be appropriate [79]

h. that it is appropriate to include an allowance of 3% for inflation for the costs included in the Johnson report [81]

i. that the matter of the identity of the security staff employed at The Village is not a matter for the tribunal [82]

The same provisions apply to the calculation of the charges payable as are set out in paragraph [3] above and are more fully described in paragraph [84]. Those amounts strictly do not become due and payable to the landlord's agents until 1st January 2006, credit of course being due for any amounts already paid or paid on account by any individual leaseholder for that year. However, delay in making those payments will not assist the management of the estate. [86]

6. In respect of the application to appoint a receiver and manager of the property, the tribunal has found that grounds specified in section 24(2) of the 1987 Act appear to it to exist upon which it might appoint a receiver and manager. It is not prepared to appoint the applicant's nominee Mr Brown to that position. [93] The applicant, Mr Burt, may propose another appointee within three months from the date hereof, but if a nominee acceptable to the tribunal has not been proposed within that period then the tribunal will not be prepared to appoint a manager and receiver upon this application [94]. Paragraph 93 also indicates some of the characteristics that the tribunal considers would be necessary in such a nominee, and its reasons for its views upon that aspect of the matter.

7. As to the applications with regard to the landlord's costs under section 20(C) of the Act those applications are granted except in respect of any further hearing of Mr Burt's application for the appointment of a manager and receiver. [99]

8. The parties have leave to apply for the determination of any issue that may arise when the accountants have undertaken this work at any time within three months after the issue to service charge payers of the last of the schedules, prepared by the accountants and any necessary consequent amendment to the accounts, for the three years in question. [84]

**Reasons**

Factual Background

9. The factual background stated in this part of these reasons is derived in part from the tribunal's inspection of the property, and in part from the case papers before it and from information given to it at the hearing. It represents the tribunal's findings of fact, derived from those sources, upon the aspects with which it deals.

10. The property was originally built as married quarters for naval personnel stationed at installations in the Gosport area. The tribunal was not told the precise date when it was built, but observes (without making any finding upon the point) that it is characteristic of a style of building in vogue in the early 1960's. The construction of the buildings appears to be primarily of concrete beneath flat roofs. There are 301 residential units upon the site. They comprise 189 two bedroom dwellings and 112 three bedroom dwellings. In addition there are 12 commercial units, a building that once was a supermarket, long since closed, and a building that was a doctor's surgery. In addition to the

buildings on the site, there are landscaped areas, some garages, and extensive car parks. The residential units are all maisonettes with either two or three bedrooms. The tribunal was informed that the two bedroom maisonettes pay 0.2987% each of the total of the annual charge attributable to the residential units, and the three bedroom maisonettes pay 0.3457% of that sum.

11. A copy of the lease of flat 34 Hillary Court was included at pages 82-120 of Mr Munch's bundle of papers. One page was missing from the tribunal's copies of that lease. The tribunal was referred to this copy from time to time during the hearing, as well as to the complete copy of a lease of flat 5 Lawrence Walk on pages 10-47 of the applicant's bundle relating to the application concerning the service charges for 2004. Both leases appear to be in a very similar form, certainly as far as they relate to the subject matter of the applications before the tribunal, and it was accepted at the hearing that they are representative of the terms of the residential leases relating to the estate as a whole. A company called Aldersgate Investments Limited originally granted the leases, but by 2002 the landlord had become Focushawk Limited ("Focushawk").

12. The flats are let for a term of 125 years from 1st January 1987 at rents that escalate by doubling the rent previously payable at twenty-five year intervals from £25 per annum in the first period of twenty-five years to £400 per annum in the last period. The leases are structured so that there is a management company interposed between the landlord and the various leaseholders (this was New Horizons Management Limited ("New Horizons") until it went into liquidation) that is responsible for carrying out the various services and for collecting the service charges.

13. The tenants' covenants are set out in the Fifth Schedule of the leases, and paragraph 3 of that schedule requires the tenant to pay to the management company "the due proportion" of the annual cost of services with a reserve for future expenditure. The "due proportion" is defined in paragraph L of the First schedule of the leases as " a fair proportion of the Annual Cost (which proportion may vary for different categories of service charge works) attributable to the Flat together with such further categories as the Company shall from time to time determine such fair proportion to be determined by the Landlord's or the Company's managing agent or qualified surveyor or accountant whose decision save for manifest error shall be final and binding." "The Annual Cost" is defined in paragraph B of the same schedule as expenditure incurred by the Company in the accounting period in carrying out the service charge works (including sums which in the accounting period in question are set aside for future expenditure).

14. The management company's obligations are set out in the Seventh Schedule. They are extensive, and as well as the obligations to repair the structure and other parts of the property that are not included in the demise of any flat, the Company is to decorate the exterior and common parts, to clean and light common parts, to insure the building, to pay outgoings in respect of common parts, and to enforce covenants. This description is not exhaustive. When arriving at its decisions the tribunal had regard to the actual wording of the

leases and not to this summary. The service charge is calculated from the cost of these works, as well as the cost of employing staff, providing accommodation for them, and carrying out a number of other duties ancillary to those obligations (that unusually include the marketing and promotion of the estate)

15. Despite the fact that some work had been done prior to the tribunal's inspection to decorate and tidy parts of the property and grounds, the overall impression that the property gives is of an estate that has considerable problems. That impression is reinforced by the fact that there has been a history of litigation in relation to it. As well as a previous application to this tribunal heard in 2002 to deal with service charges for years up to 2002, there have been a number of actions in the local county court, one of which (in which we understand the plaintiff was Mr Munch) culminated in an order against the then management company, New Horizons, to carry out substantial work at its own expense before recovering the cost (or all of it) from leaseholders. New Horizons then went into liquidation, as did Focushawk, the then freeholder, although not before it had sold the freehold reversion to Caseacre Limited ("Caseacre") the present freeholder.

16. The tribunal was able to see that the lifts between Lawrence Walk and Hillary Court are closed, and that there is evidence of fire damage in the staircase adjacent to them. Similarly the lifts at the other end of Lawrence Walk (adjacent to Livingstone Court) are also closed. In consequence, access to the flats on all floors above the ground floor is by means of the staircases only.

17. Rowner has a short tenancy agreement relating to the residential parts of the property from Caseacre, which latter company, we were told by leaseholders, entertains hopes of being able to develop parts of the property for further residential purposes. Caseacre appointed Labyrinth Properties Limited ("Labyrinth") to be its managing agent at the property in 2003, and Mr Faulkner who appeared before the tribunal on behalf of the landlord is a director of that company. Mr Faulkner was unable to tell us much about what had happened in the few years before the date of his company's appointment since it had not been involved at that time, although it had had some earlier involvement at the end of the previous decade at a time before the residents effectively managed the property themselves for a few years. He did however explain that the reason why Rowner has a short tenancy is to enable it to carry out the functions previously undertaken by New Horizons.

18. It was apparent that the period of management by residents had not been an unqualified success. The tribunal was left with a clear impression that management at that time had been undertaken with the objective of containing service charges to the lowest figure reasonably achievable, and that many jobs that might have been undertaken to the benefit of the property at that time were either delayed or not carried out at all in order to keep cost down. There is now a very clear schism between two groups of the residents that manifested itself in the later part of the hearing. The groups form rival residents' associations, and it appeared to the tribunal that it was likely that their differences may date from the time of residents' management.

19. It is apparent from the accounts that have been shown to the tribunal that there are substantial arrears of service charges that arise both from the years the subject of the present applications and from some earlier years. These seem to have arisen in part from an unwillingness to pay for what have been seen as inadequate services, and in part from an expectation following the County Court judgement mentioned earlier that various works should be seen to have been done before any more payments were made. They perhaps also arise in some measure because the property is of its nature expensive to maintain properly, and these are flats that in a number of cases at least were sold on more or less advantageous right-to-buy terms some years ago. The evidence before the tribunal was that the present inflow of service charge contributions is just about sufficient to meet the cost of the very expensive insurance that is now required for the property.

The tribunal's function, and the law relating to the service charge applications

20. The tribunal had before it some hundreds of pages of papers produced by the parties, and heard three days of oral evidence and representations. It has carefully considered all of that evidence and those representations, but in order to contain the length of these reasons it sets out here only those matters that were primarily influential in enabling it to reach the decisions that it has made, as well as some matter in respect of which the tribunal has not adopted the arguments advanced before it, but wishes to indicate why it did not do so. The decision is arranged by reference to each of the three service charge years in question and thereafter as nearly as may be in the order with which matters were dealt at the hearing. In the case of each year it addresses only the points that were, or had been, identified as being matters in issue for the decision of the tribunal for those years.

21. The tribunal makes the point that revised accounts were presented to it at a late stage. So far as the service charge applications are concerned it has proceeded upon the basis that it is to decide, in respect of the service charge applications, a number of issues that Mr Munch put to it, and the matters recorded as being in dispute in the document dated 31 March 2005 signed by the leaseholders' representatives and the landlord's agents, and those upon which Mr Concannon commented.

22. Although two of the applications were made by the landlord, it was agreed at the beginning of the hearing that it would be appropriate for those who objected to any part of the service charges first to say why that was so, allowing Mr Faulkner then to reply and to deal with the points they raised on behalf of the landlord in each case. It was similarly agreed that it was appropriate to hear the service charge cases first and then the appointment of manager application, not least because the raising of unreasonable service charges is one of the grounds upon which the tribunal may appoint a manager under section 24(2) of the 1987 Act.

23. The service charge applications made by Mr Munch in respect of the years 2003 and 2004, and by Rowner for the years 2004 and 2005, require the

tribunal to determine, in accordance with section 27A of the 1985 Act (as amended) whether a service charge is payable, the person to whom it is payable, the amount which is payable, the date at which it is payable, and the manner in which it is payable. Section 18 of the 1985 Act defines the elements that are included in a service charge, namely costs for maintenance, improvement, insurance, or management of any specified description. Section 19 provides that service charges are only payable to the extent that they are reasonably incurred and, where they are incurred for the provision of services or the carrying out of works, only if the services or works are of a reasonable standard. The provisions of these sections govern the tribunal's consideration of those applications.

The 2003 Accounts

24. The tribunal was provided at the hearing with revised accounts for the year 2003. References in this note are to those revised accounts unless otherwise stated. Mr Munch dealt with this year under a series of headings that we have shown in italics for ease of reference.

*Management Audit*

25. Mr Munch first made the point with regard to the service charges for 2003 that there had been no management audit to give details of work done and materials supplied. Mr Faulkner accepted that Mr Munch was entitled to such an audit under sections 76-84 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), but said that neither Mr Munch nor any other tenant had formally applied for such an audit. For its purposes the tribunal can only proceed on the basis of the information before it, that is to say such information as has been made available without such an audit. The tribunal has no jurisdiction over the failure to comply with any request for a management audit after proper notice requiring one has been given. That jurisdiction lies with the County Court under section 85(4) of the 1993 Act. It was not in any case clear to the tribunal that a formal notice requiring such an audit had been given under section 80 of the 1993 Act.

*The "due proportion"*

26. The question of the "due proportion" of the service charge costs to be borne by the leaseholders, Mr Munch told us, ran through the determination of the 2003 accounts as well as those for 2004, and as it would for 2005. In 2002, the tribunal then determined that the leaseholders should pay 86.3% of those costs. They found that to be a reasonable contribution. At paragraph 161 of their decision dated 19th December 2002 (a copy of which was before the tribunal and the parties) the previous tribunal stated that the lease of the commercial premises at The Village to Caseacre Limited provided that Caseacre should contribute 13.7% of the service charge costs, although there had since been an arbitrary reduction of that contribution to 5%.

27. The previous tribunal had derived their figure of 86.3% from the original 13.7% figure for contribution from the commercial lessees. That was the

figure that had been used in the past, and Mr Concannon told us that it had been generally accepted over the years as appropriate. Since that time, Caseacre had entered into a Deed of Variation formalising the 5% figure as its contribution to the service charge costs for the commercial premises. Mr Munch said that the variation could only have been effected by agreement with all of the parties including the leaseholders, so that Caseacre should still pay 13.7% of the cost.

28. Mr Faulkner pointed out that the previous tribunal had not said that Caseacre must pay 13.7% of the service charge cost. It had merely said that the leaseholders should pay 86.3% of it. That was the limit of its jurisdiction, and it could not direct who was to pay the remaining 13.7%. This tribunal accepts that this is a correct statement of the position. On the face of the matter it would then fall for either Caseacre or Rowner to bear the balance to the extent that there may be any shortfall of service charge payment from the commercial lessees.

29. Mr Munch produced documents to show the structure of Caseacre and Rowner at the hearing. He said that Rowner, in particular, had been structured so that it may be difficult to enforce judgments against it, and that Mr Baker-Harber who was involved in the previous hearing in 2002 as well as in the court proceedings, and whom he believed still to be the person primarily interested as landlord, was no longer named as a director of either company.

30. This tribunal is not bound by the decision of the previous tribunal, but sees no reason to depart from its findings upon the question of the division of the service charge between the residential and the commercial parts of the property. The evidence before it is that this was the division adopted apparently without any material dispute, for many years, and that it is only in the last two or three years that any attempt has been made to depart from that position. There has been no evidence adduced to suggest why such a departure may have been justified. Mr Faulkner has not attempted to justify the change to the requirement for the commercial parts to pay 5% of the service charge only within the context of these proceedings. The tribunal has had the benefit of seeing the estate as a whole, and of satisfying itself from that inspection, as well as from the evidence before it, that the 86.3% - 13.7% split between residential and commercial appears to be reasonable and appropriate.

*The shortfall of £142490-01*

31. It is common ground between the parties that there is a shortfall of £142,490-01 in the 2003 accounts. It appears in the balance sheet as an asset under the heading "cash difference", and would seem to be made up of monies contributed by service charge payers that are unaccounted for in that year. The issue between the parties is that of whether this shortfall should be investigated to establish what has happened to it, the chances of its recovery and, if any part may appear to be recoverable, what amounts should be expended on doing so. The accountants concerned have felt unable to certify the 2003 accounts in the usual way. Mr Munch says that, because this money is unaccounted for, the service charge should be reduced by that amount. That

argument avoids the issue that this is money that on the face of it should be available for the benefit of the service charge account but appears, for no reason that is presently known, to be missing from it. The first thing is to seek to discover what has happened to it and whether it, or any of it, is indeed available.

32. The tribunal has sought to balance the plain desirability of recovering this sum to the benefit of the service charge account against the practical possibility of identifying who may owe it and the possibility then of recovering the sum from them. The competing interests advanced before it were an estimate of £5000-00 from Messrs Menzies (formerly Messrs Wilfred Green), the accountants who have prepared the accounts to date, and of £2000 from Messrs Tenon. The estimate from Messrs Menzies (page 138 of the applicant's bundle relating to the 2005 budget) envisages a considerably more extensive initial investigation than does that from Messrs Tenon dated 12 March 2005 handed to the tribunal at the hearing.

33. The tribunal is not an appropriate forum to decide which of the firms of accountants should be employed to conduct the investigation. The possible arguments for the parties to consider in that respect seem to rest between present experience of the accounts and thus an ability to start with a certain knowledge background on the one hand, and independence and a fresh approach, balanced against the need first to acquire the background knowledge, on the other. The tribunal is, however, firmly of the view that, to avoid wasting money on an investigation that may or may not prove fruitless in terms of ultimate recovery, such an investigation should proceed by degrees. Only if the initial enquiries lead to a reasonable and proportionate hope that further enquiry and consequent further expenditure may achieve the desired result should that further expenditure be incurred. To do otherwise may merely lead to good money following bad.

34. In the circumstances the appropriate and reasonable course in the tribunal's judgement will be to authorise accountants (whoever may be chosen) to carry out an initial (it is likely to be no more than that) enquiry up to a cost of £2000 exclusive of VAT, and to report at that point upon the progress they have been able to make. They should at that time also report upon the likelihood or otherwise that further expenditure will be justified in terms of the likelihood of recovery of the whole or some part of the sum in question, and give an indication of the extent of the further investigations that will be required and of their cost, as well as an assessment of such prospects of recovery as they are at that time able to establish. This will enable the parties to consider the extent to which the service charge payers, in whose interest any further expenditure is to be incurred, is made, might reasonably underwrite the cost of further investigation.

*Units 8 and 12 service charges*

35. One of the items for which service charge is recoverable is the cost of provision of an estate office (see for example paragraph 6 of the Ninth Schedule of the lease of 34 Hillary Court on page 117 of Mr Munch's bundle).

In October 2002 a water pipe fractured in flat 19 Hillary Court belonging to Mr. Plowman. It is referred to in more detail at paragraph 62 (c) below. The consequent flow of water damaged not only that flat but also Unit 8 of the commercial units that is situate immediately beneath flat 19. The result of that damage was that the estate office located in Unit 8, and at that time still used by the management company run by the residents (subsequently referred to as "VMC2 Ltd.") became incapable of use. The estate management operation was transferred to unit 12 until March 2004, when Unit 8 had been repaired.

36. Mr Munch argued first that the rental contracts for these units had not been disclosed and so no obligation to pay any rent had been demonstrated, and secondly that it was unreasonable for the leaseholders to pay for an unoccupied office. The total overcharge was £13625-56. In reply Mr Faulkner said that it had been the practice since the early 1990's for the service charge account to bear the service charge rent and rates for the unit occupied as an estate management office. As was the common practice, all the commercial units, of which the estate office was one, bore their own service charges. Service charges had only been charged for the office occupied from time to time.

37. Mr Faulkner explained that VMC2 Ltd., which acted as manager until 1st July 2003 when his firm was appointed, had encountered cash flow problems. In consequence it had not actually paid the rent and service charge contributions for the unit it occupied for the last quarter of 2001, for the whole of 2002 and up to 30th June 2003. There were also arrears of service charge payment for the unit for the remainder of 2003. At present the service charge demand for the estate office at 31 December 2003 was £13625-56. This was made up of the total of the first three items in the 2003 cash book on page 145 of Mr Munch's bundle, namely £14593-89, less the £968-33 office expenses shown in the statement on page 58 of the same bundle which were included in that figure. As Mr Faulkner accepted, that figure includes a prepayment of £2676-88 for the vacant unit, so that the amount actually included should have been not £13625-56 but £10948-68.

38. The figure £13625-56 was, the tribunal was told, mistakenly included in the Caseacre debtor figure of £41230-56 in the balance sheet in the 2003 accounts before the tribunal at the beginning of the hearing. In the revised accounts presented to the tribunal on the final day of the hearing the Caseacre debtor figure in the balance sheet had been reduced to £27604-80 (that is to say by the whole of the £13625-56). As a result of a written enquiry raised by the tribunal after the close of the hearing Mr Faulkner accepts that that too was an error and agrees that on this basis the Caseacre debtor figure in the balance sheet for 2003 should only have been reduced by £10948-68 to £30281-68. Because the £10948-68 represents arrears of service charge for the units 8 and 12 (but only for one of them at any given time) accrued to 31 December 2003 it appears appropriate for that figure to be included in the service charge accounts for 2003.

39. The tribunal was not shown any rental agreement for either unit 8 or unit 12. Whether or not they exist, the terms of paragraph 6 of the ninth schedule are

such as to entitle the landlord to a reasonable sum by way of service charge for rental for them. However, rent can only be charged on that basis for the unit in use at the time. It appears therefore that the charge of £4500 for rent for Unit 8 from 24 June 2002 to 31 December 2003 should be omitted because on the evidence before the tribunal unit 12 was in use at that time. The rent for that unit, according to the extract from the cashbook on page 145 of Mr Munch's bundle was £2250, and only that amount should appear in the accounts.

*The account from Friars Secretarial Services Ltd.*

40. Mr Munch challenged the inclusion in the service charge accounts for 2003 of a sum of £399-50 charged on 31st December 2002 by Friars Secretariat Ltd.. The account in question appears at page 162 of his bundle. The charge was expressed to be for work done in connection with New Horizons Management Company Limited. It included dealing with the annual return, with preparation and filing of forms of change of directors' particulars in June and December 2003, the preparation of various notices, and a meeting with "the Director" in December 2003 for signing various documents. Mr Faulkner said that the invoice was for company secretarial work up to the end of 2003 and that Jordan's would have charged £500 for the same work.

41. The tribunal had the benefit of seeing the details of the various transactions relating to New Horizons, Caseacre and Rowner contained in Mr Munch's supplemental bundle. It is satisfied from that information that the work described in the Friars' account, other than that concerned with the 2002 annual return, had far more to do with the liquidation of New Horizons, and the setting up of the arrangements for Rowner and Caseacre. Apart from the annual return, it is difficult to see, in the light of the details of the transactions mentioned above, and of the background relating to an order made by the Portsmouth County Court that New Horizons should carry out works at the property at its expense, that the work was primarily for the benefit of leaseholders.

42. For reasons that are not explained, the Annual Return was rejected twice. The tribunal accepted that one rejection may sometimes occur prior to acceptance, but would not have expected that it should have been rejected twice before acceptance when it had been professionally prepared. The tribunal is of the view that the work related to the annual return should have had a value of not more than £100 plus VAT. The amount to be included in the 2003 service charge account for the work of Friars Secretariat Limited is thus to be limited to £117-50 inclusive of VAT.

*Telephone costs*

43. Mr Munch challenged the telephone costs of £308-17 for 2003 and £1382-32 for 2004, the details of which appear respectively at pages 146 and 156-157 of Mr Munch's bundle. In the case of the latter charge the figure has to be derived from a number of entries, but it appears as a whole in the 2004 statement. It is convenient to deal with both years together because the arguments are the same.

44. The charges are a mixture of landline and of mobile telephone charges. Mr Munch had asked for a full breakdown of all calls, which Mr Faulkner had not provided. Mr Munch's final position was that he accepted that telephone charges had been incurred and that it an appropriate amount should be recoverable, but that there was evidence in some of the bills of personal calls having been made because no international calls or premium rate calls would have been required in connection with the management of the property, yet evidence of one of each occurred in the statements from BT.

45. Mr Faulkner accepted that there were such charges and that they should not arise, and so could be deleted. However, he argued, there was no other evidence that the telephones had been used other than for the management of the property. The tribunal concluded that the existence of the two calls mentioned by Mr Munch was indicative that some private use had been made of the telephones, and that the terms of the leases did not require that the leaseholders should be required to pay for it. It was however likely that the predominant use of the telephones would have been a proper use. It noted, too, that the much higher 2004 figure included a one off charge for moving the line from unit 12 to unit 8 that had not occurred in 2003, and that a material part of each telephone bill related to matters like line rental and other issues that were not variable in accordance with the number or nature of calls made.

46. Doing the best it could with all of that the tribunal concluded that it would be reasonable to disallow approximately 10% of call costs from the telephone bills for each year as the best estimate it could make of the possible private use of the telephones. The resultant figures are very small in the overall context, and it rounded them to a reduction of £30 in respect of the telephone charges in 2003 and of £40 in 2004.

*"Caseacre's Land"*

47. Mr Munch argued that a number of charges in both 2003 and 2004 should not be met by the leaseholders because they related to land the freehold of which had now been transferred to Caseacre Limited by Focushawk Limited in the 2003 rearrangements. The tribunal rejects that argument, and acknowledges the assistance that Mr Concannon gave to it at its invitation in addressing it upon the point at the hearing, although the point formed no part of his own case.

48. The tribunal's rejection of the argument rests primarily on two grounds. First, the terms of the leases under which the leaseholders hold their flats are such that they are required to contribute to the costs described in them. The costs in question are set out in the Ninth Schedule in the leases (see e.g. pages 116 et seq. in Mr Munch's bundle) The costs in this instance include the upkeep and maintenance of the commercial area (except as provided for in individual leases in that area) and of the grounds surrounding the buildings at The Village.

49. That contractual obligation remains whoever is the freeholder, and it does not require a fresh obligation on the part of the leaseholders to be entered into each time a new freeholder acquires the property as Mr Munch suggested. By virtue of section 141 of the Law of Property Act 1925 the rent and the benefit of lessees' covenants are expressed to run with the reversion to the land. Secondly, the freeholder's obligations (including any obligation to make contributions) similarly run with the reversion by virtue of the provisions of section 142 of the same Act. Thus Caseacre acquired the same obligations arising from the terms of the leases as Focushawk had when it acquired the reversion from Focushawk. In that way the Act keeps the cross obligations in place without the need for any further formality of the sort envisaged by Mr Munch.

50. Where this note has occasion to refer subsequently to the arguments and conclusions on this point it simply refers them as "the LPA point".

*Mr & Mrs Munch's personal liability*

51. Mrs Munch, who appeared before us on the fist day of the hearing, is confined to a wheelchair, and Mr Munch told us that he is her carer. Mr Munch drew attention to the provisions of paragraph 1 of the Eighth Schedule to his lease. It appears at page 114 of his bundle, and provides that if any part of the Building or the flat is destroyed or damaged so that the flat or the access to it is wholly or partially unfit for occupation or use ..... then the payment of the ground rent or service charge and the advance service charge or a fair proportion of them shall be suspended until the flat or the access to it or them have been reinstated and in the event of a dispute in relation to this paragraph then the dispute shall be referred to arbitration. The words omitted relate to a condition where insurance may have been vitiated by any act of the tenant and it is accepted that the point does not arise here.

52. The evidence in connection with the closure of the lifts was not, in its essence, contradicted. So far as the lifts adjacent to Hillary Court are concerned there was a substantial fire in the staircase, fuelled by rubbish that had not been properly removed, in March 2001. The lifts adjacent to Livingstone Court were switched off in March 2002 because the insurance cover had lapsed. Since then they have been damaged to the extent that it would cost (said Mr Munch) £54000 to repair them. It was understood that Mr Baker-Harber had lodged an insurance claim in respect of the lifts adjacent to Hillary Court in 2001 or in early 2002 as appeared from a letter from him to Mr Munch dated 9 January 2002 at page 210 of Mr Munch's bundle. No-one, including Mr Faulkner, had any knowledge of the outcome, if any, of that claim, and nothing more had been heard by Mr Munch from Mr Baker-Harber on the subject.

53. Mr Munch argued that in consequence of these facts he and his wife had been unable to use their flat since 2002 when the further lift had been switched off, and that the provisions of paragraph 1 of the Eighth Schedule in their lease were accordingly triggered. They had had to move to live in a flat in Fareham since that time, and their flat here had been unoccupied. They should have to

pay no service charge or ground rent since that time and until the lifts were repaired.

54. Mr Faulkner argued that the level of inconvenience cannot have been as great as Mr Munch suggested, as the arbitration clause was not invoked some time ago, as it might have been. He accepted that the tribunal might view the matter subjectively in this instance. Mr Concannon helpfully pointed out that it was open to Mr Munch to bring an action for breach of covenant in which the service charges might feature as a set off against any damages awarded.

55. The tribunal bore in mind that it is not concerned to award damages for breach of covenant, nor has it the jurisdiction to do so. It appeared clear to it that, at the latest following the damage to the further lift, the provisions of paragraph 1 of the Eight Schedule had been triggered, and Mr & Mrs Munch were entitled from that time to some suspension of their rent and service charge. The same might apply to any other leaseholder who was unable to access his or her flat by reason of the same events, and Mr Hall told us that there may be at least one other such person.

56. Because Mr & Mrs Munch cannot use the flat for the reasons set out in paragraph 1 of the Eighth Schedule, and the landlord (technically, whatever is the position with regard to lack of funds) is in default, it is plain that they should be entitled to a suspension at least of some part of their rent and service charge. It would have been open to them, subject to any necessary consent being first obtained, to seek to underlet the flat in the time when they were unable to sue it themselves. Whilst that fact may be very relevant in terms of a claim for damages, it is here relevant only in the sense that it demonstrates that the flat was not rendered completely incapable of occupation, but only incapable of occupation in particular by Mrs Munch, and thus also by her carer, Mr Munch.

57. The tribunal has concluded, taking all of those factors into account, that it is appropriate in their particular circumstances that one third of the service charge shall be suspended during the period from the time when the further lift was damaged (precise evidence of that date was not adduced before the tribunal) until the time when at least one lift is back in service that is capable of allowing Mr & Mrs Munch once more to have access to their flat. The tribunal's jurisdiction to deal with the matter on that broad basis arises from the jurisdiction to determine the amount to be paid by a party for service charge contained in section 27A of the 1985 Act. It has no jurisdiction over the rent. If it had, and so far as the parties may be looking to it informally to express an opinion upon the point, it would have considered that a one third reduction would similarly be appropriate.

*Mr Hall's point*

58. Mr Hall made the point at the end of Mr Munch's submission as to 2003 that he considered there should be enough money in hand to pay for the lift repairs without more ado. That point appears to the tribunal to have been answered subsequently by Mr Faulkner who pointed to the very high cost of insurance

now applicable to the estate as a whole, and said that the amounts of service charge that have been actually paid have been very largely consumed in meeting those insurance costs. If, of course, all of the amounts that remain in arrear were now paid there would certainly be sufficient in hand to pay for the repairs to the lifts without more, whatever the position over the insurance claim mentioned above.

The 2004 Accounts

59. The tribunal was similarly provided at the hearing with revised 2004 service charge accounts as the accounts had by then been certified. Reference in this section of this note is to those revised 2004 accounts unless otherwise stated.

60. In addition to his comments concerning the LPA point, the telephone charges and the matter of access to their flat, there were some specific items of expenditure to which Mr Munch wished to object in the 2004 accounts. The tribunal heard him upon those points before asking Mr Concannon to address them upon the items to which his clients wished to raise. In paragraphs 61-62 of this note the numerical references are to the pages in Mr Munch's bundle where the invoices or other documents relating to the item in question appear.

61. It is convenient to record at this point that Mr Faulkner conceded certain of the points raised by Mr Munch in respect of these charges when he came to reply to him. As a result of those concessions the following sums are to be deleted from the 2004 accounts in respect of the expenditures briefly described because they are not payable by the leaseholders as part of the service charge cost, namely:
    a. the cost of a security fence (176) £105-75
    b. repairs to waste and water pipes in the car park (179) £253-80
    c. work to steps that lead to what was originally the NAAFI establishment on the property (180) £188-00
    d. roof repairs (182-3) £475-00

62. Mr Munch's disputed items that were not conceded, with the tribunal's decision upon each, were as follows:

    a. Costs of boarding up at Hillary Court (163). Mr Munch argued that the cost should be borne by Caseacre as the work in question was done on its land. Mr Faulkner said that the boarding up, which we understand was necessitated following some acts of vandalism, was essential to preserve insurance cover. The LPA point applies, and there is nothing before the tribunal to suggest that the cost of what was done was unreasonable or that its standard was inappropriate. £1456-56 inc. VAT allowed.

    b. Cost of plywood. (164 and 165). Mr Munch says that the plywood referred to was used for the commercial units. Mr. Faulkner says it is used throughout the site. The tribunal accepts Mr Faulkner's argument on this point, but in any event the leaseholders pay towards the total service charge cost for the estate as a whole, as do the commercial

lessees, and the differential use of the expenditure is reflected in the "split" between them of that cost. £162-73 inc VAT and £166-72 respectively allowed.

c. Repairs to 19 Hillary Court. (166). The leakage that occurred in 2002 and damaged unit 8 had its origin in Flat 19 Hillary Court, occupied by Mr Plowman. Mr Munch said that this was a private flat, and its repair would ordinarily be covered by the occupier rather than by the service charge. Mr Plowman said that the original leak had been ignored, and had continued so that a wall in his flat had collapsed. The repairs were not carried out until 11 months later. Mr Munch accepted that if the leak were in a communal pipe the original cost of repair might be met by the service charge account, but argued that the cost of repairing the wall ought to be met by the landlord because of the delay. Mr Plowman said that the workmen who carried out the eventual repairs had told him that the original leak should only have cost £200 to repair. Mr Faulkner said the cost had been met from the contingency fund because the insurance excess was £5000 at the time.

   The tribunal accepted that there was considerable delay after the water damage occurred. The evidence on that point was not in dispute. As a result it appeared that considerably greater damage than otherwise might have occurred was sustained. It was difficult on the information before it to know the extent to which this was the case, but plainly the likelihood was that a longer period of water penetration would have caused the damage to the wall in a building of this type of construction. The fact that the payment was out of the contingency fund and the argument about the insurance excess did not affect the matter because any additional cost arising from delay was placing an additional burden on the service charge payers. In the tribunal's collective experience, the verbal estimate of a cost of £200 may very well have been low. Again doing the best that it could with all of that information, the tribunal estimated that a total cost of £1000 plus VAT making a total of £1175 would be a reasonable sum to allow as a relevant service charge cost.

d. Materials for and making bin compound at the car park adjacent to Hillary Court. (167-169). Mr Munch said these costs are not allowable because the compound is on Caseacre's land. Mr Faulkner said it is for the benefit of the estate as a whole. In the tribunal's judgement this is another instance where the LPA point arises. It is not suggested that the works are in any way inadequate, and they are plainly for the benefit of the estate. The sums of £405.29 inclusive of VAT, £675 plus VAT (which amounts to £793-13) and £32-15 inclusive of VAT are each allowed.

e. Materials for Unit 8. (170-173). This is another instance of the LPA point. Mr Faulkner said that they are all part of the cost of the move back to unit 8 and so part of general management. There was no information before the tribunal to suggest that any of them might have

been met by an insurance claim. The invoice on page 172 appears to duplicate that issued a few weeks before on page 170 but to deduct the "office charge" contained in the former. The amounts in both are otherwise identical save for the VAT element. There is no suggestion that the costs themselves are not reasonable, or that the work is not done to a reasonable standard. The sums of £1351-25, £210-17 and of £12-40 (£10-55 plus VAT appearing amongst items relating to other aspects on page 173) are allowed. The invoice for £211-35 on page 170 is not. That is because the tribunal considers on a balance of probabilities that the invoice at page 172 was intended as a corrective invoice for that at page 170, merely omitting the additional £1 and VAT thereon that seems to have been included in error in the earlier of the two invoices.

f. Clearing rubbish adjacent to public house. (174). Mr Munch said that this material is expressed in the invoice to have been dumped by the public house rather than by residents and that the public house should pay for its removal. Mr Faulkner replied that the invoice is unfortunately expressed. There is, he said, no evidence at present that the material was dumped by the public house, and if any is forthcoming he would seek to make them pay the cost of removing it. Until then the cost of removal falls upon the service charge payers. It was not suggested that the cost itself is an unreasonable one for what was done. Mr Munch also advanced the LPA point. In the absence of any evidence (other than the wording of the invoice) linking the occupants of the public house with the rubbish, the tribunal accepted Mr Faulkner's argument as being a reasonable explanation of the situation. £233-01 inclusive of VAT allowed.

g. Costs at unit 8 of £ 31-73 for a basement door and £31-73 for minor works both inclusive of VAT, and of £1444-35 for electrical works. (177-8 and 181). The first two invoices mentioned were plainly invoices for different matters although they were for the same sum. The arguments at sub paragraph 62(e) above otherwise apply to all three invoices, and the three sums mentioned are to be allowed.

h. Roof repairs. (184) The information given to the tribunal by the parties at its request after the hearing indicates that the parts of the roof subject to the repairs mentioned in these invoices are beneath the part of the roof on which works were done as part of the installation of the aerials. That being so, the cost should be met by those who did that work rather than by the service charge payers. The costs respectively of £ 940-00 are disallowed.

i. Drainage adjacent to Livingstone Court. (185). Mr Munch advanced the LPA point in this connection. Mr Faulkner produced a drawing showing the location of the 55 manholes in question that were all around the perimeter of the building. There was no question in the tribunal's mind but that this charge was properly attributable to the service charge account. From the legal point of view, the manholes are

on the land in respect of which service charge is payable. Furthermore, the work plainly benefited those of the residential leaseholders whose maisonettes are served by them. It was not suggested that the works are in any way inadequate or that the cost of them was unreasonable. Accordingly the cost of £2749-50 is allowed.

j. Preparation of draft deed of Covenant. (186). A copy of the draft was produced to the tribunal. It was a standard form of draft for the purposes of the obligations to enter into a deed of covenant imposed upon an assignee in paragraph 10 (c) (i) of the Fifth Schedule in the leases (page 104 in Mr Munch's bundle). That schedule requires the assignee to enter into a direct covenant with the landlord to observe the terms of the lease and to pay the service charge. Mr Munch said this did not benefit the leaseholders, but Mr Faulkner argued that a sale of a flat would be impossible unless such a form were in existence, and the transaction of 2003 had made it necessary to produce a new standard draft. Without such a form in existence it would be difficult for leaseholders to sell their flats.

   The tribunal took the view that the cost could be recovered under paragraph 11 of Schedule 9 of the leases (page 119 in Mr Munch's bundle), and that the document was reasonably required for the management of the estate and for the benefit of leaseholders in that it would allow them to sell. It was plainly inappropriate that a separate form had to be drawn up with its attendant expense on each occasion. Since the service charge account had paid for the preparation of the form it would follow, in the tribunal's opinion, that any fee subsequently payable for the draft by a seller or a buyer would accrue to the same account. The total sum of £293-75 inclusive of VAT is allowed.

k. The letter and bill for the tenancy agreement. (187-8). Mr Faulkner said that this account was for work undertaken by solicitors in 2003 for preparing the short term tenancy agreement by Caseacre to Rowner of the reversion in respect of residential parts of the unit. He says that the work was for the benefit of the leaseholders because an entity had to take the place of New Horizons in the management of the estate following the liquidation of New Horizons. The form itself appears to be a rather hasty adaptation of a form of tenancy agreement usually used in creating assured tenancies, and the letter accompanying the bill in 2004 is dated just a year later than the agreement, and might be regarded as somewhat oddly worded. In this case the tribunal felt able to take the practical view, having the benefit of Mr Munch's evidence about the nature of the structure of Rowner, that the arrangements appeared to be potentially far more appropriate to the benefit of the ultimate beneficiary of the chain of companies now set up to hold the reversions than they were to the benefit of the leaseholders, and it would be quite unreasonable to expect the latter to pay for them. They did not qualify as management of the estate but rather as management for the convenience of those who ultimately benefit from any income

derived from Caseacre. That being so, the total sum of £293-75 inclusive of VAT is disallowed.

The tribunal was not directly addressed upon the point, but the provisions of paragraph 3(b) of the leases seem in any case to cover the point by requiring that the landlord takes over the Company's obligations if the company goes into liquidation. That would seem on the face of it to mean that Focushawk or Caseacre would have acquired the obligation when New Horizons went into liquidation, depending upon which was the freeholder when the liquidation occurred. If that was then Focushawk, then the obligation to undertake New Horizons' functions would have passed to Caseacre in accordance with section 62 of the Law of Property Act 1925, as Mr Concannon argued. The interposition of Rowner seems to have little purpose in the terms of the service charge regime or of the obligations to the leaseholders if that is so.

l. Service charges for units 8 and 12 for 2004. (189 – 193). These charges are allowed with the exception of the charge of £2676-88 in respect of unit 12 dated 31 December 2003 on page 189. That is disallowed because the estate office occupies only one unit at a time and from 1 April 2004 has relocated to unit 8. The rental elements within those invoices are outside of the tribunal's jurisdiction.

m. Labyrinth Properties Ltd.'s management charges. (194-203). Mr Munch says that some of these are for the commercial units (pages 194-197 inclusive), and should be excluded. However, the charges are all for the overall service charge account within the terms of the leases, and then to be split between the commercial units and the residential units on the 86.3/13.7% split. Accordingly the charges are properly included. Mr Munch does not challenge their amount, and neither did Mr Concannon, save as to the additional sum of £3628-21 dealt with at paragraphs 66 and 67 below. Accordingly the total of the invoices on these pages is allowed, amounting to £59745-77. Of that sum, £19452.12 (being the total of the invoices for the July and October quarters in 2003 for management of the residential property on pages 198 and 199) appears to be attributable to 2003, and the balance of £40293-65 appears to be attributable to 2004.

63. Although the tribunal has included consideration of many of the points that Mr Concannon made in the material relating to Mr Munch's application it is appropriate that we add specific comment on parts of it so that both he and his clients are aware of the view that the tribunal took of what he told us.

64. Mr Concannon had initial observations on three heads relating to the matters raised by Mr Munch. The tribunal has taken his comments into account in arriving at the decisions described above. It is important however to record certain of the points that he made within the context of these proceedings. They were, first, that Caseacre became responsible for any monies owed by Focushawk when it acquired the freehold reversion by virtue of the provisions

of section 62 of the Law of Property Act 1925. Secondly, it was that section that creates privity between Caseacre and the leaseholders and creates the obligation to pay the service charge (whether to Caseacre or to Rowner). Thirdly, when Caseacre acquired the reversion from Focushawk it took it subject to the rights of the leaseholders to use all of the property over which the leases confer rights upon them so to do. In particular this appears to include the car park area beneath the commercial area in which a notice appears indicating that it is for the sole use of commercial tenants. The tribunal observes in that connection, and generally, that without having had before it accurately coloured copies of the plans actually used in the leases (as opposed to various copies of what may well be those plans used for other purposes) it is unable to comment upon the extent of the land contained in the demise or over which rights have been granted.

65. Mr Concannon further pointed out that there had been a lease of part of the roof over Lawrence Walk to Caseacre. It had used that lease to enable it to grant rights for the erection of telecommunications masts. That much was not contested. However, the installation of the equipment had violated the integrity of the roof and leaks had occurred. Damage arising from that installation amounted to a breach of the landlord's covenant for quiet enjoyment, and liability for the damage rested with the landlord and not with the service charge account. The point applied only to that part of the roof where the installation had taken place. Mr Faulkner conceded that this was so, and the issue is reflected in paragraphs 61(d) and 62 (h) above.

66. As to the 2004 accounts in general, final accounts were now to hand. From these, Mr Concannon challenged the sum of £3628-21 included as "sundry expenses". He considered that this should be part of the management fee and that the separate item should be excluded. Mr Faulkner said that ordinary expenses of this sort are subsumed in his firm's fee of £110 plus VAT par flat but these are fees for things like section 20 notices in connection with the security locks, even though notices under section 20 may not have been strictly required in that connection.

67. The tribunal concluded that the additional amount added a little more than £10 per annum to the management fee for each flat. It would have had difficulty, given the nature of the estate, the extent of the work that its management properly requires, and the level of charges for management in the locality in holding that an overall management charge in this instance of some £120 was unreasonable, and in any event the RICS Service Charge Code recognises that there may be charges for items outside the managing agent's basic fee. It was not suggested that such charges as these were not recoverable under the terms of the leases. Accordingly the tribunal held that the sum may properly be included in the accounts.

68. The figure of £8623.17 in the accounts as work to cladding windows and door repair was in fact paid for external redecoration said Mr Concannon, but he did not as the tribunal understood him challenge the reasonableness of that figure or the standard of work it produced. He accepted that £86224.78 had

been paid for landscaping and cleaning, but let the question hang as to whether or not that cost and the standard of what had been done was reasonable.

69. The leases provide that the leaseholders are to pay service charges for the cost of carrying out the cleaning (including rubbish removal) of and from common parts and common accessways of the building in which the relevant flat is located (as expressed in the leases to be coloured yellow on the plans on them) and common accessways on the Estate as a whole, and for repairing the boundary and any other part of the Estate not included in the demise of any flat. The obligation (in paragraph 1 of the Ninth Schedule) includes an obligation to contribute to the cost of repair and maintenance of "the Parking Spaces", a term that the leases do not appear to define. For the avoidance of doubt the tribunal took into account the whole of the cleaning and landscaping obligation as it is defined in the Ninth Schedule, rather than the foregoing, perhaps briefer, summary. The Included Rights defined in the Third Schedule of the leases do not (subject to anything that may appear to the contrary from examination of a coloured copy of one of the plans on the leases) appear to give the leaseholders clear rights over all of these areas, or over the areas described as "other parts of the estate" despite the obligation to pay for their upkeep.

70. It was apparent during the tribunal's inspection that some gardening and some exterior painting had been done very shortly before it took place. Both paint and earth, as the case may be, were very fresh. It was equally apparent that the estate was then quite tidy, but that the nature of grass-cutting that had been done, and the almost unusually tidy nature of some of the areas of the estate where clutter would normally accumulate in a short time, indicated that quite a lot of work had been done shortly before its visit. The witness statements attached to the Respondent's reply bore testimony to leaseholders' dissatisfaction with this element of the work. The tribunal had to do the best it could with what was before it.

71. There was no indication of any sort available to it to suggest what would have been a reasonable cost for what was done to the standard to which it was done. Using its collective knowledge and experience of the likely cost of doing the works required by the lease in this connection to a reasonable standard, it concluded that it would be appropriate to allow a sum of £70,000 instead of £86224.78 referred to in the accounts for the costs of landscaping and cleaning as a reasonable payment for what seems likely, on the evidence before it, to have been provided.

72. The respondents raised the matter of the cost of the security locks in their initial representations about the 2004 accounts, although not much was said about them at the hearing. The issue as stated at page 141 of their reply to the 2004 application is that the system installed by Safe & Secure Locksmiths was £3258-50 dearer than the system proposed by Solent Locksmiths Limited. The respondents said that they did not understand why this was. The explanation seems to lie in the undated letter from Safe & Secure Locksmiths to Mrs Killeen at page 93 of the bundle that accompanied the 2004 application. They said that they could carry out the work for £1651-00 using a system with

thirteen replacement cylinders, but that such a system was no longer guaranteed to be secure following changes in copyright law. They did not explain how those changes affected the matter but the implication appears to be that keys for the old system could now be more easily copied than before, whereas the new patented system prevented this. Whilst the cost of t he new patented system seems to be very much higher than the old, nonetheless the tribunal considered, having heard much evidence about the problems of the estate during the course of the three day hearing, that a fully secure system was essential here to protect the residents and that, expensive as it seems to be by comparison with the old one, its installation and cost were reasonable in the circumstances. That cost was £3960-50 plus VAT making a total of £4653-59.

The 2005 Budget

73. There were a number of specific items from the 2005 budget referred to at page 11 of the trial bundle prefaced with the statement of items in dispute. They are referred to in paragraph 4 of that statement and appear at paragraph 3 of the respondents' reply at pages 10-13 in the bundle. Of those items the question of the split between the residential and the commercial property has been dealt with earlier in this note (at paragraphs 24-28 above). The others, so far as they required the tribunal's decision, are dealt with in the following paragraph. There are plainly still arrears of service charge outstanding that the tribunal hopes will be paid once this decision has been issued, for there is no reason at all why they should not be paid then, but otherwise their existence is not a matter for it.

74. As to the items referred to at paragraph 4 of the respondents' reply starting on page 11 of the bundle:

a. The matter of the patch repairs to the roof is not of itself a matter requiring a decision from the tribunal. Mr Faulkner has conceded that where the damage has arisen at points where the aerials have been installed following that work then it is for the companies concerned and not for the leaseholders to pay its cost.

b. The question is raised whether the cost of the asphalting work in the budget is a duplication of that charged in the 2004 accounts. The tribunal accepts that this is an on-going problem, but it appears to it from the evidence before it that the 2004 costs related almost entirely to staircases whilst the 2003 figures relating to passage ways. The comparison of budget with actual figures for 2003 at page 81 of the applicant's bundle relating to case 2004/0001 (comparison of budget with actual figures in the 2003 budget) indicates that the work then was to walkways, whilst the 2004 costs indicate that the very great majority of 2004 expenditure for asphalting was spent on stairways.

c. The respondents have asked for a copy of the asbestos survey that was carried out in respect of the building. The tribunal has no power to compel its production, but accepts that it would be appropriate for

them to have the opportunity of seeing it in view of the perceived health risk that attaches at least to some kinds of asbestos.

d. The matter of what kind of security devices are required is primarily a matter for the insurers and not for the tribunal. If the insurers require such devices as a condition of continuing cover then no doubt they must be provided.

e. The matter of landscaping and cleaning is dealt with at paragraphs 66 and 67 above. The figure to be substituted for 2005 is £72100, being £70000 determined in respect of 2004 plus 3% for inflation. The tribunal is satisfied from its own knowledge and experience that it will be possible to replace the present poor and expensive standard of work with a satisfactory standard at that price.

f. The tribunal accepts the level of management fees proposed. It will be for any manager subsequently appointed to take a view about the need to maintain a site manager. For the moment it does not consider that it would be appropriate to alter the arrangements in that respect in the light of the complexity of the management of the estate.

g. The accountancy issue as stated on page 12 has been dealt with at paragraphs 29-32 above.

h. The tribunal is not satisfied that an appropriate application for a management audit has been made in the sense that no evidence was given to it of a notice having been served as required by section 80 of the Leasehold Reform Housing and Urban Development Act 1993. If the parties want such an audit then it is a matter for them to pursue the statutory procedure, but the tribunal has no part to play in it.

75. There was considerable discussion at the hearing about the rate of interest that would be applicable to a loan made by the landlord to fund the shortfall in the service charge. Mr Faulkner explained that the service charge sums presently being collected were just about enough to pay the insurance premiums. The tribunal observes that the leases do not appear to make the payment of the service charge a precondition of the performance of the obligations expressed to be by the company towards the leaseholders. It notes too the provision in clause 3(b) of the leases that in the event of the company failing to comply with its obligations then the landlord will perform them.

76. Whilst it accepts that there may be more to the matter than it has heard, the tribunal is, on the information that it has, not at all clear why Rowner had to be introduced into the system. On the basis of what Mr Concannon said of the law upon the matter, both with regard to the lease and with regard to the operation of sections 62 and 141 and 142 of the Law of Property Act 1925 and which the tribunal entirely accepts, there appears to be no doubt at all that whatever intervening arrangements have been made Caseacre remains ultimately liable for the performance of those obligations.

77. Mr Faulkner says that no bank would countenance such a loan and that accordingly his clients can almost specify their own rate. The tribunal does not accept that. First of all it is not sure that a loan is necessary if indeed Caseacre ought to underwrite the cost of the works. It does, however, accept that it is hardly likely to do so without powerful compulsion unless it sees a reasonable prospect that the service charges will be paid as they should be so that it is not left out of pocket for any greater period than is necessary. In any event, on that analysis any loan should be made to Caseacre rather than to Rowner, or if made to Rowner should at least be underwritten by Caseacre. As indicated at paragraph 27 above, it does indeed appear from what Mr Munch said that Rowner, at least, has been structured in such a way that it may be difficult to enforce judgements against it, so that it is in turn unlikely that any Bank would have wanted to lend to it. Mr Concannon argues that because Caseacre has property this would be a secured loan to which a rate of 5% or 5.25% may be applicable.

78. If, against that background, a loan is necessary at all then the tribunal can see no reason why it should not be at a proper commercial rate of interest applicable to the risk involved. Caseacre is ultimately responsible for seeing the work done and may be expected to underwrite the loan if it does not actually take it. The tribunal has been shown that Caseacre owns the freehold, including that of the "other parts of the estate", over which the leaseholders seem (on the papers before the tribunal, although it does not have a fully coloured copy of the lease plans, which may show a different position) to have rather limited rights . It has been told that it has it in mind to develop some parts of that land for residential purposes. In short it may perfectly well be able to negotiate a loan on suitable commercial terms. There would no doubt be some risk attendant upon delays in paying service charge that have historically arisen. The comparable enquiries produced by Mr Faulkner envisaged a loan to New Horizons only. That would have been a quite different lending proposition, and in the light of subsequent events it is not surprising that banks were unwilling to undertake it.

79. Taking all of that into account, and if a loan is really required to carry out the scheme of the leases, the tribunal determined that a rate of 4% over base rate from time to time in force would be reasonable. That also happens to be the rate of interest under the lease payable in respect of arrears pursuant to paragraph 14 of Schedule 5 (page 106 in Mr Munch's trial bundle). More particularly it takes into account the fact, a part of the tribunal's collective knowledge and experience that as an expert tribunal it is entitled to take into account, that a bank when fixing a rate of interest would look not only at security but also at the cash flow from which the money was to be repaid. The arrears of service charge payments at The Village do not encourage a rosy view of that cash flow. The opposing arguments of Mr Faulkner and of Mr Concannon seek to emphasise the cash flow aspect on the one hand and the security aspect on the other, and the fact is that the two interact.

80. Mr Concannon also raised the question of the indexing of the costs in the report on the condition of the property, and likely costs of doing the work necessary to bring it back to a decent standard, prepared by Mr N Johnson in

2002 (text at pages 66-95 in the applicant's trial bundle relating to the 2005 budget application no 2004/0070). He argued that there was no need for any indexation since the report "seems to have some provision for inflation there already", and that is clearly the view of the respondents to that application.

81. The tribunal can find little support for that view in the report. A plain example is to be found in the provisions for day-to-day repairs, security cleaning and gardens management and buildings insurance premiums at the foot of the table on page 91 in the bundle. All of them remain static in each of the years from 2003 to 2008. Some other prices in the table change, sometimes upward from one year to another and sometimes downward. Those changes appear to reflect Mr Johnson's assessment of the amount of work in that category that will be required in the years in question. All of this has led the tribunal to conclude that Mr Johnson's report is not intended to reflect inflation, and indeed it would have been difficult for him in 2002 to make any realistic estimate in that respect as far forward as 2008. He does not seem to have tried to do so. It is appropriate to add 3% to the figure for 2005 to allow for inflation. That allowance may be greater or less in subsequent years dependent on economic conditions then in force.

82. There was an issue concerning the identity of the security staff employed at The Village. Some one or more of them are related to leaseholders, and other residents thought this inappropriate. The tribunal was asked to consider the position. It has no jurisdiction to do so. The question of who is or is not employed from time to time is a matter for whoever is managing the estate at that time.

*Payability of the Service Charge*

83. The arrangements for the calculation and payment of the service charge are contained in paragraphs 3 and 4 of the Fifth Schedule in the leases (pages 99-101 in Mr Munch's trial bundle). Broadly, the managing company (or the landlord in the absence of one) is to estimate a fair and reasonable sum for the payment of advance service charge and each leaseholder is to pay its due share of that estimated sum. If there proves to have been an overpayment then the surplus is to be credited against the next payment, and an underpayment may be recovered fourteen days after service of a service charge certificate showing the excess of actual cost over the estimate. The service charge is due on 1st January in each year.

84. It follows that, so far as 2003 and 2004 are concerned, any unpaid sums of service charge are now due. The tribunal has no details of the 2003 and 2004 estimates, but the actual figures have been provided to it. Without having been provided with the information before the accountants in respect of any accruals, and their working papers, the tribunal has not found it possible to provide schedules of costs for each of the three years in issue before it with certainty that they will be accurate. It has concluded that only the accountants can do that because only they have access to that information. The service charge schedules for each of the three years in issue are to be adjusted by taking into them the figures that the tribunal has determined in substitution for

the amounts that have been varied. The charges are to be determined by reference to the apportionment between commercial and residential properties mentioned at paragraph 30, and by reference to the proportions payable by the two and the three bedroom maisonettes respectively mentioned at paragraph 10. The parties have leave to apply for the determination of any issue that may arise when the accountants have undertaken this work at any time within three months after the issue to service charge payers of the last of the schedules, prepared by the accountants and any necessary consequent amendment to the accounts, for the three years in question.

85. For practical purposes the amounts payable for 2003 and 2004 will become due fourteen days after service of the revised service charge certificates prepared on the basis of those schedules as required by paragraph 3 of the Fifth Schedule in the leases. Any amounts already paid for that year or years will of course be credited against the amounts otherwise due, and any overpayment carried forward as paragraph 4 of the Fifth Schedule in the leases specifies.

86. As to 2005 service charge certificates can now be prepared for the year. They should of course have been issued before 1st January 2005, but the existence of these proceedings has presumably prevented that. The strict terms of the lease paragraph 4 of the Fifth Schedule seem to require that the payment would be due to be made then on 1st January next, when the payment based on the 2006 estimate will also be payable. It may well be, however, that leaseholders will consider it in their interest to make those payments before that time, both to assist in the management of the estate and to help to manage their own cash flow.

The application to appoint a manager

87. Mr. Burt made application to the tribunal on 29th September 2004 pursuant to sections 21-24 of the Landlord & Tenant Act 1987 for the appointment of Mr Martyn Brown of Messrs Daniells Harrison of Fareham to be the receiver and manager of The Village. A notice under section 22 of that Act was served on the landlord on the same day, but no issue was taken before the tribunal as to whether the notice did or did not precede the application. The grounds expressed in the notice were that the landlord has:

    a. "made unreasonable demands for service charge as the level of maintenance and cleaning to the estate does not reflect the level being demanded
    b. failed to have the stairwell to the high rise block repaired following a fire in October 2003, thus leaving white asbestos uncovered and could therefore have a detrimental effect on Lessees' health.
    c. Breached its repairing covenants under the lease as the lifts have been switched off and unusable for the last two years or more. The roofing to the building is decayed and need repairing/replacing.
    d. Breached its redecoration covenants of the Leases by failing to have all the exterior of the building painted in accordance with the periodic timetable of the Leases."

The notice gave twenty-eight days within which to comply with its terms.

88. The tribunal may appoint a receiver and manager under the terms of the legislation in question if one or more of the grounds set out in section 24(2) of the 1987 Act (as amended) is satisfied and/or it is just and convenient so to do. Mr Concannon said there have been unreasonable demands for service charges and it would be just and convenient to do so. Mr Faulkner replied that it is not just and convenient to appoint a receiver and manager because Mr Burt who made the application is chairman of one of the rival residents associations and represents no more than twenty percent of the total of the long leaseholders. If the leaseholders wanted to "choose their own destiny" as Mr Burt suggested in his statement then they could exercise the right to manage contained in the Commonhold & Leasehold Reform Act 202 provided that they could assemble the requisite majority.

89. The tribunal is satisfied that there are grounds upon which it could make an appointment. The failure to maintain the lifts is a plain breach of the landlord's obligations in the lease. It has continued for several years past and still continues. It is clear from inspection that the exterior decorating covenants have not been strictly fulfilled, and Mr Faulkner does not challenge the point. Similarly the lack of attention to the stairwell damaged by the fire was also apparent from the inspection. The history of the estate over the last few years exhibits an almost complete breakdown of relations between the landlord and the leaseholders, and that feature alone would in the tribunal's judgement be sufficient to render it just and convenient to appoint a receiver and manager. However his firm may seek against difficulties to try to manage the estate Mr Faulkner's firm was appointed by Mr Baker-Harber, and are still appointed by Caseacre and Rowner. They are plainly, from all that the leaseholders said before us, seen as being 'landlord's men'.

90. However, the jurisdiction to appoint a receiver and manager is a jurisdiction to be exercised for the purpose of rectifying problems that have arisen. The Court of Appeal underlined that fact in Maunder Taylor v Blaquiere [2003] 1 EGLR 52. In deciding whether to exercise the jurisdiction when grounds to do so plainly exist the tribunal must, in considering whether it is just and equitable to do so, examine what benefit may or may not flow from so doing. The question for it is not simply one of deciding whether the applicant represents enough leaseholders to render it just and equitable to accede to their application, but one of deciding whether an appointment would be capable of benefiting the estate as a whole.

91. In his application, Mr Burt nominated Mr Brown to be the receiver and manager of The Village. As chairman of the Village Residents' Association ("VRA") Mr Burt clearly is representative of one of the factions on the estate. That is in no way a criticism of him, for he is plainly doing what he believes to be right, but it is nonetheless a statement of fact. Mr Brown, who qualified as a Chartered Surveyor in 1986 and is in the General Practice Division of that profession, appeared before the tribunal to give evidence about his possible appointment. The tribunal is satisfied that he is an experienced property

manger although the great majority of his experience has been gained in managing commercial rather than residential property. However, he now specialises in the latter area. He had prepared no clear plan for the steps that he might take to deal with The Village, and had not appreciated that as receiver and manager he would be acting on his own initiative rather than taking instructions as a managing agent would do.

92. Whilst Mr Brown was clear that he would seek to deal with the factions on the estate by meeting both of them equally, the tribunal was satisfied from his evidence that he had not thought through either what he was being asked to do nor for whom he was being asked to do it before allowing his name to be put forward for this position. It was left with the clear impression, which it gained in part from Mr Brown's uncertainty, and in part from Mr Burt's wish that the leaseholders wanted 'to choose their own destiny', that Mr Brown expected, and was expected by those who nominated him, to represent their interests. Whilst no doubt Mr Brown is capable of managing the estate, the tribunal is in no doubt having heard all the parties that he would be seen as the 'VRA's man'. That would not be a great advance on the present position of Mr Faulkner's firm. It considers that it would not be just and convenient in those circumstances to appoint him because he could not be seen to have the degree of clear independence that would be essential if a receiver and manager is to be able to take decisions that are not only independent of the different factions on the estate and of the landlord, but that are seen to be so.

93. For these reasons the tribunal is not prepared to appoint Mr Brown. It is however prepared to make an appointment of someone well experienced in estate management of this sort who could command the degree of independence of all parties that would allow him or her to tackle the problems in The Village, and to provide an opportunity for the estate at last to advance from its present unfortunate position. The need for independence may perhaps even indicate a desirability to look for an appointee outside of the immediate Portsmouth/Gosport /Fareham area, although that is not essentially a matter at present for the tribunal.

94. The tribunal is however prepared to adjourn the application upon the basis that it is now a matter for Mr Burt to nominate another person, if he so wishes, who is thought to meet these criteria. He may do so within three months after the date of the issue of these reasons by writing to the tribunal with the details of such a nominee, and simultaneously sending a copy of that letter to the other parties. If he does so then the tribunal will reconvene to consider whether or not to appoint that person, but if he does not then the application will at that date become finally determined upon the simple basis that the tribunal was not prepared to appoint Mr Brown. The tribunal will not in any case consider any further nominations beyond the one nomination provided for in this paragraph because of the need, so far as reasonably possible against the background of this application, to provide certainty in the continued management of The Village. .

The Section 20C Applications

95. There were applications under section 20C of the 1985 Act before the tribunal in respect of all of the substantive applications that were before it. Some were made with the application, and others (those in respect of the two applications by Rowner) were made at the hearing by Mr Concannon on behalf of the respondents in those cases. The applications are for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with the various applications that were before the tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or person specified in the application. Section 20C (3) provides that the tribunal may make such order as it considers just and equitable in the circumstances.

96. For these purposes the applications must plainly apply to all the leaseholders, all of whom are party to some at least of the applications before the tribunal, and are aware of the detail of all of them.

97. For the purpose of determining the applications, the tribunal considered the history of the management of The Village so far as it affected the fact that these applications have come before it. Following the 2002 hearing and determination by the tribunal, and the County Court cases that followed, the landlord and the management company went into liquidation. There was an order made by the County Court (as the tribunal understands the position) that required the management company to do works at The Village before service charges were collected to meet its cost. That order seems to do no more than to reflect the terms of the leases in this respect, but it may well have been instrumental in bringing about the liquidation of the management company.

98. There is no doubt that the existence of the order seems to have led some, but certainly not all, leaseholders to delay making service charge payments until the work in question was done. Most of the work has not been done to this day, and the fact that all the lifts have now been out of action for approaching three years is only the most telling example of that fact. The identity of the landlord has changed, and the management structure now in place does not encourage hope of effective enforcement of its duties.

99. The tribunal was initially minded that it might consider making allowance in dealing with these applications for the fact that a number of leaseholders are in breach of their obligations through failure to pay service charges that might be applied to remedy some of the serious problems at the estate. However, it has concluded that it is on this occasion just and equitable, with one exception, to make the orders sought under section 20C. It was primarily influenced in that respect by the clear failure on the part of the landlord to carry out its own functions under the leases, a pattern that has by now existed, on the evidence before it, since at least 2001. Accordingly it is ordered that, save as mentioned below, the costs incurred, or to be incurred, by the landlord in connection with the various applications that were before the tribunal are not to be regarded as

relevant costs to be taken into account in determining the amount of any service charge payable by the leaseholders. The exception is that the landlord may be entitled to recover costs incurred in any subsequent application to appoint a different person as manager pursuant to the leave given to Mr Burt set out at paragraph [93] above.

100. The tribunal makes the point, now that the situation with regard to the service charges is brought up to date, that it may not (albeit depending on circumstances that obtain at that time) necessarily feel able to take the same attitude if substantial arrears of service charge continue to exist at the time when any future service charge application may be made to it.

(Signed) Robert Long
Chairman

14th July 2005

**SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL**

**In the matter of section 24 of the Landlord & Tenant Act 1987 (as amended)**

**and in the matter of The Village, Grange Road, Gosport, Hampshire**

**Case Number:** CHI/24UF/LAM/2004/0012

**Between**

Mr V Burt — Applicant

and

Rowner Estates Limited — Respondent

**Hearings:** -7th and 22nd November 2005

**Appearances :**

Miss L England of Counsel on 7th November and Mr T Concannon of Counsel on 22nd November (instructed by Messrs Biscoes) for the Applicant

Miss C Street of Counsel (instructed by Messrs Bramsdon & Childs) and Mr N Faulkner FRICS of Labyrinth Properties Limited for the Respondent

**Further Decision of the Tribunal**

Issued: 28th November 2005

**Tribunal**

Mr R P Long LLB (Chairman)
Mr J H S Preston JP FRICS
Mrs C Newman JP

**Decision**

1. The Applicant has withdrawn his application for the appointment of Mr Harvey as receiver and manager of The Village. The tribunal has determined for the purposes the further application before it in this matter made pursuant to section 20C of the Landlord & Tenant Act 1985 (as amended) ("the 1985 Act") that the sum of £2000 plus VAT of the total amount of the Respondent's costs in dealing with this application, that is to say a total of £2375-00, constitutes relevant costs that may be taken into account in determining the amount of the service charge payable by the lessees at The Village.

**Reasons**

2. References in this decision to a "paragraph" are references to the paragraphs of the tribunal's initial decision in respect of this and other applications issued on 15 July 2005

3. The tribunal stated in paragraph 88 that it had found that there were grounds upon which it might appoint a manager and receiver of The Village pursuant to section 24 of the Landlord & Tenant Act 1987 (as amended) ("the 1987 Act"). It was not, however, prepared to appoint Mr Brown, the originally nominated manager and receiver, for the reasons set out in paragraphs 92 and 93. It indicated in paragraph 94 that it was prepared to allow the Applicant to nominate another person to that position within three months after the date of issue of the decision. If he did so then the tribunal would reconvene to consider whether or not to appoint that person, but it would not in any case consider any further nomination beyond that provided for in that paragraph for the reasons that are mentioned there.

4. The Applicant nominated Mr N Harvey FRICS of Messrs Huggins Edwards & Sharp of Great Bookham Surrey to be manager and receiver of The Village within the time limit mentioned. The tribunal accordingly reconvened to consider the matter. It held a hearing at Portsmouth for some two hours on 7th November 2005 that was occupied in part with the Applicant's submissions in respect of representations made on behalf of the Respondent, and in part with questions to Mr Harvey from both Counsel and from the tribunal. The matter was adjourned for two weeks because Mr Harvey was not in a position to say at that time whether or not he would, through his firm, be in a position to employ the persons whom he felt it would be necessary to employ to assist in the management of The Village.

5. There followed correspondence between the parties' advisers that was placed before the tribunal at the second hearing on 22nd November in which the Applicant's solicitors sought information that Mr Harvey required in order to be able to consider his position fully, and the Respondents, through either their managing agents or their solicitors sought information that they required in order to further the contention made by Miss Street on their behalf at the hearing on 7th November that circumstances at The Village had so materially changed that it would no long be just and convenient to appoint a manager and receiver.

6. The correspondence appeared unsatisfactory to both sides, with the result that much of the hearing on 22nd November was taken up with the provision of information that ought to have been provided to everyone before the hearing took place. It was apparent to the tribunal that in particular Mr Harvey still did not have sufficient information at the commencement of the hearing to enable him to decide whether or not he was prepared to continue to allow his name to go forward as nominee receiver and manager.

7. In the events that happened it was necessary for the hearing to proceed, with a couple of short adjournments, for an hour and a half before Mr Harvey was able to say that he did not feel able in the light of the information that he then had to continue as nominee, and for the Applicant as a result to withdraw his application for the appointment. If information had been exchanged as it appears to the tribunal that it should have been, then the second hearing on 22nd November may very well have been unnecessary, or at the very least much foreshortened, and a great deal of time effort and expense could have been saved.

8. The Applicant had made an application under section 20C of the 1985 Act that the Respondent's costs in dealing with this application should not be regarded as relevant costs that may be taken into account in determining the amount of the service charge payable by the lessees at The Village. Counsel agreed that the wording of paragraph 99 was such as to leave that application before the tribunal for determination.

9. Mr Concannon submitted that the tribunal might allow that application for two reasons. First, a major factor in Mr Harvey's withdrawal from the matter had been stated by him to be the existence of a sum of £80,000 owed by the landlord to the service charge account and which sum, it had stated through Counsel at the hearing, it had no proposals to repay. The second reason was the general lack of information on the part of the landlord. His own client's costs of the matter were £2000 plus VAT.

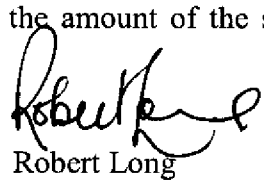
10. Miss Street indicated that the total amount of the landlord's costs in the matter were £5812 plus VAT, which amounted to a further £1017-10. The landlord should be entitled to his costs because Mr Harvey had put forward no detailed proposals for dealing with the property and only three paragraphs of antecedent history. This was a 'second bite at the cherry', but the person put forward was not eventually prepared to do the job.

11. The tribunal found that a large part of Mr Harvey's inability to be more specific, and to put forward more detailed proposals than might reasonably have been expected of him at this stage, appeared from the correspondence before it to arise from a delay or an unwillingness on the part of the landlord's advisers (presumably upon its instructions) to provide information that he reasonably required in order to be able fully to consider his position in respect of so complex a management as The Village.

12. It bore in mind that it had found following the hearing in May that there were then grounds upon which it might have appointed a manager, although it had not been necessary for Miss Street's present arguments on the question of whether or not that remained necessary to be advanced before it. The question of the outstanding £80,000 was undoubtedly a matter of which Mr Harvey might sensibly have been made aware earlier, but the existence of that debt was not of itself a determinant factor in arriving at a decision on the section 20C application.

13. The tribunal has a wide discretion in such matters as this. It determined that in view of its findings following the May hearing it had been reasonable for the Applicant to have made the application, and that although this was a second chance for him to nominate a receiver and manager for appointment, nonetheless it would have been possible for the landlord to have provided information earlier that may have rendered the 22 November hearing, and possibly even that of 7 November, unnecessary. The Landlord's costs in the matter appeared to be very high by comparison with those of the Applicant, even after allowing for the fact that his solicitors had indicated that they had undertaken their part of the work at a concessionary rate.

14. Against that, the Applicant had not eventually been able to produce a nominee willing to undertake what the tribunal accepts was likely to have been a formidable management and receivership task. It concluded that it would be appropriate in all of those circumstances to determine that a sum of £2000 plus VAT of the total amount of the Respondent's costs in dealing with this application, that is to say a total of £2375-00, constitutes relevant costs that may be taken into account in determining the amount of the service charge payable by the lessees at The Village.



Robert Long
Chairman
25th November 2005