Eastern Rent Assessment Panel
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Residential Property
TRIBUNAL SERVICE

REASONS FOR DECISION OF LEASEHOLD VALUATION TRIBUNAL

Landlord & Tenant Act 1985 Sections 27A and 20C

Premises:	Charlewood House, Aspley Heath, Beds MK17 8TA
Our ref:	CAM/09UC/LSC/2005/0017
Hearing:	22 September 2005
Applicants:	Charlewood Residents Association
Represented by:	Mr Brandon Barnwell (Chairman – No 12) Mr Keith Adamson (Treasurer – No 14)
Also Present:	Ms Pamela Ambrose (Secretary – No 6) Mr Peter Cunnison (No 11) Mrs Julia Cunnison (No 11) Mrs Maureen Barnwell (No 12) Mrs Angela Adamson (No 12) Ms Betty Robinson (No 9) Mrs Maureen Atkinson (No 18)
First Respondent:	Kebbell Developments Limited (Landlord)
Represented by:	Mr Nicholas R M Kebbell (Managing Director) Mr Richard A Barrett (Finance Director) (Blaser Mills, Solicitors)
Second Respondent:	Peverel OM Limited (Manager)
Represented by:	Mr Richard J Sandler (Company Solicitor) Mr Neil Taylor (Regional Estate Manager - witness) Mr Robert Howell (Estate Manager - observer) Mr Kishon Mather (Estate Accountant - observer)
Members of Tribunal:	Mr G M Jones MA LLM (Cantab) - Chairman Mr J R Humphrys FRICS Mr J M Power MSc FRICS FCIArb

DECISION:

Upon hearing the parties through their representatives and witnesses as set out above
And upon the Second Respondent Peverel OM Limited undertaking through its solicitor not to add to any future service charge account any costs of or occasioned by this Application

It is ordered as follows: -

1. The Tribunal declares that the following service charge items are not payable by the tenants of Charlewood House: -

Year ending 31 August 2003

(a)	Internal cleaning costs	£3,970.00
(b)	Garden Maintenance Charges	£4,476.94
(c)	Lift Repair Charges	£3,480.35

Year ending 31 August 2004

(d)	Garden Maintenance Charges	£3,166.50
(e)	Lift Repair Charges	£1,046.00
	TOTAL	**£16,139.79**

2. The Applicants and the Second Respondent have permission to apply to the Tribunal in writing within 56 days from the date of this Order in the event they are unable to agree the final account balances.

3. Kebbell Developments Limited have permission to make application to the Tribunal in writing (at the same time serving copies on the other parties) within 14 days from the date of this Order to show cause why they should not reimburse to Charlewood House Residents' Association the Application Fee of £350.00.

4. In the event Kebbell Developments Limited apply to the Tribunal under paragraph 3 above the Applicants have permission within a further 14 days to reply in writing.

5. Unless either party asks in such application or reply (as the case may be) for a hearing in relation to costs, the Tribunal will decide the issue upon written representations.

6. Unless they apply in accordance with paragraph 3 hereof Kebbell Developments Limited shall within 28 days from the date of this Order reimburse to Charlewood House Residents' Association the Application Fee of £350.00. Payment is to be made to the Treasurer and his receipt shall be a sufficient discharge.

7. The Applicants have permission if so advised to apply to the Tribunal within 56 days from the date of this Order for an order pursuant to section 20C of the Landlord & Tenant Act 1985.

Geraint M Jones MA LLM (Cantab)
Chairman
28 November 2004

REASONS

0. BACKGROUND

The Property and its Development

0.1 Charlewood House is a recently constructed four-storey Georgian style gated residential apartment house in grounds of five acres. Within the development are also a lodge and three mews houses, which have been sold freehold. The grounds immediately around the apartment house have been tastefully landscaped, with an asphalt driveway encircling a large lawn in front of the building and a formal garden to one side. The remainder of the landscaping is less formal, in the style of meadow or parkland.

0.2 The main building, which is styled after nearby Woburn Abbey contains 23 luxury apartments with a secure basement garage. A substantial entrance lobby, now enclosed by glazing, leads to an impressive entrance hall with stairways and passenger lift; 18 two and three bedroom apartments on three floors; a first and second floor duplex above the porch and entrance hall; and, on the third floor, four penthouse apartments (Nos 20-23). Each apartment has dedicated parking spaces (generally two per apartment). The level of decorative finish and the quality of fixtures and fittings in both apartments and common parts were clearly designed to be (and in general are) to a very high standard. This is reflected in the prices of the apartments.

0.3 The development of the site was a substantial project which occupied several years. A former nursing home and its outbuildings were demolished to make way for the new buildings. The former car park was removed (not entirely successfully) to make way for the formal garden. It appears that the main building was structurally complete (at least in skeletal form) by October 2001. The first five apartments were sold in October 2001 and two more in December of that year. By the end of July 2002 a total of 16 apartments had been sold, though only 10 owners were actually in residence. The last of the two and three bedroom apartments (No 1) was sold mid-November 2002, at which time two mews houses had recently been sold. The lodge and the third mews house were sold in June and August 2003 respectively. The fitting out of the penthouses was left until last. No 23 was sold in May 2003, No 20 in August 2003 and No 21 in June 2004. No 22 has not been sold and is vacant.

0.4 It can be seen that the earliest occupiers have been substantially affected by ongoing building works for two years or more after moving in. This meant a site office; numerous contractors' vehicles on site; a substantial storage area; and a considerable number of workmen. To reach the penthouses, contractors and their workmen (including "dirty" trades) must of necessity come in through the main entrance on a regular basis with tools, equipment, materials and fittings, and then either walk up three flights of stairs or use the passenger lift. It takes little imagination to guess which would be the preferred route. Moreover, there were various "snagging" defects to be attended to, in addition to general and cyclical maintenance. There was also substantial landscaping work. Although it must have been obvious, particularly to early purchasers, that there would be a period of disruption, it was inevitable that residents would find this irritating and be anxious to see and end to it.

0.5 It was also predictable that the type of people who could afford these apartments would be willing and able to take steps to protect their own interests. To this end a Residents' Association was formed, to which all residents now belong. This was formally recognised by the manager Peverel OM Ltd ("Peverel") for statutory purposes on 15 April 2004.

The Leases and the Services to Residents

0.6 The landlord is the developer Kebbell Developments Ltd ("Kebbell"). The leases are all in similar form. The sample lease is that granted to Maureen Barnwell of No 12. It is for a term of 125 years from the commencement date (some time in 2001) at an annual rent of £340.00, with reviews every 25 years. Lessees must also contribute by way of additional rent to maintenance expenses (as to which, see Schedule 6). These expenses are divided into Part A (Estate Costs) and Part B (Building Costs). Naturally, the house owners contribute to the maintenance of the estate, but not of the apartment building.

0.7 The landlord's covenants are set out in Clause 5 and Schedule 9. The lease provides for the appointment of a manager, Peverel being nominated in this capacity. The manager is to take a lease of the common parts, but not until after the last apartment has been sold. The manager is required to arrange buildings and third party insurance and to provide management and other services as set out in Clause 6 and Schedule 10. The manager (**not** the landlord) is entitled to collect contributions from residents through the service charge provisions. If so advised, the manager is entitled to make provision for future costs by way of a sinking fund.

1. THE DISPUTE

1.1 The residents say that by October 2001 the front lawn (Area A on the plan in the trial bundle) had been laid and the driveways (Area B) laid, kerbed and surfaced with pea gravel. Construction traffic crushed the gravel, turning the driveway into a dust bowl in summer and (no doubt) a mud bath in winter. This was not rectified until July-August 2003, when asphalt was laid at Kebbell's expense.

1.2 The area which is now the formal garden (Area C) was initially used for the site office, storage and contractors' parking. In the second half of 2002 the site office was moved to the west of the main building (Area D) and storage for materials and machinery to the east side (Area E). In the first half of 2003 the landscape gardening contractors Bell Plantation Ltd ("Bell") began work on Areas D and E, though some tasks remained outstanding in June 2003 and the work was not completely finished until June 2004. Generally, good quality plants were used; but the survival rate was poor because of inadequate preparation, nurture and irrigation.

1.3 In Area C, which had been used as a car park for many years, the ground was impacted and did not drain adequately. It was an obvious issue; but, as a result of either inadequate specification or poor supervision (or both), large areas of the formal garden became waterlogged and unmanageable. It was necessary to provide additional drainage; take up most of the lawn; rotovate more deeply; introduce more topsoil; returf and replant, which was done in the fourth quarter of 2003. In about June 2004 Area D was re-worked and re-seeded because the levels were wrong and the ground had become waterlogged.

1.4 Until October 2003, basic grounds maintenance was provided by a part-time gardener, Terry Brooks, who mowed the lawn (Area A) and cleared leaves from the driveway as required. From June 2003, a garden maintenance contract was in place with Bell at a cost of £505.25 per month. Subsequently, say the Applicants, in an effort to remedy poor preparation and workmanship, a high quality garden contractor has been employed at a cost of £9,500 p.a. (more than 50% over budget) and 250 additional plants and shrubs have been purchased at a cost of £1,700.

1.5 Meanwhile, from January to May 2003 major modifications to the hot water and heating systems were carried out throughout the building. This was the result of contractors' error. It was necessary to remove most of the ceilings in hallways and landings in order to install new pipe work in the ceiling voids. The resulting disruption can readily be imagined. Routine cleaning of the affected areas was ineffective. It was the responsibility of the contractors to clean up their own mess, which was not generally done at all well. Residents did what they could in an effort to keep the common areas in reasonable condition and avoid damage to carpets etc. The Applicants say that they should not have to pay for any cleaning of common parts during the period when there were still workmen in the building.

1.6 Until 12 January 2004 the site was under the control of Kebbell, who provided such management and other services as were provided during that period. Peverel accepted responsibility for management services from that time, at which time they inherited a number of problems arising out of deficiencies in the development process. One of these related to the Schindler passenger lift. The lift was commissioned in October 2001. Thereafter for more than two years it was regularly used by contractors to transport men, materials, tools, equipment, fixtures and fittings. During the first half of 2003, the penthouses were re-fitted, involving the removal and replacement of floor and wall tiles and sanitary ware. Some of the materials have been very heavy and there is a suspicion that the lift has been overloaded on more than one occasion. Workmen were seen jamming the doors open during loading and unloading. The lift was not designed for this purpose.

1.7 Certainly the usage has been far more frequent and the loads far heavier than would be the case in normal use. The Applicants say that service and repair costs for the lift have been unusually heavy. There were numerous breakdowns; the lift drive was replaced twice; and there were some lengthy periods when the lift was out of service. In October 2004, at the request of the residents and at additional expense, Peverel entered into a fully insured parts and maintenance contract with the lift manufacturer.

2. THE ISSUES

The Heads of Claim

2.1 The Applicants are aware that the Tribunal is not a Court and does not have jurisdiction to award general damages for any of the matters complained of. Accordingly, their Application dated 28 February 2005 very properly restricts their claim to challenges of specific items on the service charge account. Their heads of claim as set out in the Application can be summarised as follows: -

Year ending 31 August 2003

(a)	Internal cleaning costs	£3,970.00
(b)	Garden Maintenance Charges	£4,476.94
(c)	Lift Repair Charges	£3,616.82

Year ending 31 August 2004

(d)	Garden Maintenance Charges	£3,166.50
(e)	Lift Repair Charges	£1,046.00
	TOTAL	**£16,276.26**

The Parties

2.2 The Application was brought against Kebbell alone. On his initial review of the papers, the Chairman took the view that Peverel, as the manager named in the relevant leases and the party entitled to render service charges, should also be a Respondent.

2.3 There was considerable subsequent correspondence between the Respondents and the Tribunal on the question which of them should properly be parties to the Application. Kebbell said that, under the terms of the lease, no service charges were levied by them. Accordingly, Peverel should be the sole Respondent. Peverel said that the essence of the dispute was between the residents and Kebbell, as it related to the period before Peverel took over the management of the development. Peverel negotiated considerable reductions in the sums claimed by Kebbell for management and services provided up to the date of handover. Nevertheless, Peverel recognized that the residents were entitled to pursue additional matters. But there was no need for Peverel to be a party to the Application.

2.4 In the outcome, both Kebbell and Peverel have continued as parties. They have both submitted evidence and been present and represented at the hearing. However, the question whether one or other of them should have been removed as a Respondent remains relevant, if only in relation to the question of costs.

Consultation

2.5 The terms of the Application appeared to raise questions about compliance with the statutory consultation requirements under section 20 of the Landlord & Tenant Act 1985. This matter was referred to in Directions Orders. By letter dated 10 May 2005 the Applicants gave notice of their intention to rely upon section 20 in such manner as might be appropriate.

2.6 However, the Applicants gave no particulars of any alleged failure to consult. It became apparent during the hearing that the Applicants were not complaining about lack of consultation. The Applicants were able to express their views clearly to Kebbell and, on several issues, persuaded Kebbell to modify their approach; their complaint was that, in respect of the disputed matters, Kebbell did not give their views due weight, or react appropriately. Accordingly, the Applicants did not ask the Tribunal to make any finding under section 20; they were content to proceed on the basis of their arguments under section 19 and section 27A. In the judgment of the Tribunal, this was a reasonable approach; there clearly was consultation, whether or nor it was in full compliance with section 20 and whether or not the views of residents were given due weight.

Costs

2.7 Service charge applications always raise the issue whether the landlord or manager will be entitled to recover the costs (if any) of defending the application through subsequent service charge accounts. In this case, it appears that the leases would permit Peverel (but not Kebbell) to recover such costs in this manner. It does not appear that the Applicants understood the significance of this at the time of their Application. In their letter dated 10 May 2005, however, the Applicants indicated that they wished to rely (if necessary) upon section 20C. At the hearing, Peverel offered an undertaking not to seek to claim costs through the service charge account. On that basis, there is no need for the Tribunal to make a finding. If any issue subsequently arises as regards costs, the Applicants have permission to apply to the Tribunal for a determination.

3. EVIDENCE AND ARGUMENT

Generally

3.1 The Applicants' case was well organised and, for the most part, carefully documented. Any omissions in the documentation appeared to have been caused by deficiencies in the disclosure process. The Applicants were fortunate in that their representatives were clearly experienced in business matters, used to reading accounts, articulate and well prepared. Mr Barnwell and Mr Adamson were also amongst the earliest residents take up occupation and thus had personal knowledge of the matters in dispute.

3.2 Peverel found themselves in a somewhat uncomfortable position. The disputed charges all related to events which occurred before Peverel took over management of the site. Thus Peverel knew only what they were told, either by Kebbell or by the residents. They did, however, produce statements of account and invoices showing how the charges rendered were made up and verifying (so far as they were able to do so) the expenditure. Their stance was that they had done the best they could in the circumstances. They had negotiated substantial reductions in Kebbell's claims and did not feel they could reasonably have done more. However, they recognized that the residents had additional information and might be able to demonstrate that some of the charges accepted by Peverel ought not reasonably to be borne by the residents. Naturally, Peverel were anxious not to be left with a shortfall in the service charge accounts and, accordingly, hoped that any reductions awarded by the Tribunal could be passed on to Kebbell.

3.3 Kebbell produced a good deal of relevant documentation but did not produce any of the contracts for the disputed services. Their approach was that residents should contribute to the cost of services from which they had derived benefit during the latter stages of the development. Kebbell had agreed with Peverel to compromise various aspects of their claims. Peverel had been acting on behalf of the residents, who should accept the outcome. Kebbell did not, however, call any witnesses who had personal knowledge of the situation on the ground at the relevant time. Thus they were not really in a position to challenge the Applicants' account of events, except in a very general way.

3.4 Generally, the Statements of Case set out the issues clearly and recited the arguments of the respective parties. The Tribunal does not intend in this Decision to set out every piece of oral evidence or refer to every relevant document. This Decision is intended to explain the key findings of fact and law necessary to decide the issues in the case. Nevertheless, the Tribunal did read all the relevant documents and take note of all the oral evidence.

The Applicants' Case

3.5 The Applicants said that construction work on the apartments continued until at least January 2004. The residents paid service charges to Peverel in accordance with estimated schedules of expenditure. No final statements of accounts for years ending 31 August 2003 were produced until November 2004, long after Peverel took over. The accounts for year ending 31 August 2002 were dated 6 May 2003 and published soon after that date. Mr Dodson of Apartment 19 (who is now the auditor of the Residents' Association) noticed that the bank account was in deficit as at 31 August 2002. He surmised that the reason for this must be a failure on the part of Kebbell to make due contribution for the unoccupied apartments.

3.6 Mr Dodson accordingly wrote to Peverel on 29 May 2003, raising that issue. He also asked what expenditure was being incurred for garden maintenance and cleaning. He said that residents had not been able to enjoy the garden because it had not been completed. Many of the shrubs had died, apparently because of poor drainage. He said that the common parts were never clean because the developer was still on site. It was his understanding that the developer was to remain responsible for those items until the development was completed.

3.7 On 10 June 2003 Mr Howell (Estates Manager) replied that Peverel aimed to publish accounts for year ending 31 August 2003 by about the end of February 2004. The letter continued: -

> *"1. Garden Maintenance*
>
> *"Your assumption is correct and no expenditure is being incurred with regard to the above. The developer is still managing the estate grounds and this will continue to be the case until we are instructed to take official hand-over of the site.*
>
> *"2. Common Area Cleaning*
>
> *"The above also remains in the hands of the developer until such time as we are instructed to take officially [sic] hand-over of the site. We confirm that no expenditure is currently being incurred for cleaning."*

3.8 This response clearly implied that Kebbell would bear the charges in question up to the handover date and that there would be no charge to residents. It was reported to the other residents, who appear to have been reassured by it. However, as time went on they became increasingly concerned about the application of the monies they had already paid on the basis of pre-estimated expenditure. The first indication that there would be substantial charges for year ending 31 August 2003 was at the end of March 2004, when Peverel published draft accounts showing expenditure of £33,905. A letter dated 7 April 2004 received no substantive reply. Peverel said that they were in a difficult position and suggested a tripartite meeting, which the residents would have welcomed; but Kebbell refused. It is clear that negotiations continued between Peverel and Kebbell. By the end of April 2004 they were close to agreement on all matters. By this time the Residents' Association was formally recognized for statutory purposes. However, for reasons which are unclear, the residents were not consulted or kept informed about the negotiations and the outcome was not communicated to them until much later.

3.9 On 20 August 2004 Mr Adamson wrote on behalf of the Residents' Association to Mr Taylor explaining the residents' concerns about various matters, including the matters now in dispute. He concluded: -

> *"We have taken professional advice and instruct you to withhold invoices of £14,284 during the financial year in question.*
>
> *"We wish to discuss all items mentioned above with Kebbell Homes, with a view to reaching a satisfactory conclusion."*

3.10 When the accounts were eventually published in was clear that Peverel had taken their own course in discussions with Kebbell. Peverel had accepted a number of the invoices the residents wished to challenge. It appears that their basic approach was to accept liability for sums up to the level of the published budget. Apparently, this was in accordance with the terms of their management contract, which the Tribunal has not seen (see Peverel's letter of 26 February 2004 to Mr Barrett). The outcome was that, contrary to Peverel's assurance, residents were being charged substantial sums for garden maintenance and cleaning from September 2002 onwards. The Residents' Association waited until the accounts for year ending 31 August 2004, which were published on 18 March 2005. They then considered the accounts for the period 1 September 2002 to 31 August 2004 and decided to refer to the Tribunal the matters now in dispute.

Internal Cleaning

3.11 Mr Barnwell told the Tribunal about the unacceptable and exceptional levels of dust and dirt. Construction traffic using the graveled driveway created a great deal of dust. The entrance lobby was, at that stage, open to the elements. Contractors were using the main entrance and kept the inner doors open during the working day. Asphalt was eventually laid in July and August 2003. In January 2003 carpets were laid in common areas, apart from the central stairwell, which was done later. Between January and May 2003 the hot water and heating systems were re-worked. Pipe work was taken through each apartment to the basement area. The system then sprang several gas leaks as a result of which all the gas pipe work had to be replaced. This involved the removal of suspended ceilings and the running of new pipes through the ceiling voids.

3.12 Although cleaning was done, in his view the residents did not benefit from it. Many of them took to vacuum cleaning the common areas themselves, in an effort to minimize the "dust and general builders' mess". In the circumstances, Kebbell should bear all the costs up to the date of handover. Mr Adamson added that, although Kebbell did pay for additional cleaning, much of the cleaning work was wasted because building work carried on after the cleaners finished work for the day.

Garden Maintenance

3.13 Mr Adamson told the Tribunal about the development of the gardens. With the aid of photographs taken by residents, he described the problems with Areas C and D. he said the inadequate care of plants was a regular issue. The plants were of good quality; but Bell's employees did not feed or water them. Kebbell's foreman Neil Brown told Mr Adamson that maintenance was not in Bell's remit. Residents offered to water them and were later irritated to find that they had been charged £90.00 for a hosepipe. Mr Adamson thought this was unreasonable because the necessity arose out of the initial landscaping and was not a matter of subsequent maintenance.

3.14 Mr Adamson did not complain about the work done by Terry Brooks, though he queried the overlap between Mr Brooks and Bell (June to October 2003). An e-mail dated 15 April 2003 from Mr Barnwell to Mr Kebbell confirms that: -

> *"It was agreed that after Bell Plantations have finished the garden work a full maintenance contract would start."*

3.15 Residents did not know until much later that the annual garden maintenance contract with Bell had commenced in June 2003 at a cost of £5,160.00 p.a. So far as the residents were aware at the time, Bell's employees were on site completing the landscaping work. The meadow grass in Areas F was mown once prior to January 2004 but no effort was made to tidy up the site, which was done later by residents. So far as Mr Adamson knew, there was no physical handover of the grounds.

3.16 Mr Adamson argued that Kebbell received value from the grounds maintenance, which assisted their marketing efforts. For this purpose, the long-term welfare of the planting was not important. But the residents, who were concerned with the medium to long term, did not receive value. The residents bought their apartments on the strength of assurances that the gardens would be of a high standard. After Peverel took control, Bell were sacked and replaced by high quality landscape gardeners at nearly twice the cost (and 50% more than the original budget). Substantial additional planting was undertaken to bring the gardens up the desired standard. In all the circumstances, the residents should not have to pay any of the disputed charges.

Lift Maintenance

3.17 Mr Adamson told the Tribunal that residents were prevented by the site engineer from using the Schindler lift to move furniture into the apartments, on the grounds that it was a passenger lift only. The use by residents is relatively light. Six of the apartments are on the ground floor. The majority of residents spend a good deal of time abroad. Even now, less than half of the apartments are occupied at any one time. Today, for example, only 12 were occupied.

3.18 The "passengers only" rule did not, however, apply to the building contractors. In the period 29 February 2002 to 11 May 2005 there were 47 attendances by lift engineers, of which 32 were for repairs to the lift. On occasions the lift was out of service for up to 10 days at a time. Mr Barnwell was formerly managing director of Seimens Drives, the largest manufacturer of lift drives in Europe. He said the expected failure rate in normal use was 0.1%. The lift drive at Charlewood House burnt out twice within a period of 12 months. One one occasion Kebbell agreed to pay the bill; on the other, Schindler, as a matter of goodwill, supplied a replacement free of charge. There are continuing problems, even now, with floor level adjustment, safety circuits and door-closing mechanisms. One recent alignment problem was diagnosed as being attributable to stretching of the cables.

3.19 To the extent that these problems arose by reason of defects in the lift or its installation, the associated costs should have been borne by the manufacturer-supplier. Certainly, Kebbell should have been vigilant to ensure that liability for inherent defects (if any) was accepted by Schindler. The Applicants accepted that Schindler was a manufacturer of quality and a company of repute. Schindler's engineers told the site manager on several occasions that the lift was being used for purposes outwith the design specification. The vast majority of the lift maintenance costs were paid by Kebbell, who admitted that at least some of the problems were attributable to damage by building contractors. The only reasonable explanation for these problems was abuse by building contractors. Of course, it might prove difficult to establish which contractor was to blame, in which case Kebbell should bear the costs out of their own pockets. The residents tend to be of an age at which the use of a lift is a great convenience, if not a necessity. They were entitled to expect that, with regular maintenance, the lift would give trouble-free service for at least three years. It was not reasonable to add these costs to the service charge account.

Kebbell's Case

3.20 Mr Barrett said that Kebbell were surprised to be named as Respondents. All the service charge obligations in the lease fell upon the manager. The liability to bear costs was governed by two different agreements: the management agreement (to which residents are not parties) and the leases. Thus it was Peverel's obligation to provide services and resolve service charge issues. Kebbell did not necessarily agree with all aspects of Peverel's accounts presentation.

3.21 Mr Kebbell said his company took no issue with the facts as presented. They had tried their best to present a product they could be proud of. On several occasions they discussed issues with residents and made concessions, which they were not obliged to do. None of the extra costs impacted directly upon the service charge account because increases were more than offset by savings elsewhere. Kebbell selected the various cleaning and gardening contractors until the handover on 12 January 2004; they did not consult Peverel. They tried to act reasonably. When nearing completion, Kebbell submitted to Peverel reasonable sums which they felt were properly rechargeable. Peverel made the point that, in some cases, the charges exceeded the original budget.

3.22 The cleaning recharge was only a small proportion of total costs incurred. The building contractors were working on only one part of the building at any one time; it could not be measured exactly. The recharge was only a modest proportion of the total cleaning costs and within the original budget. The sums paid to Terry Brooks were reasonable. The grass needed cutting and leaves must be dealt with; his charges were the most competitive available. Mr Kebbell did not know the terms of Bell's contract. The overlap between the two was a mistake. But the overall recharge was reasonable. There were considerable problems with the lift; but it was not, so far as he knew, overloaded. It was difficult to see how it would be possible to exceed the maximum lifting capacity (which was 630kg or 8 persons). There is no sufficient evidence to show that the building works caused other damage to the lift.

3.23 Peverel's statement in their letter of 10 June 2003, that no charges were to be made until handover, was wrong. All apartment buyers were shown a budget at the outset. Mr Barnwell asked him about costs allocation, with particular reference to electricity. He was told that charges must be allocated between developer and residents. The principle should be the same for other expenses. In the early stages of a development, the developer occupies the greater part of the building; later the balance changes. Kebbell's practice was to make a recharge whenever residents were enjoying benefits. He felt that Kebbell and Peverel had reached a reasonable compromise.

Peverel's Case

3.24 Peverel is a large property management company which manages over 60,000 residential units in England & Wales and 40,000 units of retirement homes. At their offices in Luton they employ some 200 staff. They were originally founded in the early 1980's as an arm of McCarthy & Stone (well known as a major national provider of retirement homes), but are now owned by Holiday Corporation of America. Mr Taylor explained to the Tribunal that, in his experience of nearly 100 handovers, the developer invariably bore virtually all the costs of repair, maintenance and other services until handover. In phased developments, there were sometimes apportionment issues, though these were usually more clear-cut.

3.25 Peverel did not take over management of the site until mid-January 2004. Until that time, their role was confined to arrangement of insurance and collection of ground rents and insurance contributions. The accounts for year ending 31 August 2002 were prepared on that basis. In the summer of 2003 Mr Howell inspected and prepared a snagging list with a view to accepting a handover. The Residents' Association also prepared a list of matters they wanted Kebbell to deal with.

3.26 By 12 January 2004, Mr Howell was satisfied that the building was in a fit state for handover. Around the end of 2003 Kebbell presented a batch of invoices they wanted Peverel to put through the service charge account. Peverel were a little alarmed at the amounts involved. They did their best to satisfy themselves that the costs claimed were reasonable. They rejected costs incurred for year ending 31 August 2002, for which accounts had already been published. They considered whether Kebbell's costs might be development or marketing costs or attributable to damage caused by contractors. Kebbell was their client; but they also had a duty to residents. They tried to be as transparent as possible in negotiations on both sides. They did their best in an unusual situation.

3.27 The Chairman directed Mr Taylor's attention to the terms of the lease and asked who, in his opinion, was responsible for services and service charges during the development period. Recitals (3) and (4), Clause 4 and the 6th to 8th Schedules appear to be the relevant provisions. On the face of it, the designated manager is surely responsible, even though initially services may be provided by the landlord as developer. Mr Taylor did not disagree.

4. THE LAW

Service Charges

4.1 Under **section 18 of the Landlord & Tenant Act 1985** (as amended) service charges are amounts payable by the tenant of a dwelling, directly or indirectly, for services, repairs, maintenance, improvement, insurance or the landlord's costs of management. Under section 19 relevant costs are to be taken into account only to the extent that they are reasonably incurred and, where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly. Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable.

4.2 Under **section 27A** the Tribunal has jurisdiction to determine whether a service charge is payable and, if so, the amount which is payable; also whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if so, the amount which would be payable.

Consultation

4.3 Under section 20 of the Act of 1985 (as amended), which had effect in relation to contracts entered into up to 31 October 2003, the landlord or manager (as the case may be) was required to consult tenants before entering into contracts for more than £1,000 or £50.00 per unit, whichever was the greater. Unless the requirements of the section were met the landlord or manager could recover only £1,000.00 or £50.00 per tenant (as the case may be). However, it was recognised that there might be cases in which it would be fair and reasonable to dispense with strict compliance and the Court had power to waive the requirements wholly or in part if appropriate.

Costs

4.4 The Tribunal has no general power to award inter-party costs, though a limited power now exists to make wasted costs orders. In general, if the terms of the lease so permit, the landlord is able to recover legal and other costs (eg the fees of expert witnesses) associated with an application to the Tribunal as part of the service charge.

4.5 However, under **section 20C** of the Act of 1985 the Tribunal has power, if it would be just and equitable so to do in the circumstances of the case, to prevent the landlord from adding to the service charge any costs of the application. In the Lands Tribunal case *Tenants of Langford Court –v- Doren Ltd* in 2001 HH Judge Rich QC said that the LVT should use section 20C to avoid injustice..

5. CONCLUSIONS

5.1 The factual matters relied upon by the Applicants were not significantly challenged by the Respondents. There are, of course, matters in respect of which the Tribunal must draw inferences from the primary facts and issues of reasonableness upon which the Tribunal must reach conclusions. But it is not necessary for the Tribunal to decide any substantial conflicts of evidence.

5.2 In the judgment of the Tribunal it is clear that the leases made Peverel responsible for services and service charge accounts from the grant of the first lease, even though it was envisaged that Kebbell would initially provide the relevant services. It was entirely between Kebbell and Peverel how the provision of services was managed between them and what arrangements were made for Kebbell to be reimbursed for costs incurred. No doubt this was dealt with in the management contract between Kebbell and Peverel (which the Tribunal has not seen). But, whatever the contractual and practical arrangements between them, Peverel was obliged to provide the services to the tenants (amongst whom would be Kebbell until the last unit was sold) and only Peverel could recover relevant costs from tenants through the service charge provisions.

5.3 Tenants were from the outset entitled to the protection of the 1985 Act and related legislation. Kebbell was entitled to incur such costs as suited its purposes, which primarily involved completion of the development and the sale of apartments. If Kebbell chose (as it did) to incur costs without consulting Peverel, then (depending upon the terms of the management contract) such costs might or might not be recoverable from Peverel. As experienced professionals, the directors of Peverel would presumably be anxious to ensure that no costs were incurred by Peverel that could not be recharged to tenants. It is not the function of management companies to fund services out of their own pockets. But, whatever the position as between Kebbell and Peverel, the tenants were obliged to contribute only to such costs as were reasonably incurred and, even then, only if and insofar as the services provided were of a reasonable standard.

5.4 On the evidence, it is the usual practice for developers to bear the cost of providing services during the development period. There was a suggestion that prospective purchasers of apartments at Charlewood House were told as much; but the evidence on that point is insufficient for the Tribunal to make a finding to that effect. It is, however, clear that Peverel expected Kebbell to bear those costs and, by the letter of 10 June 2003, gave a clear assurance to Mr Dodson to that effect, which Mr Dodson reported to the residents' group.

5.5 The Tribunal finds that Mr Howell and his colleagues were well aware that the tenants were acting in concert and it should have been obvious to them that Mr Dodson would report such an important assurance to other tenants. The tenants were entitled to believe and did believe that there would be no charges for services prior to the handover date and that there was, accordingly, no need to be concerned about the level of costs incurred, provided the services were of a reasonable standard. For this reason, until the publication in March 2004 of the draft accounts for year ending 31 August 2003, their extensive complaints and enquiries focused on the standard of services.

5.6 In February 2004 Kebbell for the first time submitted to Peverel accounts for various services in respect of which they felt the tenants should make contribution. Although Peverel's management team were not expecting this, it was not unheard of. In the judgment of the Tribunal, it is doubtful whether Kebbell had any right to require Peverel to accept any of the accounts. Peverel had not authorised any expenditure on the provision of services. However, it was reasonable for Peverel to enter upon an inquiry as to what services (if any) had been provided and whether it would be reasonable for Peverel to accept responsibility for some or all of the costs, as being costs reasonably incurred in providing services for which Peverel would otherwise have been responsible.

5.7 The Tribunal accepts that Peverel was handicapped in pursuing such inquiry by the fact that its managers had not been on site during the period when the costs were incurred. It is, perhaps, unfortunate that Peverel did not take more notice of the objections raised by the Residents' Association. Peverel argues that it attempted to strike a fair balance between landlord and tenants. The Tribunal accepts that Peverel did genuinely make such an attempt, rejecting a considerable proportion of Kebbell's claims, to the benefit of the tenants. But Peverel was not in a position to bind the tenants by reaching an agreement with Kebbell and would have been well advised to involve the Residents' Association more closely in negotiations.

5.8 Undoubtedly, there were services provided to tenants during the relevant period. The Applicants accept that they ought properly to contribute to the costs of electricity; water and sewerage; fire equipment and other similar matters. They have confined their Application to services which, they say, did not benefit them or were of a poor standard.

Internal Cleaning

5.9 In the judgment of the Tribunal, the Applicants had genuine cause for complaints about the level of dust and dirt in the common parts. Until July or August 2003, there was considerable traffic on the graveled driveway, producing clouds of dust. Until at least August 2003 there were contractors inside the apartment block. The main doors were kept open by workmen during the day, admitting dust into the lobby and hallway. Workmen were tramping in and out on a regular basis. The work on the heating systems, water and gas pipes in the Spring of 2003 created a considerable amount of dust in all the corridors. The work carried out on the penthouse apartments involved the removal and replacement of extensive areas of tiling and bathroom fittings. This was also messy work. The entire central stairwell on all floors was affected. Dust would have filtered into the corridors even though workmen may not have been working there. Moreover, the period during which internal works continued was considerably longer than was originally anticipated. The Tribunal accepts that there were contemporaneous complaints about the state of the common parts. These complaints were largely ignored by Kebbell's site manager, perhaps because there was little that could be done about them.

5.10 It appears from the invoices that Mops Cleaning Services attended twice a week. In the judgment of the Tribunal, routine cleaning up to about the end of August 2003 was largely a waste of time because the workmen were still on site after the cleaners finished work. The important cleaning was that carried out by contractors at the end of their working day. This was not always done to a reasonable standard, which is hardly surprising. In any event, cleaning carried out by workmen is clearly a development cost not rechargeable to tenants. It was reasonable in all the circumstances for the tenants to contribute to cleaning costs from 1 September 2003. In the judgment of the Tribunal, it was not reasonable for Peverel to accept on behalf of the tenants responsibility for the cost of cleaning services provided by Mops Cleaning Services prior to 1 September 2003. Accordingly, the charges amounting to £3,970.00 were not reasonably incurred and are not payable by the tenants.

Garden maintenance

5.11 In April 2003 Kebbell agreed with Mr Barnwell to arrange a maintenance contract once the work was complete. E-mails in April, May and July and Schedules prepared by Mr Adamson in July and October 2003 mentioned the poor quality of workmanship and various outstanding issues. E-mails from Mr Barnwell dated 22 December 2003 and 24 May 2004 shows that some items were still outstanding. In the judgment of the Tribunal, the gardens were work in progress until at least the end of December 2003. Maintaining the grounds during this period was a development cost. It is unlikely that much garden maintenance was done in January or February 2004. Moreover, the Tribunal accepts that the standard of maintenance provided by Bell was poor. In the judgment of the Tribunal it was not reasonable for Peverel to accept on behalf of the tenants responsibility for such garden maintenance as may have been carried out by Terry Brooks or Bell. The charges amounting to £4476.94 for year ending 31 August 2003 and £3166.50 for year ending 31 August 2004 were not reasonably incurred and are not payable by the tenants. The Applicants do not seek to challenge the full costs for year ending 31 August 2004, which amounted to £7218.24.

Lift Maintenance

5.12 In normal use in this type of building, the majority of journeys would involve one or two passengers weighing an average of 75 kgs. Even if the apartments were fully occupied, residents would make only a handful of journeys each day. Lifts are, of course, designed to carry a maximum load (in this case 630 kgs or 8 persons); but most of time loads will be well below maximum capacity. With the type of usage to be expected from these residents, the lift should have given years of trouble-free use. All usage of machinery causes wear and tear. Heavy and frequent usage is likely to cause unusual or excessive wear and tear and may cause damage. The effects of such usage may not immediately be apparent and may be the cause of problems surfacing for some period after the usage ceases.

5.13 There is no clear evidence that the lift was overloaded on any particular occasion. However, there is clear evidence that it was regularly used over a long period by workmen transporting heavy materials. In their Statement of Case Kebbell admit that damage was caused to the lift by workmen. There is also evidence of a very large number of non-routine attendances by engineers. There is no reason to suppose that the mechanisms were defective when installed. The Tribunal must do the best it can on limited evidence. In the judgment of the Tribunal the level of usage during the period of internal works far exceeded normal usage and was such as to cause excessive and unusual wear and tear and, in some cases, damage to the lift mechanism. The legacy of that usage endured for a considerable period after building works ended and may still be having some effect.

5.14 It was Peverel's responsibility to ensure that charges rendered to tenants were reasonably incurred. Kebbell chose not to call evidence from Schindler to demonstrate that any of the non-routine attendances by lift engineers arose from causes other than development activity. In the judgment of the Tribunal it was reasonable for Peverel to accept responsibility only for routine maintenance costs. Any other costs were not reasonably incurred.

5.15 Accordingly for year ending 31 August 2003, charges of £555.19, £2,796.50 and £128.66 (a total of £3,480.35) are not payable by tenants, leaving two items in the sums of £381.88 and £254.59 (total £636.47) relating to routine maintenance. (The Applicants have arbitrarily allowed a sum of £500.00 for routine maintenance to reach their claimed deduction of £3,616.82.) For year ending 31 August 2004 total service charges related to lift maintenance amounted to £3,033.58. The Applicants ask that one invoice amounting to £1046.00 be disallowed. We do not have the invoice; but it clearly related to a non-routine attendance. Accordingly, the Tribunal holds that the sum of £1,046.00 is not payable by tenants, leaving a net figure of £1,987.58 payable for that period.

5.16 The result is set out in tabular form on Page 2 of this Decision. The total deducted is £16,139.79.

5.17 Any adjustment of the account between Kebbell and Peverel is not a matter for the Tribunal; but, on the evidence before the Tribunal, it appears that any agreement as to the balance of account was probably by necessary implication subject to the right of the tenants to challenge the account. If so, then the account should be adjusted in favour of Peverel by the same amount, namely, £16,139.79.

5.18 The Applicants have been substantially successful. For reasons which have already been stated, the issue of costs does not arise. The Tribunal takes the view that the necessity for this Application arose substantially because Kebbell sought to recoup from the tenants of Charlewood House through the service charge account sums in excess of what was reasonable. Peverel were put in a difficult position, not only because of their lack of detailed knowledge of the circumstances, but also because Kebbell were in a position to withhold service charge contributions due in respect of unoccupied units. In the circumstances, the Tribunal is minded to order that Kebbell shall reimburse the Applicants in respect of the application fee of £350. This conclusion is subject to any "Calderbank" offers or other relevant correspondence Kebbell may submit to the Tribunal within 14 days from publication of this Decision (accompanied, if so advised by written arguments).

Geraint M Jones MA LLM (Cantab)
Chairman
27 November 2004