FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00AF/LSC/2020/ VIDEO REMOTE**
Property	**:**	**Rosslyn Mansions, 21 Goldhurst Terrace, London NW6 3HD**
Applicants	**:**	**(1) John Ingledew (Flat 2); (2) Jonas Wandrin and Aparna Wandrin (Flat 7); (3) Gary Bortz (Flats 9 and 10)**
Representative	**:**	**Rebecca Cattermole of counsel, instructed by Adams & Remers LLP**
Respondent	**:**	**Winstonworth Ltd**
Representative	**:**	**Richard Granby of counsel, instructed by Oliver Fisher Solicitors**
Type of application	**:**	**Appointment of a manager and liability to pay service charges**
Tribunal	**:**	**Tribunal Judge Adrian Jack, Tribunal Member Mark Taylor MRICS, Tribunal Member John Francis**
Date of Decision	**:**	**3 June 2021**

DECISION

Covid-19 pandemic

This has been a remote determination which has been not objected to by the parties. The form of remote hearing was V: VIDEO REMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined without one. The documents that the tribunal was referred to were contained in various electronic documents from the parties. The order made is described at the end of these reasons.

Background and Procedural

1. This matter concerns applications made 23rd February 2021, originally by Mr Ingledew, but subsequently joined by the other tenants

(a) To appoint a manager under section 24 of the Landlord and Tenant Act 1987. They propose Alison Mooney MRIPM ARICS of Westbury Residential Ltd.

(b) To challenge the payability and reasonableness of service charges for each year from 2009 to 2019, specifically Cleaning Maintenance, Garden Maintenance, Porterage, General Maintenance and Repairs, and Management Charges, plus Telephone Entry System in 2014 and Legal Costs in 2019, and the putative charges for 2020, under section 27A of the Landlord and Tenant Act 1985.

(c) For an order prohibiting the Respondent from recovering the costs of these proceedings through the service charges under section 20C of the Landlord and Tenant Act 1985.

It is common ground a proper notice was given under section 22 of the 1987 Act before the section 24 application was made.

2. The complaints on which reliance is placed for the appointment of a manager are these:

"Ground 1: Landlord's breach of obligations under the Lease in relation to the management of the Property

1. Failure to insure or adequately insure the Property or to comply with the conditions of insurance in relation to: (i) the clearance of gutters and downpipes; (ii) roof drainage; (iii) electrical inspections; (iv) fire safety inspections in breach of clause 4(2) of the Lease.

2. Failure to comply with repairing/maintenance/decorating obligations under clauses 4(4), 4(5) and 4(11) of the Lease relating to external parts, the garden, and internal common parts. Very little has been done for many years. For example: leaks have occurred as a result of, inter alia, broken rainwater pipes leading to leaks, loose/slipped/broken roof slates, defects to flashings on parapet wall and severely decayed windowsills; the external parts have not been decorated; the paintwork internally is poor with

patches of damp and damaged plasterwork; and the entryphone system does not work.

Ground 2: Unreasonable service charges

3. The charges have been unreasonable for various reasons including, inter alia, poor quality and/or lack of adequate cleaning of the common areas of the building; standard of maintenance; and duplication of charges under management, porterage, general maintenance and repairs.

4. In addition, porterage and percentage charge for management fees are not recoverable under the Lease, and the services and works are performed or undertaken by one of the directors, John Hunt, and/ or members of his family but such arrangements have not been subject to any statutory consultation.

5. Since year end 2017, the Landlord has required payment for major works although these are not accounted for in the statement of account, the consultation was not undertaken in accordance with s.20 of the Landlord and Tenant Act 1985, and any works undertaken were inadequate.

6. For the Year End 2019, the Landlord sought to recover purported legal costs incurred from only those tenants who were also members of the tenants' association, namely the Applicants.

Ground 3: Unreasonable administration charges

7. The Landlord has charged varying sums for providing a copy of the Building's insurance without any explanation as to how the sum was calculated, targeted the tenants who own the leases of their flats and who are members of the tenants' association, and imposed random charges to individual tenants for items such as cleaning in common parts.

Ground 4: Breaches of RICS Code of Practice: Service charge residential management Code and additional advice to landlords, leaseholders and agents, 3rd Edition…

8. Various breaches include, inter alia: failure to respond promptly to reasonable requests for information regarding the "contingency fund"; failure to deal with reasonable requests in relation to the security of the building which has led to burglaries; and failure to arrange for proper risk assessments of the Property relating to fire safety and asbestos.

Ground 5: Other circumstances/Just and convenient

9. In short, the Landlord has failed to manage the Property adequately or at all, as outline above.

10. In addition, there are serious concerns about the Contingency Fund to which the tenants contribute, and it is estimated the total projected for the fund should be £89,404. The Landlord, however, refuses to provide, a statement of account or disclose any details of the Contingency Fund. By email dated 26 May 2017, the Landlord stated that "as with any savings account one is only entitled to what that person has contributed. Furthermore, out of

> respect for other contributors, to the fund, [sic] we treat their contributions as a private contractual matter between landlord and leaseholder and not for public knowledge."
> 11. The Landlord considers that any questions raised over the service charges, management of the Property and quality of work and services is "harassment" and has threatened forfeiture proceedings in retaliation for raising queries as to the management of the Property.
> 12. The Landlord's response to the notice served under s.22 of the Landlord and Tenant Act 1987 was to describe its contents as "libellous" and a list of "non structural" and "minor cosmetic" defects. Whilst that response in a letter dated 29 December 2020 said that a file was being prepared for its solicitor, there has been no further communication from the Landlord or any solicitor.
> 13. The Landlord has not taken any steps, or shown any indication that it is willing, to remedy the matters complained of in the said notice and accordingly a manager should be appointed by the Tribunal.

3. We heard this matter on 5th, 6th and 26th May 2021 remotely. There were experts called on each side, Mr John Byers BSc FRICS ACIArb of LBB Chartered Surveyors for the tenants and Mr Mark Kenwood MRICS MCIOB of Osbourn White Ltd for the landlord. They had agreed a statement of agreements and disagreements.

4. We heard from Ms Mooney, the proposed manager. There was no issue that, if a manager was to be appointed, she was qualified for such an appointment.

5. On the tenants' behalf we heard, Ms Wandrin, Mr Bortz and Mr Ingledew. On the landlord's behalf we heard, Mr John Hunt senior, its director who also managed the block; Mr Jonathan Caton, a chartered accountant with Caton Fry & Co Ltd, who was and had been the landlord's accountant since 2009; Mr John Hunt junior, Mr Hunt senior's son; Stefan Kotok, who had been a Rent Act protected tenant at Flat 8 from 1970 until he bought a long lease of the flat in 1986; and Salome Greenberg, the Rent Act protected tenant of Flat 3.

6. The matter had been listed for a two-day hearing, which was an inadequate time estimate given the number of witnesses and issues. At the end of the second day we ordered that the parties should create a Scott schedule dealing with the service charge disputes. This was prepared prior to the third day of the hearing. In the event, counsel dealt with the issues in the Scott schedule by submissions rather than calling further evidence.

7. The block has already been the subject of litigation regarding the recognition of a tenants' association which the current applicants wished to form: *Rosslyn Mansions Tenants' Association v Winstonworth Ltd* [2015] UKUT 11 (LC). This Tribunal had refused recognition to the tenants' association, but the association appealed. His Honour Judge Hutchinson QC, allowing the appeal, described the background in this way:

> "7. Rosslyn Mansions is a building comprising thirteen residential flats. Eight of those flats are let upon long leases at low rents which include the requirement to pay a variable service charge. The respondent is the freehold owner and is the landlord upon these leases. Four of these leases are held by members of the appellant, namely Mr John Ingledew (Flat 2), Mr Gary Bortz (Flats 9 and 10), and Mr Jonas Wandrin and Mrs Aparna Wandrin (Flat 7). One of the flats held upon a long lease (Flat 8) is held by Mr John Hunt, namely the director of the respondent who represented the respondent at the hearing before me. Mr Hunt does not wish to become a member of the appellant. The tenants who hold the long leases of the other three flats which are let upon long leases (namely Flats 1A, 2A and 6) have indicated that they do not wish to join the appellant and they do not support the application by the appellant for recognition as a RTA.
>
> 8. The appellant applied to the F-tT for a certificate recognising it as a RTA by an application dated 1 August 2013. Particulars in support of the application were given by the appellant in a letter dated 20 September 2013. This letter identified in paragraphs (a)-(j) reasons why the appellant sought a certificate under section 29. It is not necessary to set out in any detail in this decision the nature of these particulars, but they included claims to the effect that there was an archaic management system at the building; that there has been a refusal by the landlord to communicate and an absence of any forum for dialogue with the landlord; that there has been a failure by the landlord to consult and there have been opaque tendering methods leading to major contracts being awarded by the landlord to Mr Hunt (who effectively controls the respondent landlord) or members of his family; that there has been a refusal by the respondent to participate in informal residents' meetings or to engage with the tenants; and that there has been an expression of concern regarding lack of transparency, signs of neglect and financial and practical mismanagement."

8. The judge held at para 33(c) that "the history of complaints and the apparent breaking down of confidence between the tenants supporting the appellant on the one hand and the respondent on the other hand" was a relevant consideration for this Tribunal in deciding whether to recognise the association and remitted the matter for determination by this Tribunal. This Tribunal subsequently recognised the tenants' association.

The leases

9. Mr Hunt senior started living in Flat 8 over sixty years ago, initially as a Rent Act protected tenant. The block itself dates from the 1930's. None of the flats initially were let on long leases. In 1976 the freeholder wanted to sell. All the tenants at the time discussed purchasing the freehold, but eventually only Mr Hunt was willing and able to proceed with the purchase. Mr Hunt had qualified as an architect, but has never practised as such. He says that he was

always involved in the construction industry and had expertise in painting and decorating. (The quality of his work is hotly disputed.)

10. Mr Hunt senior affected the purchase of the freehold through his company, Winstonworth Ltd, which remains the current landlord. The transfer to Winstonworth Ltd completed on 29th July 1977. A number of long leases were granted in 1978 and there have subsequently been further grants of long leases. All the long leases are for terms of ninety-nine years from 30th September 1974. There were in recent times only two Rent Act protected tenants remaining: Mrs Greenberg, who gave evidence to us, and Mrs Ochert. Mrs Ochert has now had to go into a nursing home. For many decades there had been three flats unoccupied. There are now four unoccupied.

11. Mr Ingledew has owned his flat since 1998. Mr Bortz has owned Flat 9 since 1988 and Flat 10 since 1998. He originally lived in them himself (and connected the two flats for that purpose). Since moving back to the United States, he has let the flats out, as is permissible under his leases. In 2016 the London Borough of Islington extended the requirement for landlords to obtain a licence for houses in multiple occupation ("HMO's"). Mr Bortz has complied with this requirement. Islington told Mr Hunt of the grant of the HMO licence. Mr Hunt complains about the effect of having HMO's in the flats for its effect on insurance. We shall return to this issue. Mr and Mrs Wandrin hold their flat under a ninety-nine year lease granted on 12th March 1993 for term commencing on 30th September 1974. They purchased the lease in 2010 for over a million pounds.

12. The leases are all in similar terms. By clause 3(9) the tenant was obliged to inform the landlord of any sub-lettings and tender a fee of £20 plus VAT for each sub-letting. (This Mr Bortz did, so Mr Hunt senior knew about the lettings giving rise to the HMO licensing requirement.) By clause 4(2) the landlord was under an obligation to insure and keep insured the block and to produce the insurance policy for inspection by the tenant. The lease contained a standard repairing covenant by the landlord in respect of those parts of the building not demised and a covenant to keep the common parts clean and the garden cultivated and tidy.

13. The leases define the "annual service charge cost" as:

> "all costs fees charges expenses wages salaries commissions national Health and Industrial Injury Contributions Value Added Tax interest on sums advanced and all other sums payable or incurred by the Landlord in connection with or incidental to:-
>
> (1) The discharge by the Landlord of its obligations contained in Clause 4(1) (2) (3) (4) (5) (6) (7) (10) and (11)
> (2) The compliance with every notice regulation or order of any competent Local or other authority
> (3) The employment of any person or persons engaged for the management or maintenance of the Building
> (4) The employment of any Accountant or Agent engaged to prepare the Annual Service Account…

(5) The erection rental renewal or maintenance of the Communal Television Aerial (if any) if the Landlord in its absolute discretion considers this expedient
(6) The taking out and maintaining of such public liability or other insurance policy for the protection of the Landlord and others as the Landlord may decide
(7) The cleaning or renewing of all carpets or other coverings (if any) of the entrance hall staircase and landings in the Building
(8) The upkeep and stocking of the front and rear gardens and employment of a gardener
(9) All other services or furnishings or installations which the Landlord may in its reasonable discretion provide or instal in the Building for the comfort and convenience of the tenants
(10) The execution by the Landlord of such repairs referred to in Clause 3(5) and any legal costs incurred in attempting to recover the same from the Tenant, the Annual Service Costs to be credited with any such sums received as soon as they are recovered."

14. The leases define "the contingency fund" as being:

> "the total of all sums paid by all the tenants (or the Landlord under Clause 5(b)(11) hereof) in the Building to the Landlord or the Landlords Managing Agent to meet non-periodic unexpected or unusually large items of expenditure."

15. Clause 5(b), so far as material provides:

> "(5) The Tenant shall on the execution hereof pay the sum referred to in Paragraph 12 of the Particulars of Lease on Account of the Annual Service Charge for the period from the date hereof to the Thirtieth day of September next following and thereafter shall on the Twenty fifth day of December and the Twenty fourth day of June in each year pay a sum equal to one half of the Annual Service Charge for the immediately preceding Accounting Year or the sum of Two Hundred Pounds (whichever shall be the greater) and shall on demand pay the balance (if any) shown to be due by the Annual Service Account duly certified as aforesaid…
> (7) The Tenant shall on the signing hereof pay the sum equal to one half of the Annual Rent referred to in Paragraph 9 of the Particulars of Lease as his contribution towards the Contingency Fund and shall on the Twenty fifth day of December and on the Twenty fourth day of June in each year of the term pay the sum equal to one quarter of the Annual Rent from time to time in respect of his Annual Contribution towards the Contingency Fund
> (8) Any interest on any sums held by the Landlord or its Agents being contributions towards the Annual Service Charge or the Contingency Fund shall be credited to such sums as they accrue
> (9) The Landlord will use its best endeavours to maintain the Annual Service Cost at the lowest reasonable figure consistent with due performance and observance of its obligations herein…

> (10) The Landlord shall be at liberty in its absolute discretion to meet all sums payable from either the sums standing to the credit of the Annual Service Charge or the Contingency Fund and if the total of such sums are insufficient or are likely to be insufficient may require to be paid any further sums likely to become necessary by sending out Extraordinary Service Accounts to the Tenants
> (11) As to any flats from time to time unlet or let on terms for less than 21 years the Landlord shall as to any Service Charge and Contingency Fund payments pay any sums which would be due from the tenants of such flats if they had been leased on the same terms as these present on the appropriate percentage figure referred to in Paragraph 10 of the Particulars of Lease. The Landlord shall however have the right to defer payment to it of the Contingency Fund payments until either the earlier of (a) a sale of the respective flat on a Lease of over 21 years being completed or (b) use is required to be made of the Contingency Fund. Such deferred payments shall then be made by the Landlord with such interest as would have accrued to such payments to the contingency Fund if such payments had not been deferred by the Landlord hereunder."

Insurance

16. It is convenient to begin with considering the complaint made in respect of insurance. In the landlord's response it submits that the "[c]omplaints… made in respect of insurance… are disingenuous as the brief gap in cover complained of was occasioned by the operation of an HMO (without notice to the Respondent or its consent and in breach of the terms of the lease) by [Mr Bortz]."

17. We do not accept this defence. Firstly, there were at least two gaps when there was no insurance at all, about a fortnight in 2017 (admitted by the landlord), and a gap between the expiring of the existing insurance arranged with Endsleigh Insurance (which commenced 23rd January 2020) on 22nd January 2021 and 12th February 2021, when a new policy was obtained.

18. In addition there was a policy with effect from 5th December 2017. The Endsleigh insurance only started on 23rd January, so we find as a fact that there would have been a further period at some point between the expiry of the 2017 insurance (or any renewal of it) and the coming into effect of the Endsleigh Insurance on 23rd January.

19. Any gap in insurance is potentially very serious. If a fire occurs during a gap, it will be uninsured. We find Mr Hunt senior's insouciance about these periods when no insurance was in place seriously concerning.

20. Further the 2017 insurance contained the following contractual declaration made by the landlord:

> "Please provide the business description which best describes business Block of 13 apartments — half apartments at this location owner-occupied, half let.
> Is any part of the building unoccupied or let for residential use? No."

21. The representation that no part of the building was unoccupied was untrue. That was a material misrepresentation which may well have entitled the insurer to avoid the policy in the event of a claim. Having three flats vacant might well have increased the premium payable. In our judgment, Mr Hunt senior was at best reckless in approving that statement and at worst telling a deliberate lie.

22. A further issue in relation to insurance is electrical test certification. The only evidence in relation to this was the certificate of one flat and an estimate from a contractor for the common parts. Again Mr Hunt senior's approach to this showed worrying complacency.

The contingency fund

23. A major issue is the contingency fund. The amount in the contingency fund as at 3rd February 2020 was £10,117.96. The tenants have produced a spreadsheet showing what sums should be in the contingency fund, if the landlord had made its contributions in accordance with its obligations under clause 5(b)(11). It will be recalled that these permitted deferment of payments due from the landlord on flats which were empty or on short term lets to a time when a new long lease is granted or any withdrawal is made from the contingency fund. We did not understand Mr Granby to dispute the calculation of £89,404 as a calculation.

24. It was common ground that long leases had been granted in 1988 and 1993, which triggered the obligation on the part of the landlord to contribute to the contingency fund. Further the documentary evidence from correspondence between Mr Hunt senior and the tenants' association was that he treated the contingency fund as comprising separate accounting entities representing the individual contributions of individual leaseholders. He used this as an excuse for not giving the tenants' association access to the accounts, a breach in our judgment of section 42A(3) of the 1987 Act.

25. Mr Hunt senior's evidence to us was that from time to time, if a tenant got into financial difficulties, he (Mr Hunt) would withdraw any service charges due from that tenant from the contingency fund. This in our judgment was a breach of trust. Monies held in the contingency fund were held on trust for all the lessees jointly in order to meet unexpected or large items. It was not permissible to abstract monies from the fund to pay for individual contributions from tenants.

26. Moreover, in our judgment any such use of monies in the contingency fund also triggered the landlord's liability to pay any sums deferred under the provisions of clause 5(b)(11). (It does not lie in the landlord's mouth to say that this use of the money was not "required" under the terms of clause 5(b)(11).)

Again the landlord's failure to pay those sums into the contingency fund was a breach of trust.

27. Mr Granby suggested that there might be issues of limitation in respect of any liability. This submission faces difficulties. Firstly, at the very least Mr Hunt senior's treatment of the contingency fund was reckless: he appears to have made no attempt to investigate his obligations as trustee. He did not even discuss the proper accounting treatment with Mr Caton. Acting without knowing or caring about the true position in law is a species of fraud. There is no limitation period for such breaches of trust: Limitation Act 1980 section 21(1). Secondly, he appears to have deliberately concealed what was going on, so an extension of the limitation period under section 32 of the Act potentially applies, assuming there was any relevant limitation period.

28. We note, as part of the complaint made in respect of the RICS Code, that ordinary service charge monies are not kept in a separate trust account. On the contrary, Mr Hunt senior accepted that service charge monies were mixed with other monies of Winstonworth Ltd. This is a serious breach of section 42 of the 1987 Act as well as the Code.

Management failings

29. We shall take grounds 8, 9, 11 and 12 together, because they all raise issues about deficiencies in Mr Hunt senior's management, both its substance and its style. Before we give our overall assessment, we should say that his management is not all bad. Mrs Greenberg spoke to the essential support which he had given her during lockdown, when her daughter, who usually acted as her carer, could not visit. She spoke highly of him. This is of course to his credit. We shall deal with the service charges shortly, but Mr Hunt did keep the service charges low.

30. Mr

> "The management of Rosslyn Gardens is almost unique — the directors of the Respondent, Mr and Mrs Hunt have been resident in Rosslyn Mansions since 1964. The Respondent was set up when the then residents of Rosslyn Mansions wished to acquire the freehold of the building in 1976 to prevent sale to property developers. In the event other leaseholders were not able to proceed with the purchase, but Mr and Mrs Hunt set up the Respondent and purchased the building.
>
> The Directors of the Respondent have attempted to honour the spirit in which the building was acquired — it is both a substantial asset and the home to a stable community of leaseholders and protected tenants. The Respondent has managed the building at low cost to the benefit of, inter alia, the long lessees.
> While the Respondent accepts several criticisms made, the complaints of the Applicants are, it is submitted, greatly exaggerated or, in some instances, simply a clash between strong personalities."

31. We do not accept the thrust of this submission. Whatever the position was in 1976, the current position is very different. There is only one Rent Act protected tenant still in the block. (Mr Kotok who had been a Rent Act protected tenant had bought a long lease.) New people have moved in with different expectations of what the management of the block should be.

32. We find as a fact that Mr Hunt senior is a stubborn man. This came out strongly from the evidence of the applicants and from his own demeanour before us. He accepted in evidence to us that he had done no courses on and received no training in the management of residential blocks. Although he expressed contrition to us at his failure to learn the duties of a manager, we note that he has had many years to improve his substantive knowledge of property management. Further the tone and substance of his correspondence with tenants is in our judgment simply unacceptable.

33. Relations between the parties have completely broken down. We have seen and heard the applicants give evidence (apart from Mr Wandrin). We have also been referred to some of the correspondence. We find that the reason for breakdown is largely down to Mr Hunt's intransigence. He has simply never been prepared to act in a cooperative manner with the applicants. Any resistance by the applicants is met by threats. The complaints under grounds 6 and 11 are made out in our judgment.

Service charges

34. The main live dispute in respect of service charges was in respect of cleaning, maintenance and porterage. There was also a dispute as to gardening. As to the major works in 2017, the landlord accepted that due to the failure to carry out a section 20 consultation recovery was limited to £250 in respect of the major works. The tenants suggested faintly that the work which was done was so bad that not even £250 could be justified. The joint experts' report accepts that most of the work was of poor quality. However, they do not do so far as to say it was of no value at all. The work was charged at £59,500. There was some benefit to the tenants from it, which in our judgment exceeded £250.

35. The tenants submitted that there was no provision for recharging porterage services under the lease. Para (9) of the annual service charge cost definition allows recovery in respect of "[a]ll other services… which the Landlord may in its reasonable discretion provide." That is wide enough to encompass porterage.

36. The tenants argued that there was in fact no cost incurred on cleaning etc. The position here is that the cleaning was largely done by Mr Hunt junior. He was not paid by the landlord for this. Instead his parents gave him an allowance of £800 a month. This was not a payment for work done by him. It was a purely gratuitous payment as a matter of parental love and affection. As such it was irrecoverable under para (3) of the annual service charge cost ("employment of any person or persons engaged for the management or maintenance of the Building").

37. The accounting for the cost of cleaning etc was this. Mr Hunt senior would raise an invoice for his personal providing of cleaning etc services. Mr Caton would then include that amount in the service charge account. We agree with Ms Cattermole that the landlord cannot recover the invoices under para (3), because Mr Hunt junior was never employed by anyone. That, however, does not in our judgment preclude the landlord recovering under the general catch-all of para (1) ("sums payable or incurred by the Landlord in connection with or incidental to [t]he discharge of the Landlord of its obligations"). Mr Hunt junior was not providing any gratuitous service to the tenants; he was doing his parents a favour. We see no reason why Mr Hunt senior should not be entitled to charge the landlord company a reasonable sum for his son's services. It was Mr Hunt senior who arranged for his son to do the work. The arrangements as between himself and his son are none of the business of the landlord or the tenants.

38. This leads to the issue as to whether the services were of reasonable quality. The evidence of the experts and Ms Mooney is that the property was dirty and the garden poorly maintained. In part this was due to lockdown, but we accept that the quality of the cleaning etc was poor. Porterage was effectively Mr Hunt senior assisting with letting people into the block etc. The amount charged for all this was very low — £7,175 in the year ending 30th September 2019. In our judgment, despite the inferior quality of the service the amount demanded is justified. We disallow nothing.

39. Mr Ingledew's evidence was that the intercom for the bottom three flats was changed in 2014. That appears to justify the £142 figure in the Scott schedule. The landlord conceded that £420 was not recoverable in respect of legal fees in 2019. The putative charges in 2020 appear to be ad hoc fees. The sums claimed are low and we disallow nothing.

40. As to para 2 of the Grounds, the experts are agreed that there are very substantial wants of repair. This reflects firstly a failure to carry out works over many years and secondly the poor quality of works carried out by Mr Hunt senior. In addition, there has been a long-running problem of leaks which Mr Hunt senior failed properly to address. This ground is made out.

Making a management order

41. We now have to stand back and consider whether this is an appropriate case to make a management order. We remind ourselves that the mere fact that there is a default identified in section 24 of the 1987 does not automatically require the Tribunal to appoint a manager. On the contrary, it is only if it is "just and convenient" to appoint a manager that the Tribunal should consider doing so. The Tribunal has a discretion.

42. The breaches in respect of insurance and the contingency fund are in our judgment particularly grievous. Either on its own would justify the making of a management order. Leaving the building uninsured would have disastrous consequences, if there were, for example, a fire. Large sums are unaccounted for in the contingency fund.

43. Further we find that Mr Hunt senior has neither the technical ability nor the personal skills to manage this block. As to the first aspect, this has resulted in the block being in poor state of repair with the common parts dirty and the garden badly maintained. As to the second aspect, the breakdown in relations between him and the applicants is due to his intransigence and unwillingness to cooperate.

44. We find that we have the power to appoint a manager under section 24(2)(a), (ac) and (b) of the 1987 Act. In our judgment it is overwhelmingly the case that it is just and convenient to appoint a manager. In the exercise of our discretion, we do so.

45. Counsel have agreed the form of the management order, subject to one point, the words underlined in para 48 of the draft:

> "If called upon by the manager, the Landlord shall pay to the Manager such deferred Contingency Fund payments with interest as would have accrued to such payments to the Contingency Fund if such payments had not been deferred <u>save that the Landlord shall not be required to make such payments where the Manager would be precluded from recovering such sums from a Leaseholder by the provisions of the Limitation Act 1980 and, for the avoidance of doubt, shall be entitled to credit for sums actually expended where Leaseholder contributions have been drawn from the Contingency Fund."</u>

46. Mr Granby submits that the underlined words should be included on two grounds:

> "1. The Landlord being effectively required to account back to the 1970's with the attendant difficulties in record keeping and recollection.
> 2. Where the Contingency Fund has been used it has, inter alia, been used to meet the Lessee's proportion of works — the Landlord has paid the balance. In its current form the order risks compelling the Landlord to pay twice, once through the actual expenditure and again, now, by way of payments into the Fund that, had they been made would have been withdrawn and used in place of direct payment by the Landlord."

47. It is convenient to deal with the second objection first. Monies in the contingency fund have not been used to pay for "non-periodic unexpected or unusually large items of expenditure." Such use as there has been of monies in the contingency fund was to pay individual tenants' ordinary service charge contributions, when the individual tenants were not able financially to pay the service charges themselves. This was a breach of trust by the landlord. As we have noted above, the monies in the service charge were not held for individual tenants, but for the tenants as a body. If the landlord ends up paying twice, that is because it wrongly used the tenants' joint monies for an individual tenant's debts instead of taking steps to enforce the liabilities of individual defaulting tenants.

48. As to the first objection, there has never been any use of monies in the contingency fund for unexpected or unusually large items, so there should be no deductions. There have been various trigger events which should have led to the landlord making the deferred payments into the contingency fund. The landlord cannot be heard to say that those monies which it itself should have paid are not in the contingency fund, when it owed a fiduciary duty to pay the money in to the trust account. The applicants' spreadsheet showing £89,404 owing is mathematically correct. The landlord has not put forward its own figures.

49. We remind ourselves that a management order is intended to be a practical measure. The Tribunal has wide powers to deal with "incidental or ancillary matters": see section 24(4). (See also *Queensbridge Investments Ltd v Lodge* [2015] UKUT 635 (LC) at para [57] and the cases discussed in that case.) What we propose to order is that the landlord do transfer to the manager the sum of £89,404 in respect of the contingency fund. However, we will give the landlord liberty to apply under section 24(9) to vary or discharge this part of the order, provided the landlord first makes the payment. If an order is not made in these terms, there is every likelihood that there will be an ongoing dispute as to the amount which should be transferred with the landlord having every incentive to hold back payment for as long as possible. This form of order is in our judgment a pragmatic way of dealing with the accounting difficulties, which are entirely the responsibility of the landlord and are not anyone else's fault. Save in respect of cashflow, it does not prejudice the landlord, if the landlord can show a lower sum should have been ordered. There should be a long-stop date for the landlord to make any application. We consider six months gives the landlord an adequate period.

Costs

50. We turn then to costs. As regards the fees payable to the Tribunal, we have a discretion as to which party should pay these. The fees comprise an issue fee of £100 and a hearing fee of £200. In our judgment the tenants have substantially won. We therefore order that the landlord do reimburse those sums.

51. As to section 20C, the Tribunal will not lightly interfere with a landlord's contractual rights, but here for the same reason in our judgment it would be unjust not to make an order under section 20C.

DECISION

(a) We appoint Alison Mooney as manager of the block.
(b) We limit recovery in respect of the major works to £250 per flat. We note that the landlord has abandoned its claim to legal costs in 2019. Apart from these items we disallow nothing in the service charge accounts.

(c) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord recovering its costs of these proceedings through the service charge.

Name: Judge Adrian Jack **Date:** 3rd June 2021

Rights of Appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rplondon@justice.gov.uk.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Landlord and Tenant Act 1987 (as amended)

Section 24

(1) The appropriate tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—

(a) such functions in connection with the management of the premises, or

(b) such functions of a receiver,

or both, as the tribunal thinks fit.

(2) The appropriate tribunal may only make an order under this section in the following circumstances, namely—

(a) where the tribunal is satisfied—

(i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been

reasonably practicable for the tenant to give him the appropriate notice, and

(ii) [repealed]

(iii) that it is just and convenient to make the order in all the circumstances of the case;

(ab) where the tribunal is satisfied—

(i) that unreasonable service charges have been made, or are proposed or likely to be made, and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

(aba) where the tribunal is satisfied—

(i) that unreasonable variable administration charges have been made, or are proposed or likely to be made, and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

(ac) where the tribunal is satisfied—

(i) that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and

(ii) that it is just and convenient to make the order in all the circumstances of the case; or

(b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made.

(2ZA) In this section "relevant person" means a person—

(a) on whom a notice has been served under section 22, or

(b) in the case of whom the requirement to serve a notice under that section has been dispensed with by an order under subsection (3) of that section.

(2A) For the purposes of subsection (2)(ab) a service charge shall be taken to be unreasonable—

(a) if the amount is unreasonable having regard to the items for which it is payable,

(b) if the items for which it is payable are of an unnecessarily high standard, or

(c) if the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred.

In that provision and this subsection "service charge" means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).

(2B) In subsection (2)(aba) "variable administration charge" has the meaning given by paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(3) The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.

(4) An order under this section may make provision with respect to—

(a) such matters relating to the exercise by the manager of his functions under the order, and

(b) such incidental or ancillary matters,

as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.

(5) Without prejudice to the generality of subsection (4), an order under this section may provide—

(a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;

(b) for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;

(c) for remuneration to be paid to the manager by any relevant person, or by the tenants of the premises in respect of which the order is made or by all or any of those persons;

(d) for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.

(6) Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.

(7) In a case where an application for an order under this section was preceded by the service of a notice under section 22, the tribunal may, if it thinks fit, make such an order notwithstanding—

(a) that any period specified in the notice in pursuance of subsection (2)(d) of that section was not a reasonable period, or

(b) that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that section or in any regulations applying to the notice under section 54(3).

(8) The Land Charges Act 1972 and the Land Registration Act 2002 shall apply in relation to an order made under this section as they apply in relation to an order appointing a receiver or sequestrator of land.

(9) The appropriate tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002, the tribunal may by order direct that the entry shall be cancelled.

(9A) The tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied—

(a) that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and

(b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.

(10) An order made under this section shall not be discharged by the appropriate tribunal by reason only that, by virtue of section 21(3), the

premises in respect of which the order was made have ceased to be premises to which this Part applies.
(11) References in this Part to the management of any premises include references to the repair, maintenance, improvement or insurance of those premises.

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

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

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

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

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 21B

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.