Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

First Floor, West Wing, Southgate House, Wood Street, Cardiff. CF10 1EW.
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DECISION AND REASONS OF LEASEHOLD VALUATION TRIBUNAL (WALES)
LANDLORD AND TENANT ACT 1985 s.27A and s.20C &
COMMONHOLD AND LEASEHOLD REFORM ACT 2002, SCHEDULE 11

Premises:	Flats 1 and 2, 266 Holton Road, Barry, Vale of Glamorgan.
LVT ref:	LVT/WAL/883/12
Order:	29 July 2013
Applicant:	Wellington Investments Limited
Respondent:	Mr Pjotrs Sevcovs
Members of Tribunal:	Mr R S Taylor – Chairman Mr R W Baynham FRICS Dr A Ash

Upon the Applicant having indicated that it will not seek to recover from the Respondent any of its costs associated with these proceedings.

IT IS ORDERED THAT:-

1. In respect of Flat 2, 266 Holton Road the Respondent shall forthwith pay the Applicant the sum of £1,465.43.

2. Upon service of the requisite service charge demand, the Respondent shall pay to the Applicant £250 per flat in respect of the qualifying works.

3. The matter shall be transferred back to the Cardiff County Court, [case number 1SA01910] the payability of service charges having been determined.

REASONS

1. This is our final determination of services charges payable in respect of Flats 1 and 2, 266 Holton Road, Barry.

2. The matter has been the subject to two earlier preliminary determinations dated 27 July 2012 and 21 February 2013. Those earlier decisions are appended as annexes (A & B) to this decision and should be read in conjunction with this decision. The complicated substantive and procedural background described in those decisions is not repeated herein.

3. There was a 3 day hearing on the 11, 12 and 13 February 2013 in which most of the issues between the parties were resolved. However, when coming to draft our reasons 3 issues had not been addressed to our satisfaction. Mindful of the need to only make decisions based upon evidence before the Tribunal upon which both parties have had the opportunity to comment, we gave further directions to resolve those matters.

4. The Tribunal required further submissions upon the following matters:-

    a. The status of the £1,479 legal costs claimed in the Woodcocks letter dated 5 May 2011, it appearing to the Tribunal that these should have been accounted for as an administration charge in 2011.

    b. What the Tribunal can and should do in respect of the £7,922.92 ("the overpaid sum") which was paid by the Birmingham Midshires on the Respondent's account.

    c. Was the 2010 County Court claim issued before any sum was contractually due, in that paragraph 7.1 of the lease provides for service charges to be paid "on the rent day or within 28 days of written demand (whichever is the later date in each year of the Term)" and that the 2010 service charge invoice is dated 25 October 2010 and the County Court proceedings were issued on the 11 November 2010.

5. By the 2 April 2013 the parties had not complied with our directions and further directions were issued on the 2 April 2013

6. On the 16 April 2013 the Tribunal received a letter dated 15 April 2013 from the Respondent in which he indicated that the mortgagee had no interest in any overpaid sum, asking that it be forwarded to him. Further, he submitted the £1,479 should form part of our determination and that the 2010 County Court Claim was issued prior to the service charges being contractually due.

7. On the 7 May 2013 the Tribunal received a letter from the Applicant dated 3 April 2013 in which it sought to persuade us that the £1,479 was properly payable on the grounds that the recovery of solicitor's costs is provided for in the lease. Second, the Applicant reminded the Tribunal that there is express provision in the lease concerning the issue of overpayments; essentially the landlord can elect whether to repay or to hold on account of future service charges (see Third Schedule, para 4). Lastly, in respect of the timing of the County Court claim, "The County Court claim for service charges and ground rents was served on the 25th November 2010. The initial invoice for these charges was sent on the 25th October 2010. More than 28 days were given before issuing the claim."

8. Further directions were then issued on the 30 May 2013 in which the Applicant was required to provide a breakdown as to how the £1,479 had been arrived at and to make any submissions concerning whether that sum was reasonable. Second, to provide any submissions as to the Tribunal's jurisdiction to deal with an overpayment. Third, to provide all evidence in support of the contention that the County Court claim was served on the 25 November 2010. The Respondent was given permission to respond.

9. The Applicant did not comply with these directions. At the start of the hearing on the 18 July 2013 Mr Furneaux, on behalf of the Applicant, was most unhelpful and somewhat discourteous to the Tribunal. He stated that he had not complied with the directions of the 30 May 2013 and did not propose to produce any further documents on the subject.

10. Contrary to the letter received on the 7 May 2013 the Applicant conceded in the hearing that the County Court claim had been served prior to the date when it had contractually fallen due.

11. So far as the £1,479 is concerned, after having heard from both parties we are satisfied that this is a sum correctly included in the calculations of the overpayment. The total overpaid sum in this case is £7,922.92 (there is a further overpaid sum which is the subject of a further application and dealt with separately). The £1,479 formed part of the £9,538.35 which was paid by Birmingham Midshires. The Tribunal made a number of findings as to how the Applicant had conducted itself, in the 21 February 2013 decision. The Applicant's accounting was so poor that we determined that the sums claimed and the legal costs associated with pursuing them could not be said to be reasonably incurred and/or reasonable.

12. It had also appeared to the Tribunal, when we were drafting our decision, that the 2010 County Court claim had been brought before the Respondent was contractually due to pay the sum (para 60). However, as the point had not been exposed to the parties for comment we declined to make any findings. The Applicant now concedes that the claim was brought prior to any sum being contractually due and this acts as a further compelling reason to us why the Applicant should not be entitled to claim any legal costs (which includes the £1,479) for proceedings which should not have been commenced.

13. Neither party made any detailed legal submissions on the question of the overpayment. However, the Applicant having elected to retain the overpaid sum, the Tribunal reminded itself of the limit of its jurisdiction under s.27A Landlord and Tenant Act 1985, and in particular the decision of *Warrior Quay Management Co Ltd v Joachim* [2006] EWLands LRX_42_2006, which is clear that this Tribunal has no jurisdiction to order any repayment.

14. The Tribunal identified the possibility of a set off at paragraph 82 of the decision dated 21 February 2013. There is an overpayment in respect of Flat 1. We considered whether the overpayment might used to offset the amount owing on Flat 2. It had appeared to the Tribunal in February 2013, although we did not finally make any order in this respect, that an offset may be permissible in this situation. Having now heard further submissions from the parties, we have concluded that as there is express provision in the lease (see Third Schedule, para 4) for how overpayments are to be dealt with, this precludes the Respondent from exercising any offset. Accordingly, the sum which remains outstanding in respect of Flat 2 must be paid in full by the Respondent.

15. During the course of the hearing Mr Furneaux, on behalf of the Applicant, enquired when the Tribunal was going to deal with the 'major works' issue. The background and decision in respect of this is contained in our 21 February 2013 decision. This was explained to Mr Furneaux and he was reminded that as he has not complied with the Service Charge (Consultation etc) (Wales) Regulations 2004 he is currently limited to the recovery of £250 per flat, absent of any application pursuant to s.20ZA of the Landlord and Tenant Act 1985.

Dated 29 July 2013

Lawyer Chairman

ANNEX A

Y Tribiwnlys Eiddo Preswyl

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DIRECTIONS AND PROVISIONAL REASONS OF LEASEHOLD VALUATION TRIBUNAL (WALES)
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Premises:	Flats 1 and 2, 266 Holton Road, Barry, Vale of Glamorgan.
LVT ref:	LVT/WAL/883/12
Hearing:	11, 12 and 13 February 2013
Applicant:	Wellington Investments Limited
Respondent:	Mr Pjotrs Sevcovs
Members of Tribunal:	Mr R S Taylor – Chairman Mr R W Baynham FRICS Dr A Ash

ORDER

Upon hearing Mr Furneaux for the Applicant and the Respondent in person on the 11, 12 and 13 February 2013

And upon the Tribunal having previously determined that it would determine the service charges payable in respect of Flat 2 and then apply the common issues to Flat 1.

And upon the Tribunal having provided its provisional reasons set out herein below.

And upon the Tribunal requiring further submissions on the following issues:-

A. The status of the £1,479 legal costs claimed in the Woodcocks letter dated 5 May 2011, it appearing to the Tribunal that these should have been accounted for as an administration charge in 2011.

B. What the Tribunal can and should do in respect of the £7,922.92 ("the overpaid sum") which was paid by the Birmingham Midshires on the Respondent's account. In particular, does the Birmingham Midshires have any contractual or other right for the return of the money rather than it being paid directly to the Respondent?

C. Was the 2010 County Court claim issued before any sum was contractually due, in that paragraph 7.1 of the lease provides for service charges to be paid "on the rent day or within 28 days of written demand (whichever is the later date in each year of the Term)" and that the 2010 service charge invoice is dated 25 October 2010 and the County Court proceedings were issued on the 11 November 2010.

And upon the Tribunal inviting the Birmingham Midshires to set out its position in respect of the status of the overpaid sum and whether it has any objection to the Tribunal making an order in respect of it, requiring the Applicant to repay it to the Respondent or whether it requires it to be paid off the mortgage account.

And upon the Tribunal inviting the Respondent forthwith to send the Birmingham Midshires a copy of this decision.

And upon the Applicant indicating to the Tribunal that it does not intend to seek recovery of any costs associated with the preparing or conducting of these Tribunal proceedings.

IT IS ORDERED THAT:-

1. The Respondent shall by noon on the 27 March 2013 file at the Tribunal (4 copies) and serve upon the Applicant (1 copy) all correspondence he has had with the Birmingham Midshires in respect of the status of the overpaid sum.

2. Each party shall by noon on the 10 April 2013 file at the Tribunal (4 copies) and serve upon the each other (1 copy) any evidence and/or written representations as to:-

    a. the status of the £1,479 and whether the Tribunal is correct in provisionally including it as a matter which should be accounted for? Further, any submissions as to the reasonableness of the costs.

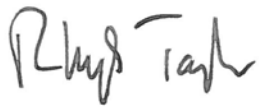
    b. how the overpaid sum should now be treated?

    c. whether the 2010 County Court claim was issued prior to the sum claimed falling contractually due?

3. Each party shall file their availability to attend at a further hearing in April, May and June by noon on the 10 April 2013 and indicate whether they are content for the Tribunal to determine the remaining matters on the papers alone, or whether they require a further hearing.

4. Upon compliance with the above directions the Tribunal shall further consider the papers and decide whether it can make a final decision or hold a further hearing.

Dated 21 February 2013



Lawyer Chairman

REASONS

The applications.

1. This case involves cross applications under s.27A of the Landlord and Tenant Act 1985 ("the Act") and Schedule 11 Commonhold and Leasehold Reform Act 2002, and an application by the Respondent for an order pursuant to s.20C of the Act. The dispute relates to 2 flats, namely Flats 1 and 2, 266 Holton Road, Barry. The Applicant is the freeholder and the Respondent is the leaseholder. The service charge years in contention are 2009, 2010, 2011, 2012 and 2013. The issues are largely common to both flats and our determination in respect of Flat 2 shall be applied to Flat 1 where relevant. Flat 1 has a discrete accounting issue.

2. The service charge disputes in years 09 to 12 are to be resolved by reference to s.19 of the Act, namely the reasonableness of the costs incurred. The administration charge disputes before us are to be determined by reference to Schedule 11, paragraph 2 of the Commonhold and Leasehold Reform Act 2002, by reference to reasonableness. In this case, although technically distinct matters, the service charges and administration charges have been dealt with by the parties together at all times. This decision reflects that approach.

3. The dispute in year 13 relates to proposed works which would fall within the definition of Qualifying Works under s.20 of the Act and the regulations made thereunder[1] ("the Regulations"). This is because the cost of the works would exceed £250 per tenant. Prior to the works being undertaken we have been invited to consider the Applicant's compliance with the s.20 consultation process. We were also initially invited to determine the reasonableness of the proposed costs, although, as will be apparent from below, our preliminary determination in respect of the s.20 consultation process has obviated the need for us to consider reasonableness at this stage.

4. The case was initially transferred to the Tribunal by order of District Judge Hendicott on the 16 November 2011. The matter was the subject of preliminary determination in July of last year concerning the Tribunal's jurisdiction. That decision is attached as Schedule 1 to this document and we do not repeat the contents therein. However, following our determination that we did have jurisdiction to determine the matter, it was apparent to the Tribunal that the County Court proceedings did not contain all matters of dispute between the parties. Mindful that, absent of further application direct to the Tribunal, the Tribunal's jurisdiction would be limited to the issues before

[1] Service Charge (Consultation etc) (Wales) Regulations 2004

the County Court, we invited further applications to be made to us. The Applicant made its application on the 27 September 2012 and the Respondent made his applications on 28 September 2012.

The background.

5. An understanding of some of the background to this case informs how we deal below with the items in dispute.

6. The Respondent complains as to the circumstances in which the Applicant became the freeholder. At one point during the hearing the Respondent went so far as to say he did not accept the Applicant was the lawful freeholder. However, despite whatever history in this matter, which we do not need to delve into, the Applicant became the freeholder in December 2009. The leasehold interests in Flats 1 and 2 were purchased by the Respondent in April 2008 and November 2008.

The 2010 aborted s.20 consultation.

7. In January 2010 the Applicant commissioned a surveyor to prepare a schedule of dilapidations and a s.20 consultation was commenced. We do not have all the papers in respect of the 2010 consultation. However, we do have the Applicant's "Paragraph B" notice dated 31 March 2010 and 3 quotes. There is an undated estimate from Total Solutions UK which states "I have the pleasure in enclosing the quotation based on schedule of works attached in the total of £113,230 inc vat." There is a second quote dated 10 March 2010 from Block Maintenance which states, "With respect to the survey as carried out by the Dilapidations Consultancy and the works list provided there are many items in consideration with the total coming to: Total amount £112,730." The quote is silent as to VAT and we note the figure is exactly £500 cheaper than the Total Solutions UK estimate. There is also a quote dated 14 March 2010 from GP Kennedy, stating "With note to the supplied Works Schedule total cost for the project comes to £129,445." All three quotes are referred to in the "Paragraph B" notice dated 31 March 2010. This s.20 consultation process was not seen through to a conclusion.

8. Block Maintenance is the trading name of Jonathan Furneaux when carrying on work as a builder. He is also the sole shareholder and sole director of the Respondent. The Regulations expressly provide for a person associated with the landlord to provide an estimate of works, provided that a person unconnected with the landlord also features as a choice on the "Paragraph B" letter (See paragraphs 4(5)&(6) of the Regulations).

The claim for 2010 unpaid service charges resulting in County Court proceedings.

9. On 25th October 2010 the Applicant issued a service charge demand for year 2010 in the sum of £6,348.15. No issue has been taken by the Respondent as to the proper service of this and other demands in this case. The demand states it is for a third of the annual expenditure and notes that detailed accounts will be available at the beginning of the following year. Payment is requested within 7 days. As noted below, where the lease provisions are described, the lease provides for payment to be made within 28 days of demand or on the Rent Day, whichever is the later. On the 11 November 2010 the Applicant issued 2 claims in the Swansea County Court each for £6,723.15, in respect of Flats 1 and 2. The claims were made up of the demand for £6,348.15 unpaid service charge, £150 for unpaid ground rent and the court issue fee of £225. This appears to be 17 or 18 days after the demand had been issued and may be before it was contractually due. The Tribunal has directed further submissions on this point as the it did not become apparent to the Tribunal until after the parties had completed their evidence. We wish to consider any submissions from them (including, if need be, a request to reconvene the hearing) before we finally determine this point.

10. The Respondent failed to file a defence in respect of either flat and on the 16 February 2011 a judgment in default in the sum of £6,723.15 was entered in respect of each of them. We do not have before us the date of the final application for judgment in default in respect of Flat 1 (one was made in 2010 and refused as the Respondent issued an acknowledgment of service) but in respect of Flat 2 we have an application dated 1 February 2011. We find, on the balance of probability, that the Flat 1 application would have been made on the same date as well. The application for default judgment contains a statement of truth.

The Applicant's accounting.

11. There is described below the requirement in the lease for the Applicant to have the accounts certified by an accountant. The Applicant accepts that it has singularly failed to do this. This Applicant's non-compliance with this requirement in the lease laid the ground for the problems which follow.

12. On the 19 January 2011, despite having issued County Court proceedings for £6,348.15 unpaid service charge, the Applicant served an "Annual Service Charge Certificate" showing a brought forward figure from 2009 of £160 and a 2010 figure of £549.54. It will be apparent that the £549.54 bears little resemblance to the £6,348.15 which the Applicant was pursuing in the County Court It is most

unfortunate, to say the least, that Mr Furneaux signed the application for the default judgment on behalf of the Applicant on the 1 February 2011, sometime after he had revised the accounts and served a much reduced service charge demand

13. We note that even the figure of £549.54 plus arrears of £160 carried forward appears to be incorrect. The items on the 2010 invoice, in fact, add up to £1090.05 which, together with the £160 should have provided a year-end balance of £1250.05. Mr Furneaux indicated in the hearing that the Applicant would not be seeking more than the £709.54.

14. The accounting here, at best, appears shambolic and reflects very poorly upon the Applicant.

The Applicant's dealings with the Respondent's mortgagees.

15. The Applicant sought to recover the default sums, despite having revised downwards the 2010 figure. The Applicant entered into correspondence with the Respondent's mortgagees. Mortgage Express in respect of Flat 2 would not pay the Applicant. Birmingham Midshires in respect of Flat 1 ended up paying, on the 26 May 2011, a figure of £9,538.35 directly to the Applicant to settle the default judgment and associated costs. This figure is the combination of the judgment figure of £6,723.15 (which itself is made up of the claimed £6,348.15 noted in paragraph 12 above, court costs of £225 and ground rent of £150), further costs of £1,230 (made up on 2 x £240 and £750 which are described in the 2011 Scott Schedule) and legal costs £1,479 (not in any Scott Schedule before us) in respect of the legal costs in preparation of a s.146 application and £106.10 interest. These figures are contained in a letter from the Applicants' solicitor, Woodcocks, dated 5 May 2011. The letter from Woodcocks was provided on the third day of the hearing after the Tribunal had asked for an explanation as to how the figure of £9,538.35 was arrived at. It appears to us, on a provisional basis, that the £1,479 should also have been accounted for but has not been. However, as this question was not put squarely to the parties, we have given opportunity for further submissions upon the point.

16. As can be seen this figure, is the result of having applied for a default judgment when the underlying accounts had been revised out of all recognition.

17. We note that in respect of Flat 1 the Birmingham Midshires also made a payment to the Applicant of £2,071.67 in respect of a claim for ground rent. Whilst we do not have jurisdiction to deal with the question of ground rent, it being a contractual matter, we do have jurisdiction to deal with the administration charges which make up a large part of the £2071.67. However, after a careful review of the papers it did

not appear to us that this matter had been put squarely before us for determination in this application and we were only shown some partial documents on the third day of the hearing. If the parties remain in dispute about these items then a further application will have to be made.

The second s.20 consultation.

18. On the 16 December 2011 the Applicant issued a further First Notice pursuant to a s.20 consultation. We have been provided with no document which shows that the Respondent suggested any alterative contractors during the consultation period. The consultation period commenced on the 16 December and under the Regulations was due to last for 30 days. The Applicant, in fact, gave 35 days to comply. Nothing happened with the consultation until 1 October 2012 when the Applicant issued a "Paragraph B" statement, providing the estimates of 2 builders, namely Premier Commercial Developments Limited at £157,766.77 inclusive of VAT and Block Maintenance at £156,461.77 inclusive of VAT. The difference between the estimates is £1,305.

19. There followed a letter dated 29 October 2012 from the Respondent requesting further information about the estimates and suggesting alternate contractors. The time for suggesting contractors had now long passed.

20. The Applicant responded to the Respondent in a letter dated 8 November 2012 stating, "We attach copies of the quotes for the works obtained recently. The quote from Block Maintenance is essentially the same as the quote from Premier Commercial Developments Limited but Block Maintenance felt that they could provide the scaffolding required for £1,000 more cheaply thereby being the cheaper quote." In response to a request for "more detailed information regarding the estimates" the Applicant replied, "see point 1" which recites the extract just quoted.

21. The Block Maintenance quote is made up of a figure of £113,714, plus £5,000 for preliminary works and £23,742.80 for VAT. We note that the basic quote plus the preliminary work comes in at £118,714 which is exactly £1000 less than the Premier quote of £119,714 ex VAT.

22. In evidence on the 12 February 2013 Mr Furneaux for the Applicant stated that he had fully costed the work and suggested he had prepared a schedule at the time which worked through the dilapidations report prepared back in 2010.

23. It was pointed out to Mr Furneaux that in submissions/preliminary discussion on the 11 February 2013 he had stated that he had "looked at the Premier estimate and taken something off." It was further put to him that he had accepted on the 11 February 2011 that he did not provide an actual estimate and that he had asked the Tribunal if he could work up a schedule overnight. Mr Furneaux claimed on the 12 February that he had been rattled on the 11 February and that he had given a wrong impression. He claimed to have conducted a proper estimate where his hourly costs and profit margins were different to Premier. He did not formally apply to admit any schedule of works. It was pointed out that the suggestion of a fully costed estimate did not fit with his letter dated 8 November 2012, which did not append a schedule of works and strongly implied that the only difference was the cost of the scaffolding. We find this evidence troubling and unconvincing.

24. Matters were not all one way before us. We found the Respondent to be quite unrealistic in his aspirations as to how the repairs might be carried by his own contractor and appeared not to understand the service charge mechanism entitling the Applicant to recover for works it has covenanted to undertake. The Respondent also made wholly unsubstantiated and wild allegations against the Applicant which had never previously been made and have no evidential basis.

25. We strongly urged the parties to seek legal advice to assist in resolving these matters.

Inspection.

26. The property comprises a flat-fronted (that is, without a forecourt) mid-terraced, three-storey building in a secondary area of Barry. The front elevation is dressed stonework, while the rear elevation is cement-rendered. The property has a slate roof and mainly wooden window frames, although several have been replaced with UPVC units.

27. The building originally comprised a shop with living accommodation behind and above on the first and second floors. It has now been altered to provide a two-bedroomed flat on the ground floor (Flat 3), with a basement storage area. Separate access leads to a two-bedroomed flat (Flat 2) on the first floor, and a two-bedroomed flat on the second floor (Flat 1). There is an enclosed yard to the rear.

28. At the date of inspection the ground floor and first floor flats were vacant and required considerable improvement works, and the entire building is the subject of an Improvement Notice issued by the Vale of Glamorgan Council. There is substantial cracking to the side retaining walls at the front of the building. There is a structural

engineers' report which suggests that this movement has been caused by the dropping of a steel bressummer situated in the front elevation, which is sitting on a wooden base which is rotting away. There also appears to be dry rot in the void between the ground floor flat (3) and the first floor flat (2).

The lease.

29. 266 Holton Road is divided into 3 flats and the common parts, referred to as 'Retained Parts' in the leases.

30. The lease for Flat 2 is for a term of 99 years at a ground rent of £150 per annum and the term commenced on the 1 January 2008. The Respondent purchased the demise described as Flat 2 on the 15 April 2008. The consideration was £70,550. The lease for Flat 1 is in similar terms, acquired by the Respondent on the 25 November 2008. The consideration was £80,000.

31. The lease describes the demise in its First Schedule by reference to the attached plan, edged red. Those parts of the building/land not contained within the demise are described as the Retained Parts and are the subject of the service charge provisions and hence the dispute before us.

32. The extent of the Retained Parts requires some elucidation so far as they relate to Flat 3, a property not subject to this dispute. The relevance of Flat 3 is the extent of its demise, which, in turn, thereby determines the Retained Parts subject to the service charge provisions described below.

33. The plan to Flat 3 includes the yard to the rear of 266 Holton Road.

34. A more difficult question is the lower ground basement/cellar which sits beneath Flat 3. The coloured plan for Flat 3 is not immediately obvious in that it does not refer to a basement. The reference is to "a store cupboard below slope of stairs." There is no store cupboard beneath the slope of the stairs in the basement, it being a solid stone staircase. We further discounted the reference to "a store cupboard below the slope of stairs" as being a cupboard which would fall beneath the stairs which serve Flats 1 and 2 on the grounds that, rather than there being a cupboard, there is a staircase which leads to the basement. It appears to us that the coloured plan to Flat 3 misdescribes the basement as a cupboard below the slope of the stairs, or is simply silent about the basement. There is no cupboard. The plan identifies the area of the staircase which is leading down to the basement but wrongly refers to it as a

cupboard. We have no powers of formal declaration, but treat the staircase and basement as not a Retained Part when considering the cost of removing fly tipped rubble from the basement. Neither party urged us to treat the basement as a Retained Part, which is wholly inaccessible by the Respondent in any event.

35. At paragraph 8 of the lease, the Landlord covenants to repair (we paraphrase) "the structure and exterior" and Retained Parts subject to the Tenant having paid the Service Charge contribution. The Service Charge is defined in the definitions at the start of the lease, as a third of the expenditure described in the Third Schedule.

36. Paragraph 5 of the lease makes express provision for the Service Charge to be paid in advance, and paragraph 5 of the Third Schedule makes reference to the 'Tenant's covenant to pay the Service Charge on account of anticipated expenditure..."

37. At paragraph 7.1 of the lease the Tenant covenants to pay the Service Charge on the "Rent Day" (defined elsewhere as 1 January of each year) "or within 28 days of written demand (whichever shall be the later date in each year of the Term.)"

38. The lease provides, therefore, for the annual service charge to be demanded in advance based upon anticipated expenditure.

39. The Third Schedule defines in more detail the Service Charge Expenditure and includes the Landlord's costs of compliance with paragraph 8 of the lease, noted above. It further provides for, "the payment of the expenses of management of the Building of the expenses of the administration of the Landlord of the proper fees of surveyors agents accountant and solicitors appointed in default by the Landlord's obligations and powers..."

40. Paragraph 2 of the Third Schedule provides "As soon as convenient after the expiry of each accounting period of not more than 12 months commencing with the accounting period now current there shall be prepared and submitted to the Tenant a written summary ("the Statement") setting out the Service Charge Expenditure in a way showing how it is or will be reflected in demands for payment of the Service Charge and showing money in hand. The Statement will be certified by a qualified accountant as being in his opinion a fair summary complying with this requirement and sufficiently supported by the accounts receipts and other documents produced to him."

41. It is of note that the Tenant's obligation to pay the Service Charge at paragraph 7.1 of the lease (described above) is not conditional upon the Landlord's compliance with Paragraph 2 of the Third Schedule. This means that whilst the Landlord is obliged to prepare a written summary and have it certified by an accountant, his failure to do so does not make the demand for payment invalid.

42. At paragraph 4 of the Third Schedule, surplus payments of Service Charge can be refunded or carried forward as the landlord thinks fit. Paragraph 5 makes provision for a sinking fund.

43. At paragraph 6.1 of the lease the Respondent covenants to pay the Service Charge "without any deduction whatsoever." The case of *Connaught Restaurants v Indoor Leisure* [1994] 1 WLR 501 makes plain that this form of wording does not preclude an equitable set off.

The Scott Schedules and 2009.

44. The parties were directed to prepare Scott Schedules in respect of years 2010 – 2012. (In the event, although no schedule was prepared, The Applicant also put a small figure for 2009 in issue.) We shall deal with the disputed items chronologically as set out in the schedules themselves.

2009

Management fees - £100 claimed

45. The Applicant was seeking a management fee of £100 per annum for the year ended 31 December 2009. Whilst we accept that a management fee of £100 per annum is a reasonably incurred item of expenditure, in the financial year 09 the Applicant was only the freeholder for less than a month. WE DETERMINE that the management charge should be limited to 1/12 of the annual charge in 2009 which is £8.33.

Letters - £60 claimed

46. The Applicant also sought £60 for the sending of two statutory letters informing that leaseholder at two addresses that he was the landlord. WE DETERMINE that this a reasonably incurred figure.

2010

Management fees - £100 claimed

47. WE DETERMINE that this is a reasonably incurred sum.

Site Visit - £66.67 claimed

48. The Applicant visited the site to assess the condition of the property, following his purchase of the freehold. This involves his travelling to the property with associated costs and time expended. WE DETERMINE that the sum of £66.67 is a reasonably incurred sum.

Repair lock to front door - £41.67 claimed

49. The Respondent states that the Repair was undertaken by him at a cost of £25 and refers us to page 268A in the bundle. This simply shows a bank credit of £25 on 2 February 2012 and clearly does not relate to this repair. There is an invoice from Block Maintenance dated 15 January 2010, relating to this work. WE DETERMINE that the sum of £41.67 is a reasonably incurred sum.

Gutter and downpipe repair - £48.33 claimed

50. This relates to the repair of the gutters and downpipe to the front elevation and the cleaning of the gutters. The Respondent stated he had paid a contractor to do this work but did not have any receipts. The Applicant disputed this and confirmed that Block Maintenance had undertaken the work and there is an invoice dated the 25 March 2010. WE DETERMINE that the sum of £48.33 is reasonably incurred.

Legal fees, advice on maintenance obligations - £29.38 claimed

51. The total costs of the legal fees was £58.75 and the Applicant conceded that this should be shared by the three flats and not only by Flats 1 and 2. The Respondent agreed. WE DETERMINE that the sum of £19.58 is reasonably incurred under this head.

Legal fees, advice on maintenance obligations - £58.75 claimed

52. The total costs of the legal fees was £117.50 and as above the parties agreed that this should be apportioned between the three flats. WE DETERMINE that the sum of £39.17 is reasonably incurred.

Legal fees, advice on invoicing Flats 1 and 2 - £270.25 claimed

53. The Applicant accepted that the invoice in the bundle related to a matter which involved an agent's fee for hearing and upon this basis, at this time in 2010, could not relate to Flats 1 or 2, 266 Holton Road. The Applicant accepted that he would have to withdraw this item. WE DETERMINE that the Respondent has no liability at all in respect of this item.

Clear rubbish from basement - £183.33 claimed

54. As noted above, we have decided that the basement is not part of the Retained Parts for the purposes of these proceedings. It follows that no service charge can therefore apply to this item. WE DETERMINE that the Respondent has no liability at all in respect of this item.

Site visit to observe structural cracking - £66.67 claimed

55. As noted earlier, the building at 266 has suffered some movement which has caused cracks to appear in supporting walls. It was reasonable of the Applicant to attend at the property to assess the extent of the cracking in October 2010. WE DETERMINE that the sum of £66.67 is reasonably incurred.

Court fees - £225 claimed

56. As noted above the Applicant's poor accounting makes the claim made in 2010 unreasonable. WE DETERMINE that the Respondent should not have to pay any of this sum.

2011

Management Fee - £100 claimed

57. WE DETERMINE, as above, that the sum of £100 per annum is reasonably incurred.

Site visit to observe structural cracking - £66.67

58. The Applicant revisited the building to observe the extent of movement since the visit in October 2010. Given the extent of the cracking in October 2010 this was an entirely reasonably thing to do. WE DETERMINE that the sum of £66.67 is reasonably incurred.

Removal of rubbish from rear yard - £183.33 claimed

59. During the inspection Mr Furneaux indicated that he believed that the yard to the rear of Flat 3 was a Retained Part. As noted already, the yard forms part of the Flat 3 demise. It follows that there can be no service charge applied to the removal of items from the yard. However, the Applicant produced a photograph showing graphically a considerable amount of rubbish on the roof of the ground floor extension to Flat 3; the roof of which is a Retained Part. After discussion the parties agreed that it would be reasonable for half of the total cost (£550) to be borne by the Applicant for removal of items from the yard, and the remainder (£275) to be shared between the three flats. WE DETERMINE that the sum of £91.67 is reasonably incurred.

Legal costs items 4 – 9 on 2011 Scott Schedule - £1,705.51 claimed

60. We have described above the unhappy chronology, whereby the Applicant sought a default judgment, despite having adjusted his accounts from £6,348.15 to £709.54 (which in any event was an incorrect figure). At best this conduct and accounting is shambolic, and in our opinion all costs associated with the County Court claim are unreasonable. It is simply not acceptable to be seeking a default judgment having decided not to pursue the amounts in any event. The position in respect of the timing of the claim appears, at first blush, to raise further questions. However, as this point was not put to the Applicant we make no findings until we have received the further submissions. WE DETERMINE that the Respondent has no liability in respect of these sums.

61. We note that, if we are correct in assuming that the £1,479 should have been shown as a demanded sum, it would not be allowed on the same grounds of unreasonableness relating to the other costs of the court proceedings.

Structural survey - £83.33 claimed

62. Given the cracking which was and remains a concern, it was entirely appropriate to seek a structural survey. The total cost of the survey was £250 which is an entirely reasonable amount. WE DETERMINE that the sum of £83.33 is reasonably incurred.

Site visit to accompany structural engineer – £66.67 claimed

63. The Applicant attended the premises with the structural engineer and it was entirely appropriate that he did so. WE DETERMINE that the sum of £66.67 is reasonably incurred.

2012

Management fee - £100 claimed

64. WE DETERMINE, as above, that this sum is reasonably incurred.

Renewal of fascia – £46.67 claimed

65. This item was withdrawn by the Respondent. WE DETERMINE that the Respondent has no liability in respect of this item.

Communal area cleaning plus changing light bulb - £20 claimed

66. The invoice suggests that this item relates to a figure of £60 for work undertaken on the 25 February 2012. At the hearing the Mr Furneaux tried to suggest this cost was for 4 visits in a year. We do not accept this as the invoice makes plain it is for one visit in February 2012. Whereas we accept the need for the Applicant to attend from time to time to inspect the premises (which we have allowed above) it is the Tribunal's view that a local person could have attended to undertake these tasks. It is noted that the Respondent denies that the Applicant ever attended. We find that the Applicant has attended but incurred more costs than would have been necessary for this task. WE DETERMINE that the sum of £6.67 is a reasonably incurred sum.

Items 4, 5, 6, 7, 8 and 9 – £491.67 claimed

67. All these items were withdrawn by the Applicant and we need say no more about them save that WE DETERMINE that in respect of items 4 – 9 on the Scott Schedule for 2012 the Respondent has no liability.

Extra maintenance allowance - £500 claimed

68. As noted, the premises are in need of considerable work. The establishment of a sinking fund is entirely appropriate, in accordance with the lease and the sum reasonable. WE DETERMINE that the sum of £500 claimed is reasonably incurred.

Summary of Scott Schedule (and 2009) determinations

69. The net effect of our determinations are shown in an Excel spreadsheet which we attach as Schedule 2 to these reasons. The amount found to be due in each year is shown. Further, we have shown the payment of £9,538.35 from Birmingham Midshires which has resulted in a credit balance carrying forward. As indicated in the recital to the order, these are provisional figures as we have included the £1,479 Woodcocks' legal costs, in respect of which we have invited further representations.

2013 and proposed Qualifying Works.

70. We do not detail herein all of the provisions required to ensure compliance with the Regulations. Reference to the cases of *Daejan Investments Ltd v Benson* [2011] EWCA Civ 38 and *Phillips v Francis* [2012] EWHC 3650 (Ch) should be made for the current authoritative guide to the process. Suffice for this decision, we make specific reference to Schedule 4, Part 2, paragraph 4(5)(a) which requires, to ensure compliance with the Regulations, the landlord to "obtain estimates."

71. Whilst, as we have noted, there is no objection to estimates being from people associated with the landlord, at least one must be from a person not associated with the landlord.

72. In this case we have the estimates from Premier and Block Maintenance. The question which we determined as a preliminary decision during the hearing (with written reasons to follow) was whether there were "estimates" obtained during the consultation process. Whilst the Premier estimate is clearly an estimate, WE DETERMINE that the "estimate" from Block Maintenance is not in fact an estimate.

73. The scheme of the Regulations is to allow competing quotes to be considered and in the event that the cheapest estimate is adopted by the landlord then there is no requirement under Schedule 4, Part 2, paragraph 6(2) to explain why a particular contractor has been chosen. The landlord is not bound to accept the cheapest estimate, but in the event that he does not do so, he must explain why (Schedule 4, Part 2, paragraph 6(1)). It can thus be seen that the Regulations allow for competing estimates to be considered where price is an important but not determining factor. For this protection to work as intended it is necessary that the estimates are genuine estimates and not simply documents which purport to be an estimate by cutting either £500 or £1,000 off the nearest estimate.

74. An estimate, according to Chambers Dictionary is “1. a valuing in the mind. 2. Judgment or opinion of the worth or size of anything. 3. A rough calculation. 4. A preliminary statement of the probable cost of a proposed undertaking.”

75. Borrowing, by way of analogy only, with the law of sham “... in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties’ explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.” (see *A v A* [2007] EWHC 99, para 33).

76. As noted above, the evidence given by Mr Furneaux on the circumstances of the 2012 Block Maintenance ‘estimate’ coming into existence was far from satisfactory. We are driven to the view that, when looking at all the surrounding circumstances, that the document was not a genuine judgment or valuing in the mind. It was not even a rough calculation. At best it can be said that it was a preliminary statement of the probable costs of a proposed undertaking, as it is close to the Premier estimate which clearly is a proper estimate. However, in this context and on these facts, that is not enough to allow us to say that this is an ‘estimate’ so far as the Regulations are concerned. Given that this is not an estimate it follows that the Applicant has failed to comply with the Regulations and that absent of our giving dispensation under section 20ZA of the Act (which has not and may not be applied for) the Applicant will be limited to the recovery of £250 per tenant for the works. In these circumstances the Applicant indicated that his probable option would be to recommence the consultation process.

77. In coming to this decision we emphasised that the Tribunal is not here to simply put traps in the way of recovery of service charges. However, the Regulations are designed to protect leaseholders and we simply could not allow such a transparently obvious attempt to circumnavigate the protections intended by the Regulations.

Accounting in respect of overpayments for Flat 1.

78. We determined at the preliminary hearing in July 2012 that our decision in respect of Flat 2 would apply to Flat 1 on all common issues which we have thus far described The issue which is discrete to Flat 1 is how the sum of £9,538.35 paid by Birmingham Midshires to the Applicant should now be treated.

79. S.27(A)(5) of the Act provides that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made a payment. In this case the Birmingham Midshires as mortgagee "stood in the shoes" of the Respondent and forced him to make a payment. It is clear from our findings that the sum originally claimed in respect of 2010, namely, £6,348.15, for which the Applicant obtained a default judgment, in the circumstances already described, cannot be allowed to stand (please note decision of 19 July 2012 appended as schedule 1 to this document as to why the Tribunal maintains its jurisdiction when a default judgment has been made). If the £6,348.15 cannot stand, it follows that the administration charges and costs on top of the £6,348.15 cannot be allowed to stand either. Out of the £9,538.25 it may be that it is only the £150 ground rent which was claimed that is outside our jurisdiction, as this Tribunal has no jurisdiction to deal with ground rents.

80. On this basis, bearing in mind the sums which we have found to be payable, it appears to us that the Applicant's overpaid sum is £7,922.92 (see Schedule 2 for a summary showing how our decision results in that figure). This figure may require adjustment following submissions, as provisionally we have included the £1,479 (which was in the £9,538.35 paid by Birmingham Midshires). Whilst we have a wide jurisdiction under s.27A of the Act, we are mindful of the mortgagee's potential claims over this sum, particularly if Flat 1 is suffering "negative equity."

81. Whilst the Respondent indicated he wished to have the money returned to him, we indicated that in the first instance we would require him to send a copy of this decision to the Birmingham Midshires inviting their comment, prior to our making any final decision as to the destination of any balance due after we have accounted for the sums which we have found to be properly claimed.

82. It is clear that the Respondent may exercise a set off (i.e. apply overpaid sums on Flat 1 to payment of sums due on Flat 2) in respect of the monies which we have found to be owing, but until we know the position of Birmingham Midshires in respect of the overpaid sum of £7,922.92 we cannot resolve this point.

S.20C Landlord and Tenant Act 1985

83. Mr Furneaux indicated that he would not seek to recover any costs of the Tribunal proceedings and upon this basis we do not need to consider this matter any further.

Dated 21 February 2013

Lawyer Chairman

ANNEX B

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal (Wales)

First Floor, West Wing, Southgate House, Wood Street, Cardiff. CF10 1EW.
Telephone 029 20922777. Fax 029 20236146. E-mail: rpt@wales.gsi.gov.uk

PRELIMINARY DECISION AND DIRECTIONS OF LEASEHOLD VALUATION TRIBUNAL (WALES)
LANDLORD AND TENANT ACT 1985 s.27A

Premises:	Flat 2, 266 Holton Road, Barry, Vale of Glamorgan.
LVT ref:	LVT/WAL/883/12
Hearing:	19 July 2012
Applicant:	Wellington Investments Limited
Respondent:	Mr Pjotrs Sevcovs
Members of Tribunal:	Mr R S Taylor – Chairman Mr R W Baynham FRICS

Upon hearing counsel for the Applicant and the Respondent in person on the 19 July 2012.

And upon it being agreed by the tribunal and the parties that the following directions have been timetabled to allow the Applicant time to consider whether it wishes to seek permission to appeal the tribunal's decision at paragraph 1 of this order, in which event the directions shall be suspended pending determination of any appeal issues. Further the timetable provides time for the Applicant to issue an application in respect of major works it proposes. In the event that no permission to appeal is sought then the tribunal will expect these directions to be strictly adhered to.

And upon it being apparent that the transfer order of District Judge Hendicott dated 16 November 2011 does not encompass all of the issues over which the parties are in dispute and upon the parties indicating that they wish the tribunal to be in a position to deal with all matters.

And upon the Applicant indicating that it will by noon on the 28 September 2012 file at the tribunal a fresh application seeking a determination of service and administration charges for financial years ending 2010, 2011, 2012 and 2013 (which shall include the major works programme).

And upon the Respondent indicting that he will by noon on the 28 September 2012 file at the tribunal an application for the determination of service and administration charges in respect of Flat 1, 266 Holton Road, Barry, for the financial years ending 2010, 2011, 2012 and 2013 and an application pursuant to s.20C Landlord and Tenant Act 1985 in respect of Flats 1 and 2.

And upon the tribunal indicating that it has jurisdiction to consider the service and administration charge dispute in respect of Flat 1, notwithstanding a default judgment, for the same reasons as it is prepared to hear the dispute in respect of Flat 2.

And upon the tribunal indicating that the applications in respect of Flat 1 and Flat 2 involve substantially the same matters and that it proposes, pursuant to Regulation 8 of the Leasehold Valuation Tribunal (Procedure) (Wales) Regulations 2004, to determine the common matters in relation to both flats. Pursuant to Regulation 8:-

1. The common matters are the service and administration charges for years 2010 to 2013 and a s.20C application in respect of two flats contained within the same freehold property where the freeholder and leaseholder are the same.
2. Flat 2 shall be the representative application.
3. The decision made in respect of Flat 2 shall apply in respect of Flat 1.
4. If either party objects to the tribunal taking this course they are invited to state their objections in writing by 4pm on the 28 August 2012 to the tribunal office at the address at the top of this order.

For the avoidance of doubt, in respect of Flat 1, the manner in which the sum paid for service and administration charges in 2010 has been accounted for is not a common matter and will be determined as a discrete issue.

IF EITHER PARTY FAILS TO ADHERE TO THE DEADLINES SET OUT ABOVE OR IN THE ORDER BELOW IT SHALL BE THE DUTY OF EACH PARTY TO IMMEDIATELY CONTACT THE TRIBUNAL TO NOTIFY THE TRIBUNAL OF THE BREACH.

IT IS ORDERED THAT:-

1. The tribunal has jurisdiction to consider the service charge dispute transferred to it by virtue of the order of District Judge Hendicott on the 16 November 2011, notwithstanding the fact that the Applicant obtained a default judgment in respect of the amount in dispute (and other matters) on the 22 February 2011.
2. The Applicant shall by noon on the 12 October 2012 serve upon the Respondent (1 copy)
    a. all invoices which go to support the service and administration charge demands made in years 10, 11 and 12 (for year 12, so far as it is able to do) and evidence it has in respect of its estimate for the service charge year 13.

b. All notices, correspondence, quotes and reports in respect of its major works consultation.

c. Copies of service and administration charge demands served in 2010, 2011 and 2012.

d. A statement, supported by a statement of truth, as to the date of service of service and administration charge demands and the prescribed rights and obligations notice with the service and administration charge demands which have been issued for 2010, 2011 and 2012.

e. An electronic copy of the Scott Schedules which have already been completed by the Applicant in respect of Flat 2

f. Land Registry Office Copy Entries in respect of the Respondent's leasehold interest in Flat 1, 266 Holton Road.

g. Written confirmation that the lease in respect of Flat 1 is the same in all material respects as Flat 2 or, if that is not the case, the lease in respect of Flat 1.

h. A statement identifying and describing the service charge provisions in the lease for Flat 2.

i. All cases papers in its possession in respect of the default judgment and subsequent payment in respect of Flat 1.

j. Service charge demands for 2010, 2011 and 2012 in respect of Flat 1.

k. Any accounts and/or summary which demonstrate how the 2010 payment for Flat 1 has subsequently been accounted for.

3. The Applicant shall by noon on the 12 October 2012 file at the tribunal written confirmation that it has complied with paragraph 2.

4. The Respondent shall by noon on the 2 November 2012 serve upon the Applicant (1 copy)

   a. His typed replies to Applicant's Scott Schedules for years 10, 11 and 12

   b. a statement, supported by a statement of truth, as to his position in respect of the service and administration charges for year 13 and his reply on the issue of the service of demands and of the prescribed summary of rights and obligations.

5. The Respondent shall by noon on the 2 November 2012 file at the tribunal written confirmation that he has complied with paragraph 4.

6. Each party shall by noon on the 16 November 2012 file at the tribunal (to be at the front of the bundle ordered below) a case summary, setting out their positions and the matters which remain in dispute between the parties, which shall include the parties' respective arguments (if any) in respect of ss.20B and 20C Landlord and Tenant Act 1985 and dates of the parties' availability for a 2 day hearing between December 2012 and March 2013.

7. The Applicant shall by noon on the 16 November 2012 file at the tribunal (3 copies) and serve upon the Respondent (1 copy) an agreed paginated bundle which shall contain (but is not limited to) to the following:-

    a. An agreed index

    b. Each party's up to date case summary

    c. Court papers in respect of default judgment, subsequent forfeiture proceedings and order of transfer to tribunal in respect of Flat 2.

    d. Court papers in respect of default judgment, later correspondence with mortgagee showing amount paid in respect of Flat 1 and summary or accounts showing how that amount has been accounted for.

    e. Applications made by each party to the tribunal

    f. Any orders made by the tribunal

    g. Copy lease in respect of Flat 2 and confirmation both leases are the same in all material respects (or the lease for Flat 1 if they are not the same in all material respects)

    h. Statement identifying and describing the terms of the lease

    i. All service charge and administration charge demands which have been served for 2010, 2011 and 2012.

    j. Office copy entries demonstrating freehold and leasehold title in respect of 266 and Flats 1 and 2.

    k. The Applicant's statement and exhibits dated 25 January 2012 and any later statements

    l. The Respondent's statement and exhibits dated 20 February 2012 and any later statements

m. The Scott Schedules completed by each party

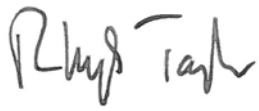
n. All invoices in support of the figures claimed in the Scott schedules

o. All notices, correspondence, quotes and reports in support of the major works consultation

8. Upon compliance with these directions the procedural chairman will consider the papers and either provide for further directions or a pre trial review which may be conducted by way of a telephone hearing.

9. If either party seeks further directions they are permitted to apply at short notice by way of email provided that the other party is copied into the request.

27 July 2012 (confirming preliminary decision indicated orally on the 19 July)



Lawyer chairman

REASONS ON PRELIMINARY ISSUE

Introduction.

1. This application arrives at the LVT having been transferred from the County Court by order of District Judge Hendicott dated 16 November 2011, wherein he directed that the LVT determine the service charges before him.

2. The claim before District Judge Hendicott started as a claim for possession of a leasehold property known as Flat 2, 266 Holton Road, Barry, Vale of Glamorgan, CF63 4HU ("Flat 2") on the 12 October 2011. I do not need to go into the detail of how the case was pleaded, nor whether it was correctly pleaded, but in summary the point being made was that the Respondent had failed to defend an earlier claim for unpaid service and administration charges, which had resulted in the Applicant obtaining a default judgment in the sum of £6,723.15 on the 22 February 2011, which in turn had led to a s.146 notice being served. The Applicant's case was that it was entitled to forfeit the lease as a result of the breach of the lease having been establish in a default judgment and a notice having been served.

3. The short question which we must resolve by way of a preliminary issue is whether the issue of service charges has "...been the subject of determination by a court" for the purposes of s.27A(4)(c) Landlord and Tenant Act 1985 by virtue of a default judgment having been issued.

4. s.27A(4) provides "No application [to LVT] may be made in respect of a matter which – (c) has been the subject of determination by a court." If a default judgment is a "determination" then the tribunal cannot have jurisdiction. If a default judgment is not a "determination" then the tribunal can hear the case.

Background.

5. Before turning to the statutory provision it is important to note a little more of the history of the case. Prior to the preliminary issue having been identified as a point for early resolution, the tribunal gave directions on the 20 December 2011 which provided for the Applicant to give disclosure.

6. Within the disclosure there is a service charge demand dated 25 October 2010 for £6,348.15 for the calendar year 2010. It is this figure, plus, we assume court costs and interest, which resulted in the figure of £6,723.15 being the subject of a default judgment.

7. In a statement dated 25 January 2012 Mr Jonathan Furneaux, on behalf of the Applicant, states, in respect of the 25 October 2010 invoice, "[6] The Claimant has been unable to complete much of the intended maintenance at the Development as all of the leaseholders have little if any service charge payments. [7] A certificate showing the actual expenses for 2010, 2011 and an invoice for the anticipated expenditure for 2011 [we think that Mr Furneaux meant to say "2012" at this point as no anticipated schedule for 2011 has been provided but one has for 2012] for the property is included in the bundle for the Tribunal's consideration. The anticipated expenditure for 2012 covers some of the works that were initially expected for 2010 but were delayed due to non payment of invoices."

8. At the hearing on the 19 July 2012 this point was pursued by the tribunal and it became apparent that the £6,348.15 had not, in fact been expended in 2010 and to present the anticipated service charge statement for 2010 and then for 2012, covering the same ground, risked the Applicant benefitting from double recovery for the same areas of work.

9. The tribunal was troubled to note that, in fact, the actual spend in 2010 would have resulted, should the demand stand in its entirety, as being only £709.54 due by way of service and administration charges.

10. The Applicant made the point, on the 19 July 2012, that the certificate dated 25 October 2010, by its very nature, could only have been based on some projected figures up to the year end. However, the actual service charge certificate for 2010 was issued on the 19 January 2012 in the sum of £709.54 (although we are not even sure if that figure is correct) The Applicant obtained default judgment for the larger figure of £6,723 on the 22 February 2011. This must have been at a point when the Applicant was aware, or should have been aware, that the expected spend, as of 25 October, had not in fact occurred.

Does a "determination" include a default judgment?

11. There are no reported cases on s.27A(4)(c). However, there have been conflicting county court level decisions made concerning the interpretation of the words "determined" and "finally determined" for the purposes of s.81(1) Housing Act 1996.

12. s.81(1) Housing Act 1996 in its current (amended) form states,

    "A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless-

    a. it is finally determined by (or on appeal from) a leasehold valuation tribunal or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or

    b. the tenant has admitted that it is so payable."

13. In the case of *Southwark v Tornaritis* [1999] 7 C.L. 330 HHJ Cox held (in relation to s.81 in its original form which used the word "determined" rather than the amended version which used the term "finally determined") that a determination includes a default judgment. However, in *Hillbrow (Richmond) v Alogaily* [2006] 2 C.L. 347 HHJ Rose declined to follow *Tornaritis* and held that a default judgment is not a final determination for the purposes of s.81, in its amended form.

14. Most recently HHJ Dight has considered the point in the case of *Church Commissioners For England v (1) Koyale Enterprises (2) Naresth Thaleshwar* which was decided in the Central London County Court on the 22 September 2011.

15. HHJ Dight came down in favour of a default judgment being a final determination for the purposes of s.81 of the Housing Act 1996, for the following reasons:-

    a. s.81 requires a "determination" and there is nothing in the wording of s.81 to suggest that this phrase was intended to exclude the normal remedies open to landlords, i.e. default judgment.

    b. there was privy council authority for the proposition that a default judgment was binding between the parties.

    c. the policy behind s.81 was to give leaseholders a breathing space before forfeiture could result and that was not undermined by default judgments.

    d. nothing useful could be achieved at a trial in the absence of a defence, so what was a tenant losing by the court allowing default judgments to satisfy s.81.

    e. the costs involved in preparing for such a 'trial' would be wholly disproportionate, both for landlords and the court.

16. All three decisions are decided at County Court level and whilst this tribunal may derive assistance from the reasoning and arguments contained therein, the LVT is not formally bound by them.

17. It is our decision that a default judgment is not a "determination" for the purposes of s.27A(4)(c) for the following reasons:-

    a. The dictionary definition (Chambers) of "determination" includes "judicial decision" and "end" – a default judgment is frequently neither.

    b. The commentary to Part 12 of the White Book states, "A default judgment is a judgment without trial and is obtained by procuring an administrative act rather than by judicial decision." Mr Cawsey on behalf of the Applicant tried to have it that a determination could be either an administrative act or a judicial decision. With due respect that is not how we read the dictionary definition and the commentary in the White Book.

    c. We note that the appeal in *Church Commissioners* was unopposed and note that other points might have been made which would have suggested a different outcome in that case:-

        i. Reading s.81(1) in context – s.81(3) refers to "a decision" which implies some active thought rather than a default provision in the absence of consideration.

        ii. s.81(1) and (3) refer to a determination or decision being appealed. There is no appeal from a default judgment which would suggest that default judgments were not intended to be included within this definition.

        iii. s.81(1) provides for a final determination by a leasehold valuation tribunal, a court or an arbitral tribunal constituted by a post dispute arbitration agreement. There is no option for a default judgment in the LVT or before an arbitrator. The *Church Commissioners* case therefore appears to warrant a wider definition to the word 'determination' depending upon where a dispute is being heard, a result which we would be surprised to find in the literal wording of the section.

        iv. The suggestion that nothing can be achieved in the absence of a defence and that trials would be a waste of time, ignores the statutory scheme which landlords must comply with in order to lawfully recover

service charges. Before service charges are payable they must be served in accordance with s.21B of the Landlord and Tenant Act 1985 and ss.47 and 48 Landlord and Tenant Act 1987. Further, s.20B of the 85 Act requires certain time limits to be imposed for the recovery of service charges and s.19 of the 85 Act requires that the costs are reasonably incurred. These are all matters which can be included in a statement in support of a Part 8 application which a court can consider prior to making a determination.

v. Whilst a default judgment does give rise to a binding result, it does so only in the event that no one applies to set it aside.

d. Points (c) (d) and (e) of our summary of the *Church Commissioners* case do not appear to be particularly relevant to section 27A(4)(c).

e. We note that section 27A(4)(d) of the 85 Act does refer to a determination by a post-dispute arbitral tribunal. This would again suggest a different definition of "determination" according to the forum if we were to follow the *Church Commissioners* reasoning.

f. The most effective point made by Mr Cawsey was that the Applicant would be in a position to commence enforcement action against the Respondent on the basis of the default judgment and that it would be perverse for that to be possible at the same time as a service charge dispute was being heard in the LVT. However, upon careful reflection, any enforcement action is likely to be met with an application to set aside under CPR 13.3 which is bound to detail the circumstances of the Applicant obtaining default judgment in the first place. Whilst it is no part of our jurisdiction to determine such an application, we find it difficult to imagine the default judgment being "the end" given the stark disparity between the default judgment figure (which was supported by a statement of truth) and the sum actually claimed in January 2011 for the calendar year 2010.

27 July 2012 (confirming preliminary decision indicated orally on the 19 July)

Lawyer chairman