Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0006/04/13

IN THE MATTER OF: 14 Kenilworth House, Cardiff & 12 Warwick House, Cardiff

AND IN THE MATTER OF SECTIONS 20C & 27A OF THE LANDLORD AND TENANT ACT 1985

B E T W E E N:

JOHN PETER O'SULLIVAN

Applicant

-and-

CASTLE COURT FREEHOLD LIMITED

Respondent

DECISION

Tribunal

Mr. E.W. Paton (Chair)
Mr. R. Baynham (Surveyor)
Mr. K. Watkins (Surveyor)

Sitting on: 25th, 28th, 29th and 30th April 2014, at the Cardiff Civil Justice Centre

The Applicant appeared in person.

For the Respondent: Mr. K. Lees (counsel), instructed by Eversheds LLP

1. This is the decision of the Tribunal, to which all of its members have contributed.

2. Castle Court is the collective name for seven adjacent blocks or 'Houses' situated in Westgate Street in the centre of Cardiff, comprising a total of 148 flats. It is in close proximity to one side of the Millennium Stadium, and at the rear many of the flats overlook the Cardiff Blues rugby stadium and pitch. It was constructed in the 1930s. The Tribunal understands from its own knowledge and experience that it was originally constructed at that time as a series of flats and rooms with shared kitchens, possibly intended as 'town residences' for the use of gentlemen visiting the city. Whatever its original purpose, it has for some time been in use as a block of separately occupied flats.

3. The flats are arranged over five floors in each of the seven blocks, with the uppermost flats (28 in number, we believe four in each block) being smaller flats or studios with dormer windows on mansard roofs overlooking Westgate Street. We did not inspect (or need to inspect) the interior of any flats, although we understand that they vary in their size and layout. We inspected the hallways and common parts of Kenilworth House. We therefore saw the recently decorated yellow interior of those areas (see below), and saw (and felt in operation) the heating system. As was common ground, the heating system at Castle Court is relatively old, and is provided by gas central heating which a) heats the radiators in common parts b) also provides the internal heating for the top 28 flats (this is how it was originally configured).

4. There is an office area, entered from Westgate Street, in which there are two offices: one for the Respondent's general use, the other for the use of the site security guard/caretaker. We visited those offices and saw various items of equipment and other matters referred to in the application (such as the fax machine and a small cupboard for the storage of delivered parcels). We also walked around the rear of the blocks, overlooking the rugby stadia, and saw (amongst other things) the rear windows and the railings of the building and flats.

5. We also saw the arrangements for refuse collection at Castle Court. These comprise a series of recessed areas on each floor of the blocks, at the rear of the building, where residents deposit refuse sacks. The security guard then transfers them to a single central, and locked, refuse bin area which opens via a locked gate onto Westgate Street. There is a refuse collection from that area six times per week by a private contractor (BIFFA), for which refuse is collected by the security guard from the areas at the rear of each floor three times a day. The refuse collector presses a buzzer by the Westgate Street gate, which contains a mobile telephone SIM card which then automatically dials the security guard's mobile telephone, so that he can then come down immediately to unlock the gate.

6. Castle Court might reasonably be described as a handsome building (or series of buildings) for its period. It is not listed, and whether it is "iconic" in Cardiff (in the

words of one witness) may be a matter of opinion and subjective judgement, but it is certainly a well known feature and landmark in the city centre. There have been a number of applications relating to it which have come before the Tribunal in previous years, but nothing in particular turns on that in relation to the present application before us.

7. Following the administration and liquidation of a previous freehold owner and management company in about 2002, the freehold of Castle Court has been owned and managed by the Respondent since 2004. It is a company limited by guarantee. Its directors, two of whom (the Chair Elizabeth Mahoney, and the Vice-Chair Mr. Gerald Hamer) gave evidence before us, are all themselves owners of flats in Castle Court. They serve on the Board in a voluntary and unremunerated capacity. One feature of the Respondent's time as freeholder has been the granting to lessees, for additional consideration, new 999 year leases of flats. We did not have the precise figures but we understand that the majority of lessees now hold their flats on such leases, including the Applicant Mr. John O'Sullivan, who is the leasehold owner of the two flats mentioned above, and has been since 2008.

8. We also understand, although little turns on this, that probably a majority of the flats are sub-let on what are likely to be assured shorthold tenancies. Some of the flats may also be let to or occupied by more short term occupiers, for example as holiday lets or for visits to rugby matches. There is, however, a smaller but significant number of owner-occupiers at Castle Court, some of whom gave evidence before us. The Applicant, Mr. O'Sullivan, is in the former category of sub-letting owners, although his evidence was that he hopes to live in one of his flats one day, perhaps on his retirement.

9. It is clear, in this as in many large blocks of flats, that there are differences of opinion over how the block is run, who should run it, and over certain actions taken and expenditure incurred. We made clear at the outset of this hearing that we are only concerned with the last of those three matters, and then only with the specific items of expenditure challenged and before us in this application. We are aware that there have been a series of company meetings, contested elections to the board of directors, and letters and emails written (sometimes in angry or confrontational tones). None of that directly concerns us in this application.

10. The Applicant, by an application in April 2013, made a number of challenges to various items and heads of expenditure by the Respondent. The challenges were made under the relevant sections of the Landlord and Tenant Act 1985 (section 27A; and by reference section 19, and section 20C in relation to costs). As one would expect, the leases – including the Applicant's leases – contain a series of covenants and provisions, governing the landlord's obligations and responsibilities, and its correlative rights to demand and levy service charges from lessees to pay for the performance and discharge of those obligations and

responsibilities. We will look at particular clauses and covenants of the lease further below, where relevant.

11. This hearing has been for the determination of only parts of that application, and some parts subsequently added to it. Because of the decision of the Chancellor in the case of *Phillips v. Francis* [2012] EWHC 3650 (Ch D), and the subsequent news of an application for permission to appeal out of time in that case, those parts of the application relating to repairs and maintenance to Castle Court, were stayed pending the final determination of the appeal in that case. Permission to appeal to the Court of Appeal was granted in November 2013 and we are told the appeal was being heard in May 2014. The relevance of the case is on the correct analysis and definition of "qualifying works" for the purpose of section 20 of the 1985 Act, and whether therefore (as the Applicant's application clearly seeks to argue) the repair and maintenance work for a single whole year would fall to be treated as "qualifying works" for which the full section 20 consultation procedure was required (in addition to those consultations previously carried out by the Respondent).

12. After two fairly lengthy and detailed directions hearings in July and October 2013 which also dealt with issues of joinder of co-applicants, the standing of the Applicant to challenge certain years of service charge, and the specification and definition of the issues and heads of expenditure to be considered, the Tribunal stayed certain parts of the application, but issued directions towards this hearing to consider those remaining issues which could be dealt with regardless of the outcome of the *Phillips v. Francis* appeal.

13. The following lessees, on being notified of the application pursuant to the directions given, joined the application as co-applicants with Mr. O'Sullivan (their flat number is given in brackets) :-

    i) Olwen Jones (3 Dunraven)
    ii) Paul Fuzard (19 Marlborough)
    iii) Gareth Jones (1 Kenilworth)
    iv) Karen Gray (6 Branksome)
    v) RD & CM James (not known to us but presumably now agreed to be flat owners)
    vi) Emma Kennedy (3 Kenilworth)
    vii) RD Jones (14A Raglan)
    viii) Colin Smith (2 Kenilworth)
    ix) Bethan Foster, also known by married name of Lumb (21 Kenilworth)
    x) Lucy and Geoff Cartwright (3 Windsor)

    We rejected an oral application made by Mr. O'Sullivan, at the start of this hearing, to add three further co-applicants. From what evidence was then before us, it appeared that one of these intended applicants was an individual, whereas the relevant flat was owned by a limited company. Another application was said

to relate to a deceased person and her estate, but we had no information or evidence on any grant of probate or administration of that estate. In any event, at least two of these intended applicants appeared to be only very recent owners or occupiers of their respective flats, such that their only legitimate interest was in the budgeted expenditure figures for 2014.

14. As a result, the seven issues before us in this three and a half day hearing were these:-

Whether service charges relating to expenditure on the following items in the years 2008 to 2013 inclusive and in the budget for 2014 (unless otherwise stated) were reasonably incurred:-

i) COMMUNAL HEATING COSTS

In outline, the issues here were whether the gas heating costs were unreasonable by reason of the communal heating being switched on "24/7" (in modern parlance), and outside the dates of 1st October to 1st May specified in the lease, and whether the buildings were just too (and unreasonably) hot as a result.

ii) THE MANAGING AGENT'S FEES

Again in broad outline, the issues here were whether the general annual fees charged by the managing agent Cooke & Arkwright for these years – calculated as 15% of general expenditure (plus VAT) until they moved to a 'fixed fee' quotation for the budget for the year 2014 – were unreasonable; and whether there were specific instances of poor quality and unreasonable service by them in performing their duties.

iii) SITE STAFF TELEPHONE COSTS

Under this head, challenges were made to the reasonableness of the Respondent's landline, fax and mobile telephone arrangements in all of these years; with particular reference (for example) to the contract and tariff for the mobile telephone provided to the security guard, and with particular aspects of both the land and mobile services being said to be unnecessary and unreasonable.

iv) SECURITY AND CARETAKING COSTS

Castle Court has, in the years under consideration, contracted for an on site 24 hour security guard service, currently provided by one Elite Security Manned Guarding Limited. The guards employed and provided by that firm work on shifts, conduct patrols of the site, monitor the site CCTV images, transfer refuse to the single central refuse collection point on the site, liaise with the refuse firm who

collect it, and occasionally pick up litter from parts of Castle Court such as the shrubberies on the street at the front. There were various issues raised about certain aspects of this service being unnecessary, unreasonable in cost, duplicated by others or capable of being performed by others.

v) WINDOW CLEANING COSTS

This challenge was confined to the years 2012 and 2013 (and the budget for 2014), and was chiefly concerned with the switch from the previous twice annually 'reach and wash' cleaning service to a four times a year service provided by an "abseiling" window cleaning provider "MacAbseil". The allegation was that this was unnecessary and unreasonable, and that there were instances of poor cleaning service.

vi) THE REDECORATION OF COMMUNAL AREAS IN 2012

This was a challenge to these works on the basis that it was not reasonably necessary to carry them out at all, and also that the choice of colour – a shade of yellow apparently known as "Pharaoh Gold" – was unreasonable and/or should have been the subject of consultation with the lessees. It was not a challenge to the quality of the painting work itself.

vii) THE PAINTING OF BALCONY RAILINGS OF INDIVIDUAL FLATS

This was an issue of interpretation of the relevant lease provisions. The Applicant's case was that some £25,000 of the expenditure on painting railings and other exterior areas related to the purely private balcony railings of flats, which were (it was said) the covenanted responsibility of the lessees of those flats and not the Respondent.

Those are very brief outlines of the issues, which will each be considered in more detail below.

Conclusion: summary

15. For reasons which we will set out fully below in each case, we find that the expenditure (and service charge levied) on all of the above items was reasonably incurred, save in relation to just two of the yearly charges for managing agents' fees. We find that the Respondent has acted reasonably in its choice of contractors and agents, and that the level of service and expenditure on each of those heads was reasonable. We reject the specific allegations, to the extent that any of them were seriously pursued in the end, as to poor quality of service rendering the charge for particular items unreasonable.

16. As was common ground, the Respondent was and is not legally obliged to provide the cheapest possible service in every case, or run Castle Court on a

shoestring. Our overall, and very strong impression and finding, is that Castle Court has been maintained and provided for to a high standard and one commensurate with its age, nature and locality. There is an element, in this as in similar cases, of the expression “you get what you pay for”, and the results were plain for us to see and hear in the evidence before us, supplemented by our site visit on the first morning of the hearing.

17. In the end, having heard the evidence and submissions of the parties over three and a half days, in a case which generated nine lever arch files of documentation (plus additional documents handed up during the hearing), we found the decisions on the vast majority of the above items relatively straightforward. Indeed, some of the specific points which had been raised in the application (such as the alleged absence of holiday cover provided by the managing agent) fell away during the hearing. Others reduced down to quite minor or trivial evidence, such as us looking at a single photograph of a dirty window or considering whether a ‘personalised message’ answerphone service at the Castle Court office (as opposed to just relying on the free BT ‘1571’ service) was an unreasonable extravagance. The interpretation issue over the painting of the railings was, as it turned out, conceded by the Applicant in closing submissions.

    Of the above issues, only one – that of the Managing Agent’s fees – caused us any significant difficulty. This was reflected to some extent in the time we spent dealing with that issue in the evidence and closing submissions, although the hearing could still have been considerably shorter had other issues not been pursued. We did, and do, consider that the Managing Agent’s fees for Castle Court have been high in the years under consideration. It is likely, although we do not have the means (short of a city wide survey of agents) of ascertaining this precisely, that they will be amongst the highest charges for residential apartments anywhere in Cardiff.

18. After careful consideration of the evidence and submissions before us, our final view was that the Managing Agents’ fees for the years under consideration were generally reasonable, save that for the years 2012 and 2013 the net figures for general management fees eventually charged (after allowance for the VAT refund issue explained below) - namely £54,072.53 (2012) and £54,768.51 (2013) were, by a relatively small margin, unreasonably high and therefore not reasonably incurred for the purposes of section 20 Landlord and Tenant Act 1985. We consider, as we explain below, that the Respondent could and should reasonably have moved to the appointment of an agent charging on a fixed fee basis slightly sooner than it eventually did. We are, however, prepared to allow some leeway in the figures, and not hold the Defendant and its current managing agent to the fixed fee figure it currently charges - £48,000 plus VAT – as a maximum. We consider that for those years a figure up to £51,800 plus VAT (which is based on £350 per flat) was the reasonable maximum charge for basic management.

Other than that, all the challenges made to the Respondent's charges in this part of the proceedings fail.

19. With that initial summary in mind, we shall now set out our detailed reasons for our findings on each issue. Commensurate with its importance and difficulty, we will deal with the Managing Agent's Fees issue last, and deal first with the other six issues.

i) COMMUNAL HEATING COSTS

20. The relevant clause of the lease governing the heating system reads as follows:-

(The landlord covenants..)

"To use reasonable endeavours to maintain at all reasonable hours through the central heating system existing at the date hereof an adequate supply of heat to such parts of the Building as are at the date hereof served by the said system and during the period from the First day of October to the First day of May next following to provide sufficient and adequate heat to the radiators (if any) for the time being fixed in those parts of the Building."

21. In relation to this, and the other heads of expenditure under consideration, the Applicant's service charge covenants are set out at clauses 4.4 and 7 of his leases, by reference to a Fifth Schedule which sets out the items of Service Charge expenditure which can be recovered by the Respondent. The Fifth Schedule provides for the calculation of Service Charge, the levying and payment of an Interim Charge, then the later calculation and certification of the actual Service Charge for that year. It was not in dispute that the heating costs, or any of the items under consideration in this application (save, initially, for the railings issue dealt with below), were matters falling in principle within the Respondent's covenants and therefore the Applicant's service charge covenants.

22. By clause 7 of his two leases, the Applicant's relevant proportion of the Respondent's "Total Expenditure", which he then covenants to pay as service charge, is 0.7812% in relation to 14 Kenilworth, and 0.7374% in relation to 12 Warwick.

23. The original gas heating charges for the years under consideration were:-

2008: £40,446.15
2009: £26,356.50
2010: £31,974.27
2011: £36,225.14
2012: £36,659.33
2013: £48,023.71
2014 (budgeted): £50,000

The VAT issue and refund

24. Several months after this application had already been issued, directions had been given and issues defined as described above, it came to the attention of the Respondent – on its case, by about October 2013 – that for a number of years VAT had been overpaid to the relevant utility companies on both electricity and gas bills. In very simple terms, a standard business rate of 15%, 17.5% or 20% had been applied to the bills on the basis of the Respondent being a commercial customer, whereas it was in fact entitled to be charged at the lower domestic rate of 5%, which would then be reflected in the charges to leaseholders for their share of those costs. The nature of the error and the overcharge was explained and summarised in various witness statements and documents provided to us, including some articles from the general property management press.

25. As stated, the VAT overcharge was never actually a pleaded issue in this application. It is something which arose during the course of the proceedings, and which was dealt with before this hearing took place. On the evidence before us, it seems to us that this issue was raised and spotted by some of the Applicants (Bethan Lumb in particular, who corresponded over it) and the Respondent (in the person of Ms. Mahoney), at around the same time in October 2013. Ms. Mahoney discussed it with Cooke & Arkwright (Mr. Angell in particular) and they immediately set about liaising with the relevant utility companies, as described in Mr. Angell's statement at paragraphs 20 to 23 and in his oral evidence.

26. The net result of this process is that by the end of February 2014, all leaseholders' service charge accounts had been re-credited not just with the fuel bill overcharge refunds obtained, going back to 2007, but also with the relevant portion of Cooke and Arkwright's management fees (plus the VAT on those) going as far back as 2004. There are ongoing efforts, we heard, to recover further sums for preceding years, which if successful will result in further similar refunds. The evidence before us was that this was not an issue unique to this company or block, and was to some extent a national issue attracting press coverage.

27. We made clear that we were not trying the issue of whether every single leaseholder had yet received the correct credit in pounds and pence on their service charge statement: the relevant point was that the principle had been accepted and the refunds either made or promised to be made.

28. Despite the time at which it arose, the fact that it was never a pleaded issue, and the fact that the matter had been or was being resolved by the Respondent and the managing agent by the time of the hearing, the Applicant sought to rely on this episode as evidence of poor service by the managing agent, for us to consider on the issue of the reasonableness of its charges. Both parties therefore

referred to it in their witness evidence and skeleton arguments. Mrs. Bethan Lumb, for example, used her own witness statement to attack the agent for its alleged incompetence on this issue, stating that she had herself identified the issue quickly when looking at the energy bills in the course of these proceedings. We are not satisfied that it was she who first drew it to the Respondent's attention: as stated, it seemed to us that it was an issue which the Respondent was already considering itself.

29. Even putting aside those (considerable) procedural objections to considering the issue for this purpose, and such an issue becoming tantamount to an allegation of negligence, we are not satisfied on the material before us that this issue is capable of having a bearing on the reasonableness of Cooke and Arkwright's fees by way of a reduction for an inadequate or unreasonable service. The issue became apparent to the Respondent and to Cooke and Arkwright, and they dealt with it swiftly, by arranging the appropriate refunds (and in fact more than they were strictly required to refund) within a matter of months. If the Applicant or any other person wishes to make a case that Cooke and Arkwright were (in effect) professionally negligent for not spotting it sooner, with the result that identifiable losses have been caused, that is a serious claim to make and not one which could be before this Tribunal. Looking at the evidence of the speed and quality of the service provided *once* the overcharge was known about, there seems to us to be no basis to criticise Cooke and Arkwright in that regard.

Heating times and dates

30. On this issue, we accept the evidence adduced on behalf of the Respondent as to the *dates* on which the heating was switched on and off in the years under consideration. That was summarised in a schedule or table which was set out at paragraph 29 of the Respondent's statement of case. That evidence was based on some works orders given to the heating contractor (Solvit) on certain dates, and the recollection of Mr. Jason Ross as to the dates in each case when the contractor would have attended. It is true, as the Applicant pointed out, that we do not have timed log books showing the arrival and departure of that contractor, but we find nothing sinister or untoward in that regard. It was not suggested, nor can or do we find, that Mr. Ross or anyone else has just invented these dates. Indeed, some are against the Respondent's interest to the extent that they fall just outside the period stipulated by the lease. But when they do so, it is generally by a matter of days, attributable to the particular date on which Solvit could attend to carry out the work.

31. We are satisfied that these departures from the dates stated in the lease are generally so trivial as to be *de minimis*, and that the Respondent used its "reasonable endeavours" to switch the heating on and off on the prescribed dates. There were also years when the heating was switched off early, or switched on later, about which the Applicant presumably does not complain. In the one year when there was any significant period of heating outside the dates –

2012, when the heating was switched on until 21st May, having been switched off for parts of April – we are entirely satisfied with the explanation given for that in the evidence, namely that following a mild April there was then a colder spell in May. The Respondent was entitled under the lease, in its discretion and in the exercise of "good estate management", to put the heating back on for a few more days, and did so. One hesitates to over-use the expression, but this could be said to be a matter of common sense.

32. As to the heating being on "24/7", we refer back to the lease provision which refers to the existing system of heating at Castle Court, which system includes the heating of the 28 flats on the upper floors. This may be an unusual arrangement, but that is the existing system to which the Respondent and lessees are contractually tied. We were told that this unusual feature is to some extent reflected in the service charge proportion paid by those flat lessees. Their flats have to be maintained at a habitable temperature. It also seems to us, as a matter of good estate management and ambience, that it is reasonable to keep the common areas of Castle Court at a comfortable and warm temperature throughout the Autumn and Winter. Again, this is a factor of the nature and character of the buildings, and the high quality of maintenance and provision expected. Not everyone would choose that. Some might wish the common parts to be kept in a more Spartan and basic fashion, and not to be heated much at all. The current leases of course oblige the Respondent to heat those common parts using the current system. It is entitled, in the reasonable exercise of its management discretion, to keep the heating switched on to maintain a constant temperature if it reasonably decides that to be the most appropriate use of the existing system.

33. As to whether this decision has made the common parts "too hot", as was alleged by the Applicant, we are not satisfied on the evidence that this is the case. Some witnesses on the Applicant's side are of that view. Mr. Hamer for the Respondent gave evidence that others liked Castle Court being a warm place. It is a matter of personal preference. It is certainly not the case that the common parts are sweltering or uncomfortable to an unreasonable extent (on our brief experience on a site visit, even on a mild day in April), nor do we accept the rather odd theory of the Applicant from his evidence of one visit in February that occupiers were keeping their flat windows open in winter, because of intense heat permeating into their flats from the heating of the common parts.

34. It might of course be a good idea, in due course, for the Respondent to consider replacing the system, if they were satisfied that the capital costs of doing so would be reflected in savings on bills. There was evidence that this was briefly looked into, and some initial costings obtained, in 2012-2013, as discussed by Mr. Gerald Hamer, the Vice-Chair of the Respondent, in his evidence. The cost was relatively high and this project has not yet been pursued. There might well be sound environmental or economic reasons to do this work some day, or for finding other ways to improve the energy efficiency of the buildings. Those are

issues for another day, or year, Indeed, some lessees might not agree to it, if the cost was too great, and might rely on the lease clause tying the parties to the existing system (unless that clause was varied by agreement in each case).

35. We therefore reject the challenge to the heating costs, and allow the sums charged, now that they have been adjusted from the original figures to allow for the sums refunded following the VAT and agents' fees overcharge.

ii) SITE STAFF TELEPHONE COSTS

36. These costs were challenged as unreasonably high for the years 2008 to 2013, and in the budget for 2014. The sums in question were summarised by the Applicant in the table at paragraph 31 of his statement of case, and ranged from £1290.42 in 2008 to a high of £2097.34 in 2011. The budget for 2014 was £1980.

37. This was the smallest (in financial terms) of all the items challenged and we can deal with it reasonably shortly. We do not find any of the telephone charges challenged to have been unreasonably incurred. We will deal with each of the specific complaints and challenges made by the Applicant.

38. It was not disputed that it was reasonable for the Respondent to provide the on site security guard (currently from the contractor Elite – see below) with a mobile telephone for his on site duties. We understand that he would be required to have one in any event as a lone site security worker, and that if the Respondent did not supply one, the security company would arrange this and pass on the charge to the Respondent. The Respondent therefore chooses, reasonably, to provide the telephone and its associated contract itself.

39. What was challenged by the Applicant was the Respondent's decision to select a particular contract and tariff for this telephone: an Orange contract, for two years at a time, for which the current basic monthly charge is £26.63 (including VAT) plus £5 per month for a lost phone replacement service called 'Orange Care'. This entitles the user to unlimited landline calls, 100 cross network texts, and 700 cross network minutes per month. The 'Orange Care' service provides for swift replacement of a lost telephone, with the replacement delivered by courier within 24 hours.

40. The Applicant's main point (see statement of case paragraphs 35 and following) was that the total allocation of minutes and calls is regularly under-used, and that "a cheaper less extensive mobile phone contract is required". He did not identify specific alternative contracts as more suitable, but did make the suggestion elsewhere of a "pay as you go" package instead, and that if a telephone was lost, it would be simpler to buy a replacement handset from (for example) Tesco for £9 or £10 as and when that occurred.

41. We spent some time looking at telephone bills and statements, but in the end we are not persuaded that this contract is anything other than a reasonable exercise of the Respondent's discretion and judgment in selecting an appropriate package for the needs of a security guard at Castle Court. The evidence of Ms. Mahoney, which we accept, is that when the time has come for contract renewals, she has researched the various options before renewing or entering a fresh contract, and has chosen the best package available which in her judgement met the Respondent's needs for this particular use of such a telephone. There is no reason why she would not do so: she has no particular interest in favouring Orange or any other provider, and it is not in her or any other directors' or leaseholders' interests to throw money away on an extravagant and unnecessary package. The Respondent's concerns and needs for such a contract include the need to avoid the call credit or entitlement running out or being exceeded while the guard is on duty, and the need for a swift if not instant replacement of a lost handset by the provider (and not having to depend on Tesco or any other shop selling handsets being open). In addition, we are satisfied on the evidence that we have heard that the Respondent is categorised for these purposes as a commercial customer, so that cheaper tariffs or rates with which the Applicant and other co-applicants may be familiar are not available in this context.

42. In the end, we are not satisfied that this mobile telephone package and the charges for it are an unreasonable expenditure for these purposes. Even if there were clear evidence before us of a directly comparable contract available to a commercial customer for these purposes (which there is not), the Respondent is not obliged to select the cheapest option in every case, but merely a reasonable one.

43. We also reject challenges to the Respondent's costs incurred in maintaining a fax machine and line, and answerphone and call diversion facilities in the Respondent's contract with BT. The fax machine is clearly used, and reasonably necessary, for certain parts of the Respondent' administration, and is in fact used daily for the faxing of the security guard's site log. It is also connected to the door intercom outside the office entrance. It is hardly an extravagant or unreasonable facility. We also accept the Respondent's evidence and arguments over why a personalised answerphone message service, giving details of the Respondent's hours and alternative contact numbers, is clearly preferable to the anonymously voiced "1571" service; and over the desirability and need to provide for call diversion from the Respondent's landline to the security guard's mobile telephone, rather than the Applicant's (as we find) impracticable suggestion that leaseholders should just remember or save the guard's mobile telephone number and ring that directly. There are third parties other than leaseholders who might telephone the office landline, and in any event mobile telephone numbers are subject to change following changes of contracts. It is far simpler, and certainly reasonable in our judgement, to simply retain and publicise the long established Respondent land line number and for calls to be diverted from that.

44. A challenge based on the apparent savings available to the Respondent through paying bills by direct debit was not seriously pursued at trial, presumably on the basis of the Respondent's response that this would be a breach of the service charge trust money accounting rules which apply to it and its agent.

45. Finally, we reject the challenge made to the Respondent's annual purchase of a second mobile telephone SIM for use within the intercom buzzer outside the refuse collection area. Far from being unreasonable, this struck us as a rather clever and effective use of leaseholders' money. The refuse for the whole site has to be collected (currently by the contractor BIFFA) six times per week from the locked area facing onto Westgate Street. To avoid:-

    i) leaving these gates unlocked around that time (and thereby potentially inviting the risk of passers by entering it or depositing more refuse in that area; or urinating in it, as happened in the past); and/or

    ii) the inconvenience and expense of missed refuse collections

    , the refuse contractor pushes the buzzer, in which is located a mobile telephone SIM card, which then automatically dials a pre-programmed number: in this case, the security guard's mobile telephone. He can then answer, tell the contractor that he is coming down (so that they do not drive off before he gets there), then go to the gates from wherever he is on the site at that time. We accept the evidence from the Respondent's witnesses, including the security guard himself, as to the convenience and efficacy of this arrangement. For around £162 per year in charges, that strikes us as money well spent to avoid the above risks, and certainly not unreasonable.

iii) SECURITY AND CARETAKING COSTS

46. The Applicant challenged the costs for security and caretaking services for the years 2008 to 2013 inclusive, and the budget for 2014. Those costs ranged from £74,248.86 (2008) to a budgeted £107,800 for 2014.

47. Those monies have been spent on annual contracts for combined security and caretaking roles. The contractor in the years 2007 to 2011 was one Corps of Commissionaires Management Limited. In recent years, and at present, it has been and is Elite Security Manned Guarding Limited. The invoices for these companies' services were at bundle 5 pages 1785 and following. The current list of duties undertaken by Elite was enclosed at bundle 5 page 1904, and the evidence of the current night shift security guard Mr. Griffiths (see below) was that his daily tasks and duties reflect this list.

48. We were aware of no specific challenge to the reasonableness of the amounts of these companies' charges, or evidence of comparable services provided by other companies for substantially less. It was not being said that these were

unreasonably expensive companies for this sort of work. The annual sums may seem high to a lay person, but in the absence of evidence to the contrary we are entitled to conclude that this is a reasonable price for a round the clock security service, and that in this as in other areas of provision, 'you get what you pay for'. The statement of case made a generalised complaint as to the costs having risen during a recession and "quer[ied]" why that was, but as stated we do not have any invoices, quotes or other material before us on which to conclude that these companies have overcharged or are unreasonably expensive compared to other, similar companies. The Respondent's entitlement under the leases to employ, in the interests of good estate management, various persons including "caretakers" and "security staff" is not in issue (see clause 5.5.9 of the leases); and even if it were we would hold (again – a similar issue was before the Tribunal in *10 Marlborough House* LVT/CH/SC/10) that it is reasonable to employ round the clock security in a city centre complex of flats of this nature and character. The evidence before us was that crime at Castle Court has been very low, and while it is difficult to prove that this is wholly a result of the round the clock security, it must at least be a contributing factor. The security must also contribute to leaseholders' and residents' peace of mind and amenity.

49. Rather, the complaints (such as they were) eventually boiled down to allegations of duplication of functions between the security guard, the maintenance staff, the Respondent and/or the managing agents. On closer inspection, and by the time of the final submissions in the case, this had reduced down to the issue of "litter picking" and "minor maintenance jobs". Moreover, it appeared to be an argument that the security guard *should* in future do these (even if under the current contract he is not obliged to), so as to save money being incurred on these matters by maintenance contractors. That appears on its face to be a challenge to the reasonableness of the costs incurred under the latter head (maintenance) which falls within the parts of this application currently stayed, rather than specific allegations that the security guard was not doing things which he was obliged to do, or that he was performing his existing duties unreasonably or inadequately.

50. We saw the site, and heard the evidence of the current night shift security guard Mr. Paul Griffiths. He was an impressive and straightforward witness, and through his evidence and the matters apparent on our site visit we gained a reasonably clear picture of what is involved in his typical shift, and its reasonableness as a service provided to leaseholders. He begins his shift in the security guard's office beside the main office, where he can monitor the CCTV images and deal with any matters which may have arisen since his last shift. He engages in regular patrols every two hours, of the whole site. To ensure that he completes these patrols, he is required to swipe with a fob "deister" contact points on the bottom and top floors of each block, which information is then relayed to his employer. At the end of the shift he faxes the daily 'site log' to the managing agent.

51. While parcel delivery is rare on his current night shift, he was familiar with the process for security guards signing for and taking delivery of parcels at the office, day and occasionally night. Smaller items are kept in a cupboard at the office for collection. Leaseholders have the option of signing a form permanently to authorise the release of a key to the guard to enable larger items to be delivered inside their flat if they are out. While not every lessee uses this service, we are not persuaded that there is a particular problem with parcel delivery at Castle Court, or at any rate one which is before us in this application as an aspect of the unreasonableness of the security guard service. If some lessees would like the Respondent to spend even more money on e.g. creating some sort of larger parcel cupboard or depot, that is a matter they can raise for debate at the next AGM.

52. The security guards also perform what we are satisfied are reasonable and helpful duties of individual flats' refuse collection, general 'litter picks' of the shrubbery areas at the front (and occasionally some other areas such as the rear terrace), and cleaning and tidying of any immediate littering or messes apparent on their rounds. The process of refuse collection, taking each flat's refuse (deposited in sacks in recesses at the rear of the flats) to the large hoppers in the central collection area was described by Mr. Griffiths in his evidence, and we could see for ourselves on site how this worked. It is not a duty which consumes a large proportion of his time, but is nonetheless helpful and effective.

53. Again, it seemed to us that the Applicant's complaints were more general ones about the 'division of labour' and who should do what, upon which views may reasonably differ. Some landlords, and buildings, might only need a single caretaker to do everything. Others might need a qualified security guard, but choose not to burden him with general maintenance tasks, instructing others for that purpose, as here. These are matters within the discretion of a reasonable landlord, but in any event do not amount to a case that the monies expended on the security and caretaking functions in this case have been unreasonably incurred.

54. In this, as with all heads of expenditure, the Respondent will doubtless be wise to review the service it is receiving each year, and consider whether it is worth appointing a different contractor for a particular year. As stated, it changed its chosen contractor in around 2011, and may do so again if it reasonably considers that Elite are too expensive or that someone else could provide a better service. As matters stand, however, we have no evidence on which to conclude that the charges under this head for the years in question were unreasonably incurred.

iv) WINDOW CLEANING

55. This issue lay in a somewhat narrower compass. Only the window cleaning charges for 2012, 2013 and (budgeted) 2014 were challenged. They were,

respectively, £12,120, £13,440, and £16,850. The evidence appeared to be that that there had been something of a hiatus in 2011 and 2012, during the switch of the majority of the lessees to 999 year leases, in which time the windows were not cleaned greatly or at all. The 999 year leases, including those of the Applicant, contain a covenant on the part of the landlord at clause 5.5.7:

"(To the extent that they are reasonably accessible) to clean the exterior of all windows in the external walls of the building."

56. The cleaning of all of the external windows in all of the blocks of Castle Court is an onerous task. Although we did not have detailed evidence of the precise number, one witness (see below) estimated that there are of the order of 10,000 panes of glass to be cleaned. The front elevation presents particular difficulty, facing as it does on to the busy Westgate Street and extending up five stories to the dormers of the flats at the very top. At the rear, some windows are in easier reach, but again some are at a considerable height. The location of Castle Court, in a city centre and facing onto the Westgate Street traffic at the front, will obviously cause the windows on that elevation to become dirtier sooner than would be the case in a quieter area.

57. The evidence before us, which we accept, was that the windows were previously cleaned with distilled water using the "reach and wash" method, around twice a year. The evidence of Mr. Gerald Hamer of the Respondent, and also Jason Ross of the managing agents, was that this method was considered to be unsatisfactory, and of insufficient frequency. It was considered that it occasionally gave rise to complaints over insufficient cleanliness, and that the long-range nature of the process also risked damaging the wooden frames of sash windows. There was also a specific practical problem in cleaning the uppermost windows on the front elevation by 'reach and wash', meaning that to get at them properly, it might be necessary to hire a 'cherry picker' then arrange for Westgate Street to be partially closed or obstructed while that was in operation.

58. We are satisfied that for these reasons, and in good faith, the directors of the Respondent decided to switch to the more modern (and admittedly slightly more expensive) method of abseiling. The contractor they have used for the years under consideration is one MacAbseil, which we understand is a trading name for, or a company operated by, Mr. Charles McCaffer, who gave evidence before us.

59. While Mr. McCaffer was of course keen to emphasis the benefits and merits of his own business, as any business proprietor would be, we found his evidence clear and helpful on the nature of that business, and the specific benefits it offers. He employs properly qualified (and doubtless fairly brave) "Rope Access Technicians" who abseil down the building from their secured points at the top, cleaning and wiping each individual window as they go using detergent and water. One clean takes three or four technicians around a week, sometimes less.

They are also able, while doing to, to inspect the buildings and point out minor maintenance needs to the managing agent. This method removes the need for a 'cherry picker' to clean the uppermost windows.

60. We are satisfied that the selection of this method and frequency of cleaning is reasonable, and we heard no evidence to suggest that the charges of MacAbseil are particularly or unreasonably high. Again, the Respondent will doubtless keep the provision and cost of this service under review each year and between cleans, but the evidence was that its directors are at present very satisfied with the service provided and its quality.

61. There was, we have to say, a somewhat half-hearted attempt in the evidence to make an argument that the quality of the cleaning service provided was not of a reasonable quality. This boiled down to us looking at two photographs, one said to be from the inside of a flat and taken on 9th November 2013, another from 13th November 2013, which were said to show dirt, marking or bird excrement which had not been successfully removed.

62. Even putting to one side Mr. McCaffer's evidence, which was not challenged, that MacAbseil had only carried out the clean between 11th and 13th November 2013 (so that a dirty window on 9th November 2013 was hardly evidence of their poor service), this was a fairly meagre evidential basis for an argument that the cleaning of 10,000 panes of glass in Castle Court had not been carried out to a reasonable standard. These specific complaints had never been communicated to the managing agent or the window cleaners themselves (who offer a 'no quibble' guaranteed re-clean), and the photographs had (given their dates) been taken and put in evidence essentially for use in these proceedings.

63. Even if there was one window from which bird excrement was not wholly removed by cleaning on one occasion, we cannot sensibly or reasonably conclude from such an isolated instance that the service provided was of such an unreasonable standard so as to justify a reduction in the recoverable service charge. We therefore hold that those charges are reasonable, and recoverable in full.

v) REDECORATION OF THE COMMON AREAS IN 2012

64. In 2012, the communal areas of the various blocks were redecorated , at a total cost of £32,770.38. The chosen contractor was R&M Williams Limited, after a process of consultation under section 20 of the Landlord and Tenant Act 1985. That process included a detailed specification of the works (see bundle 6: 1971 et seq) but the main visible feature of the concluded works was the repainting of the communal areas in a shade of yellow known apparently as "Pharaoh Gold".

65. What is challenged before us is the reasonableness of the decision to carry out those works (not their cost, or their quality when completed), and also the

selection of this colour, which the Applicant personally regards as “vile” and which his co-applicants also clearly disliked. It was said that there should have been consultation over the colour, although this argument seemed to be made as a challenge to the reasonableness of recovering the full sum for the work rather than a legal argument that the lack of consultation on this issue constituted a breach of section 20 LTA 1985 and the accompanying Consultation Regulations.

66. On the first point, the issue between the parties was essentially whether it was reasonable to carry out redecoration works to all areas ‘all in one go’, given that there were clearly some areas in need of redecoration but others in better condition. We saw clear photographic evidence of the need for redecoration of some areas. The Applicant’s argument was that these areas alone could have been attended to, other areas just ‘touched up’ or cleaned, and other areas left alone as they did not require redecoration at all.

67. The Respondent’s case, and evidence, was that it was obliged by the lease covenants to decorate regularly under clause 5.5.4, and that its policy “in the interests of good estate management” was to redecorate the whole around every five years. The Respondent, through its witnesses, made the point that it would be false economy and not best practice to redecorate different areas at different times on a ‘patchwork’ basis, which would give different parts of the communal areas different appearances and states of decoration. It had therefore decided, after what was agreed to be a considerable period since the last decoration, to proceed in this fashion.

68. While we can see why individual leaseholders and witnesses, whose own relevant communal areas in their block seemed to be in relatively good condition, might at first consider a wholesale redecoration to be unnecessary, we are satisfied that the Respondent’s policy and practice are sound and reasonable. Attending to different parts of the communal areas at different times would be a recipe for an inconsistent and ‘patchwork’ appearance, and there must clearly be economies of scale in employing one contractor to cover everything in one job. There is also general amenity value to all leaseholders in a block of this age, nature and character being maintained consistently throughout, to a good standard of decoration. For what it is worth, on the site visit the Tribunal considered the decoration of the parts it saw to be of an impressive standard and appearance.

69. As for the colour, the short answer is that reasonable people may differ in their aesthetic preferences. It is clear that the Applicant, his co-applicants and some of their supporters do not like ‘Pharaoh Gold’. They are a relatively small minority. While we were not presented with evidence of a huge groundswell of opinion the other way, the telling factor is the general absence of strong views expressed either way by the large majority of leaseholders.

70. In any event, we are not satisfied that choice of colour in decoration can be a factor going to reasonableness or quality or service, save perhaps in a truly extreme or bizarre case (for example, if a whimsical or morbid landlord painted the communal areas jet black). That is not this case. The landlord selected a colour within the range of reasonable preferences, and the areas were painted in that colour to a reasonable standard and at a reasonable price. For what it is worth, the colour did not strike the Tribunal as particularly jarring or 'vile', but as stated that is not really the point.

71. For the avoidance of doubt, there is and was no separate legal obligation to consult over the choice of colour, either generally or under section 20 and the Regulations. If a landlord was planning something radical or extreme it might consider it sensible and in the interests of harmony to let the lessees know about it in advance, and to listen to their views, but that does not amount to a legal obligation or duty.

72. The cost of the internal redecoration, and the choice of colour, was therefore reasonable and recoverable in full.

vi) PAINTING OF PRIVATE BALCONIES

73. This point was the subject of a concession by the Applicant in the course of closing submissions, but at the request of the Respondent we shall deal with it in any event as a matter of principle and interpretation.

74. The issue was originally over some £25,000-worth of the cost of painting the external railings of Castle Court in 2013. The argument was that this sum represented monies wrongly (and outside the landlord's covenants and correlative service charge recovery rights) expended on painting the "private" balcony railings of individual flats, for which those flat lessees were individually responsible.

75. Whether those sums were recoverable therefore turns on construction of the relevant provisions of the leases, to ascertain whether the works in question did fall within the scope of the landlord's covenants.

76. Mr. Lees, for the Respondent, argued that they did, on alternative bases. First, he argued that the balcony railings were not in fact included in the "demised premises" demised to the lessee by clause 5.5.1 and the First Schedule to the leases, for these reasons:-

i) clause 5.5.1 is the landlord's covenant:

"to maintain and keep in good and substantial repair and condition:-

(A) the main structure of the Building including the principal internal timbers and

the exterior walls and foundations and roof thereof the balconies balcony railings and main water tanks main drains gutters and rainwater pipes (other than those included in this demise or in the demise of any other flat in the Building)"

ii) that list presumptively includes "balconies" and "balcony railings" as structural, and also makes a distinction between them as separate items.

iii) the "demised premises" in the First Schedule then include:

...(d) Any balcony attached to and exclusively serving the Demised Premises
..But not including:-

(i) the structural parts of any balcony...
..(iv) any part item or thing not expressly included in this definition"

iv) so the first interpretation point is that the demise includes the "balcony" but not the "balcony railings", as those are defined as separate items

v) the second point is that the subsequent exclusion of the "structural parts of any balcony" would exclude the railings, as they have already been defined as structural in clause 5.5.1.

vi) a further point is that even without considering the lease definition, balcony railings are "structural" as a matter of law as they are features which give the item in question its ".essential appearance, stability and shape" (*Irvine's Estate v. Moran* (1992) 24 HLR 1, p4-5), so would be caught by the subsequent exclusion in any event.

77. We accept the argument that the railings are not included in the demise, although chiefly because of the separate listing of "balcony" and "balcony railings" in clause 5.5.1, combined with the demise then being expressed only to be of the "balcony".

78. It seems to us that the second and third arguments (that the subsequent exclusion of "the structural parts of any balcony" removes the railings from a definition which otherwise would include them) are not necessary and may even be too powerful, as this would then raise the question of what "balcony" had actually been demised at all by the first part of the First Schedule, if all of its "structural parts" (either using the clause 5.5.1 list which earlier included the word "balcony" itself as part of the "main structure", or a common law definition based on "essential appearance stability and shape") were then excluded by the next proviso. That might be a conundrum which would have troubled even Roman jurists (is there still a "balcony" left if you remove all the parts giving it its essential appearance, stability and shape?). We do not find it necessary to grapple with that point, and therefore express no final view on it.

79. The other argument was that, putting to one side interesting arguments over whether the demised premises included the balcony railings, clause 5.5.4(a) of the leases in any event obliged and entitled the Respondent to decorate:

    "the whole of outside wood iron and other work of the Building heretofore or usually painted"

    Since all railings, including those serving individual flats, are part of the "outside..iron..of the Building", the landlord could therefore decorate them under this covenant and recover service charge for such work. The point was made that unlike the interior decoration covenant at clause 5.5.4(b), which contains a bracketed excluding proviso of "(other than those parts which are included in this demise or in the demise of any other flat in the Building)", clause 5.5.4(a) contains no such exclusion, so that the landlord can simply decorate and paint everything on the outside without worrying about some parts being within someone's lease.

80. On balance, we also accept that argument. It follows as a matter of language from the clauses discussed above. We can also see the sense in the landlord retaining the power and obligation to decorate everything externally (and to recover the cost via service charge), to maintain a consistent outward quality and appearance for the whole building. This issue has not arisen, but it would be unfortunate if, for example, the position were otherwise and individual lessees could be allowed to neglect and not decorate certain exterior parts because they formed part of their flats, thereby lending a shabby appearance to the building.

81. So for those reasons, we hold that the cost of the painting of these railings fell within the Respondent's covenants. As stated, there was no separate challenge to the reasonableness of the amount or the quality of the work.

vii) THE MANAGING AGENTS' FEES

82. As indicated at the outset of this decision, this was in our view the most significant and substantial challenge made, and one to which we have had to give very careful consideration.

83. The factual position is as follows. For each of the years under consideration (2008 to the budgeted figures for 2014, inclusive) the Respondent has engaged a firm of managing agents, who are also an RICS-supervised chartered surveying practice: Messrs. Cooke & Arkwright, of Cardiff. They have been managing Castle Court since 2002. This is and has not been a "qualifying long term agreement" within the Landlord and Tenant Act 1985: they have in effect been re-appointed each year since then, on a series of 12 month contracts. In the years under consideration in this application, there was no competitive or other tendering process for the provision of managing agent services. There was such a process in 2005, inviting tenders for the year 2006-2007, as a result of which

Cooke & Arkwright were appointed in preference to the only other firm who provided a detailed bid, Messrs. Alder King.

84. In late 2013, and in relation to the year 2014-2015 (which does not fall within the years challenged in this application) the Respondent began a process inviting expressions of interest for the provision of this managing agent service, which was sent to a total of 12 firms. The evidence was that this drew little interest from those invitees. While this application was on foot, and partly in support of this application, the Applicant and co-Applicants sought further expressions of interest and fee estimates from other local firms. Correspondence with three of these firms formed part of the Applicant's case in these proceedings. The Respondent itself entered into correspondence with one of these firms, seeking further information about the figures it had provided, before deciding at a Board meeting in November 2013 to re-appoint Cooke & Arkwright for the year 2014-2015.

85. That recent process, and the quotations obtained, are of indirect relevance only, because of the facts that a) they relate to a future year not under consideration in these proceedings and b) no representative of the firms who provided those alternative quotes sought by the Applicant has given evidence before us as a witness, upon which they could be questioned and challenged if necessary. At best they provide some evidence of what some local agents might have been willing to quote as a fee estimate to manage Castle Court, on the information provided to them, and perhaps show that they tend to quote on fixed fee basis but with specific additional charges for other matters. It is difficult to engage in any more detailed comparison of their quoted figures, and those charged by Cooke & Arkwright, in the absence of fuller evidence tested at the hearing. We nevertheless have regard to such information, as far as it goes and exercising due caution as to its weight and reliability in these circumstances.

86. Cooke & Arkwright's initial fees for the years in question were helpfully set out for us in a table which distinguished between :-

i) their basic fee, both with and without VAT added to it
ii) their charges based on further expenditure and work

, while giving a final total.

87. To explain this further, in the years 2008 to 2013 inclusive C&A charged a fee calculated as 15% of the "general expenditure" at Castle Court on all matters (save for C&A's own fees, and subject also to adjustments to reflect credits or interest accruing to Castle Court's funds). This resulted in figures for those years as follows (net of VAT):-

2008 - £56,787.55
2009 - £42,499.16

2010 - £53,625.57
2011 - £52,071.35
2012 - £55,279.32
2013 - £56,085.93

For the budget for 2014, C&A changed the basis of their basic fee to that of a fixed sum, £48,000 plus VAT for that year. The evidence was that they have kept the fixed fee at that level for the following year (which was the subject of the process described above).

88. That is the basic fee they have charged for general management duties. They impose *additional* charges, calculated at a rate of either 7.5% or 5%, on the works involved in large scale "qualifying works" such as those within the Planned Programme of Maintenance (PPM). Those are not the subject of a separate challenge, as to amount or rate, even if such a challenge could be made distinct from a challenge to the cost of the qualifying works themselves, but the relevance of those charges to the present application is to make clear what is *not* included in the basic fee. Also not included are specific charges made by C&A for Chartered building surveying work.

89. A further adjustment to the basic fees set out above needs to be made to account for the refund made by C&A of that part of their management fees attributable to the overpaid VAT on utility bills in those years, as discussed above. The amounts of those refunds are set out on page 7/2454, exhibited to the statement of Ms. Mahoney, and were, by our approximate calculations (the exact sums may differ depending on which charges 'straddled' a change in the VAT rate):

2008: £1202.04 (incl. VAT @17.5% - so £1023.01 plus VAT)
2009: £802.76 (incl. VAT @ 15% - so £698.05 plus VAT)
2010: £1071.55 (incl. VAT @ 17.5% - so £911.96 plus VAT)
2011: £1013.11 ((incl. VAT @ 17.5% - so £862.22 plus VAT)
2012: £1448.15 (incl. VAT @20% - so £1206.79 plus VAT)
2013: £1580.91 (incl. VAT @20% - so £1317.42 plus VAT)

Those refunds must presumably have been gross figures inclusive of the VAT charged and actually paid at the time. C&A actually went further and made refunds for further years, back to 2004.

So the basic figures set out above for those years should be adjusted and reduced by (on average) around £1000 per year to arrive at the actual figure for basic fees, net of VAT, charged in the end for those years, thus by our calculations:

2008: £55,764.54
2009: £41,801.10

2010: £52,713.61
2011: £51,209.13
2012: £54,072.53
2013: £54,768.51
Budget 2014 (unaffected by VAT refund): £48,000

90. It is these basic figures which therefore fall to be scrutinised for their reasonableness. There is no issue that the Respondent is entitled by the leases to employ a managing agent, nor that such an agent is likely to operate on a turnover sufficiently for it to charge VAT on its services, which the Respondent is not able to reclaim. There are 148 flats in Castle Court. Although the precise service charge proportions vary as between flats, the above fees represent an average range of between £282.54 plus VAT per flat (in 2009) to £376.79 plus VAT (in 2008). An average fee of £350 plus VAT per flat would represent a charge of £51,800 plus VAT.

In considering the reasonableness of those fees for those years, a number of issues fall for consideration, and were canvassed in evidence and in oral argument. The main issues seem to us to be these:-

i) was it reasonable for C&A to have charged its basic fee as a percentage, and at 15%, for the years 2008 to 2013, before it moved to the 'fixed fee' basis instead?

ii) If not, or by way of alternative analysis, was an annual management fee 'per unit' in the above range (£282-376) unreasonably high?

iii) what do C&A do for their money? What level of service do they provide, and over approximately how many hours per week/year?

iv) is there any relevant and persuasive evidence before the Tribunal that, had these services been put out to tender in any of these years, the same level of service could have been provided for significantly less?

v) are any of the allegations made by the Applicant and co-Applicants of unreasonable or inadequate provision of service by C&A made out, and if so does that justify a reduction in the amount reasonably recoverable?

vi) in the end, and considering all of the above questions, can it be said that the final amount charged by C&A and sought to be recovered by the Respondent via service charge for each of the years challenged was, in all the circumstances, unreasonable?

We will consider these points in turn.

The 15% charge

91. The arguments against managing agents charging on a percentage rather than a fixed fee basis are now well known. The risk, or fear, is that the total of actual expenditure by the landlord may not necessarily reflect, or bear a direct proportion to, the amount of work required to be done by the agent. A large amount of expenditure could consist of the routine payment of utility bills and other regular outgoings, involving little work for the agent. Such a basis for charging may create a disincentive for some agents in monitoring or reducing expenditure, or even an incentive to cause it to be increased.

92. That is only, however, a possibility and not an argument that applies in every case. There may be cases where a percentage provides a reasonably accurate figure for the amount and value of the agent's services, and their consequent variation if expenditure varies year to year. It might even be said that a fixed fee carries its own risk of disincentive (i.e. the agent will not get paid any more if more work arises in the course of a year, so it may as well not bother working any harder).

93. Further, it is not the case that percentage fees have been declared by any competent Tribunal or Professional body to be illegitimate or unreasonable *per se*. It is true that in the most recent version of the RICS Service Charge Residential Management Code (2nd Edition), which (somewhat curiously) currently applies only in England, and not Wales, it is said (at paragraph 2.3) that:-

    "Your charges should be appropriate to the task involved and be pre-agreed with the client wherever possible. Where there is a service charge, basic fees are usually quoted as a fixed fee rather than as a percentage of outgoings or income. This method is considered to be preferable so that tenants can budget for their annual expenditure. However, where the lease specifies a different form of charging, the method in the lease will be used by managing agents."

    As stated, that guidance is not yet in force in Wales, but even if it were, it does not amount to a declaration that percentage fees are no longer reasonable. It simply states that fixed fees are considered "preferable" for the specific reason of budgetary certainty.

94. The same point applies to the 1st Edition of the RICS Code, which was approved for both England and Wales, and which stated at paragraph 2.4:

    "Your charges should be appropriate to the task involved and be pre-agreed with the client wherever possible. Where there is a service charge, basic fees are usually quoted **per accommodation unit** [emphasis added] rather than as a percentage of outgoings or income. This method is considered to be preferable so that Leaseholders/Tenants can budget for their annual expenditure."

That is at most a preference for the "per unit" basis rather than percentages, but not an outright disapproval of the latter, and again a preference only for the stated reason of budgetary certainty.

95. Further, as Counsel for the Respondent pointed out, there is at least some evidence in the decisions of Tribunals of the percentage basis having previously been regarded as a reasonable and legitimate basis for the charging of agents' fees. Of most relevance to the present application is the decision of this Tribunal, *in relation to Castle Court itself*, in decision number LVT/CH/SC/10 dated 31st October 2006. The specific challenge to managing agents' fees was rejected in relation to all the periods under consideration (which appeared to be from November 2004 onwards). The agent was of course also C&A at that time, and indeed Mr. Angell gave evidence before that Tribunal too, as to the charging of 15% plus VAT as their basic fee.
The Tribunal's brief conclusion on that point was:-

"7.1 This cost is allowed in the lease specifically [this was clearly a reference to an argument that agents' fees were not recoverable at all] and as the costs had been put out to tender we felt we could not interfere with this at all. With regard to the period 2005/6 and 2006/7 we also felt that the sums were payable."

96. The tender process there referred to took place in late 2005, with the contract for 1st April 2006 to 31st March 2007 being awarded to C&A on 17th November 2005 (see p7/2460), so it is not immediately apparent why that was relevant to all of the periods then under consideration. Be that as it may, and despite the brevity of that paragraph, we accept the evidence of the Respondent's witnesses and Mr. Angell that this decision was taken by them as an endorsement, or at least not disapproval, of the 15% method, upon which they then relied in subsequent years. It was a decision of a competent Tribunal affecting this specific landlord and agent, and it would therefore be problematic to hold that their 15% method was nevertheless unreasonable, or became so shortly after that decision.

97. Further, as Mr. Lees pointed out in oral argument, there are decisions of other Tribunals, suggesting that a 15% charge may be reasonable, such as *Flat 36, Aidans Court, Blessing Way, Barking, ref. LON/00AB/LSC/2010/0696* (13th June 2011) [see also *Flat 15, Ivy Park Court, Sheffield, MAN/00CG/LSC/2009/124,* 8th March 2010, referring to a "usual" charge "..based on either a percentage of annual expenditure (in the range of 10-15%) or a charge of an annual sum per residential unit (in the range of £250-350 per unit).] Those are not binding precedents or authorities but they are at least indicative that other landlords, and other Tribunals, may reasonably accept a percentage charge, and even one at the relatively high rate of 15%.

98. The difficult issue for us in this application is, however, whether there came a time at which a flat percentage charge for basic management fees became

unreasonable for Castle Court. As stated, the managing agent's appointment is a year by year matter, not a long term agreement, and the Respondent has a duty to review the reasonableness of expenditure, including the costs of agents, each year. The brief paragraph of approval in the 2006 Tribunal decision could not be taken as *carte blanche*, in perpetuity, for the charging of fees at 15%.

99. Further, while as already stated, the RICS guidelines do not have legal force, and are not even in their terms condemnatory of percentage charges *per se*, there does appear to have been a professional and market trend – recognised in evidence by Mr. Angell – of movement away from the percentage basis towards a fixed fees regime. Mr. Angell and Cooke & Arkwright are not to be taken to have made a 'rod for their own back' simply by virtue of having agreed themselves to operate on a fixed fee basic charge (of £48,000 plus VAT) for each of the budgeted years 2013-14 and 2014-15, but it is indicative of an acceptance by them and by the Respondent that a fixed fee approach is preferable.

100. In this case, the evidence was that this switch to fixed fees was relatively easy mainly *because* the fees charged by Cooke & Arkwright in previous years have been relatively predictable and consistent. The point was made for the Respondent that this fact, and the lack of any disparity between budgeted and final costs in this regard, goes against the perceived 'mischief' of percentage charges as expressed by RICS. That is true, but might equally raise the question: if it was relatively easy to predict these charges then, and certainly is now (hence the fixed fee regime), why was the switch to fixed fees not made sooner?

101. The evidence of Mr. Angell was that he began considering that Cooke & Arkwright should move to a fixed fee charge for Castle Court in late 2012. This was partly based on his own awareness of the RICS code provisions, and also a general shift in the market towards charging fixed fees. Cooke & Arkwright themselves also managed other properties on a fixed fee basis. So that proposed change came *from* those agents, and was then discussed with the Respondent. It was not finally implemented until the budgeted figures for 2014.

102. We heard evidence from Ms. Mahoney that she read the property press from time to time, and even some LVT decisions, to stay abreast of flat management issues and costs. We accept that evidence, but we find that the onus was on the Respondent, since it made the clear decision not to tender the managing agent annual contract for the eight years after its first tender, to do a little more to keep managing agents' charges under review and control. We consider it likely that if they had asked the question sooner, they would have found a managing agent, and probably Cooke & Arkwright themselves, willing to undertake the general management of Castle Court for a fixed fee. As stated, it is difficult to put any precise date on this, but we consider that a period of around five years after the previous LVT decision, in which time the contract had not been put out to tender, was an appropriate time at which to review the position afresh.

We shall return to the implications of that finding below.

What C&A do

103. Cooke & Arkwright's list of contracted duties is set out in Appendix A to their contract with the Respondent, and was summarised at paragraph 53 of the Respondent's statement of case. In addition to carrying these out, the point was made in evidence by a number of witnesses that Cooke & Arkwright's status as an RICS-regulated firm with surveying capacity carried with it a beneficial element of 'free' advice on some general building and surveying matters. It was clear that Cooke & Arkwright did make separate charges when their surveyors carried out proper surveying work on instructions, but the 'free' advice and help was more in the nature of the ability of the property manager to have a brief informal chat with a colleague when dealing with any building matters with which he was not wholly familiar.

104. The evidence from Mr. Angell and Mr. Ross as to their typical duties, and time spent, did disclose a reasonably consistent pattern. Mr. Angell said that the biggest single element of their work is site attendance, in response to leaseholder queries and requests. Mr. Ross's time spent on site varies, but has probably been an average of around 15 visits per month. Sometimes it has been greater (it was "not uncommon" to be called out twice in a day), sometimes less. He has a minimum of three scheduled visits each week. In addition to this, both he and Mr. Angell spend significant office time (paper and telephone work) dealing with Castle Court matters: Mr. Angell estimated that he himself spends around 4 hours a week on it, and Mr. Ross spends even more of such office time. His evidence was that his management work for Castle Court consumes between half and two-thirds of his time in a working week. He referred to the generally high expectations and demands of leaseholders, and the unique nature of Castle Court. He gave evidence (see page 7/2508) of a typical day in his working life in relation to Castle Court.

105. To give some idea of what this might amount to in terms of hourly costs, Mr. Angell replied (to our questions on this point) that his own hourly rate was around £110-120 per hour, while Mr. Ross's was in the region of £65-70 per hour. Based on the above evidence as to time spent, his estimate was that if anything they were undercharging for their actual time spent. If, for example, Mr. Angell billed for four hours per week, and Mr. Ross for ten, for (say) 50 working weeks a year, that could in theory reach a figure of £58-59,000 per year.

Allegations of poor and unreasonable service

106. We can deal with these fairly briefly. We are not satisfied on any of the evidence before us that there are any instances of poor or unreasonable quality of service from the current agents, such as could justify any reduction in the

charges recoverable.

107. We have already dealt with the VAT recharge issue above. We repeat that once this issue was discovered and raised, Cooke & Arkwright acted quickly and efficiently to secure refunds and redistribute the charges relevant to the years before us. Any claim that they or anyone else negligently failed to discover it earlier, so that additional loss was caused, is not before this Tribunal.

108. Some allegations made in the statements of case fell away at the hearing, such as an alleged lack of proper holiday cover. Others, while consuming a good deal of time and evidence at the hearing, did not seem to us to demonstrate anything like unreasonable service or delayed responses to complaints, but if anything quite the opposite. We heard much about the repeated efforts to investigate the cause, and therefore remedy, water ingress to the flat of Mr. Dan Jones, but in our judgement this demonstrated the genuine and repeated responses and efforts of Cooke & Arkwright to investigate and resolve this one problem. It cannot be said, in this or any other matter before us, that they sat on their hands and ignored tenant complaints. In relation to the flat of Karen Gray, their repeated responses and investigations in fact led them to the conclusion that the problem was one interior to that flat and therefore not one on which the Respondent could legitimately expend service charge monies. If either of those tenants, or any other tenants, consider that their landlord is failing to respond to their requests for repairs of matters falling within the landlord's covenants, they are free to bring court proceedings to pursue that; but there is no evidence that anyone has had to do this.

109. As stated, no other challenges to the quality of the service provided by Cooke & Arkwright were seriously developed before us, save for the VAT overcharge and refund issue, with which we have already dealt above. Points relating to the delayed "collection of bulky waste" and an alleged lack of adequate holiday cover by the managing agents were mentioned in the application form and statement of case, but not pursued further at the hearing. Had they been pursued, we would have rejected them on the evidence before us.

"Per unit" costing of management services

110. There is no official or unofficial "tariff" of 'per unit' management charges for blocks of flats. Some blocks will be modern, relatively simple in construction and simple to manage, and therefore amenable to a relatively modest charge of (say) £150-200 plus VAT per unit. Others will be less straightforward. The Respondent and its witnesses urged on us the point that Castle Court falls into that latter category, as a unique property raising particular management challenges, coupled with a high level of leaseholder expectation.

111. We were not presented with, for example, detailed Cardiff-wide evidence of charges for various blocks of flats, although there was some secondary

evidence that (for example) more modern blocks in Cardiff Bay might attract charges in the range described above. Mr. Lees cited as an example a reference by the Tribunal in the Sheffield decision of *Flat 15 Ivy Park Court* (Ref. MAN 00CG/LSC/209/0124, dated 8th March 2010) to an assumed range (at least in that area), "canvassed" by the Tribunal "..based on either a percentage of annual expenditure (in the range of 10-15%) or a charge of an annual sum per residential unit (in the range of £250-350 per unit)".

112. We referred in argument, and handed out copies of, this Tribunal's decision in the *David Morgan Apartments* case (LVT/WAL/SC 39&41, decision 30th March 2011). That decision, although it also involved Cardiff City Centre apartments, was slightly different, and complicated by the fact of the combined commercial and residential nature of the building in question. Amongst the various findings was that the basis of charging management fees, as a percentage of the total costs of the landlord's agent's office and staff, was unreasonable on the facts of this case, and was substituted (at paragraphs 9.29 and 9.30) by essentially 'per unit' figures:-

"..In our view, the figures which we put to the parties as being charged elsewhere for "block" estates is a reasonable starting point, but must be enhanced in order to take account of the additional factors involved in managing these more complex residential apartments"

The Tribunal then "using [its] knowledge and experience" determined figures based on an average per unit cost of £240, then £245, then £250 for the three years in question, multiplied by the number of apartments (56) in the complex.

113. Mr. Lees made the observation on this decision that, despite those figures and the reduction made, the fixed fee figures thus determined by the Tribunal (then multiplied by 56) would still have equated to between 23-28% of the total expenditure incurred in these years, but his overall point was that on the information available, this was a decision with its own particular factors and justifications, and that the two blocks of flats are (despite their proximity) not really comparable.

114. It seems likely in any event that outside London, a rate of (say) £350 plus VAT per unit would be seen as high, and perhaps at or close to the limit of what most agents would charge. As stated, we have had not had the benefit of extensive comparable evidence, and there are risks in purporting to rely on "knowledge and experience" not articulated and put to the parties for argument, but the above references and material would seem to support that view. Certainly no party produced evidence, or a decision, of a rate in excess of that figure being charged and recovered in comparable local blocks.

115. That would equate to a figure of £51,800 plus VAT in the present case (148 x £350). As is apparent from the figures summarised above, and once the

VAT refund adjustment is made, the sums charged here were generally around that level, although in most years slightly over it.

Other evidence of quotations or estimates

116. We read some indirect evidence from three would-be providers of management services to Castle Court. These were not official 'tenders' as part of a process, but the quotation of one of these firms (Western Permanent Property) was developed further in correspondence with the Respondent (and Mrs. Bethan Lumb, one of the co-Applicants), to a point where it put forward a figure of £35,145 plus VAT per annum based on attending 15 times per calendar month, which was considered by the Respondent at its Directors' Meeting in late 2013 on the appointment of agents for the year 2014-15 [page 7/2477]. Although that budgeted year is not the subject of these proceedings, it is worth noting that the Respondent chose Cooke & Arkwright (with a fixed fee quotation of £48,000 plus VAT) in preference to Western, chiefly because of concerns over the real eventual cost of an apparently cheaper quotation, in the form of further hourly charges for additional works on leaseholder enquiries, and the lack of a surveying capacity in the firm.

117. The other two quotations, from firms known as Remus and Atlantis, also suggested lower figures, but these have not been the subject of specific consideration by the Respondent.

118. Without in any way criticising any of these firms, we are not satisfied that the correspondence with these firms, the figures quoted and the sets of their terms and conditions supplied provides a sufficient basis for finding the selection of Cooke & Arkwright, and the fees they have charged, unreasonable for any of the years under consideration. There are many points which could be made, and were made, in relation to this material. First, its authors were not giving direct evidence before us, and so could not be cross-examined on any claims they might make to be providing the same or even a similar service to that provided by Cooke & Arkwright. Secondly, we do accept the Respondent's point that in many respects these were not 'like for like' quotations from firms with similar capacity and experience to that of Cooke & Arkwright. Each of them contained at least some items which would be the subject of further charges, such as dealing with out of office complaints or meetings, or queries arising from "unreasonable" leaseholder expectations. It was not clear, at least in the case of Remus and Atlantis, that any or any detailed visit to Castle Court had been undertaken.

119. Further, while the value of non-invoiced surveying help from within Cooke & Arkwright is difficult to quantify, it is of at least some significance. The general point was made, without any criticism being made of any of these firms, that they are clearly more in the nature of 'block management' firms, using their general block management fee rates as a guide in giving a quotation with a view to obtaining business, while not having a genuine appreciation of the complexity

and uniqueness of the management function at Castle Court.

120. Overall, we could not (and do not) find that this material by itself amounts to sufficiently clear and reliable comparable evidence, relevant to the years under consideration, that Cooke & Arkwright's charges were unreasonably high. We have some regard to it, as it has been referred to and put in evidence indirectly, but its effect and weight is limited by the drawbacks referred to above. At best, it provides some support for the general evidence that most agents are now prepared to offer their services on a fixed fee basis, at least for the general management aspect of their work, with some further matters being the subject of additional charges.

Conclusion on agents' fees

121. Putting all of the above material together, we find that:-

i) the basic managing agents' charges for the years 2008 to 2011 inclusive were reasonable, and it was reasonable in this time to appoint and pay an agent who charged on a percentage basis, and at the rate of 15% in this case. The Respondent was to some extent entitled to rely, for a time, on the approval given to that approach in the 2006 decision of this Tribunal, although the point was not analysed in great detail in that decision.

ii) the Respondent chose not to tender the contract annually, and re-appointed the same agent in successive years. In those circumstances, it would have been reasonable for it to at least do a little more research on different charging rates and bases. Even it was (as we find) wholly satisfied with Cooke & Arkwright, we consider that that firm (or another in its place) would have been likely to offer a fixed fee regime by at least 2012 at the latest. It is difficult to put a precise date on this, but the combination of the RICS guidance, and the practice and trend in the market locally as referred to by Mr. Angell, would probably have been reasonably apparent at least by the time of appointing an agent for the 2012 service charge year. As stated, it was Cooke & Arkwright themselves who eventually raised this with the Respondent later that year.

iii) doing the best that we can on the evidence and previous decisions before us, we consider that a rate of £350 plus VAT per unit, or £51,800 plus VAT per annum, represented the upper limit of reasonableness for managing agents' fees for a block of this age, size and character, by that time and for those years. It should be borne in mind that these are the figures for the general, day to day management functions of the agent. The agents charge separately for specialist surveying work, and separately (at rates of either 5% or 7.5%) on large scale "PPM" works in years when they arise, although they themselves do not conduct the actual section 20 consultation processes for those works. Those additional percentage rates must therefore be taken as their reasonable pre-estimation of the additional managing agent functions to which those PPM works give rise, in

all respects.

122. That is still a generous and high figure. Indeed, although we did not receive a great deal of comparable evidence generally, it may be amongst the highest per unit figures for a block of flats in Cardiff. It is not to be taken as a recommendation, or *carte blanche* for the next agent appointed to charge that sum. Cooke & Arkwright themselves currently charge £48,000 plus VAT, and have now done so for two successive years. That is a figure they have presumably, on Mr. Angell's evidence, calculated as a reasonable one which both reflects the general work they do and which will be sufficiently competitive for them to obtain future renewals of the contract they have won for the last nine years and more. Neither they nor the Respondent should assume that this figure could just be raised back up to £51,800 and be reasonable for the following year, if no further research or testing of the market is carried out.

123. We add that that this high limit as to what constitutes a reasonable sum in this case rests largely on the relatively unique (as far as we are aware) nature and layout of Castle Court, and the clear evidence before us as to the management challenges it presents and the work performed by the current agent. The Respondent nevertheless must understand (and this was also its evidence, through Ms. Mahoney) that the level of agents' fees has to kept under regular review each year, to ensure that the fees do not exceed a reasonable market figure. The current arrangement is not a "qualifying long term agreement" under section 20 of the Act, so each contract with the agent is for 12 months only. Regular and annual testing of the market, enquiry, and where feasible tendering of the contract would constitute good practice. As we say, this decision is not to be taken as *carte blanche* by the Respondent and current agent, or any other landlord or agents reading it, to charge a certain level of fees without such market testing. Nor is this Tribunal in the business of setting a 'tariff' to be followed or adopted unquestioningly by others. This decision is, as we have said, largely based on particular evidence before us and the unique nature of Castle Court.

CONCLUSION

124. Our decision is therefore as follows. The Applicant's applications on the seven matters before us in this phase of the proceedings (as set out in paragraph 14 above) are dismissed in their entirety, save that:-

- it is determined that a reasonable sum recoverable for general managing agents' fees for the service charge years 2012 and 2013 was £51,800 plus VAT in each year; so that the net fees charged for those years were unreasonably incurred in amount to the extent that they exceeded that figure.

- as stated, we calculate that the net figures eventually charged for those years, allowing for the refund following the VAT overcharge, were £54,072.53 (2012)

and £54,768.51 (2013), so the amounts by which these figures were unreasonable (in our determination) were £2272.53 and £2968.51 respectively. That equates to £15.35 and £20.06 per leaseholder for those years.

125. We anticipate that there will need to be a further directions hearing in these proceedings once the decision of the Court of Appeal in *Phillips v. Francis* is handed down. At that hearing we will consider directions for the disposal of all the further remaining matters in this application, including the issues currently stayed and the Applicant's application under section 20C of the Landlord and Tenant Act 1985.

DATED this 5th day of June 2014

E.W. Paton, Chair