FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/12UC/LSC/2020/0008**
Property	**:**	17 Tower Court, Tower Road, Ely, Cambs CB7 4AX
Applicant	**:**	Nicholas Edward Sweeney
Respondents	**1**	Futures Homescape Limited
	2	Notting Hill Genesis
Representatives	**1**	Anthony Collins Solicitors LLP
	2	Stephanie Lovegrove (counsel, instructed by Notting Hill Genesis Legal Services)
Type of Application	**a**	determination of the reasonableness and payability of service charges for the year 1st April 2018 to 31st March 2019 [LTA 1985, s.27A]
	b	an order that the landlord's costs are not to be included in the amount of any service charge payable by the applicant and those other lessees identified by property number in the application [*op cit*, s.20C]
	c	an order which reduces or extinguishes a tenant's liability to pay an administration charge in respect of litigation costs [CLRA 2002, s.158 & Sch 11, para 5A]
Tribunal	**:**	Judge G K Sinclair
Date of determination	**:**	Friday 11th September 2020

DECISION following a paper determination

---

1. The amount in dispute is £1 536.34 and the questions posed are :
   a. Whether a variable service charge for the year in question is payable; and
   b. If so, then how much is payable; and to whom.

2. For the reasons which follow the tribunal determines that :
   a. As the obligation to pay advance interim service charges is not conditional upon the certification of the amount payable a variable service charge was and is payable for the year 2018/19
   b. As the applicant has, upon disclosure of further information,
      i. Accepted how the sinking fund has been calculated and handled, and
      ii. Accepted the figures set out in paragraph 21 of the second respondent's statement of case,

   the amount payable is the £1 482.38 paid, less the sum of £337.47 credited, so there is no balance payable or rebate to be credited to him. The maintenance charge under the lease is payable to the lessor or the company. Unless or until steps are taken formally to obtain the release of the second respondent from its obligations under the lease and the first respondent covenants to observe and perform them in its stead then only the lessor or the second respondent (if the lessor so directs) may levy maintenance charges, enforce powers of entry, etc.

3. Although not convinced that the lease makes any such provision, for the avoidance of doubt the tribunal makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability that the applicant might otherwise have to pay any costs incurred by the respondents in connection with this application by way of an administration charge under his lease.

4. The tribunal makes an order under section 20C that the landlord's costs (which include the costs of any party entitled to levy a service charge) are not to be included in the amount of any service charge payable by the applicant and the lessee of flat 12 Tower Court, and a further order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that the two respondents, jointly and severally, reimburse the applicant the £100 issue fee paid by him to the tribunal.

Background

5. This application concerns a former workhouse in the City of Ely converted into residential apartments, of which 61 are believed to be held under long leases. On 1st July 2006 "the company" (the party primarily responsible under the lease for maintaining and insuring the property, providing services and obtaining payment from the lessees) entered into a management agreement with Hundred Houses Society Ltd as its managing agent. In that agreement the company was referred to as "the landlord".

6. On 3rd October 2018, halfway through the 2018-19 maintenance year, Notting Hill Genesis (as outgoing owner), Hundred Houses Society Ltd (as manager) and Futures Homescape Ltd (as incoming owner) entered into a deed of novation of the July 2006 Tower Court management agreement and another concerning property known as The Maltings. Under the heading "Background" paragraphs

(B) and (C) on the first page of the deed usefully explain :

(B) The Tower Court management agreement relates to the management of the properties set out in Part 1 of the Schedule ("the Tower Court Property")... The outgoing owner is disposing of 36 and 37 Tower Court in the Tower Court Property... to the incoming owner. The incoming owner is assuming responsibility of the Management Company as enshrined in the leases of the Tower Court Property.

(C) The parties have therefore agreed to novate the outgoing owner's rights, obligations and liabilities under the Tower Court management agreement ... to the incoming owner on the terms of this deed with effect from the date notified to the manager by the outgoing owner as being the date of completion of the Tower Court Property... to the incoming owner ("Effective Date").

The Effective Date was later agreed as 26th November 2018.

7. By clause 1 (Novation) of the "Operative Part" of the deed the outgoing owner transfers all its rights and obligations under the Tower Court management agreement to the incoming owner, the incoming owner shall thereafter enjoy all the rights and benefits of the outgoing owner and agrees with the manager that it will perform the functions of the outgoing owner under the management agreement and by bound by its terms in every way as if it were an original party to the agreement in place of the outgoing party, etc.

8. Clause 2 (Release of obligations and liabilities), clause 3 (Indemnity) and clause 4 (Acknowledgment) all refer to the management agreement only. Nowhere in the operative part of the deed is there any reference to the lease or to Notting Hill Genesis being released from its covenants as the company thereunder or Futures Homescape Ltd entering into any fresh covenant with the lessor to be bound by the company's lease covenants.

9. As in previous years the applicant paid in advance the interim maintenance charge as demanded. Unlike in previous years, however, no certified statement of actual expenditure was sent to him following the year end. Notting Hill Genesis transferred to the incoming Futures Homescape Ltd an amount of then unspent income and regarded certification of the year end account as the latter's problem. The first respondent claims to have struggled to obtain adequate financial information from the second respondent, and decided to remit the sums pro rata amongst the lessees and charge nothing for the work undertaken on its behalf for the balance of the accounting year. It therefore claimed that it could not certify the account and referred the applicant to the second respondent.

10. The applicant argues that as the maintenance charge for 2018-19 has never been certified, and no invoices or other documentation has been produced to justify expenditure, the amount that can be determined as reasonable is nil, and the sums paid in advance should be remitted, including his share of the reserve or sinking fund for future expenditure. He further argues that the deed transferring management responsibility was a "qualifying long term agreement" requiring due consultation under section 20 of the 1985 Act. The respondents disagree, and say that he was liable to pay his contribution to the interim maintenance charge against an estimate of expenditure; not against a certified amount. Further, the novated agreement was not a new long term agreement; merely a means whereby the managing agent, Hundred Houses Society Ltd, now agreed to act on behalf of the first respondent in place of the second.

The lease

11. The material lease is a tripartite one between Pinecraven Ely Ltd as lessor, Neil John Brooks and Margaret Brooks jointly as lessee, and Springboard Housing Association Ltd as the company. The lease is dated 20th December 1999 and was granted for a term of 125 years from 25th December 1998.

12. The current lessor is Gray's Inn Capital Ltd, the applicant is now lessee and, by a series of amalgamations, Springboard Housing Association Ltd has now become Notting Hill Genesis.

13. The First Schedule to the lease sets out a series of definitions, the first of which provides that "lessor", "company" and "lessee" include their respective successors in title. The Schedule also provides definitions for "maintenance year" (1st April in each year to 31st March in the following year), "maintenance charge", "interim maintenance charge" and the "maintenance fund" (the amount from time to time unexpended from the payments of maintenance charge paid by the lessee and the other lessees).

14. In particular, by paragraph (xi), "the interim maintenance charge" is expressed to mean :

> ...one twelfth of the sum specified in paragraph 9 of the Particulars or one twelfth of such sum as the lessor or the company or their respective managing agents or accountants or auditors shall reasonably estimate as being the maintenance charge for the maintenance year in which the interim maintenance charge falls due for payment whichever is the greater.

15. By clause 3 the lessee covenants with the lessor and with the company to observe and perform the obligations appearing in Part I of the Fifth and Ninth Schedules and with the lessor, company and the lessees of the other flats and houses in the property to observe those in Part II of the Fifth Schedule.

16. By paragraph (2) in Part I of the Fifth Schedule the lessee covenants :

> To pay to the lessor or the company as directed by the lessor a maintenance charge being that percentage specified in paragraph 10 of the particulars[1] of the expenses which the lessor and the company shall in relation to the property reasonably and properly incur in each maintenance year and which are authorised by the Eighth Schedule hereto (including the provision for future expenditure therein mentioned) the amount of such maintenance charge to be certified by the lessor's or the company's managing agent or accountant or auditors acting as an expert and not an arbitrator as soon as conveniently possible after the expiry of each maintenance year and FURTHER on the first day of each month in each maintenance year ("the payment dates") to pay in advance and on account of the lessee's liability under this clause the interim maintenance charge... PROVIDED THAT upon the lessor's or the company's managing agents' or accountants' or auditors' certificate being given as aforesaid there shall be paid by the lessee to the lessor or the company as directed any difference between the interim maintenance charge and the maintenance charge so certified.

[1] Paragraph 10 refers only to a "proper proportion" of the costs and expenses, such proportion to be determined by the company

17. The lease does not say how, if the actual costs incurred are lower than the interim maintenance charge already paid, any such credit on the account should be dealt with – whether by repayment, credit against the following year's interim charge, or by addition to the reserve for future expenditure.

18. The landlord's covenants appear in clause 4 and Part II of the Sixth Schedule, and by clause 5 the company covenants with the lessor and the lessee to observe and perform the obligations and provisions set out in Part I of the Sixth Schedule. All parties agree the provisions of the Seventh Schedule.

19. By Part I of the Sixth Schedule, and subject to payment by the lessee of the rents, maintenance charge and interim maintenance charge and compliance with its covenants, the company covenants to maintain and repair, decorate, insure, etc the structure of the property and common parts, maintain the central heating system, etc and, at paragraph (11), to expend the maintenance fund in accordance with the Eighth Schedule.

20. By paragraph (12) :

> In the event of the company failing to perform and observe its obligations under this lease or any of them it will authorise the lessor as its agent to perform and observe the said obligations and to recover from the lessee the due proportion of the costs, charges and expenses so incurred by the lessor as agent for the company provided always that without prejudice to the generality of the foregoing the lessor may at any time serve a notice on the company specifying any want of repair or decoration which it deems reasonably necessary to be effective under the company's obligations under this lease and the company shall within two months after the giving of such notice make good all defects and wants of repair or decoration to the satisfaction of the lessor or its surveyors for the time being.

21. By paragraph 4 in Part II of the same Schedule, and without prejudice to its right to proceed in such matters on its own initiative, the lessor covenants to enforce all or any covenants contained in leases of other parts of the property at the request of the lessee (and indemnification of its costs). By paragraph 6 the lessor also covenants :

> In the event of the company failing to perform its obligations contained or referred to in this lease to carry out the company's obligations hereunder in place of the company.

22. By paragraph 5) of the Seventh Schedule all parties to the lease agree that :

> The lessor and the company shall have power (but shall be under no obligation not contained elsewhere in this lease) to incur in relation to the property the expenses set out in the Eighth Schedule.

23. This lack of obligation to incur certain costs is stressed again at the start of the Eighth Schedule, which sets out all the various costs and expenses that may be charged upon the maintenance fund including those incurred by the lessor and the company in complying with their obligations under the Sixth Schedule, etc. These include at paragraph (9) the cost of employing a managing agent and at (11) all legal and other proper costs incurred by the lessor and the company in the running and management of the property and in the enforcement of the covenants on the part of the lessee and of the lessees of other parts of the property insofar as such costs are not recovered from the lessee in breach. The

costs of defending an application such as this are not referred to specifically.

24. Paragraph (12) refers to the cost of auditing the accounts of the maintenance fund.

Relevant statutory provisions

25. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> an amount payable by a tenant of a dwelling as part of or in addition to the rent… (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management…

26. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

a. only to the extent that they are reasonably incurred, and
b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

27. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

28. Please also note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.

29. A question raised by the applicant is whether the agreement entered into by the first and second respondents with Hundred Houses Society Ltd dated 3rd October 2018 comes within the definition of a "qualifying long term agreement", within the meaning of section 20 of the 1985 Act.

30. Insofar as qualifying long term agreements are concerned, ie those in respect of which the annual contribution of any tenant liable to pay towards the service charge will exceed £100, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) the appropriate tribunal. For the purposes of that section – and section 20ZA – the consultation requirements prior to entry into a qualifying long term agreement are those appearing in Schedule 1 to the Service Charges (Consultation Requirements) (England) Regulations 2003[2] (as amended).

31. Finally, in his application form, but not in his later more detailed Statement of

[2] SI 2003/1987

Case, the applicant refers to section 23A of the 1985 Act, which concerns the compliance with lease obligations by either the outgoing or incoming party where there is a change of landlord. Even if that might in the circumstances of this case be relevant, the provision has not yet been brought into force. It can be ignored.

Discussion and findings

32. The tribunal had before it a 401 page bundle comprising the application, tribunal directions, statements of case by all three parties, witness statements by Raj Sharma for the first respondent and Christopher Ashplant for the second, and a "tenant's reply" to those submissions by the applicant. Having read the papers the tribunal raised various questions with the parties, prompting written answers from each respondent. With the parties' consent the case was dealt with on the basis of the written material before it.

33. By paragraph (2) in Part I of the Fifth Schedule the applicant as lessee covenants that on the first day of each month in each maintenance year to pay in advance and on account of the lessee's liability under this clause the interim maintenance charge. Over the course of time the interim charge seems to have become a half-yearly rather than a monthly one, but the amount assessed remains an estimate of the expected total expenditure for that year (including a reserve for future costs).

34. At page [52] the applicant produces a copy of the "service charge estimated costs 2018/19", showing a total estimated expenditure of £46 339.84 and his share of £1 482.36 (payable in two instalments). He paid this in full.

35. Similar estimates for the previous four years appear at [48–51]. They show little annual fluctuation until the year in question :

Period	Total	Estate %	Block %	Contribution
2014/15	£32,152.41	2.00%	4.00%	£1,055.10
2015/16	£32,401.02	1.52%	4.35%	£1,098.14
2016/17	£31,640.23	1.52%	4.35%	£1,065.06
2017/18	£28,798.58	1.52%	4.35%	£1,008.05
2018/19	£46,339.84	1.52%	4.35%	£1,482.36

36. These cannot be compared easily with the service charge annual statements for the periods 2013/14 to 2017/18 which appear at [61–65], as they show a mix of global totals and individual contributions. A global service charge statement with percentage contributions as well would be far clearer and, if it were to adopt the same cost categories as in the estimated or budget figures, would greatly assist comparison with the year-end actuals.

37. A document purporting to be a service charge annual statement for the year 2018/19 was provided to the first respondent by the second respondent on 8th January 2020. It appears at [185] and shows total actual costs of £18 198.04 (as against the estimate of £46 339.84) but, unlike statements for previous years, it fails to include the cost of insurance, management and audit fees. A surplus of

£337.47 is shown, this being credited by the first respondent to the applicant, but that figure is again wrong; as he had paid £1 482.36 against the interim charges.

38. At paragraph 21 of the second respondent's statement of case [219] a table sets out certain other items which account for the difference. These are explained in paragraphs 16–20 [218–219], and at paragraph 3 ii. in his reply at [380] these figures are formally accepted by the applicant. His case on reasonableness stands or falls on the failure of certification, but if he has accepted the figures above then his need for independent verification that they have in fact been incurred rather falls away. He is also content that the sinking fund has ben accounted for and transferred by the second respondent to the first.

39. If certification is a pre-condition to liability to pay the final service charge then the applicant argues that nothing is payable for the year in question. The respondents, while pointing the blame at each other, say that it is not, relying upon the decision of the Upper Tribunal (Lands Chamber) in *Warrior Quay Management Co Ltd v Joaquim*[3]. However, in arguing that certification is only required in order to levy a balancing charge the respondents are wrong. That is not what the case says. At paragraph [24(5)] HH Judge Huskinson records :

> I asked Mr Bayne whether this meant, on his argument, that WQMC could retain the on-account payments in perpetuity and could continue in perpetuity to demand merely on-account payments and could deliberately decline ever to provide the relevant certificates, such that there could never be a final settling (until such moment, if ever, as chosen by WQMC to provide the relevant certificates) of the relevant service charge years. Mr Bayne accepted that this would not be an acceptable situation and he contended that it did not arise on the construction of the leases. He argued instead that it was open to a tenant to seek finality by making an application under section 27A of the 1985 Act to the LVT. On such an application the LVT, even if there was no appropriate certificate from an auditor or accountant, had the power to reach a final decision as to how much was payable.

40. At [25] he held that :

> It is clearly unsatisfactory that WQMC has failed to comply with its obligations under the Seventh Schedule Part III paragraph 2. However, I am unable to read the lease as meaning that if WQMC has failed to comply with this provision then this automatically thereby proclaims that in respect of the service charge year to which the failure relates WQMC had lost the right to be paid any service charge whatever, such that the entirety of any sum paid on account must be dealt with on the basis that the leaseholder is either entitled to credit for this sum or to be repaid (as to which see below) the whole of the amount paid on account.... However, I also conclude that WQMC cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year. Section 27A of the 1985 Act clearly contemplates that a tenant can apply to an LVT to obtain a binding decision on this point. I therefore also agree with Mr Bayne's submissions that, if in such circumstances a leaseholder does make an application to the LVT for a decision (as happened in the present case), the LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against WQMC and may result in the LVT deciding that a lesser sum than hoped for by WQMC may be decided to be the amount payable

[3] LRX/42/2006 (unrep)

41. Had the estimate for the year 2018/19 been similar in amount to the previous years cited then it would have been easy for the tribunal to determine that as the amount demanded in advance was in line with those earlier years, which were never challenged, then the amount demanded in advance was reasonable. That was not the case. For reasons wholly unexplained the estimate was a lot higher. The annual statement at [185](minus a number of significant and essential items) was much lower, and the applicant's "estimated charge" much lower than he had actually paid but higher than the claimed actuals, yielding a credit of £337.47.

42. Were it not for the applicant's acceptance of the figures cited at paragraph 21 of the second respondent's statement of case [219] the tribunal would have been minded – in the absence of any explanation for the high estimate or a complete answer to what sums were actually incurred – to treat the average of the previous years' estimates as being a reasonable sum, taken into account the £337.47 credited and allowed a further credit of perhaps £100. In the circumstances the effect would have been marginal, and no such determination is made.

43. Is the novation agreement a qualifying long term agreement, as argued for by the applicant? The respondents claim that the 2006 agreement with Hundred Houses Society Ltd was such an agreement, and that it was consulted upon. The effect of that agreement was that the company, as it was and is entitled under the lease to do (and recover the cost as part of the maintenance charge), appointed a managing agent that would charge an annual fee in excess of £100 per lessee for its services. The novation agreement did not change the managing agent but the appointing party – and the appointing party was not the one charging a fee.

44. Was it effective in law? On reading the papers the tribunal was concerned about certain aspects, and caused the tribunal office on 11th August 2020 to write to the parties in the terms annexed to this decision.

45. The first respondent made detailed submissions in response to the questions raised by the tribunal. The second respondent simply agreed with the first respondent's answers save for the last two, on which it felt unable to comment.

46. The tribunal rejects the arguments advanced by the first respondent. Both now agree that the interest of the company under the lease has not been assigned to the first respondent. All that they have attempted to do is substitute it in place of the second respondent under the entirely separate management agreement with Hundred Houses Society Ltd. Although describing the company as "the landlord", that 2006 agreement was a legitimate appointment by the company named in the lease as its managing agent. Had the novation agreement sought to amend the name of the agent – perhaps because of a take-over by or merger with another company, or simply a change of name or corporate structure – then that would be acceptable and, in the absence of an increase in fees, would not trigger section 20 and its consultation requirements.

47. In this case however, the party responsible by covenant with the other parties to the lease for carrying out works to the property and providing services sought to extricate itself, seemingly without consulting or seeking permission from the

lessor, and have its agent take instructions from a total stranger to the lease.[4]

48. The tribunal rejects the submission at paragraph 11 of the second respondent's further submissions that

> ...legal assignment would not have been appropriate in any event, as the second respondent did not have a legal interest in the property to transfer, as it was merely appointed a company under the lease.

49. Neither does a guarantor, which has only a contingent but ongoing liability; and it needs the lessor's consent to being released from its obligations. So too does the company – save perhaps in the case of insolvency.

50. The result is that the right to levy interim and balancing maintenance charges under the lease and the obligations to provide the specified services and obtain certification of the final account still rest with the second respondent. Without a formal deed to which the lessor is a party formally assigning the company's rights and obligations to the first respondent, incorporating a covenant by it to observe and perform the obligations and provisions set out in Part I of the Sixth Schedule, then the second respondent remains on the hook; and the lessees are under no obligation whatever to deal with the first respondent.

51. As to the practicalities and formalities of handover on 26th November 2018, the tribunal is extremely surprised that the managing agent (which is the usual case) did not have a full set of management accounts showing what costs had been actually incurred on what work, and what unspent balance remained at that date on the maintenance fund. That the reserve or sinking fund was held by the second respondent and the sum of £8 258.73 not handed over to the first until 27th November 2019 is surprising. When a RTM company acquires the right to manage there is a statutory framework for calculating what unallocated sums need to be transferred from outgoing to incoming manager. As Hundred Houses Society Ltd was involved throughout that task should have been simple, making the certification of the annual account after 31st March 2019 straightforward.

52. The tribunal's findings on these issues may only have a marginal bearing on the questions decided for the year 2018/19, but the status of the first respondent does need urgently to be sorted out.

53. It was only by issuing this application that the applicant achieved some answers and clarity about what has been going on. For the reasons given above neither the first nor second respondents have covered themselves in glory. There is no suggestion that the applicant is in breach of any of his obligations under the lease, and even were it permissible under paragraph (11) of the Eighth Schedule (which the tribunal holds is not the case), the tribunal orders that neither respondent be entitled to recover its legal costs of these proceedings by way of an administration charge payable by the applicant. This order is made under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

54. As the Upper Tribunal explained in *Plantation Wharf Management Ltd v Blain*

[4] Other than, apparently, the fact that it acquired from the second respondent the leasehold interest in to two flats at Tower Court. Would licence to assign not have been required for that aspect?

Alden Fairman & ors[5], caution should be exercised when considering a section 20C application because it interferes with the parties' contractual rights. The jurisdiction of the tribunal is based on the application itself, so the identity of the applicant is therefore crucial to considering the power of the tribunal to make orders under section 20C of the Act. Such an order can only bind the applicant and/or those persons specified in the application, and for an individual to be "specified" that person must have given the applicant their express authority. Although the application identified by number 61 lessees only the applicant and the lessee of flat 12 may therefore benefit from the order which this tribunal now makes.

55. For the reasons given the first respondent has no lawful authority to levy a charge under the lease, but for the avoidance of doubt the tribunal makes a section 20C order against it also.

56. The tribunal also orders, under rule 11(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, that the respondents, jointly and severally, reimburse the tribunal issue fee paid by the applicant.

Dated 11th September 2020

Graham K Sinclair
First-tier Tribunal Judge

ANNEXE

Letter sent by the tribunal office to the parties on 11th August 2020

Upon reading the parties' respective statements of case and evidence the judge was sufficiently troubled by an apparent discrepancy between the respective positions adopted by the 1st and 2nd respondents concerning the novation agreement entered into by 1) Notting Hill Genesis and 2) Hundred Houses Society Ltd and 3) Futures Homescape Ltd dated 3rd October 2018 that he invites answers from them to several questions before he makes his written determination.

In 2006 the 2nd respondent, as "the Company" named in the lease as responsible for providing services at Tower Court and collecting and managing the service charge, delegated the actual management functions to Hundred Houses Society Ltd – effectively as its managing agent. In that 2006 agreement the 2nd respondent is referred to as the "landlord". The 2018 novation agreement was intended to substitute the 1st respondent in the role played by the 2nd respondent under that 2006 agreement.

At paragraphs 52 and 53 of its statement of case the 1st respondent states :

> 52. ...the transfer from the Second Respondent to the First Respondent took effect by way of Deed of Novation in the way set out in paragraphs 11 and 12 of the witness statement of Raj Sharma; and not by way of entering into a new management agreement.
>
> 53. The effect of the Deed of Novation was twofold. Firstly, the First Respondent was

5 [2019] UKUT 236 (LC)

> substituted for the Second Respondent as the Company in the Lease and secondly, the First Respondent was substituted for the Second Respondent as a party to the Management Agreement.

Paragraphs 11 and 12 of Mr Raj Sharma's witness statement are to similar effect, although his exhibit RS1 is in fact a copy of the 2006 agreement and NOT the later novation agreement.

In paragraph 12 of its statement of case, however, the 2nd respondent states :

> 12. It is accepted that NHG remains the Company for the purposes of the lease. That interest has not been assigned.

At paragraph 14, however, it says this :

> 14. By a deed of novation, dated 3.10.18, NHG transferred all of its rights and obligations (i.e. those obligations placed upon it pursuant to the lease) under the Tower Court Agreement to FHS from 26.11.18. A copy of the deed of novation and accompanying Tower Court Agreement is attached at Appendix 3. [to be found at page 260 onwards]

At paragraph 9 of the witness statement of Christopher Ashplant, a solicitor employed by the 2nd respondent, he confirms that :

> 9. As stated in the RSOC [respondent's statement of case], it is accepted that NHG remains the Company for the purposes of the lease. That interest has not been assigned.

That, as pointed out by the applicant [at page 381], is not what he was saying in an email to the applicant dated 4th May 2020 :

> ...following an agreement between Notting Hill Genesis and the First Respondent, the First Respondent became "The Company" as set out in the lease dated 20 December 1999 ("The Lease") and was responsible for complying with the covenants set out in the Lease.

Although paragraph (B), under "Background" on page 1 [page 261] of the novation agreement, concludes with the sentence :

> The Incoming Owner is assuming responsibility of the Management Company as enshrined in the leases of the Tower Court Property

the Operative Part which immediately follows makes no mention of the leases and concerns only the rights and liabilities of the outgoing and incoming "owners" under the 2006 Tower Court (and one other) Management Agreement.

This confusion has potentially serious consequences for the parties, so it is only right that they are alerted to and have the opportunity to deal with the following points before a final decision is made.

The judge invites answers to the following questions.

A. As the landlord was not a party to the novation agreement and the 1st respondent has not entered into any direct covenant with it agreeing to be bound by the Company's obligations under clauses 5 and 6 of and the 6th and 7th Schedules to the lease (or with any of the lessees) is the landlord bound by the novation agreement?

B. Has there been an effective assignment of the 2nd respondent's role under the lease to the 1st respondent, notwithstanding the non-disclosure of any licence to assign?

C. If the 2nd respondent's interest under the lease has NOT been assigned, as asserted by it in paragraph 12 of its statement of case, by what right can the 1st respondent claim to levy a maintenance charge and exercise any authority whatever under the lease?

D. If there has been an effective assignment of the 2nd respondent's role under the lease then does that not act as an assignment of all its existing rights and liabilities – including the obligation to provide a certified service charge account as soon as practicable after the end of the 2018–19 accounting period?

Additionally,

E. Did the 1st respondent not undertake due diligence and ensure that it knew the financial state of the service charge account at handover?

F. As Hundred Houses Society Ltd has effectively been managing the estate on behalf of the 2nd respondent (and now the 1st respondent) there has been continuity of management throughout the relevant accounting period, so why should the 1st respondent have any difficulty in establishing the true financial facts – and whether the services carried out and their cost, including the provision made for a sinking fund, were reasonable?