**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER (RESIDENTIAL PROPERTY)**

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| **Case reference** | : | **LON/00AP/LSC/2022/0206** |
| **Property** | : | **Northwood Hall, Hornsey Land, London N6** |
| **Applicants** | : | **Philip John Whale and others** |
| **Representative** | : | **David Wismayer** |
| **Respondent** | : | **Triplark Limited** |
| **Representative** | : | **Emily Betts (counsel)**<br>**Cameron Stocks (counsel)**<br>**Hamlins LLP** |
| **Type of application** | : | **Section 27A Landlord and Tenant Act 1985** |
| **Tribunal** | : | **Judge Siobhan McGrath**<br>**Charles Norman FRICS**<br>**Michael Bell ACA CTA** |
| **Date of Decision** | : | **24th May 2024** |

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**DECISION**

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## Introduction

1. This application is the latest chapter in a long running saga of litigation relating to premises at Northwood Hall, Hornsey Lane, London N6. This claim is brought under section 27A of the Landlord and Tenant Act 1985 (the Act). The Applicants, who are 68 long leaseholders of 56 flats at Northwood Hall seek the determination of the

payability of service charges dating back to the year ended 30th June 2011. The Respondent is Triplark Limited which is the freehold owner of Northwood Hall with the responsibility for management and the discharge of the landlord's covenants under the leases and resists the application.

2. We set out the history of the various disputes affecting Northwood Hall below. We observe that the conflict and difficulty at Northwood Hall is some of the worst in our experience. We regret to say that it is unlikely that the decision in this application will resolve the matter and litigation is likely to continue for some time.

3. The fact that it has not been possible to resolve the problems which give rise to the litigation lies is, in our view, partly as a result of the conduct of the parties. We consider that the approach of the Applicants' representative Mr David Wismayer has been combative and unhelpful. Whilst we acknowledge that he considers that he is simply assisting the Applicants to achieve fairness and transparency, his manner of doing so has, on occasion, been wholly unacceptable.

4. Also however, we consider that Triplark, the respondent landlord, has been unnecessarily defensive and has failed to compromise or even to recognise and accept the inevitable consequences for them of the unhappy history at the property. We think that this approach has inflamed what was already an incendiary situation.

5. Having made these observations about the litigation which relates to past events, we should make it clear that our views about the current management arrangements at the property are very different. Having heard from the Directors of KMP Solutions, the current managing agents, we consider that Mr Mozes and Mr Klein are genuinely working hard to resolve the outstanding practical issues at Northwood Hall and we are pleased to say that they seem to be making good progress.

6. The hearing of this matter took place over five days concluding on 18th December 2023. The Applicants were represented by Mr David Wismayer who acts in the capacity as lay advisor although he is a qualified accountant. The Respondent was represented by Ms Emily Betts and Mr Cameron Stocks both of counsel. We heard evidence on behalf of the Applicants from Mr Philip Whale, who is a leaseholder at

Northwood Hall. On behalf of the Respondent evidence was given by Mr Solomon Mozes and Mr Philip Klein who are Directors of KMP Solutions Limited which has managed Northwood Hall since December 2019. Expert Evidence on behalf of the Respondents was given by Mr Stuart Burns who is a Chartered Accountant.

7. Because of the nature of the issues in this matter the Tribunal comprised a judge, a valuer chairman and an accountant assigned from the Tax Chamber for the purpose.

**The Background to the Application**

8. In order to understand the various allegations and submissions of the parties, we must first set out the relevant history of the disputes at Northwood Hall. This is dealt with in more detail in the other judgments and decisions referred to below but nonetheless the background is quite lengthy. After dealing with the history, we then explain and give our decision on a number of matters of principle before turning to our determinations on the specific items of dispute contained in a Scott Schedule.

9. Northwood Hall is a purpose-built residential block which was constructed around 1935 and comprises 194 flats. Of the total, 159 flats are held under long leases and 35 are held by the Respondent, 34 out of its freehold interest and one as long leaseholder.

10. From 1978, the Respondent's original interest in Northwood Hall was as Head Lessee. In September 2016, it acquired the freehold reversion through a wholly owned subsidiary, Crownhelm Limited and the freehold was transferred to the Respondent in March 2018.

11. A major cause of difficulty at the property have been the works to replace the communal heating and hot water system. Although the Respondent had obtained advice and estimates about a replacement system in 2009, some of the lessees were unhappy that the proposed works were making little progress. In 2010 a number of leaseholders learned about Right to Manage companies and decided to exercise that right with a view (in particular) to organising the replacement of the heating and hot water system. The Right to Manage was acquired by the RTM Company in January 2011 with the assistance of a firm known as Canonbury Management ('Canonbury')

who offered their services for free in exchange for a one year appointment as the new RTM Company's managing agent.

12. In June 2011 the RTM Company engaged CBG Consulting to prepare a design for the heating and hot water system. Tenders were invited and on 19th December 2013, the RTM Company entered into a contract for the construction of the heating project with Parker Bromley Limited. CBG was appointed as contract administrator and Canonbury as project manager. The contract was let for the sum of £2.68 million. With professional fees included the projected total cost of the scheme was £3.2 million. The works were intended to start in February 2014 and to be completed in December 2014.

13. The project very quickly went wrong. In about June 2014, the RTM directors were informed by Canonbury that because asbestos had been discovered in the risers in the flats, and because a supposed structural obstruction had been identified in the corridors, the scheme design would have to be changed from "vertical" to "horizontal." It later emerged that there was no evidence of asbestos in the risers or any relevant structural problem. The change of design meant that an extensive system of horizontal ceiling-mounted pipework was to be installed throughout the communal corridors whereas previously there had been none.

14. During 2014 and 2015 the project continued but with substantial difficulties and tensions. Mr Wismayer became involved with the block at the end of 2014. Subsequent events were described in one Tribunal decision as follows:

> "8. Mr Wismayer arrives on scene in or about December 2014 after being appointed as a consultant by the RTM directors. Mr Wismayer has extensive experience of managing flats and projects in blocks and has been for many years responsible for the management of Morshead Mansions, a block in West London.
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> 9. Mr Wismayer has proved to be a divisive figure. He is firmly supported by some leaseholders and bitterly opposed by others. There were various twists and turns following Mr Wismayer's appointment. He was appointed as a Director of the RTM Company and in April 2015, under

his guidance, the RTM Company recommended to leaseholders that they abandon the design change to the heating system involving horizonal piping and revert to the original design.

10. There then ensured one of the many battles which have occurred at the Block. There was a struggle for control of the management. Some RTM Directors wanted to be rid of Canonbury and to appoint Mr Wismayer to manage the Block, others opposed that change. Whilst this was going on, Mr Wismayer was attempting to become a leaseholder at the Block by purchasing one of the flats. Triplark and various lessees opposed to Mr Wismayer marshalled their forces and in July 2015, Mr Wismayer was removed as a Director of the RTM. In a side battle, Mr Wismayer's attempt to purchase a flat at the Block was the subject of litigation starting in the FTT and going all the way to the Court of Appeal.

11. The heating and hot water project continued with the changed design with the horizontal pipework in the corridors.

12. In April 2016, Triplark, supported by some leaseholders, applied for the appointment of Mr Maunder Taylor as a Manager. That application was opposed by other leaseholders who proposed Mr Wismayer as a Manager. The Tribunal appointed Mr Maunder Taylor as a Manager until September 2019.

13. Mr Maunder Taylor continued with the heating and hot water project in its amended horizontal design and proceeded to install new heating and hot water systems into the individual flats against some opposition. The demands for Service Charges and disputes over the installation of the new system led to yet further litigation, this time two actions (which were then consolidated) between Mr Maunder Taylor as Claimant and various leaseholders as Defendants and between other leaseholders as Claimants and Mr Maunder Taylor as Defendant. Those actions came to trial in the Spring of 2019 and led to the judgment of Mrs Recorder McGrath in May 2019. In summary, that judgment went against Mr

Maunder Taylor in both cases including a finding that the costs of works internally in flats to install heating and hot water systems was not payable by the leaseholders by way of a Service Charge (under the terms of the leases the landlord was not entitled to carry out works internally in the flats).

14. Triplark applied to the FTT for an order extending Mr Maunder Taylor's appointment at the block. That application was supported by some leaseholders and opposed by others. The opposing leaseholders again nominated Mr Wismayer as Manager. Following the judgment of Mrs Recorder McGrath in May 2019, Triplark changed their application by proposing an alternative Manager to replace Mr Maunder Taylor. The application came to a final hearing at the FTT in August 2019 and the FTT decided not to appoint either candidate and the management therefore reverted to Triplark."

15. It is necessary to understand certain aspects of that overview in a little more detail. The application in 2016 was made under section 24 of the Landlord and Tenant Act 1987 by a group of lessees supported by the Respondent. On 18th June 2016, the Tribunal appointed Mr Bruce Maunder-Taylor as Manager on an interim basis. At a further hearing on 18th July 2016, that order was varied to enhance Mr Maunder-Taylor's ability to deal with the heating and hot water project and on 24th September, Mr Maunder-Taylor was appointed as Manager by the Tribunal for a term of three years until 13th September 2019.

16. The consolidated proceedings came about as follows:

(a) On 10th February 2017, 12 tenants brought a High Court action against Mr Maunder-Taylor and the RTM Company (the First Action Tenants) seeking injunctive relief preventing Mr Maunder-Taylor from cutting off the supply of hot water and requiring him to restore the supply of central heating. They also sought damages and the recovery of payments made by way of service charge to Mr Maunder-Taylor and to the RTM Company which they said should not have been made.

(b) On 19th June 2017, Mr Maunder-Taylor commenced proceedings for service charge arrears in the county court against various tenants (the Second Action Tenants).

Those tenants counterclaimed for the recovery of payments made by service charge to Mr Maunder-Taylor and the RTM Company for mistaken payments which they said should not have been made.

(c) In December 2017 the claims made by and against the First and Second Action tenants were consolidated/ under Claim number D10CL409 in the county court. Judgment was handed down on 22nd May 2019 and is referred to in these proceedings as "the McGrath Judgment" and the subsequent order as "the McGrath Order." The claims are referred to as "the McGrath Proceedings."

17. By January 2019, the claims by the First and Second Action tenants against the RTM Company were settled by way of a Tomlin Order. The RTM Company agreed to pay the lessees £420,000 in respect of their claims against it together with £100,000 in respect of costs. The RTM withdrew its application under section 20ZA of the 1985 Act and agreed not to give any assistance to Mr Maunder-Taylor in the McGrath Proceedings and not to provide any information or documents. The tenants agreed to withdraw their objection to the dissolution of the RTM Company and it was dissolved on 26th February 2019.

*The McGrath Judgment*

18. The hearing of the McGrath Proceedings took place in April 2019. It took place over eight days and evidence was given by 13 lessees, Mr Wismayer, Mr Maunder-Taylor and his service charge accountant Stephen Bird. Expert evidence was given in M&E and costs. Judgment was handed down on 22nd May 2019 and decided, amongst other matters, that interim service charges were not recoverable unless and until proper notice had been given under the terms of the lease, that the leases made no provision for the accumulation of a reserve fund and that under the leases, the landlord had no right to recover the cost of replacing the apparatus within the flats (the internal works) as part of the service charge.

19. A summary of the judgment was given at paragraph 137 as follows:

"1. Mr Maunder Taylor, as Manager, is in breach of his obligation under clause 5(7) of the leases, to provide central heating to the first action tenants' Flats and they are entitled to damages and other further relief to be determined;

2. That it is appropriate to make a final injunction requiring Mr Maunder Taylor, as Manager, to maintain a supply of hot water to the first action tenants' Flats;

3. That the cost of the internal works are not recoverable as service charge;

4. That the requirements of section 20 of the 1985 Act were fulfilled in respect of the original design for the heating and hot water system; alternatively, that dispensation under section 20ZA of the 1985 Act is granted but only in respect of the boiler replacement works;

5. That a second consultation under section 20 of the 1985 Act was required in respect of the revised design for the common parts pipe work and that no dispensation of that requirement is granted; accordingly, those costs are limited to £250.00 from each leaseholder.

6. That the interim service charge costs from 1st July 2016 until 31st August 2017 are not payable until proper notice under clause 4(i) of the leases has been given;

7. For the avoidance of doubt, the leases make no provision for the accumulation of a reserve fund.

8. That it has not been proved that any service charges for the first period (up to and including the service charge year ending 30th June 2016) are recoverable.

9. That the first action tenants and second action tenants are entitled to recover the mistaken payments to the extent consistent with the above findings, to be agreed or in default of agreement for assessment by the court."

20. Additionally, a recital in the McGrath Order recorded that Mr Maunder-Taylor indicated to the Court that he would within 21 days amend the statements of accounts of each tenant to correctly reflect the findings of the Court on liability for service charges in the period concerned.

21. Finally, an order under section 20C was made in favour of the leaseholders who had been parties to the litigation in the McGrath Proceedings.

22. Following the McGrath Judgment, claims were issued by the Respondent on behalf of about 100 leaseholders who had not been parties to the McGrath Proceedings seeking a determination under section 20C in respect of costs incurred in that Action. Eventually a consent order was made in March 2020 in similar terms to that

made in the consolidated action. As a result Mr Maunder Taylor paid a settlement sum from which credits were made to service charge accounts.

23. Although a section 20C order was made in favour of most of the leases, a number do not benefit from such an order since they were neither parties to the Consolidated Act nor parties to the later application by the Respondent.

*The Martynski Decision*

24. Whilst the McGrath Proceedings were pending, Mr Maunder-Taylor had made an application to the Tribunal under section 27A in respect of the service charge year ending 30th June 2018 against all of the leaseholders. That application was ultimately decided in a reviewed decision of the Tribunal dated 10th March 2020 (the Martynski Decision) where decisions were made in respect of certain service charge expenses including decisions in respect of contributions to a reserve fund.

25. The Martynski Decision was appealed on the issue of reserve funds. The appeal was dismissed. The Upper Tribunal found that because Mr Maunder-Taylor had conceded in the McGrath Proceedings that the lease gave no power to collect contributions towards a reserve fund, he was bound by that concession and by the decision of the county court.

*The Management Order*

26. As indicated above, in August 2019, the FTT heard an application to vary the Management Order made by the Tribunal in 2016. It decided that the Order should be discharged and management therefore reverted to the Respondent. Mr Maunder-Taylor's appointment came to an end on 13th September 2019 but he continued to manage the Building on behalf of the Respondent until it appointed new managing agents (KMP) in December 2019.

*Further Proceedings*

27. In addition to this application that are further sets of ongoing proceedings. Firstly, in June 2022, the Respondent commenced county court claims for service charge arrears in respect of the years in which Mr Maunder-Taylor was the appointed

manager and further years when the Respondent resumed management. Those claims are made against a number of lessees who are also Applicants in this case including Mr Whale who gave evidence both in the McGrath Proceedings and before this Tribunal. The claims are not insubstantial and the amount sought, for example, against Mr Whale is £22,725.57. In March 2023, the Respondents applied to the county court to have the claims transferred to the Tribunal to be heard at the same time as this application. The Applicants in turn applied for the claims to be stayed. In the event, the county court refused to transfer the cases save for one Application. All of the claims including the transferred claim have been stayed.

28. Secondly, the Respondent has brought a High Court claim against a number of leaseholders, some of whom have settled, but the proceedings are being defended by 11 leaseholders, all of whom are Applicants in this case. The claim is for a declaration concerning the proper interpretation of the leases in respect of works to the interior of the flats relating to heating and hot water. The 11 flats are the only flats not connected to the new heating system.

29. Thirdly, the Respondent has commenced High Court proceedings for breach of trust and negligence against Mr Maunder-Taylor. The claim is brought by the Respondent as freeholder of the building and as the holder of interests in 35 flats (34 directly out of its freehold interest and 1 as long leaseholder) and originally was also said to have been brought as representative on behalf of all leaseholders of Northwood Hall who have the "same interest in parts of the claim brought by the Claimants as leaseholder." However, in June 2023 it was recorded that the Respondent was not acting as a representative for the leaseholders unless and until there was a further order of the Court.

30. Those three sets of proceedings are clearly intended by the Respondent to achieve certainty about the recoverability or otherwise of substantial service charge costs and damages. The claims against the lessees relate to similar costs which are the subject of this application and the outcome here will influence the further conduct of those proceedings.

31. During the course of the hearing Ms Betts made it clear that it is the Respondent's contention that where service charges were found not to have been payable during the period of Mr Maunder-Taylor's management, this was not the responsibility of the Respondent which was doing its best to recover such costs from him in the High Court proceedings. The issue of whether losses should be borne by Mr Maunder-Taylor (for whatever reason) or the Respondent or indeed the lessees is not before us in these proceedings. However, in a number of instances in the Scott schedule we have been asked to make specific findings which reflect the payability of items which it is said, are contested by Mr Maunder-Taylor.

32. Finally and separately, the Respondent has brought an FTT application under section 27A(3) of the 1985 Act for a determination whether the cost of specified future work would be recoverable under the leases of the building and whether such costs would be reasonably incurred and payable. The works are for the enhancement to the existing heating/hot water system, the replacement of (i) all flat entrance doors (ii) doors to meter cupboards (iii) communal fire doors and also communal fire stopping works. The indicative cost exceeds £2m.

**The Scope of these Proceedings**

33. This application is made under section 27A of the 1985 Act. Our only jurisdiction under that section is to decide the payability of service charges. At the hearing Mr Wismayer made it clear on behalf of the Applicants that he was not asking the Tribunal to decide whether specific amounts were payable by specific leaseholders. Instead, we were invited to make determinations on a number of principles which could then be applied in the treatment of the service charges for the years in question.

34. The scope of our section 27A jurisdiction was considered in *Williams and others v Aviva Investors Ground Rent GP Ltd and another* [2023] UKSC 6 which was recently applied at first instance concerning various properties at St George Wharf and Battersea Reach in London LON/00AY/LSC/2019/0330. The limits of our jurisdiction were explained at paragraphs 47 to 50 of that latter decision as follows.

> "47……. Before the Tribunal can decide an application under either section 27A(1) or (3) it must be satisfied that the question before it engages issues of

payability under section 18 of the 1985 Act relating to the contractual or statutory legitimacy of the service charge costs. It may not (per *Williams v Aviva*) make declarations solely about a landlord's management decisions. A tribunal will need to be satisfied that an application by either a landlord or a lessee gives sufficient information for the Tribunal to consider that it would in due course be able to make a determination about payability.

48. Even if an application meets that threshold, then on behalf of the respondents it is said that there is a burden on the applicants to demonstrate that they have a prima facie case in support of the application. We agree, but consider that what amounts to a prima facie case in such a broad jurisdiction will vary from application to application. In this case, we consider that, as a minimum, the lessees must show:

(a) That their challenge is not a challenge simply to the way in which a landlord has reached its management decisions. That is because such a challenge would not engage section 27A at all;

(b) That their challenge sufficiently articulates an alternative course for the landlord so that a Tribunal could consider that, if that alternative course were adopted, it would be reasonably arguable that costs incurred would be saved. That is not to say that the burden lies entirely on the lessees to establish unreasonableness: but they must make a coherent case at the outset.

49. If the Tribunal could be satisfied that its jurisdiction was engaged then it would go on to decide the contractual and/or statutory legitimacy of the costs being incurred, the reasonableness of the costs, and ultimately their payability…….

35. On that basis, we are wholly satisfied that the burden lies on the Applicants to demonstrate both (i) that the Tribunal's jurisdiction is engaged by these applications and (ii) that they have made out a prima facie case on the challenge to payability. If they have done so, then it is for the landlord to meet those allegations as per

*Yorkbrook Investments Ltd v Batten* (1986) 18 HLR 25 and *Enterprise Home Developments LLP v Adam* [2020] UKUT 151 (LC).

36. A number of the matters raised for determination by the Applicants fail to meet those tests. Firstly, we will not consider service charges prior to year-end 30th June 2012. We have no evidence of the conduct of the service charge accounts before that date and insofar as we are asked to take that prior period into account, we decline to do so. Even if those years had been properly brought into issue (which we doubt) then they may well have been susceptible to being struck out either on the basis of the *Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013* rule 9(d)(matters considered to be frivolous, vexatious or an abuse or process) or 9(e) (there being no reasonable prospect of the Applicants' case succeeding).

37. Secondly, during the course of the hearing Mr Wismayer suggested that the Tribunal should consider whether the condition of Northwood Hall was such that we could be satisfied that there had been failures to comply with the obligations under the leases, in particular to keep the property in repair. This is not part of our jurisdiction. Although the Tribunal can consider whether there should be an equitable set-off where breaches of repairing covenants are established, it does not do so on a routine basis and a fully particularised and evidenced case would have to be made by the Applicants before we could do so. In this case it was suggested that the Tribunal should inspect the property and form a view of its condition. That is certainly not part of our remit. The Tribunal therefore declines to consider any allegation relating to the condition of the building.

38. Thirdly, Mr Wismayer was very critical of a number of management decisions made by and on behalf of the Respondent during the course of the last four years. The Tribunal will take no account of that criticism unless the result of those decisions impacts on the payability of the service charges.

39. Finally, we accept Ms Betts' submission that our jurisdiction in these proceedings is limited to determining the payability and reasonableness of service charges and does not extend to granting positive relief in respect of any sums found to have been

overpaid or not recoverable (*Brett v Harlow Court Ltd* [2022] UKUT 52 and *Termhouse (Clarenden Court) Management Ltd v Al Balha* [2021] EWCA Civ 1881).

**The applicability of the McGrath Judgment to non-parties**

40. In the statement of case prepared by Mr Wismayer, the Applicants seek a determination that "the findings in the McGrath Judgment and Order and those in the Upper Tribunal decision by Judge Rodger relating to the interpretation and application of clause 4(2) of the leases, the power to establish and maintain reserve funds, the validity of demand for, and payability of, service charges and recoverability of costs incurred in respect of the service charge account generally should be applied by the Tribunal for the benefit of all leaseholders at Northwood Hall."

41. Were that finding to be made it is said by the Applicants that the effect would be as follows:

(a) That none of the costs incurred by either the RTM Company or by the Manager for works inside the leaseholders' flats (the internal works), could be taken into account when calculating any demand for maintenance charge in any financial year.

(b) That because the costs of the horizontal elements of the heating renewal scheme should have been the subject of consultation under section 20 of the Act but were not then apart from the costs of installing the new boilers (about £150,000), no costs incurred in the heating renewal scheme could be recovered from any leaseholder under the service charge.

(c) That the costs of installing the new boilers in 2014 would not be recoverable under the service charge for any leaseholder because the demands on which the RTM Company then relied failed to apply the provisions of clause 4(2),

(d) That in the seven financial years down to 30 June 2018, none of the total of £5,253,517 costs incurred in that period in the course of the heating renewal scheme, were recoverable under the service charge.

42. The Respondent does not accept either that this summary accurately reflects the McGrath Order nor that it is open to the Tribunal to simply apply the findings and

consequences of the McGrath Order to non-parties in the proceedings. Ms Betts pointed out that the Applicants had given no legal basis on which such a determination could be made. Additionally, she said that the McGrath Order operated *in personam* and not *in rem*. In support of this proposition, she referred the Tribunal to *Ward v Savill* [2021] EWCA Civ 1378. The definition of the difference between the two concepts is found at paragraph 52 where reference is made to the judgment of Lord Mance in *Pattni v Ali* as follows:

> "For present purposes, a judgment *in rem*… is a judgment by a court ….., adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it). The distinction is shortly and accurately put in Stroud's Judicial Dictionary, 7th ed (2006) at p 2029, cited (in an earlier edition) by Deemster Kerruish:
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> > A judgment in personam binds only the parties to the proceedings as distinguished from one in rem which fixes the status of the matter in litigation once for all, and concludes all persons…'".

43. More generally, it was observed in the case that the number of categories of judgments *in rem* are few because a judgment *in rem* would bind others who were not parties in the proceedings despite their not having been afforded the opportunity of making submissions or producing evidence. At paragraph 73-75 of *Ward v Savill*, the Chancellor observed:

> "73. …..It is precisely because a judgment in rem is conclusive against the world, that the circumstances in which Parliament grants jurisdiction to make such judgments are rare. As Hickinbottom J said in *R(PM) v Hertfordshire CC* at [42]:
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> > "Given the overriding nature of judgments in rem, the circumstances in which a court or tribunal is given such a power or jurisdiction are understandably rare, and usually granted in the clearest of terms."
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> 74. Of course, the present case does not involve consideration of whether Parliament has conferred statutory jurisdiction to grant a judgment in rem but the same concern expressed by Mr Justice Hickinbottom, identified, to avoid procedural injustice through a party being bound by a judgment without an opportunity to be heard, should dictate a similarly cautious approach to the

question whether, as a matter of common law or in equity, a judgment takes effect in rem or not.

75. The mere fact that the judgment involves declarations as to proprietary rights or as to a party's beneficial interest cannot without more make it in rem ....."

44. In closing the Applicants submitted that the question whether the McGrath Judgment was *in rem* or not was irrelevant. They argue that the Tribunal has jurisdiction to make findings under section 27A which, if made, would have consequences equivalent to those of the McGrath Order.

45. We do not accept the Applicants' submissions. We do not consider the McGrath Order to be binding *in rem*. Although determinations about service charge cases relate to service charge funds which are held in trust for all leaseholders that is insufficient to justify treating them as having been made *in rem*. The creation and maintenance of the statutory trust depends, in the first instance, on the terms of the individual leases between the parties. In the county court proceedings, the action was brought against individual lessees and the claim was based on an allegation that those leaseholders were in breach of their leases by their failure to pay specified service charges.

46. The McGrath Judgment was made in the county court and (save for the section 20ZA decision) was not a Tribunal case. The rules relating to lead cases in the county court were not engaged. The treatment of lead cases in the Tribunal is governed by rules 24 and 25 of the Procedural regulations. Neither rule applies in this case and nor do they apply generally because specific procedural steps must be taken for them to be engaged. Very importantly all parties and potential parties must be actively involved in order to preserve procedural fairness.

47. It appears that numerous leaseholders have paid the service charges concerned in the judgment without demur. Section 27A(4)(a) provides that no application under section 27A(1) may be made in respect of a matter which has been agreed or admitted by the tenant. The mere fact that payment has been made will not displace

the Tribunal's jurisdiction. However, if a leaseholder who had paid service charges, were to make an application under section 27A in reliance on the McGrath Judgment, they would have to establish that (as a matter of fact) the payment did not represent a true agreement to finally pay. Leaseholders pay service charges which might be the subject of challenge for numerous reasons. Sometimes they see a greater benefit to paying than in reliance on their strict rights under the contract or statute. There is no evidence at all before the Tribunal that most of the leaseholders not previously involved in litigation, now wish to challenge the service charges. If they did wish to do so they would have to bring their own application.

48. We acknowledge that a number of the Applicants in this case are "new" Applicants. On the assumption that they have not agreed that costs are payable they could be entitled to the benefit of both the McGrath and Martynski Orders. However, we have no evidence on which to base such an assumption, for example we have not heard of continued objections and whether if payment has been made why that that should not amount to an agreement and if they have not paid not, why not? In our view because of the passage of time since the McGrath and Martynski determinations, the better inference is that there has been acquiescence on payability however we make no factual finding on this, see para 51 below.

**The RTM Years and The Tomlin Order**

49. Part of the case on behalf of the Applicants would depend upon the Tribunal disregarding the *Tomlin* order made between the First and Second Action tenants and the RTM in respect of the claims numbered D10CL409, D10CL559 and the counterclaim in the Second Action. We do not regard this as permissible. The Tribunal may not go behind that agreement the terms of which provided at clause 4 that: "The payment of the Settlement Sum is made by the RTM Company (and will be accepted by the Tenants) in full and final settlement of the RTM Company's liability to the Tenants in the Actions to repay the Mistaken Payments or give compensation and/or damages for breach of trust in the amount of the Mistaken Payments, plus interest and costs."

50. We accept Ms Betts' contention that the relevant Tenants cannot start a new claim against the RTM Company. Once a claim or an issue in respect of a claim has been

compromised, a party may not seek to re-litigate the same claim or issue: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160. What is more, our observations above about section 27A(4) apply equally to the Tomlin Order. As observed by Judge Gerald sitting in the Upper Tribunal in *Jam Factory v Bond* [2014] UKUT 0443 (LC) "the bundle of contractual and statutory rights and obligations relating to the disputed arrears" are replaced by "a new singular contractual obligation…." There is no evidence at all that the agreement was not final and we consider that it displaces the Tribunal's jurisdiction under section 27A.

51. So far as the "new" Applicants are concerned, even if the Tribunal had reached a different conclusion about the binding nature of the Tomlin Order we consider that in any event, the evidence before the Tribunal in respect of the years 2011-2017 is insufficient to enable us to make the additional determinations sought by the Applicants. We accept Ms Betts' submission that the Applicants have made sweeping but unsubstantiated allegations about the RTM Company's compliance with the lease. There is insufficient evidence for the Tribunal to proceed to a determination, we refer to our observations at paragraphs 33 to 35 and furthermore that part of the claim may have been susceptible to being struck out on the basis of *Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013* 9(e) that there is no reasonable prospect of the Applicants' cases succeeding.

**The Principles of Construction**

52. Before turning to the specific items in dispute it is worth rehearsing the principles which underly the construction of leases. In *89 Holland Park (Management) Limited v Dell* [2023] EWCA Civ 1460, Lady Justice Falk described those principles, and we respectfully adopt her analysis. At paragraph 18 she said:

> "18. There was no dispute about the principles to apply. The leading authority on the construction of leases is *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. As Lord Neuberger explained at [15]:
>
> > "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the

language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…"

19. Lord Neuberger went on to emphasise seven factors, of which four are particularly relevant. Lord Neuberger's third and fourth points, at [19] and [20], were about commercial common sense. That concept may not be invoked retrospectively. The natural language should not be departed from simply because a contract has worked out badly, or even disastrously, for one of the parties. Further, while commercial common sense is a very important factor, the court should be "very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight". The aim is to identify what the parties agreed, not what the court thinks that they should have agreed.

……

21. The seventh point is specific to service charges (although Lord Neuberger added that it did not help resolve the issue raised in that case):

"23. Seventhly, reference was made in argument to service charge clauses being construed 'restrictively'. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl*

*Cadogan* [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not 'bring within the general words of a service charge clause anything which does not clearly belong there'…"

22. There appears to be an element of tension between the principle that service charge clauses are not subject to any special rule of interpretation and Lord Neuberger's approval of Rix LJ's statement in *McHale v Earl Cadogan*. However, I consider that this is more apparent than real. It must be borne in mind that leases are typically long-term obligations with the potential for significant future liabilities. It is inherently unlikely that parties entering into such a transaction would intend to commit themselves to obligations that are neither expressly spelled out nor of a nature that clearly fall within general words, read in their context."

**The Leases**

53. The way in which the service charge is to be administered is set out in Clause 4 of the lease. Clause 4(2) provides as follows:

"4(2)(a) [*The Lessee shall*] pay to the Lessors…such percentage as is specified in Part 7 of the Second Schedule hereto of the expenditure incurred by the Lessors in carrying out their obligations as set out in Clause 5 hereof …. such payment being hereinafter referred to as 'the maintenance charge'

(b) The yearly sum as specified in Part 6 of the Second Schedule shall be paid as a contribution towards the said maintenance charge and such sum shall be paid to the Lessors by equal quarterly instalments and in advance on the usual quarter days in each year….

(c) As soon as practicable after the end of each Lessors' financial year the Lessors shall furnish to the Lessee an account of the maintenance charge payable by the Lessee for that year due credit being given therein for the advance payment by the Lessee in respect of the said financial year and upon the furnishing of such account there shall be paid by the Lessee to the Lessors any balance or difference found to be payable or there shall be allowed by the Lessors to the Lessee any amount which may have been overpaid by the Lessee by way of advance payment for the following year as the case may require.

(d) The amount of the said maintenance charge shall be ascertained and certified annually by certificate signed by the Lessor or their Agents as soon after the end of the Lessors' financial year as may be practicable and shall relate to such years in manner hereinafter mentioned.
(e) The expression 'the Lessors' financial year' shall mean the period from the First day of July in each and every year to the Thirtieth day of June in the following year or such other annual period as the Lessors may in their sole discretion from time to time determine as being that in which the accounts of the Lessors either generally or relating to the Building shall be made out.
(f) A copy of the certificate for each such financial year shall be available for inspection by the Lessee .....
(g) The certificate shall contain a fair summary of the Lessors' said expenditure and outgoings as incurred in the financial year and the certificate shall (save in the case of manifest error) be final and binding upon the Lessee.
(h) The expenditure incurred by the lessors in carrying out their obligations as set out in clause 5 hereof shall be deemed to include not only the actual expenditure incurred during the Lessors' financial year but also such reasonable anticipated expenditure, which is of a periodic or recurring nature as the lessors or their managing agents, may, in their sole discretion, allocate to the financial year in question as being fair and reasonable in the circumstances.
(i) It is hereby further specifically provided that at the end of each financial year of the term hereby granted the charge as specified in Part 6 of the Second Schedule hereof shall be revised and adjusted in the light of the actual expenditure incurred by the lessors in carrying out their obligations under clause 5 hereof for the previous financial year of the term and the Lessors, or, in the alternative, the Lessors Managing agents shall at the end of the financial year of the term serve upon the Lessee a notice specifying that such revised and adjusted sum shall be deemed to be incorporated in Part 6 of the Second Schedule here too, and such sum shall thenceforth be payable yearly by the lessee in accordance with clause 4(2)(b)....."

54. In the McGrath Proceedings, two matters were decided in respect of this clause. Firstly, it was decided that notices served in purported discharge of the requirements

in clause 4(2)(e) were invalid and for that reason and until proper notice was given, the interim charges were not recoverable. The second matter related to the sufficiency of compliance with clauses 4(2)(c) and (d). The clauses were described as follows:

> "The requirement of clause 4(2)(c) is the provision to each lessee of an account of the maintenance charge payable by them showing credit for the advance payment and making a reconciliation. This then gives rise either to a duty to pay the balance or a credit towards the next advance payment. The requirement of clause 4(2)(d) is wholly different. It is a requirement to produce evidence of the maintenance charge of each year certified by the lessor or their agent. By clause 4(2)(f) a copy of the certificate is to be made available for inspection and by clause 4(2)(g) is to contain a fair summary of expenditure and outgoings."

Importantly, the McGrath Judgment found the accounts prepared by Mr Maunder-Taylor's accountant to be compliant.

55. On behalf of the Applicants, it is contended that (and here we paraphrase) an endemic failure to comply with the provisions of clause 4(2) of the Lease has the consequence that service charges simply cannot be recovered. The Respondent says that nothing within the lease makes time of the essence and a failure to comply with the notice provisions in clause 4(2) can be remedied going forward.

56. In closing the Applicants made it clear that they were not saying that a single failure to give notice under clause 4(2)(i) could not be made good nor that several failures would be fatal and could be remedied if the appropriate steps were implemented.

57. The way in which clause 4 works is by specifying two types of payment that must be made by a lessee. One payment is the sum identified in clause 4(2)(b) in Part 6 (or 4 in some leases) of schedule 2 to the lease which is to be paid by four quarterly instalments due on the usual quarter days. That sum has been described as an "interim" payment. It is expressed as an annual amount. By clause 4(i) that sum can be revised and adjusted to reflect the previous years' actual expenditure and upon appropriate notice having been given the new sum becomes incorporated into the lease and is payable going forward. The other payment is a balancing payment

identified in clause 4(2)(c) which becomes payable in accordance with that paragraph when an adjusted account is provided to the lessee by the lessor.

58. The Applicants say that successive failures to comply with clause 4(2) generally and especially the failure to give notice under 4(2)(i) "stretch back into the past as far as the records as available" which they say is 2006 and by inference right back to 1998. Leaving aside the question of the impact of such conduct would have on the accounts, the Tribunal is unable to make a finding of such wholesale failure. In the McGrath Judgment it was concluded that it had not been proved that any service charges for the first period (up to and including the service charge year ending 30th June 2016) were recoverable because no evidence had been produced. It was also concluded that the interim service charge costs from 1st July 2016 until 31st August 2017 (the last day before the claim was issued) were not payable until proper notice under clause 4(i) had been given. Finally, it was found that the accounts prepared by Mr Bird (Mr Maunder-Taylor's accountant) satisfied the requirements of clause 4(2). All of this is a far cry from demonstrating a "catalogue of sustained, successive failures to comply with clause 4(2)" as asserted by the Applicants.

59. So far as the question of whether a failure to comply with the mechanics in the lease could have had the effect contended for by the Applicants, we find that it could not. There is nothing within the wording of clause 4(2) which can support the argument that a failure to comply with its requirements in one financial year breaks the sequence and means that the lessors are not able to prove the opening balance brought forward on the account nor that if the failure extends to several years, that they are then not able to re-establish an enforceable entitlement to payment.

60. Clause 4(2) imposes a requirement on the lessor to provide certification of the service charge expenditure for each year not for successive years. The requirement to provide an adjusted account to the lessee under the lease is a different matter which does not impact on the ability of the landlord to rely upon clause 4(2) as a wider basis for the recovery of the service charge which is crystalised when final accounts are provided in accordance with clause 4(2)(c).

61. On a separate matter the Applicants contend, and we agree that clause 4(2)(b) requires a lessee to pay the interim service charges by equal quarterly instalments on the usual quarter days in each year. However, there is no requirement in the lease which specifies when demands may be served or what should be the form and content of such demands. We do not consider that reference in demands to modern quarter days renders them defective. The quarterly charge would remain payable in accordance with the lease. Furthermore, it is our view that in accordance with the principles set out in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19 we are satisfied that a reasonable recipient of the demands would understand that the inclusion of the modern rather than the usual quarter dates did not vary the terms of clause 4(d).

62. Finally on this point we do not consider that time is of the essence in these leases. We accept Ms Betts' submissions in this respect and agree her reliance upon *West Central Investments Ltd v Borovik* [1977] 1 EGLR 29 where a service charge was still payable even though the landlord is four years late in providing accounts. Although clause 4(2)(c) requires an account of the maintenance charge to be provided "as soon as practicable" after the end of each financial year, "practicality" will depend on the circumstances of each case and here we agree with Mr Burns that the accounts were so provided. The relevant dates of service of the of the clause 4(2)(c) notice were: 26th April 2022 for the year ending 30th June 2021; 11th February 2022 for the year ending 30th June 2020; 3rd August 2020 and re-served on 13th April 2022 for the year ending 30th June 2019.

**Legal Costs**

63. For the Respondent, it is contended that they are entitled to claim legal costs as part of the service charge. For the Applicant it is said that legal costs are not recoverable under the terms of the lease.

64. During the course of the hearing it was suggested that the fact the county court and the Tribunal had made orders under section 20C of the 1985, preventing the landlord from recovering their cost indicated that the leases supported their right to do so. The Tribunal rejects that contention. Neither the Court nor the Tribunal construed the terms of the lease before deciding whether to make a section 20C order and the

jurisdiction to make a section 20C is not predicated on a contractual right to recover legal costs.

65. On the other hand, in 2016, Mr Maunder-Taylor applied the Tribunal for a variation in the management order because of an apprehension that legal costs may not be recoverable under the terms of the lease. The Tribunal agreed to vary the order and added a clause as follows:

> "The Manager shall be entitled to an indemnity for his own costs reasonably incurred and for any adverse costs order out of the service charge account, and such costs and adverse costs shall be payable by the Lessees as a service charge according to the provisions of the Leases and this Order."

66. The Applicants submit that the reason the Tribunal made such provision was that they had been persuaded that the lease did not make any such provision. Whether that is the case or not, we consider that we should revisit the construction of the lease ourselves. The Respondents rely on clause 5(11) of the lease. This provides:

> "The Lessor will themselves or alternatively at their discretion employ a firm of Managing Agents to manage the Building and discharge all proper fees salaries charges and expenses payable to themselves or to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents in respect of the Building or any parts thereof and the ancillary costs in connection therewith."

67. No specific mention is made of solicitors, lawyers or legal advice. Ms Betts contends that there is no general statement of principle that requires express reference to litigation or lawyers in order for legal costs to be recovered, although she accepts that covenants ought to be expressed in "clear and unambiguous" terms. (*Geyfords v O'Sullivan et al* [2015] UKUT 683 (LC). She submits and we agree that it is unhelpful to compare the wording of leases in decided cases with the clause under consideration. However, she accepts that the wording of clause 5(11) is in near identical terms to that considered by the Court of Appeal in *Sella House v Mears* (1988) 21 H.L.R. 147 where the clause in question was found not to support the recovery of legal costs but she seeks to distinguish the position because clause 5(11)

allows the recovery of "ancillary costs." In her submission legal costs fall within the ambit of those general words.

68. On behalf of the Applicants it is submitted that *Sella House* decided that "costs of computing and collecting rents" is a cost of management and does not include legal costs and that "ancillary costs" are costs ancillary (in a supplementary or in a support role) to the "costs of computing and collecting rents" and must therefore also be a cost of management. Therefore, they contend that clause 5(11) does not cover legal costs. They specifically drew the Tribunal's attention to the judgment of Taylor LJ in agreeing with the judgment of Dillon LJ:

> "I agree. I add only a few words on the issue whether legal fees can be included in the service charge under this lease. Nowhere in Clause 5(4)(j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j)(i) is concerned with management. [In (j)(ii) it is with maintenance, safety and administration.] On the respondents argument a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord's legal costs of suing his co-tenants, if they were all defaulters. For my
>
> part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties. Accordingly, I agree with my Lord that the terms of paragraph (j) of clause 5(4) do not extend to cover legal costs in the service charge."

69. Following the hearing the Tribunal asked for the parties' submissions on whether the decision in the *Holland Park* case impacted on the issue of the recoverability of legal costs. In Ms Betts' analysis of the case she observed that although the Court of Appeal had found that the relevant clause did not support the recovery of legal costs in general, they also said that it was clear that each case must be decided on its own facts. This she submitted gives further support to the starting point that comparisons with leases in other cases do not provide a reliable guide.

70. In our view clause 5(11) does not give the landlord the right to recover legal costs as part of the service charge. In reaching this decision we have had regard to the following:

(a) In our view the clear wording of the first part of the clause is to allow the landlord to engage a managing agent and the clear wording of the second part of the clause is to deal with the mechanics of paying for that management service. Hence, the landlord may "discharge all proper fees salaries charges and expenses payable to themselves or such agents or such other person who may be managing the Building…"

(b) The third part of the clause extends the power to specifically make payment for those management services to include "the cost of computing and collecting the rents…" and "the ancillary costs in connection therewith." In our view the ancillary costs could properly include, for example, a book-keeper's fee or an accountant's fee which would relate directly to the computation and collection of the rents. We do not consider it can support the recovery of a lawyer's fee which would only be incurred where a lessee or lessees are in default. This is neither mentioned nor can be inferred.

(c) There is no mention of solicitors or other legal professionals. In our view that is very simply because the clause is directed at the routine costs of management. Separate and specific provision for dealing with the recovery of arrears or other contentious matters would be required.

(d) As observed by Lord Neuberger in *Arnold v Britten,* the natural language should not be departed from simply because a contract has worked out badly, or even disastrously, for one of the parties. The aim is to identify what the parties agreed, not what the court thinks that they should have agreed.

71. In reaching this conclusion we considered whether the general costs of legal advice on the management of the Building could be recovered by the landlord under clause 5(11)). We decided they could not. There is no justification for giving the words "computing and collecting" a wider meaning. On the basis of our analysis above, the wording of clause 5(11) is not general, in fact it is very restrictive and is limited to the narrow categories of cost mentioned in the previous paragraph. It does not extend even to routine legal advice.

**Accountancy Project Work**

72. This relates to the work required to reconcile the accounting records following the McGrath Judgment and the transition of management from Mr Maunder-Taylor to KMP. This is described in Mr Mozes' Third Statement as the Accountancy Project Fee. Mr Mozes explained in his statement that after some initial work on the accounts following the handover it became clear that considerable work was needed. It was agreed with the Respondent that the accountants would have to undertake additional work which would be charged on an hourly basis. The accountancy work and the accountancy project work were separated in the accounts. The project work was billed in a number tranches as follows: invoice dated 20th April 2020 in the sum of £2,940 (inc VAT), part of an invoice dated 15th January 2021 for £3,600 (inc VAT), invoice dated 12th April 2021 in the sum of £10,180.20 (inc VAT), invoice dated 26th July 2021 in the sum of £7,935 (inc VAT), invoice dated 21st January 2022 in the sum of £21,750 (inc VAT), invoice dated 23rd March 2022 in the sum of £6,256.80 (inc VAT) and invoice dated 14 February 2022 in the sum of £4,200 (inc VAT). These sums are split between 2021 being £32,208 and 2020 being £24,655.

73. On behalf of the Applicants it is said that sums incurred in checking, examining and reconciling the accounts previously prepared by and on behalf of Mr Maunder-Taylor are not recoverable under the lease. As already related, clause 5(11) permits the Respondent to "employ a firm of Managing Agents to manage the Building and discharge all proper fees salaries and expenses payable to themselves or to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents in respect of the Building or any parts thereof and the ancillary costs in connection therewith." The Applicants submit that the transition from one Manager to another should not give rise to costs which could not be regarded as a relevant cost within the meaning of section 18 of the 1985 Act. In their submission, the Respondent should look to Mr Maunder-Taylor for recompense rather than passing the costs onto the lessees. In response the Respondent contends that once it is accepted that accountancy work is recoverable under clause 5(11) then it is a question of whether the work is reasonable.

74. We are satisfied that general accountancy work is recoverable under clause 5(11) and it was not part of the Applicants' case that the lease did not allow those costs. As already observed, the costs that are recoverable under 5(11) are costs associated with

managing the building and therefore the question we have to answer is whether the work done by Melinek Fine on the project can be classified as such. On the one hand it could be said that the work relates to management as its purpose was to ensure that the correct costs were passed onto the lessees and that the accounts were as accurate as possible. On the other hand, we also have to consider whether work on the accounts that arises not in the normal course of management, but because of the serious failures of management, can be a cost that can properly be passed onto the lessees under the terms of the lease?

75. On balance we consider that the cost does fall within clause 5(11). We have no doubt that accountancy costs fall within the contemplation of the clause and although the expenditure can be characterised as being out of the ordinary, that does not change the nature of the expenditure. Whilst we have some sympathy with the position of the Applicants, we consider that their remedy lies in a claim against the person or persons they say are responsible for the failures in management which gave rise to the additional cost. Although the Tribunal can apply the rules of equitable set-off to mitigate service charge costs where failures of management or breach of terms of the lease are alleged, it will only do so in a straightforward case where formal pleadings, discovery etc, are not required. This is not a straightforward case.

76. Finally on this point, we are satisfied that the sums claimed are reasonable. It is clear from the evidence that the work involved in reconstituting the accounts was onerous and time consuming. There was no challenge to the amounts claimed in respect of the sums charged for the project work nor were alternative costs proposed or evidenced.

**Section 20B**

77. Compliance with the provisions of section 20B of the 1985 was raised in the statements of case but not addressed at the hearing. In our view there is no substance in the allegations that there was no compliance with section 20B. So far as the RTM years are concerned the point is academic because of our findings in respect of the Tomlin Order and other proceedings. In respect of more recent years we accept Ms Betts' submission to the effect that compliance was unnecessary either because the

final demands did not exceed the interim demands or that as a matter of fact relevant notice had been given under section 20B(2).

**The Reserve Fund**

78. It is necessary to make some preliminary observations about the reserve fund before dealing with the individual items in dispute and identified in the Scott Schedule. Firstly, there has been no final determination on the question of whether a reserve fund may be collected under the terms of the lease. We have not been asked to make that determination. However, as already noted, the parties in the McGrath Proceedings agreed that Mr Maunder Taylor could not collect a reserve fund and the Upper Tribunal found that it was not possible for the parties, or the Tribunal to go behind that concession.

79. The second point is that the Scott Schedule includes disputes about sums paid from the reserve funds in the Right to Manage years. As we have already found, those Applicants who were first and second action leaseholders cannot go behind the Tomlin Order which is a final settlement for those years. Additionally, we have taken the view that we cannot make findings in respect of those years for the other Applicants in these proceedings for the reasons set out in paragraph 50.

80. Thirdly, in 2021, all unspent amounts held in reserve for diverse purposes totalling £2,920,500 were transferred to the General Reserves giving a balance as at 30th June 2021 of £3,309,749. In 2022 the sum of £3,001,967 was credited to the service charge account leaving a balance of unspent reserves of £307,782. The sum credited to the service charge account purportedly included two demands for £200,000. One original charged to the general reserve in 2018 and the other charged to the general reserve in 2019. This cannot be correct, and the sum transferred included the unspent reserves plus only one sum of £200,000 and not the unspent reserves plus £400,000. The balance of £307,782 in unspent general reserve therefore includes only one of the demands for £200,000 or neither if the general reserve balance includes a series of accumulations from earlier periods. The Respondent's evidence was that the Reserve Fund credit of unspent reserves included the £200,000 from 2018 and that the £200,000 demanded in 2019 formed part of the potential

allocation associated with pipe end works of £307,782. The respective movements in the Reserve Fund allocations are set out in Appendix IIA and Appendix IIB.

81. It is part of the Applicants' case that the transfer to the General Reserves ought to have been implemented earlier and ought to have been better communicated to the lessees. There is some force in the latter complaint, but we do not consider that it impacts on the issues before the Tribunal in this case. However, so far as timing is concerned we accept Mr Burns' assessment that the decision not to transfer earlier was a judgement call which was re-addressed within the period of 10 months and which he regarded in the circumstances as acceptable.

82. Finally, the sum transferred to the General Reserves has been described by the Respondent as "a loan." It does not include any part of the reserves that have actually been expended. We anticipate that this description has been adopted by the Respondent because of the ongoing litigation with Mr Maunder-Taylor. As previously indicated, we are not deciding how wrongly incurred service charge costs (whether expended or unexpended) are to be treated at the end of the term of management under section 24 of the 1987 Act and in particular we are not deciding where liability lies for any shortfall. That question will remain outstanding. The ambit of this determination is simply to decide which service charge items are payable and which are not.

**Items in Dispute**

83. Our decisions on the items in dispute are set out in Appendix I which follows the same numbering as the final Scott Schedule provided by the parties. On occasion reference is made to our decisions on matter of principle already set out.

84. We have made specific determinations in respect of all items including the financial year ending on 30th June 2017. We have not made specific determinations in respect of any item in previous years for the following reasons:

    (a) Our conclusions in paragraphs 49 to 51 of this decision.
    (b) It is said by the Applicants that items challenged during the period were subject to the McGrath Judgment.

(c) No specific evidence was adduced in respect of other costs.

(d) Although we acknowledge that the Applicants contend that they are entitled to credits for costs incurred during those years which have not been reimbursed, that is not a matter within the jurisdiction of section 27A.

Finally, it is part of the Applicants' case that the claim for arrears include amounts that are pre-2016 arrears. As we have made it clear we do not make any specific determinations on those items. However, for the avoidance of doubt we note Mr Burn's conclusions in his reports that pre-2016 amounts are not included within the arrears claimed by the Respondent and that Triplark did not receive and is not in possession of any funds which were collected as service charge/reserve fund by the RTM Company.

**Mr Burns**

85. In reaching our conclusions in this case we have been greatly assisted by the evidence of Mr Burns. He is a chartered Accountant with over 30 years' experience. Throughout that time has been involved with forensic accounting/litigation support work. Is head of Fisher Forensic which is the specialist Forensic Accounting Department for HW Fisher and Company. He has provided expert evidence in Court on over 60 occasions including the High Court and the International Court of Arbitration. He acts as an Expert Witness in respect of about 30 new cases each year where the quantum involved ranges from tens of thousands to millions of pounds. He receives appointments from the President of the Institute of Chartered Accounts in England and Wales.

86. In his report dated 18th October 2023, Mr Burns deals comprehensively with the accountancy issues raised by the parties. His examination of the underlying evidence for the accounts relating to the years in dispute was meticulous. Ultimately his conclusions were largely unchallenged. We are grateful for his assistance in this matter.

**Allegations of False Accounting**

87. Throughout the course of the application, serious allegations were made by Mr Wismayer on behalf of the Applicants. Those allegations were repeated on numerous occasions and include allegations of fraud and dishonesty and false accounting. The allegations were maintained until part way through the hearing when, during Mr Wismayer's cross examination of Mr Burns, he abruptly withdrew them.

88. The Tribunal deprecates the language used by Mr Wismayer and his continued reliance on unsubstantiated allegations until well into the final hearing of the case. The more serious that an allegation is, the higher the standard of probity that is required. We have seen no evidence to justify the allegations made. We appreciate the strength of feeling in this case and acknowledge that the disputes about the service charges and the hot water and heating system are still not resolved. We also take the view that the timing of the county court proceedings against some of the Applicants in this case was bound to inflame a very difficult and delicate situation. However, none of this can excuse the manner in which allegations of dishonesty have been framed. The allegations of dishonesty and false accounting were totally without merit.

89. Mr Burns' expert report comprehensively dealt with the accounting disputes between the parties. At the hearing and on behalf of the Applicants Mr Wismayer described the report as one of the most impressive he had seen and that it was "up there with the best." At paragraph 10 of his report, Mr Burns dealt with the claims of false accounting, focusing in particular on the dispute about how balances within the accounts ought to have been applied. His conclusion was that "I do not consider that this is tantamount to "false accounting" or "patently false accounting" and that the correct treatment has subsequently been included per the 2022 accounts. Per the measures included within section 10.4 (of Mr Burns' account) I am not aware of any "intention to conceal or falsify information or any motive of gain or intent to cause loss." The Tribunal accepts that conclusion in its entirety.

**Conclusion**

90. In conclusion, our findings on the payability of the items in dispute are based on the principles set out in the body of this decision and the decisions recorded in Appendix I. In the light of our decision that legal costs are not recoverable under the terms of

the leases we do not strictly need to consider the application under section 20C but as observed, that jurisdiction is free-standing and if the Applicants wish nonetheless to seek a section 20C order they must lodge written submissions within 14 days of receipt of this decision which must be copied to the Respondent. The Respondent will then have 14 days to lodge submissions in response.

Judge Siobhan McGrath