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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference No:	**CHI/00HB/LSC/2015/0089**
Property:	**Queen Square Apartments, Bell Avenue, Bristol, BS1 4AP**
Applicants:	**Elizabeth Kate Peddle and Ian Alexander Smith, both of Apartment 25 and 23 other applicants**

Appearing in person and with Mark Bird (Apartment No 4)

Respondent:	**Westmark (Lettings) Ltd**
Represented by:	**Mr Justin Bates, of Counsel**
Instructed by:	**Nabarro LLP, Solicitors**
Second Respondent:	**Bedell Corporate Trustee and Atrium Trustees Ltd as Trustees of EPIC (Colmore Row) Unit Trust**
Represented by:	**Mr Robert Hall, of EPAM, Managing Agent**
Instructed by:	**Veale Wasbrough Vizards, Solicitors**
Third Respondent:	**Queen Square (Bristol) Residential Management Company Ltd (No Appearance or Representation)**
Application type:	**For a determination of liability to pay and reasonableness of service charges, section 27A Landlord and Tenant Act 1985; for an order under section 20C Landlord and Tenant Act 1985**
Tribunal:	**Judge Professor David Clarke Judge Martin Davey Mr Simon Hodges**
Date of Hearing:	**7, 8 and 9 November 2016**

DETERMINATION AND STATEMENT OF REASONS
The full determination of the Tribunal is set out at the end

Preliminary

1. This application, under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination by the Tribunal of liability to pay and reasonableness of service charges, was made on 19 December 2015 by Elizabeth Kate Peddle and Ian Alexander Smith of 25 Queen Square Apartments, Bell Avenue, Bristol BS1 4AP. They had the written support of the long leaseholders of 23 other apartments so that a total of 24 out of 29 apartment owners were parties to the application. The respondent named in the application was Westmark Omega (Queen Square) Ltd ("Westmark Omega"), the company that had entered into agreements to sell the newly constructed apartments in 2006 and 2007 and that had subsequently granted the leases. The lease ("the Lease") of Apartment 25 vested in Ms Peddle and Mr Smith is dated 19 May 2007 and was accepted by all parties as representative of the terms of the leases to all 29 apartments. In this determination, we refer to Ms Peddle, Mr Smith and Mr Bird, of apartment number 4, as "the Applicants" as they appeared before the Tribunal and presented the case on behalf of all.

2. Initial directions, including arranging a case management hearing, were issued by Judge Agnew on 30 December 2015.

3. At a case management hearing, held on 1 March 2016, before Judge Clarke, it became apparent that Westmark Omega had been dissolved and the leasehold interest as underlessee was held by Westmark (Lettings) Ltd ("the Respondent") who were substituted as First Respondent. It also became clear that the service charges at issue were undertaken by Bedell Corporate Trustee and Atrium Trustees Ltd as Trustees of EPIC (Colmore Row) Unit Trust (hereafter just "Epic") who was the immediate landlord of Westmark Lettings and the head lessor. Epic was joined as Second Respondent. Finally, the Tribunal was informed that there had been a grant of a concurrent lease to the Queen Square (Bristol) Residential Management Company Ltd ("the Management Company") resulting in the Management Company being the tenant of the Respondent and the immediate landlord of the Applicants. The Management Company was joined as Third Respondent. Directions were made for disclosure and service of copies and a further case management hearing arranged.

4. The second case management hearing was on 8 June 2016. A letter to the Tribunal office from a registered shareholder and Director of the Management Company, Mr Peter Eales, a former solicitor now residing in Spain, indicated that neither he nor the Third Respondent would be taking any part in the proceedings. Further directions were made relating to the disclosure of

documents from former managing agents and the filing of statements of case. A third case management hearing was agreed.

5. At the third case management hearing, held on 11 October 2016, orders were made relating to the presence of an oral witness, for ordering and pagination of all documents, and, after hearing the parties, for the order of discussion of the issues arising between the parties. The case was set down for a predicted four day hearing.

Inspection

6. Prior to the first day of the hearing, the building, known as 22-25 Queen Square and 42-43 Welsh Back ("the Property") was inspected by the Tribunal in the presence of all parties that later appeared before the Tribunal. It consists of a modern mixed office, retail and residential development completed in 2007. It fronts onto public highways on three of its four sides. Queen Square is a very large Georgian-era square in the centre of Bristol. Originally, there would have been four Georgian houses, numbers 22-25 Queen Square, on the site but only the stone facades remain; the stone facade continues into Bell Avenue, which is a short street giving access to the square in its south eastern corner. Halfway along Bell Avenue, the stone façade gives way to modern brick faced construction. Thus, from the east side, which fronts onto Welsh Back and the floating harbour, the appearance is of a modern development; from the western aspect, from the square, one sees the Georgian house facades in keeping with the adjoining historic buildings.

7. The Property contains six separate elements. The entrance from Queen Square leads into commercial office space, which stretches along the square frontage and onto the three floors above. The entrance from Bell Avenue leads upstairs to the 29 long leasehold apartments on four upper floors. On the ground floor, with frontage both to Bell Avenue and Welsh Back is the third element, namely a retail unit, currently a coffee shop. From Welsh Back, there is the entrance to the "Affordable Units", as they are described in the Leases, namely six social housing units let to a Housing Association, which together constitute the fourth element.

8. The important fifth element is the common parts to the whole development. These consist of the external walls and roofs, a small paved area and low boundary wall on the Queen's Square frontage, a large underground car park and a central terrace above the car park giving light to the rear of the offices on the west side, the rear of the Affordable Units on the East side, and the rear of the Apartments on the south and east sides. The final element is the common parts exclusively for the apartment owners, which consists of the ground floor entrance hall, lift, access stairs, and corridors leading to the apartments.

9. The Tribunal also inspected the interior of Apartment 4.

Invitation to Withdraw

10. At the start of the hearing, Mr Bates invited the Applicants to withdraw their application and to take up the offer of the Respondent to provide funds to ensure that the Applicants took control of the Management Company.

11. The Applicants did not agree to the request to withdraw their application.

The Application

12. The Application set out a considerable period of time for which a determination under section 27A was sought. There were three elements to the application. Firstly, in relation to the service charge element relating to the Property as a whole, the car park and the block policy of insurance, the Applicants sought a determination for the eight years 2008-2015 inclusive. This service charge is controlled by the head lessor, Epic. Secondly, determination was sought in relation to the charges made on the residential long leasehold apartments only for the three years 2009-2011 inclusive on the basis that no reconciliation against budgeted payments made had ever been done. Finally, the Applicants sought a resolution of the whereabouts of sinking fund payments made by the Applicants and other apartment owners in the years 2007-2011.

13. Their Application was broken down, both in their initial application, and later in their more detailed statement of case, into what resolved into fourteen separate issues. These are more fully set out in the Key Issues section below.

Factual basis (1) – the legal title structure

14. The legal structure of the Property has a complicated history. The freehold is vested in Bristol City Council who granted a head lease dated 16 August 2005 ("the Head Lease") to National Westminster Bank. It is for a term of 150 years from 16 August 2005. The Head Lease was assigned to a company called RBS Property Development (Westmark) Ltd and then further assigned to Westmark Omega who were developers of the site.

15. Leases were granted by Westmark Omega, presumably including the commercial, retail and affordable housing leases (which the Tribunal did not see) and the 29 apartment leases. The Lease to Ms Peddle and Mr Smith was granted on 9 May 2007. It is for a term of 150 years less two days from 16 August 2005 as are all the apartment leases. The last apartment lease, of Flat 27, is dated 25 May 2007. So by that date, a fairly straightforward legal structure existed of the Head Lease, and under that, the leases to the apartment owners, (and the commercial and retail occupiers and the housing association).

16. Following the completion of the development, Westmark Omega, on 31 May 2007, granted a concurrent lease of the residential part of the Property only ("the Block") for a term of 150 years less one day (expiring at 12 noon) to the Management Company. The Management Company thereby became the landlord of the apartment owners and a tenant of the head lessor. The grant of

this concurrent lease was provided for in the contracts of sale of the apartments.

17. However, in what appears to be a sale and lease back arrangement, Westmark Omega, on 31 May 2007 (or the following day), assigned the Head Lease to Halifax plc who promptly granted a further concurrent lease on 1 June 2007 of the property already leased to the Management Company back to Westmark Omega for a term of 150 years less one day, but expiring at 11.59pm. By this action, Westmark Omega reappeared on the title, not as head lessor as before, but as lessee of the residential parts and the immediate landlord of the Management Company (and the Housing Association). On 11 June 2007, the head lease was assigned by Halifax plc to Epic.

18. The present structure was thus established, with Epic as head lessor, Westmark Omega as lessee of the residential parts of the property, the Management Company tenant of exactly the same part, with the Management Company being in turn the landlord of the 29 apartment long leaseholders (and the affordable units, but the Tribunal is not concerned with that aspect).

19. The only change since 2007 is that on 19 November 2009, Westmark Omega assigned their intermediate lease to the Respondent, Westmark Lettings Ltd.

Factual basis (2) – the service charge provisions and brief history

20. The service charge provisions in the Lease of apartment 25, mirrored in the other apartment leases, are not constructed in a way that makes for easy understanding.

21. Clause 11(1) of the Lease provides a covenant to pay, by way of additional rent, the proportions of the service charge specified in Schedule 7 relating to parts 2 and 6 of Schedule 5. Parts 2 and 6 of Schedule 5 relate to the lessor's covenants to insure, to maintain, repair and renew the main structure and to decorate; and, for those apartments with a car parking space (not all have such a space), to maintain, repair and renew the car parking spaces. This was described to the Tribunal at the hearing as the 'up the stream' service charge as the covenants are ultimately those of Epic and the payments should be made to the Management Company, and thence to the Respondent and then to Epic.

22. Clause 11(4) of the Lease provides for a covenant to pay, by way of additional rent, the proportions of the service charge specified in Schedule 7 relating to Parts 3 and 5 of Schedule 5. This was helpfully described as the second stream of service charges, namely the apartment block only costs ("the Block" as defined in the Lease) and covers maintenance, repair, renewal, cleaning and decoration of the common parts and service media within the Block.

23. Once the two concurrent leases were in place, there was then these two separate elements of service charge, the former to be managed by Epic as head

lessor, and charged down the line to the apartment owners (and to the commercial and retail lessees) and then paid back up the line to Epic from the apartment owners via the Management Company and the Respondent.

24. At an early date, it was discovered that the proportions of the 'up the stream' service charge to be recovered from the Respondent by Epic, on the one hand, and from the apartment owners and the Management Company by the Respondent, did not match. The proportion payable to Epic by the Respondent is 57.95% but that payable in total by the apartment owners under the apartment leases to and through the Management Company to the Respondent is 54.12%. The Tribunal was told that the Respondent accepted that it had to bear the 3.83% shortfall.

25. The history of the way that the service charge administration has been managed by agents is, with the notable exceptions of those now in charge, acknowledged by the parties to be inadequate at best. The 'upstream' agents, appointed by Epic, were BNP Paribas from 2007 to 2010 and Workman from 2011 to 2013. The agents appointed to manage the Block from 2007 by Westmark Omega, were Mainstay, who resigned by a letter dated 28 November 2011 and ceased acting in February 2012. It is clear from the paperwork before the Tribunal that there was little communication between BNP Paribas and Mainstay and it is accepted that there was inappropriate 'double charging' in the years 2009 and 2010 with both agents charging for the same work. There was no reconciliation by Mainstay for the final two years and despite many requests, the apartment owners did not receive copies of the details of the service charges or the accounts to enable them to see whether what they were being charged was correct and reasonable. Full details only emerged after this Application was commenced.

26. This is notwithstanding the fact that a firm of chartered accounts, Andrew Waters and Associates, were commissioned in 2011 by Westmark Omega to provide an independent accountants' report ("the Andrew Waters report") on the accounts of the Management Company. This report was completed in 2012 but not made immediately available to the Applicants. A copy was provided for the hearing.

27. With effect from 29 February 2012, Adam Church Ltd ("Adam Church") were appointed to manage the Block and its service charge element. (This determination considers the circumstances of that appointment later in this judgment). The Appellants expressed themselves entirely satisfied with the way that the Block has been managed by that firm and no issue arises for determination of any of the Block service charges for the years 2012-2015. Since 2013, Epic have taken management of the Property as a whole 'in house' and it appears that a much better working relationship has developed between Epic and the apartment owners since Mr Hall has been involved.

28. The Tribunal was made aware of prolonged litigation between Epic and the Respondent, which was not finally resolved until 6 February 2013. The nature, issues and detailed outcome of that litigation were not revealed, though the Initial Response of the Respondent said that it did relate to the Property and settled a claim and counterclaim between Westmark

Developments and Epic and part of the sum awarded related to service charges due. The litigation does not impact on the issues the Tribunal has to resolve; but it is mentioned because of one very unfortunate consequence in relation to the Management Company mentioned in the next section of this determination.

Factual basis (3) - the story of the Management Company

29. The Management Company was established by Westmark Omega when developing the site and it is clear that the intention was for the Management Company to become the apartment owners' immediate landlord and to be a residents' management company after completion of the development. This is provided for in detailed terms in Clause 18 of the Agreement to Sell, entered into by the Applicants as Buyer and Westmark Omega as Seller, and presumably by all the apartment owners. It is there provided that the Buyer will apply to become a member of the Management Company; that the directors and secretary of the Company will be nominees of Westmark Omega as Seller until completion of the concurrent lease, whereupon they shall resign; that the Seller procure the completion of the concurrent lease; and that on completion of the sale of the apartment, the Buyer will sign Form 288a consenting to act as Director of the Management Company; and the provisions were not to merge on completion.

30. If all that had been so carefully contracted for had been carried through, it is highly likely that these proceedings would never have been required, for the Applicants and their fellow apartment owners would have been the directors of the Management Company and able as a result to have the control of decisions relating to it. Quite why this did not happen in June or July 2007 was never explained to the Tribunal but it was not the fault of the apartment owners as everything should have been in place for the transfer to proceed.

31. What is clear is that at the date of the hearing, over eight years later, the Management Company still has the original nominee shareholders and directors and that it is, and has been on previous occasions, at risk of being struck off for failing to file accounts. Mr Bates refused to accept that it is the nominee of his client, Westmark (Lettings), the Respondent, but it is clear that the current directors were originally the nominees of Westmark Omega; and Mr Eales states in his letter that he still regards himself as the nominee of the Westmark group of companies. There is no evidence at all to suggest that the registered directors have ceased to be nominees.

32. In 2010, Mr Bird wrote to a company in the Westmark Group, Westmark (Developments) Ltd ("Westmark Developments") which was then based in Bristol, asking for the transfer of the Management Company to the residents as required by the contracts of sale. Mr Cresswell, the managing director, replied on 2 March 2010. He noted that 'there was a considerable sum of money in dispute' and this was 'owed to the Residential Management Company by the overall management company' (it is clear that this was a reference to BNP Paribas). He went on: 'I will be delighted to hand over the Management Company to you and your neighbours but I do not think that you

would thank me, or appreciate it being handed over at present. We have now instructed our lawyers to continue to litigate against the Head Lessor in order to recover the sums owed . . . so that we can the hand over the Management Company to you and your neighbours as soon as possible. However, I must make it clear that it seems that this could result in lengthy litigation and unless you and your neighbours wish to take this upon yourselves, it could be some time before we are able to do this'.

33. It is not surprising that, given this communication, the apartment holders became unwilling to take on control of the Management Company until matters were resolved. Yet, Mr Bates, on behalf of the Respondent, agreed with the view of the Tribunal and accepted that the advice given by Mr Cresswell was incorrect. There was no reason in 2010, or since, for the Management Company not to have been handed over. Disputes in the past to which the Management Company was not a party would not have impacted upon the future operation of the Company.

34. It is quite probable that the view in Mr Cresswell's letter was prominent in the minds of the Applicants and their neighbours when Westmark Developments, or its parent company, UK & European Investments Ltd ("UK & European"), attempted, through its agent Mr Stacey, to get a transfer of the Management Company completed. This occurred in late 2011 and early 2012. The catalyst for action appeared to be the resignation of Mainstay as agents and the necessity of appointing its replacement as managing agent for the Block. This was taken forward in Mr Stacey's detailed letter of 20 October 2011, but only received by the Appellants on 14 November 2012, which set out how this was to be achieved, with proper reference to the contract documentation, the need to make relevant filings with the Companies House and the co-operation required to decide which of the Apartment owners would become the Directors. It also recorded that Mr Eales, and his firm Stafford Eales, were no longer the retained legal advisers. This led to what appeared to be a profitable meeting and a reply on behalf of the apartment owners by a Mr Martin, an apartment owner. By that reply, substantial issues were raised that needed to be resolved (many of which the Tribunal has to resolve in this determination). It is also not surprising that, given the (now accepted) poor management and the views of Mr Cresswell in 2010, the apartment owners wanted 'to see and be satisfied with the financial statements for 2011 before assuming responsibility as directors of the Management Company'.

35. However, Mr Stacey, replying on 10 January 2012 (this time on UK & European headed letter), took that last statement to mean that the apartment owners 'were unwilling to take forward' the handover of control of the Management Company 'until all queries have been resolved'. It was in this letter that Mr Stacey agreed to make arrangements 'to ensure that management services continue to be delivered' which led to the appointment of Adam Church, more fully discussed below. Following a note from Mr Bird in response, which the Tribunal has not seen, Mr Stacey sent an e mail on 16 January 2012 from a UK & European e mail address stating that he would avoid getting embroiled in a debate over the past and 'would focus on dealing with the handover of the Management Company'. He stated that the

Management Company accounts and returns had been filed and were up to date and that queries should not impact on such a handover.

36. In February 2012, further correspondence ensued relating to the appointment of Adam Church in succession to Mainstay and the letter of 2 February from Mr Stacey referred to the appointment of TLT solicitors to achieve the handover of the Management Company. Five individual apartment owners were put forward as the Directors and on 10 February Mr Martin asked for an AGM to be arranged by Mr Stacey to facilitate the handover. After Adam Church had been appointed, Mr Stacey wrote again on 3 May 2012 saying he had met to finalise the handover of accounts and proposed a meeting with Adam Church 'to take forward the transfer of the Management Company'. But, again for reasons that remain unclear, the transfer was never completed even though as late as 23 May 2012, TLT (acting for Westmark Developments) sent Mr Bird a replacement certificate of membership of the management company.

37. There the matter seems to have rested until the issues of service charge demands and invoices on behalf of the Management Company on 26 November 2015 relating to 'upstream' service charges for the years 2011-2015 triggered this application to the Tribunal.

38. While the failure to achieve a straightforward transfer of the Management Company by Westmark Omega as required by the contracts of sale is very regrettable, the Respondent, Westmark Lettings, has made an open offer to the Applicants to provide legal services up to £5,000 to ensure the transfer is now made as soon as possible. While the Applicants are concerned that the funds offered may be insufficient, the dissolution of Westmark Omega means that the contractual obligations cannot be fulfilled by Westmark Omega. It is not for the Tribunal to offer advice but it is undoubtedly the case that achieving a transfer of the Management Company to Directors representing the apartment owners as quickly as possible is a pre-requisite to proper management under the terms of the leases in the future. Mr Bates, while having no specific instructions, considered it likely that his client would cover all the legal costs if they exceeded £5,000. Such a position might be the least the apartment owners might expect given the sad history relating to the Management Company revealed to the Tribunal.

The Evidence of Mr Stacey

39. Mr John Stacey was called to give evidence for the Respondent. A witness statement was filed which included 11 exhibits, some of which were substantial, but many were already included in the bundle. In his witness statement, he sets out the fact that he is employed by a firm called Ask Asset Management and so provides services to the Respondent and is not employed by them; but none of the parties nor the Tribunal suggested anything turns on that fact. He is principally contracted to provide services to UK & European. The Respondent is a wholly owned subsidiary of UK & European. Mr Stacey explains that the developer of the site, Westmark Omega, was a wholly owned subsidiary of Westmark Developments, which is also a wholly owned

subsidiary of UK & European. All belong to the Lewis Trust group of companies.

40. The individual dealing with the development of the site was a Mr Andrew Slade, who was employed by Westmark Developments. After Mr Cresswell, the managing director of that company, died in 2012, the Westmark Developments office in Bristol was closed and since Westmark Omega had by then transferred title to the Respondent, Mr Stacey was asked to step in and 'pick up the residual issues'.

41. His witness statement says that 'the party responsible for giving instructions in relation to the service charges was the Third Respondent' (i.e. the Management Company). But he fails to elucidate how this could be when Mr Eales, the Director and a nominee when the company was incorporated, took no part in giving any instructions. He stresses, and firmly confirmed when asked orally, that, whilst he gave instructions, based on the Andrew Walters report, to Adam Church to raise the invoices for 2011, (he says in his witness statements '2008-11' but that must be incorrect since the invoices for the years 2008-10 were issued before Mr Stacey became involved) he did not give instructions to issue the invoices for the service charges due for 2012-2015 inclusive.

42. In relation to the post-2012 service charges on the apartments, and the appointment of Adam Church, Mr Stacey states in his witness statement that his actions were taken to assist the apartment owners and taken to ensure the apartment block was being correctly managed. He stresses that the appointment of Adam Church was an interim measure pending the appointment of the 'directors in waiting'. Finally, he notes that Adam Church's fees are funded entirely out of the charges collected from the apartment owners and the Respondent provides no funding and does not procure any of the services for which Adam Church raises invoices.

43. Once Mr Bates had established from Mr Stacey that he did not give instructions to Mr Church to issue the 2012-2015 invoices and that there was no-one else but himself competent to act on behalf of the Respondent, Mr Stacey was put up for cross examination, which occupied most of the second morning of the hearing.

44. The principal issue that dominated the questions put to Mr Stacey was that of the extent to which the Respondent, or other companies in the group, could be said to have acted on behalf of the Management Company. The evidence can be summarised as follows:

(1) The Tribunal asked Mr Stacey about the appointment of Adam Church in 2012, noting that Mr Stacey had signed the management agreement appointing Adam Church on 28 February 2012 and had written to Mr Church the same day, on UK & European headed notepaper, saying that 'we will appoint Adam Church Ltd'. In response, Mr Stacey said that he had made it clear in the letter that it was an interim arrangement and that he signed on the strict understanding that the terms and conditions and a more formal agreement will be entered into. He also pointed to the fact that the client's name on the

management agreement had been left blank, since who was the client was unclear. On this issue, Mr Bates said that Westmark Lettings had a hand in appointing Adam Church, but that there were three options as to who was the client. The first possibility was Mr Stacey personally, which could be discounted, or it was Westmark Lettings or it was UK & European. The Tribunal considers that there is a fourth possibility. The client could be (and should be) the Management Company.

(2) Mr Bird pressed Mr Stacey on the issue, putting to him the fact that the Applicants' understanding at the time was that he was appointing Adam Church on behalf of the Management Company. Mr Stacey denied that was the case. When Mr Stacey was asked if the Westmark group continued to act in the name of the Management Company, Mr Stacey said that it was the Applicants who asked him to make the appointment, to which Mr Bird's reply was that the apartment owners had no power to give such instructions.

(3) In support of his contentions, Mr Bird referred Mr Stacey to his letter of 2 February 2012 to Mr Martin which said that 'I have not accepted the resignation of Mainstay', indicating that he was acting on behalf of the Management Company. Mr Stacey said that he did not have that authority and that 'he should have worded the letter more carefully'. Again, Mr Bird referred Mr Stacey to his letter of 10 January 2012 where he comments on his instructions to Mainstay to prepare accounts. Mr Stacey again did not accept the implication of authority from those words saying he was only trying to move things forward and that he did not know the details at the time.

(4) Mr Bird suggested that the instructions to TNT solicitors by Westmark Developments indicated again control of the Management Company. Mr Stacey's response was that he was trying his best to help and may have done too much.

(5) Finally Mr Bird pointed to the letter of Mr Cresswell which talked about 'handing over control' of the Management Company. This, Mr Bird put to Mr Stacey, suggested control of the Management Company at that time (2010); and it was Mr Slade who had appointed Mainstay as agents on behalf of the Management Company.

45. The other main points to emerge from that cross examination are as follows:

(1) This property was one of the 'assets' of Westmark Lettings, the Respondent, as they were entitled to the ground rents. After questions from the Tribunal, and later confirmation from Mr Bates, it was established that Adam Church collected the ground rents from the apartment owners and paid the sums, as directed by the Respondent, to the Lewis Trust. That conclusion is supported by the 14 June 2016 letter from Adam Church to Mr Bird. To that extent, therefore, Adam Church has been procuring services for the Respondent contrary to what Mr Stacey indicated in his witness statement.

(2) Ms Peddle asked why, despite many requests, details of service charge invoices had not been made available to the apartment owners, especially as they would have been available for the Andrew Waters report. Mr Stacey responded that the Respondent did not have or

process invoices (which the Tribunal considers is rather strange given that Epic would be sending invoices to the Respondent).

(3) Mr Hall raised the point that, since Epic produced figures every six months and service charge reconciliations, surely the Respondent would have these? Mr Stacey maintained that he had no knowledge of such invoices.

(4) Questions were raised about the role of Mr Oliver Bishop who was, the Tribunal was informed, an employee of UK & European but had now left the company. (The Tribunal comments that it had asked at a case management hearing if Mr Bishop could come as a witness but his current whereabouts were not known). Adam Church states in a letter in the bundle dated 14 June 2015 that 'any formal direction in terms of Queen Square apartments is usually given to us by Oliver Bishop at UK & European'. The same letter notes that 'Adam Church Ltd was instructed to collect ground rent by Oliver Bishop (with agreement from Mr John Stacey'); and 'Adam Church Ltd is instructed on behalf of Queen's Square (Bristol) Residential Management Ltd'. Finally, it was 'Oliver Bishop who instructed Adam Church Ltd to collect historic service charges'. Additionally, it was Oliver Bishop who had written to all the apartment owners. He wrote to Adam Church from a UK & European email address and the letters were on Westmark Developments notepaper. So it was put to Mr Stacey that Westmark had authorised the 2015 service charge demands. Mr Stacey's response was to acknowledge that he had line management authority over Mr Bishop but that he was speaking just for Westmark Lettings, the Respondent. He also firmly denied that he had authorised Oliver Bishop to issue the 2012-2015 invoices.

(5) Miss Peddle questioned the statement in Mr Stacey's witness statement in paragraph 13 that 'his understanding' was that Oliver Bishop had presented the Andrew Waters report to the apartment owners in 2013 and that they had asked that demands not be raised. Ms Peddle stated that this was incorrect – indeed, they had asked to be invoiced and it was now so much more difficult with the passage of time.

(6) Mr Stacey was questioned about his 20 February 2012 letter, which stated that he had received a draft response from Mainstay (in response to the apartment owners' concerns) and that 'this will be issued once I am clear on the content'. Mr Stacey agreed that he had never followed up on that letter and the draft response was never sent out. Mr Stacey said he had not sent it because he thought it was 'unhelpful'. He accepted the response was not in the bundle of documents and that he had no idea where it was. (Mr Bates commented that it was his instructions that all documents in the Respondent's possession had been disclosed).

(7) Mr Hall put to Mr Stacey that he, Mr Hall, had had regular discussions with Mr Bishop who regularly promised that service charges due from the Respondent to Epic would be paid but that there was a considerable amount outstanding. Mr Bates intervened to note that there was a potential dispute on that issue.

46. There is one postscript to be noted to the evidence of Mr Stacey. On the morning of the third day of the hearing, Mr Bird produced an email exchange

that had not been in the bundle. This began with an e mail to all apartment owners from Oliver Bishop and copied to John Stacey. It attached the calculation of monies due and noted that 'this now includes the 2015 charges'. There was a response from John Stacey so he must have read the e mail. He (Mr Stacey) states to Mike Pick, another apartment owner, 'we continue to be reliant on information from Epic to close this out'. Mr Bird contends that this shows that Mr Stacey was aware that, contrary to his evidence, Oliver Bishop was preparing to send out invoices for 2012-15. Whilst the Tribunal is not prepared to dismiss Mr Stacey's assertion that he did not authorise the issue of the invoices, this email does make clear that he was at least aware of what was being prepared.

The Key Issues

47. The issues that the Tribunal needed to decide were agreed at the third case management hearing. They are as follows:

(1) Given that the Management Company had not been active and the Director, Mr Eales, had not (it seemed) authorised the issue of invoices on 26 November 2015, both the Applicants and the Respondent questioned the authority and validity of those service charge demands.

(2) The Respondent maintained that Adam Church had been appointed outside the terms of the Lease and therefore the sums claimed were not service charges and were, instead, recoverable on a quantum meruit basis.

(3) The Applicants questioned whether the service charges invoiced took account of the difference in the apportionment percentages.

(4) The Applicants contended that there were errors in the details of some of the service charges levied and, in particular, that costs had been allocated incorrectly.

(5) In the Application, prior to seeing the detail of the service charge accounts eventually disclosed in these proceedings, the Applicants raised issues of competitiveness of some of the charges for services and questioned whether they were good value for money, raising issues of whether these detailed charges were reasonable.

(6) The admitted duplication and double charging for work by BNP Paribas and Mainstay, as managing agents for Epic and the Management Company respectively, required, in the view of the Applicants, close examination to see if they had been overcharged.

(7) The Applicants contended that, looked at in terms of specific items and the overall poor quality of the service provided, aspects of the charges made were unreasonable.

(8) The Applicants asked the Tribunal to consider a determination in respect of the alleged missing reserve fund contributions.

(9) The submission was made that VAT had been wrongly charged on the service charges that had been levied.

(10) The fees charged by the Head Lessor's managing agents were contended to be excessive.

(11) In their Application, and at a time when details of service charge details had not been disclosed, the Applicants raised the issue of whether an item of service charge should have been made the subject of consultation as required by sections 20 and 20ZA of the 1985 Act.

(12) The Applicants pointed to the significant failures to follow the timetables and procedures provided for in their Lease. They added that it was clear that relevant RICS guidance had not been followed.

(13) The Applicants contended that section 20B of the 1985 Act applied to the invoices served on 30 November 2015 and

resulted in some of those service charges levied being irrecoverable.

(14) In the Application, the Tribunal was requested to consider an order under section 20C of the 1985 Act.

48. These issues are taken in turn below. At the hearing, each issue was fully considered before moving to the next so the detailed submissions on each matter is also considered in turn before the Tribunal states its determination on the point. However, it will be helpful first to summarise the main contentions of each party as they were set out in the statements of case and summarised in closing submissions.

Summary of the Submissions of the Parties

49. The Applicants' statement of case sets out the issues enumerated in the previous section and their submissions on each point are considered as the Tribunal sets out its determinations below. In their closing submission, Mr Bird summarised their case as one where the Applicants, and all apartment owners, had been let down badly by the Westmark group of companies. Each apartment owner had bought a home and a major asset on the strength of the terms of the agreements for sale, which promised a properly functioning management company. The handover never happened and he contended that he had been told explicitly that this had been to retain control. (The Tribunal comments that this assertion was not given in evidence and there was therefore no opportunity for the Respondent to comment or refute it; and consequently the Tribunal does not take this assertion into account in its decision). Mr Bird further contended that when asked to work with TLT solicitors in 2012 to achieve a handover, they had done so but action stopped and was never resumed. It was the Applicants' case that the individuals concerned – firstly Mr Cresswell and Mr Slade and then Mr Stacey and Mr Bishop – had appeared to act indiscriminately on behalf of the various Westmark Group of companies and from their point of view, they dealt with Westmark as that group of companies with no indication of distinction between them.

50. Ms Peddle concluded by saying that they would not be before the Tribunal if the Westmark individuals had done their jobs properly. As a result, those apartment owners who had had to sell in the last eight years had had to sell at an undervalue (the Tribunal comments again that no evidence was brought on this point) and that she and others had had to spend hours of their time trying to resolve the issues before bringing them to the Tribunal, which in itself had meant that all her holiday time from her job in 2015 had had to be devoted to preparing for this case.

51. The Respondent's statement of case was grounded on the fact that it was not the immediate landlord of the Applicants and had no ongoing role in this development. Its sole function was to act as a conduit for costs incurred by Epic to be passed on to the Management Company and in turn to the Applicants. In the words of Mr Stacey in his evidence, Westmark had a financial asset (receipt of the ground rents) and that was the extent of their

involvement. On that basis, their written statement of case contended that the Respondent had no liability and proposed the practical solution of assisting the Applicants by paying for solicitors to achieve the handover of a functioning management company.

52. As regards management, the Respondent contended that Mainstay had been appointed by the Management Company and all demands were sent out on behalf of the Management Company and the Respondent played no part (the guarantee of Mainstay's fees being the responsibility of Westmark Developments). As regards the appointment of Adam Church, this was done outside the terms of the occupational leases and arose from necessity. The payments requested were not service charges within the jurisdiction of the Tribunal but obligations arising from contract, estoppel or quantum meruit.

53. From the outset, Mr Bates stressed (and occasionally repeated) that he was instructed by Westmark Lettings only and had no instructions from any of the other Westmark group of companies. Westmark Omega had been dissolved and, since the closure of the Bristol office, Westmark Developments had become inactive. It was for the Management Company to answer the issues raised.

54. In this context, the Tribunal notes that the Initial Response of the Respondent, not withdrawn, did comment in some detail on the issues raised by the Applicants. Amongst the details, the Respondent records that it instructed a firm of chartered accountants, Andrew Waters, to prepare a report to assist in understanding the position relating to service charges (a copy of that report was included in the documentation); and that it has assisted the apartment owners in dealing with historic queries. While it had no direct contractual relationship, the Respondent noted that Mr Oliver Bishop, an employee of UK & European Investments, had met with the apartment owners on numerous occasions to try and understand the historic issues and assist in resolution. It also records that 'the Respondent attended a meeting' with apartment owners in December 2015.

55. In his closing submissions, Mr Bates concluded by asserting that the Respondent had 'nothing to say' on the issues of reasonableness and on the detailed complaints about the service charges put forward by the Applicants. He accepted that his predecessors in title had been wrong in their approach to the handover of the Management Company and the Applicants were entitled to feel cross. He noted that everyone has treated Westmark as an amorphous group but he only acted for Westmark Lettings. He urged the Tribunal not to find that his client controlled the Management Company as the Directors were not nominees or employees of his client and management accounts were produced in the name of the Management Company. With regard to the section 20B of the 1985 Act issue, fully discussed below, Mr Bates maintained his strong submission that the date for calculating the 18 month period was the date that the Management Company incurred their service charge liability, namely when they were called upon to pay the Epic service charge element 'up the chain'.

56. The statement of case by the Second Respondent, Epic, is perhaps best summarised by Mr Hall's closing remarks that Epic had been drawn into this dispute through no fault of its own. On issues of detail, Epic contended that increases in car park service charge between 2008 and 2013 reflected increased expenditure; that the reserve funds contributions were demanded in error and the amounts re-credited in the 2011 accounts; that it accepted that VAT was not chargeable on the Applicants' service charges and that it had issued a VAT credit note to Westmark Lettings, the Respondent; that the fees of its agents were reasonable; that no qualifying works within section 20ZA of the 1985 Act had been procured and no qualifying agreements had been entered into; and that other matters raised were not its concern. This mirrored the major contention in Epic's Initial Response that the service charges that it demanded were in accordance with the contractual relationships as defined by the various leases and relate to costs that were reasonably incurred and for works and services of a reasonable standard.

57. It is worth commenting that, in their Initial Response, Epic reserved the right to contend that the passage of time had rendered a fair hearing of certain issues impossible to the extent that they depend on oral evidence or the memory of witnesses and thereby amount to an abuse of process; but this issue was not taken up either in the statement of case nor by Mr Hall at the hearing.

58. The Tribunal now records the contentions of the parties on each of the key issues set out above; and sets out its determination on each of the issues.

Authority to issue service charge demands to the Applicants

59. The Applicants issued these proceedings by making an application under section 27A of the 1985 Act on 19 December 2015. This was less than three weeks after each of the apartment owners had received invoices similar to those sent to Mr Smith and Ms Peddle at Apartment 25. Each of those invoices was sent on behalf of Queen Square (Bristol) Residential Management Company Ltd, the Third Respondent. The invoices were sent under the name of the Management Company "C/o Adam Church Ltd" from its address, 256 Southmead Road, Bristol. Yet the Third Respondent has but two Directors, Mr Peter Eales and his wife. They are apparently resident in Spain and have refused to attend these proceedings or arrange for representation on behalf of the Company. Not surprisingly therefore, the Applicants raised in their statement of case the issue of whether there is any authority to make these demands stating that if they were not properly made they are therefore not payable. However, their claim was on the basis that 'these invoices were issued on the instructions of Westmark Developments'. Mr Bates, on behalf of the Respondent, firmly maintained his position, stressed at the outset, that he acted for Westmark Lettings alone; that Westmark Lettings was a distinct legal entity from the Management Company and distinct from Westmark Developments; that his client was landlord of the Management Company and that it was his client's tenant; but his client was not in any landlord and tenant relationship with the apartment owners, and that his client had not authorised the demands.

60. The Tribunal is satisfied that the Management Company, set up by Westmark Omega as the apartments were constructed and readied for sale (as outlined above) was, and has been, regarded by individuals employed by, directly or as consultant to, the Westmark group of companies as an entity that they had authority over and were therefore the controlling force behind this Company. The evidence for this conclusion is:

1. The Management Company was set up by a solicitor acting on behalf of Westmark Omega;
2. Mr Peter Eales, the solicitor in question, stated in an e mail dated 17 June 2016 to the Tribunal Office that he 'has always acted in accordance with the wishes and instructions of the Westmark group of companies';
3. On 2 March 2010, Mr E.J. Cresswell, writing as managing director of Westmark Developments, said 'I will be delighted to hand over the Management Company . . . but I do not think you would thank me, or appreciate it being handed over at present', so clearly implying a substantial degree of control to enable it to be handed over.
4. On 20 October 2011, Mr John Stacey wrote to Mr Bird on Westmark Development notepaper stating: 'Westmark initially appointed its nominees as the first directors and company secretary' and that he would facilitate filings at Companies House to enable the apartment owners to appoint their own Directors.
5. On 10 January 2012, Mr Stacey, writing this time on UK & European Investments notepaper, with a heading to the letter of 'Queen Square (Bristol) Residential Management Company', refers amongst other things to enforcing the obligations of Mainstay, who were acting on behalf of the Management Company, and handing over control.
6. Again writing on UK & European Investments notepaper to Adam Church, John Stacey appoints Adam Church to manage Queen Square Apartments 'as an interim arrangement pending formal handover of the management company'. He signed the management agreement (though the name of the client was left blank, deliberately, as he told us). But he did state in his evidence that 'UK & European asked me to be involved on behalf of Westmark Lettings as the Westmark Developments team had closed down'.
7. Adam Church, who has acted efficiently since 2012 in managing the apartment service charges, state specifically that 'formal directions in terms of Queen Square Apartments is usually given to us by Oliver Bishop at UK & European'.
8. The e-mail from Oliver Bishop from his UK & European email address dated 25 August 2015 (only provided to the Tribunal on the third day of the hearing following John Stacey's oral evidence the previous day) to the Applicants and apartment owners makes it clear that he, Oliver Bishop, has supplied the information to establish the amounts of the building, insurance and car park charges and that 'Adam Church will then be instructed to raise demands'.

9. Mr. Adam Church specifically states in his e-mail to Mr Bird on 14 June 2016 that he was instructed to collect the ground rent due from the apartment owners by Oliver Bishop. Mr Bates confirmed that ground rent had been received for the year up to 2014 and paid on the instructions of his client, to whom the ground rent would be due from the Management Company, to the ultimate owner of the Westmark group of companies, the Lewis Trust group.
10. Mr. Adam Church states in the same letter that he relied solely on the information supplied by Oliver Bishop in regards to the amounts requested for the historic service charges.

61. The Tribunal therefore determines that there is ample evidence that the Management Company began its existence as being held by its Directors as nominees for Westmark Omega; that that status has remained unchanged except that Westmark Omega is now dissolved; that a number of individuals acting on behalf of Westmark Developments (of whom Westmark Omega was a subsidiary company) and UK & European Investments (Westmark Developments' holding company) have subsequently directed the Management Company's affairs; that, specifically, Mr Oliver Bishop did so in authorising Adam Church to issue the invoices in question; and that the invoices were properly authorised on behalf of the Management Company.

Service Charges

62. In paragraphs 31-34 of the Respondent's statement of case, it is submitted that Adam Church was appointed outside the terms of the occupational leases and that the effect of the discussions that led to the appointment created a partly oral, partly written, contract between the Respondent and the Applicants; and that the Applicants were liable to contribute to the costs incurred on a quantum meruit basis. It was also claimed that in any event the costs were not incurred within a landlord and tenant relationship and so were not service charges and the Tribunal had no jurisdiction to determine that aspect of the dispute.

63. Mr Bates did not press this argument strongly on us in his oral submissions. He did refer us to *Morshead Mansions Ltd v Di Marco* [2008] EWCA Civ 1371 in support of his proposition that a service charge must be payable to the landlord in its capacity as landlord. In that case it was held that a claim brought by a management company against one of its members for liability as the member could be enforced and was not to be treated as a claim against the member as a tenant. However, if the Tribunal were to decide, as we have, that the demand was made by the Management Company and the charge was payable to that Company, he and his client were content with such a finding. In other words, Mr Bates agreed that it was a service charge.

64. Mr Hall, for Epic, merely observed that there was a settlement of the dispute between Epic and the Respondent in 2012 but since then Epic had issued regular budgets and reconciliations but received no payment from the Respondent.

65. The Tribunal having held that the service charge demands issued in November 2015 were properly authorised, the argument put in the Respondent's written case falls away as there is a landlord and tenant relationship between the Management Company and the apartment owners. But even if the Tribunal had not so determined, there would have been an argument that the demands were still service charges as they were charges incurred by Epic as service charges and calculated in accordance with the apartment leases. However, there was no need to decide that point. The demands dated 26 November 2015 and received by the Applicants on 30 November 2015 were service charges as defined in section 18 of the 1985 Act and the Tribunal has jurisdiction to determine the application made.

The Apportionment Percentage

66. The Applicants submitted that there was no evidence that the service charge demands issued on 26 November 2015 in relation to the Buildings and the Insurance service charge had been correctly levied. They pointed out that the correct total percentage to be divided between the 25 apartment owners was agreed to be 54.12% (to two decimal places) whereas the percentage chargeable by Epic to the Respondent was 57.95%. They sought assurance that the amounts levied totalled 54.12%.

67. The Applicants took the Tribunal through the Mainstay accounts for 2009, 2010 and 2011 which they had seen for the first time when produced for this hearing and demonstrated that the difference in apportionment has not been addressed since the amount due from the Respondent in the accounts equated to the sum demanded of the Applicants.

68. Both Epic and the Respondent agreed that there was a discrepancy in the allocation percentages arising from the terms of the apartment leases. The Respondent accepted that the result was that they had to bear the 3.83% shortfall. Mr Hall for Epic agreed that their agent's accounts showed 57.95% due from the Respondent and it was for them to do the recalculation, which Mr Bates accepted.

69. Rather than take a lot of time at the hearing forensically examining each year's figures, it was agreed by all the parties that it was appropriate for this to be done subsequent to the hearing. The Tribunal therefore determines that the amount of the service charges for Buildings and Insurance is chargeable to the Respondent at the percentage rate of 57.95%; that the percentage chargeable to the Management Company and through it to the apartment owners is 54.12%; and that the Respondent covers the 3.83% shortfall. The parties are to seek to agree the correct figures in the light of this determination and in the light of the filed accounts but liberty to apply in default of agreement.

Incorrect allocation of costs

70. The Applicants in their statement of case drew attention to errors that they had now been able to find in the accounts of Epic's agents. In the year ending 31 December 2007, a total of £2,932.80 is charged for the costs of a caretaker, for bin store cleaning and for window cleaning but it was common ground that

there were no communal areas requiring caretaking services, no communal bin stores and no windows to clean.

71. The Tribunal determines that these costs were incorrectly included the service charges for the year ending 2007 and were therefore not payable.

72. At the start of the third day of the hearing, the Applicants put forward two further issues arising from their perusal of the detailed account entries. Firstly, they questioned the £3,000 spent in 2011 on the installation of a CCTV system to monitor the car park and social housing entrance. They contended that there was no authority in the apartment leases for such an improvement to be included within the service charge. Mr Hall responded that the installation was the result of a dialogue between their agents, the commercial tenants and Mr Oliver Bishop and was installed following a break in through the car park entrance into the car park resulting in damage and stolen bicycles. Though he contended that he had agreed the installation with his tenants it was accepted that there was no evidence of agreement with the apartment leaseholders. Since in their leases an improvement to install a CCTV system did not fall within what could be charged, the cost was irrecoverable. The Tribunal determines that that aspect of the 2011 charge was wrongly made.

73. Secondly, Mr Bird was concerned that a new lightning conductor had been included in the 2015 accounts, a matter that had arisen in discussions about the 2016 budget. Since it was not possible to identify for certain that item of expenditure in the accounts (it is possible that an entry on 'lighting' should have been 'lightning'), the Tribunal records the agreement of the parties that if a new lightning conductor was installed, it would fall outside the repairing obligations chargeable in the Building Schedule but if it was replacing a defective conductor then it would be an acceptable service charge entry.

74. Later in the hearing, in the discussion involving the issue of the procedure and timing for administration of the service charges, the Applicants questioned the costs involved with extensive installation of a large amount of bird spikes and netting to deal with the nuisance and the droppings of pigeons. However, after discussion, all parties accepted that this was an aspect of necessary pest control and properly chargeable.

75. Once again, the fact is that these accounts have only recently been disclosed to the Applicants. It is accepted that the Applicants have not had the opportunity to completely review the figures, especially for the four years ending 2007, 2008, 2009 and 2010, and will now be able to do so. It is to be hoped that the parties can agree the position over any further discrepancies that are identified but the Tribunal gives liberty to apply.

Competitiveness of Charges and Value for Money

76. The Applicants submitted that the costs of certain items in 2011 appeared higher than the cost for the same service in 2015 and indicated poor management practice. At the hearing, after discussion, the Applicants

accepted that, without further evidence, the Tribunal had insufficient basis to find that there was overcharging. However, for the year ending 2011, the parties agreed to examine the accounts and review the position. In the absence of agreement there is liberty to apply.

Duplication of work and charges

77. It is common ground between the parties that during the year ending 31 December 2010 there was duplication of work between Mainstay, appointed on behalf of the Management Company and BNP Paribas appointed on behalf of Epic with both agents charging for management of the Building and for the Parking management. However, the documents filed did not provide a detailed breakdown of the implications of the double charge.

78. The Tribunal, with the agreement of the parties, determines that any part of the service charge in the years 2008, 2009 or 2010 which resulted from the duplication of charges as a result of the overlap of managing agents work is not chargeable to the Applicants. Once again, there is liberty to apply to the Tribunal in the absence of agreement.

The issue of reasonableness

79. In addition to the specific challenges already covered, the Applicants make a more general case on the unreasonableness of the service charges relating to all the periods 2007-2013 as they relate to the building, insurance and car park Schedules which are the responsibility of Epic and its predecessors in title. They rely partly on the letter written by Mainstay, agents appointed on behalf of the Management Company, dated 28 November 2011, which refers to longstanding issues relating to poor management of the Building. The letter notes that 'they are yet to receive evidence that expenditure is appropriate and in line with standards of service provided'. They partly rely on the fact that BNP Paribas and Workman, agents for the years 2008-10 and 2011-13 respectively had their contracts terminated by Epic. The Applicants further rely on the fact that EPAM, the current agents from 2014, needed help from apartment owners in their challenge to invoices for cleaning the car park in previous years.

80. Mr Hall admitted that Epic were dissatisfied with the work undertaken by BNP Paribas and that Workman's performance deteriorated after a promising start. Indeed, he told us that Workman's management fee had been halved for 2013 and the benefit of that reduction passed on to the Respondent. Mr Bird pointed out to the Tribunal, as had been noted in the paperwork, that some charges, especially in 2009 and 2010 seemed very high. The Tribunal pointed out that there were no invoices or contracts in the documentation to give any explanation of these figures.

81. Mr Bird was able to point to some issues that are revealing for these periods such as payments to a firm called Grittit who received a retainer and

sums for gritting the car park ramp whenever the temperature fell below 4 degrees centigrade even if it was a mild winter with little or no frost.

82. It became common ground that the services provided in 2009 and 2010 were simply not good enough but that there was insufficient material to examine and decide where the exact problems lay. The Tribunal is satisfied that the Applicants have demonstrated that the service charge totals for the years 2009 and 2010 were unreasonable as they relate to the buildings and car park schedules and the Tribunal determines that these charges should be reduced by 25%. Since these have been paid already, an allowance against the next service charges due should be given.

Reserve Fund Contributions

83. Mr Bird pointed out that the apartment leases make provision for the establishment of reserve funds. By clause 1.2.4 of Schedule 5, such funds collected by the Management Company must be kept in a separate account and any interest must be added to the fund. Since 2012, Adam Church had set up such funds and they were operating satisfactorily.

84. However, reserve funds payments had been paid to Mainstay (who were then the agents appointed on behalf of the Management Company) by the apartment owners and the accounts now produced show such payments and the end of year balance sheet shows the sums so held in sinking funds for building service charge, parking service charge and, growing in amount each year, for the apartment service charge. Nevertheless, the amounts did not increase, said Mr Bird, by as much as the payments made by the apartment owners.

85. A small amount of the reserve funds, namely a total of £3,000 collected by Epic or their predecessors in title, was held as required until 2011 when as admitted in Epic's statement of case, it was used 'to defray expenses for that year'.

86. It seems clear that some money paid under the reserve fund provisions prior to 2012 cannot be accounted for and the Tribunal was told that no party to the proceedings can say where those funds are or whether they were expended in properly or improperly.

87. The Applicants' case is that they suspect, but cannot prove, that some funds were used to fund unauthorised deficits and they contend, without direct evidence, that this was done or authorised by one or more of the employees of the Westmark group of companies.

88. A Tribunal has no jurisdiction to make a declaration of breach of trust and in the absence of direct evidence as to where the sums paid now reside cannot, under a Section 27A application, provide either a direct or indirect remedy. If reserve funds have gone missing, the Applicants should have a potential remedy elsewhere but it does not lie with the Tribunal.

VAT charges made

89. The Applicants submitted that VAT had been wrongly charged on some of the service charges rendered by Epic's agents and they were concerned that these incorrect additions had been handed down in the invoices issued in November 2015.

90. In its statement of case, Epic accepted that, by virtue of section 32 and Schedule 9, Part II, Group 1 of the Value Added Tax Act 1994, read together with paragraph 3.128 of VAT notice 48, VAT is not chargeable on the Applicants' service charges. However, Epic claimed, and this was not

challenged by the Respondent, that Epic had issued a VAT credit note to Westmark Lettings amounting to £22,053.95.

91. Nevertheless, it remained unclear whether or not any part of the VAT wrongly levied had been passed on so as to be reflected in the invoices issued to the Applicants. It was clear from the filed documents that the credit was in the statement of account showing the amount Epic contended that the Respondent still owed.

92. The Tribunal determines that in so far as any of the invoices include the wrongly levied VAT, then the amount of that VAT is not payable. If the parties are unable to agree on the exact figures, there is liberty to apply.

Fees of Head Lessor's managing agents

93. The Applicants submitted that the only management fees and expenses that they are obliged to pay by way of service charges are the fees and disbursements of any managing agent appointed by or on behalf of the Management Company. This is clear by virtue of Clause 3.2 of Part 3 of Schedule 5 of the Apartment Leases. There is however no such express provision in the convoluted service charge provisions to cover the costs and expenses of the agents of Epic, the head lessors.

94. Mr Hall contended that the obligation on the apartment leaseholders to contribute to the 'Lessors expenses' included the management expenses; since there was an obligation to repair and maintain, and other duties, it was proper that the costs of managing those obligations should be recoverable.

95. The Tribunal cannot accept Mr Hall's submission. There is no rule of law that a landlord should recover 100% of its expenditure. There is no special rule of construction for a service charge provision. However, a court or tribunal, when interpreting the provisions of a lease, should bear in mind the context of the provision and remember that the drafting of leases is invariably done on behalf of those persons who are able to recover the service charges. Mr Bates reminded the Tribunal of the authorities of *Arnold v Britten* [2015] UKSC 36 and *Gilje v Charlgrove Securities Ltd* [2004] 1 All ER 91 in support of these propositions. The Tribunal is also conscious that long residential leases are usually offered to prospective buyers on a 'take it or leave it' basis with little or no opportunity to make changes to the terms of those leases.

96. In the Lease of Apartment 25 before the Tribunal, there is express provision for the recovery of the fees and disbursements paid to any managing agents or auditor appointed by or on behalf of the Management Company (clause 3.2 of Schedule 5), and such clause follows the general provision in clause 3(1) to contribute to the expenses incidental to the running and administration of the Management Company. However, when one turns to Schedule 2, the liability of the apartments as part of the Building as a whole, there is again the general expenses clause, in similar terms, in clause 2.1 but no equivalent of clause 3.2 and thus no mention of any liability to contribute to the fees and disbursements of the head lessor. There is in brackets in clause

2.1 an avoidance of doubt provision that excesses payable under any insurance policies are included in those expenses but no avoidance of doubt provision in relation to management fees and disbursements.

97. The Tribunal is aware that, particularly in public sector lease cases such as after the exercise of a right to buy, that a provision relating to costs of services may include the cost of managing those services (*Waverley Borough Council v Arya* [2013] UKUT 0501). However, in these apartment leases, especially after giving the benefit of any doubt to the occupational leaseholders, the Tribunal is clear in its conclusion that the fees and disbursements paid to any management agents employed by the head lessor, Epic, are not recoverable under the service charge provisions in the apartment leases, and so determines.

The question of non-consultation

98. In their statement of case, the Applicants, who had never received any consultation notices under section 20 of the 1985 Act, questioned the extent to which the charges were payable where any such consultation should have occurred. However, once the details of how the service charges had been compiled were released, the Applicants had not been able to identify any concrete example of where a statutory consultation should have occurred. Mr Hall, referring to his statement of case, confirmed that no qualifying works and no qualifying long term agreements within the meaning of section 20ZA of the 1985 Act had been entered into by Epic which would result in the relevant contribution of any tenant exceeding the statutory limit.

99. The Applicants having accepted that they had no evidence to the contrary, the Tribunal determines that no aspect of the service charges demanded can be questioned on this basis.

Failure to follow procedure

100. There has undoubtedly been a conspicuous failure (without apportioning blame as between the Respondent and Epic) to ensure that the procedure for submitting service charge demands to the apartment owners have been done in a timely manner and in accordance with the terms of the apartment leases. It does not help that the apartment leases require accounts to be made up to the end of June in each year whereas the head leases provides for 31 December but the Applicants sensibly did not press this point, as if it were to be observed it would just add more complication. However, they have a legitimate complaint about the tardiness of the demands issued in November 2015 and the failure to give them the details now supplied of the elements making up the service charge demands made, despite many requests for such information.

101. The Tribunal has no specific powers to provide a direct remedy for such failures. However, it is engaged with the issues of reasonableness, and has the

jurisdiction given by section 20B of the 1985 Act dealt with below, which provides the opportunity for redress in other ways.

Section 20B

102. The Applicants contended that Section 20B (1) applied to the invoices received by them on 30 November 2015, and dated 26 November 2011. This section provides:

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

103. Although subsection (2) of section 20B is not applicable on the facts of this case, we shall need to refer to its terms in deciding the proper construction of subsection (1). Subsection (2) of Section 20B provides:

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

104. The Applicants' submissions were straightforward. Each of the 25 apartment owners had received 4 or 5 invoices together on 30 November, one for each of the accounting years 2011, 2012, 2013, 2014 and 2015. These invoices related to Epic service charges 'passed down the chain'. For 2011, the liability was shown only as 'Epic service charges total liability'; for the four subsequent years they were set out under three headings, namely Epic service charges re insurance, Epic service charges re building schedule and (where applicable) Epic service charges re parking. It was subsequently clear from accounts filed in the papers for this hearing that the figures were taken from accounts completed for those years. The costs involved had therefore been incurred *by Epic* (Tribunal emphasis) during the relevant year in question. Consequently, the Applicants argued, for the years 2011, 2012 and 2013, section 20B applied to terminate any liability of the apartment owners for these costs. For the year 2015, the section did not apply. For the year 2014, they had no liability for those costs incurred before 18 months prior to 30 November 2015, namely 31 May 2014, but remained liable for those costs incurred after that date.

105. In response, Mr Bates put forward an argument for the benefit of the Tribunal while commenting that his client, Westmark Lettings, the Respondent, had no direct interest in the outcome as it related to the invoices submitted under the name of the Management Company on 30 November 2016. He argued that the date for calculating the 18 month period was the date that the Management Company incurred their service charge liability, namely when they were called upon to pay the Epic service charge element 'up the chain'. He contended that that was at most 3 months or so prior to November

2015 and that therefore the removal of liability allowed by section 20B (1) did not apply.

106. In support of this argument, Mr Bates began by referring the Tribunal to the Court of Appeal decision in *Burr v OM Property Management Ltd* [2013] EWCA Civ 479 which upheld the decision of the Upper Tribunal and the words of HH Judge Mole QC quoted with approval (at paragraph 8):

> "A liability does not become a cost until it is made concrete, either by being met or paid or possibly by being set down in an invoice".

Thus, Mr Bates argued that one is looking for when the immediate landlord demanding a service charge is itself liable to pay, and that the 18 month time limit runs from that point.

107. In support of his view, Mr Bates contended that the amount of the same costs can be incurred at different times for different landlords. He alluded to the problem, in a chain of leases as here when the service charge is passed down, which might easily arise. Thus, the head lessee might delay until just before the end of the 18 month period (dated from at least some of the relevant costs being incurred) before demanding its service charge. This could occur quite naturally when accounts are made up at the end of the 12 months amounting to an accounting year. Preparing the accounts may take some time, say four months, and there is then only a small window to serve the demand. The result might be that the intermediate landlord and a management company might find themselves out of time when their demands, dependent upon receipt of figures from the head lessor, come to be served if the construction contended for by the Applicants were to prevail. If, however, (as he contended) his construction were to be preferred then the problem was resolved. Thus, in this case, costs paid for by Epic would be incurred first by Epic who then have 18 months to serve their demand, then at a later date when Epic sought payment from the First Respondent who then can calculate their 18 month window to serve from such receipt, and later again only when a demand was served on the Management Company, who again enjoy an 18 month period of opportunity to serve their demand on the Apartment leaseholders.

108. It was suggested to Mr Bates that, if the Applicants' construction was correct, Section 20B (2) might provide an answer to the problem for an intermediate landlord waiting to receive a demand for service charges, all or part of which are to be passed on 'down the chain' and when the 18 month time limit is running out. The intermediate landlord could notify its tenant that service charges had been incurred and that the tenant would be subsequently be required to contribute to them. He responded by noting the decisions in *Gilje v Charlgrove Securities Ltd* [2004] 1 All ER 91 and *Brent LBC v Shulem B Associates Ltd* [2011] EWHC 1663. The latter decision decides, amongst other things, that a section 20B notice must state a figure for costs which have been incurred – which would be difficult if the actual costs are unknown because the head lessor, who has paid for them, has not yet sent its demand for payment.

109. Mr Bates also contended, correctly, that each lessee of residential property, whether or not they occupy, is entitled to the protection of the 1985

Act provisions generally, and section 20B in particular in this case. Each such lessee should therefore have the benefit of an 18 month period to serve their demand.

110. Mr Bates argument was an attractive one but after careful reflection, the Tribunal concludes that the construction contended for by the Applicants is correct. The point at issue does appear to be a novel one – neither Mr Bates nor the Tribunal are aware of a decision on the point – so the Tribunal must construe the statutory words in the overall context of the Landlord and Tenant Act 1985 giving full weight to the words used both in section 20B and other relevant sections of the Act and seeking assistance from what has been said in the cases that have discussed section 20B.

111. Our reasons for deciding that the Applicants' contentions are correct are as follows:

1. In the *Burr* case, in passages that the Tribunal was not specifically referred to, firstly His Honour Judge Mole in the Upper Tribunal stated in words approved by the Court of Appeal:

   > 'A cost and a liability are separate things' – (paragraph 8)

   and Lord Dyson MR repeated later that

   > 'there is an obvious difference between a liability to pay and a cost' - (paragraph 11).

   Therefore, the fact that the liability to pay a service charge being charged 'down the chain' only arises when the person receives its demand does not prevent the cost from arising earlier. Mr Bates stressed that ' as clearly stated by Lord Dyson MR, a liability must crystallise before it becomes a cost, and that means that in the case of the person first incurring the cost (Epic in our case) the cost is only incurred when a liability is imposed on Epic. But once the cost has arisen in that way, it is our view that it cannot cease to be a cost and somehow arise a second time when, at a later date, the intermediate landlord or a management company are called upon to pay.
2. While it seems that the person drafting section 20 did not have fully in mind the issues the Tribunal must address in this case, it is clear that the costs of a superior landlord are relevant costs, for the definition in section 18(2) of the 1985 Act reads:

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

   Thus, the costs of the service charges in the invoices demanded on behalf of the Management Company were costs incurred by a superior landlord, Epic in this case. In the Tribunal's view therefore, the costs were incurred at the time that superior landlord became liable to pay.
3. To adopt the construction contended for by Mr Bates would potentially negate much of the protection for leaseholders where, as here, there are service charges incurred 'up the chain' that have to pass through two lessees before the demand to the leaseholders can be served. In theory, that could mean they were liable for, say, repair costs to the main structure up to nearly four and a half years after the work was done and payment made to the contractor. The Tribunal is mindful of the

warning of Lord Dyson MR in *Burr,* (paragraph 16), that while section 20B was enacted to protect tenants from stale claims, it is still for the court to determine the extent of the protection. But when that might mean the protection period might increase from 18 months to up to about 53 months, the Tribunal concludes that it is a relevant factor in preferring the Applicants' construction, which does not substantially reduce the protection of the section.

4. The Tribunal does not consider that the problems that an intermediate lessor might face on the Applicants' construction, as alluded to by Mr Bates, force it to prefer his construction. It may be the position at the moment that the *Shulem* case requires a Section 20B notice to state a figure for the costs that have been incurred and that 'those costs' referred to in Section 20B (2) must be actual costs but the case also makes clear that the figure need not be stated with complete accuracy. So in this situation, if the Respondent or the Management Company find that the 18 month time limit is approaching, they can specify a figure that they consider will cover the claim that it will later wish to make, for (as Morgan J opined in *Shulem*), a statement of a greater amount includes the statement of a lower amount.
5. The potential problems for intermediate lessors are substantially mitigated where, as in these (and most) leases, there is provision for estimated service charges to be levied before the accounting year in question. Section 20B does not bite on such provisions provided that the final charge does not exceed the payments demanded on account. Thus, if the management company had requested charges in advance, as was done in earlier years, then the sums so paid in advance would not be impacted by the late service of the demand for any balance remaining due, save to the extent that the balance exceeded the advance charge.

112. For these reasons, the Tribunal determines that the apartment leaseholders are not liable to pay to the agent on behalf of the Management Company the service charge demands for the years 2012 and 2013 since the costs were incurred more than 18 months prior to the demand. Equally, they are not obliged to pay the demand made in 2015 for the year 2011 for the same reason. However, for that year, there was a demand to pay the estimated service charge, which some apartment owners paid and some did not. The liability to pay under the demand issued five or so years ago is not impacted by Section 20B.

113. Applying the same approach, the Tribunal determines that the apartment leaseholders are liable for the service charges demanded for the accounting year 2015. For the year 2014, they are liable except in respect of costs which were incurred by Epic prior to 31 May 2014. The parties agreed that these could be determined between them by an examination of the accounts now provided. If the parties cannot agree the exact figure, the Tribunal gives liberty to apply for a resolution of amounts in dispute.

114. Finally, served with the 2015 invoices, was a credit note giving credit to the apartment leaseholders for Westmark's contribution to the service charge.

In the Tribunal's judgement, this remains valid and is not affected by its decision on the invoices.

115. The Tribunal would add that, for the sake of completeness, if it had determined that Mr Bates was correct in his contention, then it would have held that the leaseholders are not yet liable to pay anything under the invoices served on 30 November 2015. This was because no evidence was given to the Tribunal that Epic had made a valid demand on the Respondent – indeed the Tribunal was told that there was dispute between the Respondent and Epic which included such issues; and there was no evidence that a demand had been served by the Respondent on the Management Company. For on his construction, the leaseholders are only liable when there is a complete chain of liability established. Perhaps this is an additional reason for preferring the Applicants' construction.

Section 20C

116. The Applicants have applied under section 20C of the 1985 Act for an order that all or any of the costs incurred by either the Respondent or Epic are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by them or the other apartment leaseholders.

117. The Tribunal is not aware of any clause in the Leases that might permit this in the absence of the order. However, neither Mr Bates nor Mr Hall opposes the order and the Tribunal makes the order requested under that section.

The Tribunal Fee

118. Neither Ms Peddle nor Mr Bird, when asked, specifically requested an order for reimbursement of the Tribunal Fees that they had incurred. However, Mr Bates, anticipating what the Tribunal might have otherwise decided in its discretion, offered on behalf of the Respondent to pay one half of the fees incurred if Epic agreed to discharge the other half. Mr Hall agreed. Given the trials and tribulations that the leaseholders have suffered in various ways since the apartments were sold to them it seemed to the Tribunal that there was a clear case for such an order. The Respondent and Epic are therefore ordered under rule 13(2) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") each to reimburse to the Applicants one half of the fees paid by them, namely £315 by each respondent.

Costs

119. No party made an application for costs under rule 13(1) of the Rules. Ms Peddle commented that they had been unable to afford legal representation but the cost the apartment owners had suffered in other ways, such as lost sales and reduced market value on sales, was considerable and she had had to

take up most of her holiday entitlement in order to attend Tribunal hearings and prepare the paperwork. Both Mr Bates and Mr Hall reserved their position for consideration after they receive this determination.

Concluding Remarks

120. In conclusion, the Tribunal would like to thank the parties for the professional manner in which the case was heard. Mr Bird and Ms Peddle, despite having no legal training, presented their case cogently and concisely – and without undue emotion, which, given the testing times they have experienced, is much to their credit. They had obviously put in an enormous number of hours in getting to grips with the law and studying large amount of documentation, much of which arrived only shortly before the case was heard. Their fellow apartment owners are greatly indebted to them.

121. Mr Bates was of considerable assistance to the Tribunal throughout the proceedings. Mr Hall is managing for Epic in an obviously far more professional way than his predecessors and was patiently helpful in a situation not of his making.

122. The Tribunal expresses the hope that the Management Company can swiftly be put on a proper footing with the apartment owners as the shareholders and with directors appointed from among their number; and that future relations between the parties can ensure a smooth running of the communal services within the Property.

Right of Appeal

123. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

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

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

Summary of the Tribunal's determinations

1. There is ample evidence that the Management Company began its existence as being held by its Directors as nominees for Westmark Omega; that that status has remained unchanged except that Westmark Omega is now dissolved; that a number of individuals acting on behalf of Westmark Developments (of whom Westmark Omega was a subsidiary company) and UK & European Investments (Westmark Developments' holding company) have subsequently directed the Management Company's affairs; that, specifically, Mr Oliver Bishop did so in authorising Adam Church to issue the invoices in question; and that the invoices were properly authorised on behalf of the Management Company (paragraph 61).
2. The demands dated 26 November 2015 and received by the Applicants on 30 November 2015 were service charges as defined in section 18 of the 1985 Act and the Tribunal has jurisdiction to determine the application made (paragraph 65).
3. The amount of the service charges for Buildings and Insurance is chargeable to the Respondent at the percentage rate of 57.95%; that the percentage chargeable to the Management Company and through it to the apartment owners is 54.12%; and that the Respondent covers the 3.83% shortfall. The parties are to seek to agree the correct figures for payment by the Applicants in the light of this determination and in the light of the filed accounts but liberty to apply in default of agreement (paragraph 69).
4. The costs of a caretaker, for bin store cleaning and for window cleaning were incorrectly included the service charges for the year ending 2007 and were therefore not payable (paragraph 71).
5. The cost of installation of CCTV equipment in 2011 was irrecoverable (paragraph 72).
6. If a new lightning conductor has been installed, it would fall outside the repairing obligations chargeable in the Building Schedule but if it was replacing a defective conductor then it would be an acceptable service charge entry (paragraph 73).
7. The extensive installation of a large amount of bird spikes and netting to deal with the nuisance and the droppings of pigeons was an aspect of necessary pest control and properly chargeable (paragraph 74).
8. The accounts for the four years ending 2007, 2008, 2009 and 2010 have only recently been disclosed to the Applicants. It is accepted that the Applicants have not had the opportunity to completely review the figures and will now be able to do so. The Tribunal hopes that the parties can agree the position over any further discrepancies that are identified but the Tribunal gives liberty to apply (paragraph 75).
9. There was insufficient basis to find that there was overcharging for any service or poor management practice. However, for the year ending 2011, the parties agreed to examine the accounts and review the position. In the absence of agreement, there is liberty to apply (paragraph 76).
10. Any part of the service charge in the years 2008, 2009 or 2010 which result from the duplication of charges as a result of the overlap of managing agents work is not chargeable to the Applicants. Once again, there is liberty to apply to the Tribunal in the absence of agreement (paragraph 78).

11. The Applicants have demonstrated that the service charge totals for the years 2009 and 2010 were unreasonable as they relate to the buildings and car park schedules and these charges should be reduced by 25%. Since these have been paid already, an allowance against the next service charges due should be given (paragraph 82).
12. A Tribunal has no jurisdiction to make a declaration of breach of trust and in the absence of direct evidence as to where the sums paid as reserve funds now reside cannot, under a Section 27A application, provide either a direct or indirect remedy. If reserve funds have gone missing, the Applicants should have a potential remedy elsewhere but it does not lie with the Tribunal (paragraph 88).
13. In so far as any of the invoices include the wrongly levied VAT, then the amount of that VAT is not payable. If the parties are unable to agree on the exact figures, there is liberty to apply (paragraph 92).
14. The fees and disbursements paid to any management agents employed by the head lessor, Epic, are not recoverable under the service charge provisions in the apartment leases (paragraph 97).
15. No aspect of the service charges demanded can be questioned on the grounds that consultation with the apartment owners was required (paragraph 99).
16. The Tribunal has no specific powers to provide a direct remedy for failures to observe the procedure timetables within the apartment leases (paragraph 101).
17. The apartment leaseholders are not liable to pay to the agent on behalf of the Management Company the 'upstream' service charge demands for the years 2012 and 2013 since the costs were incurred more than 18 months prior to the demand. Equally, they are not obliged to pay the demand made in 2015 for the year 2011 for the same reason. However, for that year, there was a demand to pay the estimated service charge, which some apartment owners paid and some did not. The liability to pay under the demand issued five or so years ago is not impacted by Section 20B of the 1985 Act (paragraph 112).
18. The apartment leaseholders are liable for the service charges demanded for the accounting year 2015. For the year 2014, they are liable except in respect of costs which were incurred by Epic prior to 31 May 2014. The parties agreed that these could be determined between them by an examination of the accounts now provided. If the parties cannot agree the exact figure, the Tribunal gives liberty to apply for a resolution of amounts in dispute (paragraph 113).
19. The credit note giving credit to the apartment leaseholders for Westmark's contribution to the service charge remains valid and is not affected by the Tribunal's decision on the invoices (paragraph 114).
20. A order is made under section 20C of the 1985 Act that all or any of the costs incurred by either the Respondent or Epic are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by them or the other apartment leaseholders (paragraph 117).
21. The First Respondent, Westmark Lettings Ltd, and the Second Respondent, Bedell Corporate Trustee and Atrium Trustees Ltd as Trustees of EPIC (Colmore Row) Unit Trust are ordered under rule 13(2) of the Tribunal Procedure (First-Tier Tribunal) (Property

Chamber) Rules 2013 ("the Rules") each to reimburse to the Applicants one half of the fees paid by them, namely £315 by each respondent (paragraph 118).

22. There is no order for costs (paragraph 119).

Judge Professor David Clarke
30 November 2016