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

| | | |
|---|---|---|
| **Case Reference** | **:** | **CHI/OOML/LSC/2019/0072** |
| **Premises** | **:** | **Pavilion Court, Grand Parade Mews, Brighton BN2 9RU (Pavilion Court)** |
| **Applicant** | **:** | **Mrs Pauline Schellerup (Flat 14)**<br>**Miss Phyl Woodford (Flat 36)** |
| **Representative** | **:** | |
| **Respondent:** | | **Retirement Lease Housing Association (RLHA)** |
| **Representative** | **:** | **PDT Solicitors** |
| **Type of Application** | **:** | **Service Charges - Sections 27A and 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002** |
| **Tribunal Members** | **:** | **Judge RE Cooper** |
| **Date of Decision** | **:** | **3rd December 2019** |
| **Date of Publication** | **:** | |

---

**AMENDED DECISION**

---

I have exercised my powers to amend the decision of 3rd December 2019 under Procedure Rule 50, which allows for the correction of clerical mistakes, accidental slips or omissions. The original text is stuck through and the amendments are made in bold. I have corrected the original Decision because of typographical errors in paragraph 1 and the date of the decision.

Judge R.E. Cooper
16.1.2020

**The notional rent for the Resident Manager's accommodation (the Estate Manager's Accommodation Cost) is not recoverable from the Applicants through the Management Service Charge for the**

**period commencing on 1st December 2012 until 30th November 2019.**

**In consequence of that decision, each Lessee has made an overpayment of £1,211.80**

**An Order is made under section 20C of the Landlord and Tenant 1985 Act that the costs of and associated with this application are not recoverable through the Service Provision.**

**An Order is made under paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 that the costs of and associated with this application are not recoverable against the Applicants as an administration charge.**

**The £100 application fee paid by the Applicants is to be reimbursed by the Respondent.**

## Background

1. The Applicants are the leasehold owners of Flats 14 and 36 situated in Pavilion Court, Grand Parade Mews, Brighton BN2 9RU ('Pavilion Court'). The Respondent is the freehold owner of Pavilion Court, a purpose-built block of flats for retired people that was constructed in or around 1991. The First Applicant is a party to a 99-year lease between herself and RLHA dated 2nd April 2009. The Second Applicant's 99-year lease between herself and RLHA commenced on 30th July ~~1999~~ **1992.**

2. The Tribunal received an application from the Applicants on 18th July 2019 under s27A Landlord and Tenant Act 1985 ('the 1985 Act'). They seek a decision whether the service charges demanded by the Respondents for the 2012/13 to 2018/19 service charge years are payable (and if so, the amounts that are reasonable). The sole item in dispute in respect of each of those service charge demands is the Estate Manager's Accommodation Charge (a notional rent) that is stated by the Respondent to be payable in each of those years for the resident manager's flat in Pavilion Court.

3. The Applicants make associated applications in respect of the Respondent's costs under s20C of the 1985 Act ('s20C') for the benefit of themselves and all 44 leaseholders at Pavilion Court. They also seek an order under Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ('Paragraph 5A'),

4. On 13th September 2019, at a telephone case management hearing attended by both Applicants and Mr J. Clewlow of PDT solicitors for the Respondent, it was agreed the matter was suitable for a paper determination without a hearing. Directions were given which have been complied with. There was no inspection of the subject property.

5. References to the page number of the parties' documents are marked [ ] in the decision.

## The Issues for the Tribunal

6. The principle issues for the Tribunal to determine are whether the Estate Manager's Accommodation Charge (which is a notional rent) for the resident manager's flat is payable by the Applicants in the service charge years commencing 2012/13 to the present, and if so whether the amount is reasonable.

## The Law

7. The law relevant to this application is set out in the Appendix to this decision. Under s27A of the 1985 the Tribunal has the jurisdiction to determine whether a service charge is payable and, if it is;
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

## The Applicants' leases

8. Although the layout and numbering differ between the two documents, and the First Applicant, Mrs Schellerup, is referred to as 'the Tenant' rather than 'the Lessee', the provisions of the leases relevant for the purpose of this decision are in identical terms. For the remainder of this decision, the numbers referred to are those in the Mrs Schellerup's lease for Flat 14 which provides as follows;

9. The preamble provides the background to the grant of the lease

   *'2. The objects of RLHA are to provide housing designed or adapted for active elderly retired persons'*

   *'4. RLHA is the registered proprietor of….Pavilion Court….comprising 45 self contained units of accommodation together with…. known as Pavilion Court ("the Property")'*

   *'5. It is intended to demise the said units of accommodation at the Property upon terms similar to those herein contained to elderly retired persons…and that RLHA will retain the parts of the Property used in common by all the tenants of the said units…and such other (if any) part of the Property which shall not be demised as aforesaid (hereinafter called "the Retained Parts")'*

10. Clause 2 of the lease contains the Tenant's Covenants which at 2.1 include payment of *'…the Management Service Charge in accordance with the provisions of the Third Schedule hereto…'*.

11. Clause 3 sets out the Covenants by RLHA, including provision that all future leases it grants for Pavilion Court '*..shall be in substantially the same form as this lease..'*. There is no express obligation in the

Respondent's covenants to employ a resident warden for the property. However, Clause 4 provides as follows;

*'**Agreement by Tenant in case of special medical attention***
*Whilst RLHA agrees to use its best endeavours to employ a resident warden for general supervision of the Property and for answering the emergency calls of the Tenant it cannot guarantee to give a twenty four hour service and neither RLHA nor the resident warden…can accept responsibility for medical or other care of the Tenant….'*

12. Clause 5 contains usual provisions regarding reinstatement following damage, the right to forfeit, service of notices and so on, and Clause 6 sets out the provisions for surrender of the lease back to RLHA and the mechanism for calculating the payment that is then due to the Tenant following that surrender, once a new Tenant has been found to purchase the demised flat.

13. The relevant provisions concerning the Management Service Charge are contained in the Third Schedule as follows;

*'1. In this Schedule the following expression shall have the following meanings;*
*1.1 "Account Year" means the financial year of RLHA which for the time being ends on the Thirtieth day of November*
*1.2 "Specified Proportion" means 1/44th*
*1.3 "The Service Provision" mean the sum computed in accordance with Clauses 2 and 3 of the Schedule*
*1.4 "The Management Service Charge" means the Specified Proportion of the Service Provision rounded up to the nearest pound…'*

*'2. The estimated Service Provision in respect of any Account year shall be computed before the beginning of the Account year and shall be computed as follows:*

*2.1 the expenditure estimated by RLHA as likely to be incurred in the Account Year by RLHA upon the matters specified in Clause 3…less the amount (if any) which RLHA intends to spend from the reserve….*

*2.2 an appropriate amount as reserve towards matters specified in Clause 3 as are likely to give rise to expenditure after such Account Year…'*

*3. The expenditure to be included in the Service Provision shall comprise all expenditure of RLHA in connection with the repair management maintenance and provision of services for the Property and shall include (without prejudice to the generality of the foregoing):-*

*3.1 the cost of the salary of the resident manager and deputy resident manager (if any) and the provision of accommodation for them at the property and all other direct costs in connection with the provision of*

*the resident manager's service together with twelve and one half per cent of the aforesaid costs as a contribution towards the cost of administering the resident manager's service*

*3.2 the cost and expense of the decoration and maintenance and repair of the exterior…*

*3.3 the cost and expense of the maintenance repair and cultivation of the paths…*

*3.4 the cost and expense of the maintenance and repair of the interior of the Demised Premises and the other units of accommodation (other than decorative repair)..*

*3.6 the cost and expense of lighting heating and cleaning….*
*…..*
*3.9 a contribution towards the general administration costs of RLHA..'*

*4. As soon as is practicable after the end of each Account Year RLHA shall….determine and certify the amount by which the estimate referred to in Clause 2…shall have exceeded or fallen short of the actual expenditure in the Account Year..'*

**The Applicants' case**

14. The Applicants' case is set out in the application and at [70 -130].

15. In summary, the Applicants say that their leases do not permit the Respondent to recover the Estate Manager's Accommodation Charge (a notional rent) through the Management Service Charge.

16. The Applicants say that Pavilion Court was constructed in around 1991 as a private purpose built retirement home comprising 45 one and two bedroom flats with communal facilities including a garden, and 28 allocated parking spaces. Each of the leases are in similar form, and require the leaseholder to pay 1/44th of the total Service Provision. Flat 1 is a two-bedroom flat occupied by the Resident Manager of Pavilion Court. Until 1996 or 1997 a Deputy Resident Manager lived in Flat 6, but a decision was taken to dispense with this role and that flat was sold. Prior to that sale the leaseholders' stipulated share of the total Service Provision had been 1/43rd.

17. No Estate Manager's Accommodation Charge was payable in the early years of the scheme, but in September 1996 the Respondent informed the Leaseholders a notional rent for the Resident Manager's accommodation would be charged for the Account year commencing on 1st December 1996 and in future years. This has been an ongoing issue of dispute between some of the Leaseholders and the Respondent, and the subject of complaint, but no resolution has been found, hence the application to the Tribunal.

18. The Applicants maintain there is no provision within the lease for recovery through the Service Provision of a notional rent in respect of the Estate Manager's accommodation for the following reasons;

    (i) Clauses 2 and 3 of the Third Schedule limit recovery under the Service Provision to expenditure that is estimated will be incurred and expenditure actually incurred. They rely on the decision of *Gilje & Others v Charlgrove Securities Ltd (2001) EWCA Civ 1777,* which confirms a notional rent cannot be considered to be monies expended.

    (ii) The Respondent cannot be said to have foregone rental income by providing the Resident Manager's flat because the provision of two wardens' flats was a condition of the planning consent granted by Brighton & Hove City Council on 25th April 1991. Flats 1 and 6 were restricted to occupation by the Resident Manager and Deputy Manager. The developer of Pavilion Court had been compensated for the provision of the two warden flats by reason of the planning gain. Any subsequent freeholder (including the Respondent) would have been aware of the restriction on the use of the two flats.

    (iii) There is no mention of the notional rent in the lease and it was never the Respondent's intention to charge it when the Applicants' leases were entered into. There was never any mention of the notional rent in any of the sales literature, Purchaser's Information Pack or Leaseholder's Handbook at the time of the Applicants' purchases (or any of the other leaseholders' to the best of the Applicants' knowledge).

    (iv) Clause 3 and sub-clause 3.1 when read together with the preceding and succeeding clauses in the Third Schedule clearly show that only expenditure incurred or actual expenditure is recoverable. The Applicants accept that the Resident Manager's salary, national insurance, pension and allowances for lighting etc are all payable under the lease because they represent actual expenditure and amount to 'direct costs' as provided for in Clause 3.1.

    (v) If the word 'cost' in clause 3.1 was deliberately used so as to allow for the recovery of money foregone (as the Respondent argues) then the use of 'cost' in sub-clauses 3.2 to 3.5 must also have been deliberate, allowing for almost all of the Service Provision to be based on notional rather than actual costs.

19. The Applicants also question the calculation of the Estate Manager's Accommodation Costs. There is no written procedure for establishing or reviewing the notional rent, and the Respondent has been less than transparent about how it has established rental values or calculated subsequent annual increases.

**The Respondent's case**

20. The Respondent's case is set out at [59 - 69] and [131 - 135]. The Respondent says the Resident Manager is paid an annual salary (together with national insurance, tax and pension contributions), which is recoverable under Clause 3 of the Third Schedule. The salary paid (of some £15,000) does not reflect the market salary for such a position because the Respondent provides the manager with a two-bedroomed flat in Pavilion Court rent-free.

21. In summary, the Respondent says it is entitled to recover the cost of providing the Resident Manager's accommodation through the Service Provision for the following reasons;

    (i) The deliberate inclusion of the word 'cost' within paragraph 3.1 allows the provision of accommodation to be construed as money foregone, which is therefore recoverable. The Respondent says that sub-paragraph 3.1 of the lease is very clear, and confirms the '*the cost of the salary of the resident manager…and the provision of accommodation for them at the property…'* is therefore payable. The clause would make sense even without the word 'cost', but its insertion makes clear the Respondent's intention to recover the cost of providing accommodation to the resident manager through the service provision.

    (ii) Although it owns the resident manager's flat, if the resident manager did not occupy it, RLHA would be able to generate a rental income from it, or dispose of it for a capital sum. It was not a condition of the grant of planning consent for Pavilion Court that two flats had to be retained for wardens.

    (iii) The cases of *Gilje* as well as *Lloyds Bank Plc v Bowker Orford [1992] 2 ELGR* and *Agavil Investment Co v Corner (unreported) October 3 1975* all support the proposition that 'cost' includes both money spent as well as money foregone.

    (iv) The situation at Pavilion Court can be distinguished from *Earl Cadogan v 27/28 Sloane Gardens Ltd [2006] 2 EGLR 89* (where the caretaker's notional rent was not considered to be a 'cost') because in that case the head lease included restrictive covenants preventing the flat from being used for any other purpose than a caretaker's flat. So it could never be let out, and the landlord, therefore, could not be said to suffer any financial loss by allowing the caretaker to live there.

    (v) Whether the Respondent pays a market salary to the resident manager or a pays a reduced salary and foregoes income by providing a rent-free flat, both are equally a cost that is recoverable through the Service Provision.

    (vi) If the Respondent is not permitted to charge this notional rent, it will simply result in the resident manager being paid a market salary, to which the Leaseholders agree they will have to contribute.

(vii) The use of the words *'actual expenditure'* in Clause 4 of the Third Schedule simply relates to RLHA certifying the difference in amount between the estimated expenditure and actual expenditure in the Account Year. It does not imply any limitation on what can be recovered under the lease, or have any bearing on what can be included as 'expenditure' under Clause 3 of the Third Schedule.

(viii) The use of the words '*costs and expenses'* in Clauses 3.2 to 3.5 does allow for money foregone as well as money spent, but the Respondent would not attempt to recover money without valid justification.

22. The accommodation cost calculated is reasonable. The Respondent obtains three valuations for the resident manager's flat and deducts 15% from the average of the three. This process is undertaken every three years. Having not kept a records of the advice previously provided by local letting agents, the Respondent has obtained the opinion of two local letting agents who say the accommodation cost of £650 is significantly lower that rental market comparators.

## The Tribunal's consideration

### The Estate Manager's Accommodation Charge

23. The dispute between the parties concerns the proper construction (or interpretation) of the terms of the Applicants' leases, and whether the notional rent for the resident manager's flat is recoverable from the leaseholders through the Service Provision (or service charge).

24. The parties to this dispute pray in aid various authorities and decisions of the Tribunal which have considered whether notional rent for accommodation provided to resident wardens or caretakers is recoverable through the service charge (in particular *Agavil Investment Co v Corner (unreported) 3rd October 1975, Lloyds Bank plc v Bowker Orford [1992] 2 EGLR 44, Gilje v Chalgrove Securities Ltd [2001] EWCA Civ 1777, The Earl Cadogan v 27/28 Sloane Gardens Ltd [2006] 2 EGLR 89* as well as a number of LVT and First-tier Tribunal decisions).

25. However, the Tribunal must start with general principles of interpretation and the specific clauses of the particular lease in this case and its context.

26. The Supreme Court in *Arnold v Britton* [2015] UKSC 36 has recently given definitive guidance on interpretation. Lord Neuberger at §15 set out the approach that courts or tribunals should follow;

*"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the*

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

27. The Supreme Court also confirmed there is no special rule of interpretation for leases and no requirement that terms in a lease should be construed restrictively (at §23).

28. In both parties' stated cases there is much said regarding the practical arrangements at Pavilion Court and the history of the dispute between the parties. The Applicants say historically there was no question of a notional rent being passed onto the leaseholders and there has been a lack of transparency about the process. The Respondent's argument rests on the practical arrangements for the employment of the resident warden at Pavilion Court. S/he is paid a salary below the market salary for the position because a two bedroom flat is provided rent-free.

29. Ultimately, however, the task for the Tribunal is the construction of the lease, which is a matter of law, although, of course the facts and purposes known or assumed and the commercial common sense prevailing at the time the leases were drafted will be a relevant consideration.

30. It is clear from the preamble in the lease that Pavilion Court comprises 45 separate flats that RLHA intended would be demised to elderly retirees. The preamble, however, also allows for the retention of the common parts '*and such other (if any) part of the Property which shall not be demised as aforesaid'*. In other words it enabled the Respondent to retain one (or more) of the flats if it chose to do so.

31. As the proportion of the Service Provision to be paid by the individual leaseholders is 1/44$^{th}$, it is clear that one of the 45 flats is retained by the Respondent to house the resident manager who does not contribute to the Service Provision.

32. When reading the lease as a whole there is no express obligation on the Respondent to provide a resident manager for Pavilion Court. There is no requirement to do so contained in the Lessor's covenants (in Clause 3), and, in Clause 4, the Respondent only agrees to use *'best endeavours'* to employ one. However, the provision of a resident manager and possibly a Resident Deputy Manager was clearly in the contemplation of the parties at the outset, indeed there is reference in the planning permission to two of the 45 flats being for wardens in the description of the proposed development [91].

33. The Tribunal does not accept, however, the Applicants' argument that the provision of two flats for resident wardens in the development was a condition of the planning consent. It is clear the conditions attached to the grant of planning consent related principally to the design, and in particular the provision of adequate facilities for those with disabilities, including the partially sighted [92 - 93].

*34.* In terms of the leaseholders' liability to contribute to the Service Provision, the Tribunal starts with the ordinary and natural meaning of the Third Schedule, and in particular Clauses 2 and 3, which govern how the Service Provision is to be calculated. Clause 4 provides for the balancing exercise at the end of the accounting year based on whether the estimate in Clause 2 had exceeded or fallen short of the *'actual expenditure in the Account Year'* [34 – 35].

*35.* Clause 2 of the Third Schedule provides the mechanism for a payment on account. This includes

(i) the estimated expenditure that will be incurred in the forthcoming accounting year (by reference to '*the matters specified in Clause 3*'), less any amount that it proposes is to be used from the reserves (Clause 2.1), and

(ii) an appropriate amount for the reserve fund for expenditure in future years (Clause 2.2),

36. As to Clause 3, the executive provision expressly sets out that '*The expenditure to be included in the Service Provision shall comprise all expenditure of RLHA in connection with the repair management maintenance and provision of services for the Property and shall include (without prejudice to the generality of the foregoing):-.....'* There then follow nine separate sub-clauses (3.1 to 3.9) which in general terms cover the resident manager, maintenance and decoration of the exterior and retained parts, maintenance and cultivation of the grounds, maintenance and repair of the demised flats (except for decoration), lighting, heating, cleaning and other expenses relating to the communal parts, the costs of employing professionals and the general running costs of RLHA.

37. A natural reading of the executive provision of Clause 3 indicates that it is actual expenditure '*in connection with the repair management maintenance and provision of services'* that is to be included in the Service Provision.

38. The Respondent, however, relies on sub-clause 3.1 and says that the deliberate reference to *'the cost of the salary of the resident manager.....and the provision of accommodation for them at the property and all other direct costs in connection with the provision of the resident manager's service...'* entitles it to recoup the money foregone (either as a rental income or capital sum) by providing the rent-free accommodation.

39. The Respondent says its position is supported by *Gilji,* the unreported case of *Agavil* and *Lloyds Bank Plc v Bowker Orford*.

40. Whilst I accept that Laws LJ in *Gilji* indicated at §24 when discussing *Agavil* that he *'would have no very great difficulty in perceiving that income foregone may well amount to a cost'*, that comment was strictly obiter. The question he was considering was whether notional rent fell within the rubric '*monies expended'*, which was the operative term of the lease under consideration. Laws LJ concluded it did not. He concluded that no reasonable or prospective tenant would perceive that the words *'4(2)….To pay to the lessor a sum equal to twelve and one half per centum per annum of: (i) All monies expended…in carrying out..works and providing the services….'* would oblige them to contribute to the notional rent for the caretaker.

*41.* The decision in *Agavil* has not been produced by the Respondent but is referred to in *Cadogan v 27/29 Sloane Gardens Ltd*. In *Agavil* the Court of Appeal upheld the landlord's entitlement to recover a notional rent for a caretaker's flat. The lease in that case (as quoted in §14) provided for the *'re-imbursement of cost expenses and matters mentioned in the Schedule'*. The Schedule required the tenant to pay the *'Costs charges and expenses incurred by the Lessor in carrying out the obligations under Clause 3 of this lease'* (which obligations included, *'employ a caretaker for the Buildings whether resident upon the premises or otherwise'*). The Schedule also dealt with *'The expenses… of the services provided by the Lessor… in connection with… the… caretaker's accommodation*. As reported, Cairns LJ construed the word *'reimburse'* as meaning no more than *'indemnify'* and held that the word *'incurred'* was '*appropriate to use in connection with any cost falling upon the landlord, including their forgoing an advantage they would otherwise have had'*. However, that was in the context of a lease where there was express provision for accommodating the caretaker outside the building.

*42.* The Applicants rely on *The Earl Cadogan v 27/29 Sloane Gardens* which they say is authority for their assertion that the express use of the word *'expenditure'* in Clauses 2, 3 and 4 of the Third Schedule indicate that only actual money spent (rather than notional income foregone) can have been contemplated by the parties. His Honour Michael Rich QC clearly confirms that the term *'expenditure'* cannot include notional rent (§34). However, he did find that the phrase *'total expenditure incurred…in carrying out its obligations under Clause 5(5)…<u>and all other costs expenses outgoings and matters incurred in connection with the management and running of the Building</u> including without prejudice to or limitation of the generality of the following…'* was sufficient to include notional rent, particularly when one of the thirteen sub-paragraphs that followed provided for *'the cost of employing maintaining and providing accommodation in the building for a caretaker….<u>including an annual sum equivalent to the market rent of any accommodation provided rent-free'</u>* (emphasis added).

43. Whilst the Tribunal accepts that authorities relied on by the Respondent have found that the term *'cost'* in a lease may be sufficient to include

income foregone, the decisions relate to different factual contexts, and in connection with differently worded leases. In any event, all of those decisions must be read down in the light of the Supreme Court's decision in *Arnold v Britton*.

44. In construing the Applicants' leases in this case, I find that interpretation put on the lease by the Respondent (which ultimately is derived solely from the inclusion of the word 'costs' in sub-clause 3.1) strains the natural and ordinary meaning of the words used in Clauses 2 and 3 to the Third Schedule when reading the lease as a whole. A liability for the leaseholders to contribute a notional rent does not emerge clearly and plainly from the words used.

45. If it had been the intention of the parties that the money foregone was to be included in the Service Provision, then clear unambiguous words could have been used. For example, the clause found in the *Earl Cadogan v 27/29 Sloane Street* quoted at paragraph 42 above (even though ultimately in that case it was found that no money was foregone due to express provisions of the head lease preventing the caretaker's flat being used for any other purpose).

46. Similarly, in *Carey-Morgan v de Walden* [2013] UKUT 0134 (LC) where notional rent was found to be recoverable, the lease provided that the *'costs of and incidental to'* employing caretaking staff expressly included *"a sum equivalent to the market rent of … accommodation"* provided for the caretaker.

**Conclusions**

47. This Tribunal concludes that the leases in respect of Flats 14 and 36 Pavilion Court cannot be construed as enabling the Respondent to recover notional rent for the resident manager's flat through the service charge. No reasonable person looking at the lease in context, and having the relevant background knowledge could read it as requiring leaseholders to pay an amount to reflect the financial loss to the Respondent in using one of the flats to house the resident manager rent-free. I have reached this conclusion for the following reasons;

    (i) The natural and ordinary meaning of Clauses 2 and 3 of the Third Schedule (which determine how the Service Provision is calculated) and also the balancing provision in Clause 4 all indicate that the Service Provision is to be calculated by reference to actual or anticipated expenditure, in other words monies actually spent on carrying out repairs, management, maintenance and the provision of services at Pavilion Court.

    (ii) Although the use of the word *'cost'* may potentially include notional costs, in the particular context and language of this lease it does not.

    (iii) Whilst there is reference to '*the cost of the salary of the resident manager…and the provision of accommodation for them…and*

*all other direct costs'* in sub-clause 3.1, that must be read in conjunction with the executive part of Clause 3 of the Third Schedule. In other words '*The expenditure to be included in the Service Provision shall comprise all expenditure of RLHA* (in repair, maintenance and the provision of services)*…and shall include…the cost of the salary of the resident manager…and the provision of accommodation…and all other direct costs'*.

(iv) There is no express obligation on the Respondent as a term of the lease to actually provide a resident manager, although it was clearly in the contemplation of the parties that at least one warden might be employed. It is not one of the Respondent's covenants in Clause 3, and Clause 4 of the lease simply provides that the Lessor would use best endeavours to employ one to supervise the property and answer emergency calls of the leaseholders.

(v) Although it was in the contemplation of the parties that a resident manager might be employed, there is no express reference to the lessees being required to contribute to the notional cost of providing the rent-free accommodation to the resident manager to reflect the potential income that the Respondent would forego (as there was, for example in the lease in *the Earl Cadogan*).

(vi) There is no arrangement specified in the lease for how such a notional rent would be calculated.

(vii) The fact that no Estate Manager's Accommodation Costs were charged in the early years of the scheme supports the contention that it was not in the contemplation of the parties that notional rent would fall to be recovered through the service charge. Indeed the Director of RLHA in an undated document [87] written some time in or after 1996 clearly states that until that time RLHA (who of course were responsible for the drafting of the lease) were of the view that only direct expenses associated with the flat could be recovered.

(viii) Ultimately, any ambiguity arising from the drafting of a clause of a lease is to be resolved in favour of the payee, i.e. the leaseholders.

**Calculation of the Estate Manager's Accommodation charge**

48. Having reached that conclusion there is no need to consider the question of the reasonableness of the Respondent's actual calculations of the Estate Manager's Accommodation Charge.

**Decision**

49. The Estate Manager's Accommodation Charge is not recoverable from the Applicants through the Service Provision for each of the following accounting years

£7,384 for 2012/13 (£167.82 per Applicant)
£7,384 for 2013/14 (£167.82 per Applicant)
£7,574 in 2014/15 (£171.48 per Applicant)
£7,574 in 2015/16 (£171.48 per Applicant)
£7,801 in 2016/17 (£177.30 per Applicant)
£7,801 in 2017/18 (£177.30 per Applicant)
£7,801 in 2018/19 (£177.30 per Applicant).

The total of these sums amounts to £53,319 for the period from 1st December 2012 to 30th November 2019 equating to an overpayment of £1,211.80 by each of the Applicants.

**Costs**

50. Finally, the Applicants have made applications under s20C of the 1985 Act for an order that the costs of these proceedings should not be added to any future service charge demand, and under Paragraph 5A, that they should not be recoverable as an administration charge. Whilst the Respondent confirmed in their Statement of Case that they do not seek to recover their costs regarding the application, as the application has not been withdrawn I must make a determination. The Applicants have succeeded in their application, and I am satisfied that it is just and equitable for a s20C Order to be made for the benefit of all those persons listed at section 9 of the application [8]. For the same reasons, it is appropriate to make an order under Paragraph 5A disallowing any contractual costs being claimed against the individual applicants as an administration charge It would also be fair and reasonable for the Respondent to reimburse the Applicants' fee for this application.

Judge R.E. Cooper
~~3.11.2019~~ 3.12.2019

**Note: Appeals**

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.

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.

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.

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.

## APPENDIX

The Landlord and Tenant Act 1985 Act (as amended) provides:

***Section 18 Meaning of "service charge" and "relevant costs"***

*18(1) In the following provisions of this Act 'service charge' means an amount payable by a tenant of a dwelling as part of or in addition to the rent—*

*(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and*
*(b) the whole or part of which varies or may vary according to the relevant costs.*

*(2) 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, in connection with the matters for which the service charge is payable.*

*(3) For this purpose—*

*(a) 'costs' includes overheads, and*

*(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.*

***Section 19 Limitation of service charges: reasonableness***

*(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—*

*(a) only to the extent that they are reasonably incurred, and*

*(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*

*and the amount payable shall be limited accordingly.*

*(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.*

**Section 20c Limitation of service charges: costs of proceedings**

*(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before….the First-tier Tribunal….are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or person specified in the application. …*

**Section 27A Liability to pay service charges: jurisdiction**

*(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –*

*(a) the person by whom it is payable,*
*(b) the person to whom it is payable,*
*(c) the amount which is payable,*
*(d) the date at or by which it is payable, and*
*(e) the manner in which it is payable.*

*(2) Subsection (1) applies whether or not any payment has been made.*

*(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs, and if it would, as to –*

*(a) the person by whom it is payable,*
*(b) the person to whom it is payable,*
*(c) the amount which is payable,*
*(d) the date at or by which it is payable, and (e) the manner in which it is payable.*

*(4) No Applications under subsection (1) or (3) may be made in respect of a matter which –*

*(a) has been agreed or admitted by the tenant,*
*(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,*
*(c) has been the subject of determination by a court, or*
*(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.*

*(5) But the tenant is not to be taken as having agreed or admitted any matter by reason only of having made a payment.*

*…*

**Paragraph 5A to Schedule 11 of the 2002 Act (as amended) provides:**

*Limitation of administration charges: costs of proceedings*

*(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.*

*(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable*
*..*