FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/23UC/LSC/2019/0075**
Property	**:**	**Lodge 11, The Landings, Station Rd, South Cerney, Glos, GL7 5LU**
Applicant	**:**	**Susan Jean Tupper**
Applicant's Representative	**:**	**Stephen Charles Tupper, Solicitor, of TuppersLaw**
Respondent	**:**	**PGIM Real Estate UK Ground Lease Fund (PUK GLF Nominee A Ltd & PUK GLF Nominee B Ltd)**
Representative	**:**	**James Fieldsend, Counsel, Instructed by Osborne Clarke LLP, Solicitors**
Type of Application	**:**	**Determination of liability to pay and reasonableness of service charges under Section 27A of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge Professor David Clarke** **Jan Reichel, FRICS**
Dated	**:**	**30 June 2020**

DETERMINATION AND STATEMENT OF REASONS

DETERMINATION

On the issues of the liability to pay and reasonableness of service charges under Section 27A of the Landlord and Tenant Act 1985, the Tribunal determines that:

1. It was unreasonable to include the area of land known as the Peninsula with the Landings for the purpose of the apportionment of the services delivered to the Landings on an Estate-wide basis. However, the Tribunal is satisfied that this action did not result in the amount of the charges being made to each individual lodge owner at the Landings being sufficiently different to warrant an amendment to the charges made to the owners of lodges at the Landings.

2. Considered as a whole, the management charges are too high. The Tribunal considers that a reasonable sum for an overall management fee for the Landlord's Property would be 13% of the total costs of services provided, excluding management, in any accounting year. It determines that a total sum of £568.80 which was charged to the Applicant across the five accounting years 2013/14 to 2017/18 was not reasonably incurred.

3. The charge for the collection of waste by the commercial contractor which was included in the service charge made to the Applicant is unreasonable as this charge is properly payable only by those lodge owners who sub-let their properties on a commercial basis.

4. The excess charge for waste disposal of £6,000 incurred in 2017 and not recovered from the contractor should not be charged to residents. It is unreasonable to pass on the cost of the error as a service charge under the Lease. The Tribunal therefore determines that it was unreasonable for the Applicant to be charged her proportion of this sum amounting to £17.44.

5. The amounts demanded for payments into the Capital Asset Reserve Fund from the 41 Landings lodges for each of the years 2016/17, 2017/18, 2018/19 and 2019/20 included £500 in respect of minor items. The Tribunal determines that for each of these four years, the payments requested for the Fund were clearly unreasonable to that extent. That unreasonableness was evident at the time the service charge demands were made. The total for the four service charge years is £2,000. When divided among 41 lodges, the amount due to the Applicant is £48.78 and the Tribunal according determines that the amounts requested from the Applicant are unreasonable to that extent.

6. All other relevant costs have been properly and reasonably incurred or (in respect of management services) are of a reasonable standard.

7. In respect of the application under section 20C of the Landlord and Tenant Act 1985 and the application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, the Tribunal makes no order.

STATEMENT OF REASONS

INTRODUCTION

The Application

1. This Application ("the Application") was made on 20 July 2019 and seeks a determination from the Tribunal of the liability to pay, and reasonableness of, service charges under section 27A of the Landlord and Tenant Act 1985 ("the Act") as they relate to the Applicant's property, namely Lodge 11, The Landings, Station Road, South Cerney, Gloucestershire, GL7 5LU ("the Property"). The Application raises those questions in respect of five service charge years, namely 2013/14 through to 2017/18, for each of which years accounts are available. The Application is also in relation to 2018/19 but accounts have not been supplied for that year (as it was hoped would happen). A determination is also sought in relation to the year that was current when the Application was made, namely 2019/20.

2. The Applicant is Susan Jean Tupper. Her Application has been conducted by her husband, Stephen Tupper, a solicitor with a firm called Tupperslaw.

3. Two associated applications were made on the same day, 20 July 2019, by the Applicant. The first is an application for an order under section 20C of the Act; the second is an application for an order under paragraph 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002, both of which have been considered and determined with this Application.

4. The Application was set down for a three-day hearing at the end of March 2020 and nine large lever arch bundles of documents were supplied to the Tribunal members. The advent of the Covid-19 virus and the resulting lockdown regulations led to a cancellation of both the inspection of the Property and the oral hearing. The parties subsequently agreed to a determination on the papers and after further Directions were issued, supplied the Tribunal with the written submissions that would have been given to the Tribunal orally at the hearing. The loss of the inspection of the Property is unfortunate but the Tribunal was instead supplied with helpful photographs of the Property and its environs and is content that it possessed the relevant information that would have been revealed by an inspection.

5. After careful consideration of the documentation and the submissions made, the Tribunal considered that it was necessary for certain matters, and approaches to the material which was before the Tribunal, to be discussed with the parties. Accordingly, a hearing by way telephone conference was held for three hours on 17 June 2020. This was attended by both members of the Tribunal, the representative for the Applicant, Mr. Stephen Tupper, Counsel for the Respondent, Mr. James Fieldsend, and a representative from the solicitors for the Respondent. Where relevant in this statement of reasons, matters discussed at that telephone conference will be mentioned below.

The Property

6. The Property is one of 41 holiday lodges at a development known as the Landings, described below. It is sited within the Cotswold Water Park, a large area of some 40 square miles across the three counties of Wiltshire, Gloucestershire and Oxfordshire. Part of the Water Park, known as the Watermark Estate ("the Estate"), has been developed over a period of years as holiday homes. There are five major separate groups of properties within the Estate. These are known as Isis, surrounding Lakes 5a and 5b with 100 lodges; Windrush, around Lake 7 with 82 lodges; Summer, (Lake 11 – 46 lodges and more under construction); Spring (Lake 14 - 80 lodges); and the Landings alongside Lake 16. There is an additional small piece of development land within the Estate known as the Peninsula, which is adjacent to the Landings. The Tribunal has been supplied with a plan of the whole Watermark Estate which shows that Isis and Windrush are around adjoining lakes to the north-east of the South Cerney Outdoor Centre (not part of the Watermark Estate), Summer is to the south-east of that Centre and the other side of a public highway (the B4696), while Spring and the Landings are to the south-west of the Centre. There is therefore a significant degree of separation of the various parts of the Estate.

7. The Landings consists of a long straight piece of land aligned on a north-west to south-east axis between the Spring Lake 14 to the north-east and the Landings Lake 16 to the south-west. The 41 Lodges are to the south-west of the access road and therefore between the access road and the Lake 16 ("the Lake"). Each lodge has access to a pontoon or jetty onto the Lake for the mooring of boats. The photos supplied showed the variety of lodges, all built in what is described as 'New England' style, but unfortunately did not specifically identify Lodge 11 on any photograph. It is described in the papers as one of the semi-detached properties of two stories. The photographs and the plan on the Lease show that the lodges do not have gardens granted as part of the leases but only a narrow veranda stretching around each property.

8. The photos supplied also show other buildings or structures on the Landings, namely three rubbish and recycling stores, a groundsman's work shed, a toilet block, storage units and the letter boxes for residents. The papers reveal that there are also two tennis courts for use by residents and two slipways into the Lake. In addition to the wide access road, there are areas for the parking of both cars and boats. The rest of the Landings area, which is not granted as part of the leases of the 41 lodges, consists of landscaped areas of gravel and grass, and a wide variety of shrubs. At the north-western boundary of the Landings are the premises of the South Cerney Sailing Club. There is also the additional piece of land, called the Peninsula, which juts out into the Lake. It is in the process of being developed with a further six lodges. Four are complete and two remain under construction.

9. It is a planning condition of the development that the lodges are not to be used as a permanent residence or as a primary residence. There was once a further condition that there should be no occupation at all for a period during January and February, but that planning condition has been removed. That further condition was also contained as a restriction in the leases that were granted at the Landings. Many leases have since been

amended accordingly. Apparently, no change has been made to the terms of the Lease of Lodge 11.

The Lease

10. The purchase of Lodge 11, the Landings, by the Applicant, was made of the site before construction, in other words 'off plan'. No details of the contract of purchase were supplied to the Tribunal. The lease ("the Lease") is for a term of 999 years from 1 January 2004 and is dated 14 October 2005. The Lease was granted by the Landings Lake Development Company to the Applicant, Susan Jean Tupper. The Tribunal was told, by both parties, that the developer controlling the company that granted the Lease was a person called Maxwell Thomas. The ground rent is a not insignificant sum, namely £1,000 per annum plus VAT, and is annually reviewed from 1 July by reference to the Retail Prices Index (and the figure now payable, including VAT, is close to £2,000 per annum). A service charge, referred to in the Lease as the maintenance charge, is also payable under the provisions in Schedule 3 of the Lease. Reference will be made to the detailed terms of the Lease, as relevant to the determination, as appropriate below.

The Respondent

11. The Respondent to the Lease is PGIM Real Estate UK Ground Lease Fund (PUK GLF Nominee A Ltd & PUK GLF Nominee B Ltd), consisting of two companies registered in Jersey. The Tribunal is told that the Respondent is nominee for and on behalf of Ocorian Ltd, also registered in Jersey. The Respondent was formerly known as UBS Trustees (Jersey) Ltd until the change of name in 2017. It purchased the freehold of the Landings in 2012. It had previously purchased the freehold titles to the Isis and Spring Estates and a 999 head lease of Windrush. Copies of those registered titles were in the documentation.

12. When the freehold title to the Landings was purchased, the Respondent did not purchase the freehold title to the Lake, nor that of the Peninsula. The Tribunal is told that these freehold titles remain vested in Maxwell Thomas, or one of his companies. The Lake is subject to a lease to the Sailing Club. The Tribunal is also informed that the Respondent does not have either the freehold or any other estate or interest in the Summer development.

The 'Landlord's Property'

13. The 'Landlord's Property' is a defined term within the Lease. The Particulars state the Landlord's Property to be:

> The property comprising Lake 16 Cotswold Water Park, South Cerney, Gloucestershire being registered at HM Land Registry under Title Number GR160953 shown by way of identification only edged blue on Plan 2'.

However, the definition of the phrase 'Landlord's Property' reads:

> '(T)he property described in the Particulars as the Landlord's Property and each and every part of it together with any other property from time to time designated by the Landlord under Clause 5.6 or such lesser area designated by the Landlord but including all landlord's fixtures, fittings, plant machinery and equipment from time to time at the Landlord's Property'.

Clause 5.6 provides:

> 'The Landlord may designate from time to time additional property to form part of the Landlord's Property either for the remainder of the Term or for a shorter period'.

14. Plan 2 attached to the Lease includes the Lake, the current area of the Landings, the area now occupied by the South Cerney Sailing Club and some additional land alongside the Lake. However, the area known as the Peninsula was excluded from the definition from the outset since (as if it was an island on the plan surrounded by the Landlord's Property) it was edged around in blue and thereby excluded from the Landlord's Property in the Lease.

15. The original area so defined and covered by the term 'Landlords Property' was changed by a formal re-designation under clause 5.6 of the Lease after the Respondent purchased the Landings in 2012. The purchase was of the Landings; the freehold title to the Lake and to the Sailing Club and the other land near the Lake was not included in the sale. Consequently, by a letter dated 11 October 2012, Osborne Clarke, as solicitors for the Respondent, made a fresh statement about the extent of that definition. They gave notice on behalf of the Respondent, and in accordance with the provisions of the Lease, that the 'Landlord's Property' for the purposes of the Lease was the land shown edged red on the two plans enclosed with the letter. One of the two plans delineated most of the land between the Lake and Spring lake to the north-east, including all 41 lodges, the access road, parking spaces and ancillary buildings, while the second showed a long thin strip of land between the Landings and the edge of Spring lake. By that designation, the freehold of the Lake, the land occupied by the Sailing Club premises and other land round the edge of the Lake was excluded from the Landlord's Property.

16. It is conceded by the Respondent that no further re-designation under Clause 5.6 has occurred. Therefore, the extent and the definition of the Landlord's Property has not changed since 2012. The area known as the Peninsula is not, and never has been, part of the Landlord's Property as defined.

17. In the light of the clarity and agreement that the definition of Landlord's Property for the purposes of the Lease only extends to the 41 lodges of the Landings, the Tribunal does not have to determine the extent of the power given to the Landlord to change that definition of the extent of the 'Landlord's Property'. It is probable that an extension of what is included may only be possible to other nearby property of the Landlord, and not to property vested in another person. The Peninsula is excluded as it is not within the 2012 designation, and it could probably not be included until the freehold title is vested in the same landlord.

18. The consequence of the 'Landlord's Property' only being the 41 lodges of the Landings is significant for the determination in this case. The Lease contains no reference to the Watermark estate or any other property except the Landlord's Property as defined. Therefore, the services charged must be for the services provided to those 41 lodges. The service charges cannot include the costs incurred in respect of other nearby property, whether of the Landlord or someone else, that the Respondent has chosen to manage together with the Landings.

Management of the Watermark Estate and Estate Costs

19. The Estate is managed as a single entity by Mainstay Residential Ltd ("Mainstay"), on behalf of the freehold or head leasehold owners. This is notwithstanding that there are some elements of the Estate vested in the Respondent (Isis, Windrush, Spring and the Landings) and some elements vested in (the Tribunal is told) Maxwell Thomas or one of his companies (Summer, the Peninsula). Until 2014, the Estate was managed by Savills; Mainstay have managed since then.

20. There is an on-site estate manager and manager's office, located by the Isis lake and a security hut at the Isis/Windrush entrance which is manned 24 hours a day. The plan supplied also indicates a Watermark Holidays reception office on the Summer site. It is therefore perhaps not surprising that it was decided by the Respondent that the provision of management services, security, landscape maintenance and other matters within the service charges levied on Landings properties should be delivered on an Estate-wide basis.

21. The Respondent stresses that there is no Estate-wide service charge. Rather, it is said that there are common services to be provided across the developments and the cost of the service is centralized. The costs are then apportioned to reflect the level of service given to each development. It is submitted that this avoids separate contracts for services supplied to each development and benefits the leaseholders through economies of scale.

22. The division of the costs incurred in delivering services to the Estate is calculated on a 'per lodge' basis and then charged to the separate areas of the estate. A key issue for the Tribunal to address is both the validity and the reasonableness of the division of the charges made to the Landings and to the Property for services incurred on an Estate-wide basis.

OUTLINE OF CONTENTIONS AND APPLICABLE LEGAL PRINCIPLES

The contentions of the Applicant

23. The Applicant's case is put by her husband and representative, Mr. Stephen Tupper. Mr. Tupper is a solicitor in practice but indicates that he is not a property law specialist. The submissions on behalf of the Applicant are put in papers submitted by Mr. Tupper. In this determination, reference to the Applicant's case and submissions are to those put forward in the paperwork on the Applicant's behalf by Mr. Tupper.

24. The Applicant has not filed any witness statements. No evidence is brought forward by any expert witness. No comparisons (in situations where they might have been relevant) have been produced. Instead, the Applicant relies solely upon the submissions made which refer to the service payments and accounts demanded from the Applicant for the years 2013-14 to 2017-18 and the budgeted service charge put forward thereafter. Assertions and arguments are then put forward from the figures available and from the documentation supplied. Reliance is also placed on various matters by reference to aspects of the voluminous correspondence over the years between Mr. Tupper and the agents of the Respondent, mainly the estate manager for the period, a Mr. Jonathan

Richie, who was the on-site manager for Mainstay for the period between September 2015 and September 2019.

25. The Applicant contends that all items within the service charge for all six years in question 2013-14 to 2018-19 are unreasonable – as her representative Mr. Tupper puts it in his closing submissions, it is a challenge to the entirety of all the service charges made over the years in question. In relation to the financial year 2019-20 only budgetary figures are available. A Scott Schedule was completed but no details were entered by the Applicant to indicate the grounds on which any individual aspect of the service charge was submitted to be unreasonable. Similarly, the Applicant did not put forward any figures of the amounts that the Applicant considered might be reasonable.

26. The contentions of the Applicant can be conveniently separated into four different strands, as was helpfully done by Counsel for the Respondent. These are as follows:

1. The service charges made in relation to the club subscriptions are alleged to be 'exploitative'. These challenges, whether made under the general law, the Unfair Contract Terms Regulations, or the Competition Act 1998, are all challenges to the legality of recovery.
2. All the charges made and listed in the Application are said to be unreasonably incurred.
3. The standard of service from the managing agent was said not to be reasonable (but otherwise there is no dispute as to the reasonableness of the standards in the provision of any of the other services).
4. There is a challenge to the legality of payments which have been made from the reserve fund, as well as a challenge to the reasonableness of the sums demanded in relation to the reserve fund.

27. The Applicant puts her case rather more widely. In her view, it is alleged that the service charges are 'a complete and utter omnishambles'. It is said that there are so many errors that every single aspect of the charge is fatally contaminated by irregularities. It is perhaps because of that view that in no case does the Applicant indicate what part of a particular aspect of the charge is unreasonable; or to put it another way, no indication is given as to what it might be reasonable for her to pay for the services that she has received. In her Reply, and final submissions, there is an acceptance that a reasonable amount is payable for repair and maintenance work, but that is all.

28. This determination approaches the contentions of the Applicant in the same way that both parties have framed their submissions. In other words, rather than look at each of the financial years in question, the determination will be in the form of looking at the specific items in turn and across all years rather than taking each financial year separately.

The contentions of the Respondent

29. The Respondent and its agent have provided considerable detail to the Tribunal to justify the service charges made in the years at issue. The charges are supported by invoices for the various amounts. In some instances, as recorded in the amended Scott

Schedules completed by Counsel, the Respondent has accepted that a small amount of the sums included in the service charges were either made in error or should not have been included. However, except in relation to those matters, the Respondent's case is that the charges are properly made; that the amount of the charges are reasonable; that the agent's management did not fall below the standards expected of a competent agent; and that the Tribunal has no jurisdiction to consider the validity of debits made to the reserve fund. It finally contends that the budgeted costs for 2019-20 are also reasonable. Through its Counsel, the Respondent helpfully offers to provide, subsequent to this determination, the amount of the service charge that is relevant to, and consequent upon, this determination.

Matters to be determined

30. The main matters to be determined in this case fall into four discrete areas, into which the strands identified in paragraph 26 above operate:

1. There are aspects of the service charge that are delivered on an estate-wide basis, particularly estate management, security, and gardening and landscaping but also aspects of waste management. Here the challenge is that the charges have not been reasonably incurred.
2. There is a challenge to club subscriptions, those made to the South Cerney Sailing Club and to the Watermark Club. Here the challenge is primarily to the lawfulness of the charges imposed though the issues of whether they have been reasonably incurred is also raised.
3. The Applicant challenges the standard of management by the agents; there are some additional matters associated with management to be considered as well.
4. Concerns are raised about the service charge payments into the reserve fund; and it appears the reasonableness of the reserve fund service charge levies may also be an issue.

Each area will be considered in turn.

The applicable law

31. The limitations of the jurisdiction of the Tribunal under the Landlord and Tenant Act 1985, s27A are clear. There is no dispute in this case about the person by whom the service charge is payable, the person to whom it is payable or the dates by which it would be payable, or manner in which it would be payable. The disputes arise, firstly, as to whether a service charge is payable (s27A(1)) in respect of a few matters (the club subscriptions); and, secondly, in the case of costs which have been incurred for services, whether a service charge would be payable in respect of those costs (s27A(3)). Where costs have been incurred in a period for which a service charge is payable, then they can only be taken into account to the extent that they are reasonably incurred and then only if the services are of a reasonable standard (s19(1) of the Act). The Applicant raises the issue of reasonableness in respect of all costs incurred but the issue of the standard of the services only in relation to the management fees.

32. The statutory provisions have been set out in the light of the Applicant's contentions in her Statement of Case and in the earlier parts of her Reply. She sought a range of legal remedies including orders for repayment, reimbursement of overpayments, orders to prevent future service charges and for access to documentation. This Tribunal under

this Application can only determine whether a service charge is payable at all (the issue of the legality of the charges made under the lease) and, when costs have been incurred, whether those costs are payable, whether they are reasonable and whether they are of a reasonable standard (the subsequent issue of reasonableness of the charges if otherwise properly made under the lease).

33. At the end of her Reply dated 21 February 2020, in paragraph 53 thereof, the Applicant, through Mr. Tupper, eventually accepts those restrictions on the relief available in this Tribunal and asks for a decision as to whether any particular sum is payable in accordance with the terms of the Lease and, if it is, the amount which is payable.

34. Where there is, as in this case, both a challenge to the entitlement of the Respondent to recover costs incurred, and a challenge to the reasonableness of the costs of the service charge, and to various aspects of it, it falls to the Respondent to justify that the Applicant is liable under the Lease and (if the Applicant is so liable) it falls to the Applicant to adduce prima facie evidence that the costs complained of are unreasonable: *Schilling v Canary Riverside Development PTD Ltd* (2005) LRX/26, 31 & 47. Since the Applicant has not filed witness statements of any expert or comparative evidence, it is necessary to establish that the documentation filed does indicate that some prima facie evidence is available to the Tribunal where unreasonableness is alleged. Only then does the Respondent, who has filed detailed evidence by way of accounts and invoices that show that costs have in fact been incurred, need to justify the reasonableness of the service charges made. Nevertheless, as a Tribunal where there is no formal system of pleading, it is important that this determination is based on consideration of all the evidence placed before the Tribunal: *Yorkbrook Investments v Batten* [1985] 2 EGLR 100.

35. In determining whether costs are 'reasonable', the key question for a tribunal to answer is whether those costs were 'reasonably incurred' – the words used in section 19(1)(a). The Tribunal, in respect of each matter raised by the Applicant as unreasonable, must consider if the actions of the Respondent were appropriate in all the circumstances and properly effected in accordance with the requirements of the Lease, the RICS Service Charge Residential Management Code, and the Act; and then move to consider if the amount so charged was a reasonable amount: *Forcelux v Sweetman* [2001] EGLR 173, LT. In determining what is then reasonable, a tribunal must then give to that expression a broad and common sense meaning: *Viscount Tredegar v Harwood* [1929] AC 72 at 78.

SERVICES DELIVERED ON AN ESTATE WIDE BASIS

Estate Costs charged to the Landings

36. As detailed above (paragraphs 19-22), some of the charges levied in the maintenance charges for the Landings include costs incurred on an Estate-wide basis, particularly relating to management costs, security and gardening and landscape services. In her Reply dated 21 February 2020, the Applicant contends that that fact alone is sufficient for a ruling in her favour on the basis that the costs were not incurred in relation to the

Landlord's Property. While it is true that the Lease makes no mention of any wider Estate, it is not the case that this will mean that costs incurred in common across the Estate cannot be validly and reasonably charged to the Landings. It is well established that a landlord may provide services across properties let to different leaseholders, and then apportion the charge across different properties. This may be done provided it is in accordance with, or acceptable within, the terms of the lease in question and provided the resultant charge made is fair and reasonable. In this way, economies of scale can be achieved so that the overall costs to all the leaseholders and tenants may thereby be reduced. For example, it is well established that local authorities with multiple leasehold estates with long leasehold residents may have (for example) cleaning contracts for all those properties with a single contractor. The service charges are valid provided the terms of the lease are observed and the local authority can show that the distribution and apportionment of those charges for cleaning between the various properties is fair and reasonable.

37. *Norwich City Council v Redford* [2015] UKUT 30 is cited by both parties in this context. In that case, the city council was required to maintain and renew the communal lighting on an estate of properties and under the service charge could recover its reasonable expenditure on fulfilling that obligation. The council chose to do this by agreeing a city-wide contract for maintaining lighting but chose to apportion that charge by reference to the rateable values of properties rather than by the actual expenditure incurred under that contract for the estate in question. The Upper Tribunal upheld the First-tier Tribunal's decision that that method of charging was not in accordance with the terms of the lease in that case. Those terms required that the 'expenditure in complying with its obligation' had to relate to the expenditure actually incurred. The city council had failed to do that and the apportionment of charges by means of a reference to rateable values was not valid.

38. There is, however, nothing in the case of *Norwich City Council v Redford* to condemn the provisions of services delivered in common to more than one set of properties and then apportion the cost, if it is done in accordance with the terms of the lease in question. Indeed, the F-tT in that case found that apportionment might have been entirely legitimate if there had been a fixed-price contract. But such apportionment must not only be reasonable and fair, but it needs to ensure that costs incurred in relation to another set of properties is not thereby charged to the property where the service charge is in dispute. As HH Judge Alice Robinson noted in *Norwich City Council v Redford*, a lessee about to enter into a lease would express considerable surprise if told that the city council could include in its service charge sums expended on other properties. A court or tribunal would certainly need to see very clear words to come to such a conclusion and the Lease in this case certainly does not permit that. The Respondent accepts that position and submits that the service charge machinery is not operated on an estate-wide basis and does not include costs incurred by other lakeside developments within the Estate. Counsel also stresses that it is not repairs and maintenance at issue in this case (as it was in *Norwich City Council v Redford*) but rather the provisions of services in common for each of the various lakeside developments.

Apportionment of Estate Costs

39. Where services to the Landings are incurred on an Estate wide basis, the Respondents, through the agents, Mainstay, need to apportion those costs between the various sites or developments that benefit from those services. The method of apportionment that they have chosen is to take the total number of lodges on the Estate and then divide the costs on a per lodge basis. Thus, in her witness statement Neelam Samra (at paragraph 67) states that the number of lodges on the Watermark Estate in the year ending 30 June 2017 was 344. The number of lodges at the Landings is 41 so the amount charged to the Landings would be 41/344 of the total cost.

40. It does not seem that the Applicant makes a challenge to the reasonableness of the methodology of the apportionment (though there is a challenge to the inclusion of the Peninsula lodges with the Landings – see paragraphs 49-54 below). It is the view of the Tribunal that, at least on the evidence before it, that an apportionment of Estate costs on a per lodge basis is a reasonable approach – if to incur costs on an estate wide basis is justified. The justification for providing for services, and charging for them, on an estate wide basis will now be considered.

Justification for incurring costs on an Estate-wide basis

41. There are three or four areas of charges within each service charge year where the Respondent incurs costs on an Estate-wide basis and then apportions the costs between the various developments. The Applicant questions the reasonableness of provision of services in that way given that the Lease provides for services to the Landlord's Property. Before considering each of these areas in turn – namely (in particular) security, gardening and landscape maintenance and estate management costs – it will be convenient to consider some wider issues applicable to them all.

42. The Tribunal considers that these are the principles that should guide the determination on these issues.

1. The first consideration is the terms of the Lease. This provides that the services are to be provided to the Landlord's Property. While there is nothing in the Lease expressly to permit those services being provided on an Estate-wide basis and then apportioned, there is equally nothing to prohibit that approach.
2. The Respondent submits that the provision of services on an Estate-wide basis permits economies of scale to be achieved; or, in other words, it is able to deliver the service to the Landings at a lower cost than if those services were provided for the Landings alone. But in the absence of express provision in the Lease, is it for the Respondent to provide evidence to justify its approach? Or must the Applicant establish a prima facie case that the delivery of the service in this way is unreasonable?
3. The best evidence to make that justification for an Estate-wide delivery of services would normally be to have had a tendering exercise for delivery of those services. Such an exercise will set out the standards expected and give evidence of market pricing. But other evidence of such justification may be available.

43. There are some decisions providing limited assistance to the Tribunal in determination of the issues, and especially the issue of a tribunal's approach to the

evidence. In *Veena SA v Cheong* [2003] EGLR 175, the service charge included the cost of a full-time porter in a block of seven flats. A part-time cleaner was also employed. The property had been developed and sold within the last ten years as a luxury flat with the benefit of porterage. The lease provided for 'a porter or porters' and so was a service contemplated when the lease was granted. The issue was whether the Respondents were justified in employing both a full-time porter and a part-time cleaner. The Leasehold Valuation Tribunal upheld the submissions of two of the leaseholders that a part-time porter would suffice and to employ a full-time porter and a part-time cleaner was not reasonable. The appeal to the Lands Tribunal was unsuccessful; the landlord could not show that the decision of the LVT was wrong. A part-time porter would have been adequate. This case shows that the way a service is delivered must be reasonable; a landlord cannot charge for a service which is delivered in a way that is excessive to what is reasonably required.

44. In *A2 Housing Group v Taylor* (2006) LRX/36/2006, the Lands Tribunal upheld a contract for cleaning and landscape services covering 180 mixed tenure estates in 19 different boroughs totaling some 5,000 units. This had been agreed by the applicant, a housing association landlord, after (it said) having unsatisfactory experiences with the use of individual contractors on single estates. The resultant costs were however very much higher than before. The Leasehold Valuation Tribunal had, after directing that quotations be sought for the single estate at the same specifications, and finding that those produced a more competitive quotation, found that the costs incurred under the large central contract were unreasonable and reduced the charges. The Lands Tribunal reversed that decision and the charges under the single central contract were upheld. It noted that the LVT had not criticized the landlord's preferred option of a single contract which had been on the grounds of improved service delivery and simplification of management and recognized that the specification was not 'gold plated'. The LVT was wrong not to attach more weight to the evidence about the inability of alternative local contractors to provide an adequate level of service. This decision shows the importance of weighing all the evidence when considering both the process and the cost of services delivered on an estate-wide basis.

Approach to the evidence

45. Since some services are delivered to the Landings on an estate-wide basis, the issue that has arisen in this case is whether it is for the Respondent to demonstrate that the leaseholders either benefit from these arrangements or show that the alleged economies of scale are in fact achieved. The Applicant considers that to be the case. She contends that services should be delivered only to the Landlord's Property and where that is not the case, then the whole amount of the charges levied are unjustified. The concept that once unreasonableness is shown means that no charge at all is payable is misconceived; it is contrary to authority, including those cases cited in this statement of reasons, and contrary to the Act where in s19(1)(a) service charges remain payable *to the extent* that they are reasonably incurred. But that leaves the question of the proper starting point when considering the evidence relating to services delivered on an estate wide basis – is it for the Applicant to adduce prima facie evidence that the costs complained of are unreasonable (*Schilling v Canary Riverside Development PTD Ltd* – above paragraph

34) or is it for the Respondent to adduce evidence to show that it is reasonable to deliver services on an estate wide basis?

46. This was one of the issues put to the parties for comment on 17 June. Mr. Tupper naturally supported the view that it was for the Respondent to make a prima facie case in favour of estate-wide service provision but did not cite any authority that might suggest that was the case. His strongest point was the practical one – that it was too much to expect an individual leaseholder to be able to produce that evidence. He also considered that, since there was no provision in the Lease for estate-wide charges, the starting point was that services should be delivered for the Landings alone. He argued that any move away from what the Lease provided for should be justified by the service provider. He pointed to the 'lack of visibility' from estate-wide provision and the lack of any estate-wide accounts.

47. For the Respondent, Mr. Fieldsend's submission was that any approach that put on the Respondent a burden to provide prima facie evidence in favour of estate-wide provision was contrary to authority and particularly the decision in *Schilling v Canary Riverside Development PTD Ltd* (above). He also referred to the Upper Tribunal decision in the recent case of *Enterprise Home Developments LLP v Adam* [2020] UKUT 151 where the Deputy Chamber President, Martin Rodger QC, made it clear that making an application under s27A does not place a burden on the landlord to justify and document each item of expenditure. There must be some affirmative case from the person making an application or some fact to incite suspicion that costs had been unreasonably incurred. When a challenge is made to any service charge, the principled approach is that the challenger must establish that there is a case to be heard. Mr.Fieldsend contended that this was in line with the wording of s27A, namely, that a service has been provided and a cost incurred which is recoverable through the service charge and it is then for the Tribunal to determine whether it was reasonable to incur the cost and whether it was reasonable in amount. Providing a service in a particular manner is not prima facie evidence that the process or the outcome is unreasonable.

48. The Tribunal has some sympathy with this Applicant, indeed any applicant, with the task they face of challenging a service provided on a basis wider than the single block or development with which the terms of a lease are concerned. Nevertheless, the Tribunal considers the approach of Mr. Fieldsend is the correct one. It is true that in *Wallace-Jarvis v Optima* [2013] UKUT 328, the President gave permission to appeal on the basis that the water charges (with which the case was concerned) were so high that it was clearly arguable that the tribunal could treat those charges as not being reasonably incurred, with the onus on the landlord to justify those charges. In the full appeal, having found on the evidence that the charges were unreasonably high, the burden did indeed shift to the Respondents to show that the amounts had been reasonably incurred. However, the decision in that case ultimately supports the Respondent's contention. It is necessary for the applicant to demonstrate that there is some aspect of the provision or service delivered even on an estate-wide basis that gives rise to a prima facie case that either the process involved in the delivery of the service or the amount charged for such delivery is unreasonable.

The Peninsula

49. Before considering the challenge to those services delivered on an estate wide basis, it is necessary to consider the relationship of the Landings to the Peninsula. The Peninsula is the name given to a piece of land jutting out south-westwards into the Lake at the north-western end of the Landings between the Landings and the Sailing Club. The access to the Peninsula is from the Landings and through the entrance and security barrier giving access to the Landings. As has been described above (paragraphs 6 and 17), it was not developed at the same time as the Landings and does not form part of the Landlord's Property as defined in the Lease. It is not vested in the Respondent. It is apparent from the papers that it is being developed, though not at a fast pace. Four lodges have apparently been completed, and a total of six are planned.

50. The Respondent, through Mainstay as its agents, chose to include the lodges on the Peninsula with the 41 lodges on the Landings for the purposes of apportioning costs incurred on an estate wide basis. Thus, as Peninsula lodges were completed, they were added to the total on the Peninsula so that the number grew – to 42, 43, 44 and so forth.

51. The Applicant contends that this approach should not have been adopted. She goes on to allege that, as a result, she has been asked to pay more by way of service charge on the Property. She does not however include any calculations to demonstrate why that might be so.

52. The Respondent has conceded that the Peninsula is not part of the Landlord's Property and, in effect, therefore accepted, through Counsel, that the inclusion of the Peninsula with the Landings could have meant that the Landings would be paying for costs that would fall to be paid by the Peninsula alone, or, perhaps, paying more overall. An analysis has been done by the Respondent. There are very few such costs incurred by the Peninsula alone (the Tribunal is told) but adjustments have been made to eliminate them for charges to the Landings. However, the Respondent further contends that the approach to apportionment, which is to apportion estate costs that benefit both the Peninsula and the Landings according to the total number of lodges on each development relative to the total number of lodges across the Estate, means that there is no material difference arising either from the inclusion or the removal of the Peninsula lodges from consideration with the Landings. This is because removal of the Peninsula lodges will reduce the relativity percentage and thus reduce the overall cost to the Landings, but that is matched by an increase in the contribution of each of the 41 Landings lodges (as opposed to 42 to 44 lodges depending on the year if the Peninsula is included) to that reduced cost. In the revised Scott Schedules submitted by the Respondent, it is demonstrated that the alternative mathematical calculations differ only marginally. The Tribunal accepts the submission that there is no material difference in the charge made to the Landings in respect of costs that apply to both the Landings and the Peninsula arising from the Respondent treating the two together.

53. However, it was (at the very least) unwise for the Respondent to add the Peninsula lodges to those of the Landings since they are not part of the Landlord's Property as defined. It blurs the requirement that the service charge to the Landings should be for the Landlord's Property and raises concerns, as in this case, that the correct charge is

not being made. It was therefore not reasonable for the Respondent to add the Peninsula lodges to those of the Landings. But it was not obviously improper under the terms of the Lease to aggregate the two developments since the wider estate is not mentioned in that document; rather, it is a question of whether that aggregation rendered part of the service charge unreasonable. As a method of producing an apportioned figure to allocate to the Landings it produces a fair result, or, at least, one that is not demonstrably unfair. But it remains unwise and potentially misleading to include the Peninsula with the Landings for the purposes of apportionment. No doubt the Respondent will adjust the calculations that it makes for future accounting years by keeping the Peninsula entirely separate from the Landings.

54. The determination of the Tribunal in relation to the Peninsula is that, while the process of aggregation was unwise and may be considered to be unreasonable, it has not been demonstrated that the amounts charged to the Landings as a consequence were unreasonable.

Security

55. The security provisions made for the Landings are on an estate wide basis. They are set out in the Respondent's witness statement of Neelam Samra at paragraphs 76-87 where they are described as an 'estate cost'. There is a security office on the Windrush/Isis estate where CCTV cameras monitor the various sites and run the intercom system to cover the security barriers including that at the Landings. As well as the 24-hour CCTV service, there is 24 hour manned guarding and the night guard is supported by a mobile security unit which visits the Landings three times a night with four specific checkpoints. The service is provided by Securitas, an independent company specializing in security. The costs charged, and then apportioned across the estate, cover the employment costs and provision of equipment and systems. The total security charge for the Landings in 2017-18 was £21,097.11 apportioned across the 41 lodges or about £514.56 per lodge.

56. The Applicant does not contend there should be no security provision in the service charge. The Lease in Schedule 3, Part 1, paragraph 10, provides for the Landlord 'making and maintaining security arrangements for the Landlord's Property'. The issue for the Tribunal is therefore just an issue of reasonableness – is the provision made reasonable and were the charges for that provision reasonable?

57. The Applicant's challenge to the security charges contains two arguments. The contention is firstly that the payment should only be for the 'Landlord's Property', as defined and so should not cover security of the lodges themselves (and therefore should not include monitoring of occupation); and secondly that some of the costs incurred, such as on the security office elsewhere on the Estate, are unnecessary for the Landings when it is considered as a single unit as the Lease requires.

58. The Tribunal firstly determines that the arrangements made by the Respondent for security at the Landings are reasonable. Though the Lease refers to the security of the Landlord's Property (which the Applicant contends excludes the 41 lodges), a system of security that totally ignored the security of the lodges makes little sense – if there are

signs of a break in, fire or serious damage to a lodge, a security guard is not likely to pass by and ignore it. The Applicant does not contend that the lodges are to be ignored in the security provided – but the logic of the argument proposed by the Applicant is that they should be ignored. However, the Tribunal cannot accept that interpretation of the Lease. Indeed, by virtue of its reversion and as holder of the freehold title, in the view of the Tribunal, the Landlord's Property includes the 41 lodges. Consequently, the Tribunal determines that the security arrangements properly include the long leasehold lodges within the phrase 'Landlord's Property'.

59. The provision of security barriers on a luxury holiday estate in the countryside and with a high turnover of temporary occupants is reasonable and such a system requires monitoring of the intercom. The entrance barrier needs to be manned remotely and, given that the wider estate security requirements also exist, this can be conveniently done from the nearby local office serving both the wider Estate and the Landings so that on-site problems can be rapidly dealt with. The presence of a local office is therefore a benefit in this overall context. Similarly, there is considerable value to the Respondent and leaseholders alike in having a CCTV system installed which is monitored locally so that any concerns revealed can be immediately investigated. No doubt, leaseholders can also have reassurance from the provision of a night-time guard service with three checks at night. The conclusion must be that these arrangements, which the Tribunal considers sensible on a luxury holiday development, not only benefit the Landlord's Property but in so doing provide considerable benefit for the leaseholders. Applying the approach set out in *Forcelux v Sweetman* [2001] EGLR 173, LT, the Tribunal determines that it was reasonable to incur the security costs on an estate-wide basis.

60. The Tribunal also considers that the cost of the security so provided has not been demonstrated to be unreasonable. It considers that, if a security service offering the same range of benefits in security terms and to the same level of service were provided for the Landings alone, it is unlikely that it could be provided at the same or a lower cost. At the very least, the Applicant has provided no evidence to show that such a local service for the Landlord's Property could be achieved at a lower cost. Consequently, the sharing of a central cost is justified since providing security separately to the 'Landlord's Property', a small estate of 41 lodges has not been shown by evidence to be a cheaper and equally acceptable option. The Tribunal determines that it has not been demonstrated that it would be possible to deliver the same or similar level of service at a lower cost. The method of dividing up the charge on a per lodge basis is reasonable (see paragraphs 39-40 above).

61. In conclusion, the Tribunal considers that the Applicant has not even made out a prima facie case of unreasonableness in relation to security. Even if the delivery of security through an office some way from the Landings was sufficient to make that case, the Tribunal is clear in its conclusion that both the way the service has been delivered and the amount of the costs charged has not been demonstrated to be unreasonable. However, the Tribunal would add that the Respondent may well wish to follow good procurement practice and plan to undertake a tendering exercise for the delivery of security services. This might also be a good opportunity to take account of the leaseholders' views of the level of service provided prior to such a procurement exercise.

In this way, the Respondent's submission that some weight should be given to the lack of complaint about the scope of the service from leaseholders other than the Applicant could be tested; and the Applicant's understandable concern about the way the service has been currently procured could be answered.

Gardening

62. The services of grounds maintenance and landscaping (shortened for this determination to 'gardening') has been provided to the Landings in three different ways over the service charge years in question, as set out in the witness statement of Neelam Samra at paragraphs 115 to 130. Until 2015, the gardening for the entire Watermark estate was through an employed team of five persons led by a head groundsman and the costs were apportioned on a per lodge basis across the estate. Those persons were employed by an associated company of the agents, Mainstay Facilities Management. The Tribunal notes that on-site staff would usually be employed in accordance with the RICS code by a landlord, though employment by an agent is perfectly possible as confirmed by the decision in *Country Trade v Marcus Noakes* [2011] UKUT 407. However, the Tribunal would expect the terms of such employed on-site staff to be set out in the terms of engagement of the managing agents.

63. From 2016, each of the ground staff were allocated to a specific site, one to the Landings, and the salary of that person was met through the Landings service charge; but the costs of the head groundsman was still apportioned across the Estate as an additional charge. In January 2017, the member of staff allocated to the Landings went on sick leave and the work was, for an unspecified time, covered by the rest of the team. When that person did not return to work, external contractors were instructed for the work for the Landings. The Tribunal is now told that a tendering exercise is underway for the gardening services to the Landings. The Tribunal adds that there is no suggestion by the Applicant that the gardening services have not been of an adequate standard. The issue is the reasonableness of the charges made.

64. The requirement of the Lease is for the gardening services to be supplied to the Landlord's Property. This is provided for in clause 4.2 of the Lease where the Landlord is required to keep clean, tidy and maintained the gardens and other open areas of the Landlord's Property; and the performance of that obligation under clause 4.2 is then a charge under Schedule 3, Part 1. This provision is supplemented by clause 13 of that Schedule, so that the leaseholders must contribute to the cost of maintenance of the Landlord's Property designated for communal use including any banks and shores of the lakes. The Applicant is not required to pay for maintenance of the wider Watermark Estate. If, however, as the Tribunal has decided in relation to security, the gardening can be more efficiently and more economically supplied as part of a wider contract, then the Respondent would be justified in charging a proportion of the wider costs.

65. The recent experience of a contractor providing the gardening service, rather than an employed gardener or an estate wide team, demonstrates that the gardening service can (unlike security) easily be provided by a contract servicing the Landings alone. It may be the more cost-efficient way of providing gardening to the Landings rather than by being part of a centralised service - but it may not be. In the light of the decision in *A2*

Housing Group v Taylor (2006) LRX/36/2006, the Tribunal must decide if there is sufficient evidence to conclude that the estate-wide service is justified and if so whether the costs are reasonable.

66. The contentions of the Applicant are supported by two facts emerging from the evidence. Firstly, to some extent at the very least, there is the fact that the gardening service was supplied by an associated company of the managing agent. The decision in *Country Trade v Marcus Noakes* (above) shows that this can be an acceptable approach but there is no evidence on which to judge whether the provision in this case was a reasonable way of providing the service. In other words, the process is questionable. It would have been better either if the service to be provided was under a contract after an arms-length tendering procedure or provided by the associated company after tendering for such a contract. Such an approach would have given the Applicant some reassurance that the service was being provided economically and on a value for money basis.

67. The second fact is that the Landlord's Property at the Landings is a relatively narrow strip of land between two lakes, though the Tribunal was told it contains over 40 different trees and shrubs. If the Landings was a stand-alone development by the Lake, a managing agent would very probably not employ a gardener but instead compile an annual programme of grounds maintenance and landscaping that would be required together with a specification of gardening work that was necessary; then seek tenders for the work and award a contract accordingly. It now seems that this is the approach being adopted.

68. The Tribunal therefore determines that the system adopted for providing the gardening service prior to 2017 fell short of giving a clear justification for a charge on an estate wide basis and therefore provides the necessary prima facie evidence of potential unreasonableness. However, when one looks at the charges over the years in question, the costs incurred through use of the independent contractor do not materially differ from the amounts charged after apportionment of the Estate-wide gardening service. This indicates that the amounts charged prior to 2017 were not obviously unreasonable in total. The Applicant did receive the benefit of a garden and landscaping maintenance service in those years and has not complained that the standard of work was inadequate.

69. On the information available, the closest the Applicant can get to making a case that aspects of the costs for gardening are unreasonable is in relation to the costs that were made in earlier years when the Landings service charge included a proportion of the cost of a head gardener, in addition to the costs of the gardener allocated to do the work. But in the light of the charges made by the current gardening contractor, the Tribunal does not consider the amounts charged in those earlier years were unreasonable. Moreover, the Tribunal accepts the Respondent's contention that landscape management requires a level of skilled knowledge. In short, on the evidence available, the charges made for grounds maintenance and landscaping have remained at a consistent level, notwithstanding the changes to the way the service is organized and the Tribunal believes that the costs made for each year are not unreasonable.

70. The decision of the Respondent to provide these services after a proper tendering exercise in future is sensible. It ought to provide a far better basis for future service charges under this heading with leaseholders having the ability to see details of the level of service they can expect for the service charge that they pay.

71. The Applicant also complains about the cost of gardening equipment, purchased over the years when the Landings work was done by the employed estate team but are now no longer used by the contractors, at least in relation to the Landings. However, the Tribunal only has jurisdiction to consider the reasonableness of the service charge as a whole and the itemized individual elements within it. The Tribunal cannot examine individual purchases made from service charge funds received (see paragraph 128 below); it can only consider the reasonableness of charges made for gardening, grounds maintenance and landscaping and (separately) for a reserve fund.

Estate management fees and the claim of double charging.

72. In both her Statement of Case and her Reply, the Applicant makes a series of complaints about the reasonableness of the service charges as they relate to management of the wider estate of which the Landings is part. The contention is that if one takes the Landings on its own, namely the Landlord's Property as defined, then to charge both for an estate manager (and the costs of an estate office) and an overall management fee is unreasonable; and similarly there should be no charge for some of the estate costs such as those made for the estate vehicle, for the estate manager's I-Pad and certain internal matters such as provision of coffee for visitors. Thus, at paragraph 17 of the Reply, the Applicant contends that the Respondent has not considered the service charge needs of the Landings on a standalone basis. The Respondent has conceded that some small charges were inappropriately, perhaps accidentally, included and has committed to making a credit in respect of such items (such as staff training) but otherwise submits that to incur management charges across the estate and then to apportion those charges is acceptable and the apportionment reasonable.

73. The Tribunal considers it right to examine these concerns of the Applicant in a wider context and in the light of a surprising admission by the Respondent. The wider context is that there are in the service charges levied on the Applicant two sorts of management charge. The first is the share of the management fee of the agents charged to the Landings - £9,686 in 2017-18 (and a significantly higher sum budgeted for 2019-20). The second are a series of management charges relating to estate management. Over the years, the nomenclature of the headings has not been entirely consistent but in 2017-8 they were listed as:

1. Estate salaries: £6350.22
2. Estate Office costs: £1,041
3. Estate Office telephone: £513.54

74. The admission, which the Tribunal found surprising, is that, despite the size of the task in managing the wider Estate including the Landings, there appears to be no management agreement between the Respondent and Mainstay, its agent. The importance of this absence, in relation to the case made by the Applicant, is that it is

very difficult, if not impossible, to understand the extent of the management services which are covered by that basic and considerable management fee.

75. The Respondent, through the witness statement of Neelam Samra at paragraphs 27-32, states that when it acquired the Landings and became the freeholder, the agents were Savills. Savills had been appointed by an agreement dated 28 September 2011 and the Tribunal was supplied with a copy of that agreement. A supplemental agreement dated 13 September 2012 extended Savills appointment to include the Landings. This appointment continued until 1 November 2014 when Mainstay were appointed as agents. However, that appointment (the Tribunal is told) is not recorded in any written agreement. The Respondent merely says that the intention was, in respect of the services under the Lease, to continue management 'as had been carried out by Savills'. It was pointed out that the fees remained the same for 2015-16 and have only increased subsequently by reference to the increase in average weekly earnings.

76. The Tribunal would not consider it appropriate, in considering the reasonableness of the service charges, to rely on the terms of a contract between the Respondent and an earlier agent. It is however interesting to note that the contract with Savills is in a usual form and the services to be supplied by the agent include the arrangement and administration of contracts for repair, maintenance, security lighting and cleaning (clause 4.9 of the agreement). There is no provision for a local estate office to facilitate management. The fees to be charged should not exceed 10% of the service charge budget plus 2.5% of the Ground Rent chargeable for ground rent collection.

77. The terms of the Lease (Schedule 3, Part 1, paragraph 3) provide for services to be supplied in relation to the Landlord's Property, as defined. In providing services, the Landlord may properly incur the charges of employing servants, agents or contractors. If the Landlord were to certify that managing agents have not been employed, then a sum either equivalent to 12.5% of the costs, charges and expenses recoverable, or such sum as equates to £5 per week (such sum being increased annually in line with the Retail Prices Index), can be added to the service charge.

78. When applied to the facts of this case, the Tribunal would expect, for a development of 41 leasehold properties the size of the Landings (the Landlord's Property), that the management would be undertaken by appointed agents, perhaps after tender, under a contract and run from a national or local office. There would, however, be no on-site management – the size of the development would not demand it. Instead, there would (no doubt) be regular visits by an agent's representative, and services would be carried out by contractors; and repairs, as required, would be completed after tendering. Management of all these activities would be covered by an agreed management fee (not dissimilar to clause 4.9 in the agreement with Savills), usually with agreed additional fees chargeable in specified circumstances, such as oversight of repair works. Here, the Respondent has chosen an agent, apparently without market testing or tendering, and has not put in place a management contract by which the leaseholders can judge the performance of the agent so appointed against what the agent is required to do. It also means that it is more difficult for the Tribunal to judge on the material before it whether the management services as a whole – central fee plus the local estate costs of

management – are a reasonable charge for the Landings, in connection with the Landlord's Property as defined, or whether the totality is excessive and unreasonable.

79. It is the view of the Tribunal that management of the Landlord's Property as defined in the Lease does not demand the presence of an on-site manager, nor an estate vehicle, and that the cost of office equipment such as telephones and the cost of the I-pad would normally be subsumed within an overall management charge. However, it is not a necessary consequence that the estate management charges for all the years the subject of this application should be deleted in full. This is because some of the duties within the role of the estate manager (set out in paragraph 89 of Neelam Samra's witness statement) are required for the Landlord's Property (whether undertaken from a local estate office or from elsewhere) such as engaging with residents, responding to leaseholder enquiries, assistance with preparation of service charge budgets and so forth. If management had been related only to the Landings, this work would probably have been done from the agent's main off-site office. Moreover, the Tribunal recognizes (as the Respondent contends) that the very many discussions and meetings with the Applicant's husband and representative have been on site and in person with the estate manager. But without an agreement between the Respondent and Mainstay to assist, the Tribunal must do the best that it can, from the material presented, to determine what a reasonable management fee overall for the Landings should be.

80. In the light of this position, the Tribunal raised the issue of estate management costs in the light of, and in the context of, the wider management charges made to the Landings and thence to the Property, in the telephone conference held on 17 July. The Tribunal put to the parties that the better approach was to consider the provision of, and charges for, management as a whole rather than undertake a detailed examination of the various charges made, whether the basic management fees or aspects of estate wide costs. For this purpose, the total management charges considered would cover the following items in the accounts, namely, the management fees of Mainstay, the estate salaries, the estate office costs and the estate office and site manager's telephone costs. During the telephone conference, the following key points emerged:

1. The Respondent, through its Counsel, Mr. Fieldsend, acknowledged that the Applicant had established a prima facie case that there could be unreasonable elements in the totality of the management charges that have been levied.
2. Both parties acknowledged that to examine the reasonableness of the management charges made in their totality, rather as separate items, was a sensible approach.

81. The Tribunal put to the Respondent its concern about the lack of a management contract, and the calculation the Tribunal had made of the totality of management charges in each of the years in question which ranged (on calculations by the Tribunal) between 15.5% of total expenditure in 2014/5 to 20.8% in 2016/17 and at various percentages in between in each of the other years. Applying its expertise and knowledge derived from its experience, it seemed to the Tribunal that these were prima facie unreasonably high percentages. The absence of evidence about the contractual charges between the Respondent and Mainstay and the fact that no evidence has been presented of any tendering or procurement exercise for managing services was a significant

concern. In the circumstances, the Tribunal suggested that the determination of what might be a reasonable level of management charge could be assisted by reference to Schedule 3, Part 1, paragraph 3 of the Lease, as set out in paragraph 77 above.

82. In his response, Mr. Fieldsend accepted that there was no estate management provided for in the Lease but submitted that the service that had been provided was within the scope of the Lease. While accepting that the management costs could be examined globally, he stressed that the guidance in Schedule 3, Part 1, paragraph 3 offered two methods of calculation and that the application of the £5 per week figure, once uprated to account for inflation, produced a figure that in percentage terms was higher than 12.5%. In any event, this provision in the Lease was at most a guide as to what might be reasonable. He submitted that if there had been a written contract between the Respondent and Mainstay it would have not answered the question that needs to be answered. He also said that testing the market is not the only way to identify market value and that a tendering or procurement process is not a requirement, though he accepted it would be good evidence. The overall approach, he contended, was that the Tribunal should step back, look at the nature of the development and then determine a reasonable level of management fees.

83. Mr. Tupper was attracted to the proposition to examine management fees as a whole but pointed out that if there had been no managing agent and Schedule 3, Part 1, paragraph 3 came to be applied, he could still argue the level of charge was unreasonable. He maintained his original position, namely, that an on-site manager was not necessary.

84. The Tribunal determines that, taken as a whole, the management charges are too high. It disagrees with the Applicant that the on-site estate manager is of no benefit. It is true that if the Landings were to be managed as a single unit, there would be probably no justification in terms of cost for an on-site manager. But the Landings does benefit from that role. Just as the Applicant has had significant dealings with that manager, meaning that reference to an office elsewhere has not been necessary, so too for the other residents and leaseholders both on the Landings and on the wider Estate. But in the absence of express provision in the lease, the costs of such a manager must be considered as a part of the wider management charges. If an estate manager is on site, there is a corresponding reduction in the staffing requirements and costs of management from Mainstay's main offices.

85. The Tribunal further determines that the charges in relation to the estate office, estate vehicle and office equipment, while quite possibly reasonable in relation to the management of the wider Watermark estate (if that had been what the Lease required the Tribunal to consider), are not reasonable within the actual terms of the Lease where management fees can only be levied in relation to the Landlord's Property as defined. This is not to say that the Respondent should discontinue this provision but rather that the Tribunal would expect those costs to be absorbed in the general management fee. To a very considerable extent, they already are since the general management fee, as a percentage of the overall charge net of those management fees, ranges from 7.8% in the budget for 2019/20 and 7.9% in 2014/15 to a high of 9.6% in 2016/17. These figures,

were they to be the only management charges, are modest for a development with some complexity.

86. The Tribunal would expect, applying its knowledge and expertise, that an overall management fee for both the Landings (if managed separately) and for the Watermark Estate taken as a whole, to be in the range of 12.5%, or thereabouts, of the overall service charge expenditure. Stepping back, as the Respondent's Counsel asked the Tribunal to do, the conclusion is that there may be much greater management activities to be done in relation to the holiday facilities offered, security and grounds maintenance and landscaping than in other developments, but very much less management time required in relation to repair and maintenance of buildings and none at all for 'common parts' – since all the lodges are independent units. The provisions in Schedule 3, Part 1, paragraph 3, which would suggest a charge in the same range if there were to be no agents, supports the conclusion that overall management charges should be in the range of 12.5%, or a little higher, of the overall service charge expenditure. Yet in each of the years in question, the total management charges always exceed 15% and are as high as 20.8% in 2016/17. The Tribunal determines that, in the absence of further evidence to justify that level of charges, the Applicant has demonstrated that the level of management charges is unreasonably high.

87. The Tribunal determines that the Applicant has established a prima facie case that management charges made to her in the financial years the subject of this Application, mostly covering the period since Mainstay took on management of the Landings, are, when considered in their totality, too high. Applying its knowledge and experience, the starting point that the Tribunal adopts is that it considers that a reasonable sum for an overall management fee for the Landlord's Property would be in the region of 12.5% of the total costs of services provided, excluding management, in any accounting year. The Applicant having established a prima facie case, it is for the Respondent to justify the actual level of charges levied. In the light of the evidence submitted and having regard to the provisions in the Lease, and given the lack of evidence of any procurement exercise or even a written contract between the Respondent and Mainstay, or evidence of the level of management charges on any similar holiday sites, the Tribunal determines that there is insufficient evidence to justify the actual level of charges which are at over 15% of the total costs of services provided, excluding management. Given that the Lease provides, in the event of there being no agent, an alternative method of charge that could result in a charge exceeding 12.5%, the Tribunal is prepared to accept a small margin of increase which may be appropriate for a holiday development with extensive leisure facilities. It therefore determines that the maximum reasonable level of management charge is 13% of the total costs of services provided, excluding management, and that management costs in excess of that percentage have not been reasonably incurred.

88. The calculation undertaken by the Tribunal is as follows:

1. For the year end June 2014, total expenditure, less management costs, was £107,408. Management charges should not exceed 13%, or £13,964. Actual management expenditure was £17,048. Consequently, £3,084 has been unreasonably incurred. £75.22 has been unreasonably incurred in the charge made to the Applicant.

2. For the year end June 2015, total expenditure, less management costs, was £106,172. Management charges should not exceed 13%, or £13,803. Actual management expenditure was £16,437. Consequently, £2,634 has been unreasonably incurred. £64.24 has been unreasonably incurred in the charge made to the Applicant.

3. For the year end June 2016, total expenditure, less management costs, was £89,677. Management charges should not exceed 13%, or £11,657. Actual management expenditure was £17,541. Consequently, £5,884 has been unreasonably incurred. £143.51 has been unreasonably incurred in the charge made to the Applicant.

4. For the year end June 2017, total expenditure, less management costs, was £83,380. Management charges should not exceed 13%, or £10,840. Actual management expenditure was £17,370. Consequently, £6,530 has been unreasonably incurred. £159.27 has been unreasonably incurred in the charge made to the Applicant.

5. For the year end June 2018, total expenditure, less management costs, was £96,887. Management charges should not exceed 13%, or £12,596. Actual management expenditure was £17,785. Consequently, £5,189 has been unreasonably incurred. £126.56 has been unreasonably incurred in the charge made to the Applicant.

6. For the years ending June 2019 and June 2020, the end-of-year accounts are not available to the Tribunal. The total charges made to the Applicant in respect of management to the Landings should not exceed 13% of the total expenditure, less management costs, incurred.

89. The Tribunal accordingly determines that a total sum of £568.80 which was charged to the Applicant across the five accounting years 2013/14 to 2017/18 was not reasonably incurred.

Waste management

90. The Applicant makes two complaints of unreasonable charges in relation to waste management. The first relates to charges since 1 July 2017. On this date, the local authority began to make municipal collections of waste. The lodges that were not sub-let were entitled to free collections of domestic waste. However, owners of lodges that sub-let their properties as holiday homes were considered as producing commercial waste and so are not entitled to free collections. Since that date, the Respondent has continued to pay for the collection of the commercial waste but has included the charge for that collection in the service charge for all properties whether the lodges are sub-let or not. The Applicant contends that this is 'clearly and obviously unreasonable'.

91. In her witness statement at paragraphs 109-113, Neelam Samra seeks to justify this position. She contends that the number of bins provided by the Council are insufficient, so that they overflow requiring use of a commercial bin and this is compounded by council collections being fortnightly. The commercial bins are therefore used by all. She therefore claims that there is no subsidisation as all lodge owners benefit as the commercial bins resolve the issue of overflowing domestic bins. She also contends that there is no subsidisation as the commercial properties pay business rates. Counsel for the Respondent submits that it is both necessary and prudent to organise the refuse disposal in the way the Respondent does because of the varied nature of the use of the lodges. He submits that it is of benefit to all owners and is therefore a cost that is reasonable to incur.

92. The Tribunal accepts that it may be difficult for the Respondent to identify which lodges pay commercial rates and therefore which lodges should be paying for the charge for commercial collection. But it should not be impossible to do so – and the Respondent has not contended that it is not possible. A lodge owner like the Applicant who chooses not to sub-let is not obtaining any commercial income from the property. The Applicant should not therefore be obliged to pay a proportion of the commercial cost of collection of refuse for those properties that are let commercially. Any problem with an insufficient number of bins must be resolved in other ways. The Tribunal determines that the charge for the collection of waste by the commercial contractor included in the service charge made to the Applicant is unreasonable.

93. It is not possible for the Tribunal to calculate what sum may be due for a refund to the Applicant as a result of this determination of unreasonableness. It gratefully accepts the Respondent's offer in the submissions to make any such calculations. If the resulting figure cannot be agreed by Mr. Tupper, there is liberty to apply to the Tribunal, for a paper determination only.

94. The second allegation of unreasonableness in relation to waste by the Applicant relates an overcharge in 2017. This was identified by the Applicant to the Respondent. The overcharge related to the method that the private contractor adopted in that year. The overcharge, which the Respondent appeared to accept, amounts to approximately £6,000. The witness statement of Neelam Samra states that the waste contractor refused to give a credit in relation to the challenge to their charges and after protracted discussions it was not thought to be a 'good use of resident's money' to pursue potentially protracted and costly legal proceedings to recover the sums in dispute.

95. The Tribunal determines that the excess charge for waste disposal should not be charged to residents. (Indeed, if this error was an error made by the commercial waste supplier, it should not have been charged to leaseholders who do not use their lodges commercially in any event). It may have been commercially sound for the Respondent to decide that it was not sensible to pursue the amount of the excess charge, but the Tribunal considers that the mistake should have been noticed by competent agents in time for it to have been resolved. Any cost arising from this error should then have been absorbed by the Respondent. It is unreasonable to pass on the cost of the error as a service charge under the Lease. The apportioned cost that was part of the Applicant's service charge is however quite small. If the excess and now disallowed charge of £6,000 is apportioned between 344 lodges, the amount due by way of refund to the Applicant is £17.44. The Tribunal determines that it was unreasonable for the Applicant to be charged this sum of £17.44.

CLUB SUBSCRIPTIONS

The club subscription to the South Cerney Sailing Club.

96. The Lease provides for 'Club Membership', defined as a membership for the term of the Lease, namely 999 years, of the 'Landings Sailing Club' or such other club as the Landlord may nominate from time to time. The 'Landings Sailing Club' (hereafter the

'Landings Club') is defined to mean the Qualifying Persons from time to time enjoying the benefit of club facilities. The Qualifying Persons are defined in detail but essentially mean the Tenant and her family members. Thus, a club membership is a permanent feature of ownership that attaches to the leaseholder for the time being of the Lease. 'Club Facilities' are defined as including block memberships of local clubs or other arrangements for the use of facilities as the Landlord may from time to time designate as forming part of the facilities of the Landings Club. There is therefore reference in the Lease to two sailing clubs with two different names (Landings Sailing Club and South Cerney Sailing Club). However, the structure and definitions in the Lease make it clear that the Landings Club is the name for the overarching club that all Landings lodges belong to; and South Cerney Sailing Club is a part of the facilities enjoyed by the Landings Club members.

97. The Lease specifically provides for the Tenant to nominate four members of the Landings Club in clause 5.7 of the Lease, with provisions effectively limiting that membership to the time when the Tenant is the leaseholder under the Lease. The membership is not assignable and ceases on an assignment of the Lease.

98. One of the costs to which the tenant contributes by way of service charge is the provision of family membership of the South Cerney Sailing Club ("the Sailing Club") (Schedule 3, paragraph 17 of the Lease). The Sailing Club is defined in the Lease to mean the sailing club based at the Lake or any successor club; and reference is also made to the lease granted to the Sailing Club by the then landlord and dated 17 July 2003. The amount of the charge for family membership of the Sailing Club in 2017-18 (1 July 2017 to 30 June 2018) to the Landings (as shown in the amended Scott Schedule) appears to be £10,051.16. This results in a charge per lodge, assuming 41 lodges from the Landings and 3 from the Peninsula, 44 in all, of £238.66. But 3 lodges from the Peninsula are included which the Tribunal determines (and the Respondent accepts) should not have been so included (see paragraphs 49-54 above). For the 41 Landings lodges, not 44, the total amount for membership charged is reduced to £9,785.06 so the charge per lodge for 41 lodges and for the Property, Lodge 11, is still £238.66.

99. The subscription to the Sailing Club charged was, in the Application, claimed to be unlawful on three grounds:

1. That the provisions (for both the Sailing Club and other Landings Club facilities, namely the Watermark Club – see below) are 'exploitative' and per se unlawful.
2. That they contravene statutory limitations in the Unfair Terms in Contracts Regulations 1999.
3. They are unlawful under the Competition Act 1998.

100. The third contention, based on the Competition Act 1998, was ultimately withdrawn by the Applicant and need not be considered further. This was a sensible decision given that the 1998 Act did not apply to land agreements and the removal of that exclusion in 2011 did not have retrospective effect.

101. The Tribunal determines that the subscription to the Sailing Club is not exploitative and not per se unlawful. The claims of the Applicant that sailing is a minority pastime,

that she has no interest in sailing, and that other areas of the Watermark Estate are not required to pay a membership fee of a sailing club, may well all be true but they do not form any legal basis for a challenge to the Sailing Club subscription.

102. The obligation to pay the subscription as part of the service charge is part of a contract freely entered into by the Applicant. As an 'original lessee', on basic principles of both contract and property law, she is bound by all the terms of the contract. However, in the view of the Tribunal, the provision would also be binding on a subsequent lessee taking the Property by assignment. This is because the provisions are benefit to the Property. Probably, a provision to pay a sailing club subscription in a lease of an inner-city home situate far from the lake where the club operates would not be enforceable. However, in this Lease, the conclusion must be that membership of the sailing club benefits the Property since it is on the shores of the lake with access to a private jetty in a development that was designed with slipways and parking for boats. The Tribunal is told that only the properties at the Landings include membership of the Sailing Club. It can be reasonably postulated that the properties at the Landings were designed to be of interest to those keen on sailing (hence the name of the development, and the name of 'Landings Sailing Club' as the name for overarching club membership in the Lease) and probably marketed to include the sailing club membership as a benefit attached to the lease of each lodge.

103. Therefore, the Tribunal can take account of the fact that these are holiday homes designed to have a range of shared leisure facilities available to occupants which benefit the land and the owners for the time being of those holiday homes. The Landings were homes built for owners to have the benefit of boating on the lake. Whether or not the Applicant wanted to use those facilities, these provisions should have been clear from the Lease that she signed. She would have had the benefit of the advice from her conveyancer at the time. It appears that these provisions were probably central to the development at the Landings, though the Tribunal has not seen any marketing material or details of the contract of purchase. The Applicant states to the Tribunal that her purchase was 'off plan' but does not suggest that the contract in any way disguised the nature of the purchase or the terms of the Lease. The claim by the Applicant that the length of the Lease (999 years) makes the provisions exploitative masks the fact that the leisure facilities will benefit the owners for the time being of the properties from time to time who will purchase with knowledge of what is offered.

104. The Respondent also submitted that there is a benefit to the Applicant from membership of the Sailing Club since the lease of the Lake to the Sailing Club provides for the club to have a maintenance obligation and the requirement to take steps to keep the lake clean. Therefore, the Respondent argues that the club subscription gives the additional benefit of the care of the Lake and thus benefits the Landings lodges which border the edge of the lake. The Applicant disputes this as a benefit considering that leaving the lake to nature would enhance the environment rather than (as she contends) the maintenance diminishing it. In this context, the Tribunal notes that the witness statement of Neelam Samra at paragraph 37, refers to a lake environmental management plan. This plan would seem to be in place in compliance with a section 106 planning agreement with Cotswold District Council. On balance, the Tribunal agrees

that the Sailing Club's maintenance obligation is a benefit to the Property especially when one takes into consideration the requirements of the local authority in relation to water quality. But even if it were not, the provision in the Lease to pay the subscription would be enforceable.

105. The only concern of the Tribunal is that it has been told that the leaseholder of Lodge 19 has negotiated a release of the obligation to pay the Sailing Club subscription. No further details are provided, so further comment is not possible. The Tribunal merely observes that the other lodge owners, including the Applicant, should not be prejudiced (for example by being charged increased Sailing Club subscription fees) as a result of a variation, in the lease of another lodge, to the terms of the standard lease provisions to which they were not a party.

106. The second basis of the Applicant's challenge to the Sailing Club subscription is that it falls foul of the provisions contained in the Unfair Terms in Contracts Regulations 1999 ("the 1999 Regulations"). These Regulations have been held to apply to leases. Though the Regulations have been replaced by the Consumer Rights Act 2015, the 1999 Regulations continue to apply to the Lease of this Property as it was granted in 2005. The Applicant contends the provision to pay the subscription is unfair because the subscription can and will increase and the Applicant has no right to withdraw.

107. A term is unfair under the 1999 Regulations if it is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights and obligations (Regulation 5(1)). An assessment of unfairness must take account of the goods and services for which the contract was concluded, looking at all the circumstances existing when the contract was concluded (Regulation 6(2)). The Respondent submits that a term can only be unfair if it is 'so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour – *Director General of Fair Trading v First National Bank plc* [2001] UKUL 52.

108. The Tribunal determines that the provisions for payment of subscriptions are not unfair contract terms within the 1999 Regulations – for the reasons submitted by the Respondent. The 2005 Lease is of a holiday home by a lake where leisure facilities are provided and the obligation to pay the Sailing Club subscription goes to the heart of the contract and the Lease – i.e., it is part of the subject matter of the contract. The subscription is a price to be paid for the service offered – the ability to sail on the Lake. If the Sailing Club raised the annual subscription to an unreasonable level, then a remedy is available in this Tribunal; and, as the Court of Appeal also made clear in *Hounslow LBC v Waaler* [2017] EWCA Civ 45, any exercise of a discretion, in this case any increase in the subscription, is not without limits as the decision must also be rational - thus strengthening the remedies available to a tribunal.

109. It is not clear whether the Applicant makes a formal challenge to the reasonableness of the amount of the Sailing Club subscriptions if the Tribunal concludes, as it has, that the subscription charge is not unlawful. However, no evidence was adduced to support any claim of unreasonableness of the subscription, for example by way of comparison with fees charged by other sailing clubs or in any other way, to

suggest the amount of the subscription levied per lodge is unreasonable as a family membership of the sailing club. The amount does not appear to the Tribunal to be unreasonable on its face. The Applicant's challenge to the service charge in each of the years in question as it relates to the Sailing Club subscription is rejected. The charge is lawful and the amounts not unreasonable.

The club subscription to the Watermark club.

110. The definition in the Lease of 'Club Facilities' in Clause 1.2.9 has already been noted – see paragraph 96 above. It is worth setting out that definition in full:

> 1.2.9 'Club Facilities' shall mean such facilities including (without prejudice to the generality of the forgoing) block memberships of local clubs or other arrangements for the use of facilities (in either case whether or not under the Landlord's control) as the Landlord may from time designate as forming part of the facilities of the Landings Sailing Club'.

Though there is no specific evidence of the designation of such facilities by the Landlord, it appears to be common ground that those facilities are provided under the umbrella of what is called in the papers before the Tribunal as the Watermark Club. These facilities are also available to owners of lodges in the other Watermark developments. Though paragraph 5.8 of the Lease provides that the Tenant may use 'other leisure facilities', that right appears to be limited to other facilities at the 'Landlord's Property' so the Watermark charges fall to be charged under paragraph 5.7 of the Lease relating to facilities available to the Landings Club.

111. The Respondent, through Neelam Samra at paragraph 40 of her witness statement, describes those facilities available to the leaseholders through annual membership of the Watermark club. These include use of a gym and spa facilities at the De Vere hotel, the right to play at two local golf courses and the use of their club houses; use of six tennis courts; discounted rates for water skiing; and access to the Sports Bar and Lakeside Brasserie. Unlike the submissions made in relation to the Sailing Club, the Applicant does not say that she or her family do not use, or do not wish to use, all or some of the facilities provided as part of the Watermark Club.

112. The challenge of the Applicant in her original statement of case made by her husband as her representative, focuses on the amount of the charges made. The share of the overall charge relating to the Watermark club applied to the Landings lodges in 2017-18 was £10,780 or £262.93 for the Property. The basic challenge is one of unreasonableness of the charge. The Applicant contends the figures do not demonstrate value for money and although the Applicant considers that the provision of accounting information requested but not supplied would demonstrate the charges went beyond 'cost plus a reasonable margin', there is no other concrete evidence provided to the Tribunal that the amount charged for a considerable range of facilities is unreasonable.

113. Though the main submission appears to be an issue of reasonableness, the Applicant still contends in her original statement of case that the part of the service charge relating to the Watermark club is 'unfair, unreasonable, and illegal'. The reasons advanced for this submission are the requirement to be a member of a leisure club where a leaseholder has no say over what is provided by the club, the requirement to pay

whatever what it costs and the fact that there is no right to terminate membership if they are not satisfied with the service. The failure to disclose information is also put forward as a reason supporting this submission.

114. For the reasons set out in paragraphs 102 and 103 above in relation to the Sailing Club, the provisions relating to the Watermark club are not illegal or unfair in law and are clearly set out in the Lease which the Applicant signed. Similarly, the provisions are not unfair under the 1999 Regulations for the reasons stated in paragraph 108 above.

115. Similarly, there is no clear evidence, whether by evidence from a person with expertise or by way of comparative material, that the amount of the Watermark subscription is unreasonable. The Applicant does not claim (unlike the position with sailing) that she does not wish to use the facilities provided. Rather the main claim to unreasonableness is the inability of the Applicant to obtain details of the costs supporting the annual fee. As has been noted, the Applicant has not submitted any comparative market evidence. Without such evidence, and as the Respondent submitted, reasonableness is not just about process, but also outcomes – *Hounslow LBC v Waaler* [2017] EWCA Civ 45. The outcome is membership of the Watermark club with its wide range of benefits and without evidence to demonstrate otherwise, the cost of membership is reasonable.

116. The Tribunal notes that that there is provision for the club to provide the freeholder with detail of the costs supporting the annual fee. The Tribunal does consider that the Respondent, who remains responsible to the leaseholders even though the facilities are provided, or largely provided, by other persons or organisations, should be giving greater information to the Applicant and other leaseholders. It would undoubtedly be helpful if the Respondent could in future seek from the freeholder a breakdown of costs and supply this to the leaseholders. Although this has not been done so far, the Tribunal determines that the Applicant has not provided sufficient prima facie evidence to suggest that the fees charged in the service charge years in question are unreasonable in any way.

MANAGEMENT ISSUES

Management - the standard of performance

117. The Applicant submits that the standard of performance of Mainstay as agents of the Respondent falls short of the reasonable standard required by s19 of the Act. She refers to Mainstay's corporate website, to their membership of ARMA and to aspects of the RICS code. However, the actual examples of where it is said that the standard of performance falls short are limited. One of those is an allegation about the way that the Reserve Fund (known as CARF - see below paragraph 128) has been used but consideration of that matter is outside our jurisdiction as will be explained. Errors in budgeting are said to be significant and obvious and the budgets and account headings and details are said to be inconsistent. There is a complaint that annual accounts were no longer sent to lodge owners but instead made available on the website. The Applicant contends that Mainstay use their own services for accountancy, health and safety audits, fire risk assessments and insurance re-assessment which are claimed to be contrary to

the RICS code. She also says that there is a conflict of interest since, across the Watermark Estate, Mainstay act for two different landlords. Overall, the Applicant contends that there is a lack of transparency.

118. These claims must be considered in the context of the voluminous paperwork in this case. Much of this is the correspondence over the years between the Applicant's representative and husband, Mr. Tupper, and various persons acting for the agents, especially the then estate manager, Mr. Richie. It is right to record that Mr. Ritchie's witness statement notes that his time was disproportionately allocated to dealing with Mr. Tupper and, given the amount of correspondence, this appears to be almost certainly true. The Tribunal agrees with Counsel for the Respondent, Mr. Fieldsend, who describes the level of communication as extraordinary. While the reference by Mr. Ritchie that he was subject to threats and inappropriate behaviour from Mr. Tupper are not a matter for the Tribunal (Mr. Tupper admits his frustration may have boiled over and he says apologies were given), the invariably professional response at all times by Mainstay and its employees to Mr. Tupper's numerous emails and often robust style of questioning does not suggest to the Tribunal an unreasonable standard of management but rather the opposite. The Tribunal considers Mainstay have done everything they could to deal with the matters raised.

119. In the witness statement of Neelam Samra from paragraph 144, and in the submissions of Counsel for the Respondent, the specific allegations of the Applicant are answered. Mainstay accepts that some mistakes have been made, such as including the lodges on the Peninsula with the Landings as part of the apportionment exercise (see further the discussion at paragraphs 40 and 52 above). A series of errors were acknowledged at paragraph 59 of Neelam Samra's witness statement, some of which were first raised by Mr. Tupper. These relate to the incorrect addition of VAT on the Sailing Club membership; an incorrect posting of team building costs; and an error by external accountants in incorrectly using the RICS Service Charges in Commercial Property in one accounting year. These mistakes have all been corrected and credit given when appropriate. A careful review has also been done to see if any of the costs specific to the Peninsula had been incurred and included in the calculation of the service charge for the owners of lodges on the Landings. The amounts identified were very small, but the costs have been adjusted.

120. At the request of the Applicant, paper copies of the annual accounts were supplied to her and no charge made for this. No sufficient evidence is submitted to support the contentions that the use of in-house expertise in relation to health and safety audits or risk assessments were inadequate or contrary to the RICS code. Indeed, the code suggests that the conflict of interest in this context must constitute something that impedes "your ability to focus on the best interest of the client". The Applicant has not, and probably could not, identify such a conflict of interest. Therefore, the contention of the Respondent that acting for two different landlords is not a conflict of interest is accepted. The two landlords do not have conflicting interests in the matter of the service charges.

121. The Applicant has not been inactive in pursuing complaints. She used the internal complaint procedure and was properly directed to the Property Ombudsman scheme which resulted in a recommendation of a small goodwill payment of £75. The decision, which was before the Tribunal, does not reveal any major failings in management.

122. The Tribunal agrees with the Respondent's submissions. Far from being evidence of an unreasonable standard of management, Mainstay has shown a willingness to engage when justifiable points have been raised and to correct errors and mistakes once they have been established. It has also spent an inordinate amount of time explaining points raised and answering every communication – if rarely to the satisfaction of Mr. Tupper. In the light of all the evidence before it, the Tribunal does not find that the standard of performance of Mainstay falls below that of reasonable.

Health and Safety; Insurance; Repairs and Maintenance

123. In all the years at issue in this case, there are a number of regularly recurring items, namely a charge under the heading Health and Safety, a charge under the heading of Insurance, and in 2017-18 a charge in respect of repairs and maintenance. In each case, the Applicant in her statement of case and under the Scott Schedule, claimed that the amounts were either unreasonable, incorrectly demanded, or both. There is however no evidence put forward to explain or substantiate those claims or even facts upon which a Tribunal could consider if there was any merit in the claims made. It is for the Applicant to make her case and establish a prima facie argument that these charges were unreasonable, whether wholly or in part.

124. In the witness statement of Neelam Samra, the Health and Safety Charge is explained as covering risk assessments necessary for statutory compliance and the main aspect of the insurance as it relates to common areas is the Block Buildings Insurance Policy charged separately to the service charge. She indicates that the Communal Insurance captures the Landings contribution to motor fleet insurance. In so far as this relates to either the provision of security, or gardening and landscaping services, those issues has been dealt with at paragraphs 55 and 62 above. The repairs and maintenance in the year 2017-18 is explained by Neelam Samra as day-to-day work undertaken that year in relation to the Landings, with invoices supplied.

125. Without any meaningful submissions from the Applicant on these issues, the Tribunal determines all such charges have been reasonably incurred or, at least, not demonstrated to be unreasonable. The only caveat the Tribunal would enter is in relation to comment in the witness statement concerning the 'motor fleet insurance'. There was insufficient evidence to take the matter further or even to be sure exactly what the charge relates to, but in the light of the Tribunal's determination in relation to management charges (see paragraphs 72-89 above), the Respondent may wish to look again at whether it is appropriate in future to make a charge under this heading.

RESERVE FUND ISSUES

Payments out of the Fund

126. The Lease provides in Schedule 3, Part 1, paragraph 1 for the maintaining of any sinking or contingency fund. This has been established under the name Capital Asset Reserve Fund (hereinafter "the Fund") named by the acronym CARF in the paperwork. Its purpose is "to cover the cost of the future carrying out of major works of repair, renewal, replacement and maintenance" pursuant to the Respondent's obligations under clause 4.2 of the Lease, namely to keep the Landlord's Property in good repair and condition. The Landlord's Property is as described in paragraph 13 above. Since the repair and maintenance of the lodges themselves will be the responsibility of each leasehold owner, the purpose of the Fund is to cover such items as the repair of the roadways, parking spaces for cars and boats, the slipways and jetties and the buildings on the Landings other than the lodges and the gardens and other open areas of the Landlord's Property. The definition of Landlord's Property in the Lease includes "all additions, alterations and improvements and all landlord's fixtures, fittings, plant machinery and equipment from time to time at the Landlord's Property". The fund therefore extends to personal property of the Respondent as well as the freehold area of the Landings. The amount demanded from the 41 lodges together varies from year to year, from £7,500 to £14,500 while the budget for 2019-20 appears to have an additional sum for road surfacing.

127. In the Statement of Case and in the Scott Schedule, the Applicant contends that the sums demanded each year are both unreasonable and incorrectly demanded. There is some complaint that it is unclear what are the plans for the use of the Fund, with different plans being put forward, and that some works, such as spending on pathways in 2018, was only added to a list of items to be covered in the previous year. However, it is clear from the Applicant's statement of case that the real challenge is to the use of, and payments out of, the Fund. Thus, in paragraphs 116 and 117 of that Statement of Case, there are lists of items on which sums had been spent from the Fund. The contention is that these items are not major works of repair, renewal, replacement or maintenance.

128. The Respondent contends, correctly, that the Tribunal has no jurisdiction to examine the legality or reasonableness of these payments out of the reserve fund. This is clear from the wording of the 1985 Act and on the authority of *Solitaire Property Management Company v Holden* [2012] UKUT 86, a decision that is binding on a First-tier Tribunal. Therefore, whatever this Tribunal may think about nature of the payments out of the Fund, it has no jurisdiction to consider them.

Reasonableness of the payments requested into the Fund

129. In the *Solitaire Property Management Company v Holden*, the First-tier Tribunal in that case had determined that the service charge demanded in relation to payments into the reserve fund were reasonable. Therefore, once it was determined that the Tribunal had no jurisdiction to examine payments out of the fund, the matter in that case was closed.

130. In this case, however, the Application does assert that the service charge is unreasonable though later in the documentation the Applicant, through Mr. Tupper, does appear to concede that the amounts requested were not unreasonable.

131. The RICS 'Service Charge Residential Management Code' states that a reserve fund should be for such things as 'major works, cyclical works or replacing residential plant'. This is very similar wording to the 'major works of repair, renewal, replacement and maintenance' found in the Lease. The Code further states that the service charge for any reserve fund should be based on a 'costed, long-term maintenance plan that reflects the stock condition'. It further provides that the plan should be available to the leaseholders. Apart from a spreadsheet entitled 'Watermark CARF – working progress', the Tribunal has not been provided with such a long-term maintenance plan, either for the Landings – the 'Landlord's Property' – or for the wider Watermark estate.

132. The Tribunal considered that it was important that the views and submissions of the parties were sought on the issues relating to the potential unreasonableness of the service charge demands in relation to the Fund and invited the views of the parties on the following questions.

1. Whether the Tribunal has jurisdiction, notwithstanding the decision in *Solitaire Property Management Company v Holden*, to hold that all or part of the sums requested by way of service charge for annual Fund payments are unreasonable.
2. Whether the spreadsheet entitled 'Watermark CARF – working progress' provides evidence to the Tribunal indicated that monies would be spent on items that were either not major works or was spending on matters other than the Landlord's Property.

133. These issues were discussed with the parties in the telephone conference on 17 June 2020. The first point was resolved with Mr. Fieldsend conceding that it was open to the Tribunal to exercise its jurisdiction and find that the charges made into the Fund have not been reasonably incurred, notwithstanding the decision in *Solitaire Property Management Company v Holden*. However, this was a limited concession in accepting that S27A of the Act was wide enough in its scope to permit a determination of whether demands for payment into the Fund were reasonable. Moreover, the concession was subject to his primary point, set out in paragraph 134 below, that it was an academic issue and not applicable in this case. Notwithstanding that limited concession, which the Tribunal believes was correctly made, the Tribunal is acutely aware of the risk of a finding of unreasonableness being made in the light of the later knowledge from hindsight as to how monies from the Fund was spent. It is important that the Tribunal asks the question (if it arises) of whether unreasonableness can be ascertained from information available at the time the service charge demands were made.

134. For the Respondent, Mr. Fieldsend submitted that it was clear from the Statement of Case that the Tribunal was primarily being asked to resolve the validity of payments out of the Fund, which matter is outside its jurisdiction. Moreover, he pointed to paragraph 56 of Mr. Tupper's Supplemental Submission of 14 April 2020 on behalf of the Applicant where he says: "there is no challenge to the reasonableness of the CARF charge'. On that basis, the submission of the Respondent is that there is no challenge to the reasonableness of the charge and it would be wrong for the Tribunal to introduce a point of challenge that has not been raised by the Applicant.

135. In the event that the Tribunal does consider that it is right to examine the reasonableness of the charge of payments into the Fund, the submission of the Respondent is that it then falls to Applicant to establish a prima facie case that the payments requested are unreasonable. In an answer to a question for the Tribunal, Mr. Fieldsend did say that he considered that the recommendations of the RICS had been followed and the CARF Schedule meant that leaseholders were not caught by surprise.

136. Mr. Tupper, for the Applicant, considered that the Applicant had raised the issue of unreasonableness of the payments and pointed to the particulars of the claim when the Application was made. While the phrasing of the basis of the claim did focus on the validity of payments out of the Fund, this was because he was at the time unaware of the particular restrictions on the jurisdiction of the Tribunal and he would have expected a tribunal to have jurisdiction. The paragraph in the Supplemental Submission was entitled: 'Was the Respondent entitled to use the CARF funds in the way that it did?' and was not a withdrawal of the claim of unreasonableness. Moreover, the full reading of the paragraph in his submission is:

> 'while there is no challenge to the reasonableness of the CARF charge – at least on the basis that the monies were raised from the owners (i.e. to pay, over time, for the eventual replacement of the road etc.) – there is most certainly a challenge from the Applicant as to whether the resultant charges/pilferings passed onto the owners were reasonably incurred'.

137. Mr. Tupper said that the Tribunal can consider the reasonableness of the service charge into the Fund and the issue was whether the sums been reasonably incurred.

Analysis and decision

138. The Tribunal considers that both parties have misapprehended aspects of the proper approach to the Fund. From the Respondent's point of view, it is clear that the Respondent, through its agents, have treated the Fund as effectively part of an Estate wide fund from which they disperse funds for both the Landings and in respect of machinery and equipment used on an estate-wide basis – and parts of the Watermark Estate are not vested in the Respondent. Since that machinery is probably also not vested in or owned by the Respondent, but would belong to the agents, or to the contractors, and may be used mainly or completely on one of the developments not vested in the Respondent, it becomes tenuous at best to see that the all the spending on machinery is on the Landlord's Property as defined. While services can undoubtedly be delivered in a reasonable manner and at reasonable cost on an estate-wide basis, the Capital Asset Reserve Fund authorized by the Lease is funded by the 41 lodge owners and is for the future benefit of the Landlord's Property as defined. It is not a service. It is a trust fund for expenditure on future major expenditure and repairs for the Landings.

139. Even if it were the case that the Fund has been, and will be, only used in respect of the Landlord's Property as defined, the second misapprehension of the Respondent's agents has been the failure to take due account of the words in the Lease, mirrored by the guidance in the RICS Service Charge Residential Management Code, that the funds are designed to be used in respect of 'major works' of repair and renewal. The Respondent has already accepted that some items charged to the Fund in the past are

clearly inappropriate. But it is significant that the spreadsheet entitled 'Watermark CARF – working progress' includes spend for each year in respect of 'other minor items, including hand tools'. It is difficult to comprehend how such matters, described as 'minor items' could ever qualify as 'major works' of renewal and replacement.

140. The Applicant has perhaps not carefully examined the definition of Landlord's Property. It is clear from clause 1.2.7 of the Lease that it extends beyond the land itself, and further than 'fixtures and fittings' to the land. It specifically covers 'plant, machinery and equipment from time to time at the Landlord's Property'. So major works of repair to, and replacement of, any large items of machinery, could be covered by, and be legitimate spend from, the Fund.

141. The Tribunal considers, notwithstanding the Respondent's submissions, that it has the jurisdiction to consider whether the sums requested as service charge payment into the Fund are reasonable. The Applicant raised the issue in the Statement of Case and has not withdrawn that claim. Though the decision in *Solitaire Property Management Company v Holden* is clear and binding on this Tribunal so there is no jurisdiction to deal with payments out of the Fund, that case was one where the F-tT held that the payments so requested had been reasonable.

142. The Tribunal further determines that the Applicant has established a prima facie case in respect of the service charges levied on her for payments into the Fund. In this respect, the historic way the Fund has been used is relevant evidence for the Tribunal to which can be added the documentation supplied. The Applicant may have focused on the details of the payments made out of the Fund (the Tribunal has some sympathy with the Applicant on this point since s19(1)(a) does refer to a service charge being reasonable only to the extent they are reasonably incurred) but the submissions are relevant to the issue of whether the payments requested in future years is reasonable if the approach to the way the fund is used is unchanged.

143. The Tribunal rejects the Respondent's submission that there is no challenge by the Applicant to the reasonableness of the charge and it would be wrong for the Tribunal to introduce a point of challenge that has not been raised by the Applicant. Mr. Fieldsend himself, elsewhere in his submissions, drew the valid distinction between process and outcomes. The Tribunal considers that the Respondent has not adopted the correct process in relation to the Fund. It has not followed the RICS Code that the service charge for any reserve fund should be based on a 'costed, long-term maintenance plan that reflects the stock condition'. The evidence reveals that the Fund has been used without regard for the limitations imposed by the Lease. While the Applicant clearly states that she does not object to the amounts requested – the outcome – she does object to the process that led to that outcome.

144. The amounts demanded for payments into the Fund from the 41 Landings lodges for each of the years 2016/17, 2017/18, 2018/19 and 2019/20 include £500 in respect of 'other minor items, such as tools'. The Tribunal determines that for each of these four years, the payments requested for the Fund were clearly unreasonable to that extent. That unreasonableness was evident at the time the service charge demands were made.

The total is £2,000. When divided among 41 lodges, the amount due to the Applicant is £48.78.

145. While the Applicant may consider that such a small sum is not a fair reflection of her concerns about the way the Fund has been operated in the past, the Applicant has clearly stated that the *amounts* requested in past years is not an issue – 'there is no challenge to the reasonableness of the CARF charge'. The Tribunal is also reluctant to undertake an exercise which would involve the Tribunal looking more closely at payments from the Fund, since the issue of the validity of payments out of the Fund is beyond our jurisdiction. However, if the Respondent is to ensure that future service charge demands are not subject to challenge on this issue, a new approach to planning the level of the Fund contributions which are based on the terms of the Lease and in line with the RICS guidance will be required.

ANCILLIARY MATTERS

Application under section 20C of the Act

146. The Application included an application under section 20C of the Landlord and Tenant Act 1985 for an order that the costs incurred by the Respondent landlord in connection with these proceedings are not to be included in the amount of any service charge payable by the Applicant being the persons on whose behalf the application is made.

147. The Respondent opposed the making of such an order. This is not because the Respondent might intend to seek to recover its costs but for the reason that it states unequivocally, through Counsel, that it has no intention of seeking to recover its costs from the Applicant either as an administration charge or through her service charge. Further, and for the avoidance of doubt, the Respondent confirms that it has no intention of seeking its costs through the service charge of any leaseholder. This means that it is not necessary for the Tribunal to consider whether an order under section 20 would otherwise have been appropriate in the circumstances of this case.

148. The Tribunal therefore makes no order under section 20C of the Act in respect the costs incurred by the Respondent in connection with these proceedings.

Application under the 2002 Act, Schedule 11, paragraph 5A

149. The Application included an application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. This is an application for an order by the Tribunal to reduce or extinguish a tenant's liability to pay an administration charge in respect of litigation costs.

150. The Lease does not appear to contain any right in the Lessor to charge such an administration charge. In any event, no submissions were made to the Tribunal by either party in respect of this application apart from the Respondent indicating, through Counsel, that it had no intention to recover the costs of this Application as an administration charge. The Tribunal therefore does not make an order under the 2002 Act.

Costs

151. The Applicant, through Mr. Tupper, indicated that a claim for costs would be made. There has been no reasoned argument put forward to support that claim, perhaps because of the unfortunate lack of a full oral hearing. The Applicant is entitled to put forward such a case. However, in the light of the determination, the Applicant will have to consider if a reasoned case for an order for costs could be substantiated.

152. The Tribunal sees no basis for an order for costs on the information currently before it. The starting point should be that each side bears their own costs. The Tribunal would also refer to the further guidance in the way to approach an application for costs where unreasonableness is at issue made by the Upper Tribunal decision in *Willow Court Management Company v Alexander* [2016] UKUT 290. That decision

emphasises that unreasonable conduct is an essential pre-condition to the making of an order for costs under Rule 13(1)(b); but even if there is some unreasonable behaviour, the Tribunal still has to exercise its discretion as to whether or not to order costs – because the subsection says that such an order 'may' be made, not 'must' be made. In that context, the Upper Tribunal made it clear that the fact that a party loses its case at the substantive hearing is not determinative so that it does not automatically result in an order for costs; and that there is a high threshold for the standard of unreasonableness to be met.

Closing remarks

153. The Tribunal wishes to express its appreciation for the high quality of the bundles of documents produced by the parties.

154. The Tribunal hopes that the detailed discussion within this determination, and the guidance it gives, can be the basis of a more constructive relationship between the parties in the future.

Right of Appeal

155. 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.

156. 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.

157. 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.

158. 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 that the party who is making the application for permission to appeal is seeking.