FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/OOHE/LIS/2020/0026
Property:	Atlantic Bays Holiday Park, St Merryn, Cornwall PL28 8PY
Applicants:	Mr Martin Francis and Mrs Rebeka Katherine Francis
Representative:	Mrs Francis
Respondents:	The Lessees, members of Point Curlew Tenants'Association (listed at pages 61 to 63 of the Hearing Bundle)
Representative:	Mr R Crozier of counsel
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay service charges) Landlords application for the determination of reasonableness of on account service charges for the year 2020.
Tribunal Members:	Judge A Cresswell (Chairman) Mr M Woodrow MRICS
Date and venue of Hearing:	15 September 2020 by Video
Date of Decision:	23 September 2020

DECISION

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The Application

1. This case arises out of the Applicant landlords' application, made on 5 March 2020, for the determination of liability to pay on account service charges for the year 2020.

Summary Decision

2. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred.
3. The table in the Annex below sets out the heads of expenditure challenged by the Respondents where the Tribunal found the total of the sums demanded not to be reasonable and payable. Those items and other items determined appear in bold in the table.
4. The Tribunal finds that the sum of £1,474.89 is due from each property/leaseholder.
5. The Tribunal allows in part the Respondents' application under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus precluding the Respondents from recovering 34% of its reasonable costs in relation to the application by way of service charge or administration charge.

Inspection and Description of Property

6. The Tribunal did not inspect the property. The park had been inspected on previous occasions by one of the Tribunal members and there was a plethora of photographs.
7. The Tribunal, in its determination of 30 July 2019, described the property in question thus:

> 7.In its determination of 9th March 2 0 17 (relating to service charges from 2008 to 2012) the Tribunal described the property thus:- " The Tribunal carried out an inspection of the Holiday Park on 26th January 2016. It had served as an RAF station in World War II covering altogether 25 acres or thereabouts in countryside near to Padstow and the coast. The site is divided into four parts. One large part contains holiday chalets. A second smaller area contains more recently constructed holiday lodges and concrete bases on which more lodges can be constructed. This area is also available for the pitching of tents which is permitted for 28 days per annum. A third area contains a touring caravan park with a toilet/shower block and laundrette, constructed. for the opening of the touring park in 2010. The fourth area contains a newly constructed reception, office and shop, an amenity centre which was originally the officer's mess for the RAF station and was latterly a bar and restaurant, a sewage pump house and a children's play area. The touring area and the tent pitches are part of a business run by the Respondents as is the bar in the amenity centre. Much of the Applicants' challenge to the service charges concerned the extent to which expenditure on the Holiday Park should be apportioned as between the landlord (having regard to their business interests on the site) and the lessees. On inspection the Tribunal found the Holiday Park to be in generally good order. The grassed areas were neat and tidy, roads in good condition, fences well maintained. The amenity centre was partly derelict but there was a bar area and conservatory in operation. Extensive refurbishment of the remainder of the building had been brought to a halt due to the litigation between the parties."

8. That description holds good for the purpose of the current application. Since 2016, however, substantial additional work has been carried out to renovate the Amenity Centre.

8. The property was described to the Tribunal as occupying 28 acres and the Tribunal found (see later) that there were 177 chalets as at 1 January 2020.

Directions

9. Directions were issued on 26 May 2020 and 13 July 2020 and 25 August 2020.
10. Judge Tildesley OBE recorded:

    1. The Applicant seeks a determination on the liability to pay the service charge on account in the sum of £340,331.25 (the contribution for each leaseholder is £1,993.70) for the year 1 January 2020 to 31 December 2020 under Section 27A of the Landlord and Tenant Act 1985.

    2. The issue for the Tribunal is whether the estimated service charge is no greater amount than is reasonable.

11. Judge Tildesley also made the following comments:

    10. The Tribunal observes that the dispute between the Applicants and PCTA has been ongoing since 2010. There have been at least three County Court judgments dated, 28 October 2011, 18 June 2013 and 19 May 2017 one of which went on Appeal. HHJ Cotter QC in the judgment recorded that both parties had incurred costs of almost £800K each. There have been six previous Tribunal decisions. The decision on 31 March 2016 (CHI/00HE/LIS/2015/0013) determined the on account charge for 2015. This decision was subject to an appeal by the Upper Tribunal (*Knapper v Francis* [2017] UKUT 003 (LC). On 28 November 2019 the Tribunal under the same case reference issued a final determination in respect of the actual service charges for 2013 to 2016 inclusive. This again was subject to an Appeal to the Upper Tribunal but restricted to the costs of the managing agents. Judge Agnew sitting as a County Court Judge on 31 October 2019 made a declaration regarding the leaseholders 'rights for service charge statements and as part of the judgment gave the leaseholders liberty to apply for an injunction.

    11. The Tribunal holds that the principles underpinning the Application for the on account service charge for 2020 have been established by the 2017 UT decision in *Knapper v Francis*. It also follows the FTT decision that determined the 2015 on account service charge although not binding would have some influence on this Tribunal's evaluation of the current application.

    12. The Tribunal is mindful that the overriding objective of dealing with cases fairly and justly requires it to deal with the Application proportionately, avoiding unnecessary formality and minimising delay. The Tribunal considers that the Respondents 'proposed directions add unnecessary complexity and delay to the Application before the Tribunal. The Tribunal is not convinced having read the proposed directions that it is proportionate to widen the dispute. The Tribunal also questions the relevance of those matters for the determination of the on account service

charge. The Application to determine the on account service charge for 2020 is a discrete matter and is governed by different principles than actual service charges and serves a different function of putting a landlord in funds to carry out its responsibilities under the lease subject to the lease permitting this and to the statutory protections afforded to leaseholders.

13. This does not prevent the Respondents from pursuing their rights to receive service charge statements, and they have a separate course of action for challenging the reasonableness of the actual service charges. Also, if the Applicants are relying on previous actual expenditure to justify the on account charges it would be necessary for them to produce the service charge accounts for previous years as part of the evidence for this application.

12. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration. The bundle submitted ran to some 1337 pages. An application by the Respondents made very close to the hearing to increase the bundle to 1816 pages was refused.

13. This determination is made in the light of the documentation submitted in response to the directions and the evidence and submissions made at the hearing. Evidence was given to the hearing by Mr and Mrs Francis and their managing agent, Mr Justin Armstrong, and by Mr Adrian Pattenden (written statement) for the Respondents. At the end of the hearing, Mrs Francis and Mr Crozier told the Tribunal that all relevant matters had been discussed and they had nothing further to add.

14. The Tribunal has dealt with this case having regard to its overriding objective:
The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

. (a) exercises any power under these Rules; or

. (b) interprets any rule or practice direction.

(4) Parties must:

. (a) help the Tribunal to further the overriding objective; and

. (b) co-operate with the Tribunal generally.

The Law

16. The relevant law is set out in sections 18, 19, 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002.
17. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable.
18. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
19. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administration charge payable by the tenant specified in the application.
20. In reaching its Decision, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. In accordance with the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account.
21. "*If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the* ***Yorkbrook*** *case* **(Yorkbrook Investments Ltd v Batten** (1986) 19 HLR 25) *make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.":* **Schilling v Canary Riverside Development PTE Limited** LRX/26/2005 at paragraph 15.
22. **Enterprise Home Developments LLP v Adam** (2020) UKUT 151 (LC):

    27. In ***Yorkbrook Investments Ltd v Batten*** *(1986) 18 HLR 25 Wood J, giving the decision of the Court of Appeal, addressed the issue of the burden of proof on the reasonableness of service charges. At page 34 he said this:*

"Having examined the statutory provisions we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence – of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, providing that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a prima facie case then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions."

28. Much has changed since the Court of Appeal's decision in ***Yorkbrook v Batten*** *but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a prima facie case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach. In this case it might quite reasonably have taken the view that Mr Adam had failed to establish any ground for thinking the sums claimed had not been incurred or were not reasonable, which would have left only the question whether any item of expenditure was outside the charging provisions. "Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available: London Borough of Havering v Macdonald [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.*

23. The lessee is obliged to identify the costs which s/he disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee's challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, the Tribunal will expect him/her to produce evidence of the amount by which the landlord's costs should be reduced. It is a key element of the section 27A determination process (**The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** [2015] UKUT 0333 (LC)).

24. Where a party does bear the burden of proof:
"*It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law… It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out…: the burden of proof is a last, not a first, resort."* (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

25. The Upper Tribunal reiterated in **Knapper v Francis** [2017] UKUT 3 (LC) that the Tribunal can make *its own assessment of the reasonable cost.*

26. The relevant statute law is set out in the annex below.

The Lease

27. By **Clause 3b** of the lease the landlord covenants to provide the services set out and numbered 1-7 in Schedule 3. Those services are stated to be:-

"1. To pay all rates and other charges upon the Estate or any part thereof other than .those properties specifically demised to third parties

2. The erection and maintenance of suitable notice boards on the Estate

3. The maintenance operation and cleaning of soil and drainage pipes and other conducting media conduits and channels and pumps in relation thereto

4. The provision and maintenance of firefighting equipment

5. The cutting and mowing of grass lopping pruning and felling of trees on the Estate

6. Management of the Estate and its appurtenances including - where applicable the charges wages pensions contributions insurance and provision of uniforms and working clothes of any staff employed by the Lessee (sic) and the provision of telephones (if any) and also the cost of providing tools appliances cleaning and other materials bins receptacles together with any amounts of fees paid to architects agents surveyors and solicitors employed by the Lessor in regard to the management of the Estate

7. Repairing renewing rebuilding decorating cleaning and maintaining those parts of the Estate (which include an amenity centre if any) used in common with other lessees including without prejudice to the generality of the foregoing the footpaths roadways and car park on the Estate

8.A management charge of five per centum (5%) of the total cost of the items referred to in this Schedule"

28. By **Clause 2q** of the lease the lessee covenants to “Pay to the Lessor by way of additional rent the service rent hereinafter defined in Clause 4 within fourteen days of written demand after the accounting date as hereinafter defined in each and every year of the term PROVIDED ALWAYS that the tenant shall pay to the Lessor on each of the accounting dates in every year during the term such sum or sums as the Lessor may reasonably require on account of the said service charge and any such payment to be credited to the tenant against payment of the services as certified to be due from it (as hereinafter provided) by the certificate issued next after the making of such demand and in default of such payment by the Lessee or the whole or any part of the service rent the Lessor shall be entitled to distrain re-enter and exercise all the remedies o f a lessor exercisable in respect of a breach of covenant”

29. **Clause 4** provides that:- "The service rent hereinbefore covenanted to be paid by the Lessee shall be a fair and equitable proportion determined from time to time by the lessor and such sum shall be ascertained by a certificate given by the Lessor or its managing agents and certified by them to be the aggregate of the sums actually expended on the liabilities incurred by the Lessor in any period ending on the Thirty

first day of December or such other date as the Lessor may in its discretion determine....during the term hereby created in connection with the management and maintenance of the Estate and the provisions of such services as herein described and in particular without limiting the generality of the foregoing shall include the cost of the matters referred to in Schedule 3 hereto (a) such certificate as to the amounts or sums actually expended or liabilities incurred as aforesaid shall be final and binding on the accounting date of each year as may be practical PROVIDED ALWAYS that any omission by the Lessor of any sum expended or liability incurred in any year shall not preclude the Lessor from including such sum or the amount of such liability in the certificate of any subsequent year or years as the Lessor shall deem fit PROVIDED FURTHER that there shall not be included a sum which is (i) properly recoverable by the Lessor from the Lessee under the terms and provisions hereof or by general law or (ii) actually recovered by the Lessor from the Lessee of any other part of the Estate under the terms and provisions of the lease under which such Lessee holds or by general law (iii) as soon as practical after the accounting date in each year throughout the term the Lessor will submit to the Lessee a statement certified by the Lessor's agent to show the computation of the said sums expended and the liabilities incurred for the preceding year and the Lessee shall be entitled within fourteen days of receipt of such statement to inspect the vouchers and receipts of all items included in such statement."

30. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).

31. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

The Divisor

The Respondents

32. The Respondents had argued in writing that there were 178 units on site on 1 January 2020, but moved their position in oral submissions to there being 177.
33. Mr Crozier directed the Tribunal to photographs at page 933 of the bundle, which he described as showing a semi-detached unit of 2 units. He said that each of the two units was occupied by a different person.

The Applicants

34. The Applicants told the Tribunal that their two sons lived in the unit. In each half of the unit was a bedroom, shower/bathroom and kitchen/utility area. Each occupied space was split from the other and it was not possible to get from one to the other internally.
35. Mrs Francis was unaware of any other units on the estate where an occupant could not access all of the interior of a unit.
36. She told the Tribunal that there was one water supply and one electricity supply to the units.

The Tribunal

37. The Tribunal, having identified the unit in question, and there being no dispute between the parties that there were otherwise 176 units on site (including the disputed unit in question), finds that the disputed unit consists of 2 independent units, such that the total number of units is 177. In so deciding, the Tribunal was particularly persuaded by the fact that it was not possible for the occupier of one half to access the other half internally. To all intents and purposes, the division of the building had been such as to create 2 separate independent units, notwithstanding the sharing of water and electricity supply.

Office/Receptionist

The Respondents

38. The Respondents conceded for the purpose of these proceedings that the sum for this was reasonably demanded.

Accommodation

The Respondent

39. The Respondents argued that a sum for the provision of accommodation for staff members had been ruled as being not recoverable in the 2010/2012 determination.

The Applicants

40. The Applicants argued that the sum had been allowed in the 2015 on account determination.
41. Mrs Francis stated that a site manager would need to live on site, as the Applicants themselves currently do.
42. She said that the sum had been disallowed in the 2010/2012 determination because there was no actual invoice for the cost. There would be an invoice from the Applicants to the Respondents in respect of occupation by the site manager.
43. Mrs Francis contended that the sum was recoverable by virtue of Clause 4 of the Lease as a liability incurred by the landlord and by Paragraph 6 of Schedule 3 of the Lease.

The Tribunal

44. The Tribunal notes that, although the 2015 on account determination did allow the sum in question, there was no discussion within the Decision as to the Tribunal's rationale for doing so. There was, however, discussion within the 2010/2012

determination, which was delivered in 2017. There, the Tribunal referred to the cost as being a notional one.

45. This Tribunal agrees with the finding that this was a notional cost and not a sum actually expended as would be required by Clause 4.
46. Although Mrs Francis spoke about there being an actual future invoice for the occupation by the site manager of the unit, this would not be for a cost actually incurred by the Applicants, but rather for the notional cost to the Applicants of the provision of the facility.
47. Had the monies in question been expended on the provision of accommodation very close to the site by a third party, then, subject to justification of the need for very close proximity by the manager to the site out of hours, it is likely that such a sum would be recoverable under Clause 4 of the Lease.

Vehicle Finance
The Respondents

48. The Respondents argued that only one vehicle had been allowed in the 2015 on account determination and that the costs were £2071.86 in 2014/2015.
49. Mr Crozier further argued that the costs would be spread over the year, so that the Applicants were not justified in demanding the whole costs at the beginning of the year.
50. Mr Crozier indicated that the truck in current use appears on one of the Francis's son's Facebook page as being used by him for log deliveries, rubbish collection and other business uses, including waste soil removal. He argued that the vehicle was bigger than needed for the site.

The Applicants

51. The Applicants argued that 2 vehicles had been allowed in the 2015 on account determination.
52. Mr Armstrong explained that the £7500 demanded was made up of the lease costs of 2 vehicles together with an addition for running costs and servicing.
53. Mrs Francis accepted that the use of vehicles was subject to a test of reasonableness each year. She accepted that the costs were subject to apportionment and said that the Applicants would know better the position after one year of proper service charge monies coming in.
54. She said that the Applicants currently use a pick-up truck to clear up, do hedging work, carry maintenance materials, etc. She said that a number of vehicles were used on site but not all were put through the service charge. She accepted that her son has used the truck and that this will be reflected in the final service charge as well as apportionment for self -use and apportionment in respect of site use.

The Tribunal

55. The Tribunal could see no reason to alter the Decision made in the 2015 on account determination, i.e. that one vehicle should be allowed, but with scope for the Applicants to argue at the final service charge stage that more than one vehicle had reasonably been required. Accordingly, the Tribunal reduces the sum for the on account service charge to £5000, a figure agreed by the Respondents in correspondence.
56. Clearly, any final demand for a second vehicle(s) would be sensibly accompanied by a note to justify same, in the hope of obviating further discord.
57. The Tribunal could not accept the suggestion by the Respondents that only a part of the vehicle demand should be payable as part of the on account charge. First of all, it would not be possible to drip feed the monies involved as this would involve a wholly unworkable mechanism. Secondly, it would defeat the very purpose of the on

account charge which is to place the Applicants in a position where they are confident of funds for the coming year. The code makes it clear "*While it is prudent to slightly over-estimate the total level of funds required to run the development for the following year, the estimated budget should always be as close to the subsequent final accounts as possible*."

Storage Shed

The Respondents

58. The Respondents argued that this was a new build and, as such, not recoverable under the Lease. The Tribunal had ruled against this cost in the 2015 on account determination and it had also been ruled against by Judge Cotter in the County Court.
59. The argument was raised before Judge Cotter. It is not possible to import an ability to construct something new. Maintenance costs of a storage shed, once built, would be maintenance and management costs payable by the Respondents in accordance with the terms of the Lease. The Lease does not provide the Applicants with unfettered discretion to call anything maintenance and management.

The Applicants

60. The Applicants submitted that the storage shed should not be classed as a new build. It was, rather, a necessary facility for the proper management and maintenance of the estate. Once the amenity building work commences, there would be a need to rehouse tools and equipment required to maintain the estate. The Applicants needed a safe storage facility.
61. The purchase was covered by Schedule 3 Paragraphs 6 and 7 and by Clause 4 of the Lease.
62. Judge Cotter dealt with Clause 4 in his judgment. The storage shed is necessary and reasonable to manage the park and is, accordingly, allowable as a necessity under Clause 4.
63. Mr Armstrong told the Tribunal that £20,000 was a budget figure. The Applicants had looked at a double unit of Portakabins or containers, but it was likely that Mr Francis would himself build the storage shed.

The Tribunal

64. The Tribunal finds that a new storage shed would be a new build and, as such, not recoverable under the terms of the Lease, just as the Tribunal had decided in the 2015 on account determination and just as HH Judge Cotter had also found: *144. The capital cost of first construction of amenity centre or indeed or any other building is not included in the terms of the standard lease.*
65. The Tribunal could see the reasonable requirement for a storage shed for maintenance tools and materials. Such an objection as made to the cost of the purchase or build of a storage shed could not be made to the reasonable leasing costs of a storage shed, Portakabins or containers leased to the Applicants by a third party or to the reasonable cost of maintenance of a shed built by Mr Francis (the latter as admitted by Mr Crozier).

Security Barrier

The Respondents

66. The Respondents contended that a security barrier would be a new build and, as such, not recoverable under the terms of the Lease.
67. Further, the installation of a security barrier would interfere with a right over land (**Shortlands v Hill** [2018] 1 P. & C.R. 16) and expenditure on same would not be reasonable because it would create a nuisance.

68. The site rule requiring Respondents to sign in would be seen as a derogation from the easement of free passage.

The Applicants

69. The Applicants argued that the barrier is required for the safety of the park. Many of the Respondents refused to sign in on entry to the park in contravention of park rules. The lease, Clause 2 paragraph (r) requires the Respondents "*To observe perform and comply with all reasonable rules regulations and conditions imposed from time to time by the Lessor for the management of the Estate*". Rule 21 reads *Pursuant to clause 2(r) of your lease - it is a requirement of the site that all owners and their guests must sign in at the site reception office whilst on site during office hours (if reception is closed please sign in on the next working day that the office is open) If you are attending site out of hours please kindly ring or email ahead prior to your arrival in order for your presence on site to be recorded at reception.*
70. Fly-tipping has been a problem on the park.
71. Knowing who is on the park is a constant daily problem for management. The police have been called and ambulances and management do not know who is on site. Every other park has a requirement to sign in.
72. The Applicants require the name, vehicle registration, where the person is going on site and how long they intend to stay.
73. Mrs Francis indicated that it should be possible to upload the Respondents' details into a number plate recognition system or Respondents could text or email the required details 24 hours a day.
74. There would be a pedestrian gate at the side of the barrier and the barrier would be managed by the CCTV system.

The Tribunal

75. The Tribunal finds that the erection of a barrier would not be a "new build", but rather the provision of a tool or appliance within the wide terms of Schedule 3 paragraph 6. The Tribunal also agrees with HH Judge Cotter that the words manage and maintain in clause 4 should not be read restrictively: *95. The draughtsman clearly wanted to provide and in effect expressed that he was providing a saving provision in case an item of management and maintenance was not specifically set out within schedule 3. These are, as Mr Paton submits "extensive and wide words, going considerably beyond a bare covenant to "maintain"."*
76. The Tribunal could see the necessity for the Applicants to be aware of who was on site and the good sense of a security barrier in the circumstances described by Mrs Francis and concluded that a reasonable cost of same would be allowable under Clause 4 of the Lease as part of the proper management and maintenance of the estate. The Tribunal would, however, require further evidence that such a barrier could operate without infringing the easement of free passage.
77. The easement, at paragraph (a) of Schedule 1 of the lease is "*The right of way at all times and for all purposes with or without vehicles over and along the roadways and footpaths on the Estate and the right of access on foot only to the demised premises to and from the said roadways and pathways*".
78. Lord Justice Mummery in ***West v Sharp*** (1999) 79 P&CR 327 at 332 said this:

> "There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the alleged obstruction."

79. Unfortunately, the evidence available to the Tribunal at this hearing did not provide the Tribunal with an assurance that there would not be a substantial interference

with the easement of free passage. For the above reason, no allowance is approved for the on account service charge, but the Tribunal would not wish to discourage the Applicants from presenting further and fuller arguments on a subsequent occasion to the Respondents and thereafter, if necessary, to the Tribunal as to whether a proposed security barrier would still allow for the substantial and practical exercise of the right of way.

Costs for Professional Fees in Preparation for Qualifying Works
The Respondents

80. The Respondents argued that for such costs, estimates were required and information as to when costs were to be incurred.
81. Mr Crozier said that it is very rare to talk of substantial expenditure by a landlord without some proper costings. It would be sensible to line up quotations in November/December and then have something to go on. The Applicants cannot just guess at costs. The RICS code gives landlords guidance on how they should approach such issues.

The Applicants

82. The Applicants via Mr Armstrong indicated that there were a number of major projects in view, which Mrs Francis said were well known to the Respondents, chief amongst which was the need for a drainage survey.
83. The sewage line and pumping station are also part of the biggest job. There are issues with flooding and drainage on the site. Most of the £25,000 in the on account charge would be in respect of drainage works, a drainage survey costing some £5/6000 on its own.
84. Mrs Francis told the Tribunal that the Respondents had spent thousands of pounds on surveys when they were the owners of the park. They knew that the drains had collapsed. It was unaffordable for the Applicants to take forward this work without contributions from the Respondents.
85. South West Water will not adopt the drains until they are up to standard and rainfall will soon put chalets under water.

The Tribunal

86. The Tribunal considered the guidance of the Code here:

7.3 Budgeting/estimating service charges

The lease commonly provides for the landlord to recover expenditure as an estimated interim service charge payable in advance. When calculating a service charge budget, you should use due diligence and professional expertise to make an assessment of expenditure required to maintain the development and services for the forthcoming period (typically a year) and beyond. Similar to when securing instructions, here too you must not purposely underestimate costs or provide leaseholders with misleading estimates of future contributions required.

Some leases, however, do not require advance payments to be made or specify a rate of payment which is out of date and therefore do not allow for recovery of the actual costs adequately. From a landlord's point of view it is not a satisfactory system if all the bills have to be paid by the landlord without sufficient

advance contributions from leaseholders. Services may be difficult to provide but the landlord must follow the terms of the lease.

In such a situation, the landlord may have to wait over a year to recover the expenditure incurred early in the service charge year and may have to pay for the cost of borrowing money to finance the costs. Sometimes the landlord cannot recover any interest charged on borrowings as part of the service charge.

This problem of financing the service costs can also cause difficulties where the leaseholders themselves are responsible for providing services and the charges are payable in arrears. If any of the leaseholders are late payers, funds to carry out maintenance and repairs may run out before the end of the year. Failure to provide such services may constitute a breach of the landlord's obligations, leading to legal action.

You should consider an application to the FTT for a variation of the lease if the lease deals inadequately with the payment of service charges. However, leaseholders have no obligation to agree to variation of their leases.

The best information available should be used to inform the budget estimate. This is likely to be, in descending order of importance:

- *actual costs where contracts are already in place and/or the actual costs for the following period have already been agreed, taking into account any known or anticipated major works, or cyclical costs to be incurred during the year*

- *estimates based on likely out-turn of current year, actual accounts for the last completed financial year and any known or likely variations/increases for the future year; and*

- *comparable evidence from similar schemes, which is often the best information available for some costs on new developments.*

Unless your contract delegates specific authority to you for service charge budgets, they should be approved by your client prior to demanding any service charges. Initial service charge demands should be accompanied by a copy of the approved budget. This budget should have sufficient detail to enable leaseholders to understand the nature of the charges being levied and the rationale behind the level of estimated expenditure. To allow comparison between years, there should be a standard format for presentation to leaseholders.

While it is prudent to slightly over-estimate the total level of funds required to run the development for the following year, the estimated budget should always be as close to the subsequent final accounts as possible. It is appropriate to make some explained allowance for a contingency within the estimated budget.

The purpose of an estimated budget is to ascertain and support the level of interim service charges demanded on account and to provide a robust benchmark for monitoring service costs throughout the period (typically a year). You should explain to leaseholders that it is only an estimate upon which the interim service

charge is based. The budget may also include contributions to reserve funds. The final level of service charge contributions will be based on the actual expenditure incurred, which may be more or less than anticipated, especially where unforeseen matters arise during the year. The amount of the actual service charge contributions may also reflect any surplus or deficit from the previous year, depending on the terms of the lease. You should notify leaseholders of significant departures from the budget and should be willing and able to explain the reasons for them.

87. The Tribunal can see the requirement for major works on the park, particularly the drainage system. It agrees with the Respondents, however, that more detail is required to justify some of the proposed expenditure. It should, for example, be a quite simple task for the Applicants to identify individual issues for major works and to assign to those issues the likely costs of obtaining professional advice.
88. The Tribunal has determined to reduce this cost from £25,000 to £10,000, but on the basis that that reduction does not inhibit the Applicants from spending more in the current year if it is reasonable to do so and demanding that expenditure in the final accounts and does not inhibit them from seeking to justify higher expenditure in the 2020/21 on account demands where it is reasonable to do so and in accordance with the guidance in the code.
89. The sum allowed will enable the Applicants to commission investigative works on the drainage system and the drawing up of specifications for the works necessary to comply with current standards for foul and surface drainage water.

5% Management Charge, Site Manager and Managing Agent
The Respondents

90. The Respondents conceded that the Applicants could employ a site manager as well as a managing agent and take its 5% management charge in accordance with the terms of the lease. They argued, however, that the spend must be reasonable and not involve duplication such that the Respondents would be paying for the same service twice.
91. Mr Crozier submitted that the comparator roles illustrated in the hearing bundle were not true comparators. One was for a 400-acre estate, a totally different proposition to this park; another was a deputy general manager dealing with much more significant resources. In this instance, the manager would be dealing only with the chalets, some 5 acres.
92. There is already a managing agent and there would be considerable overlap between the managing agent and the site manager; and, there would be a question of apportionment too.
93. The Respondents also argued that the whole of the 5% payment should not be required on account as it would be used during the course of the year and not upfront.

The Applicants

94. The Applicants, explained Mrs Francis, had been unable to find a like-for-like comparator. Taking the comparator rates at £23 per hour would result in an annual expenditure of £48,000, but the Applicants were asking only for the sum of £35,000 the same as approved for the 2015 on account charges.
95. 17 acres are used by the Respondents.
96. When the Respondents were in charge, in 2005, they allowed £50,000 for a manager as well as providing a manager's flat and a car. They know that it is necessary for the manager to live on site so as to manage it effectively.

97. Mrs Francis had described in the hearing bundle at page 975 how the site manager role was different to the role of a managing agent.
98. Mrs Francis stated that if it worked out that having a site manager and a managing agent was excessive, then this could be looked at again.
99. She believed that £35,000 was a correct costing for the role relating to the Respondents (the leaseholders). The plan was to employ a manager just for leaseholders and that Mr and Mrs Francis would manage the rest of the park.

The Tribunal

100. The Tribunal noted the finding of the Tribunal in the Decision relating to the 2015 on account charge and could see no reason not to follow that Decision, made as it was in the knowledge that there was a managing agent for the estate. The Tribunal, from its own knowledge and from its reading of the description of the roles at page 975 of the hearing bundle, very much appreciates the difference in the two roles and can readily see the requirement of a site manager for this site in addition to a managing agent.
101. In its determination for the 2015 on account charge, the Tribunal found that a reasonable sum for the employment of a manager was £35,000. Some five years later, the Applicants are only asking for the same amount. Also, the Applicants have pared down considerably sums on offer to a site manager of a much larger site. In the circumstances described, the Tribunal finds that £35,000 is a reasonable sum for the on account cost of a site manager.
102. The Tribunal could not accept the suggestion by the Respondents that only a part of the 5% should be payable as part of the on account charge. First of all, it would not be possible to drip feed the monies involved as this would involve a wholly unworkable mechanism. Secondly, it would defeat the very purpose of the on account charge which is to place the Applicants in a position where they are confident of funds for the coming year. The code makes it clear "*While it is prudent to slightly over-estimate the total level of funds required to run the development for the following year, the estimated budget should always be as close to the subsequent final accounts as possible.*"

Section 20c and Rule 13 Costs and Paragraph 5A Application

103. The Respondents have made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Respondent's costs incurred in these proceedings.

104. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

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

(3) The … tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002 Schedule 11

Paragraph 5A Limitation of administration charges: costs of proceedings

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

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

(3) In this paragraph—(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and (b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal

Section 20C

105. The Tribunal was told by Mr Crozier that the Respondents accept that the Applicants are able to recover their professional costs under the terms of the lease.

106. In considering an application under Section 20C, the Tribunal has a wide discretion, having regard to all relevant circumstances. It follows a similar course when considering administration charges. "*Its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them." "In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.*" (**Tenants of Langford Court v Doren Ltd** (LRX/37/2000).

107. "An order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances." "The scope of the order which may be made under section 20C is constrained by the terms of the application seeking that order...; "The FTT does not have jurisdiction to make an order in favour of any person who has neither made an application of their own under section 20C or been specified in an application made by someone else". (**SCMLLA (Freehold) Limited** (2014) UKUT 0058 (LC)). *"In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make."* (**Conway v Jam Factory Freehold Limited** (2013) UKUT 0592 (LC)).

108. In **Bretby Hall Management Company Limited v Pratt** (2017) UKUT 70 (LC), HH Judge Behrens gave a summary of the decision in **Conway v Jam Factory**:
46. I was referred to a number of cases where s 20C has been considered including the decision of the Deputy President in The Jam Factory [2013] UKUT 0592 which contains a full review of relevant authorities. I shall not lengthen this judgment by setting out the lengthy passage from the report. I summarise what I take to be the principles:

1. *The only principle upon which the discretion should be exercised is to have regard to what is just and equitable in the circumstances.*

2. *The circumstances include the conduct of the parties, the circumstances of the parties and the outcome of the proceedings.*

3. *Where there is no power to award costs there is no automatic expectation of an order under s 20C in favour of a successful tenant although a landlord who has behaved unreasonably cannot normally expect to recover his costs of defending such conduct.*

4. *The power to make an order under s 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not used in circumstances which make its use unjust.*

5. *One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income.*

109. The Applicants were, the Tribunal finds, justified in bringing this application. There was a failure to agree important heads of expenditure and a history of a failure to do so. The Applicants need monies to manage the Estate.
110. The case for the Applicants in respect of the items in dispute was not fleshed out until the Respondents detailed their specific objections, but that is what the Upper Tribunal in **Enterprise Home Developments LLP v Adam** said should happen. Where the Applicants did less well, however, was in failing to give more detail of the less recurring matters, such as the costs for professional fees in preparation for qualifying works.
111. The Tribunal notes that the Applicants, whilst not unused to this type of proceeding, were not represented. They have been partially successful in their submissions and have had clarification from the Tribunal in respect of some of the items not allowed on account.
112. The Respondents have, for the purpose of the proceedings, made concessions but they too have added clarification to their case even on the day of the hearing.
113. Taking a rounded view, the Tribunal allows the application under Section 20C of the Landlord and Tenant Act 1985 in part. It directs that the Applicants' costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge above for the current or any future year over and above a limited sum of 66% of the landlord's reasonable costs.

Paragraph 5A

114. The Tribunal makes the same order as under Section 20C above for the same reasons. For the sake of clarity, the Applicants are not permitted to seek their reasonable costs as both a service charge and an administration charge.

A Cresswell (Judge)

APPEAL

1. 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.

2. 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.

3. 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.

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

ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of “service charge” and “relevant costs”

(1) In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent—
(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose—
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

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

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration
agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Atlantic Bays Holiday Park Service Charge Budget 2020

	Tribunal
Staff / Admin Services	
Site Manager	**£35,000**
Office / Receptionist	£20,000
Site Wardens	£35,000
Accommodation Cost for Manager / Wardens	**£Nil**
Grounds Maintenance	£22,000
Soft Services	
Refuse	£4,500
Pest Control	£1,200
Insurance	£4,000
Rates	£5,000
Consumables	£2,500
Staff Uniforms / PPE	£2,000
Hard Services:	

Pump Maintenance / Repairs	£7,500
Fire Equipment .	£2,000
Repairs / Renewals	£20,000
Office Equipment/ Stationery	inc. in repairs and renewals
Machinery / Tools	inc. in repairs and renewals
Site Vehicles	**£5,000**
Utilities:	
Electricity	£7,500
Water	£1,500
Telephone & Broadband	£1,000
Professional Fees:	
Accountancy Fees	£7,000
Health & Safety	£1,000
Managing Agent	£29,925
Legal/Professional Fees	£20,000
Day to Day Total:	£233,625
Cost per Unit ie **1/177**	**£1, 319.92**
Special Projects:	
Landscaping	£5,000
Maintenance / Storage Shed	**£Nil**
Site Security Barrier	**£Nil**
Professional Fees in preparation for qualifying works	**£10,000**
Total ServiceCharge Budget:	**£248,625**
Management Charge:	
5% Management Charge	**£12,431.25**

TOTAL COSTS:	**£261,056.25**
Total Cost per Unit ie 1/177	**£1,474.89**