FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	(1) CHI/00MW/LSC/2020/0045 (2) CHI/00MW/LSC/2020/0046
Property	:	(1) Saltbox Unit B1 and Munday Cottage H2 West Bay, Halletts Shute, Yarmouth, Isle of Wight PO41 0RJ (2) Munday Cottages H4 and H5, west Bay, Halletts Shute, Yarmouth, Isle of Wight PO41 0RJ
Applicants	:	(1) Mark Richard Pilcher and Terence Brian Kennedy and Ray Mary Ann Kennedy (2) Susan Moores and Philippa Anthony
Representative	:	
Respondents	:	(1) West Bay (Holdings) Limited (2) West Bay Club Limited
Representative	:	Miss Katie Gray of Counsel and Charles Russell Speechley LLP, solicitors
Type of application	:	Service charges
Tribunal member(s)	:	Judge D. Agnew Mr S. Hodges FRICS
Date of hearing	:	16 and 17 December 2020
Date of determination	:	26 January 2021

DETERMINATION

Background

1. This case concerns two consolidated applications for a determination by the Tribunal under section 27a of the Landlord and Tenant Act 1985 ("the Act") as to the payability and reasonableness of certain service charges in respect of holiday homes on a resort at West Bay, Halletts Shute, Yarmouth, Isle of Wight PO14 0RJ.

2. In the application under case reference CHI/00MW/LSC/2020/0045 ("app 45") Mr Pilcher is the long leaseholder of the unit known as Saltbox B1 and Mr and Mrs Kennedy are the long leaseholders of Munday Cottage H2. In the application under case number CHI/00MW/LSC/2020/0046 (app 46") Susan Moores and Philippa Anthony are the long leaseholders of Munday Cottages H4 and H5. The landlord and owner of the freehold of the site is West Bay(Holdings) Limited. The Management Company (which is a party to the tri-partite leases of the units) is West Bay Club Limited.

3. The Applicants' application named as Respondents two Directors of the landlord company, namely Mr Andrew Day and Mr John Buckland. At the start of the hearing on 16 December 2020 the Applicants agreed to amend their application by deleting the Directors as Respondents and replacing them with West Bay (Holdings) Limited and West Bay Club Limited. Miss Gray, counsel for both these Respondents, had no objection to that amendment.

4. The West Bay resort comprises 107 self-contained holiday cottages together with a Country Club and spa complex. The Country Club has a swimming pool, tennis courts, gym, sauna, activity rooms and coffee shop. The cottage owners are entitled under their leases to a certain number of Club memberships for which they pay as part of their service charge entitling them to use the Club facilities. They have to pay extra for classes run from the Club and for spa treatments. Club membership is available for members of the public who are not lessees of one of the units on the resort and other organisations can pay a fee to use some of the facilities on the site. The cost to the lessees of the Club facilities and their contribution to the expense of running and maintaining the Club is a particular bone of contention in this case, as will be seen later in this determination.

5. The Applicants' leases prevent the units being used as the lessees' principal residence, so as to preserve the resort as a holiday location. That being the case many of the lessees do not use the properties for themselves but let them out on short term holiday

rentals. There is, however, no restriction on the number of weeks in the year that the properties can be occupied.

6. The issues in the two applications are not identical although there is a considerable overlap. Both applications pose the question as to whether service charges going back to 2010 can be recoverable by the landlord in circumstances where there has been a failure by the landlord to have service charge accounts certified in accordance with the lease and where no summaries of lessees' rights and obligations was served along with the demands for payment until very recently. App 45 then focuses on the cost to the lessees of membership fees of the Club and whether the contribution towards the Club's expenses is being fairly borne as between the lessees and external Club members. Mr and Mrs Kennedy also have an issue as to the number of Club memberships for which they are being charged in their service charges. App46 additionally raises issues concerning the reasonableness of service charges in the year ended 2018 which are set out in a Scott Schedule.

7. The applications came before the Tribunal for determination by way of a video hearing on 16 and 17 December 2020. All the Applicants appeared in person. Mr Pilcher spoke on behalf of himself and Mr and Mrs Kennedy and Ms Moores was the principal speaker for herself and Ms Anthony. Ms Katie Gray of counsel appeared for the Respondents. Mr Andrew Day, Director of the Respondent companies and Ms Toni Sheppard, the General manager of West Bay Club Limited, had provided witness statements and attended to give evidence. Mr Lear, solicitor, and Ms Clark of Charles Russell Speechley, the Respondents' solicitors, also joined the hearing.

8. A second witness statement of Mr Day and of Ms Sheppard had been received by the Tribunal only on the morning of the hearing. The Applicants confirmed that they had received the same. They did not object to the statements being adduced in evidence and as they contained some useful information and exhibits relevant to the issues the Tribunal had to determine they were allowed into evidence.

The certification issue

9. In order to understand the Applicants' position with regard to this issue it is necessary to consider the relevant provisions in the leases of the units.

10. Clause 3.1.2 contains under the heading "Tenants' Covenants" the following provision:

" To pay the Manager the Maintenance charges in accordance with the provisions of schedule 3 without making any deduction….."

In Schedule 3 under the heading "Initial Contribution" there is the following provision:

"the amounts notified to the Tenant which the Manager reasonably estimates to be the Tenants Proportion for the relevant accounting Period and which may be varied by the Manager whenever it shall reasonably so determine together with such other amounts notified to the Tenant which represent the fair proportion payable by the Tenant of any sinking or contingency fund established from time to time by the Manager for the purposes referred to in paragraph 1 of Part 1 of this Schedule."

Then, under paragraph 2 of Schedule 3 it states:

"The Tenant shall in respect of every Accounting Period pay to the Manager the Initial Contribution annually in advance on the same day on which the Rent is payable under the Lease…."

Then, under paragraph 3 of Schedule 3:

"The Manager shall, as soon as reasonably practicable after the end of each Accounting Period supply to the Tenant a statement (duly certified by the Manager's accountant or the Manager's surveyor acting as an expert) giving a summary of expenditure on services provided pursuant to part 1 of this Schedule for that Accounting Period and such statement shall in case of manifest error by (sic) final and binding on the Tenant".

11. It is clear from the demands included in the hearing bundle that all service charge demands since 2010 have been demands for "Initial Contributions" or on-account payments under paragraph 2 of Schedule 3 and there have never been any demands for a balancing charge under paragraph 3 of Schedule 3. The Applicants, however, maintain that as no accounts have been certified, at least until year ended 2017, none of the payments on-account that have been made were payable. They cite three First-tier Tribunal/Leasehold Valuation Tribunal cases in support of their argument on this point and they make a claim for repayment of payments made.

12. The Respondent's case on this issue is that the certification is only required in respect of year-end accounts once expenditure has been incurred and failure to certify the accounts, which until year end 2015 is admitted, does not affect the payability of the interim demands. In any event, the expenditure for years ended 2015 and 2016 was signed off by Michelle Gregg, the Manager's Finance Manager, under the supervision of a qualified accountant, Mr Tobitt, and those for years ended 2017, 2018 and 2019 were certified by a firm of Chartered Accountants who also prepared the end of year accounts. As a belt and braces argument the Respondents claim that either the Applicants are estopped from claiming the invalidity of the on-account charges in view of the fact that they paid them without demur for a number of years and that a lessees' steering committee approved the charges, or alternatively, they can be taken to have admitted the charges and therefore, under

section 27A(4) of the Act it is not now open to them to challenge the said charges.

13. The Respondents cite the cases of *Clancy v Sanchez [2015] UKUT 387 (LC), Admiralty Park Management Company Limited v Mr Olufemi Ojo [2016] UKUT 421(LC) and Cain v Islington LBC [2015] UKUT 542 (LC)* in support of their argument with regard to estoppel and/or acceptance.

The Tribunal's determination on the certification point

14. The Tribunal finds against the Applicants on this point. It is clear from Schedule 3 Part 2 to the lease that there are two separate obligations on the part of the Tenant. First, there is the obligation in paragraph 2 to pay a sum on account of the charges that the Manager estimates it will incur in the ensuing year. The second obligation in paragraph 3 arises at the end of the service charge year once the expenditure has been incurred. At that point the expenditure is required to be certified by the Manager's accountant or surveyor. If, as a result of the actual expenditure there is a shortfall between what has been expended and what has been paid on account, a balancing charge may be made by the landlord to recoup that shortfall. That can only be done if the expenditure is certified. The certification can only apply to the end of year account because the landlord cannot possibly certify expenditure that has not yet taken place. It does not invalidate the separate obligation to pay on-account of service charges if the end of year expenditure is not certified. The three cases cited by the Applicants in support of their case on this issue do not, in fact, do so. They concern the requirement to have audited accounts at the end of a service charge year in order for the expenditure actually incurred during the year to be payable. They do not concern on-account charges.

15. It is to be noted that the lease does not require the landlord to produce certified accounts but only to have the list of expenditure certified. Had it been necessary for the landlord to have claimed the difference between the sum payable on account and the actual expenditure at the end of the year the Tribunal finds that the certification by the Finance Manager in 2015 and 2016 would have been sufficient. There is no requirement in the lease for the certification to have been by a Chartered or other qualified accountant, nor is there a requirement that the certification be by an entity unconnected with the Management Company. The word "accountant," in the Tribunal's experience, is a generic term apt to describe anyone who deals with accounts. In 2017, 2018 and 2019 the certification was indeed made by an independent firm of accountants who produced the service charge accounts. There can be no doubt that such certification is sufficient to satisfy paragraph 3. However, the certifications from 2015 onwards are, as has been pointed out in paragraph 14 above, irrelevant to the lessees' liability to pay the on-account charges provided for in their leases. It is good

to note, however, that the Management Company has, since 2017 had end of year accounts prepared and duly certified by a firm of accountants and the Tribunal trusts that this will continue otherwise they are likely to find that they are unable to recoup any year-end shortfall, should that occur. Further, although the Tribunal has no power to enforce it, the Tribunal would recommend that the lessees are given a service charge statement that shows how much they have paid in on-account charges over the years compared with the annual service charge expenses, so that the lessees can see whether they are in credit and if so by how much. The Tribunal would expect the newly appointed Managing Agents to do this going forward as a matter of course, but the Management Company will have all the past records and should be able to produce this fairly easily.

16. The Tribunal having found that the on-account charges were payable notwithstanding no certification of expenditure at year end, it renders unnecessary consideration of the claims by the Respondent that the Applicants are estopped from denying that the on-account charges are payable or that they had accepted the validity of the charges due to having paid them over a considerable period without demur. The question of estoppel or acceptance is, however, relevant to other challenges to the service charges as demanded and so the Tribunal will address those issues later in this determination.

17. Ms Moores and Ms Anthony mention the requirement by the Act for accounts to be certified by an independent qualified accountant where there are more than four leases concerned. Although for the reasons stated above that is irrelevant to the on-account charges, the Tribunal points out by way of information, should it be relevant in the future, that that provision (section 21(1) and (6) of the said Act) has not yet been brought into force.

The issue of failure to supply summaries of tenants' rights and obligations with service charge demands

18. At the time when the applications were made the Applicants stated that no Summaries of Tenants' Rights and Obligations, as required by section 20B of the Act, had been served with service charge demands since 2010. They quite properly, therefore, challenged that the service charges demanded were not lawfully owed. The Respondents accepted that this was the case but pointed out that the demands had recently been re-issued with the appropriate summaries and that the deficiency had thereby been rectified. The Applicants accepted that this had been done but not until Friday 11 December 2020. This was of particular relevance, they maintained, in connection with the Respondents' case on estoppel and acceptance of demands, which will be referred to later in this decision. They accepted, however, that the late re-submission of the

charges accompanied by the relevant summaries corrected the earlier deficiencies.

Number of Club memberships issue

19. This is an issue which involves Mr and Mrs Kennedy only. They say that they have been charged for 6 Club memberships as part of their service charges whereas until 2016 they should only have been charged for 2. They say that it was part of the pre-purchase agreement when they acquired their cottage that they would be entitled to 6 club memberships, reflecting the fact that their cottage is a three bedroom property and has a guest occupancy of 6, but only have to pay for 2 memberships. That is what they thought was the situation until 2016 when for the first time the documentation accompanying the service charge demand made clear that they were paying for 6 memberships. In 2016 the Kennedys (and other lessees) entered into an agreement with the landlord and Management Company which provided, inter alia, for them to be allocated and pay for 6 Club memberships. Further, the agreement states that when it comes to an end the number of Club memberships would revert to the situation prior to the agreement coming into effect. Although the agreement came to an end in 2018 they are still being charged for 6 Club memberships. A copy of the 2016 agreement is contained in the hearing bundle at page 220 of volume 1.

20. The Respondent's case is that the Kennedys' lease entitles them to 6 memberships of the Club and that they are obliged to pay for 6. The relevant clauses are:

    Schedule 3 Part1 paragraph 1, under the heading "Costs charges and expenses to which the Tenant contributes by way of Maintenance Charges:

    "All reasonable costs charges and expenses properly incurred by the Landlord and/or the Manager and VAT thereon in:

    1. *The provision of six memberships to the Savoy Country Club [now the West Bay Club]….."*

    Schedule 3 part 2 paragraph 3 under the heading "Computation and Payment of maintenance Charges:

    Tenant's Proportion

    "the fair proportion (such proportion to be determined in the absolute discretion of the landlord from time to time) payable by the Tenant of the total expenditure incurred by the manager in any Accounting Period providing any of the services referred to in Part 1 of the Schedule (and for the avoidance of doubt that shall include the full cost of the provision of the two memberships of The Savoy Country Club referred to in Clause 1 of Part 1 of Schedule 3)."

21. Miss Gray contended that the reference to two memberships in the paragraph 3 quoted above must be a mistake because the full cost of providing the memberships referred to in paragraph 1 of Part 1 of the Schedule is to 6 memberships. In any event, Miss Gray contends that estoppel by convention or acceptance of the situation over a considerable period of time now prevents Mr and Mrs Kennedy from denying that they are liable to pay for six Club memberships. The Respondents adopted the previous landlord's allocation of memberships when they acquired the resort in 2009 and the Kennedys have been entitled to six memberships throughout that time and have always been charged for six. It is only with the institution of the current proceedings that the charging for six memberships has been challenged. The three cases cited by the Respondent and referred to in paragraph 13 above apply.

The Tribunal's decision on the Kennedys' memberships

22. There is an obvious tension between the wording in paragraph 1 of Part 1 of the Schedule and paragraph 3 of Part 2. The Tribunal agrees with Miss Gray that the latter paragraph mistakenly refers to two memberships when it should have said six memberships. The reason why the Tribunal finds that this is a mistake is because in paragraph 3 of part 2 to the Schedule it refers to "the two memberships (emphasis added) referred to in paragraph 1 of Part 1 of Schedule 3" when that paragraph does not mention two memberships, but six. Reading the two clauses together it is clear to the Tribunal that the intention of the draughtsman was that the full cost to the landlord and/or the manager should be recoverable and in order to achieve that the cost of each and every membership was intended to be recoverable by the tenants' service charge. There are other leases, for example Mr Pilcher's lease, where two memberships are provided and he is required to pay for two. This is because he has a one bedroom unit and a guest occupancy of two. It is speculation on the part of the Tribunal but the mistake may have arisen by the draughtsman failing to amend paragraph 3 in part 2 of Schedule 3 in the word processed template in regard to this particular lease. Whatever the reason, the use of the words "for the avoidance of doubt" are particularly inapt in this instance. The phrase that follows in the brackets is intended to clarify the preceding wording but has the opposite effect.

23. There was no evidence before the Tribunal of the pre-contract assurance that the Kennedys say they were given when deciding to purchase their property that they would have six memberships but only be required to pay for two. If there had been, the Tribunal would have to have considered whether, in construing the lease, that evidence could be taken into account but in the absence of such evidence that does not arise.

24. Nor was there any evidence before the Tribunal as to whether the Kennedys or their rental guests have made use of six memberships

outside the period of currency of the side agreement. In the light of this decision they will no doubt be sure to make full use of the ability to use six memberships in the future.

25. As for estoppel and/or acceptance the evidence is that until 2015/ 2016, there was no clear information given to the lessees as to how their service charges were made up and they had no reason to know that they were being charged for six as opposed to two memberships. Thereafter from 2016 to 2018 during the currency of the side agreement they expected to pay for six memberships in accordance with that agreement and so there was no reason to raise the matter for those years although they might have been expected to have realised that they had always been paying for six memberships. The Tribunal does not find that the situation was sufficiently clear-cut to find an estoppel by convention or an agreement by virtue of payment without demur over a period of time in respect of this particular issue. However, as stated above, it is not necessary for the Tribunal to have found estoppel or agreement for the Respondent to succeed on this point.

The issue of whether the lessees are liable to pay a contribution to maintaining the fabric of the Club in addition to Membership Fees

26. The Applicants' case in respect of this issue is as follows. From year ending 2010 to 2015/16 the service charge demands were itemised with only four lines entitled: Insurance, Maintenance Charge, Council Tax and TV Licence. These four items made up the total demanded. From 2009 to 2014/15 the lessees collectively had been charged an annual Club membership fee totalling £120,000. The Club's accounts show that no charges were made in addition for the costs of maintaining the fabric of the Club premises. However, in 2015/16 Club membership demanded from the lessees collectively rose to £179,000 and in addition the lessees were charged a total of £38,982.95 for Club Facilities Maintenance. This meant that service charges for Mr and Mrs Kennedy, for example, rose from £5,961 per annum to £7,738 in 2015/16. In 2016/17 the total maintenance charge to lessees in respect of the Club premises came to £38,992 and in 2017/18 it was £23,827. In 2018/19 it was £28,118 and in 2019/20 it was ££18,947. The Applicants say that they should not be charged for 100% of the costs of maintaining the Club facilities but that these should be contained in the membership fee to which non-lessees contribute.

27. The Respondent says that it is the lease which specifies that the cost of maintaining the fabric of the Club is to be charged to the lessees in their service charges. Under clause 5.1 of the lease the Manager is obliged to:

"keep in good repair and condition, clean, tidy and maintained and whenever necessary to renew and replace….

5.1.5 the leisure facilities including without prejudice to the generality aforegoing the tennis courts swimming pools indoor sports area spa gymnasium and aerobics suites and any other leisure facilities now or at any time during the term constructed placed or erected on any part of the Landlord's property."

28. Mr Day's evidence was that the Club membership fee for the lessees was £120,000 per annum when they acquired the resort in 2009 and they kept the fee at the same level until 2015/16. This was because they were hoping to build up the resort and increase its attractiveness for lessees and their rentals. However, the landlord/Manager made a loss by doing this and in effect subsidised the running of the resort. This was unsustainable and in consultation with the lessees' steering committee the Club membership fees were increased in 2015/16 to £179,000 which contributed to the day to day running costs of the Club facilities (the remainder coming from external memberships and fees to organisations to use the facilities, attend classes and spa treatments). In addition, and in accordance with the lease, the cost of maintaining the fabric of the Club premises was included as a charge to the lessees under their service charges. As stated above this came to £38,982.95 in that year. The Club membership fee to the lessees of £179,000 has remained the same for 2016/17 and 2017/18 and also the on-account charge for 2019/20. However, the cost of maintaining the Club facilities has varied from year to year, as recorded above.

29. Miss Gray submitted that just because charges had been subsidised in earlier years did not mean that a full recovery should not be effected in later years.

The Tribunal's decision on the lessees bearing 100% of the cost maintaining the Club facilities

30. To a large extent this issue is entwined with some of the issues that follow concerning the cost to the lessees of the leisure facilities supplied by the landlord via the West Bay Club. On the narrow point, however, as to whether it is right that the lessees should have to pay 100% of the cost of maintaining the fabric of the Club premises, it is clear that this is what the lease provides in clauses 5.1 and Schedule 3. The scheme as laid down by the lease is that the total cost of running the Club is recovered from several sources. The cost of maintaining the premises themselves is borne by the lessees and the running costs come from the membership fees (plus some incidental income from classes fees, hiring out the facilities to local organisations and spa treatments). The lessees consider that this is unfair as roughly 30% of users pay 100% of the maintenance costs. However, that is how the lease has structured the running of the Club and whether or not this is fair is not a matter that the Tribunal can interfere with. What the Tribunal is empowered to do under the Act is to determine whether the cost to the lessees of the services

provided to them by their landlord and/or Management Company under their leases have been reasonably incurred and of a reasonable amount. Those are matters which are addressed later in this decision.

The cost of Club membership to the lessees issue

31. As stated in paragraph 30 above, this issue is intertwined with the issue of apportionment of the cost of maintaining the fabric of the Club. The membership fee is intended to cover the day to day running costs of the Club. The Applicants' case is that the lessees are being charged unreasonably high amounts for Club membership. As previously stated, the annual cost to the lessees of Club membership from 2009 to 2014/15 was a total of £120,000. That equates to £578.60 per lessee membership compared with £660 for external members. During the currency of the side agreement from 2016 to 2018 the number of memberships available to lessees was increased to 454 to match the maximum occupancy per unit which brought down the cost of each membership to £395.10 per annum even though the total cost to lessees increased to £179,000. There has been a slight increase in the charge for 2019/20 to £182,962 which takes the cost of membership to just over £400 per membership. All these charges also attract VAT in addition.

32. Mr Pilcher said he thought the membership fee for lessees totalling £120,000 was "probably reasonable". None of the lessees produced any comparable evidence of the cost of membership for a similar club on the Isle of Wight. Ms Moores and Ms Anthony contended that staff members allowed to use the facilities were not making any contribution to the costs and queried whether external organisations or the owners of the seven freehold properties on the site contribute fairly to the costs. They also objected to their renters having to pay for use of the Club facilities, they having been assured when buying their properties that they would have free use. Ms Moores and Ms Anthony said that renters were being charged up to £150 for the privilege.

33. Mr Day's evidence was that the West Bay Club did not seek to make a profit. Indeed, in the early years from 2009 to 2015/16 it made a loss which was unsustainable. The lessees were charged a total of £120,000 towards the cost of running the Club at first because that was what the previous owners had charged. Somewhat late in the day, in his witness statement produced shortly before the hearing, Mr Day produced additional substantial documentation to show that the costs of running the West Bay Club are broadly similar to those of West Wight Club. Although there are some differences in the facilities offered by the two clubs the comparison shows that the costs of the two Clubs are in the same ballpark. Mr Day's evidence was also that the cost of external membership is at the very top end of what the market will bear. It is £660 per annum compared with £448 for the West Wight Club and £474 inclusive of VAT for the

lessees. External memberships subsidise the lessees' memberships. If they were to reduce because the charge for external membership became too high, it would cost the lessees more as there would be less of a subsidy. Staff members are required to use the facilities as part of their training and they do not attend classes unless spaces are not taken up by members. The freehold house owners are required to pay a full external membership fee. Other organisations, such as the firefighters and schools who occasionally use the facilities pay a fee for the privilege and this is paid into the pot to help with the running expenses.

34. Miss Gray contended that the cost of membership to the lessees had been discussed and agreed with Mr Donaldson of the lessees' steering committee and so the lessees were estopped from challenging them now. Mr Pilcher argued that the steering committee had no authority to bind the individual lessees and so they were not estopped from challenging the charges.

35. Miss Sheppard explained that there was still complimentary use of the swimming pool and gym for holiday renters but due to the increase in occupancy it was necessary for them to introduce a small fee of £10 for an induction course they required them to attend. This was introduced for health and safety reasons following the unfortunate death of a holiday maker.

The Tribunal's decision on the cost to the lessees of the Club Membership

36. It is the Tribunal's task to determine whether the charge to the lessees of the services provided by the Respondents in accordance with the lease are reasonable. It is therefore appropriate at this juncture to remind oneself of the services that are offered by the West Bay Club to the lessees. There is an indoor swimming pool, a fully equipped gym, a sauna and spa, tennis courts and fitness studios, changing rooms and a coffee shop. These are not inexpensive facilities to run and maintain. The lessees through their membership have unlimited use of these facilities, albeit that their occupancy of their cottages is limited to them being, in effect, holiday homes. The resort has good reviews on Tripadvisor, making it attractive for renting out to holidaymakers.

37. The question is whether a cost to the lessees of £578.60 per annum per club membership from 2009 to 2015/16, £474 (inclusive of VAT) per annum for 2015/16 to 2018/19 and just over £480 per annum for 2019/20 is a reasonable amount for the lessees to pay towards the cost of running the Club. Mr Pilcher accepted that the cost up to 2015/16 was reasonable. The cost per membership has gone down since then due to the increase in the number of memberships issued. The cost to the lessees now is roughly equivalent to the cost of the most extensive membership of the West Wight Club, which is a leisure centre and Community Centre run by

a charitable trust. The accounts of this Club show that they benefit from donations, fund raising activities and grants from several local councils. No doubt this income keeps the cost of membership down. The lessees at West Bay have to contribute to the maintenance of the actual fabric of the Club in addition to the cost of Club membership. The figures are set out in paragraph 36 above. The total maintenance figures are apportioned between the lessees in accordance with a formula based on number of bedrooms plus a weighting for unit size. This apportionment has not been challenged previously and has been in operation for a number of years. Even in these proceedings the apportionment was not seriously challenged: it was more a case of the lessees wanting to understand how the costs were apportioned. They did not suggest any alternative apportionment. The Tribunal finds that this is a reasonable basis of apportionment because the larger the unit the greater the opportunity of a higher occupancy level and a potentially higher income from renting out the property.

38. There is one aspect of apportionment that requires particular mention. The number of memberships being offered to the lessees has continued at the same rate as under the side agreement, notwithstanding that this has come to an end. The side agreement was necessary because it provided for a higher number of memberships being offered to lessees than provided for in the leases. If the current arrangement were to revert to the situation as provided for in the leases, the cost of each membership would increase and some lessees (but not, apparently the current Applicants) would have fewer memberships allocated to them than the occupancy level of their unit. It is a matter for the lessees to decide in discussion with the landlord/Manager, the managing agents and the current incarnation of the steering group how they want to proceed for the future. The Tribunal has decided not to upset this apportionment in these proceedings as it would result in a higher charge to the Applicants and other lessees who are not parties to these proceedings who may well have representations they wish to make should this be a matter that is fully argued before a Tribunal at some stage in the future. Furthermore, use will have been made by the extra memberships over the past two years and so is another reason not to upset this arrangement.

39. If one takes Mr Pilcher's case as an example, the total cost to him of maintaining the club premises and the running of the Club in 2015/16 came to £395 x 2 plus 0.71% of £38,982 which entitles him to two club memberships. That works out at roughly £533 per membership. The maintenance costs in subsequent years have usually been lower than for 2015/16. In 2017/18, for example, the cost per lessee membership was £395 plus 0.71 per cent of £23,827, making the cost of each Club membership £480. Over the years, therefore, the Tribunal finds that the cost of use of the Club facilities to the lessees has worked out less than it would have to have been had they not been lessees but external members. The Tribunal

therefore finds that the cost has been reasonable over the period since 2009. Whether or not the lessees take full advantage of the facilities, either by staying in their properties themselves (albeit not as their principal home) or by renting out their cottages is a matter for them but the potential is there for them to have very extensive use of those facilities.

40. The Tribunal has no jurisdiction to determine what the external membership fees should be but the Tribunal accepted Mr Day's evidence that the external membership fees do subsidise the lessees' contribution to the running costs but the lessees make up for that, to a large extent, in having to pay the maintenance costs. The Tribunal also accepted that the external membership fees were at the top end of the scale and that if they were increased the likelihood was that external membership would fall off leaving the lessees to pay more.

41. Ms Sheppard's evidence was that there was no additional charge to the lessees' renters for use of the swimming pool or gym but they did charge a £10 induction fee which was necessary for health and safety reasons. The Tribunal has no jurisdiction to determine whether the £10 induction course fee is reasonable as it is not a service charge.

42. Having taken all the evidence into consideration the Tribunal determines that the costs of Club membership as charged to the lessees throughout the period from 2009 to 2019/20 are reasonable and payable.

The Scott Schedule

43. App 46 by Ms Moores and Ms Anthony included a challenge to the costs incurred in 2018/19. The challenged items were set out in a Scott Schedule to which the Respondents replied and supplied further information in a second witness statement from Mr Day and from Ms Sheppard served shortly before the hearing. Ms Sheppard gave further detail in evidence at the hearing. Having heard that evidence the Tribunal asked Ms Moores and Ms Anthony to consider over the short adjournment whether they now accepted the explanations given or whether there remained any issues of quantum with regard to the service charges for that year still in contention. After the adjournment they confirmed that they were satisfied with the explanations given in respect of all items on the Scott Schedule save for three: namely a) the cost of club membership (already dealt with above) b) rates and c) insurance. With regard to b) and c) the Applicants were anxious to know that they were only being charged for the resort itself and not other sites owned by the Respondents or associated companies. They had suspicions because the insurance documentation did say that the insured included companies other than the Respondents and also they had never had disclosed to them the rates demands.

44. Although Mr Day assured the Tribunal on these matters the situation was capable of being clarified if the Applicants had sight of the insurance schedule which should state the property covered by the insurance, and the rate demands. Mr Day said he would provide copies of these documents to the Applicants of App 46 and to the Tribunal within 7 days. If the applicants were then satisfied they should inform the Tribunal by 8 January 2021 and if not satisfied, they should set out why. The Respondents would then have the opportunity to respond by 22 January 2021.

45. In accordance with those Directions the Respondents did disclose the relevant documentation. The Applicants raised their queries in the light of that disclosure and the Respondents responded thereto. The queries related to the identity of the buildings comprising the insurance cover and rates, whether cover extended to other companies named on the policy, and the apportionment of these costs as between the lessees on the one hand and the West Bay Club on the other.

46. The Respondents produced evidence from their broker in answer to the Applicants' queries and confirmed that all apportionments had been made in accordance with professional advice received.

The Tribunal's decision regarding the Scott Schedule

47. There was no evidence before the Tribunal to gainsay the Respondents' explanations with regard to the Applicants' queries on the Scott Schedule. The Tribunal therefore finds that the costs as charged are reasonable and payable.

Costs

48. The Applicants have made an application under Section 20C of the Act that the landlord's costs of these proceedings should not be capable of being claimed as a service charge in any future service charge demand. The Tribunal has power to make such an order if it considers it just and equitable to do so. In this case, the Respondents have been wholly successful in resisting the challenge from the Applicants. That is a weighty factor in the Tribunal's decision but it is not the only one. The lessees contend that the only reason they engaged in this application and pursued it to a hearing was because of the lack of information, documentation and explanation from the Respondents.

49. The Tribunal agrees that a great deal of information and documentation was not supplied to the Applicants until either the last minute or even until after the hearing in response to further Directions from the Tribunal. The Tribunal is at a loss to know why that should be because, when the explanations and documents came, they fully supported the Respondents' position. Perhaps it was because they felt they had already gone through this process with Mr Donaldson, but as the Respondents themselves

acknowledged, Mr Donaldson had no authority to bind all the lessees. It is to be hoped and expected that the new Managing Agents will take heed of this case and be as open and transparent with the lessees going forward so that, hopefully, it will not be necessary for further Tribunal applications.

50. In all the circumstances, the Tribunal finds that it is just and equitable to make an order under section 20C but to limit it to 60% of the landlord's costs. This means that 40% of those costs may be regarded as relevant costs to be included in a future service charge demand. Those costs will be subject to the test of reasonableness under section 27A of the Act.

51. Miss Gray accepted that there was no power under the lease for the landlord to charge an individual lessee its legal costs of these proceedings, so there is no need for an order to be made under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002.

52. Although she wished to reserve her position with regard to costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property chamber) Rules 2013 she did not seek to claim at the hearing that the Applicants had acted unreasonably in respect of bringing or pursuing the proceedings. However, the order that has been made above in regard to section 20c is an indication that the Tribunal's preliminary view would be that the Applicants have not acted unreasonably.

Dated the 26th January 2020

Judge D. Agnew (Chairman)

APPEALS

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