FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**BIR/47UE/LIS/2020/0013**
HMCTS Code	:	**V:CYPEREMOTE**
Property	:	**26 Medina House, Diglis Road, Worcester, WR5 3DD**
Applicant	:	**David Sillitoe (tenant)**
Respondent	:	**Diglis Water Estate Management Company Limited**
Representative	:	**Mainstay Group Limited**
Type of application	:	**Liability to pay service charges and/or administration charges**
Date of Hearing	:	**14 January 2021**
Date of Decision	:	**4 March 2021**

DECISION

Covid-19 Pandemic: Audio Video Hearing
This determination included a remote video hearing which has been consented to by the parties. The form of remote hearing was audio (V:CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing.

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DECISION

1. For the reasons which follow the estate service charge for the years 2016-2020 is reduced by reducing the Management Fees payable by the Applicant by the following amounts:

2016	10.32
2017	10.40
2018	17.44
2019	15.78
2020	15.18

2. All other estate service charges for the years in question are reasonably incurred and have been correctly demanded.

3. No order is made under section 20C of the Landlord and Tenant Act 1985.

4. For the avoidance of doubt an order is made under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that the Respondent's costs of and incidental to this application may not be recovered from the Applicant personally.

BACKGROUND

5. This an application for determination of the payability and reasonableness of service charges for 2016, 2017, 2018, 2019 and 2020 which have been levied upon the Applicant by the Respondent.

6. The Applicant is the lessee of flat 26 Medina House, which forms part of the Diglis Water Estate ("the Estate"). The Estate comprises 17 apartment blocks, including Medina House and three commercial units. Two management companies are parties to the lease. First, Medina Diglis Water Management Company Limited ("Management Company No 1") who is responsible for the maintenance of the whole of the Medina House block building and secondly - the Respondent, described in the lease as Management Company No 2, who is responsible for general maintenance of the Estate in so far as not included within the 17 apartment block buildings or the commercial units, which are each subject to a separate "Block" service charge.

7. The Applicant is not challenging the Medina House Block charge levied by Management Company No 1. He is challenging the Estate Charge levied by the Respondent.

8. The Estate Charge relates to Maintenance Costs, Utility Costs, Public Liability Insurance, Professional Fees (including management fees), Estate Technician (Caretaker) and Site Consumables and a Contribution to

reserves. The Applicant has been charged the following amounts for the years in question:

Year	Budget charge (January-June)	Budget charge (July-December)
2016	96.20	103.65
2017	105.00	117.94
2018	122.98	110.04
2019	-77.40	102.77
2020	129.16	129.16

9. The Applicant has paid all service charge demands but is disputing the amounts charged for the years in dispute for the following reasons:
   (i) The annual estimates and demands provided by the Respondent are for the whole Estate. They do not show the charges broken down for Medina House and do not clearly show how the Applicant is being charged for the services he receives. The Applicant does not therefore believe the annual estimates are issued in accordance with his lease
   (ii) No calculation has been provided to show how his service charge has been apportioned in accordance with the lease.
   (iii) The service charge accounts are composite accounts which include charges that the Medina House lessees do not contribute to, but there is no clear explanation as to which charges they do contribute to.
   (iv) It is not possible to assess what some charges are for or their reasonableness, in particular:
      (a) The Management Fee is only included in the Estate Service Charge despite the non-Estate Charges accounting for a significant proportion of the overall charges.
      (b) It is not possible to ascertain from the accounts what the Estate Technician charges relate to.

The Estate

10. No inspection of the Estate was carried out by the Tribunal due to the Covid-19 restrictions in place, but the Tribunal did view the Estate on available digital platforms and also considered the photographic evidence provided by the Respondent. Diglis Water Estate is a large, attractive estate with extensive grounds, there are wide walkways, wild flower areas, large grassed, paved and decked areas, a river side quay area and extensive areas of cultivated trees and shrubs. All appeared, from the evidence available, to be well maintained. (pages 1244-1251 of the Respondent's Bundle)

THE LEASE

11. The Applicant's lease was granted on 17 November 2006 for a term of 125 years from first of January 2006. There are four parties:
    (1) Taylor Woodrow Developments Ltd (Landlord)
    (2) David Sillitoe (Tenant)
    (3) The Medina Diglis Water Management Company Limited (Management Company No 1)
    (4) Diglis Water Estate Management Company Limited (Management Company No 2).

12. The following lease definitions are relevant:

*"**The Contribution**" - means the proportion of the Management Company No 2 Maintenance Expenses payable from time to time during the Contractual Term by the Other Units.*
*"**Dwellings**" - excludes the Other Units and means the individual residential only units intended for sale on the open market by the Landlord now or to be constructed within the perpetuity period by the Landlord within the Development and "Dwelling" means any one of them.*
*"**The Other Units**" - excludes the Dwellings and the Office and means the commercial only mixed use affordable rent affordable shared ownership and any other individual units not intended to form part of the communal facilities now or to be constructed within the perpetuity period by the Landlord within the Development.*
*"**The Office**" - means the site office now or within the perpetuity period to be constructed within the Development to facilitate the proper and efficient operation of the Development.*
*"**Second Maintained Property**" - means those parts of the Development which are more particularly described in Schedule Two the maintenance of which are the responsibility of Management Company No 2.*
*"**Management Company No 2 Maintenance Expenses**" - means the moneys actually expended or reserved for periodical expenditure by or on behalf of Management Company No 2 and at all times during the Contractual Term in carrying out the obligations specified in Schedule Seven.*
*"**The Tenant's Proportion**" - means the proportion of the Management Expenses payable by the Tenant in accordance with the provisions of Schedule Eight.*

Schedule Two describes the Second Maintained Property as:

1. The Second Maintained Property comprises the whole of the Development so far is not comprised within paragraph 2 of this Schedule and including……………….:
    1.1 All Service Installations used by the Second Maintained Property or located entirely within or partially within the Second Maintained Property

1.3 The Gardens and Grounds and the Access Areas comprised within the Second Maintained Property

1.4 any communal facilities or amenities .... within any part of the Second Maintained Property.

2. The following are excluded from the Second Maintained Property (being the responsibility of others):

2.1 the Compounds
2.2 the First Maintained Property
2.3 the Dwellings and Other Units
2.4 the Office
2.5 the New Road and the New Sewers

Schedule Eight – describes the Tenants Proportion of the Maintenance Expenses as follows:

" TENANT'S PROPORTION OF MANAGEMENT COMPANY NO 2 MAINTENANCE EXPENSES:

After deduction of the Contribution the Tenants Proportion of the balance of the Management Company No 2 Maintenance Expenses expressed as a fraction is one over the total number of Dwellings approximately but the Tenant must refer to the annual estimate given by Management Company No 2 or the managing agent"

13. **Schedule 12** contains the covenants on the part of Management Company No 2, which include an obligation to carry out the maintenance works set out in Schedule Seven.

14. **Schedule Seven** contains a list of maintenance works. Of particular relevance to this matter are:

Paragraph 4 - *"Keeping the Gardens and Grounds comprised within the Second Maintained Property in good condition and tending and renewing any lawns flowerbeds hedges shrubs and trees and maintaining and (where necessary) replacing any walls fences paths benches seats or garden ornaments"*

Paragraph 5 - *"inspecting repairing maintaining and resurfacing... The Access Areas and parking spaces within the Second Maintained Property and all Service Installations forming part of the Second Maintained Property...."*

Paragraph 6 - *"providing operating maintaining and if necessary renewing...*

6.2 any electronic security system...... serving the Second Maintained Property

6.3 the lighting apparatus of the Second Maintained Property"

Paragraph 10 - "*maintaining and arranging for the emptying of receptacles for rubbish...."*

Paragraph 11 – *"..providing operating maintaining and if necessary renewing and adding to the firefighting appliances communal television aerials and other such equipment as…"*
Paragraph 14- *"..inspecting repairing maintaining or replacing (where necessary) any communal facilities or amenities… comprised within the Second Maintained Property…"*
Paragraph 17 *"…all reasonable expenses incurred… in relation to the daily management and running of the Office including the wages of such person(s) Management Company No 2 considers it necessary to employ to fulfil the functions and administer the responsibilities of the Office"*

15. The **"Development"** is described in the lease by reference to the extent of the Landlord's reversionary freehold title (WR97537) and two adjoining titles owned by the landlord at the date of the lease (WR102326 and WR102327). The title plan, showing the extent of the registered title WR102326 was provided (page 105 of the Respondent's Bundle). Unfortunately copies of the other two title plans were not provided. However, Mainstay included within the Bundle a plan of the Estate showing the areas of the Development that are subject to a general estate service charge, coloured green (page 101 of the Respondents Bundle).

THE HEARING

16. The application was considered at a remote video hearing on 14 January 2021. Mr Sillitoe appeared and represented himself. The Respondent was represented by Mr Alexander Siegle and Ms Harrison both of Mainstay Residential Limited ("Mainstay"), the Respondent's managing agents. Mr Siegle confirmed that he is an associate director of Mainstay for the Midlands and South-West regions overseeing 8 property managers. Ms Harrison is the property manager responsible for the day to day running of the Diglis Water Estate services.

17. Mainstay filed a Bundle of 1251 pages which included the application, Mr Sillitoe's Schedule of disputed items, the Respondent's case, the Applicant's Reply, the budget charges and calculations for 2016-2019, service charge financial statements for 2016-2019, end of year surplus/deficit charges and calculations for 2016-2019, invoices, plans and photographs of the managed areas, and budget calculations for the year to 31 December 2020 including a calculation and breakdown of the Applicant's proportion ("the Respondent's Bundle").

THE ARGUMENTS PUT BY PARTIES

18. The parties confirmed that the service charge under discussion was the general estate service charge, referred to within the composite service charge accounts ("the Composite Accounts") issued by the Respondent each year, as *the Estates Service Charge* ("the Estate Charge"). The Composite Accounts also include charges in respect of other services

including a Pumping Station; Gates; Car Parking Secure phase B; Car Parking open; Car Parking secure C3 to C6 and Car Parking secure C1 C2 and C7; which the Applicant does not contribute to ("the non-Estate Charges").

19. Mr Sillitoe did not advance any legal argument that the lease required the Respondent to allocate the Estate Charge between the Blocks in accordance with the extent to which the residents of each Block benefitted from the Estate Charge services. He said that Medina House was a Block with a clearly defined boundary. He was happy to pay for maintenance of his Block, he was not happy to pay for other Blocks and parking areas that he didn't use.

20. Mr Sillitoe said that he was unable to picture, from the annual estimate how the Estate Charge worked. He said, surely he should only be asked to pay for work that was carried out to his area, Medina House and not the other parts of the Estate. Also, that where there are levels of service that he doesn't contribute to, separate accounts should be prepared so that he is not presented with complicated accounts and left to work out what he is paying for. Mr Sillitoe had seen software that accommodates preparation of accounts on this basis in his professional capacity within public sector housing.

21. It was pointed out to Mr Sillitoe that the Tenant's Proportion stipulated in the lease, was a fixed proportion of the Estate Charge. As the charge covered the entire Estate it was inevitable that he would pay for services that did not directly benefit Medina House residents, but that equally the other 400 or so residents of the Estate would contribute to services that only benefitted Medina House. That was the nature of a fixed service charge contribution. Mr Sillitoe conceded that he could not point to any provision in the lease that required the service charge demands or accounts for the Estate Charge to be broken down between Medina House and the remainder of the Estate.

22. Mr Sillitoe said that that after raising concerns that the Composite Accounts included service charge items that he did not contribute to, which was confusing, he received an email dated 16 July 2019 from Rhianna Jacobs of Mainstay, which said that the Mainstay service charge team were looking at producing two versions of the accounts letter going forward, to cater for those who contribute to one level only (i.e. the Estate Charge) and those who contribute to several levels within the accounts.

23. When asked about the email Mr Siegle said that he was not aware of this suggestion, which had been made by a relatively junior member of staff, until Mr Sillitoe bought it to his attention. Mr Siegle explained that it was not a practical suggestion. Mainstay had not been able to separate the accounts until the development was completed and effectively handed over for management. He said this did not take place until the early part 2019. There are now 17 blocks within the Estate comprising 422 residential units which contribute to the Estate Charge. Mr Siegle submitted that there was nothing in the lease that required Estate Charge to be split between the

Blocks and limited to the services benefiting that Block. Medina House benefited from landscaping and wildflower areas and also the Riverside area, along with other Blocks. Other Blocks contribute to the jet washing of the quayside around Medina House while not directly benefiting from this.

24. Mr Siegle also confirmed that Medina House had been completed first and was the only Block with leases that include a second management company for the Estate Charge. The other Blocks have separate freeholders and separate Block charges for maintenance and repair of the buildings that comprise their Block. It is only the general Estate Charge, to which all residents of the Estate contribute, that has a shared budget.

25. Moving on to Mr Sillitoe's second challenge, that it was not possible to ascertain from the accounts how the Tenant's Proportion had been calculated, Mr Siegle referred to pages 99 and 100 of the Respondent's Bundle which contained two schedules of apportionments for the years 2016-2019. The first showing the budget charges and apportionments for each year and the second, the end of year surplus/deficit charges ("the Apportionment Document"). Mr Siegle conceded that the Apportionment Document had been produced for the Tribunal proceedings from an internal accounts document and had not been sent to leaseholders with the service charge budgets and accounts.

26. Mr Siegle said that an explanation of the apportionments had not been included in the accounts because until 2019 the number of residential units on the Estate changed every year, depending on how many completed flats the developer had sold. Mr Siegle explained that if, for instance, Block J completed and was handed over for management in August those leaseholders would only have a liability for five months of the service charge year rather than 12 months. At the beginning of the year when the budget figures are produced (page 99 of the Respondent's Bundle) Mainstay won't know how many new residential units will be completed during the service charge year. The budget is therefore based on those residential units that are completed at the start of the year. When the end of year surplus/deficit charges are calculated (page 100 of the Respondent's Bundle), Mainstay will know how many residential units have actually completed during the year. A calculation is then made of the individual block holders proportion adjusted to take account of the number of days in the year the newly completed residential units have contributed to the service charge. The adjustment is described in the surplus/deficit calculation as the Z figure per day, with the individual leaseholder's adjustment shown underneath.

27. The Tribunal had little difficulty following Mr Siegle's explanation, but unfortunately could not reconcile his explanation with the Z figure 'calculation and method' shown on the Apportionment Document itself. It was however evident from the Apportionment Document that application of the Z figure adjustment made little difference the overall Estate Charge, a difference of between £ -8.51 (in 2018) and £12.94 (in 2016).

28. Mr Sillitoe accepted that it would be disproportionate to embark on a detailed analysis of the way in which the Z value had been calculated, given that it made a very small difference to the end of year accounts but said that proportionality had been on his mind throughout. The costs of pursuing this application had already outweighed the service charges he'd paid, but he simply couldn't get an explanation of the service charge without bringing the case. He had tried but had failed to get a satisfactory explanation from Mainstay and had never seen the Apportionment Document outside these proceedings.

29. Mr Siegle said that unfortunately some residents of the Estate receive far more complicated service charge demands and accounts, depending on where they live and where their parking is located. For instance, car parking at Medina House is situated under the block and falls within the Medina House Block service charge. Mainstay don't touch it.

30. He explained that after completing the remaining Blocks, the developer had sold the freehold of the Block buildings but retained some of the open car parking areas many of which are shared between Blocks owned by different freeholders. The retained land is managed by Diglis Water Estates Limited, not the Block freeholders. Mainstay were appointed to maintain the shared open car parking areas, the water pump and the services gates, for Diglis Water Estates Limited, in addition to the areas within the Estate Charge. All residential units (and three commercial units) contribute to the Estate Charge, the charges for the open car parking and other items are only charged to the residents of the Blocks which benefit from them. If Mainstay prepared a separate budget document and accounts for all these areas some residents would receive 4 or 5 demands and accounts. To avoid the cost of this, Mainstay have produced Composite Accounts that show the Estate Charge and separately the non-Estate Charges for the other areas. The service charge demands and service charge summary (page 1232 of the Respondent's Bundle) clearly set out the individual heads of charge within the Estate Charge and separately, the non-Estate Charges for the car parking areas, gates and water pump that are charged separately.

31. Mr Siegle was asked how the Tenant's Proportion had been calculated and if that was shown in the accounts. He confirmed that the calculation was not shown in the accounts, just on the Apportionment Document, but that 422 privately owned, socially rented or freehold residences and three commercial units contributed to the Estate Charge. That figure included the socially rented RSL housing. The Tenant's Proportion of the total Estate Charge for 2017-2019 was therefore 1/(422 adjusted by the commercial units weighting and the Z figure) as shown on the Apportionments Document. Now the Estate was complete the number of residential units was unlikely to change.

32. Mr Siegle was asked to explain where the calculation showed the deduction of the "Contribution" received from the "Other Units" before the Tenant's Proportion was applied, as required by the lease. After some time looking at the various lease definitions Mr Siegle conceded that the calculation was

not strictly in accordance with Schedule 8 but submitted that the net effect was the same. The residential units within the definition "Other Units" were essentially the affordable rent and shared ownership units owned by the RSL's. The RSL leases provide a different basis for calculating their contribution to the Estate Charge. Mr Siegle had not looked in detail at the RSL leases but believed the contribution agreed was an equal share per residential unit, essentially the same as the Dwellings. The leases of the three commercial units stipulate a 'fair proportion' and they have been given a weighting based on their respective internal areas, so contribute a higher proportion than the residential units. The contribution from the Other Units is therefore dealt with by ascribing them a notional rating of 1, in the case of the residential units and a square footage rating in the case of the commercial units. The notional ratings (converted to a percentage) are then applied to the charge along with the Dwellings (that have also been given a notional rating of 1). The net effect of calculating the Estate Charge in this way produces the same result as would deducting the "Contribution" based on the same notional ratings, from the Estate Charge, before dividing the balance between the remaining Dwellings.

33. In relation to Mr Sillitoe's second issue, that he could not understand which parts of the service charge Medina House leaseholders were liable for, Mr Siegle explained that they were only liable for the Estate Charge not the non-Estate Charges, which was clear from the budget accounts and the end of year financial statements sent out each year. When in 2019, Mr Sillitoe had queried which charges related to Medina House, Mainstay had responded to explain that he was only being charged the Estate Charge as detailed on page 8 of the service charge budget.

34. Mr Siegle was then asked to deal with Mr Sillitoe's concern about the Mainstay's management fee and explain the reason for not apportioning the fee between the Estate Charge and the non-Estate Charges given they accounted for about 25% of the overall service charges. Mr Siegle said that all the residential units contribute equally to the Estate Charge, they also pay their own Block charge for their Block buildings which includes a separate management fee. Some additionally contribute to one or more of the non-Estate Charges shown on the summary page (page 1232 of the Respondent's Bundle). However, Mainstay were retained on an annual fixed fee basis (increased periodically in line with RPI) for management of the entire Estate which included the Estate Charge and the non-Estate Charges (but not the individual Block Charges). He said that because Mainstay were operating on a fixed fee they did not break the time down between heads of expenditure and did not have a system in place to measure this. He acknowledged that a fixed fee meant that Mainstay made a profit in some areas and a loss in others where they were required to spend more time. However, as all the residential units contribute to the Estate Charge, while only some contribute to the other charges, Mainstay determined that it would be efficient and fair to just include their total management fee in the Estate Charge. Mr Siegle also said that management of the open parking areas was not a substantial drain on time.

35. Moving on to Mr Sillitoe's final issue concerning the lack of transparency of the Estate Technician charges - Mr Sielge submitted written and oral evidence concerning the charges. He confirmed that the Estate Technician was a full-time Caretaker employed by Mainstay who was placed at the site Monday to Fridays each week to carry out general duties which included, cleaning sweeping and litter picking the grounds, paths, parking areas and shared bin stores on the Estate. He undertakes minor repairs to the Estate and is responsible for reporting more complex repairs to Mainstay for action. He also completes health and safety audits and other related paperwork.

36. The Caretaker charges for 2019 (including mobile phone charges) are just over £33,000.00. Mr Sillitoe questioned if this was just a monthly retainer paid to Mainstay in case anything cropped up. Mr Siegle explained that Caretaker services were initially provided for fewer hours. In 2016 when Mainstay took over management of the services there were only about 200 completed dwellings, no wild flower areas and much less common estate areas. The Caretakers costs were only some £19,000.00 that year. Mr Siegle said that the Caretaker is now on site 40 hours a week to deal with the necessary maintenance works. He is not just parachuted in when there is a problem. Mr Siegle also confirmed that the monthly fee charged by Mainstay for the Caretaker service included the Caretakers salary, employers tax and national insurance, the costs of managing the Caretaker and a profit element. The fee also included training, uniform, IT equipment and a mobile phone.

37. Ms Harrison gave evidence to confirm that the grounds maintenance contractors were only contracted to attend on-site once a fortnight in the summer months and once a month in the winter months. There was therefore a big chunk of time between visits when day to cleaning sweeping, weeding, hedge trimming and litter picking was needed. She said the Caretaker tackled all the jobs he could do with the range of tools kept on site, to keep the development safe and nice for residents.

38. Mr Sillitoe said that in reality this meant he was paying professional fees and Caretakers fees of some £60,000 against the charges for the services provided of just £38/39,000 and that if Mainstay tendered for the work it would cost a lot less and be more manageable.

39. Although Mr Sillitoe had not made any specific challenges in his statement, or reply to individual invoices, he raised some additional concerns at the hearing concerning a few of the invoices in the Bundle. He queried whether some gate charges and aerial charges for Beddington Court in the 2016 accounts were Block charges rather than Estate Charges (pages 267, 269/270 of the Respondent's Bundle). Mr Siegle submitted that the gates formed part of the maintained external areas and the communal aerials were part of a TV system shared between more than one Block so within Schedule 7 paragraph 14 (communal facilities).

40. In summary, Mr Sillitoe said that he was no clearer now than he was 12 months ago and can't understand why there is not more clarity and

transparency in the accounts, particularly as regards to the costs passed on. He was troubled by the conflict of interest with Mainstay providing services and worried this was leading to a duplication of charges. Mr Sillitoe said that he'd had to bring the case because Mainstay had agreed to provide clearer accounts but hadn't done so.

41. Mr Siegle said that he couldn't agree that Mainstay had not been transparent about what was charged. It is all set out in the accounts. Mr Sillitoe is provided with accounts and invoices for all the items that he contributes to. Mr Siegle said that now the Development was complete they would look to preparing the accounts in the way the leases intended, but until now they'd had to work out the charges as equitably as possible by reference to daily rates.

Parties submissions on costs

42. Mr Siegles written statement included details of the costs (actual and anticipated) incurred by Mainstay on these proceedings, totalling £7,098.00. He states that that the Estate Charge for 2106, 2017, 2018, 2019 and 2020 are within the budgets prepared for each year, are reasonable and are charged in accordance with the lease. He also states that Mainstay had endeavoured to respond in a timely manner to all Mr Sillitoes concerns and where found wanting had made amends. No other leaseholder has disputed the Estate Charge and neither did Mr Sillitoe for over ten years (pages 17 and 18 of the Respondent's Bundle).

43. Mr Sillitoe said that the costs of these proceedings should not be included in his service charge because the accounts are not clear or transparent or in accordance with the lease. Mainstay had admitted this and said they were going to review the way the accounts are prepared next year.

44. Mr Siegle said that Mainstay had been trying to resolve Mr Sillitoe's issues over a period of time. Mr Sillitoe had paid the Estate Charge throughout his ownership without complaint until 2019 when he first raised the issues. Mainstay gave Mr Sillitoe full and clear explanations to his queries in the chain of correspondence referred to in Mr Siegle's statement (page 14-17 of the Respondent's Bundle). When responding to Mr Sillitoe's application, which was largely unparticularised, Mainstay had provided all the information it thought might be relevant to Mr Sillitoe's concerns, in the hope that he could be reassured and a full hearing avoided. However, in preparing an extensive Bundle of 1251 pages, substantial costs had been incurred which Mainstay would seek to include in the service charge or recover from Mr Sillitoe if provided for in the lease.

LAW

45. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain important statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the

terms of the lease i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

46. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

    The person by whom it is or would be payable;
    The person to whom it is or would be payable;
    The amount, which is or would be payable;
    The date at or by which it is or would be payable; and
    The manner in which it is or would be payable.

47. Section 19(1) of the Act provides that:

    "*Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

    and the amount payable shall be limited accordingly."

48. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100 / Daejan Investments Ltd v Benson [2011] EWCA Civ 38*).

49. When interpreting a written contract, the Tribunal has to identify the parties' intention by reference to what a reasonable person having all the relevant background knowledge would understand the terms to mean. We have to focus on the meaning of the words in their context and in the light of the natural meaning of the clause; any other relevant provisions; the overall purpose of the clause and the lease; the facts and circumstances known by the parties at the time; and commercial common sense (*Arnold v Britton [2015] UKSC 36*).

50. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman [2001] 2 EGLR 173*, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

    "39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest

available, but whether the charge that was made was reasonably incurred.
40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

51. In *Veena v Cheong [2003] 1 EGLR 175*, the Lands Tribunal (Mr P H Clarke FRICS) said:
    "103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

DELIBERATIONS ON SERVICE CHARGES

52. The lease is a form of tri-partite lease (albeit with two management companies) under which the tenant agrees to pay a fixed proportion of the maintenance expenses incurred by Management Company No 2 in complying with its covenant to carry out the services set out in Schedule Seven, in relation to the Second Maintained Property.

53. Schedule Two specifies which parts of the Development are included in the Second Maintained Property. It is not clear if the Respondent has determined that the parts of the Development that relate to the non-Estate Charges, all fall outside the Second Maintained Property, or that they relate to services that do not fall within the Schedule Seven services. Either way, the Respondent has determined that the non-Estate Charges services should not fall within the Estate Charge, which is contributed to by all leaseholders on a fixed proportion basis, but should be charged separately only to those leaseholders which benefit from the services. Mainstay have been appointed to manage both the Estate Charge and the non-Estate Charges, a decision that has led to complex composite service charge budgets and accounts that cover many different heads of charge.

54. We are however only determining Mr Sillitoe's application which essentially raises the same six issues in relation to the Estate Charge for the years in question.

    (i) the annual estimates and demands do not show a breakdown for Medina House and are not in accordance with the lease.

55. The Tribunal's view is that there is no contractual requirement in the lease for the Respondent to breakdown the charges in this way. Schedule 8 requires first that, in advance on the 1 January and 1 July each year, the tenant pays one half of the Tenant's Proportion of the amount estimated by the Respondent (or its managing agents) of the Management Company No 2 Maintenance Expenses for the period ending on the next 31 December. Secondly, a summary of the Maintenance Expenses for the period ending on the 31 December in each year is to be provided within 6 months of the end of the service charge period with an accountant's certificate.

56. The Management Company No 2 Maintenance Expenses are defined as the moneys actually expended or reserved for periodical expenditure by or on behalf of Management Company No 2 in carrying out the obligations specified in Schedule Seven. Nowhere is there any requirement for the maintenance charges to be broken down between the contributing Blocks and that is because all the leaseholders on the Estate pay a fixed proportion of the charges. The Tribunal finds therefore that the budget accounts and summaries have been prepared in accordance with Schedule 8 of the lease.

(ii) There is no calculation in the accounts to show how the service charge has been apportioned accordance with the lease.

57. The Tribunal has considered Mr Siegle's evidence on this point. The issue is, does the Tenant's Contribution accord with Schedule 8 of the lease which requires the fraction to be applied after deduction the Contribution. The service charge demands, and summaries express the tenant's contribution as a percentage rather than a fraction and it is not therefore easy to relate the calculation to definition of the Tenant's Contribution. However, regard must be had to the full definition in the lease which is:

> "*After deduction of the Contribution the Tenant's Proportion of the balance……expressed as a fraction is 1/total number of Dwellings approximately but the Tenant must refer to the annual estimate given by Management Company No 2 or the managing agent.*"

58. The word *approximately*, and reference to the tenant having also to refer to the *annual estimate* qualify the calculation and indicate that although the proportion was intended to be a fixed proportion there were factors that might affect the calculation. Mr Siegle confirmed that Medina House was the first Block to be completed, the remainder of the Development having completed over a period of years. Leaseholders of other Blocks are on different forms of lease with different service charge provisions and the developer has sold the freehold reversion to most of the completed Blocks to different buyers. These are circumstances that were likely to have been in the mind of the parties when the terms of the lease were settled and may account for the qualifications within the definition of the Tenant's Proportion.

59. The Tribunal accept that Mainstay have had to account for pro-rata contributions from Dwellings completed within the service charge years and that appears to be covered by the word "approximately". The Tribunal struggled with the Z value calculation in the Apportionment Document and can understand why it would not have been sensible to include that sort of calculation in the service charge summary or demands. It would however have been possible for Mainstay to have provided a simple explanation for the leaseholders, as Mr Siegle was quite able to do at the hearing. The Tribunal is nevertheless satisfied that the Z value adjustment to the Tenant's Proportion does not offend the lease definition – it is an adjustment to enable the number of Dwellings to be calculated 'approximately' and fairly.

60. The Tribunal find that while Mainstay may have approached calculation of the Tenant's Proportion by ascribing a notional value to the Other Units and the Dwellings before applying them as a percentage (rather than a fraction) to the Estate Charge, the net effect is the same as if leaseholders of the Dwellings were charged an equal fixed proportion of the Estate Charge after deducting the Contribution. The Contribution is defined as '*the proportion of the Management Company No 2 Maintenance Expenses payable from time to time during the Contractual Term by the Other Units'*. Mr Siegle explained how those contributions were calculated and it makes no practical difference if they are deducted before the balance is divided equally between the leaseholders of the Dwellings or given a notional value to allow their relative percentages to be applied to the Estate Charge. The leaseholders' equal contributions are set out in the estimates and demands provided by Mainstay which the Tribunal finds accords with the qualified definition of the Tenant's Proportion in Schedule 8 that stipulates- '*but the Tenant must refer to the annual estimate given by Management Company No 2 or the managing agent'*

(iii) The service charge accounts are composite accounts which include charges that the Medina House lessees do not contribute to, but there is no clear explanation as to which charges they do contribute to.

61. The Estate Charge budgets, demands and accounts are composite accounts but there is nothing in the lease that requires the estimate or summary to be provided in a particular form. The accounts set out clearly what heads of expenditure are included and the Tribunal did not find the service charge budgets, demands, or account summaries produced by Mainstay, to be unclear or difficult to follow. The Summary page shows clearly what items are being charged under various heads of expenditure. There is a column for the Estate Charge and a separate column for each of the non-Estate Charges, which show details of the specific amount charged under each head of expenditure.

62. In 2019 Mr Sillitoe raised in correspondence with Mainstay issues concerning the presentation of the budget, accounts and demands. The correspondence from Mainstay deals courteously with this and in some

detail. Mr Sillitoe was not satisfied with the responses hence this application. The Tribunal have considered the correspondence, which was attached to Mr Sillitoe's application (although not in the Bundle) - and find that his misunderstanding of the effect of agreeing an estate wide service charge based on a fixed contribution, was the main reason for his dissatisfaction with the service charge budgets and accounts. Mr Sillitoe genuinely, but incorrectly believed that he should not have to pay service charges for any service that did not directly benefit leaseholders of Medina House.

(vi) The management fee is only charged to Estate Charge despite the non-Estate Charges, accounting for a significant proportion of the overall charges.

63. The Tribunal were not convinced by Mr Siegle's submissions on this. He acknowledges that the leaseholders of Medina House do not contribute to the non-Estate Charges, but justifies including Mainstays management fee for the management of these areas in the Estate Charge on the basis that they receive a fixed fee for the entire Estate and has no system in place to break down the time – which is in any event not substantial. Mainstay are, on this evidence, wrongly charging the leaseholders of Medina House management fees that are referable to the non-Estate Charges. The terms of Mainstay's management contract and the limitations of their internal systems do not justify including charges for non-Estate Charges work in the Estate Charge. The Tribunal finds therefore that management fees that relate to the non-Estate Charges should not have been included in the Estate Charge.

64. As Mainstay have no system in place for assessing the time spent on the non-Estate Charges, the Tribunal have applied a reasonable adjustment based on the proportion the total Estate Charge bears to the total of the estate service charges each year, as shown in the end of year accounts for each year in dispute. For example - in 2016 the Estate Charge accounted for 79.99% of the total charges shown on the year end accounts. Applying that percentage to the management fees of £20,246.00 results in a reduction of £4,052.00, of which Mr Sillitoe's share, based on his percentage contribution of .2549%, is £10.32.

65. Using the same calculation for each of the end of year accounts, we have determined that the management fees for each year were not payable by Mr Sillitoe in full, but that after applying the reductions for each year, as set out below, the balance of the management fees for each year is reasonably incurred.

Year	Amount of reduction
2016	10.32
2017	10.40
2018	17.44
2019	15.78
2020	15.18

(vii) It is not possible to ascertain from the accounts what the Estate Technician charges relate to.

66. Mr Siegle and Ms Harrison gave evidence explaining the role of the Estate Technician (or Caretaker) which is to provide basic services across the Estate in relation to the Schedule Seven services. The Tribunal accepts the evidence of Mr Siegle concerning the Caretakers hours and of Ms Harrison concerning the desirability of having an on-site presence to alert Mainstay to any issues and to keep on top of general maintenance between the grounds maintenance company's visits. The Tribunal finds that the services provided by the Caretaker are consistent with the Respondents Schedule Seven maintenance responsibilities and proportionate given the size of the Estate and the extent of the managed areas.

67. Schedule Seven paragraph 21 provides that the Respondent may engage such persons or sub-contractors as may be necessary to carry out its functions under Schedule Seven. The Respondent has appointed Mainstay to carry out its obligations. Mainstay could have engaged another company or person to provide Caretaker services but have chosen to appoint itself to provide the service to the Respondent, at a commercial rate which is invoiced monthly.

68. The Tribunal understands Mr Sillitoe's concerns about the possibility of a conflict of interest, and the risk of management fees being double charged under the contract for Caretaker services. The Respondent did not offer any evidence of Mainstay's processes for selecting themselves to provide the Caretaker services. However, there was no evidence from Mr Sillitoe as to what a reasonable sum might be. He did not put forward any alternative quotes for the Caretaker services so we are unable to determine whether the costs for the Caretaker services are reasonably incurred. We would need evidence of what sum might be a reasonable sum for the Caretaker services if Mr Sillitoe wanted us to reduce the charge. On that basis we have determined that the charges for the Estate Technician and Site Consumables were reasonably incurred.

69. Other than the issues dealt with above Mr Sillitoe did not make any specific challenge to the Estate Charge for the years in question which would allow the Tribunal to make any determination that they were not reasonable incurred.

COSTS

70. The application includes two requests for orders relating to costs. The first is an application for an order under section 20C of the Act that any of the

Respondent’s costs are not to be included in the amount of any service charge payable by the Applicant. The second is an application for an order under paragraph 5A of Schedule 11 of the 2002 Act, extinguishing the Applicant’s liability to pay an administration charge in respect of litigations costs.

Section 20C

71. The Tribunal has wide discretion in considering whether to make a s20C order but must have regard to what is just and reasonable in all the circumstances. Although Mr Sillitoe has succeeded in obtaining a modest reduction in his management fees this is not a case where the outcome can be measured in terms of that reduction. The Tribunal did not find against the Respondent on any matter other than the way it has chosen to allocate its management fees and although this has resulted in a small reduction in Mr Sillitoe’s charges the outcome is completely disproportionate to the costs of the dispute.

72. Furthermore, the Tribunal found against Mr Sillitoe on one of his main items of dispute, which was based on his misunderstanding of the effect of a fixed proportion service charge.

73. The Tribunal must also consider the effect on those that will bear the consequences of any order, because any order under s20C will only benefit Mr Sillitoe, leaving the other leaseholders who have not participated in the proceedings, to pay the Respondent’s costs through the service charge. Taking account of the parties submissions, the outcome and proportionality the Tribunal does not find that it would be just and reasonable in the circumstances to make any order under s20C.

Paragraph 5A

74. Under paragraph 5A of Schedule 11 to the 2002 Act the Tribunal has the power to limit a lessor’s recovery of litigation costs, where these are charged to a tenant as an administration charge under the lease. Paragraph 5A does not enable the Tribunal to make a costs order in the proceedings. A tenant's contractual liability to pay costs under the lease will arise only when the relevant administration charge is demanded, and any order made by the Tribunal on this application may then reduce or extinguish liability under such a demand.

75. Schedule 9 sets out covenants which are enforceable by the Landlord. Paragraphs 1.2 and 3 have been referred to in the Respondent’s statement as supporting a contractual liability imposed on the tenant to pay the litigation costs.

Paragraph 1.2 states:

“ *To pay the reasonable charges of any managing agents appointed by the landlord from time to time for the collection of rents and accounting*

to the landlord for the same together with any value added tax on such charges."

Paragraph 3 states:

"Provided that section 168 subsection 2 of the Commonhold and Leasehold Reform Act 2002 has been satisfied to pay all costs charges and expenses (including legal costs and fees payable to a surveyor and any value added tax on the same) incurred by the Landlord in or in contemplation of any proceedings or the service of any notice under section 146 and 147 of the Law of Property Act 1925 including the reasonable costs charges and expenses...... the costs of application to a Leasehold Valuation Tribunal but determination that a breach has occurred..."

76. As these are not proceedings in relation to the collection of rents, and the litigation costs have been incurred by the Respondent not the Landlord, there does not appear to be a contractual liability on Mr Sillitoe to pay the litigation costs of these proceedings as an administration charge under the lease. However, for the avoidance of doubt, the Tribunal makes an order under paragraph 5A on the grounds that it would not be just and equitable to allow the Respondent to attempt to recover litigation costs within, what is intended to be a non-costs jurisdiction, from Mr Sillitoe personally through the back door of a contractual administration charge.

Judge D. Barlow **Date: 4 March 2021**

Rights of Appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).