



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER (RESIDENTIAL  
PROPERTY) &  
IN THE COUNTY COURT at LEICESTER**

**Tribunal references** : **BIR/44UE/LIS/2022/0010**

**Property** : **Flat 86 Rosalind Court, Brunel Way,  
Stratford Upon Avon, CV37 6EL**

**Applicant** : **Mr Robert Vernon (Litigant in Person)**

**Respondent** : **Orbit Housing Association Limited**

**Representative** : **Mr Pritchard-Jones (Counsel)**

**Application** : **Service Charges  
Section 27A and 20C Landlord and  
Tenant Act 1985, Schedule 11 paragraph  
5 Commonhold and Leasehold Reform  
Act 2002**

**Tribunal members** : **Judge C Payne**

**Date of Hearing** : **9 June 2022 (Video Hearing)**

**Date of decision** : **9 August 2022**

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**DECISION**

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## **Summary of the Decision**

1. The Tribunal determines that the Scheme Based Support Charge and the Activity Charge are not service charges within the meaning of section 18 of the Landlord and Tenant Act 1985. Accordingly, the application is struck out under section 9(2) (a) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
2. The Tribunal orders that any of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant under Section 20C of the Landlord and Tenant Act 1985.
3. The Tribunal extinguishes the Applicant's liability to pay any administration charge in respect of the litigation costs incurred by the Respondent in these proceedings under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

## **Background**

4. Rosalind Court is a block of 102 Apartments in a five-storey retirement complex ("the Property"). It is a mixed tenure scheme consisting of sheltered and extra care tenants, the extra care tenants having additional personal care and support needs. The scheme is restricted to tenants over the age of 55 years. Mr Robert Vernon ("the Applicant") holds an Assured Shorthold Tenancy, which commenced on 22 April 2021, for 86 Rosalind Court ("the Tenancy Agreement"). He is categorised as a sheltered housing tenant and does not receive personal care in his home. Orbit Housing Association Limited ("the Respondent") is the landlord of the Property.
5. The Applicant made an application under s27A of the Landlord and Tenant Act 1985 ("1985 Act") for determination of the reasonableness and payability of service charges under the Tenancy Agreement. The Applicant also applied for an order under 20C of the Act (Limitation of service charges: costs of proceedings) and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("2002 Act") (Limitation of administration charges: costs of proceedings).
6. The Applicant applied specifically for a review of the Scheme Based Support Charge and the Activity Charge for the years 2019-2022. However, the only Tenancy Agreement before the Tribunal and referred to in the parties pleadings is one which commenced on 22 April 2021. As such, the Scheme Based Support Charge and Activity Charge were considered in relation to that tenancy and for the years 2021/2022 and 2022/2023.

## The Issues

7. From the submissions at the hearing and consideration of the documentation provided by the parties, the Tribunal considers that the issues it needs to determine are:
  - a. Whether the Scheme Based Service Charge and Activity Charge are service charges within the meaning of section 18(1)(a) of the 1985 Act;
  - b. If they are, are they service charges that are variable for the purposes of section 18(1)(b) of the 1985 Act;
  - c. If they are, then are they payable under section 27A of the 1985 Act;
  - d. And finally, what determinations on the Applicant's applications under section 20C of the 1985 Act and Schedule 11 of the 2002 Act should be made.

## The Law

8. Section 18(1)(a) of the 1985 Act defines 'service charge' as *an amount payable by a tenant of a dwelling as part of or in addition to the rent... (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management.*
9. The case of *The Gateway (Leeds) Management Ltd v Naghash [2015] L+TR 36* was highlighted by the Respondent and confirms that, in that case, service charges for a concierge, gym and CCTV system were found to be recoverable and amenable to the jurisdiction of section 18 of the 1985 Act.
10. Section 18(1)(b) of the 1985 Act goes on to state that a 'service charge' is *an amount payable by a tenant of a dwelling as part of or additional to the rent... (b) the whole or part of which varies or may vary according to the relevant costs.*
11. Under Section 27A of the 1985 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:-
  - a. *The person by whom it is or would be payable*
  - b. *The person to whom it is or would be payable*
  - c. *The amount, which is or would be payable*
  - d. *The date at or by which it is or would be payable; and*
  - e. *The manner in which it is or would be payable*

12. A lessee also may ask the Tribunal (under section 27A of the Act), to determine whether a service charge is payable in any service charge year. Specific items of expenditure may be challenged, and the Tribunal will determine whether expenditure is, or would be, reasonably incurred.
13. Ascertaining the amount payable as a service charge requires consideration of the terms of the Tenancy Agreement, as this is the foundation stone of the legal right for the Applicant to demand payment of sums due from the Applicant to the Respondent. Secondly, it requires consideration of compliance with statutory controls over service charge demands.
14. In considering the terms of the Tenancy Agreement the Tribunal is assisted by the case of *Arnold v Britton & Others [2015] AC 1619* which confirmed that the interpretation of a contractual provision within a Tenancy Agreement involves identifying what the parties meant through the eyes of a reasonable reader and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.
15. In the case of *Retirement Lease Housing Association Ltd v Schellerup [2020] UKUT 232 (LC)*, the Upper Tribunal confirmed that the question of whether a leaseholder was obliged to contribute towards the cost of a landlord fulfilling an obligation was not a question of principle to which the same answer would be given in every case. In each case, the answer would depend on the language used. The focus should be on the words of the lease (Tenancy Agreement), read as a whole in their relevant context, with the well-known principles of contractual interpretation in mind.
16. Section 18(2) of the 1985 Act defines relevant costs as:

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

17. Section 19 of the 1985 Act deals with the limitation of service charges on the basis of reasonableness and provides:

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

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

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

*and the amount payable shall be limited accordingly.*

18. Section 9(2) (a) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states:

*(2) The Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal—*

*(a) does not have jurisdiction in relation to the proceedings or case or that part of them; and*

*(b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.*

### **The Tenancy Agreement**

19. The Appellant's flat, 86 Rosalind Court, is defined as "your home" or "the property" on page 1 of the Tenancy Agreement.

20. Page 2 of the Tenancy Agreement has a section entitled *Payment for the property* and states:

*The payments due weekly for your property are detailed below, or as varied from time to time in accordance with this Agreement.*

*Weekly Rent: £138.38*

*Weekly Variable Service Charge; £46.02*

***Total Weekly rent: £184.40***

*Weekly Support Charges:*

- *Scheme-based Support Charge: £18*
- *Emergency Alarm Charge: £0.00*

*Weekly heating charge: £0.00*

*Weekly water charge: £0.00*

*Weekly Council Tax Charge: £0.00*

***Total Weekly Payment: £ 204.30***

*The variable service charge is made up of the services listed in Appendix A.*

*...*

*We can change your Total Weekly Payment without your consent in line with the Variable Service Charge, Supporting Charge and other charges sections of this Agreement.*

21. Clause 1.3 is entitled *Variable Service Charge, Support Charge and other charges* and states:

*(i) In addition to the rent, we may charge for variable service charges. The details provided in Appendix A have been calculated on the basis of*

*how much we expect the services provide to cost during this financial period taking into account the reasonable costs incurred during the previous year, estimates for future years, and allowing for any surplus or deficit from the previous accounting periods.*

*We may increase your variable service charge (if one applies to you) at any time if we give you at least one month's notice in writing, but we will not do so more than once a year unless there is a change in the service provided. We may vary, add to, suspend or cancel any service charge items listed in Appendix A (which may increase your variable service charge) but will provide you with notice of any changes to your services or charges.*

*(ii) In addition to the rent and variable service charge, we will charge for support services provided or other charges shown in this Agreement on the basis of reasonable costs incurred during the previous year and estimates for future years. We will give you one calendar months' notice of any changes to these charges by writing to you at the property.*

*(iii) If the property is subject to funding for scheme based support services or emergency alarm (lifeline) services, you agree to accept and pay for these services.*

...

22. Clause 1.4 is entitled *Support and/or Furniture* and states:

*(i) This tenancy is to facilitate the provision of support for you to a member of your household. The nature of the provision, and your obligation to pay for it, are set out in the separate Support Agreement. The provision of support is fundamental to the tenancy. It shall be regarded as a breach of this tenancy if you withdraw from or breach the Support Agreement and in the event of such a withdrawal or surrender*

23. There is no Support Agreement in place with the Applicant.

24. There is no Appendix A to the Tenancy Agreement. However, the Respondent asserts that the intention was that the Service Charge Budget for 2021/2022 ("Budget for 2021/2022") to be incorporated as Appendix A.

25. The Respondent provided a copy of an email dated 20 April 2021 which is an email from the Respondent's lettings team to the Appellant which said:

*Good afternoon  
Please find attached the compliance documentation for your sign up this week.  
Kind regards  
Sue*

26. The email appended the documents listed below, copies of which were not provided to the Tribunal:

- (i) *86 Rosalind Court Service Charge Information.pdf*
- (ii) *P2823 Orbit A5 4pp Fire door safety brochure FINAL WMFS comments.pdf*
- (iii) *P3018 Orbit A5 16pp Fire safety brochure\_ 2019 update v1.cleaned.pdf*
- (iv) *Section 21B Service Charges – Summary Rights Obligations.doc*
- (v) *86 Rosalind Court Robert Vernon\_05\_03\_2021ORBIT.xlsm*
- (vi) *Surrender Form – 15 Rosalind Court.doc*

27. The Respondent advised the Tribunal that document (i) was the Budget for 2021/2022 and that document (v) was the Tenancy Agreement. The Respondent asserted that, as the Budget for 2021/2022 was sent to the Applicant at the same time as the Tenancy Agreement for signature, the Budget for 2021/2022 was thereby incorporated into the Tenancy Agreement as Appendix A. The Applicant could not recall specifically being sent this email and said that he was unaware that the intention was that he should regard the Budget for 2021/2022 as Appendix A to the Tenancy Agreement, having never been informed that was intended to be the case by the Respondent.

## **Evidence**

### *The Scheme Based Support Charge*

28. The parties agree that the Scheme Bases Support Charge relates to an overnight care service run at Rosalind Court from 10pm -7am each night. There was some considerable confusion as to what exactly this service included.
29. The Respondent stated in its Statement of Case that the service included answering emergency lifeline calls, checking security and reporting emergency repairs. The Applicant disputed this explanation.
30. The Tribunal was provided with a copy of a letter from the Respondent's Independent Living Area Manager to the Applicant dated 28 May 2021. That letter states:

*It has been brought to my attention that there are queries regarding the Weekly Support and Activity Charges at Rosalind Court. ...*

*The weekly support and activity charges at Rosalind Court contribute to the cost of the overnight Care Staff (who will provide emergency response if needed) and the Activity Coordinator. ...*

*The Activity Coordinator will be working to arrange activities to suit a variety of interests, all of which are open to all residents...*

*The peace of mind of the Living Hub System, overnight response and activities ...are part of the overall scheme service.*

*The support and activity charges form part of your signed tenancy agreements and there is no option to 'opt out' of this. ...*

31. The Applicant provided a copy of a form sent to him in August 2021 giving residents the option to opt out of having the Lifeline service. He also provided a photograph of the Lifeline screen in the property showing that it was disconnected. The Applicant said that he had never had the benefit of this service. This is consistent with there being no charge listed for an *emergency alarm* on page 2 of the Tenancy Agreement. The provision of a Lifeline service is not included as part of the Scheme Based Support Charge. However, for those extra care residents with a Service Agreement in place, the overnight care staff would attend if the Lifeline system was triggered. For those residents without a Support Agreement in place, they would call the emergency services in the usual way, if required.
32. The Applicant and Respondent both confirmed that there is an out of hours emergency repair number which residents call in the case of an emergency repair being required. The example of a flood being reported was given. It was agreed that the reporting service for out of hours emergency repairs is not included in the Scheme Based Support Charge. There was no evidence of the care staff making any report to the out of hours repair service on behalf of residents before the Tribunal. The evidence of the Applicant that the residents reported their own repair requirements to the out of hours service was preferred and, therefore, it is concluded that this does not form part of the Scheme Based Support Charge.
33. The Respondent drew the Tribunal's attention to the contact list for the day staff at the scheme suggesting that the Scheme Based Support Charge contributed to their costs. On closer scrutiny it was noted that these staffing charges were included in the general service charge calculation and confirmed that the provision of general day staff who manage the property does not form part of the Scheme Based Support Charge.
34. Ms Jones, an officer of the Respondent, told the Tribunal that the night staff were provided by a third party Care Provider under the three way agreement with the Local Authority and that it was her understanding that they delivered planned care calls for those residents with Service Agreements, assisted those who triggered the Lifeline system if they had a fall, provided unplanned extra care to those who required it and did general walk arounds and security checks of the scheme. No copy of the



three way agreement was provided to the Tribunal. The charge is varied dependant on the rate fixed in a three way agreement between the Respondent, the Local Authority and the Care Provider. The costs of that contract are split equally between all of the residents of Rosalind Court and, as such, the costs are reasonable.

35. The Applicant provided a letter from Mr and Mrs Butler which described an incident on Friday 20 May 2022. The letter refers to the night staff holding a list of specific residents to whom they provide care and some residents not being on that list. The Applicant submitted that it is only those residents who qualify for additional personal care funding and have a Service Agreement in place that are provided with the additional care and support administered by the night staff. This is consistent with the evidence provided by Ms Jones regarding the overnight staff providing planned care calls for those residents on personal Service Agreements.
36. Ms Jones informed the Tribunal that the Scheme Based Support Charge is listed separate to the general service charges in the Tenancy Agreement and Budget for 2021/2022 because it relates to specific personal support requirements, which are funded separately in the Benefits System. They are not considered to form part of the housing provision for which Housing Benefit payments might be applied. Personal care requirements are assessed and funded separately. Only those residents assessed to be entitled to additional personal care funding would be funded to access additional extra care services and have a separate Service Agreement put in place to meet their specific needs. She confirmed that a significant number of residents in Rosalind Court, including the Applicant, would not qualify for the additional funding or a Service Agreement as it is a mixed tenure scheme with only some of the residents qualifying for or requiring extra care.
37. From the evidence before the Tribunal, it is determined that the Scheme Based Support Charge is a charge for the provision of overnight personalised care for those residents who have a separate Service Agreement in place. It is not a service provided for the benefit of all residents. It is not provided in connection with occupation of Rosalind Court. It is a personal care service which some residents at Rosalind Court happen to subscribe to by way of separate Service Agreements, which are personalised to meet their additional personal care needs.
38. When asked whether the Applicant's flat was a *property subject to funding for scheme based support services or emergency alarm (lifeline) services* under clause 13.1(iii), Ms Jones confirmed that it was not the particular property that was entitled to funding but a question of what an individual was entitled to in respect of Housing Benefit or Personal Care funding. However, the three way contract with the Local Authority and Care Provider was to provide all extra care that might be required for all those with Support Agreements at the scheme. She also

confirmed that only those tenants with personal care funding in place would enter into the additional Support Agreements referenced in the Tenancy Agreement.

39. The Respondent's case is that the Scheme Based Support Charge is a service that they provide which relates to the well-being of residents and, therefore, falls within the definition under section 18(1)(a) of the 1985 Act. The Applicant's case is that the charge does not relate to a service related to occupancy of Rosalind Court, it is not provided for the benefit of all residents and only those residents requiring extra care and with a Service Agreement in place receive any benefit from the service.

### *The Activity Charge*

40. The Applicant's case is that the Activity Charge does not constitute a service charge and that, even if it were found to be a service charge, the charge should be considered to be unreasonable as no service has been or is being provided in respect of that charge.
41. The Respondent's case was that the Service Charge Budget for 2021/2022 was given to the Applicant when he began occupation of the property. He should have understood that documents to be Appendix A and, as the Activity Charge is listed in that document, it is chargeable under clause 1.3(i) of the Tenancy Agreement. It relates to a service that is provided at Rosalind Court for all residents and, as such, is a service charge within the meaning of section 18 of the 1985 Act.
42. At the commencement of the Tenancy Agreement in April 2021 the Activity Charge was fixed at a rate of £1.90 per week. This was increased to £2.09 per week further to a letter dated 21 February 2022. A copy of the letter was not provided to the Tribunal.
43. In the Budget for 2021/2022 a number of charges are set out relating to the general upkeep and provision of services to Rosalind Court, this includes the upkeep and maintenance of the common parts of the scheme and staffing costs of £62,974.72. The Annual Service Charge and Weekly (52) Service Charge are then calculated. Sitting entirely separately to the Annual and Weekly Service Charge calculation is a further section at the foot of the document entitled *Personal Charges* under which is listed:

<i>Weekly Activity Charge</i>	<i>£1.90</i>
<i>Weekly Care Charge</i>	<i>£18.00</i>
<i>Total Weekly Personal Charge</i>	<i>£19.90</i>

44. It was confirmed to the Tribunal that the Activity Charge sat separate to the general service charges as it is not something that is considered to be

directly connected to the housing provision that would be covered by Housing Benefit payments.

45. There is considerable confusion as to what it is that the Activity Charge is for and the Respondent was unable to provide an explanation to the Tribunal of how the sum being charged had been calculated. In the letter from the Respondent's Independent Living Area Manager to the Applicant dated 28 May 2021 it was suggested that the Activity Charge paid for the provision of an Activity Coordinator at Rosalind Court. Ms Jones confirmed that there was an error in that letter as there is not an Activity Coordinator appointed for the scheme. The parties agree that there was a member of the Respondent's day staff who, as part of their wider role, took on the role of Activity Coordinator for a period of time at the start of 2021. However, due to the Coronavirus Pandemic they were unable to run any events and there has not been any Activity Coordinator or staff member responsible for running activities in place at Rosalind Court since mid-2021.
46. The parties agree that, from the commencement of the Tenancy Agreement in April 2021, there were not any activities run at Rosalind Court until May 2022. The Respondent advised the Tribunal that this was due to the restrictions in place relating to the Coronavirus Pandemic.
47. Ms Jones confirmed to the Tribunal that her understanding is that the Activity Charge is intended to be used to create a fund that can then provide items such as bingo cards or craft materials to residents who choose to run activities. No evidence of any specific expenditure on activities was provided to the Tribunal by the Respondent.
48. The Applicant provided the Tribunal with a copy of a Flyer for a *Spanish Night* that took place on 8 June 2022. The flyer states that the cost payable by the residents for attendance at the event will be between £15-£20 per person. The Tribunal's attention was also drawn to a Jubilee event, which was sponsored by Morrisons supermarket.
49. Ms Jones suggested that for the Spanish night the Respondent had offered to pay for decorations and refreshments but that it was felt that paying for the whole event would diminish the Activity Charge Fund such as to limit other activities over the course of the year. On that basis the residents were asked to pay £15-£20 for the event which would pay for the food and entertainment cost. No evidence was provided of any expenditure on this event from the Activity Charge fund and the Respondent could not confirm what, if anything, had been provided. The Applicant's evidence was that nothing had been provided by the Respondent beyond the use of the common area of Rosalind Court, the cost of which is included in the weekly variable service charge. Based upon the evidence before the Tribunal, the Applicant's evidence that the Respondent did not contribute to the event from the Activity Fund is preferred and a conclusion reached that the Respondent did not incur

any costs in relation to this event which are not already included in the weekly variable service charge.

50. Ms Jones suggested that she thought decorations might have been provided for the Jubilee celebration, though she was unable to provide any detail of what had been provided. No evidence of this expenditure was before the Tribunal and the Applicant stated that the residents had provided the decoration for that event. The Applicant's evidence is preferred on this point and it is concluded that the Respondent did not incur any costs in relation to this event which are not already included in the weekly variable service charge.

51. A copy of a Weekly Activity Planner was provided to the Tribunal. The parties agreed that these activities were suggested and run by the residents, starting from the week commencing 18 May 2022. They are run in the common parts of Rosalind Court. On the planner a number of activities are listed with a request for *Donations of tea, coffee and biscuits*. This was confirmed to mean that residents were asked to donate refreshments. Ms Jones suggested that she thought some refreshments might be provided from the Activity fund but there was no evidence of this expenditure before the Tribunal and this would be inconsistent with the request that residents should donate their own refreshments for activities. Based upon the evidence before the Tribunal, the Applicant's evidence that the Respondent does not contribute to these activities from the Activity Fund is preferred and a conclusion reached that the Respondent has not incurred any costs in relation to the provision of these activities which are not already included in the weekly variable service charge.

52. Ms Jones and Mr Hopper, on behalf of the Respondent, confirmed that the payments for the Activity Charge would be reconciled with any expenditure along with the other charges in the Service Charge Budget for 2021/2022 and, if appropriate a credit would be made to the 2023/2024 budget rather than the overpayment being returned to the residents. There was no explanation provided for the delay in accounting for the fund that is not expended or why the unexpended fund was not returned to residents or for how the Activity Charge was calculated or for why it had been increased in February 2022.

## **Discussion and Determination**

### *Service Charges under the Tenancy Agreement*

53. Page 2 of the Tenancy Agreement sets out the weekly payments due under the Tenancy Agreement, which includes a *Weekly variable service Charge* of £48.80. *Weekly support Charges* under which only the Scheme Based Support Charge is listed, are accounted for separately. The Tenancy Agreement then goes on to say that *The **variable service charge** is made up of the services listed in Appendix A.*

54. There is no document expressly referred to as Appendix A. However, the Budget for 2021/2022 was provided to the Applicant prior to the commencement of the Tenancy Agreement. The Respondent did not assist the situation by failing to label the Budget 2021/2022 documents as Appendix A or draw it specifically to the Applicant's attention in that context. The Respondent also sent the document to the Applicant along with a number of other documents, many of which were also unclearly labelled, and all lacking any explanation.
55. A party reading both documents would be assisted by clause 1.3(i) of the Tenancy Agreement which states that *the details provided in Appendix A have been calculated on the basis of how much we expect the services provide to cost during this financial period taking into account the reasonable costs incurred during the previous year, estimates for future years, and allowing for any surplus or deficit from the previous accounting periods*. A reasonable reader would conclude, therefore, that Appendix A consisted of a calculation of the anticipated cost of the services provided in relation to Rosalind Court for the coming year. Having been presented with the Budget for 2021/2022 at the same time it would be reasonable to conclude that that document constituted the Appendix A referred to in the Tenancy Agreement in so far as it related to the anticipated Annual Service Charge and Weekly (52) Service Charge.
56. There was no dispute between the parties that the variable service charge or the personal charges under the Tenancy Agreement may be varied according to the reasonable costs incurred by the Respondent in providing services under the Tenancy Agreement. The parties, however, disagreed as to whether the Scheme Based Support Charge and Activity Charge formed part of the service charges payable under the Tenancy Agreement or were payable at all by the Applicant.

#### *Scheme Based Support Charge*

57. The Scheme Based Support Charge is listed separately to the service charges and clearly labelled as *Personal Charges* under the Budget 2021/2022 document and in the Budget 2022/2023 document. This is because it is not considered to be a cost related to the housing of the residents which might be funded using Housing Benefit payments.
58. In the Tenancy Agreement, the Scheme Based Support Charge is listed separately to the *weekly variable service charge* and listed under a separate section entitled *weekly support charge*. A reasonable reader in possession of both documents would conclude that there is a clear intention that the Scheme Based Support Charge is entirely separate from the variable service charges.
59. There is then no obligation under the Tenancy Agreement for the Respondent to provide or the Applicant to pay for personal care as there

is no Support Agreement in place with the Applicant as referenced in clause 1.4 with the Applicant and the Applicant is not entitled to funding for scheme based support services or for a Lifeline service under clause 1.3(iii). The overnight support service is a personalised service provided to specific residents who happen to live in the scheme and require personal care services, it is not something which relates directly to services linked to the residents' occupation of their flats or the upkeep and management of the common parts.

60. There are obligations under separate Service Agreements that are in place with other residents for the Respondent to provide them with specific personal care services and they receive funding to access such assistance. As the level of personal care and funding accessed by these individuals varies, it would be expected that they would be invoiced for the personal care provision provided to them individually. There is no obligation on a resident of Rosalind Court to fund the additional personal care requirements of their neighbours.
61. As the overnight personal care provision is a personalised support service provision for only those specific residents who have entered into a separate Support Agreement, it does not relate directly to the provision of *services, repairs, maintenance, improvements or insurance or the landlord's costs of management* for Rosalind Court. It follows that the Scheme Based Support Charge is not a service charge within the meaning of section 18(1)(a) of the 1985 Act.
62. Further, even if it were considered to be a service charge then the charge would not be considered reasonable. It is reasonable for the Respondent to incur the costs of the provision of overnight personal care on behalf of extra care tenants with Service Agreements in place. However, it cannot be reasonable to commission such services on behalf of all the tenants in a mixed tenancy scheme, where many have no Service Agreements in place and, as such, would have no access to or benefit from that service. It is not for the residents as a whole to be funding the specialist and personalised care needs of those who qualify for extra care and personal assistance. Indeed, those tenants requiring additional personal care are able to access additional separate funding in addition to their Housing Benefit payments to pay specifically for that provision.

#### *Activity Charge*

63. The Activity Charge is also listed separately to the service charges and is clearly labelled as *Personal Charges* under the Budget 2021/2022. It is not mentioned at all in the Tenancy Agreement. A reasonable reader in possession of both documents would conclude that the Activity Charge sits entirely separate from the variable service charges.
64. As the Activity Charge is not part of the variable service charges and is not referred to elsewhere in the Tenancy Agreement there was no

obligation established for the Respondent to provide activities or for the Applicant to pay for them under the Tenancy Agreement when it commenced. There is nothing before the Tribunal to suggest that any notification under clause 1.3(i) has been provided to the Applicant to add the Activity Charge as a service charge item. The Activity Charge is not something that is considered to constitute part of the housing provision costs at Rosalind Court. It is not capable of being funded from Housing Benefit payments and sits separate to the costs for the Applicant's occupation of his flat. On that basis, it cannot be said that the Activity Charge is a payment for any *services, repairs, maintenance, improvements or insurance or the landlord's costs of management* related to the Applicant occupation of the Property. It follows that the Activity Charge is not a service charge within the meaning of section 18 of the 1985 Act.

65. Further, the Tribunal was provided with no evidence of any payments having actually been made by the Respondent in relation to the Activity Charge. It is agreed by the parties that no activities were provided until May 2022 and, from the evidence before the Tribunal, the activities since May 2022 do not appear to have been funded in any way by the Respondent. Activities are taking part in the common parts of the Scheme, the maintenance of which is included in the weekly variable service charge payment. The staff who facilitated the meeting to discuss what activities residents might like to run do so as part of their wider role within the scheme, which is already funded through the staff costs included in the weekly variable service charge payment. There is no Activity Coordinator.
66. Any activities that have been run have been funded by the residents either directly making payments, providing items or donating refreshments, save for in the case of the Jubilee event, which was funded through external sponsorship.
67. In a situation where no costs have been or are being incurred and no service has been or is being provided, beyond those already budgeted and paid for separately under the weekly variable service charges, it cannot be said that the Activity Charge is a payment for any *services, repairs, maintenance, improvements or insurance or the landlord's costs of management*. It follows that for this reason too the Activity Charge is not a service charge within the meaning of section 18 of the 1985 Act.

### *Conclusion*

68. Having determined that the Scheme Based Support Charge and the Activity Charge are not service charges within the meaning of section 18 of the Landlord and Tenant Act 1985, the Tribunal lacks jurisdiction in regard to those charges and so strikes out the Applicant's Application

under section 9(2) (a) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

### **Section 20C and paragraph 5A applications**

69. Section 20C provides:

*20C.— Limitation of service charges: costs of proceedings.*

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

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

70. The purpose of section 20C is to give the Tribunal the power to prevent a landlord actually recovering its costs via the service charge when it was not able to recover them by a direct order from the Tribunal. The discretion given to the Tribunal is to make such order as it considers just and equitable.

71. In *Tenants of Langford Court (Sherbani) v Doren Limited LRX/37/2000*, which concerned an application for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 in which the applicant tenants had been successful, the Lands Tribunal (Judge Rich QC) made the following remark:

*28. In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.*

72. In *Conway & Others v Jam Factory Freehold Ltd [2013] UKUT 0592 (LC)*, which was a case involving a tenant owned management company, Martin Rodger QC, Deputy President of the Upper Tribunal (Property Chamber), said that:

*75. In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order,*



*and to bear those consequences in mind when deciding on the just and equitable order to make.*

73. The Applicant submitted that he and his fellow residents were elderly and reliant on benefits. They are struggling to pay the Activity Charge and Scheme Based Support Charge. There would be significant adverse impact on them if the charges they faced were further increased by the costs incurred by the Respondent in this matter being added to their service charge. It was submitted that the majority of residents, including the Applicant rely upon housing benefit payments to pay for most, if not all, of their accommodation costs. Given the nature of the scheme, this is considered to be a fair assessment of the financial circumstance and potential adverse impact on the Applicant (and other residents) of the Respondent being allowed to pass on the costs of this matter to them through their weekly service charges.
74. The Respondent submitted that they are a not for profit organisation and that they had no option but to defend the application as they are obliged under the s106 Agreement for the scheme to provide the personal care services to residents with extra care requirements. Further, they noted that 3 orbit staff members had attended the hearing. While it is accepted that the Respondent is a not for profit organisation, it is not accepted that they were obliged to commission the provision of personal care services for residents who do not have Service Agreements in place. Further, it is also not accepted that it was essential to have 3 staff members attend the hearing as only Ms Jones provided any substantive evidence, with her colleagues primarily in attendance as observers.
75. The Applicant has succeeded in his claim. Taking into consideration all of the circumstances of the parties, the impact and the outcome of the Appellant's Application, it would not be just or equitable to allow the costs the Respondent has incurred in relation to this matter to be recharged through the service charge provisions in the Tenancy Agreement. Accordingly, the Tribunal orders that any of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.
76. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides:

*Limitation of administration charges: costs of proceedings*

*5A (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.*

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

*(3) In this paragraph—*

*(a) “litigation costs” means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and*

*(b) “the relevant court or tribunal” means the court or tribunal mentioned in the table in relation to those proceedings.*

77. The table referred to in sub-paragraph 3(b) confirms that if the proceedings to which the costs relate were proceedings in the first-tier tribunal, then the first-tier tribunal is the relevant court or tribunal, and if the proceedings were in the county court, then the county court is the relevant court or tribunal.

78. Based on its reasoning regarding the section 20C Order, an order is also made extinguishing the Applicant’s liability to pay any administration charge in respect of the litigation costs incurred by the Respondent in these proceedings under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Judge C Payne

### **Rights of Appeal**

1. A written application for permission must be made to the First-Tier Tribunal at the Regional Tribunal Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Tribunal Office within 28 days after the date this decision is sent to the parties.
3. 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.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
  
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.