IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) AND

IN THE COUNTY COURT SITTING AT 10 ALFRED PLACE, LONDON WC1E 7LR

Case references	**:**	**(A) LON/00BK/LLE/2021/0005** **(B) LON/00BK/LSC/2020/0152** **(C) LON/00BK/LLE/2021/0004**
County Court Claim Number	**:**	**(B) GO1YJ292**
Properties	**:**	**(A) The residential leasehold properties in Fitzroy Place, London W1** **(B) & (C) Apt 705, 5 Pearson Square, Fitzroy Place, W1T 3BQ**
Applicants	**:**	**Fitzroy Place Residential Limited (1), Fitzroy Place Management Co Ltd (2) 2-10 Mortimer Street GP Limited and Mortimer Street Nominee 1 Limited (3)**
Representative	**:**	**Bryan Cave Leighton Paisner LLP**
Respondents	**:**	**(A) Mr Angus Lovitt & 234 other long residential leaseholders in Fitzroy Place** **(B) & (C) Nueva IQT SL (a company incorporated in Spain)**
Interested person	**:**	**Fitzroy Place Residents' Association**
Type of application	**:**	**To determine the payability and reasonableness of service charges**
Tribunal	**:**	**Judge Sheftel** **Mr Stephen Mason FRICS** **Mr Alan Ring**
Date	**:**	**9 March 2023**

DECISION

SUMMARY OF DECISION

The tribunal's findings with regard to payability are as follows:

(A) The basis of measurement of apportionment: The tribunal concludes that the references to NIA in paragraph 6.1 of part 1 of schedule 6 to the private residential leases, can properly be construed as GIA. However, it is determined that the Applicants' methodology for the apportionment of the Estate Service Charges is not in accordance with the terms of the private residential leases;

(B) The weighting of apportionment: The parties agreed at the start of the hearing that apportioning by reference to use for specific types of expenditure was appropriate as a matter of principle. However, the tribunal makes no finding as to any specific apportionment for any particular head of costs;

(C) The apportionment of Estate Manager time: The allocation of the estate manager's time to the Estate Service Charge was valid;

(D) The apportionment of office costs: The allocation of the office costs to the Estate Service Charge was valid;

(E) Contribution to the Education Facility: It is determined that the Applicants are not required to bear any shortfall for service charge costs by virtue of the fact that the Education Facility is not required to contribute to such costs;

(F) Contribution to security, cleaning of the square and maintenance of play equipment: The leaseholders are liable to pay towards these items under the terms of the residential leases;

(G) Events manager: The costs of an events manager are not recoverable under the terms of the residential leases;

(H) Christmas lights and decorations: Such costs are recoverable under the terms of the lease as a matter of principle;

(I) Procurement and administration fees; It was agreed at the start of the hearing that such costs are recoverable as a matter of principle.

Background

1. The Applicants in the main application (A), LON/00BK/LLE/2021/0005, are: (1) the immediate landlord to the residential long leaseholders of various apartment blocks in Fitzroy Place, London W1 ("the Development"), (2) the management company for the Development, and (3) the freeholders of the Development.

2. The Applicants seek a determination from the tribunal under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable by residential leaseholders and are reasonable in amount.

3. There are two other applications that relate solely to Apartment 705, 5 Pearson Square, Fitzroy Place, namely:

    - (B) County court proceedings under claim number GO1YJ292, where the second applicant claims unpaid service charges in the sum of £2,090.94 from the leaseholder, Nueva IQT SL (a company incorporated in Spain). Those proceedings have been transferred to the tribunal and are being dealt with under reference number LON/00BK/LSC/2020/0152; and

    - (C) Tribunal application LON/00BK/LLE/2021/0004 brought by Nueva IQT against the second applicant seeking a determination of the correct contractual apportionment of the estate service charge shared between residential and commercial units in the development at Fitzroy Place.

4. These earlier applications were previously stayed, as the issues they raise may be covered by the main application.

5. At a case management hearing on 7 March 2022, the tribunal determined that this hearing should deal with questions of *payability*. Disputes as to reasonableness will be considered at a later date and in light of the

tribunal's findings in this Decision. The particular issues the tribunal were required to consider are set out in more detail below.

6. A 4-day hearing took place on 23-26 January 2023, with the tribunal carrying out an inspection on the morning of 23 January 2023. The tribunal was provided with a bundle totalling 3,312 pages.

7. The Applicants were represented by Ms Katrina Mather of counsel and four distinct groups of active respondents were represented by Mr Neil Willis of the Residents' Association, by Mr Alejandro Camarero on behalf of Nueva IQT SL and several other respondents (the "Nueva Respondents"), by Mr Kay Puvanesam in person and by Mr John Beresford of counsel on behalf of Octavia Housing. All had earlier provided statements of case.

8. The tribunal heard evidence from Ms Emma Hares of Rendall & Rittner, the managing agents and Mr Edward Atterwill of Aviva on behalf of the Applicants. In addition, Mr Willis and Mr Puvanesam gave evidence, although neither was subject to cross examination. The tribunal also heard expert evidence from Mr Graham Pack who had been instructed by the Applicants and Mr Bruce Maunder-Taylor who had been instructed by Mr Puvanesam.

9. While the tribunal is conscious of the fact that there are clearly significant areas of dispute between the parties, the tribunal is grateful to all parties for their assistance.

Miscellaneous procedural matters

10. The tribunal notes that on 28 December 2022, Mr Puvanesam had written to the tribunal stating that he sought to withdraw from the proceedings but that he would continue to pay Mr Maunder Taylor's expert fee for his attendance at the hearing. On 3 January 2023, the Applicants sought clarification as to the effect of this communication and whether, as a consequence, Mr Maunder Taylor would attend the hearing. Mr Puvanesam responded on 12 January 2023. He confirmed that as he was a respondent he could not formally withdraw from the proceedings. However, although he would not be attending, he nevertheless wished for

his expert, Mr Maunder Taylor to attend. In the event, Mr Puvanesam did attend, gave evidence and made submissions.

11. It should also be noted at on 11 January 2023, the Applicants made a new application under section 35 of the Landlord and Tenant Act 1987 for an order for variation of the leases. At the time of submitting the section 35 application, the Applicants' solicitors requested that this be dealt with at the same hearing. While the tribunal appreciates that the issues raised in the new application clearly overlap, there was simply insufficient notice for the new application to be considered at the same time. At the start of the hearing, Ms Mather confirmed that the Applicants were not asking that the application be determined at this hearing.

The Development

12. The Development is located north of Oxford Street in central London, occupying a site of approximately 3 acres. The Development is high value, comprising 6 blocks, 2 of which are multi-let offices. There are 235 private flats which enjoy access to a Residents Amenity Area and benefit from a concierge service and 54 shared ownership / affordable housing flats demised to Octavia who in turn have let 14 of the flats to individuals pursuant to shared ownership leases. There are also a number of restaurant and retail units, an Education Facility, healthcare unit, basement car park, basement storage units, bicycle parking and loading bays.

13. The central square is a pedestrianised area over which the residential occupiers have rights of access and egress. The central square is 'open' and so can be accessed by members of the public. There is a sculpture installation (referred to as 'play equipment' in the Lease), steps, seating and grass area. The Residents Amenity Area is located in Block 4, as is the concierge. This area also contains meeting rooms, a lounge, a cinema and gym.

14. The tribunal was informed that the terms of the private residential leases are materially the same. With regard to Octavia's headlease, there are

some significant differences from the private residential leases which, so far as are relevant to these proceedings, are addressed below.

Issues

15. As set out in the tribunal's directions order of 7 March 2022, the issues for determination at this hearing were as follows:

    i. The basis of measurement of apportionment: The Applicants seek a determination of the method of measurement which should be adopted when calculating and apportioning service charges between the residential units and the other paying parties in order to determine the leaseholders' liability to pay (the options being the Net Internal Area (NIA) specified in the residential leases, the Gross Internal Area (GIA) or the Gross External Area (GEA) for which the Applicants contend);

    ii. The weighting of apportionment: The Applicants seek a determination of the correct method of weighting service charge apportionment between the paying parties in order to establish the leaseholders' liability to pay (the Applicants averring that floor area determined by square footage is the correct approach to apportioning service charges and/or, in any event that apportionment is at its discretion in accord with the terms of the lease);

    iii. The apportionment of Estate Manager time: The Applicants seek a determination of the correct apportionment of the cost of the Estate Manager time between the paying parties in order to ascertain the leaseholders' liability to pay (the applicants stating that, to date, the cost of the Estate Manager has always been wholly apportioned to the Estate Service Charge and the Applicants averring that this is the correct allocation). Some leaseholders challenge the apportionment of time between residential and commercial service charge payers;

iv. The apportionment of office costs: The Applicants seek a determination of the correct apportionment of the office costs between the paying parties in order to ascertain the leaseholders' liability to pay (the Applicants stating that, to date, the office costs have always been wholly apportioned to the Estate Service Charge and the Applicants averring that this is the correct allocation). Some leaseholders challenge the apportionment of costs between residential and commercial payers and the allocation of Estate-only costs;

v. Contribution to the Education Facility: The Applicants seek a determination of the liability of leaseholders to pay towards the share of general running costs of the estate that are attributable to but not paid by the Education Facility (the Applicants averring that the standard apportionment provisions contained in lease should apply);

vi. Contribution to security, cleaning of the square and maintenance of play equipment: The tribunal's determination is sought as to whether the leaseholders are liable to pay towards these items. In its response, the Residents Association noted that the new managing agent had adjusted the basis of the Block Cost allocations to better align the cost of cleaning each block, which may fall to the tribunal to consider;

vii. Events manager: The tribunal's determination is sought as to whether the leaseholders are liable to pay towards an event manager position, with the role being in place for the period 1 January 2019 to 22 May 2020 (some leaseholders disputing such liability);

viii. Christmas lights and decorations: The Tribunal's determination is sought as to whether the leaseholders are liable to pay towards these items (some leaseholders disputing such liability);

ix. Procurement fees;

x. Staff administration fee;

Basis of measurement of apportionment

16. As set out above, the Applicants seek a determination of the correct method of weighting service charge apportionment between the paying parties in order to establish the leaseholders' liability to pay.

17. So far as is material, the relevant provisions in the private residential leases are as follows.

Paragraph 1.1 of part 1 of Schedule 6 provides:

The Tenant shall pay to the Landlord a Service Charge… in accord with the provisions of this Schedule 6…, the purpose of which is to enable the Landlord to recover from the Tenant the Tenant's due proportion of all expenditure overheads and liabilities which the Landlord or the Company or any Superior Landlord may incur in and in connection with providing and/or supplying the Services and/or complying with their respective obligations in this Superior Lease, this Lease and/or under any legal obligation binding on any of the Superior Landlord, the Landlord and/or the Company with the intention that the Superior Landlord, the Landlord and/or the Company should be able to recover all of the Service Costs incurred.

Paragraph 2 contains the following definitions:

Block Service Charge means all of the Service Costs incurred by the Landlord, the Company or the Superior Landlord in carrying out the obligations under Clause 5.1 (Provision of Services) in respect of the Block Services.

Block Services means those services provided by the Landlord, the Company or the Superior Landlord in relation to the Block set out in Schedule 6, Part 3 (The Services) paragraph 2 (Block Services) and headed Block Services.
…

Estate Service Charge means all of the Service Costs incurred by the Landlord, Company or the Superior Landlord in carrying out the obligations under Clause 5.1 (Provisions of Services) relating to Estate Services.

Estate Services means those services provided by the Company, the Landlord or the Superior Landlord in relation to the whole of the Estate set out in Schedule 6, Part 3 (The Services) paragraph 1 (Estate Services) and headed Estate Services.

Paragraph 6.1 of part 1 of Schedule 6 contains the clause which has been the subject of the principal area of dispute:

The following provisions apply to the determination of the Tenant's Proportion:

a. in respect of the Block Service Charge it is (subject to paragraph 9 of this Schedule) to be calculated primarily on a comparison for the time being of the net internal area (as defined by the Measuring Code) of the Premises with the aggregate net internal area of the Lettable Areas of the Block (excluding the net internal area of any management accommodation); and

b. in respect of the Estate Service Charge it is (subject to paragraph 9 of this Schedule) to be calculated primarily on a comparison for the time being of the net internal area (as defined in the Measuring Code) of the Premises with the aggregate net internal area of the Lettable Areas of the Estate from time to time.

Regard must also be had to paragraphs 6.2-6.4 of part 1 of Schedule 6:

6.2 The Landlord and/or the Company may in its or their respective discretion having regard to the nature of any expenditure or item of expenditure incurred, or the premises in the Block or the Estate as the case may be which benefit from it or otherwise, the Landlord, the Superior Landlord and/or the Company may in its discretion:

a. adopt such other method of calculation of the proportion of the expenditure to be attributed to the Premises as is fair and reasonable in the circumstances;
b. if it is appropriate:
(I) attribute the whole of the expenditure to the Premises;
(II) attribute a fair proportion of any expenditure to another person which has benefitted from the relevant service before attributing the remainder of the expenditure to those who would otherwise be liable; and/or
(III) allocate the whole or part of any expenditure to a different head of expenditure than that to which it would ordinarily be allocated as its [sic] fair and reasonable and proper in the circumstances.

6.3 The Landlord and/or the Company shall be entitled by giving written notice to the Tenant to vary the Tenant's Proportion from time to time as a consequence of any alteration or addition to the Block(s) or the Estate or any alteration in the arrangements for provision of services therein or any other relevant circumstances.

6.4 Any variation in the Tenant's Proportion shall take effect from such date as the Landlord and/or Company may specify in such written notice having regard to the date of occurrence of the reason for such variation."

Finally, it should be noted that definition in the lease of 'Lettable Areas' is as follows:

Lettable Areas means:
(a) the Apartments in the Blocks;
(b) all car parking spaces and storage areas (as designated from time to time by the Landlord) within the Car Park;
(c) the Commercial Buildings and all associated areas designated from time to time by the Landlord as being exclusively for the use of such premises;
(d) the Health Centre; and

(e) the Education Accommodation.

18. As set out above, the key provision of the private residential leases is paragraph 6.1 of part 1 of Schedule 6. With regard to the block service charge, this is to be calculated by a comparison of the net internal area ("NIA") (as defined by the Measuring Code) of the premises with the net internal area of the Lettable Areas of the Block. With regard to the Estate Service Charge, this is to be calculated by a comparison of the NIA of the Premises with the NIA of the Lettable Areas of the Estate.

19. Before considering the above provisions in more detail, it should also be noted that there is a mismatch between the private residential leases and the Octavia lease. While the private residential leases make reference to NIA for both the Block Service Charge and Estate Service Charge, the Octavia lease uses gross internal area ("GIA") for the Block Service Charge and 'a fair and reasonable proportion' for the Estate Service Charge:

> *(a) in respect of the Block Service Charge it is (subject to paragraph 9 (Acknowledgements) of Schedule 5 (Service Charge) to be calculated primarily on a comparison for the time being of the gross internal area (as defined in the Measuring Code) of the Apartments within the Premises with the aggregate gross internal area of the Lettable Areas of the Block (excluding the gross internal area of any management accommodation); and*
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> *(b) in respect of the Estate Service Charge it is to be calculated on a fair and reasonable basis and in accordance with the principles set out in paragraph 9 (Acknowledgements) of Schedule 5 (Service Charge);*

20. Returning to the terms of the private residential leases, the principal difficulty with the clause arises from the fact that the NIA is defined by reference to the Measuring Code. However, the Measuring Code does not contain a definition of NIA for residential premises. As such, in the Applicants' submission, the clause simply cannot be made to work as it is drafted. Ms Hares's evidence was that Plowman Craven (who had been engaged by the Applicants) advised that the were no net internal measurements available and that they would '*not do this as it is not a recognised unit of measurement for residential units*'. The tribunal was also informed that the current version of the Measuring Code mandates that measurement of residential premises be done on the basis of GIA.

21. One option to resolve this problem, suggested by Mr Maunder Taylor, would be to read the reference to the Measuring Code in the clause as subordinate to the requirement to measure based on NIA. However, the difficulty with this is how would NIA be defined? It appeared to be generally agreed that the definition of NIA for commercial premises as contained in the Measuring Code would be inappropriate for measuring residential premises. NIA in commercial premises excludes things such as bathrooms and corridors and it would be extremely odd if flats paid a different proportion of service charges based on the size of their bathroom(s). Certainly, there was no suggestion from either expert that NIA as defined for commercial premises under the Measuring Code would be a suitable basis for measuring NIA for residential purposes – and there does not appear to be any other standard or widely used definition of NIA for residential premises.

22. Mr Maunder Taylor was optimistic that if two surveyors were asked to agree a definition of NIA for the purposes of measuring the flats, they could come to an acceptable definition. However, the problem with this is (i) there is no certainty that any such agreement would in fact be reached; and (ii) moreover, it would not be applying the terms of the lease as the lease contains no definition other than the reference to the Measuring Code.

23. The experts provided an agreed statement that "*Gross Internal Area measurements, in accordance with RICS Measuring Code of Practice, is the nearest to that defined in the lease of Net Internal Area*". They also agreed that the proportions being charged are *not* based on Gross External Area "GEA") as the lessees have been informed but are based on a GIA measurement. However, the Estate Charges are apportioned on Gross External Areas whereas the apportionments used for the residential properties are based on Gross Internal Areas.

24. The Applicants' original statement of case stated that they had always used gross external area ("GEA") as the basis of measurement rather than NIA. However, following receipt of the expert reports, the Applicants

amended their case and instead submitted that the references to NIA should properly be read as reference to GIA.

25. It should be noted that the Octavia lease already contains a reference to GIA for the apportionment of the Block Service Charge. Accordingly, the Applicants contend that no issue arises in this regard. A separate issue arises in relation to apportionment of the Estate Service Charge, but this is addressed below.

26. On the question of how the tribunal should approach the question of interpretation, the parties made reference to the Supreme Court's decision in *Arnold v Britton* [2015] UKSC 1619. Lord Neuberger set out the principles as follows:

> *17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision 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. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*
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> *18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.*
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> *19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.*

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).

23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case.

27. Further, Lord Hodge, agreeing with Lord Neuberger, added the following:

76. This conclusion is not a matter of reaching a clear view on the natural meaning of the words and then seeing if there are circumstances which displace that meaning. I accept Lord Clarke's formulation of the unitary process of construction, in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, para 21: "[T]he exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the

parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

77. This unitary exercise involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated (Re Sigma Finance Corp ([2009] UKSC 2) [2010] 1 All ER 571, para 12 per Lord Mance). But there must be a basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used. The construct is not there to re-write the parties' agreement because it was unwise to gamble on future economic circumstances in a long term contract or because subsequent events have shown that the natural meaning of the words has produced a bad bargain for one side. The question for the court is not whether a reasonable and properly informed tenant would enter into such an undertaking. That would involve the possibility of re-writing the parties' bargain in the name of commercial good sense. In my view, Mr Morshead's formulation (para 67 above), on which his case depends, asks the court to re-write the parties' leases on this illegitimate basis.

28. In summary, the Applicants submitted the parties cannot have intended to contract on a non-existent or unworkable basis.

29. In contrast, the private residential lessees took the view that the wording is clear, i.e. expressly referring to NIA, and that the wording of the lease should be applied. However, it also appeared to be accepted by Mr Camarero and Mr Puvanesam that if the reference to the Measuring Code cannot properly be ignored when interpreting the meaning of paragraph 6.1, then it would be appropriate to use GIA as the method of measurement.

30. The tribunal is satisfied that there is an error in the lease and that the stipulation for 'net internal area (as defined by the Measuring Code)' in paragraph 6.1 is unworkable. We agree with Ms Mather's submission that the reference to the Measuring Code must be mandatory because without it there is no way to define NIA. However, this brings things back to the problem that the definition is defective. This is not a case of the tribunal being asked to correct a bad bargain; rather, it is an exercise in trying to make sense of what on its face would be a non-sensical bargain.

31. In attempting to ascertain the parties' objective intention, we give particular weight to the joint statement of the experts that "*Gross Internal Area measurements, in accordance with RICS Measuring Code of Practice, is the nearest to that defined in the lease of Net Internal Area*". Ultimately, we agree with the submission of Ms Mather that the only sensible definition would be akin to GIA. In the circumstances, the tribunal confirms that as a matter of interpretation, in paragraph 6.1 of part 1 of Schedule 6 to the private residential leases, the references to 'net internal area' can be read as 'gross internal area'.

32. However, that is not the end of the matter. The Applicants were clear that notwithstanding the argument as to whether references to NIA could be read as GIA, so far as the Estate Service Charge was concerned the way in which costs were apportioned was not on its face in accordance with the terms of the private residential leases. In other words, as Mr Beresford put it, the issue is not only one of what the appropriate method of measurement is, but also the issue of *what* is being measured.

33. As set out above, paragraph 6.1 of part 1 of Schedule 6 provides that the Estate Service Charge is "*to be calculated primarily on a comparison for the time being of the net internal area (as defined in the Measuring Code) of the Premises with the aggregate net internal area of the Lettable Areas of the Estate from time to time*". Key to this is the definition of 'Lettable Areas" which, as set out above, for residential flats refers only to the apartments themselves (and car parking spaces) – but not the residential common parts.

34. However, according to the Applicants, the actual methodology employed to calculate the estate service charge was on the basis of a 2-stage process as follows:

    - The total cost is divided up between residential ('**A**') and non-residential ('**B**'). Historically, the previous managing agents took the 'B' amount and charged this to Commercial occupiers in accordance with their lease terms. This leaves the 'A' amount to be charged to Residential occupiers. This initial split has always been done on the

basis of GEA, although it is the Applicants' position that, going forwards, this is still appropriate but should be conducted on the basis of GIA of the overall buildings rather than GEA of the overall buildings. This proposed change came about when considering the problem with the wording of 'net internal area' in the private residential (but not Octavia) leases and it was the Applicants' position that it will result in only a negligible difference.

- The 'A' amount is split between each apartment to determine what each individual leaseholder should pay. This is done by aggregating all of the GIAs of all of the apartments (plus Medical and Education) and then working out each apartment's percentage of that whole.

35. The application of this methodology has created a significant amount of controversy both in terms of procedure and its substance.

36. Mr Camarero submitted that this had not been apparent in the Applicants' statement of case; was effectively being sprung on the respondents at the hearing; and was something they had not had proper chance to consider – although it should be said there was significant cross examination of the Applicants' witnesses on this issue and the respondents all made submissions in relation to it. In response, Ms Mather made reference to two documents in the bundle suggesting that this issue had been canvassed earlier:

(1) A response to service charge queries from the previous managing agents, JLL, dated April 2021, which included a section setting out the basis of apportionment. However, Mr Camarero stated that this was sent to the Residents' Association and he did not receive a copy as he is not a member;

(2) An explanation of the methodology attached to the Nueva statement of case. In response, Mr Camarero's evidence was that this was an exercise undertaken by him trying to make sense of what was happening with the apportionment rather than a response to an issue being raised by the Applicants.

Moreover, the Applicants' initial position was that the issue as to the appropriateness of the Applicants' methodology was not in fact part of the application, although the Applicants ultimately did not oppose the tribunal making a finding on whether this methodology was in accordance with the terms of the lease.

37. This aspect of the proceedings is troubling. While it might not have formed part of the Applicants' pleading, the tribunal had nevertheless been asked to make a finding on the correct basis of measurement (NIA or GIA). This was presented as a matter of contractual interpretation. But to construe that part of the clause, it is necessary for the tribunal to look at the clause as a whole and indeed the wider contract. If the tribunal were to make a finding on one part of the clause while knowing that it was part of a wider issue as to whether the Applicants' apportionment was in accordance with the lease, it would make such finding either of little or no value or, worse, potentially misleading if and to the extent that it did not reflect the wider reality. It would also cast doubt on the value of the hearing given that the majority of time in terms of both witness evidence and submissions, was spent on the issue of the Applicants' methodology. Mr Willis strongly advocated that the tribunal should address the issue in our decision and while the tribunal appreciates the frustrations of respondents, particularly those expressed by Mr Camarero, in light of the matters noted above, and given that the tribunal heard full submissions on the point, it would be contrary to the overriding objective and proportionality not to address this point.

38. Turning to the substantive question, the Applicants expressed a clear rationale for the chosen methodology: namely that it was based on fairness. Specifically, it was said that in order for a common basis of measurement to be achieved for the estate calculation, the total GIA of the commercial buildings must be combined with the total GIA of all of the residential blocks so that all the common areas of both parts are included in the calculation to create commonality. To do otherwise, i.e. comparing the entirety of the commercial premises with only the actual apartments for the residential parts (for which the Respondents contend) would mean you are not working off a common basis of measurement.

39. However, notwithstanding the rationale for this methodology, the issue for the tribunal is whether it is in accordance with the terms of the private residential leases. The reason why this is a problem for the Applicants is due to the definition of 'Lettable Areas' in the private residential leases, which encompasses the entirety of the commercial buildings but for the residential parts, only the apartments and car parking spaces:

> *Lettable Areas means:*
> *(a) the Apartments in the Blocks;*
> *(b) all car parking spaces and storage areas (as designated from time to time by the Landlord) within the Car Park;*
> *(c) the Commercial Buildings and all associated areas designated from time to time by the Landlord as being exclusively for the use of such premises;*
>
> *…"*

40. Pausing there, it should be noted that the issue arises only in respect of the private residential leases. As set out above, the Octavia lease is less prescriptive and requires only that the apportionment of the Estate Service Charge is on a basis that is 'fair and reasonable'. Insofar as the Applicants' chosen methodology is based of fairness between the residential and commercial parts of the Development, the tribunal agrees and confirms that it is appropriate and in compliance with the terms of the Octavia lease.

41. Returning to the private residential leases, at times during the hearing, it was suggested on behalf of the Applicants that the issue only arose once NIA is read as GIA (or GEA). However, this cannot be correct because the issue arises from the definition of Lettable Areas, not from the basis of measurement – i.e. that the definition of Lettable Areas encompasses the entirety of the commercial buildings but for the residential parts, only the apartments and car parking spaces. In other words, whatever basis of measurement is used, it does not include the common parts of the residential areas in the calculation but does include the entirety of the commercial parts – and it was for this reason that it was suggested on behalf of the Applicants that such a basis of apportionment would be unfair.

42. A variation of this submission was that applying the interpretation contended for by the Respondents could lead to uncertainty insofar as the parts "*associated areas designated from time to time by the Landlord as being exclusively for the use of such* [commercial] *premises*" might vary each time commercial units were let. However, even if this were correct, such variance would not be a reason to depart from the clear meaning of the terms of the lease if that is what has been agreed.

43. In our finding, the Applicants' methodology, while understandable, is not in accordance with the provisions of paragraph 6.1 of part 1 of Schedule 6 to the private residential leases.

44. However, as an alternative, it was submitted that the Applicants had a discretion to adopt a different method of apportionment in any event by virtue of paragraph 6.2 of part 1 of Schedule 6. This raised two issues: (i) did paragraph 6.2 allow the Applicants to adopt the methodology that they have; and (ii) if so, is it contingent on notice first being served on the private residential lessees.

45. Dealing with the second issue first, Ms Mather sought to address the objection from Mr Camarero that no notice of variation had been provided. Specifically, the Respondents' submission was that any variation could only take effect from the giving of notice under paragraph 6.4. As no such notice had been given, any variation to the basis of apportionment under the lease was of no effect.

46. As set out above, paragraph 6.3 and 6.4 of part 1 of Schedule 6 provide as follows:

> *"6.3 The Landlord and/or the Company shall be entitled by giving written notice to the Tenant to vary the Tenant's Proportion from time to time as a consequence of any alteration or addition to the Block(s) or the Estate or any alteration in the arrangements for provision of services therein or any other relevant circumstances.*
>
> *6.4 Any variation in the Tenant's Proportion shall take effect from such date as the Landlord and/or Company may specify in such written notice having regard to the date of occurrence of the reason for such variation.*"

47. Variations to the basis of apportionment under paragraph 6.3 are permitted as a consequence of "*any alteration or addition to the Block(s) or the Estate or any alteration in the arrangements for provision of services therein or any other relevant circumstances*". It was not suggested that this was applicable in the present case. Rather, the point was that, in the Applicants' submission, the reference to variations in apportionment taking effect from the giving of notice under paragraph 6.4 is only to variations under paragraph 6.3. This is on the basis that paragraph 6.4 makes reference to 'such notice' – but only paragraph 6.3 and not paragraph 6.2 makes reference to the giving of notice. Further, it is noted that only paragraph 6.3 uses the language of 'variation' which is also referred to in paragraph 6.2. Instead, paragraph 6.2 uses the phrase 'adopt such other method of calculation'.

48. In the tribunal's determination, Ms Mather is correct as to the interpretation of paragraphs 6.3 and 6.4 and that no notice is required in circumstances where the landlord has adopted a different method of calculating the apportionment under paragraph 6.2.

49. This, then, comes back to the question of whether the Applicants have validly exercised a discretion under paragraph 6.2. As set out above, paragraph 6.2 provides as follows:

> *6.2 The Landlord and/or the Company may in its or their respective discretion having regard to the nature of any expenditure or item of expenditure incurred, or the premises in the Block or the Estate as the case may be which benefit from it or otherwise, the Landlord, the Superior Landlord and/or the Company may in its discretion:*
>
> *a. adopt such other method of calculation of the proportion of the expenditure to be attributed to the Premises as is fair and reasonable in the circumstances;*
> *b. if it is appropriate:*
> *(I) attribute the whole of the expenditure to the Premises;*
> *(II) attribute a fair proportion of any expenditure to another person which has benefitted from the relevant service before attributing the remainder of the expenditure to those who would otherwise be liable; and/or*
> *(III) allocate the whole or part of any expenditure to a different head of expenditure than that to which it would ordinarily be allocated as its [sic] fair and reasonable and proper in the circumstances.*

50. The Applicants rely on paragraph 6.2(a). Ms Mather submitted that paragraph 6.2(a) allows for the exercise of discretion to make a permanent and blanket change to the basis of apportionment as the

Applicants have done in the present case. In particular, it was said that the provision can be read as follows:

> "*The Landlord and/or the Company may in its or their respective discretion having regard to the nature of … the Estate … adopt such other method of calculation…*

As such, it was submitted that paragraph 6.2 gives the Applicants a discretion to adopt a different method of calculation for various reasons, including the nature of the Estate.

51. However, we do not consider this to be a valid reading of the clause. In particular, it ignores the words the words immediately following the word 'Estate', i.e. '*as the case may be which benefit from it or otherwise*'. In our finding, those words must relate back to the earlier reference to expenditure or item of expenditure. In other words, on proper interpretation, the clause gives a power to the landlord, '*having regard to any expenditure or item of expenditure or the premises in the Block or the Estate as the case may be which benefit from <u>it</u>* [i.e. the expenditure] *adopt a different method*'. The reference to the Estate or block is to the estate or block benefitting from such expenditure. Thus, the discretion arises by reference to particular expenditure. It does not give a discretion to adopt a blanket change to the method of calculation for everything.

52. In the circumstances, the tribunal finds that the methodology for the apportionment of *all* Estate Service Charges adopted by the Applicants is not one that they are entitled to impose pursuant to paragraph 6.2 of part 1 of Schedule 6 to the private residential leases. Accordingly, we find that insofar as Estate Service Charges have been apportioned in accordance with such methodology, such apportionments are not in accordance with the provisions of the private residential leases.

<u>Weighting of apportionment</u>

53. While the principal basis for apportioning estate service charges is on a square footage basis as per paragraph 6.1 of part 1 of Schedule 6 as set out above, there is also a discretion under paragraph 6.2 to apportion

particular costs to relevant occupiers based on their use or level of benefit. According to the Applicants, certain charges are currently apportioned this way:

a. Electricity – as incurred per block

b. Cleaning – as incurred per block

c. Loading Bay – 70% commercial, 30% residential

d. General Manager – 40% residential, 60% estate all units

e. Facilities Manager – 40% commercial, 60% residential

f. Car park – split between occupiers who own a car parking space

54. At the start of the hearing it was agreed by the Respondents that apportioning by reference to use was appropriate as a matter of principle. Indeed, it appears to be what is specifically envisaged in paragraph 6.2 of part 1 of Schedule 6 to the private residential leases as set out above.

55. However, no evidence was heard, and no finding is made, as to the appropriate weighting for any particular type of expenditure (i.e. the examples referred to above) and the appropriate weighting in each individual instance will need to be considered at a future hearing if and to the extent that it remains the subject of challenge.

Apportionment of the estate manager's time

56. The Applicants seek a declaration of the correct way in which the cost of the Estate Manager should be apportioned in order to establish the leaseholders' liability to contribute to such costs. It should be noted that the title 'Estate Manager' is used interchangeably with 'Estate Director' and 'General Manager. There was no dispute as to the recoverability of the cost of these positions as a matter of principle. Rather, the issue related simply to the question of apportionment.

57. The dispute before the tribunal related principally to the historic apportionment and specifically the fact that the costs of the Estate Director under the previous managing agents, JLL, were allocated to the Estate Service Charge in their entirety. It was submitted, principally on behalf of the Residents' Association, that this was not appropriate. Mr Willis argued that that the previous manager, Kim Southgate employed two people, one of whom worked solely on the commercial parts. It was also said that Kim Southgate spent part of her time solely on the commercial elements of the Development. As such, it was submitted that simply applying the costs to the Estate Service Charge was inappropriate.

58. Mr Atterwill's evidence was that he regularly met with Kim Southgate and others and that generally estate issues were discussed. He also stated that minutes of meetings were not taken and that he was not aware of minutes of meetings with the managing agents.

59. While we note the Residents' Association's frustration as to the lack of minutes of meetings, in the tribunal's determination there was simply not sufficient evidence to reach a finding that allocating the costs to the Estate Service Charge was inappropriate. The tribunal also notes that a proportion of the costs under the Estate Service Charge will be allocated to the commercial lessees in any event. In the circumstances, we accept the Applicants' evidence that it was appropriate to allocate such costs to the Estate Service Charge and consequently, the Respondents' challenge on this ground does not succeed.

60. Finally, we note that according to the Applicants, the current position is that Rendall & Rittner split the cost of the General Manager, Facilities Manager and Estate Administrator 60% to the estate service charge and 40% to the residential service charge. Mr Camarero, in particular, disputed this apportionment. However, as the tribunal did not hear evidence on this, no finding is made as to the current basis of apportionment and we confirm that this is a matter which can be raised at a future hearing.

Apportionment of office costs

61. The arguments on this issue followed on from the submissions in relation to the apportionment of the estate manager's time. As above, no submissions were made that such costs were not recoverable under the terms of the lease as a matter of principle.

62. Rather, Mr Willis made similar submissions to above as to how such costs had been apportioned, namely that there were three people in the office, one of whom was wholly dedicated to the commercial parts of the Development and that a proportion of Kim Southgate's time was also dedicated to the commercial parts.

63. According to the Applicants, the confusion arose in relation to the Touchpoint System which fell under the category of 'Office Costs' when JLL were managing agents. It was submitted that it was not controversial that if a proportion of the Estate Office Costs related exclusively to the Commercial Buildings, that amount should only be and was only recharged to the occupiers of the Commercial Buildings. The Applicants' evidence was that they have not charged the leaseholders for services provided exclusively to the Commercial Buildings. As set out in Mr Atterwill's witness statement at paragraph 14 each office block was charged separately for their own Touchpoint System. As such, the sums that were charged under the Estate Service Charge related to software attributable to the estate; costs did not appear on the Estate Service Charge where they were purely commercial.

64. In the circumstances, the tribunal finds that, again, there was not sufficient evidence to displace the submission that the costs are properly allocated to the Estate Service Charge for the purposes of apportionment. We accept the Applicants' evidence on this issue and the Respondents' challenge on this issue does not succeed.

Contribution of the education facility

65. By virtue of the section 106 agreement, the Education Facility only contributes towards service charge costs from which it directly benefits.

As a consequence, the Education Facility only make a limited contribution to the Estate Service Charge.

66. The effect of this is that there is an amount which would otherwise be attributable to the Education Facility for a proportion of the general running costs of the estate which are not paid by the Education Facility. Mr Puvanesam submitted that this 'shortfall' should be made up by the Applicants rather than the residential lessees paying a higher proportion where the Education Facility does not contribute. At the hearing, Mr Camarero also pointed out that the tribunal had not been provided with a copy of the Education Facility's lease and so did not know the precise basis of its contribution.

67. In support of the submission that any shortfall should not be borne by the Applicants, two provisions of the lease are relied on:

(1) First, the Applicants note that in paragraph 9.1(a) of Schedule 5 to the private residential leases, there is an acknowledgement that:

> *"the lessees of the Affordable Housing, the Health Centre and/or the Education Accommodation may not make a full (or any) contribution to the cost of providing the Estate Services and/or the Block Services, but any such contribution made will be credited in reduction of the cost of providing the Estate Services and/or the Block Services (as applicable);"*

(2) Secondly, pursuant to paragraph 1.1 of part 1 of Schedule 6:

> "*The Tenant shall pay to the Landlord a Service Charge… in accord with the provisions of this Schedule 6…, the purpose of which is to enable the Landlord to recover from the Tenant the Tenant's due proportion of all expenditure overheads and liabilities which the Landlord or the Company or any Superior Landlord may incur in and in connection with providing and/or supplying the Services and/or complying with their respective obligations in this Superior Lease, this Lease and/or under any legal obligation binding on any of the Superior Landlord, the Landlord and/or the Company with the intention that the Superior Landlord, the Landlord and/or the Company should be able to recover all of the Service Costs incurred.*"

68. In the tribunal's determination, the fact that the tribunal has not seen the education facility's lease does not preclude a determination as to the interpretation of the terms of the private residential leases. In our view the final part of paragraph 1.1 of part 1 of Schedule 6 – i.e. that the landlord "*should be able to recover all of the Service Costs incurred"* - is

significant. It goes against any suggestion that in some circumstances there may be a shortfall which will be borne by the Applicants. Conversely, there is nothing to suggest that the Applicants should *not* recover a proportion of the overall costs which would otherwise be payable by party which does not have to pay having regard to the terms of its own lease such as that of the Education Facility.

69. Similarly, the provision in Schedule 5 set out above necessarily implies that the private residential lessees' contribution may change for some types of expenditure because it specifically provides that where contributions *are* made by the Affordable Housing, the Health Centre and/or the Education Accommodation, they will be credited against the overall cost. In other words, the private residential lessees will pay less in those circumstances.

70. In the circumstances, the tribunal finds in favour of the Applicants on this issue and determines that, as a matter of interpretation, the Applicants are not required to bear any shortfall for costs by virtue of the fact that the Education Facility is not required to contribute to such costs.

Contribution to security, cleaning of the square and maintenance of the play equipment

71. The issue is whether, as a matter of principle, the leaseholders are liable to pay towards the cost of providing security, cleaning of the communal square and maintenance of play equipment. As with other items in dispute, we make no findings as to quantum and any arguments about reasonableness can be raised at the next stage of the proceedings.

72. On the question of principle, no challenge was made by the Residents' Association. Rather, the challenge was brought by the Nueva Respondents and Mr Puvanesam.

73. There was no suggestion that such costs were not recoverable under the terms of the private residential leases and for the avoidance of doubt, the tribunal accepts that they are recoverable under paragraph 1 of part 3 of

Schedule 6 to the lease. Nevertheless, the Nueva Respondents and Mr Puvanesam pursued their objection on the basis that the residents do not benefit from the security (and cleaning and maintenance of the square).

74. On behalf of the Nueva Respondents, Mr Camarero noted that the reason that the square is open to the public and moreover, that security is required is due to the terms of the section 106 agreement between the developer and Westminster Council. The provision in the private residential leases requiring the lessees to meet the costs of such security makes the lessees liable for the fulfilment of the landlord's obligations under the section 106 agreement. Mr Camarero submitted that the question of fairness was important: leaseholders had no right to challenge the section 106 agreement. In this regard, he noted that after seven years, the landlord could negotiate to try and change the status quo under the section 106 agreement (for example making the square a closed square) but had no intention of doing so. The result, submitted Mr Camarero, was that leaseholders were paying for services to the community. Ultimately, he submitted that the term was unfair as, contrary to the Unfair Terms in Consumer Contract Regulations 1999, it had not been individually negotiated and created a significant imbalance (it should be noted that the Regulations are effectively replaced by the Consumer Rights Act 2015 for contracts entered into after 1 October 2015). In his submission, leaseholders were having to pay for a benefit for others: leaseholders had very limited rights over the square other than rights of entrance and egress. Mr Puvanesam broadly agreed with these submissions.

75. The tribunal does not accept the Respondents' submissions on this issue. We do not agree that, as a matter of fact, the Respondents do not derive a benefit for the services in question. Indeed, the tribunal agrees with the Applicants that were no such services provided, this would be likely to generate complaints from other residents – although in saying this we make no comment or findings as to the quantum of such costs which will be an issue for the next hearing. However, even if it could be shown that residents did not benefit from such services, the respondents are under a contractual obligation – which was not in dispute – to contribute to such services. We further do not agree that such provisions are some how

unfair or unlawful. The respondents were aware of the physical make-up of the Development when they acquired their leases (i.e. that it was an open square) and were aware of the terms of the lease. They also had the opportunity to take legal advice. Further, we were not made aware of any *obligation* on the part of the Applicants to negotiate for or change the nature of the Development so that it would no longer be open to the public or that failure to do so would breach any obligation to leaseholders.

76. In the circumstances, the tribunal rejects the challenge to this head of costs on the question of principle. Challenges on quantum will be considered at the next stage of the proceedings.

Events Manager

77. The issue before the tribunal is whether leaseholders are liable to pay towards the cost of an events manager who was employed for the period 1 January 2019 to 22 May 2020. This was an issue which all respondents, including Octavia, contested – all contending that the costs are not recoverable under the terms of the lease.

78. According to Ms Hares, the "*events manager's role was to organise events for the residents and some which were open for the public to attend to create some "life" in the spaces and a sense of community between the residents*".

79. Clause 5.1 sets out the services to be provided under the terms of the private residential lease.

> Clause 5.1 provides:
> *Provision of Services*
> *5.1.1 (Subject to and conditional upon payment of the Service Charge by the Tenant) the Company covenants with the Landlord and the Tenant to use its reasonable endeavours to provide or procure the provision of the Services on the basis set out in the succeeding provisions of this Clause 5.1 (Provision of Services).*
> *5.1.2 The Company may from time to time (but is not obliged to) appoint Managing Agents to carry out and procure the provision of Services or any of them and collect the Service Charge on behalf of the Landlord and/or the Company and shall give notice to the Tenant of the apportionment and identity of the Managing Agents so appointed from time to time.*

5.1.3 The Company may provide or procure provision of the Services in such manner and to such standard as the Company or its Managing Agents in their absolute discretion shall determine provided that the manner and standard of Service will at all times be consistent with the principles of good estate management and the use of the Block and Estate Common Parts as part of a mixed-use development with car parking and ancillary services.
5.1.4 …
5.1.5 If the Superior Landlord, the Landlord, the Company or the Managing Agents at any time reasonably consider that it would be in the general interest of the tenants of the Estate, they shall have the power to add to, discontinue or vary any of the Services which in its or their opinion shall have become impractical, undesirable or obsolete.

Paragraph 1 of part 3 of Schedule 6 sets out the Estate Services. While it was not disputed that none of the express services set out in paragraph 1 make reference to or would allow for an events manager, the Applicants rely on paragraph 1.29 which permits the Applicants to recover charges for:

"*…other services to the Estate as the Landlord, the Company and/or the Superior Landlord may determine (in their absolute discretion) from time to time.*"

80. It should be noted that the Octavia lease is in substantially the same terms so far as is material to this issue, paragraph 1.27 of part 3 of Schedule 5 to the Octavia lease contains the equivalent provision to that set out above. The disparity in the numbering is because the private residential leases contains two additional services, although they are not relevant for present purposes.

81. Reference was also made to paragraph 1.1(b) of part 2 of Schedule 6 which within the list of 'Basic Service Costs', allows for the appointment, amongst others, of '*… other professional persons to arrange and supervise the execution of any works or the provision of any services in or on the Estate*' (an equivalent provision is contained at paragraph 1.1(b) of part 3 of Schedule 5 to the Octavia lease).

82. The Applicants submitted that the appointment of an Events Manager was recoverable under the terms of the leases. Further, it was said that if lessees chose not to participate in the activities, that was a matter for them but did not negate the Applicants' ability to exercise their discretion as

envisaged by the Lease and recover the cost of employing an Events Manager.

83. In response, Mr Beresford submitted that the 'sweeper' clause set out above was not sufficient to allow the Applicants to recover the costs of an Events Manager. While accepting that every contract must be construed on its own terms, Mr Beresford submitted that as a general proposition, the tribunal should be slow to allow recovery on the basis of a sweeper clause, where there was no specific power to recover the charges of an events manager.

84. Further, he contended that the Basic Service Costs allows for the recovery of costs of management but limited to the types of management set out in the sub-clauses to paragraph 1.1. He submitted that 'events' could not fall within general management or administration envisaged by those provisions and therefore could not fall within para.1.1(b) of the Basic Service Costs as set out above.

85. The Residents' Association also challenged the principle of such costs. Mr Willis noted that the service charge plan provided to leaseholders did not contemplate the appointment of an Events Manager – although accepted that this did not trump the provisions of the lease itself.

86. In the tribunal's determination, paragraph 1.29 (and the equivalent provision in the Octavia lease) does not allow for the appointment of an events manager. As noted above, the lease does not contain any express provision to allow the recovery of an events manager through the service charge. While paragraph 1.29 does give the Appellants a discretion to recover charges for 'other services', we do not accept that this can extend to the employment of an events manager. In construing the extent of this discretion, we have regard to the other services provided for in the lease which are concerned with the proper management and administration of the Development: the role of the Events Manager was of a different nature to those other services. It is also important to have regard to the wording of this clause. In particular, it should be noted that it allows for "… *other services to the Estate*…" (emphasis added).

87. As a matter of ordinary language, it is doubtful that the employment of an events manager is a service *to the Estate* - on the Applicants' own evidence, some were open to the wider public. Accordingly, and in any event, we do not consider that the employment of an events manager can fall within this provision.

88. Similarly, we agree with Mr Beresford that paragraph 1.1(b) of part 2 of Schedule 6 (and the equivalent provision in the Octavia lease) does not assist the Applicants. Although there is a reference to 'other professionals', this must again be considered against the clause as a whole and the types of management and administrative functions which are envisaged – these are typical functions associated with the efficient and proper management of the Development. We determine that the reference to 'other professionals' does not extend to the employment of an events manager in this context.

89. In the circumstances, we conclude that the costs of an events manager are not recoverable under the terms of the residential leases.

Christmas Lights

90. The argument put forward by the Residents' Association, and also on behalf of Octavia, was that the cost of Christmas lights is not recoverable under the terms of the leases.

91. The Applicants rely principally on clause 1.11 of part 3 of Schedule 6 to the private residential leases, which allows the Applicants to recover charges for:

> "*furnishing, carpeting and equipping and ornamentation of the Estate Common Parts, the Car Park, the Community Building and the Residents' Amenity Area*."

The Octavia lease is in similar terms.

92. It was argued that Christmas decorations properly falls within the above provision as being 'ornamentation'. Ms Mather cited the Oxford Dictionary definition of "Ornamentation" as: "*The use of objects, designs,*

etc. to decorate something". It was submitted that Christmas lighting and decorations are ornamentation and plainly fall within the Estate Services. Accordingly, it was said that the Applicants are entitled to provide and charge for such service.

93. Mr Beresford submitted that this clause only entitles the landlord to charge for the costs of installing ornamentation that is intended to have *permanent* presence on the Development (which would exclude Christmas decorations). In this regard, it was also noted that the other items that this clause deals with (furnishing and carpeting) are items which are likely to have a permanent presence on the Development. According to Octavia, it cannot have been the parties' intention that this clause would entitle the Applicants to charge for the costs of annually putting up and taking down Christmas decorations.

94. The Residents' Association also challenged the principle of such costs. Mr Willis noted that the service charge plan provided to leaseholders made no reference to Christmas lights – although, as above, accepted that this did not trump the provisions of the lease itself.

95. The tribunal determines that the reference to 'ornamentation' can include Christmas decorations. The fact that they are temporary does not mean that they cannot be classed as 'ornamentation'. Moreover, the fact that the words '*furnishing, carpeting and equipping*' suggest a degree of permanence does not mean that the same must also be true of 'ornamentation'.

96. In the circumstances, we determine that such costs are recoverable as a matter of principle. However, as with other findings in this Decision, this in no way precludes a challenge as to the quantum of such costs at the next stage of the proceedings.

Procurement and administration fees

97. At the start of the hearing, the respondents agreed that procurement fees and staff administration fees were recoverable, as a matter of principle,

under the terms of the leases. However, this subject to challenges as to reasonableness which can be made at the next stage of the proceedings.

98. In the circumstances, the tribunal confirms that such charges are recoverable under the terms of the leases.

Miscellaneous matters

99. Four other issues were raised on behalf of Nueva IQT SL and were identified in the Directions of 8 March 2022. Although the tribunal did not receive detailed submissions on all of these points, we comment below having regard to the evidence that was heard:

- *Whether the applicants have credited against the costs of providing the Estate Services, any net income derived from the letting of the Community Building*: this will be a matter for the next stage of the proceedings;

- *The treatment of the Residents' Amenity Area and its inclusion in the calculation of the Residential Percentage*: the tribunal's findings in relation to the apportionment of the Estate Service Charge is addressed above;

- *Anomalies in the sizes of apartments in Cleveland Street and 7 Pearson Square, and the Education accommodation and Health Centre*: the tribunal did not hear evidence on this specific matter. However, we have set out above our determination on the interpretation of how service charges should be apportioned under the residential leases;

- *The use of GIA (sic) rather than NIA to calculate the Residential Service Charge, and the rounding of contribution figures*: this has been addressed above.

Section 20C

100. Finally, the tribunal notes that there are outstanding applications under section 20C of the Landlord and Tenant Act 1985, i.e. that the costs

incurred by the Applicants should not be regarded as relevant costs to be taken into account in determining the amount of any service charge.

101. At the end of the oral hearing, the tribunal indicated to the parties that it would give directions for the section 20C application at the end of this Decision. In the circumstances, it is directed as follows:

(1) The Respondents must provide any written representations in support of an application under section 20C by **10 April 2023** to the Applicants and the tribunal;

(2) The Applicants may respond by **24 April 2023**;

(3) The Respondents may serve a brief reply by **2 May 2023**;

(4) By the same date (2 May 2023), the parties should notify the tribunal whether they wish for the application under section 20C to be determined on the papers or whether they wish for there to be a hearing.

102. Separately, the tribunal will list a case management hearing to discuss the next stage of the proceedings in due course.

Name: Judge Sheftel **Date:** 9 March 2023

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).