FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal Case reference	:	**CHI/00MW/LSC/2022/0059** **CHI/00MW/LSC/2022/0073**
County Court claim	:	H4GQ4T5N
Properties	:	Chalet 23 and others Sandown Bay Holiday Centre, Yalverland Road, Sandown, Isle of Wight, PO36 8QR
Applicant	:	Moor Construction Limited
Representative	:	Joshua Dubin of Counsel instructed by Boyes Turner
Respondents	:	Michael Kirby, Chalet 23 (1) and George Phipps, Chalet 12 (2) Sharon Cotton Chalet 20 (3) Trevor Noad Chalets 21 and 184 (4) Andrew Waruszynski, Chalet 25 (5) Gillian Cotton, Chalet 26 (6) Trudi Cotton, Chalet 28 (7) James Randall, Chalet 48 (8) Michael Cox Georgina Cox, Chalet 52 (9) Rowena Barlow Carl Barlow, Chalet 60 (10) June Phipps, Chalet 88 (11) Keith Allingham, Chalet 127 (12)
Representative	:	Charles Knapper of Curtis Whiteford Crocker Solicitors
Type of application	:	Transferred Proceedings from County Court in relation to Service Charges Section 27a Landlord and Tenant Act 1985- determination of service charges S20ZA Landlord and Tenant Act 1985 dispensation from consultation

Tribunal member(s)	**:**	Judge J Dobson Mr K Ridgeway MRICS
County Court Judge	**:**	Judge J Dobson
Dates of Hearing	**:**	23rd February 2023 and 3rd March 2023
Date of Re- convene	**:**	30th March 2023
Date of Decision	**:**	12th June 2023

DECISION

Those parts of this decision that relate to County Court matters will take effect from the 'Hand Down Date' which will be the date this decision is sent to you.

Summary of the Decision of the Tribunal

1. **The service charges demanded by the Applicant in the proceedings from various of the Respondents and in dispute for the service charge years 2017- 2018 to 2022 (which is not all of the service charges for any given period) are payable and reasonable in the overall sum of £589.77 per chalet, which sum is comprised of the following amounts in respect of the particular elements, per chalet, of service charge in dispute:**

   Playground reserve charges £ 35.70
   Repairs to paths and rebuilding retaining walls £ 394.47
   Contributions to reserve funds/ general contingency £ 159.60

2. **The service charges in respect of insurance demanded by the Applicant in the proceedings from the 1st Respondents is payable and reasonable in the sum of £181.92.**

3. **As to costs, firstly the Applicant may not recover the costs of the proceedings, whether solicitor's costs, disbursements of managing agent's fees, as service charges.**

4. **As to costs between the Applicant and the First Respondent, any entitlement of either of those parties to costs and the summary assessment of such costs, if not agreed, will be determined following receipt of any representations from those parties.**

Summary of the Decision of the County Court

5. **The Applicant succeeds against the Respondent in the sum of £421.07 in respect of the claim for service charges demanded between 20th February 2020 and 25th February 2021.**

6. **The Applicant succeeds in the sum of £181.92 in respect of the claim for insurance.**

7. **The Applicant succeeds in respect of ground rent in the sum of £206.93.**

8. **The Applicant is entitled to interest on the total of £809.92 of £108.00.**

9. **The remainder of the Applicant's claims are dismissed.**

10. **As to costs, firstly the Applicant may not recover the costs of the proceedings, whether solicitor's costs, disbursements of managing agent's fees, as service charges.**

11. **As to costs between the Applicant and the First Respondent, any entitlement of either of those parties to costs and the summary assessment of such costs, if not agreed, will be determined following receipt of any representations from those parties.**

Background

12. The Applicant company (company number 03008262) is the freeholder of Sandown Bay Holiday Centre ("The Park"). The director of the Applicant is one Mr Richard Lundbech. The Applicant is at least in part a building/ construction company, although also the owner of various properties in Hampshire, including the Park.

13. The former owner who operated the Park had gone into receivership in 2011. The Applicant purchased from the administrators of the former owner on 13th January 2017. The Applicant employs a managing agent to manage the Park. That agent was formerly Daniells Harrison which had indeed managed the Park since 2011 when first appointed by the receivers of the former owner. More recently, January 2011, Daniells Harrison were taken over by Eddisons Commercial Limited.

14. The 1st Respondent is the lessee of Chalet 23 ("the Property"), having become so back in 2007. The other Respondents are the lessees of the

other chalets ("the Other Chalets ") listed above, save for Michael and Georgina Cox who are no longer the lessee of Chalet 52, having sold that in 2022. A schedule was provided by the Applicant of the respective purchase dates, of which six post-date the Applicant's purchase of the Park.

15. The Park is a holiday park, as the name indicates, and not a residential park. It is located on a hillside to the east of the island, by the coast and on the former site of military buildings, of which a barrack block and later extensions to it became a building the building referred to as the Clubhouse (which term is adopted in this Decision). There are 187 single- storey holiday chalets on the Park. Those are brick and block constructions not mobile homes. Adjacent to the Park is the former site of a Victorian gun battery.

Procedural History

16. The Applicant filed a claim in the County Court Business Centre under Claim No. H4GQ4T5N by Claim Form dated 27th October 2021 [3- 4] in respect of sums said to be due from the 1st Respondent lessee. The claim related to unpaid service charges, insurance (stated separately to service charges more generally), ground rent, interest and costs demanded between 20th February 2020 and 25th February 2021. The stated value of the claim on the Claim Form was £2884.19, excluding the court fee paid, which reflected that value and excluding legal costs on issue (although the £2884.19 also included £180 legal costs said to be payable in accordance with the terms of the Lease).

17. The 1st Respondent filed a Defence dated 30th November 2021 [6 onwards], which included an argument that no compliant demands had been made and also sought a transfer to the Tribunal.

18. The case was subsequently transferred to the administration of the Tribunal and for the determination by the Tribunal of the payability and reasonableness of the residential service charges and also determination by the Tribunal Judge sitting as a County Court Judge of the Court elements, pursuant to the Order of District Judge Grand dated 12 April 2022. The County Court elements of the case had been allocated to the Small Claims Track. The application was given the first above-listed case number.

19. An application was separately made by the 1st and the other Respondents dated 24th June 2022 for a determination by the Tribunal as to the payability and reasonableness of seven aspects of the service charges for the service charge years 2017- 2018 to 2022 inclusive. The scope of that application therefore extends beyond that of the claim against the 1st Respondent and includes the entire period of ownership of the Park by the Applicant. Consequently, the Tribunal decision is required to address both the period of the Applicant's claim and the other relevant years, the former of which will be relevant to the County Court but the latter of which will not. That was given the second above-

listed case reference. The costs which the service charges in dispute were demanded to contribute to amounted to very broadly something in the region of £350,000. Given that such costs are divided between the lessees, the sums were necessarily rather smaller per lessee.

20. In addition, the Applicant has, on 23rd February 2023- the final hearing date (see below) made an application for dispensation from consultation requirements in respect of major works previously carried out. That application is made in respect of each of the Respondents. The Applicant is properly the applicant, and the Respondents are properly the respondents to that application. Necessarily, that application did not form part of the bundle but no specific pages of it require mention in this Decision. It was not given a separate reference number given its timing.

21. As previously identified in Directions, the Respondents, whilst so termed, are in practice the applicants in respect of their above applications to the Tribunal and so to any extent that any burden of proof or otherwise may apply to the Tribunal applications, it applies to the Respondents as being the applicants in those applications and/or to the Applicant as respondent in those applications.

22. There have been various Directions given, including at two case management hearings. The parties requested that the case was stayed for a time to facilitate a potential resolution of the dispute, although the case was not in consequence stayed. Rather dates were put back to build in a time for any resolution to be achieved. As will be apparent, that did not enable matters to be resolved in the event.

23. The Applicant was directed to provide a bundle for the final hearing and did so. The bundle comprises, including the index, of 673 pages.

24. The bundle helpfully included plans of the Park and various photographs of the Clubhouse, both as it formerly looked [460-478] and following the demolition of various former parts of it. In light of those and the other information contained within the bundle, the Court and Tribunal were content that it was not necessary to inspect the Park in order to determine the particular issues raised in this case. The parties had not requested that an inspection take place.

25. It was necessary to arrange for the Tribunal to reconvene to consider matters further, which occurred on 30th March 2023, as regrettably being the first date on which the Tribunal members were both available. Necessarily matters remained in abeyance until then.

26. There are several different elements and quite a number of determinations required, some involving findings of fact. The length of the Decision itself reflects that. The different elements are dealt with in turn and with sub- headings identifying them for ease of reference.

27. The Tribunal and Court nevertheless sincerely apologise for the delay in the provision of this Decision since the reconvene, which exceeded expectations.

28. Whilst the Court and Tribunal make it clear that they have read the bundles in full, many of the documents are not referred to in detail, or in many instances at all, in this Decision, it being unnecessary to so refer. Where the Court and/ or Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that they have been ignored or left out of account. Insofar as reference is made to any specific pages from the bundle in this Decision, that is done by numbers in square brackets [ ], as occurs in the preceding paragraphs where appropriate, and with reference to PDF bundle page-numbering. Much of the documentation, for example pages of invoices and supporting documents [principally 247- 459], was the subject of limited if any mention.

29. This Decision seeks to focus on the key issues and, not least given there are several different elements to this case, does not cover every last factual detail. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Many of the various matters mentioned in the bundle or at the hearing do not require any finding to be made for the purpose of deciding the relevant issues in the case. Findings have not been made about matters irrelevant to any of the determinations required. Findings of fact are made in the balance of probabilities.

The Lease

30. A copy of the original lease of the 1st Respondent of Chalet 23 was provided within the bundle [91 onwards]. That lease ("the Lease") is dated 23rd June 2000. The parties to this dispute were not the original contracting parties. The term of the Lease is 125 years from 1st January 2000.

31. It was common ground that the leases held by the other Respondent are in the same or substantively the same terms at least in respect of any provisions relevant to the determination of the matters for determination in this case, although not it was said in identical terms.

32. There are certain relevant definitions in the Lease, including, most notably, the following:

> "The Estate"- the freehold land and property known as Sandown Bay Holiday Centre (Recital paragraph (1))."
>
> And "the demised premises"- the holiday chalet plus associated rights described in the First Schedule.

33. Clause 6(3) provides the Applicant has an obligation to:

"Maintain in good substantial repair the structure and exterior of the demised premises (as the same is further defined by Clause 1 Part 1 of the Fifth Schedule hereto) and all such sewers drains pipes wires party structures and other conveniences and parts of the Estate as may be enjoyed or used by one of the chalets in the Estate in common with others"

34. The Applicant is also (clause 6(1)) required to insure and keep insured the Property and the Other Chalets.

35. The costs and expenses to which the Respondents are required to contribute are provided for in the Fifth Schedule to the Lease [109 onwards]. Part I of the Schedule relates to the particular chalet demised to any given Respondent. Paragraphs 1. and 2. of the Fifth Schedule require the Respondents to pay repairing, cleaning and decorating costs and the cost of insuring the demised premises.

36. Part II of the Fifth Schedule identifies costs related to the wider Estate to which the Respondents must contribute. It merits setting those out relatively fully, given that is where the heart of the dispute lies. The costs are in respect of the following:

"1. All maintenance repair renewal cleansing and decoration effected for the purpose of keeping in good and substantial repair
   (a) The boundary walls and fences of the common parts of the Estate
   b) The common access roads footpaths forecourt yard and pathways within the curtilage of the Estate (including the necessary lighting thereof)
2. The maintenance in good working order and repair of all sewers drains channels watercourses gutters rainwater and soil pipes sanitary apparatus water tanks wires and cables in under and upon the Estate and serving the same and excluding nevertheless any which exclusively serve any one chalet or other building in the Estate
3. .....
4. Keeping the gardens and grounds of the Estate generally in neat and tidy condition and tending and renewing all lawns flower beds shrubs and trees forming part thereof and keeping the same planted free from weeds and the grass cut as the Lessor considers necessary
5. The costs of periodically inspecting examining maintaining and overhauling any part of the Estate for the purpose of performing the Lessors obligations hereunder and any other costs properly incurred by the Lessor for the purpose of complying with such obligations
6. .....
7. The costs of insuring the Estate in respect of any risks for which the Lessor may be liable as an employer of persons working on the Estate in connection with the services referred to in this Schedule or as owner of the Estate or any part thereof (but excluding the individual chalets and other buildings thereon)
8. The cost of supplying providing overhauling and keeping in good and serviceable order and condition all appurtenances appointments fixtures and fittings bins receptacles tools appliances materials equipment and other things which the Lessor may deem desirable or necessary for the maintenance appearance upkeep or cleanliness of the Estate or any part thereof

9. All costs incurred in provision and supply of any other services or facilities relating to the Estate or part of it provided by the Lessor from time to time during the Term and not expressly mentioned herein
10. The establishment and maintenance of a reserve fund to provide for any items of future capital expenditure foreseen by the Lessor
11. The fees of the lessor and the Lessor's agents for the general management of the Estate and all other expenses (if any) incurred by the Lessor in and about the maintenance and convenient management and running of the Estate
12. .....
13 .....
14. When any repairs redecorations or renewals are carried out by the Lessor under either part of this Schedule it shall be entitled to charge as the expenses or costs thereof of its normal charges (including profit in respect of such work)

37. The obligation on the Respondents to make the relevant payments is contained in clause 3(1) of the Lease in respect of the rent. The Respondents are also required by clause 3(3) to repair and maintain the demised premises, with related obligations in clause 4.

38. The obligation to pay the service charges is contained in clause 5 of the Lease. The level of contribution of the 1st Respondent to service charges is provided for in and is stated to be the full costs of insurance of the Property and 1/188th of the costs of the Applicant fulfilling its other obligations. The same applies to the other Respondents in respect of the insurance for the Other Chalets and the Applicant's other obligations. As to why 1/188th where there are 187 chalets was not made clear.

39. The service charge mechanism provides (clause 5 (a)) for the Applicant to estimate the service charges for the given subsequent year by 31st August. The service charge year runs from 1st September to 31st August of a given year.

40. The estimated service charges are to be the estimated amount required to meet the obligations in the Fifth Schedule for the coming year, which shall be based on the previous year's expenditure but allowing for costs reasonably to be foreseen beyond that. The Applicant may also (5(b)) include an additional sum if for any reason it is apparent that an estimate based on the above will not cover the whole cost to be incurred in the coming year, in which case the Applicant may determine the estimated additional amount.

41. The Applicant must by 31st August in any given year determine the actual expenditure in the preceding year and supply to the lessee a copy of the accounts in respect of those, producing such supporting receipts as are available (5(c)). There is then provision for a balancing credit or charge. Any credit may be carried over to a reserve fund where related to costs reasonably foreseen or for the replacement of capital equipment.

42. Payment is required to be made by a lessee within fourteen days of the demand for estimated or balancing service charges (5(d)). All of the above is an essentially common type of arrangement.

43. There is also a requirement pursuant to clause 3(7) to pay all costs, charges and expenses incurred by the Applicant incidental to the preparation of a forfeiture notice, set out more fully below insofar as costs are addressed in this Decision.

44. The Regulations in the Second Schedule provided that the chalets may only be used as holiday chalets and during the times permitted.

45. The Fourth Schedule gives (2(a)) the Applicant the right:

> "To execute works and erections and to construct buildings or to rebuild alter or use any of the adjoining or neighbouring land or buildings or to build upon or over add to or extent the Estate …….. in such manner as shall be approved by the Lessor ……."

and (2(c) gives the further right:

> "To make such alterations as it may think in the position or extent of such of the gardens and grounds within the Estate as may from time to time be allocated by the Lessor for the use of the occupants of the Chalets on the Estate"

46. The Lease more generally provides for the parties to perform their obligations.

47. Whilst there has been no variation of the Lease or any other lease the Tribunal understands, the evidence given was that in practice service charges are demanded by two instalments on 1st September and 1st March of any given year. No point was taken about that and at first blush the Tribunal perceives that the net effect was to delay the payment of half of the estimated service charges, which would appear to have been capable of being demanded all in August/ September. As no issue arises, it is unnecessary to address this aspect further.

The Construction of Leases

48. It is well- established law that the Leases are to be construed applying the basic principles of construction of such leases, and where the construction of a lease is not different from the construction of another contractual document, as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (paragraph 15):

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the

> contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

49. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

> "the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook [2009] AC 1101, 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 likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

The Hearing

50. The Judge sat at Havant Justice Centre. The other attendees, including Mr Ridgeway, attended remotely.

51. Mr Joshua Dubin, counsel, represented the Applicant company. The Respondents were all represented by Mr Charles Knapper, solicitor.

52. Mr Dubin provided a Skeleton Argument late on the afternoon prior to the hearing and not seen by the case officer until the morning of the hearing. That amounted to some 24 pages and so it may be doubtful that the term Skeleton is appropriate. Nevertheless, it was of assistance in clarifying the Applicant's position. The Court and Tribunal were able to consider that prior to commencement of the hearing. Mr Dubin also provided a bundle of authorities 150 pages long. The Court and Tribunal were not also able to read those in the hour from the case officer forwarding the Skeleton Argument and authorities until the commencement time of the hearing.

53. One matter which arose at the hearing and is touched upon above is that the Applicant had not made any prior application for dispensation from consultation in respect of the major works to the Clubhouse, such that if the Tribunal determined that the Applicant would otherwise be able to recover the costs of such works as service charges, the amount of such recovery was £250 per lessee absent compliance with

consultation requirements (which it was accepted had not occurred) or the grant of an application for dispensation.

54. The Applicant was permitted to make such an application, on the basis that the Respondents were alert to the issues and able to deal with them. However, the Tribunal was not prepared to deal with such an application purely on the basis of mention of it in a witness statement, skeleton argument or similar but only on a proper application being filed and the fee paid. The Tribunal concluded that requiring any other statements of case or witness statements was unnecessary. The Tribunal would treat it as read that the Respondents objected to dispensation being granted.

55. Mr Knapper had objected, being understandably critical of the lack of an application for dispensation despite the professionals involved with the Applicant. He also made a point that all lessees ought to be able to respond, although that would have required an application to be made by the Applicant in respect of dispensation against all lessees, which the Applicant did not make. The Tribunal was mindful that all lessees would be expected to be respondents and that there was a risk of distinction between the particular Respondents and the other lessees. In the event, dispensation was of less import than it might have been, for the reasons explained below and so that potential issue need not be dwelt on.

56. A smaller matter arose as to the breakdown of the claim between the elements listed of service charges, insurance and ground rent.

57. Oral evidence was received from Mr David Wiggins MRICS, of Eddsions and who runs their Isle of Wight office, but giving evidence in the capacity of a lay witness and not as a surveyor expert witness, on the one hand and Mr Michael Kirby, the 1st Respondent, on the other. The Tribunal asked various questions of witnesses seeking clarification of matters advanced. The Tribunal additionally received written evidence from Mr Wiggins [72 onwards] and from Mr Kirby [588 onwards]. The contents of that evidence are not set out here but are referred to as appropriate below when the Court and / or Tribunal address the relevant issues. Both of those witnesses had provided written statement and much of what Mr Wiggins said in his reflected a 23 pages statement of case on behalf of the Applicant [9-33].

58. The time taken to receive evidence was such that it was not possible to receive closing submissions. The Tribunal determined, with the agreement of the advocates, that in this instance the better course was to receive submissions orally rather than in writing. Accordingly, a further hearing was fixed for 3rd March 2023 for those oral submissions to be made and to enable the Court and Tribunal to deal with any ancillary matters. The hearing was adjourned part heard until 3rd March 2023, concluding around lunchtime on that date

59. Both Mr Dubin and Mr Knapper made oral closing submissions at that hearing. Those are not repeated here but are referred to as appropriate in the consideration of the specific issues below.

60. In respect of Michael and Georgina Cox, who are no longer the lessee of Chalet 52 having sold that in 2022, the Tribunal sought clarification of the basis on which the parties asserted, if they did, that the particular Respondent was entitled to any determination as to the payability and reasonableness of the service charges.

61. In closing, Mr Dubin submitted that the Landlord and Tenant (Covenants) Act 1985 applied, which the Tribunal accepts. Section 5 provides that on an assignment of whole, the tenant is released from the covenants generally. Section 17 was also referred to, which provides for the situation where a former tenant would remain liable for what is described as a fixed charge (which term includes variable service charges much as might be imagined it would not) and requires, amongst other things, a landlord to service notice on the former tenant as required for the liability to arise. He also confirmed the position in terms of the Respondent's periods of liability for service charges, accepting Respondent's liability only arose on registration. These points are returned to in the Conclusion below insofar as required.

62. The Tribunal and Court are grateful to all of the above for their assistance with this case.

The Tribunal matters

The jurisdiction of the Tribunal

Service Charges

63. The Tribunal has power to decide about all aspects of liability to pay service in relation to residential properties and can interpret the lease where necessary to resolve disputes or uncertainties. Service charge is in section 18 of the Landlord and Tenant Act 1985 ("the Act") defined as an amount:

> "(1) (a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord's costs of management and
> (2) the whole or part of which varies or may vary according to the relevant costs."

64. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable (section 27A). Section 19 provides that a service charge is only payable insofar as it is reasonably incurred and the services or works to which it relates are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges. The amount payable is limited to the sum reasonable.

65. The Tribunal may take into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account."

66. There are innumerable case authorities in respect of several and varied aspects of service charge disputes, but most have no obvious direct relevance to the key issue in this dispute. In a number of case authorities, for example *Knapper v Francis* [2017] UKUT 003 (LC) (although in that case there were more specific points) it has been held that where service charges demanded were so demanded on account, the question is whether those demands were reasonable in the circumstances which existed at that date. It is for a landlord to demonstrate the reasonableness of any estimate on which the on-account demands are based, see for example the case of *Wigmore Homes (UK) Ltd v Spembly Works Residents Association Ltd* [2018] UKUT 252 (LC). *Cos Services Ltd v Nicholson and another* [2017] UKUT 382 (LC) (and also earlier authorities such as *Carey Morgan v De Walden* [2013] UKUT 0134 (LC)) applies such that there is a two-part approach of considering whether the decision making was reasonable and whether the sum is reasonable.

67. It is also well established that a lessee's challenge to the reasonableness of a service charge (or administration charge) must be based on some evidence that the charge is unreasonable. Whilst the burden is on the lessor to prove reasonableness, the lessee cannot simply put the lessorto proof of its case. Rather the lessee must produce some evidence of unreasonableness before the lessor can be required to prove reasonableness (see for example *Schilling v Canary Riverside Development Ptd Limited* [2005] EW Lands LRX 26 2005, a case touched upon in Mr Dubin's Skeleton Argument as mentioned in another case cited by him but in any event well known to the Tribunal- the other case adds nothing requiring mention). The Tribunal is entitled in determining the service charges payable whether any sum should be off- set in consequence of any breach by the lessor, where relevant.

Dispensation from consultation

68. In respect of a consultation process, section 20 of the Act applies.

69. Section 20(1) provides that the "relevant contributions of tenants" will be: "limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either— (a) complied with in relation to

the works or agreement, or (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal." Whereas the Act refers to tenants, as Acts tend to, that means lessees, the term adopted in this Decision, under long leases.

70. The related Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations") – specifically regulation 6- provide that the relevant sum is more than £250 per lease, so where the lessor undertakes qualifying works with a cost per lessee above that the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum unless the required consultations have been undertaken or the requirement has been dispensed with by the Tribunal. An application may be made retrospectively.

71. The provisions of Schedule 4 Part 2 of the Regulations apply to a consultation of this nature but the specific requirements do not require exploration in detail in this instance.

72. Section 20ZA provides that on an application to dispense with any or all of the consultation requirements, the Tribunal may make a determination granting such dispensation "if satisfied that it is reasonable to dispense with the requirements".

73. The appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The extent of the failure and other matters previously taken into account are not relevant considerations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

74. The factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it. The Tribunal should be sympathetic to the lessee(s).

75. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

> "..... I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

76. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the lessee will be or has been caused relevant prejudice by a failure of the Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted.

77. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

78. If dispensation is granted, that may be on terms.

79. There have been subsequent decisions of the higher courts and tribunals of assistance in the application of the decision in *Daejan* but which are not relied on by the parties and which do not require specific mention in this Decision.

80. The Applicant does specifically rely- and Mr Dubin's Skeleton Argument cites- a case authority of *Phillips v Francis* [2014] EWCA Civ 1395, [2015] 1 WLR 741, of which the Tribunal is aware and understands that Mr Knapper was similarly aware, a case relating to chalets on a holiday site were held to be dwellings within the meaning of the Act and where the site owner carried out major works without consulting in accordance with the Regulations. A particular issue was whether the work carried out was all part of one planned single set of works, so that the Consultation Regulations threshold (£250 per lessee) was met or a series of disparate pieces of work so that the threshold was not crossed. The first was described as the 'aggregate approach' and the latter as the 'sets approach'. The Court of Appeal approved the 'sets approach', holding that the question of what a single set of qualifying works comprises is one of fact and degree. It was described as a multi-factorial question, the answer to which should be determined in a common- sense way taking into account all relevant circumstances. Various relevant factors were identified, which the Tribunal returns to when considering this aspect of the dispute below.

Are the Residential Lease Service Charges payable and reasonable?

81. The Applicant made a concession, set out in the Skeleton Argument, that the Applicant no longer sought some of the legal costs which had been incurred and included in the service charges from the majority of the Respondents. Such costs were the costs of pursuing lessees in default. The exception was the 1st Respondent, against whom the Applicant sought an award of its costs of his own asserted default. Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 was referred to, although those relate specifically to wasted costs and to such part of those costs as related to the Tribunal part of the proceedings.

82. The Respondents also made a concession following the evidence of Mr Wiggins in respect of the paths and retaining walls item of the service charges. It was accepted that the charges did not relate to matters connected to the new chalets to be developed- see below- and no argument was pursued further that they were not payable and reasonable.

83. The Tribunal first addresses the question of whether any of the service charges remaining in dispute have been demonstrated by the Applicant to be payable.

Validity of demands

84. The 1st Respondent specifically raised in his pleaded case the question of whether service charge demands made had been valid. Meeting requirements for service of demands is a significant matter. Where the Applicant has failed to demonstrate valid demands, the reasonableness of any service charges included in such demands and the applicable test does not arise.

85. In terms of statutory requirements, meeting those requirements is so fundamental that the Tribunal often considers that it is entitled as an expert Tribunal to consider such matters irrespective of whether the points have been raised by a lessee, although necessarily that is where the Tribunal considers it appropriate to do so, which is not always. Indeed, quite commonly such matters are not raised by lessees, who are unaware of those statutory requirements. It ought to be simple to demonstrate compliance where that has happened. In respect of meeting requirements of the lease, arguably that is even more fundamental. Certainly, a party relying on a right to demand service charges and recover unpaid service charges pursuant to the terms of a lease should expect to demonstrate that the given lease permits the recovery of such service charges, irrespective of what the specific sum may be. The Tribunal is entitled where appropriate and given service charges are demanded based on an entitlement in the Lease to so demand them, to consider whether the requirements of the Lease have been shown to be met.

86. Given that the 1st Respondent did take a point and is represented, it is not necessary to dwell longer on the approach which might have been taken irrespective of that. The particular and only point taken as to validity was that of whether the address provided for the Applicant landlord complied with section 47 of the Landlord and Tenant Act 1987 and so the Tribunal confines itself to that point in this instance.

87. The registered office of the Applicant is Northover House, 132a Bournemouth Road, Chandlers Ford, Eastleigh, Hampshire, SO53 3AL. The address on the service charge demands [e.g. 152] for the Applicant is Anchor House, Wicor Path, Fareham, Hampshire, PO16 9QT, described in the witness statement of Mr Wiggins as its correspondence address and the address of Mr Lundbech.

88. The Applicant contended that the address complied as being one of several from which its business is carried out, and as such satisfies the test. The Applicant relied on Mr Wiggins' evidence about the nature of the Applicant and Mr Lundbech's role and working practices, which it asserted to be unchallenged. That written evidence was that Mr Lundbech runs the day-to-day business of the Applicant from his home.

89. The Respondent had asserted that the address given was a "care of" address) or the address of an agent, and so the sort of address criticised in a case authority provided by Mr Dubin of *Beitov Properties Ltd v Martin* [2012] L. & T.R. 23. That determined the address of the landlord's agent to be insufficient. The Upper Tribunal) Lands Chamber) explained as follows:

> "The purpose of the requirement in s.47 to include in any demand the name and address of the landlord is to enable a tenant to know who his landlord is, and a name alone may not be sufficient for this purpose. To provide an address at which the landlord can be found assists in the process of identification……The address given was not the landlord's address. It was not the company's registered office or the place from which it carried on business "

90. In closing Mr Knapper said that the point has "largely fallen away". He noted that a care off address was given towards the top of the demands, which was clearly correct. He accepted that a further- and the relevant-address was shown lower down. As there was no complete concession, the Tribunal determines the point.

91. The Tribunal agrees with the Applicant that the address provided on the service charge demands met the requirement of section 47 as being an address of the Applicant (and met the requirements of section 48).

92. The Tribunal accepts the evidence given by Mr Wiggins that the address given is an address from which business of the Applicant is carried out, by the sole director of the company Mr Lundbech. The address of a director from where he conducts the business is not a care of address nor the address of an agent. It is not the sole address and it is not the registered office. Hence the address is an address of the landlord, rather than "the address". However, "the address" singular necessarily assumes there to be only one and it was accepted by the Upper Tribunal that where the landlord has more than one address, the landlord may choose which address to use. The Applicant landlord has chosen Anchor House.

93. The Tribunal observes that the relevant address is not as clearly displayed as it perhaps could be, being contained in a block of narrative. On the other hand, that does identify on the top line that notice is given of an address for the purpose of section 47 and 48 of the Landlord and Tenant Act. The year given for that Act, 1984 not 1987, is incorrect but not point was argued about that and so the Tribunal does

not take one, making no comment as to any preliminary assessment of any merits. The address is also expressed to not only be the address for notices by also to be the registered office address, which the evidence indicates it is not, but about which the Tribunal also makes no other comment.

Decision re validity

94. The Tribunal determines insofar as the issue was argued that the demands were valid.

The Clubhouse

95. It was not identifiably in dispute that the Clubhouse was in a significant state of disrepair and was contaminated with white and brown asbestos. Neither was it in dispute that in September 2019, Mr Lundbech told the Residents' Association that he proposed to demolish parts of the Clubhouse and would not re-open it.

96. The Clubhouse had previously (until the receivership in 2011) operated as a bar and provided food. That had not been for the exclusive use of residents of the Park but rather was for general public use and the residents derived no profit or other identified benefit other than that a facility existed on the Park. Mr Wiggins said in evidence that it was operated by the then freeholder but not connected with the site. The Clubhouse had been closed and had been fenced off for a significant time prior to the purchase of the Park by the Applicant.

97. It was common ground that the Applicant received an estimate from South Coast Plant Ltd dated 4th November 2019 for demolition, site clearance and asbestos removal at the Clubhouse [479]. That estimated a total cost inclusive of VAT of £130,250. The Applicant gave its own alternative estimate for those works [480] at a cost of £108,000. The works were carried out by the Applicant itself in January and February 2020, although the eventual sum charged by way of service charges was £114,990.00. The service charge for 2019-2020 was said in the Respondents' application to include an amount of £120,000.00 plus VAT (£638.28+VAT per chalet) in respect of this element. A survey was commissioned after the event from Eddisons by the Applicant as to its opinion regarding reasonableness of the costs [483-495].

98. The dispute centred on whether the works were what the 1st Respondent described as 'development works' [589 and 591] to the Clubhouse or whether they were works which one way or another fell within obligations of the Applicant and where the cost of complying with such obligations was one to which the Applicants were required to contribute. Mr Wiggins, whilst being cross-examined, attempted to support the Applicant's case but given the matters below was unable successfully to do so.

99. The Tribunal determines that the Respondents are not required to pay service charges in respect of the cost incurred by the Applicant, as explained below.

100. In relation to this issue, the Tribunal noted the terms of the Lease with particular care. The Tribunal considered the Fifth Schedule of the Lease to be particularly revealing and to provide the answer in relation to this issue.

101. The Applicant has various responsibilities in respect of the Estate. The Estate is, as noted above, defined at the start of the Lease as being Sandown holiday centre. However, the Schedule provides more specifically in respect of the matters to which contribution must be made by the Respondent and does not the Tribunal determines include within that all aspects of the Estate.

102. There are in paragraph 1 of Part II a list of various elements of the Estate, the costs in relation to which must be contributed to. A variety of matters are required to be contributed to, none of which are particularly surprising in themselves. Those include walls, roads, pipes, various specific items of equipment and insurance. There is no specific reference to the maintenance of the Clubhouse or indeed any other building on the site, which Mr Wiggins accepted, as indeed he inevitably had to.

103. The Tribunal has little doubt in the face of those detailed provisions that the cost of maintenance and repair and similar of the Clubhouse would have been specifically provided for had such been intended. The size and nature of the Clubhouse is such that it could scarcely have been overlooked and the Tribunal finds must have been in the minds of the contracting parties. As it is, the contracting parties did not feel it necessary to include any reference to maintenance and repair of the Clubhouse.

104. The Tribunal determines that to be entirely consistent with the fact that the Clubhouse was used as separate commercial premises which in effect just happened to be situated on a part of the Park and where the business operating was open to the general public and generated profit for the operator of the business. The Tribunal agrees that the lessees received no direct benefit beyond that received by anyone else. It was entirely logical that any repair, maintenance and similar in relation to the building would have been borne by the Park owner operating that business and not by the chalet owners. The fact that the Clubhouse has not been operated by the Applicant or indeed for several years is not relevant to that.

105. The Tribunal considers that the only sensible construction of the provision is an intention on the part of the contracting parties not to provide for the lessees to contribute to the maintenance and repair of the Clubhouse.

106. The contribution by the Respondents is in any event limited to works "effected for the purpose of keeping in good and substantial repair" The Tribunal does not consider that all of the removal of asbestos and demolition of parts in poor condition falls within "keeping in good and substantial repair" in this instance- even if there might be an argument that some may in appropriate circumstances. Given the determination in the preceding paragraphs, it is unnecessary to explore that further.

107. The Tribunal rejects the other arguments of Mr Dubin that the Respondents were obliged to contribute to the costs involved in the major works.

108. The Applicant argued that removing dangerous and dilapidated parts of the Estate is within the obligation to keep all parts of the Estate in repair and "about maintenance and convenient management and running of the Estate" (Part II of the Fifth Schedule paragraph 11.), by way of making the Estate safe and preparing the structure of the Clubhouse and area around it for new uses. Mr Dubins argued in his oral submissions that making safe fell naturally within the provisions of Part II.

109. The provision relied on by the Applicant is part of paragraph 11, the whole of which demonstrates that it relates firstly, to fees charged for management, which does not assist the Applicant in respect of this point. It does refer also to "all other expenses" for "maintenance and convenient management and running of the Estate" but construction of the words used and taken in the context of the other clauses cannot lead to a conclusion that the contracting parties intended it to include the costs of the major works undertaken to the Clubhouse by the Applicant.

110. Mr Dubins sought to argue that paragraph 11 must include dealing with dangerous structures. It would be sizeable stretch to construe the general convenient management and running of the Estate to include major demolition and related works to a commercially- operated building and so the Tribunal cannot accept that argument. It would consequently be a sizeable stretch to construe the words "all other expenses" of such management and running as including the costs of the major works to the Clubhouse. Rather the words relied on are clearly and simply, the Tribunal determines, intended to cover any cost in respect of more general management which could be said to go beyond the fees referred to at the start of the particular paragraph. In any event, the argument that such a general provision includes what is described as 'rendering safe a dangerous structure and preparing it for a new use or uses' in these circumstances would require placing a construction on the term of the Lease which the Tribunal determines is cannot be so placed.

111. The Applicant also seeks to argue that the provision in clause 6(3), including "such ..... parts of the Estate as may be enjoyed or used by one of the chalets in the Estate in common with others" would cover the Clubhouse without mentioning it specifically. However, the lessees

have not since the Clubhouse was closed some years ago and before the Applicant's ownership had any use or enjoyment of the Clubhouse nor has there been any way of them doing so and they plainly will not do when the remaining part of the Clubhouse is developed into three chalets sold off to purchasers of those. Even if the provision could be construed so as to include the Clubhouse- which the Tribunal considers it cannot- it does not assist the Applicant.

112. The Applicant also submits that the provision in paragraph 5, including "periodically inspecting examining maintaining and overhauling any part of the Estate" gives an entitlement for the Applicant to charge for the major works. However, the Tribunal considers that the major works do not fall within any of those terms. The same applies to the other provisions of Part II.

113. The closest anything gets that within the clauses through suggesting a positive obligation to contribute to the Clubhouse is clause 4 which makes reference to grounds. However, the remainder of the paragraph refers to trees shrubs grass and similar demonstrating the grounds in question to be land within the holiday centre and not buildings. The fact that the areas around the Clubhouse were rather incidentally impacted by the demolition and the remainder of the major works does not, the Tribunal determines, make the major works fall within any sensible scope of the provision in paragraph 1 related to footpaths, forecourt and so on.

114. The Tribunal has no doubt from the provisions agreed by the contracting parties and from the words used by them that if works to the Clubhouse, including the major works in issue in this case, had been intended to be matters to which the Respondents must contribute, the Lease would have specifically said so. Insofar as there may be doubt, the resolution of that must go in favour of the Respondents.

115. The Tribunal also considered the insurance clause in Part II of the Fifth Schedule to be particularly revealing.

116. There is no reference to contributing to the insurance of any other building, indeed there is a specific exclusion that the lessee does not so contribute, reading "but excluding the individual chalets and other buildings thereon)". A lessee is required to pay the cost of the Applicant insuring the particular demised premises in Part I of the Fifth Schedule, which explains the part about "individual chalets".

117. However, the exclusion of "other buildings" is not for that reason and so there has been a specific agreement between the contracting parties about any other buildings than the individual chalets situated on the Park That is very strongly indicative of any buildings falling outside of any matters for which the Respondents are obliged to contribute generally. It is sensible that the exclusion was contained within the insurance clause, which would otherwise have suggested that the lessees should so contribute. The clause and the drafting of the Lease

generally strongly indicates that if the lessees were intended to contribute anything else in respect of other buildings such as the Clubhouse, the Lease would have so stated.

118. Therefore, whilst the Clubhouse is a part of the Estate, it is far more importantly not a part of the Estate in respect of which the Respondents are required by the Lease to contribute, including with regard to the major works. The power of the Applicant to undertake various works including building works in the Fourth Schedule does not of itself produce an entitlement to charge the lessees for the cost of such work as service charges.

119. It is unnecessary to say more in light of that. However, the Tribunal also considers that even if the Lease had permitted to charge the Respondent for the costs which it incurred in respect of the Clubhouse, it would either not have been reasonable for any service charges to be charged or the level of service charges reasonable would have been very low.

120. Whilst it is correct to say that the Applicant removed parts of the Clubhouse which were in a poor state, the evidence demonstrates that by the time the works were undertaken the Applicant did not do so in order to turn the building into one usable by the Respondents nor otherwise simply to remove any parts of the Clubhouse in a poor condition. Rather the works created- and the Tribunal finds on the evidence were intended by then to create- a building which could be developed into three holiday chalets and created space to facilitate the supply of parking spaces necessary to fulfil planning requirements- see further below. It is abundantly clear that the Applicant will seek to sell those chalets for profit and will receive substantial sums for them. The effect of the Respondent funding the major works would have been to significantly reduce the cost to the Applicant of developing the three chalets and so to significantly increase the profit made by the Applicant at the Respondent's expense.

121. That is a position which was never likely to find favour and where it is likely that a Tribunal would only have allowed the cost to be recovered as service charges with the very clearest supporting lease terms indicating the lessees or their predecessors had accepted such a scenario and with the most compelling support for reasonableness. The Applicant came nowhere remotely close to that. Mr Dubin's inventive argument that the removal of dilapidated parts of the Clubhouse might increase the value of the existing chalets- for which there was no evidence and mere speculation- was not persuasive.

122. It may be that if the Clubhouse had firstly specifically been referred to in the Lease as falling within elements of the Estate for which costs could be charged as service charges and secondly the Applicant had removed any parts dangerous and otherwise addressed disrepair and then utilised the building for a purpose benefitting the Respondents, service charges would have been reasonable- in which regard simply

removing parts of the building is insufficient. However, as neither of those circumstances apply, there is nothing to be gained by speculation about this point.

123. In a similar vein, whilst Mr Knapper suggested in cross-examination of Mr Wiggins that there had been historic neglect of the Clubhouse both by the Park owner prior to the receivership in 2011 and subsequently by the receivers, the Tribunal does not find it necessary to make any findings in that regard, nor attempt to reach any determination as to whether that may have any relevance to the level of service charges. The same applies in respect of Mr Dubin's suggestions to Mr Kirby that the work was reasonable and removed an eyesore. Mr Kirby's responses mostly related to having no first-hand knowledge of the work undertaken or that it had nothing to do with him.

124. The Tribunal agrees, for what its worth, that the Respondents have not provided any specific evidence that the cost of the major works was unreasonable- and so for example the burden would not have passed to the Applicant as to reasonableness generally. As to any profit element which would have been received by the Applicant in respect of the work may have been another matter. Mr Knapper's suggestion that the purchase price paid by the Applicant for the Park would have reflected its condition may be correct but was not evidenced and, in any event, did not add anything in the event.

Dispensation in respect of major works re the Clubhouse

125. In light of the above, the question of whether the Applicant would be granted dispensation from consultation in respect of the major works had the costs been chargeable as service charges is not directly relevant. However, lest it be subsequently determined that the Tribunal is incorrect in its construction of the Lease and the effects of that, the Tribunal does address this aspect of the dispute.

126. Mr Wiggins said in evidence that the receivers had received legal advice that the chalet leases were commercial in nature rather than residential and did not fall within the provisions of the Act, However, the Applicant did not pursue such an argument. Mr Knapper queried that advice in any event, given that the notice of rights had been provided with service charges demands, to which Mr Wiggins replied that the advice received had been to provide those. The fact that it was considered at the time that the lessees did not have the protection of the Act was given as the reason for a lack of section 20 consultation. Mr Wiggins said that there was consultation but accepted that was not in accordance with the Act.

127. The argument about the major works related to whether the project of the renovation of the Clubhouse comprised one single set of works or three discrete parts- being contents removal, asbestos removal and demolition. The Applicant asserted each to be a separate process from the others and had a discrete cost for the purpose of the Act. Viewed

from that perspective the service charges per lessee would fall below £250 for any given discrete element of the overall works. Mr Dubin argued that the demolition had to take place first, and the works sequentially more generally, and that when that work was undertaken (January 2020) there was no crystallized plan for the development of new chalets at the site, although the Tribunal notes the careful choice of words and refers to its finding above. Reference was also made to the asbestos removal work being required to be carried out by a licensed contractor and that the Applicant subcontracted that work. Mr Dubin also said in closing that the demolition took place before planning permission was granted.

128. Mr Wiggins said in oral evidence that the elements could be undertaken separately, although in response to cross-examination he conceded that they were undertaken as one set of works. He maintained that they did not have to be so undertaken, arguing that asbestos removal would have occurred whatever else had happened and for whatever use the Clubhouse had been put, and that there were three stages, one following the other. It is doubtful whether the Applicant's case can survive the concession in oral evidence, although nothing turns on whether it can or not in the event. The Tribunal determined the question in any event.

129. The Respondent argued that all aspects were part and parcel of one whole, hence the amount charged to each lessee exceeded £250 and so consultation was required. Mr Knapper also referred to the practical need to undertake one element of work before the next could be attended to. The Tribunal agrees with the Respondent about that aspect.

130. The Tribunal has noted the examples of relevant factors identified by the Court of Appeal in *Phillips v Francis*. The items of work were carried out to the same building, whether the original part or subsequent extensions to it. The question of whether they were the subject of the same contract it not especially helpful in the event where the Applicant itself undertook the works, but the Tribunal accepts that a single contract would have been granted to the other company which provided an estimate, and it is very likely that the same approach would have been taken with any other external contractor. The works were done at more or less the same time. In that regard, whilst the Applicant referred to the demolition being undertaken first and in January 2020, the remainder of the work followed on swiftly. The Tribunal accepts Mr Dubin's point that the work was undertaken during a period in which the Park was closed and that was the best time for it to be undertaken. However, that did not weigh in favour of the Applicant. The fact that the work had to be undertaken following a sequence, not unusually, did not take the Applicant anywhere here. Neither does the need for specialist contractor for any part of the work – specifically the asbestos- of itself make such work separate to the remainder and no other feature was such that it ought to be regarded as a separate set of work. The items of work had some difference of character but relatively

marginally. The way in which the works were planned and the Applicant's reasons for the way they were implemented, insofar as revealed, would also have supported there being a single set of works and not three individual ones.

131. The Tribunal additionally notes that there are always various elements of building work and various trades are involved. The work here was essentially one of removing parts of a building. Necessarily, items needed removing, most notably the asbestos without which the demolition could not take place and establishing a very clear link between that element and the demolition. Whilst there was a gap between demolition and planning permission being granted in February 2020 [570-584], in the Tribunal's experience planning permissions do not materialise rapidly upon a decision to develop being made: rather the formulating of plans, any enquiries as to the prospects of a positive application and related communications, the application for planning and the planning process takes quite a period of time. The date of the grant of permission is of little relevance in itself. The Tribunal noted that the initial correspondence from the Applicant to the lessees dated 2nd March 2017 shortly after purchase of the Park [116- 118] trailed the potential demolition of parts of the Clubhouse and identified one potential course as being additional chalets but the letter is too unclear as to firm intentions- its says plans are being formulated and ideas investigated- and too long before any works to assist either side. Correspondence in mid- 2018 [119-120] referred to demolition and a potential shop but essentially the same observations apply. At an uncertain later date there was sketch plan showing three chalets created from the barracks [122], apparently by April 2019 although that is not completely clear. By April 2021, there was a detailed plan (although showing four) [124] and proposal (for three) set out in a detailed document [565-569], so plainly some time before those the intended course of action had crystalised. Although there is some lack of clarity and hence the Tribunal is unable to pinpoint the exact intention at an exact given time, overall the lack of an overall plan and development only being thought of after the demolition has certainly not been adequately demonstrated and applying the balance of probabilities to the available evidence, the Applicant's case on that fails.

132. Accordingly, the Tribunal determines that the major works comprised one set of works, albeit with different elements to them, and not three distinct sets of work. Therefore, the works would have required consultation requirements to have been complied with.

133. In respect of whether dispensation would have been granted, the Tribunal has considered the further arguments of the parties. The Tribunal accepts the Applicant's argument that the contractor from which the Applicant obtained a quote, South Coast Plant Ltd, would have charged £42,500 for asbestos removal, whereas the Applicant itself estimated £35,000. The Applicant's figure was again lower in respect of the other elements of the work. In addition, it was not challenged that the Applicant has chosen to absorb £11,000 of extra

cost [481] and that no independent contractor would have been likely to do so. As to the level of profit which the Applicant would have actually made if it had been able to charge the Respondents as it sought to, if any, is unclear and nothing turns on that.

134. The Respondents have not demonstrated that another contractor would have undertaken the work for less than the Applicant and would thereby have been instructed, such that no prejudice to the Respondents has been demonstrated. Mr Kirby's oral evidence that it was for the Applicant to demonstrate that was incorrect. Whilst Mr Knapper submitted in closing that the Respondent could not obtain a quote once the work had been undertaken, he then conceded it to be possible and the Tribunal considers that an alternative quote would have been obtainable had the Respondents wished to obtain one.

135. Accordingly, if the Tribunal had determined the works to the Clubhouse to be chargeable as service charges in the first place, the Tribunal would have granted dispensation from consultation requirements in this instance. As the Tribunal did not so determine, there were no service charges which the Respondents could be required to pay and so consultation was irrelevant. The Tribunal was asked on behalf of the Respondents to impose a condition that the Applicant pay some of the Respondents' costs if dispensation were granted, but as it has not been, because the works are not one which service charges can be charged for, that point does not arise.

Decision in respect of Clubhouse charges

136. The Tribunal therefore determines that the service charges demanded in respect of the Clubhouse of £114,990.00 are not payable.

Playground reserve charges

137. No playground was in the event constructed. The service charges in issue relate to investigating developing a proposed playground. As Mr Dubin conceded, the project- as he described it- did not come to fruition. One obvious issue arising is that there was no tangible benefit to the Respondents for the expenditure incurred.

138. Nevertheless, there had been costs demanded as service charges of some £37,500.00 for each of the service charge years 2017-2018 and 2018- 2019, so £75,000.00 in total, to be placed in a reserve to meet the cost of the proposed work to the playground. Various invoices are relied on [497-500], although invoices generated by the Applicant itself and relying, the Tribunal understands, on paragraphs 11 and/ or 14 of Part II of the Fifth Schedule. Reference appears to have first been made in a letter from Daniells Harrison of August 2017 [146 onwards].

139. In the event, the actual expenditure was £6712.80 including VAT, said by Mr Wiggins in his statement to relate to the preparations of submissions, proposals and communications with the local council. The

Applicant decided not to proceed further. Consequently, there was, the Applicant says, a refund of £68,287.20 to be credited across the group of lessees as a whole. That left a net deduction from the reserve fund per lessee of £35.70.

140. The Tribunal pauses to note that the Respondents say that the charges of £200.00 plus VAT per chalet for each of 2017- 2018 and 2018- 2019 would have totalled £74,400.00 plus VAT (£89,280) and the amount "refunded" was £56,906.00 and that appears to be borne out by the Budget/ Actual Report in the bundle for 01/09/2019 to 31/08/2020 [139]. There is something of a gulf between the sets of figures. However, the Tribunal is not addressing accounting matters but rather the reasonableness of service charges and more particularly the reasonableness of the actual expenditure incurred and charged (the reasonableness of the earlier estimated service charges having been rendered irrelevant by the later actual service charges). Any dispute about whether the level of refund was correct and there is money retained by the Applicant to which the Respondents are entitled would require determining in a different forum.

141. The Applicant's case was essentially that it was entitled to charge as what came to be actual service charges for the investigatory and preparatory work and that the provisions of Part II of the Fifth Schedule at paragraphs 5 and 11 applied. The 1st Respondent's case asserts that the playground was "nothing more than an idea"- in oral evidence Mr Kirby referred to "just a theory", and so in effect does not cross any threshold to be costs reasonably chargeable. Mr Kirby also relied on a lack of a planning application. He did accept that a playground would have benefitted the Park.

142. The Tribunal has some appreciation of the Respondents' position. However, the Tribunal finds that the costs were incurred as part of development of the Park which fell within matters for which the Applicant was entitled to charge the Respondents and the fact that the playground did not materialise does not render the service charges unreasonable. It is reality that not all projects, using Mr Dubin's word as being as good as any, are able to be completed.

143. The Tribunal does not consider paragraph 5 to cover the works- the playground project does not obviously involved "inspecting examining maintaining and overhauling" the Park. The Tribunal does determine that paragraphs 9 and 11 do cover the work on the project, which related to managing the Park in a broad sense and the provision of a facility more specifically, much as that did not materialise in the event. The Tribunal had some concern that it was indicated by Mr Dubin in closing that the cost charged involved some apportionment of wider costs of different projects, including the Clubhouse development- issues as to which are discussed under the header Surveys and planning permission for redevelopment. However, no point had been taken about the level of charges if any were payable.

144. The Tribunal notes that Mr Kirkby was rather noncommittal in his evidence in relation to this item and that Mr Knapper said relatively little in his closing submissions. It may be, although without impact on the Tribunal's determination, that the Respondent's identified that although expenditure by them on the costs of the proposed playground was unattractive, there was no strong argument.

145. Mr Knapper had however cross-examined Mr Wiggins on this element of the case. Mr Wiggins said that Mr Lundbech had asked the lessees and there had been a strong desire on their part to have a playground. Also, that there had been no specific reason to seek to build a playground other than that it was what the lessees wanted. Mr Wiggins added that the areas will be landscaped and improved. None of that altered the Tribunal's determination.

Decision in respect of Playground reserve charges

146. The Tribunal determines that £6712.80 in respect of these charges was payable, being £35.70 per chalet, including that of the 1st Respondent.

Repairs to paths and rebuilding retaining walls

147. The Respondents originally contended that this element involved major works for which no consultation had taken place. No point had been taken that such works could not be recovered under the terms of the Lease. The 1st Respondent's written case asserted it to be unclear where the works took place and implied that they may be related to the Clubhouse works. The Applicant relied on a plan provided by Mr Wiggins [521] which it said shows clearly that these are works wholly unrelated to the Clubhouse demolition and also added that to the extent that the Respondents' challenge was in effect only a request for clarification, such clarification had been provided. Estimates for works were provided [522- 530] and invoices [504– 520].

148. In light of the Respondents' concession following Mr Wiggins oral evidence on this element of the case no determination by the Tribunal is sought. Mr Knapper explained in closing that as the excess over the amount beyond which consultation is required is so modest, it had been decided that there was no merit in a challenge.

149. The amounts involved as referred to in the Respondent's application and the budgets were £38,160.00 inclusive of VAT for 2019- 2020 [138] and £36,000 inclusive of VAT for 2020- 2021 [141].

150. Given that the charge was accepted or admitted, there is no need to say any more about this element, save to confirm as below.

Decision in respect of repairs to paths and rebuilding retaining walls charges

151. The service charge of £394.47 per chalet is payable, including by the 1st Respondent.

New car parking

152. The Applicant's case is that following the demolition of the later extensions to the Clubhouse, nine parking spaces, plus one spaces for bicycles (a restriction in the planning permission which prevented what the Applicant originally intended to be ten car spaces) have been provided on the available land and that those are available to the lessees and hence the costs of the related work is chargeable as service charges. It is said that there were previously only three spaces in that area. There is only a temporary surface, stated by Mr Wiggins to be compacted hardcore, but the Applicant's position was that it intended to create a permanent one at an anticipated cost of £30,000 plus VAT [82].

153. The Respondents' position, as highlighted by Mr Knapper in closing, was that the provision of parking was directly linked to the planning permission for development of the Clubhouse and so the 2020- 2021 service charges in respect of this item were not payable. The Tribunal agrees.

154. The planning permission for the new chalets requires them to be provided with at least five parking spaces. Mr Wiggins accepted as much in his oral evidence, although his witness statement had asserted that all of the spaces were available for general use.

155. That written statement quotes condition 7 of the planning permission which specifies:

> "the holiday accommodation hereby permitted shall not be brought into use until space has been laid out within the site for a minimum of five and a maximum of nine cars to be parked and for vehicles to be loaded and unloaded and for vehicles to turn so that they may enter and leave the site in forward gear. Thereafter this space shall only be used for the parking and manoeuvring of vehicles belonging to occupiers of the holiday accommodation hereby permitted and their visitors and not for any other purpose."

156. Mr Wiggins says in the statement that he understands that there is no requirement for the spaces to be provided to be allocated to the new units or dedicated for use by those units. The Tribunal is unable to identify how he may have formed that understanding. The condition is quite specific that the spaces "shall only be used" by the "holiday accommodation hereby permitted" and "not for any other purpose". That simple and clear wording cannot be construed as enabling the spaces to be used by any resident of the Park or visitor, explicitly saying quite the opposite.

157. Consequently, the Tribunal finds that it was necessary for the Applicant to lay out a car park and provide at least five parking spaces for the three new chalets. The Tribunal also finds that those parking spaces

cannot be available for the other lessees because the Applicant would thereby have failed to provide the necessary spaces for the new chalets. The Tribunal gives very little weight to the comment of Mr Wiggins that he understands from Mr Lundbech that the latter queried with the planning officer and was told that the intention was that the spaces be available for anyone. That comment is third- hand, is imprecise, is unsupported by anything from the planning authority and flies directly in the face of the clear words used in the condition, which could not conceivably have been adopted if the intention was the opposite.

158. Mr Wiggins added in oral evidence that the use of the spaces would not be policed and that it would not be possible to control their use in any sensible manner. However, given the terms of the planning condition, the Tribunal considers that to be inadequate. A failure to take any steps to ensure that the parking is available to the new chalets created is liable to cause difficulties, including at the time of attempted sale of the newly developed chalets, if not already sold. The Tribunal agrees with Mr Kirby in his oral evidence, not that the point affected any determination, that there may be limited appeal to a purchaser if no parking spaces is included.

159. Nevertheless, none of that alters that fact that the Applicant must provide at least five spaces in order to comply with planning permission for the development cannot comply with the condition otherwise, and the Tribunal determines will provide them for that reason.

160. There are nine spaces and so more than the number necessary for the planning permission to be complied with. However, there has been no evidence provided of any additional cost having been incurred by the Applicant to that which the Applicant would have incurred for the provision of five spaces for the new chalets within the period in question. In addition, the four other spaces amounts to only one more than the three available previously, so benefit to the lessees is marginal and clear evidence of reasonable cost of providing one net additional parking space would have been required for cost to be allowed.

161. The Tribunal determines that the cost of providing the new parking spaces was not work falling within paragraphs 1, 9 or 11 of Part II of the Fifth Schedule or otherwise within the provisions of the Lease but rather is cost incurred by the Applicant as part and parcel of the development of the three new chalets.

162. The Tribunal adds with the aim of reducing the scope for future dispute that it considers that once the construction of the new parking spaces is completed, they became part of the grounds of the Park. Consequently, costs incurred by the Applicant in maintaining the spaces are chargeable as service charges. However, that is separate to the cost of providing the spaces.

163. The Tribunal notes that such contribution should include contribution by the lessees of the new chalets once construction is complete and that

more generally, an increase in the number of chalets would appear to require adjustment of the contributions per chalet to avoid recovery of more than 100% of the payable service charges.

Decision in respect of charges for new car parking

164. The Tribunal determines that none of the service charges are payable.

Contribution to reserve funds and/or General contingency

165. The dispute under this sub-heading related to whether the expenditure must be for identified projects and so the appropriate construction of the sentence, "The establishment and maintenance of a reserve fund to provide for any items of future capital expenditure foreseen by the Lessor". The Applicant's case was that any future capital expenditure was covered, whereas the 1st Respondent contended that the sums charged as service charges had to be in respect of specific identified projects and may not be demanded otherwise. The playground had been one such identified project, although other issues arose as explained above.

166. Mr Wiggins explained in his witness statement [specifically 83] that there are two reserves, called "Estate Reserve" and "General Contingency", the latter being described as a relatively small amount of money collected each year to build a buffer against unforeseen costs in the longer- term future. The former was described a sum collected either for a specific purpose or to ensure money for unexpected works in the current year.

167. Mr Dubin argued that it is for the Applicant to determine how much and for what purpose the reserves are to be collected and held, and the accounts provide sufficient detail to meet the lessor's obligations, referring to *Criterion Buildings Ltd v McKinsey and Co Inc (United Kingdom)* [2021] EWHC 314 (Ch). Necessarily, that it subject to the specific terms of the Lease placing any greater restrictions on the purpose for which a reserve may be collected.

168. *Criterion* involved commercial premises, outside the jurisdiction of this Tribunal, and where the landlord was "entitled to include in the service charge for any service charge period an amount which the Landlord reasonably determines is appropriate to build up and maintain a sinking fund and a reserve fund in accordance with the principles of good estate management". That wording is somewhat different to the terms of the Lease and there were limits to the specific types of expenditure which the reserve fund could be used to cover.

169. Mr Knapper concentrated on the word "foreseen", which he argued produced a narrow entitlement to hold a reserve fund and required specific projects to be identified. It did not, he argued, permit a reserve to be kept for general future expenditure. The correct approach, he asserted was for the Applicant to identify specific items likely to require

expenditure and that funds obtained for one purpose could not be used for another.

170. His cross-examination of Mr Wiggins related to that. Mr Wiggins evidence on that point, whilst otherwise clear, was not easy to follow. He appeared to agree with Mr Knapper that specific projects were required but then also said that it was possible to "foresee" that there would be matters "unforeseeable". The point he sought to make was not clear.

171. As Mr Knapper identified in his closing submissions, the wording of the provision is "awkward". The Tribunal gave the construction of the provision considerable thought.

172. If the word "foreseen" onwards were removed from paragraph 10 of Part II of the Fifth Schedule, the Applicant would have a very wide discretion and one which would be unusual. There would in the normal course be some limit to the amounts, the lease in the case authority limiting it by way of "reasonably determines is appropriate". The question is how much of a limit the particular clause in the Lease sought to impose.

173. The Tribunal notes that the provision in the Lease the word "any" and does not say, 'only such items of future capital expenditure as are identifiable at the given time', which is the effect the Respondents wish to be given to the wording. There is no specific requirement as to the timescale in the future for the expenditure. That said "foreseen" must require the Applicant to be genuine and the Applicant to be able to demonstrate that it did foresee capital expenditure at some point ahead of incurring the expenditure and be able to explain how.

174. Equally, the Tribunal reminds itself that the full provision reads "The establishment and maintenance of a reserve fund to provide for any items of future capital expenditure foreseen by the Lessor". So, the fund will provide for the future expenditure from the sum contained within it and the Applicant is entitled to accumulate a fund, not just to receive in advance payment for specific expenditure items. The expenditure foreseen is likely to vary from time to time as needs for capital expenditure are identified.

175. The Tribunal determines from the wording used and the terms of the other provisions, that the contracting parties intended the provision to be given the wider interpretation argued for by the Applicant and cannot be construed so as to limit the provision to the narrow one argued for by the Respondent.

176. Accordingly, the Tribunal determines the service charges demanded for the "Estate Reserve" are permitted. Funds collected within that for a specific purpose are unproblematic. Funds to ensure money in hand for unexpected works in the current year is really the portion to which the above discussion relates and whilst "unexpected" causes the Applicant

some difficulty, the Tribunal determines it to be different to "unforeseen" and that the fact that the expenditure would fall within the given current year is sufficient for the service charges to generate such sums to fall within the provision.

177. The Tribunal observes that to a large degree any difference between the parties is one of timing. To that extent Mr Wiggins' reference in oral evidence that the lessees were not prejudiced because money stayed in the fund had some, but not complete, merit. There will be capital expenditure required and the Applicant is entitled to seek in advance the sums required for that. The need to identify specific projects might have reduced the level of services charges chargeable at given times but would in turn have increased them at others.

178. However, given that Mr Wiggins specifically describes in his witness statement the "General Contingency" as being a buffer for "unforeseen" costs, the Tribunal determines that sum does not fall within the provisions of the Lease.

179. It is one thing to give a provision a wide interpretation determined to be intended but quite another to determine expenditure "foreseen" to include matters specifically described as "unforeseen". The Tribunal is unable to discern any proper construction of the phrase used, including the particular word used, which could permit that.

180. No other argument as to reasonableness was advanced on behalf of the Respondents.

181. The budget sum for the Contribution to reserve funds is £5000.00 per service charge year across the 188 chalets. The relevant shares of that would be £26.60 per chalet per year.

Decision in respect of charge for contributions to reserves funds and/ or general contingency

182. The Tribunal determines that the service charges in respect of contributions in the sum of £26.60 per service charge year per chalet to the Estate Reserve were reasonable and payable, so £159.60 for the six years overall.

Surveys and planning permission for redevelopment

183. The Applicant's case in relation to this aspect was not clear. It was quite difficult to discern the service charges for costs beyond those properly falling within one of the other headings above and the basis on which those are payable and reasonable.

184. The witness statement of Mr Wiggins explained that some of the preparatory and planning fees for what was described as "the project to renew common facilities" [83] were accounted for against the

playground reserve. The Tribunal accepts that as appropriate where the charges related to the proposed playground.

185. He also said that "generally" the Applicant has sought to charge half of the costs as service charges, giving an example of a "site investigation re contaminated land" [see 564]. However, it is asserted that Mr Lundbech told Mr Wiggins that the Applicant paid costs specifically related to the chalet development. There is no evidence provided of the correctness of that, either from Mr Lundbech or by way of documentary evidence, irrespective of Mr Wiggins stated confidence in such correctness.

186. There was no identified written evidence as to why contaminated land required investigation and whether that related to the Clubhouse or some other part of the Park, and if the latter then why. Mr Wiggins in oral evidence in response to enquiry by the Tribunal said that it was a requirement of planning permission, that is to say for the development of the Clubhouse, given the former military use of the site. The charges in respect of planning permission were said by Mr Wiggins in oral evidence to have been split 60:40, as the invoice confirmed [458]. The explanation given was that it was said that there was an attempt to come with an appropriate and fair apportionment in each instance by looking at what was intended and what it had relevance to. Mr Wiggins believed there to be ten instances of apportionment.

187. It is said by Mr Dubin in his Skeleton Argument that the charges relate to long-term development of the Park although the Applicant accepts that developing new chalets will be for its benefit in the first instance- the Tribunal understands because the Applicant will sell them for its own profit- and hence the Applicant does not seek to charge the full cost. The Applicant asserts that there will be benefit to the Park as a whole, although without identifying a specific provision which covers these costs.

188. The Respondents contend that they ought not to be charged any of the cost. The Tribunal application made identifies that in late 2018, the Applicant applied for planning permission to build a number of new chalets, a manager's house and to demolish/convert the old clubhouse but that the planning application was withdrawn in early 2019. It is said that there was attendance at a meeting of the leaseholders and it was stated that lessees had been charged pro-rata for part of the cost of the surveys / planning application but did not go into specific detail of the amounts or what parts the leaseholders were being charged for. Given the various matters raised by the Respondents in this case, the Tribunal considers that the Respondents have gone far enough in challenging to require the Applicant to justify the service charges falling into this section of the dispute.

189. The Tribunal identifies that paragraph 11 of Part II of the Fifth Schedule may apply, as might certain other of the provisions of that Part, although none of the provisions, including paragraph 11, are

considered by the Tribunal to obviously be intended to relate to this situation.

190. The Tribunal determines that the charges in respect of planning permission and contaminated land relate to the development of the Clubhouse and are not payable for that reason. More generally, the Applicant has offered no sufficient explanation for a 50:50 division of costs generally nor how that is reasonable. The Tribunal considered on the information provided that the percentage chosen was nothing demonstrably other than arbitrary. It is also unclear in which instances there has been any different percentage charged, save in respect of planning permission where the Tribunal determines in light of its above determinations that nothing ought to have been charged to the lessees, and on what basis.

191. There is also inadequate evidence as to the extent to which any given element of the costs was properly chargeable to the Respondent, if any. There is no discernible analysis of the extent to which the fees relate to matters for which service charges are recoverable- which may in any event have been reduced to the extent that the Tribunal has disallowed other service charges for given works in dispute. The contaminated land investigation referred to above is one example.

192. It may well be that some survey and other fees do relate to matters properly falling within service charges and that some level of charges for such fees is reasonable. However, there is no way of the Tribunal properly identifying that on the evidence presented.

193. Rather, the Applicant has failed to demonstrate that any of the survey fees do fall within matters chargeable as service charges to the Respondents in any given sum of at all. Given that the final hearing took place and the Applicant has been represented throughout, the Tribunal has dealt with the matter on the evidence chosen to be presented.

194. The Tribunal accordingly disallows the service charges in respect of this aspect.

<u>Decision of the Tribunal in respect of charges for surveys and planning permission for redevelopment</u>

195. The Tribunal determines that none of the service charges are payable.

Fees for defaulting lessees

196. The Applicant still sought the Tribunal to determine, notwithstanding the concession in respect of legal fees, that the fees of the managing agents incurred in respect of their work in connection with legal proceedings of some £37,084.62 were payable and reasonable. Those related to the time spent in dealing with litigation and related. In addition, the Applicant had charged for general legal fees incurred in

obtaining advice for the benefit of the Estate and all leaseholders in the sum of £445.20, which related to the removal of a car from the Park. The Respondent's application referred to a sum of £504 for the service charge year 2016- 2017 but that falls before the years the subject of the Respondent's application.

197. In respect of the former element, the Applicant relied on paragraphs 9 and 11 of Part II of the Fifth Schedule, whether as part of "All costs incurred in provision and supply of any other services" or "The fees of ..... the Lessor's agents for the general management of the Estate". The fees are a charge for dealing with an aspect of management of the Park, not excluded by any of the provisions of the Lease, the Applicant argues.

198. The Tribunal perceives that it is in respect of this aspect of the dispute that the Applicant's Counsel included in his authorities bundle a case authority of *Iperion Investments v Broadwalk House Residents Ltd* 1996] 71 P. & C.R., although the case was not referred to in the Skeleton Argument or in oral closing and so it was not clear to the Tribunal what assistance it was considered the case would provide. In any event, the wording in the respective leases and the circumstances of the cases were different such that the Tribunal did not find the authority determinative of any issue.

199. The statement of Mr Wiggins explained that as part of the accounting process adopted the managing agent's fees of dealing with litigation had been included under the title legal costs. Whilst Mr Wiggins said that enabled the Applicant to identify the "true cost" of the litigation, he correctly conceded that it could give rise to confusion. Mr Kirby broadly, but without enthusiasm, accepted the nature of the work undertaken by the managing agents.

200. The Respondents argued that fees of the managing for time spent assisting the lawyers fell within legal fees and that it was not realistic to distinguish between fees of the managing agents and others. Mr Knapper also referred to the significant charging rates.

201. There was also a fair amount of cross-examination of Mr Wiggins by Mr Knapper in respect of the management fees, but in the circumstances set out below the Tribunal does not consider it necessary to set that out. Similarly, there was cross-examination of the 1st Respondent by Mr Dubin but nothing material arose.

202. The Tribunal does not agree with the Respondents' argument. The Tribunal accepts that on the wording of the Lease, in principle charges for the work of the managing agents in dealing with legal proceedings may be recoverable, as management charges rather than as legal fees, in respect of management of the Park. Consequently, the points made by Mr Knapper in respect of application of the Court of Appeal judgment in *Sella House v Mears* [1989] 1 E.G.L.R. 65- a case not produced to the Tribunal but a longstanding and oft- quoted authority

of which the Tribunal had prior knowledge- are not relevant in respect of the managing agent fees. That case had related to legal costs.

203. However, the Applicant failed to provide the agreement entered into with the managing agents.

204. The Applicant thereby failed to show that the work falls within work of the managing agents for which the Applicant is obliged to pay generally. More specifically, the Tribunal finds that it is highly likely applying its experience of agreements entered into between freeholders or equivalent on the one hand and managing agents on the other, that there is an agreement for the Applicant to pay a given annual fee to the agents, potentially with additional charges at a specific hourly rate or at a piece rate where any work undertaken falls outside of the fixed fee.

205. The Applicant also failed to show that it is obliged to pay for the work beyond the level of any fee agreed with the agent, as being work which falls outside of such fixed fee. The Applicant did not produce any agreement enabling the terms of that to be known. The Tribunal did check with Mr Dubin that the agreement was not provided, and he confirmed that it was not.

206. Nor was there anything to demonstrate, although not directly relevant in the event, the rate at which the managing agent could charge the Applicant for any work falling outside of the work within a fixed fee, if any. Therefore, even if the Tribunal had considered that any additional sum could be demonstrated to be payable, the Applicant would have failed to demonstrate the reasonableness of the specific sum charged. The Tribunal observes in that regard that the fees of the managing agent sought to be charged as service charges were considerable and the Tribunal would have analysed with some care the extent to which those could be regarded as reasonable.

207. The Tribunal is mindful that it did not request a copy of the agreement between the Applicant and the managing agent. However, the Tribunal considers that as both parties were represented throughout, including therefore the Applicant, the Tribunal is entitled to considers matters on the basis of the evidence which the parties saw fit to rely on and was not compelled to venture into the arena by inviting other documentary evidence.

208. In respect of the latter element, the Tribunal accepted the charges regarding removal of the car left by a former lessee were specifically for legal advice. The Tribunal noted the information as to the work undertaken to be limited but considered that the quantity of work was relatively modest and the information to suffice in itself.

209. Mr Kirby in oral evidence raised the fact that his solicitor had asked questions which had not been replied to, but the Tribunal did not consider that took him anywhere and he accepted that advice had been sought. He also suggested that the police could have been involved,

although he provided no basis for it being a police matter. Mr Wiggins added in oral evidence that if the legal fees were recovered, the sum would be credited to the service charges, although he could offer no support for that occurring.

210. Mr Knapper relied again on *Sella House* and the judgement of Taylor LJ that there must be a specific provision in "clear and unambiguous terms" to allow the Applicant to receive legal fees from non- defaulting lessees, which he contended did not exist. Mr Dubin relied on the terms of clauses mentioned above.

211. The Tribunal determines that the work does not fall within paragraphs 9 and 11 referred to above. The removal of the car was an element of Park management, using the term generally, and the legal fees were incurred related to that, but the wording of those provisions cannot be construed as including legal fees being chargeable to the lessees. Neither provision makes any reference to legal fees. The authority relied on by Mr Knapper plainly applies and the provisions are a long way from providing in clear and unambiguous terms for recovery of legal fees.

Decision re fees for defaulting lessees

212. The service charges were not payable.

Insurance

213. The Claim Form listed insurance separately to service charges. However, the Tribunal considers that the charge for the costs of insurance is a service charge.

214. The Tribunal sought an explanation as to why insurance was listed separately, which Mr Wiggins provided, explaining that the renewal date does not coincide with service charge years because there had been no known policy in place when the receivers were appointed- and the Tribunal surmises the receivers had obtained insurance upon being made aware. The Tribunal also noted that the Lease refers to the insurance separately, the insurance in question relating to the individual chalet and not the Park as a whole, which provides a sensible explanation.

215. The insurance element of the case only involved the First Respondent. It is a matter for the Tribunal as being a service charge to be determined arising from the Court order in the proceedings between the Applicant and the First Respondent and not the Respondents' application.

216. Mr Kirkby's oral evidence as to lack of payment was that related to changes to the nature of the policy, mentioning in particular a change from residential to commercial. He did not offer evidence that suitable insurance could have been obtained for a lower sum or otherwise argue

that the amount was unreasonable. He failed to advance any sufficient case for there to be anything required of the Applicant in response.

217. The amount said to be payable by the Applicant was £967.26. However, the only demand identifiable during the period for which the claim is brought is one made on 1st September 2020 [190] for a period 1st September 2020 to 28th February 2021, in the sum of £181.92. Insurance for other years does not fall with the matters referred to the Tribunal by the County Court or the subsequent applications to the Tribunal.

218. Given the cost of £181.92 for six months, the Tribunal perceives a cost of £363.84 for a full year, which appears to be borne out by the charge on 1st March 2022 being the same figure [542]. In the absence of any sufficient challenge to those sums, the Tribunal determines the insurance to be payable and reasonable in full. The Tribunal makes the passing observation that if the yearly insurance for a chalet had been £967.26, the Tribunal may have called for a detailed explanation from the Applicant despite any lack of challenge, the sum appearing obviously unreasonable, a point perhaps rendered obvious by the figure apparently being for somewhat more than a year's insurance. The Tribunal is also less than clear whether the VAT element shown was part of the premium charged by the insurance company or was added by Daniells Harrison but given the lack of challenge and the modest sum of £30.32 involved, an as in this instance there was another company involved (see in contrast Ground Rent below), the Tribunal leaves the matter there.

Decision in respect of insurance

219. The Tribunal determines the cost of insurance to be payable by the First Respondent and reasonable for the relevant six months of the service charge year 1st September in the sum of £181.92.

The County Court issues

Claim in relation to service charges/ insurance under the Lease

220. The County Court issues were considered by Judge Dobson alone, having regard to the findings and determinations of the Tribunal in respect of the Residential Lease service charges. The answer in respect of this aspect of the claim is relatively simple. The Tribunal has determined on the evidence presented the service charges (including in respect of insurance) payable by each chalet owner(s), including therefore by the 1st Respondent, and reasonable, for the years 2017-2018 to 2022- 2023.

221. However, the claim made by the Applicant is very specifically for the sums demanded between 20th February 2020 and 25th February 2021 and hence only some of amounts discussed above. The Court cannot

identify any of the playground charges which were demanded between the relevant dates.

222. On the footing that half of the 2019- 2020 sum was charged in each instalment for that service charge year, so half on 1st September and half on 1st March, only the 1st March portion would fall within the period of the claim. For 2020- 2021, only the 1st September portion would so fall. Hence, the 1st Respondent is liable in respect of the County Court claim for those two halves where sums were charged during those service charge years.

223. Therefore the 1st Respondent's relevant contribution was £26.60 to the Contribution to reserve funds. In respect of the paths and retaining walls, the sum is £394.47. In addition, the contribution of the Respondent to the cost of insurance for the period was determined to be £181.92. The evidence of Mr Wiggins in his statement was that the 1st Respondent had made no payments since the date of a statement of account exhibited [541-545] and the 1st Respondent did not assert any other payments.

224. Mr Dubin sought the sum of £4235,57 in his closing submissions, a significant increase from the amount in the Claim Form on the basis that the balance shown on the Respondent's account had increased since the issue of the claim. It had been apparent that certain invoices in the bundle post-dated the period referred to in the Claim Form. The Court did not consider that any claim had been advanced such that the additional sum was due in the proceedings. The Claim Form prepared by solicitors is specific as to the time period and no application to amend had been made. Mr Dubin did not seek to make further submissions. Quite what part of the larger figure may have been due if open for determination is unclear and soes not merit consideration.

225. Mr Kirby referred in oral evidence to there being water repeatedly outside his chalet despite having supposedly been dealt with and that he had offered to sort out the problem himself but that he had been told he could not touch it. The nature of any breach of covenant by the Applicant and any impact on the payability and reasonableness of the service charges which had been identified as in dispute was not, the Court finds, sufficiently explained to provide any defence (and for the avoidance of doubt neither had the Tribunal considered there to be any basis for set- off).

226. More generally, Mr Kirby objected to paying for the Applicant's development of the Clubhouse, an argument with merit in respect of much of the service charges as demonstrated by the determinations of the Tribunal. He also referred to correspondence he had sent, but not, it was highlighted in cross- examination, to Anchor House. None of that provided a defence.

227. Hence insofar as the service charges and insurance involved in the County Court claim have been found payable and reasonable by the

Tribunal and relate to the period for which the claim is made, the Court determines them to be owing and due.

228. The Claimant is therefore entitled to, and is granted, judgment in the sum of £1,388.35 for these elements. .

Ground rent

229. The demands for ground rent and matters in respect of ground rent more generally were scarcely touched upon in the hearing. Mr Dubin put to Mr Kirby that he did not dispute the ground rent, to which Mr Kirby agreed. His reason for not paying was that his questions had not been answered.

230. Copies of various demands were provided by the Applicant [125 onwards and 540-541], which Mr Dubin asserted in closing to be valid, the 1st Respondent had not disputed and the Court accepts at least in relation to the period with which it is concerned. The Court finds the 1st Respondent's explanation not to provide any valid defence to the claim for ground rent and so the ground rent for the period of the claim is due.

231. The Court notes that the demands are for rent of £206.93 on 1st of January 2020 (and the same for 2018 and 2019). However, the remittance advice in each instance is for £248.32, which appears to arise from adding 20% on top of that figure, presumably for VAT- not other explanation presents itself. The Sixth Schedule provides for a charge of £125 rent, which will be adjusted in accordance with the Retail Price Index at the relevant time.

232. The Court proceeds on the basis that the rent so adjusted would be £206.93 as at January 2020, in the absence of any suggestion otherwise. As to why the figure was the same for the subsequent two years is less than clear. In any event, the Court can identify no provision in the Lease enabling the addition of VAT and cannot identify why ground rent involves a VATable service. Contrary to insurance, there is no other company which might charge VAT. The Applicant failed to demonstrate it VAT to be chargeable.

233. The Court is very cautious about taking any point not specifically raised by the Respondent. However, each demand contains two figures, only one of which as the Court sees it can be correct. In the ordinary course, the Court would have sought supplemental submissions as to the correct figure but in this instance the Court has been particularly mindful of the small sum in question, proportionality and that seeking such submissions may leave both parties worse off whatever the outcome. For those reasons, the Court proceeds doing its best on what is before it.

234. The Court determines that in the absence of any justification for the higher figure- and in particular for the addition of VAT if that is what

has occurred, the claim for ground rent year on year which has been proved on the balance of probabilities by the Applicant is £206.93. The Applicant's claim for ground rent therefore would at first blush succeed in the sum of £620.79 on the basis of the demands in the bundle.

235. However, the claim was for sums demanded between 25th February 2020 and 25th February 2021. Only one of the demands for ground rent was made during that period, that dated 17th December 2020. Therefore the sum in that demand, net of apparent VAT and so the £206.93 figure stated is the sum which the Court will award. The Claimant is therefore entitled to, and is granted, judgment in the sum of £206.93 in respect of ground rent claimed in the proceedings.

Costs included in the claim

236. Insofar as it was said that £180 of the claim was comprised of legal costs, the Court considers that those ought not to be part of the claim but rather be part of the costs of the claim unless there is a very clear reason why they are recoverable as part of the claim itself.

237. None has been provided. The Claim Form states "The Claimant also claims Legal Expenses for £180 in accordance with the terms of the lease." The Claim Form does not explain which term is considered to produce an entitlement to legal costs as part of the claim itself. There is no suggestion that the amount claimed for costs had been demanded as service charges or administration charges- in which event they would have been matters for the Tribunal. There is no explanation for the amount claimed.

238. Save for general comments about the 1st Respondent being in default, in the context of the claims for costs originally claimed as service charges but then not pursued, the basis of the claim remains unclear throughout the rest of the case. The matters uncertain from the Claim Form are never entirely clarified.

239. The Applicant's statement of case argues that the words of paragraph 9 of Part II of the Fifth Schedule "All costs…." are wide enough to allow for this claim and so too "all other expenses……" in paragraph 11, a similar but not identical argument to that referred to in paragraph 198 above.

240. The Tribunal repeats the reference to *Sella House* and the judgement of Taylor LJ that there must be a specific provision in "clear and unambiguous terms". The provisions relied on by the Applicant are not, the Court determines anything like clear and unambiguous as to legal costs. The only provision which is clear is the very narrow one touched on by the Tribunal in paragraph 44 above, clause 3(7) and more specifically referring to "all costs charges and expenses (including Solicitors costs and Surveyors fees) incurred by the Lessor incidental to the preparation and service of a notice under sections 146 and 147 of the Law of Property Act 1925".

241. That is, as the Appellant's Statement of Case noted, very restrictive, not even covering work in contemplation of a notice or similar wording. It is also explicit in its reference to solicitors' costs, indicating that the contracting parties could identify those and provide for them where appropriate. The Court is confident that the contracting parties would have referred to solicitors' costs and other legal fees and related expenses if they had intended to do so.

242. The Applicant is of course able to recover its legal costs in other circumstances where a party is able to do so, simply not as contractual costs. In any event, none of the above provides an entitlement to claim legal costs as part of the claim itself.

243. The Court determines that the Applicant has failed to demonstrate a basis for this element of the claim, The Court therefore disallows that part of the sum claimed in the Claim Form.

Interest

244. The Court notes that the claim made for interest related to the period from 20th February 2020. That daily rate presumably assumed the claim succeeding in full, which it has not. Rather the claim has succeeded in the sum of £809.92. £0.18 is the daily rate of interest at 8% on that.

245. However, the Court does not allow interest at 8% Commonly awards have been at 1% or 2% during the period since the claim, in which time the bank base rate was generally very low and that impacted the approach of Courts. That rate has increased more recently. Taking matters in the round, the Court allows 4%, so a daily rate of £0.09. For a period of 1200 days to date, that amounts to a total of £108.00.

246. Therefore, the Applicant is entitled to £108.00 in respect of interest.

Conclusion

247. It will be identified that the Tribunal has determined certain of the service charges to be payable and reasonable of the various types identified by the above headings, utilised as those were the areas of dispute set out on behalf of the Respondents and adopted by the parties in presenting their cases.

248. The Court and Tribunal note Mr Wiggins stated that it would be difficult to appropriately debit and credit the Respondents' accounts, given that the relevant time period is not the same for each in light of their dates of purchase and the Applicant's statement of case had sought the Tribunal's determination to be limited essentially for that reason. However, the task of the Tribunal is to determine whether service charges in dispute are payable and reasonable and not to address the accounting consequences. The task of the Court was to

decide whether any sum was owed by the 1st Respondent to the Applicant of the sums claimed in the County Court claim. The question of whether any other Respondent owes any sum to the Applicant or is owed any sum by the Applicant, or indeed the 1st Respondent owes or is owed any other sum, is a matter for the parties to resolve, if necessary by separate proceedings but much better by negotiation or another form of dispute resolution such as mediation if necessary. Accounting difficulties caused to the Applicant because it has sought to charge service charges which have ben determined not to be payable or not to be reasonable is its own problem arising demands which ought not to have been made. Advancing an argument that the Tribunal ought not to disallow service charges which properly ought to be disallowed because that is inconvenient to the party which demanded them is optimistic in the extreme and unhesitatingly rejected by the Court and Tribunal.

249. Consequently, whilst the Tribunal posed a question as to the effect of purchases after 2017 and the sale by Mr and Ms Cox, the Tribunal considers that the impact is one for the parties to take account of and does not alter the payability and reasonableness of the service charges. If the effect had been that no Respondent at all would be liable for service charges for any given year and so there had been no basis for the Tribunal to make any determination for such given year, that would have been another matter.

250. The Court and Tribunal also observe that the Applicant and those Respondents who continue to own chalets on the Park will be involved in an ongoing relationship in that regard year on year. Save that all parties should carefully consider the effect of this Decision and what may be charged for and with what supporting evidence, the parties must sensible seek to maintain a constructive relationship, lest substantial sums be expended in further litigation. It is to be trusted that insofar as the Applicant sought to claim other sums not covered by the claimed as stated in the Claim Form, it will not be difficult to identify which of those sums would, or would not, be awarded, in the event of proceedings and hence those will not prove necessary.

Costs and fees- Court and Tribunal

251. There are different but over-lapping jurisdictions which fall to be exercised by the Tribunal and by the Court. There are distinct provisions as to costs.

252. Costs were referred to by Mr Dubin in his Skeleton Argument. The Applicant did not oppose the disallowance of the recovery of the legal costs of these proceedings by the Applicant through the service charge pursuant to section 20C of the Act, making no distinction in that regard between costs of the County Court and costs of the Tribunal proceedings.

253. That element of costs is therefore addressed below as not requiring anything further.

254. However, the Applicant did also seek to claim costs against the 1st Respondent specifically as a defaulting leaseholder who had, the Applicant argued, forced it to issue proceedings. Reference was made to the provisions of rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. The Applicant indicated that it would seek the costs of the County Court proceedings also. That raises the question of how best to deal with such costs.

255. In respect of the County Court costs, the claim was allocated to the Small Claims Track and so the jurisdiction to award costs is significant limited by the provisions of the Civil Procedure Rules. There ought to be summary assessment of any County Court costs awarded, although it must first be determined to which party, if either, any costs should be awarded. Submissions will be required as to both the nature and amount of the costs order. Consideration will also need to be given by the Tribunal to any costs application made pursuant to rule 13 in respect of costs of the Tribunal proceedings.

256. With a little reluctance the Court and Tribunal have concluded that written submissions should be required as to costs as between the Applicant and the First Respondent. Directions will be given by the Tribunal in respect of both elements.

257. Whilst some questions were asked of the 1st Respondent by Mr Dubin in respect of costs, the Tribunal does not record those or the answers given at this stage.

Section 20C applications

258. With regard to the section 20C application of the Respondents and in light of the Applicant's stated position at least in respect of costs other than managing agent's fees, the Court and Tribunal do, separately and in respect of the specific costs falling with the jurisdiction of each, disallow the recovery of costs through the service charges pursuant to section 20C. The Court and Tribunal do so without a separate heading for each decision on the basis that is unnecessary in this instance.

259. However, both the Court and Tribunal do make the following observations in respect of costs and whether the costs of the proceedings could be charged as service charges pursuant to the terms of the Lease in any event.

260. Clause 3(7) of the Lease provides that the Respondent shall pay:

> "all costs, charges and expenses (including Solicitors costs, and surveyors fees) incurred by the Lessor incidental to the preparation and service of a notice under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court or incidental to the inspection of the premises and the drawing up of Schedules of dilapidations."

261. There is nothing obvious in the Applicant's claim which states that the County Court proceedings were taken incidental to the service of a forfeiture notice and/ or that such of the original proceedings as became Tribunal proceedings were pursued for that purpose. It is at least not obvious at this stage that proceedings would be recoverable by the Applicant from the Respondent pursuant to the terms of the Lease. The claim and the Tribunal proceedings do not relate to an inspection and schedule. However, neither the Court or the Tribunal reach any final determination on this point, which may be relevant to any claim for costs by the Applicant and which application ought not to be pre-judged.

262. Section 20C enables the disallowance of contractual costs which would otherwise be recoverable. There are a number of applicable case authorities in respect of section 20C. *Conway -v- Jam Factory Freehold Limited* [2013] UKUT 592 (LC) is the one most often cited. In very brief summary, the test to be applied boils down to whether an order is just and equitable, a test with wide scope for application to the circumstances of the individual case as considered appropriate by the Tribunal (or Court) exercising its discretion. The particular authority adds that it is, "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".

263. In other circumstances, the Court and/ or Tribunal would be likely to consider whether there is an ability for the Applicant to seek to recover the costs of the proceedings and whether disallowance of the contractual costs is appropriate if there is no ability for the Applicant to seek to recover the costs of the proceedings in any event- so whether there is a need to determine such ability. However, on balance, the Court and Tribunal have concluded that an order disallowing recoverability of the Applicant's costs as service charges charges would be just and equitable in light of the Applicant's concession as to all costs other than managing agent fees and the determination by the Tribunal with regard to the recoverability of those fees, and that there is considerable merit in providing finality and avoiding any potential for later argument or proceedings over recovery of costs as service charges

264. Therefore, the Court and Tribunal have determined that the appropriate approach to take is to make the orders identified.

ANNEX - RIGHTS OF APPEAL

Appealing against the Tribunal's decision

1. 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 date this decision is sent to the parties.

2. 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.

3. 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.

4. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against a reserved judgment made by the Judge in his/her capacity as a Judge of the County Court

5. A written application for permission must be made to the court at the Regional Tribunal office which has been dealing with the case. The date that the judgment is sent to the parties is the hand-down date.

6. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

7. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties:

    1. 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

    2. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the Regional Tribunal office within 21 days after the date the refusal of permission decision is sent to the parties.

    3. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the decisions of the Judge in his/her capacity as a Judge of the County Court

8. In this case, both the above routes should be followed.