FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/24UJ/LSC/2023/0019
Property	**:**	6 Shamrock Way, Hythe Marina Village, Hythe, Southampton SO45 6DY
Applicants	**:**	Mr and Mrs T B Bishop
Representative	**:**	In person
Respondent	**:**	Hythe Marina Village Ltd
Representative	**:**	Clarke Wilmott LLP (solicitors)
Type of Application	**:**	Section 27A Landlord and Tenant Act 1985 (service charges), s.20C Landlord and Tenant Act 1985 and para 5 of Sch.11 to the Commonhold and Leasehold Reform Act 2002
Tribunal Members	**:**	Judge Mark Loveday
Date and venue of hearing	**:**	22 June 2023 - Decision without a hearing (Rule 31)
Date of Decision	**:**	22 June 2023

DETERMINATION

Introduction

1. This is an application for a determination of liability to pay service charges under s.27A Landlord and Tenant Act 1985 ("the 1985 Act").

2. The applicants are the lessees of 6 Shamrock Way, Hythe Marina Village, Hythe, Southampton SO45 6DY. The Respondent is the landlord. The application dated 30 January 2023 seeks determinations in respect of relevant costs incurred during the 2019/20, 2020/21, 2021/22 service charge years and budgeted costs to be incurred in the 2022/23 service charge year. The amount in dispute consists of management fees and reserve fund contributions in each year. The sole issue is whether these costs are payable under the terms of the applicants' lease.

3. Directions were given on 10 March 2023 and the Deputy Regional Judge directed that the Tribunal would make a decision without a hearing under Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. In accordance with those directions, the applicants have filed a statement of case and reply, and the respondent's solicitors have filed a statement of case dated 21 April 2023.

The facts

4. Hythe Marina Village is a modern mixed-use development on the western shore of Southampton Water, comprising a 206-berth marina, 226 waterside homes, shops, restaurants, bars and a hotel. The residential and commercial properties are arranged along the sides of the various boating berths. There are also three separate blocks containing services for the boatowners, including showers and laundry facilities.

5. 6 Shamrock Way is part of a complex block that forms the main archway entrance to the marina. The flat itself is on the first and second floors. The street entrance is shared with another flat at 7 Shamrock Way and there is a door entry system for both flats. The bundle includes photographs of the carpeted hallway at ground floor level inside the street door, the stairs and the lift leading to the first floor, where it appears the entrance to 6 Shamrock Way is located.

6. The respondent initially employed Savills as managing agents, but they were replaced by Rendall & Rittner Ltd with effect from 14 August 2019. The agents prepared service charge budgets in each relevant year and annual end of year accounts, audited by Messrs UHY Hacker Young. The papers in this case included various end of year accounts and budgets.

7. The first issue relates to management fees. In each year, the respondent's accountants assessed managing agents' fee for an unspecified number of apartments at Hythe Marina. They then applied an apportionment of 14.998% to arrive at the applicants' contribution to these costs:

Service Charge Y/E	Managing Agents' Fees	Applicants' contribution
24 March 2019	£1,200	£179.98
24 March 2020	£2,914	£437.04
24 March 2021	£3,016	£452.34
24 March 2022	£3,076	£461.34
24 March 2023 (interim)	£3,169	£475.29

8. The second issue relates to reserve fund contributions. In each year, the respondent's accountants assessed a reserve contribution for "6-7 Shamrock Electricity, Repairs and Decoration". It appears to be common ground that this was a reserve fund contribution for works to the premises containing the two units. The accountants then applied an apportionment of 50% arrive at the applicants' contribution to these costs:

Service Charge Y/E	Reserve	Applicants' contribution
24 March 2019	-	-
24 March 2020	£1,250	£625
24 March 2021	£2,500	£1,250
24 March 2022	£500	£250
24 March 2023 (interim)	-	-

The two sets of contributions are the subject of the application.

The Lease

9. The underlease of 6 Shamrock Way is dated 22 March 1988, and demised the premises and a garage at the marina for a term of 999 years less 10 days from 25 March 1984 together with a right to use a mooring berth.

10. There are various obligations on the part of the lessee to pay charges to the lessor. The provision at the heart of this application is at clause 6.24 of the Lease:

> "6.24 To pay on demand a fair and reasonable proportion (to be conclusively determined by the Reversioner as to all matters of fact) of the cost to the Reversioner of complying with the clause 7.4 and if required by the Reversioner to pay on demand a fair and reasonable proportion (to be conclusively determined by the Reversioner as to all matters of fact) of such sum as the Reversioner in its absolute discretion considers appropriate on account of the anticipated future costs of complying with clause 7.4".

To understand this, one must also consider clause 7.4. The reversioner must:

> "… repair clean and maintain in good and substantial repair and condition where necessary renew rebuild and replace the pontoon and entrance hall and to light the entrance hall"

The reference to the "entrance hall" is slightly misleading, since under clause 1.27, the expression includes much of the structure of the building containing the

flat:

> "The staircases, the loadings, the roof, the lifts, the foundations, the external walls and one-half in thickness of every internal wall separating the entrance hall from the adjoining premises forming part of the village".

11. Another similar charge is at clause 6.3.1, which requires the lessee:

> "6.3.1 to pay to the Reversioner on demand a fair and reasonable proportion (to be conclusively determined by the Reversioner as to all matters of fact) of the cost of insuring the Building in accordance with clause 7.8"

12. However, the principal and most detailed service charge provision is at clause 9 of the Lease. Under this, "the Owner ... covenants with the Reversioner to pay an annual service charge in accordance with the provisions of this clause". Clause 9 sets out detailed machinery for the calculation and payment of the service charge, including provision for interim and balancing service charges. In the initial period, the service charge was a fixed figure which was index linked until 24 March 1990. From that date, the service charge was payable on a conventional basis by apportioning the reversioner's "total service charge expenditure". The material parts of clause 9.4 are as follows:

> "9.4 The certified service charge shall in each service charge year be a sum equal to the specified proportion of the Reversioner's share of the total service charge expenditure in that year Provided That for this purpose the following expressions have the following meanings:
>
> 9.4.1 "The total service charge expenditure" in any service charge year means the actual costs and expenses incurred by the Reversioner in that year in providing all or any of the services and other matters set out in clause 8 hereof and otherwise complying with the Reversioner's obligations thereunder including any interest and fees in respect of moneys borrowed to finance the payment of such costs and expenses but excluding any costs and expenses paid out of the reserve fund or out of insurance moneys received by the Reversioner under any policy effected pursuant to clause 8.7 hereof
>
> ...
>
> 9.4.3 "Residential lettable unit" means any premises forming part of the Village which are or are at any time intended or designed to be occupied and used for residential purposes including any mooring berth lower quay wall or car parking space the right to the use of which is or is intended to be included on any letting of such premises
>
> 9.4.4 "The specified proportion" means in any service charge year the proportion which the aggregate rateable value of the demised premises and the mooring berth bears to the total aggregate rateable values of all Residential lettable units comprised in the Village on the first day of that year"

A feature of the clause 9 scheme is that the apportionment relies on domestic rateable values, which have now of course been abolished. However, clause 9.7 permits a re-apportionment by the reversioner in the event of "any change in rateable values or any other change in circumstances". In such a case, the apportionment is subject to "such fair and reasonable adjustments in the specified proportion as appear to be required".

13. Clause 8 includes three sets of material covenants on the part of the reversioner. First, at clause 8.1 is the primary obligation of the Reversioner to maintain the retained parts:

> "8.1 To clean repair decorate and maintain in good and substantial repair and condition and where necessary renew rebuild reinstate or replace the Village (including but without prejudice to the generality of the foregoing the locks and ancillary equipment the lock control building the sea wall the Marina walls and the sheet steel piling forming the face to the Marina walls the piling the sewage pumping system the services and service conducting media and the roads walkways and footways) but excluding the lettable units

In order to understand clause 8.1, it is necessary to consider various terms which are defined elsewhere in the Lease. In clause 1.5, "the Village" is defined as:

> "means the property from time to time comprised in Hythe Marina Village Hythe the current extent of which is shown edged red on Plan No. 1 but subject to such variations or extensions as shall from time to time be notified by the Reversioner to the Owner and references to the Village are to the Village and any part of it"

Plan No.1 shows the site of the Marina, including the site of the various estate roads and boat basins, and the site of the building containing 6 Shamrock Way is plainly within the area edged red. By clause 1.16, "Lettable Units":

> "means residential or commercial premises forming part of the Village which are or are intended or are designed at any material time to be the subject of a separate letting but shall exclude mooring berths the Marina walls and car parking spaces and a 'lettable unit' shall be construed accordingly"

14. Returning to clause 8, the second material group of landlord obligations are at clauses 8.9 and 8.10:

> "8.9 For the purpose of performing its obligations hereunder at its discretion to employ on such terms and conditions as it shall think fit one or more surveyors builders architects engineers tradesmen accountants or other professional persons caretakers porters harbour masters lock operators maintenance staff cleaners and such other persons as the Reversioner may from time to time in its absolute discretion consider

necessary and in particular to provide for such persons a flat or other accommodation free of rent rates or other outgoings to the occupier and any other services considered necessary or desirable by the Reversioner for them

8.10 To employ at the Reversioner's discretion a firm of Managing Agents to manage the Village and discharge all proper fees salaries charges and expenses payable to such agents and/or to such ether persons (including the Reversioner) who may be managing the Village including the cost of computing auditing and collecting the service charges in respect of the Village"

15. The third material obligation in clause 8 is at clause 8.13. The reversioner is obliged:

> "8.13 To set aside such sums at such times as the Reversioner shall in its absolute discretion consider appropriate as a reserve against the anticipated future costs of supplying the services and other matters set out in this clause 8 and performing the Reversioner's obligations hereunder with a view to equalising so far as practicable the annual payments to be made by the Owner under clause 9 hereof and to apply and administer the said sums ("the reserve fund") and the income thereof ... "

Administration of the Reserve is dealt within in clauses 8.13.1 to 8.13.5.

The case for the parties

16. In their first statement of case, the applicants' argument was straightforward. They argued that under clause 6.24 of the Lease, the reversioner could charge the "cost" of complying with clause 7.4, the "cost" of lighting the entrance hall and the "cost" of renewing, rebuilding and replacing the entrance hall. But it could not charge for employing managing agents to provide those services in relation to the 'Entrance Hall'. There was simply no provision the charge the agents' fees to the "entrance hall schedule". Equally, there was nothing in clause 7.4 which provided for a reserve fund. There was no dispute about any charges made under clause 9 to the Lease, which had been paid in full.

17. The respondent accepted in its statement of case that the management fees were in respect of the "Entrance Hall", and it listed the considerable work undertaken by the managing agents in relation to maintenance of the common parts and structure, including the lift. Clause 7.4 of the Lease places an obligation on the respondent to maintain the entrance hall. The cost is of compliance with clause 7.4 of the Lease is recoverable from the applicants in such proportion as the respondent determines under clause 6.24 of the Lease. It had determined that apportionment at 14.998%.

18. The respondent further accepted that a reserve fund contribution was included in the service charge accounts issued to the applicants for the years in dispute. Clause 6.24 of the Lease placed an obligation on the applicants to pay such sums

as the respondent considered appropriate on account of anticipated future costs of complying with clause 7.4 of the Lease. The reserve fund was used to build a reserve for the respondent to comply with its future obligations under clause 7.4 of the Lease. The respondent was therefore entitled to collect a reserve fund from the applicants for future expenditure in this regard. There was a provision in the Lease (presumably clause 8.13) for the respondent to request monies from leaseholders for the reserve fund at its absolute discretion.

19. In their Reply, the applicants submitted that clauses 8 and 9 of the Lease were wholly irrelevant, since they related to the Estate Service charge only. Only the "true cost" of complying with clause 7.4 could be charged. There is no provision for employing managing agents to manage the entrance hall, etc. The "management fee" was "therefore payable by the applicant under the terms of the Lease". But "only under the Estate Service charge in [clause 9]" Similarly, there was a provision at clause 8.13 to recover a contribution to a reserve, but no separate one for the hallway, etc. expenditure.

Discussion

20. This is an issue of interpretation. The general principles were succinctly summarised by Lord Neuberger in *Arnold v Britton* [2015] EWSC 36; [2015] A.C. 1619 at [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":
> • the natural and ordinary meaning of the clause,
> • any other relevant provisions of the lease,
> • the overall purpose of the clause and the lease,
> • the facts and circumstances known or assumed by the parties at the time that the document was executed, and
> • commercial common sense, but
> • disregarding subjective evidence of any party's intentions.

Arnold v Britton was a case which involved service charges, and Lord Neuberger (with whom Lords Sumption and Hughes agreed) said this at [23]:

> "… [R]eference was made in argument to service charge clauses being construed 'restrictively'. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing

> the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not 'bring within the general words of a service charge clause anything which does not clearly belong there'."

Accordingly, service charge provisions are not subject to any special rule of interpretation, but the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". These words of qualification were stressed by the Court of Appeal in the more recent case of *Kensquare Ltd v Boakye* [2021] EWCA Civ 1725, although the precise scope of the qualification is open to some debate.

21. The Tribunal considers there is force in the applicants' principal argument, that clause 6.24 alone does not provide any route for the respondent to recover a contribution to the costs of employing managing agents to manage the common parts of the building containing their flat. The words "costs" in clause 6.24 more naturally relates to expenditure on the services provided, rather than managing the delivery of those services. More significantly, the provision can be contrasted with clause 8.10 (which expressly mentions managing agents) and to some extent clause 8.9 (which refers to other professionals employed to deliver services).

22. However, the Tribunal does not agree with the applicants' submission that that is a sufficient answer to the question of contractual recoverability. The Tribunal considers that clause 8.1 places an express obligation to repair and maintain all parts of the Village, except the "lettable units". The hallways, staircases, roofs, foundations and other parts of the blocks of flats within the development are not "lettable units" as defined by clause 1.16 of the Lease. The obligation to maintain these areas falls within "clause 8" of the Lease, which engages clauses 8.9 and 8.10, In other words, the plain meaning of the words used in these covenants is that the respondent may properly employ managing agents to deliver management services at Hythe Marina Village, including the management of the common parts of the block containing 6 and 7 Shamrock Way. The contribution to the fees paid to the managing agents for managing those parts is still recoverable under clause 9 of the Lease, notwithstanding that the lessees' contribution to the services themselves is payable under clause 6.24.

23. The Tribunal finds support for this from a further consideration. The evident purpose of the service charge provisions is to enable the landlord to recover all its expenditure on managing the development. The applicants' contention would result in the surprising conclusion that the respondent could not recover contributions to the costs of maintaining and repairing significant parts of the development. As explained above, the 'Entrance Hall' in this particular lease means the roof, foundations, hallway, staircases, lifts and other structural parts of the building containing the flat. And as stressed by the respondent, the maintenance, repair, insurance and management of these parts requires considerable work. Indeed, the obligation to maintain in clause 7.4 and the obligation to pay a service charge in clause 6.24 extend even further than the building containing the flat – they include the maintenance of the pontoon adjacent to the applicants' mooring berth. It would therefore have been obvious to the

parties at the time of the Lease that the Reversioner would in all probability employ managing agents to deliver these services and that the lessee would have to contribute to those costs. The context of the Lease and the purpose of the service charge provisions therefore suggest that the parties would have provided for the recovery of contributions to the managing agents fees for delivering these burdensome management obligations – and the most obvious way of achieving this is for the clause 9 service charges to include contributions to these management fees. Moreover, it would be particularly odd if the only persons who did not have to contribute to the fees paid to manage the common parts of 6 and 7 Shamrock Way and the pontoon adjacent to the applicants' mooring berth were the applicants themselves. Indeed, to be fair to the applicants, in their Reply it seems they did not entirely dispute they were liable to contribute under clause 9 of the Lease.

24. The question which remains is whether the contributions set out in the annual service charge accounts reflect the clause 9 contractual provisions. The Tribunal was told the apportionment of the managing agents fees for managing the "Hallway" etc, was set at 14.998% of the total fees of the managing agents. It is unclear how many flats these fees are divided between. The service charge analysis for 6 Shamrock Way in the service charge statements suggest that various different apportionments were used for its service charge calculations. For example, the "Estate Residential SC", and "Estate Residential Reserves" (which accounted for over 98% of expenditure in every year) has been apportioned using a percentage of 0.2454% to arrive at the clause 9 service charge for 6 Shamrock Way. Moreover, insurance contributions (under clause 6.3.1 of the Lease) were apportioned using a percentage of 8.35%, and cleaning (presumably under clause 6.24) at 16.64%.

25. The Tribunal reminds itself that it should not generally intervene if the landlord has a discretion about apportionment (or indeed re-apportionment): *Aviva Investors Ground Rent GP v Williams* [2023] UKSC 6 at [33]. But in this case, it is difficult to reconcile the various apportionments in the accounts with the contractual apportionments in the Lease. The Lease does allow different percentage apportionments to be made to various different heads of cost. For example, the percentage "fair and reasonable proportion" of insurance costs (clause 6.3.1) may and almost certainly will differ from the percentage used for the clause 9 apportionment. Similarly, the percentage "fair and reasonable proportion" of Hallway and pontoon costs (clause 6.24) may and almost certainly will differ from the percentage used for the clause 9 apportionment. But in this case, the respondent has applied the same apportionment for the managing agents' fees as it has for the clause 6.24 apportionment. In effect, it has wrongly introduced 'sub-apportionments' into clause 9, something which is not permissible under the Lease. It appears it should have apportioned these costs in the same way as the "Estate Residential SC", but it has not done so.

26. The respondent's answer to this seems to be that it has a discretion to find an apportionment of 14.998%. Its argument in the statement of case that it has power to do so under clause 6.24 of the Lease is plainly wrong. As already explained, the relevant service charge provision is clause 9, where the apportionment and re-apportionment provisions are clauses 9.4 and 9.7. And for the reasons already given, the power to re-apportion in clause 9.7 allows only a

discretion to vary the percentage contributions for all costs in the same way. It gives no discretion to sub-apportion. It follows that the managing agent's fees must therefore be split between all the residential lessees in the Village, not just the lessees of 6 and 7 Shamrock Way.

27. As to the Reserve Fund contributions, the outcome essentially follows the above. The provision for expenditure falls squarely within clause 8.13 of the Lease, and the costs are therefore recoverable from the applicants under clause 9 of the Lease – not under clause 6.24. Once again, the apportionment of 50% is not one which is permitted under clause 9 of the Lease. There is no provision for a separate reserve fund for 6 and 7 Shamrock Way. If other separate reserve funds are maintained for different parts of the Village, these will also have to be reviewed.

28. It follows that the Tribunal finds the apportionments of managing agents' fees and reserve fund contributions have not been made in accordance with the terms of the Lease. This may of course mean a reconsideration of the charges for all the residential units at the Village, once the respondent has aggregated the managing agents' fees for the various parts of Hythe Marina Village and reviewed the various reserve funds. It may also be that this complicated (and no doubt expensive) exercise produces only a trivial difference to the charges payable by the applicants and the other lessees. But that is not a good reason for ignoring the contractual service charge regime in the Lease.

Section 20C/Para 5A

29. Section 20C of the 1985 Act provides as follows:

> "(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before … the First-tier Tribunal … are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
> …
> (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

30. The well-known principles applicable to s.20C applications are summarised in Tanfield on Service Charges & Management (5th Ed) at paras 15-06 to 15-11. In the recent case of *Obi-Ezekpazu v Avon Ground Rents Ltd and another* [2022] UKUT 121 (LC), the Upper Tribunal stressed that when considering a section 20C application, "the FTT was not exercising a conventional costs jurisdiction but was determining to what extent" leaseholders "should be relieved of a contractual obligation" which they have "willingly entered into".

31. The applicants have substantially succeeded in their application. There is nothing in their conduct in relation to the proceedings to suggest they have acted improperly. Notwithstanding any contractual entitlement to costs, it is just and equitable to make an order under section 20C of the 1985 Act. The respondent's costs incurred in connection with proceedings before the Tribunal are not to be

regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicants.

Conclusions

32. The application succeeds. The Tribunal determines under s.27A of the 1985 Act that the following elements of the service charges payable by the applicants have not been determined in accordance with the Lease:
    (a) managing agents' fees for managing the communal areas of 6 and 7 Shamrock Way, and
    (b) the Reserve Fund contributions for the communal parts of 6 and 7 Shamrock Way.

    The Tribunal does not have sufficient material to determine the sums payable in any of the service charge years referred to in the application. But it has indicated above how they ought properly to be computed.

33. Under s.20C of the 1985 Act, the respondent's costs incurred in connection with proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicants.

Judge Mark Loveday
22 June 2023

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.