FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	CAM/00MF/LSC/2022/0070
Property	**:**	Flat 9, The Broccoli Cloister, Woolf Drive, Wokingham, Berkshire RG40 1AW
Applicant	**:**	Joy Spink
Applicant's Representative	**:**	In person
Respondent	**:**	Greensleeves Homes Trust
Respondent's Representative	**:**	Clive Moys, of counsel
Type of application	**:**	Liability to pay service charges
Tribunal members	**:**	Mr Max Thorowgood and Mr Roland Thomas MRICS
Venue	**:**	CVP
Date of Decision	**:**	6 November 2023

DECISION

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1. The application

1.1. By her application dated 24th November 2022 the Applicant seeks a determination of her liability to pay the service charges which she has paid in respect of the years ending 31st March 2018, 2019, 2020, 2021 and 2022 in relation to her Assured Shorthold Tenancy of Flat 9, The Broccoli Cloister, Woolf Drive, Wokingham RG40 1AW.

1.2. The Applicant's tenancy agreement is dated 18th October 2016 and was granted to her by The Cinema and Television Benevolent Fund ("the CTBF"). The CTBF transferred its interest in the premises known as the Glebeland House Estate to the Respondent on 15th June 2017.

1.3. The agreement is in a somewhat unusual form insofar as it was for an initial term of 6 months and yet it makes detailed provisions for the payment by the Applicant of service charges in respect of buildings insurance and repairs, amongst other things. Given the very limited interest of an Assured Shorthold tenant in the building in which their premises are situated and the restrictions which are placed upon their liability to contribute to the cost of repairs by s. 11 Landlord & Tenant Act 1985, the terms seem to be a rather peculiar amalgam of lease and tenancy agreement which, when subjected to the Applicant's scrutiny (following the change of ownership), have been found to give rise to a substantial number of difficulties with the result that even by the point of the hearing a significant number of concessions had been made in response to the points made by the Applicant. A number of further concessions were then made by the Respondent over the course of the ensuing days.

1.4. Before proceeding to consider the large number of issues which arise, we would like to pay tribute: first, to singular forensic skill with which the Applicant has presented her case as well as her analysis of the various legal questions to which it gives rise; and second, to the good humour, patience and forbearance (as well as forensic skill) with which Mr Moys, Ms Nixon and Mr Jaggs responded to the application. Too often in these cases relations between the parties become so strained that their enjoyment of their homes is very adversely affected by disputes about what are ultimately relatively small sums of money. We are pleased to think that that has not and will not be the case here. Indeed, we were informed that the Applicant has recently entered into a new more conventional form of tenancy agreement with the Respondent in respect of her flat.

2. The terms of the tenancy agreement

2.1. The premises known as Glebelands House were given to the CTBF in 1936 in order that it might operate a retirement home for those who had worked in the film and television industries. In 1985 a nursing facility was added and in 2007 the Broccoli Cloister was built to enable independent but supported living facilities to be offered on site in addition to care home facilities. The parties agreed that the amenities offered by the 8 acre site are very considerable.

2.2. The Glebelands House site is now divided into four moreorless separate sites:

2.2.1. The care home which operates from Glebelands House which can accommodate up to 42 residents;

2.2.2. The Broccoli Cloister, in which the Applicant's premises are situated, which consists of 27 residential apartments;

2.2.3. Academy House, which is subject to a long lease in favour of a third party, which comprises 47 separate units; and

2.2.4. Stable Court and the Cottage, comprising together 4 units.

Mr Jaggs accepted in his witness statement that the total number of units between which the service charge ought to have be divided was 120 as opposed to the 115 units on the basis of which the Applicant's service charge had until these proceedings were initiated been calculated.

2.3. The particulars of the tenancy agreement which are set out in the front page of it provide for the Applicant to pay a rent of £715.00 and an 'Initial Provisional Service Charge' of £315.00 per calendar month. The box into which a service charge % might have been inserted is marked 'N/A'.

2.4. The relevant terms of the tenancy agreement are as follows:

> "the Common Parts" means such of the areas and amenities that are designated from time to time by the Landlord in the Estate to be for the benefit of the tenants and occupiers of the Estate and all persons expressly or by implication authorised by them including, without prejudice to the generality of the foregoing;-
>
> > (i) the communal areas in the Building and in any other buildings on the Estate which also comprise fiats including the entrance halls, landings, lifts, lift shafts, staircases, corridors, passages, and
> >
> > (ii) the areas in Glebelands House shown hatched black on the attached plan, and
> >
> > (iii) the pedestrian ways, forecourts, car parks, roads, drives, pavements, landscaped areas and gardens of the Estate, and areas designated for the keeping and collection of refuse, butnot limited to them
>
> BUT SUBJECT nevertheless to the provisions of Clause 5.5.3
>
> "the Estate' means the land shown edged green on the attached plan and includes the Building and all other structures (including boundary walls and fences) from time to time erected on the Estate
>
> [No plan was attached.]
>
> "Glebelands House" shall mean the main building on the Estate in which some of the Common Parts are located
>
> "the Landlord's Building Service Charge Expenses"means:
>
> > (i) the costs and expenditure (including all charges, commissions, premiums, fees and interest) paid or incurred, or deemed (in accordance with the provisions of paragraph 3.2.3 of Schedule 3) to be paid or incurred, by the Landlord in respect or incidental to all or any of the Building Services or otherwise required to be taken into account for the purpose of calculating the Service Charge, except where such cost and expenditure is

recovered from any insurance policy effected by the Landlord; and

(ii) the sums that the Landlord from time to time pays

(a) by way of premium for insuring the Building, including insuring for loss of rent, or where the insurance includes the Building and other property, the proportion of those sums reasonably attributable to the Building, and

(b) for insurance valuations

(iii) Any insurance excess suffered as a deduction from a claim under any such insurance policy

“the Landlord Estate Service Charge Expenses" means:

(i) the costs and expenditure (including all charges, commissions, premiums, fees and interest) paid or incurred, or deemed (in accordance with the provisions of paragraph 3.2.3 Schedule 3) to be paid or incurred, by the Landlord in respect or incidental to all or any of the Estate Services or otherwise required to be taken into account for the purpose of calculating the Service Charge, except where such cost and expenditure is recovered from any insurance policy effected by the Landlord; and

(ii) the sums that the Landlord is from time to time liable to pay

(a) by way of premium for insuring Glebelands House and any other buildings on the Estate to the extent that they are used as the Management Premises as defined in Schedule 3 (limited to 16% of such premium for insuring Glebelands House being borne as part of the Landlord's Estate Service Charge Expenses)

(b) by way of premium for insuring in such amount and on such terms as the Landlord acting reasonably considers appropriate against all liability of the Landlord to third parties arising out of or in connection with any matter involving or relating to the Estate, and

(c) for insurance valuations: and

(iii) Any insurance excess suffered as a deduction from a claim under any such insurance policy.

“the Service Charge” means the relevant respective Service Charge percentages of the Landlord’s Building Service Charge Expenses and of the Landlord's Estate Service Charge Expenses

“the Service Charge Percentage” is as set out in the Particulars

3. Tenant’s Agreement

The tenant agrees with the Landlord to perform and observe the following obligations:

3.1 Rent and Service Charges

3.1.1 To pay to the Landlord (or to the Landlord's agents as directed) the Rent and the Initial Provisional Service Charge in advance by Bankers Standing Order (if so directed) on the Rent and Service Charge Payment Dates and not to exercise or seek to exercise any right or claim to withhold rent or any right or claim to legal or equitable set-off. The Tenant shall observe the Service Charge obligations set out in the Third Schedule to this Agreement

3.1.2 The Tenant recognises that the final Service Charge liability will not be known until some period after the end of a Financial Year (as defined in Schedule 3) and therefore an adjustment to payments made by the Tenant on account will then have to be made (apportioned as appropriate if this Tenancy is determined during a Financial Year) and the Tenant may therefore be liable to make an additional payment for the relevant period (or receive a refund or credit) notwithstanding that this Tenancy may have been determined.

...

3.5.7 to keep the drains gutters and pipes and lavatories within or serving the Flat clean and free from obstruction

...

Landlord’s agreement

4.1 To keep the Flat and any Furniture include in the Tenancy insured at all time throughout the Tenancy against loss or damage by fire and such other insurable risks as the Landlord may decide

...

4.3 To keep in repair the Building and the Retained Parts and the facilities for space and water heating and other Utilities in the Flat in good repair

4.4 The Landlord shall maintain Glebelands House in such good order and condition as shall enable the Tenant and others so entitled to enjoy such of the Common Parts as shall from time to time be sited in such building

SCHEDULE 3 (The Service Charge and Services)

3.1 Definitions

In this Schedule the terms defined below have the meanings given in this paragraph

3.1.1 “Financial Year”

References to “a financial year" are references to the period commencing on 1** April in any year and ending on 31st March and in the same year or such other annual period as the Landlord in its discretion determines as being that for which its accounts either generally or in respect of the Estate are to be made up

3.1.2 “the Management Premises”

‘The Management Premises" means all the administration and control offices and storage areas, staff rooms, kitchens, laundries, guest rooms and other areas maintained by the Landlord for the purpose of managing the Estate and performing the Landlord’s obligations under this Lease together with any living accommodation provided by the Landlord for an estate manager and for other staff employed by it for purposes connected with the Estate

3.1.3 "the Plant”

“The Plant” means all the electrical, mechanical and other plant, machinery, equipment furnishings furniture fixtures and fittings floor coverings curtains or ornament or utility in use for common benefit from time to time on, in or at the Estate not solely serving the Flat, including without prejudice to the generality of the foregoing, goods and passenger lifts lift shafts heating cooling lighting ventilation and air conditioning equipment, cleaning equipment, fire precaution equipment, fire and burglar alarm systems, door entry systems, television aerials, and reception systems, closed circuit television, refuse containers and compactors and all other such equipment including stand-by and emergency systems

3.2 Service charge provisions

3.2.1 Certificate of the Landlord’s Expenses

As soon as reasonably practicable after each Financial Year the Landlord must ensure that the Accountant issues a certificate containing a summary of the Landlord’s Expenses for that Financial Year and a summary of any expenditure that formed part of the Landlord’s Expenses in respect of any previous Financial Year but

which has not been taken into account in the certificate for any previous Financial Year.

3.2.2 Omissions from the certificate

Omission by the Accountant from a certificate of the Landlord's Expenses of any expenditure incurred in the Financial Year to which the certificate relates is not to preclude the inclusion of that expenditure in any subsequent certificate

3.2.3 Deemed Landlord's Expenses

3.2.3.1 In any Financial Year the Landlord's Expenses are to be deemed to include such fair and reasonable part of all costs and expenditure in respect of or incidental to all or any of the recurring Services, when ever paid or incurred whether before or during the Term, including reasonable provision for anticipated expenditure by way of contribution to sinking and reserve funds as the Landlord in its reasonable discretion allocates to that Financial Year

3.2.3.2 If the Landlord, agent for the Landlord, or a person connected with the Landlord or employed by the Landlord attends to:

(a) the supervision and management of the provisions of Services for the Building and the Estate

(b) the preparation of statements or certificates of the Landlord's Expenses

(c) the auditing of the Landlord's Expenses or

(d) the collection of rents from the Building then an expense is to be deemed to be paid or a cost incurred by the Landlord being a reasonable fee not exceeding that which independent agents might properly have charged for the same work

3.2.4 Certificates conclusive

Any certificate of the Landlord's Expenses, and any certificate of the Accountant in connection with the Landlord's Expenses, is to be conclusive as to the matters it purports to certify

3.2.5 Payment

For each Financial Year the Tenant must pay the Service Charge Percentage of the Landlord's Expenses such payment to be made by direct debit if the Landlord so requires

[As noted above this percentage was not

3.2.6 Payment on account

for each Financial Year the Tenant must pay to the Landlord on account of the Service Charge such a sum as is reasonable having regard to the likely amount of the Service Charge. That sum must be paid in advance by equal instalments on the first day of every month, the first instalment to be paid on the first day of the month immediately before the commencement of the Financial Year in question. During any financial year the Landlord may revise the contribution on account of the Service Charge for that Financial Year so as to take into account any actual or expected increase in expenditure.

3.3 **The Services**

The Services are:

3.3.1 the Building Services

...

3.3.1.5 save and to the extent that they are include in paragraph 3.3.2 of this Schedule administering and managing the Building performing the Service, performing the Landlord's other obligations in this Lease and preparing statements or certificate of and auditing the Landlord's Expenses

...

3.3.1.7 discharging the reasonable and proper costs of any service or other matter the Landlord, acting reasonably, this proper for the better and more efficient management and use of the Building and the comfort and convenience of its occupants and others that may at any time be entitled to use its facilities and amenities

...

3.3.2 The Estate Services Expenses

For the avoidance of doubt reference to "Common Parts" in this paragraph shall include (unless the context otherwise admits) the Management Premises

...

3.3.2.2 16% of the cost of:

a) the use and maintaining of gas water electricity and drainage services to Glebelands House

b) business rates/counsil tax incurred in respect of Glebeland House

c) maintaining renewing and repairing the structure, roof, foundations and fabric of Glebelands House and the external decoration thereof

3.3.2.12 employing such agent or other persons as the Landlord acting reasonably considers necessary or desirable form time to time in connection with the management and administration of the Estate and providing any of the Services referred to in paragraph 3.3.1 and 3.3.2 of this Schedule, performing the Landlord's other obligations in this Lease and collecting administering and managing rents and the Service Charge accruing to the Landlord from the Estate including engaging the services of an Accountant and other professional services ancillary thereto paying all incidental expenditure including but without limiting the generality of the above, remuneration payment of statutory contributions and such other health, pension, welfare redundancy and similar or ancillary payment and any other payment the Landlord acting reasonably thinks desirable or necessary and providing work clothing

...

3.3.2.15 discharging all existing and future taxes, charges duties, assessments, impositions and outgoings whatsoever in respect of the Common parts (but not exceeding 16% of the cost of such liabilities in respect of Glebelands House) including without prejudice to the generality of the above, those for water, drainage, electricity, gas and telecommunications

...

3.3.2.19 discharging the reasonable and proper costs of any service or matter the Landlord, acting reasonably, thinks proper for the better and more efficient management and use of the Estate or for the comfort and convenience of it occupants

It will be apparent from a careful reading of the above that, save and insofar as the Applicant's liability to bear costs associated with Glebelands House is limited to 16%, these terms do not define the proportion of the total Service Charge which the Applicant was to bear. The matter ought to have been dealt with by means of paragraph 3.2.5 of Schedule 3 and the terms defined by the Agreement and the Particulars of it but it was not. Instead, seemingly as a matter of informal understanding/at the discretion of the landlord, the Service Charge was apportioned on the basis that the Building Service would be

shared equally between the residents of the Cloister, i.e. 1/27th each, the Estate Service Charge would be shared between the residents of the Estate, 1/115th (now agreed to be 1/120th), and the Estate Service Charges referable specifically to Glebelands House would be apportioned as to 16% between the residents of the Cloister. There was no evidence as to whether that was the basis upon which the Applicant's Initial Provisional Service Charge contribution was based, but we are prepared to assume that it was as the contrary was not suggested.

3. The Applicant's grounds of challenge

3.1. The Applicant advanced a number of distinct grounds of challenge:

3.1.1. First, she said that a number of terms were unfair and consequently unenforceable against her by reason of s. 62 of the Consumer Rights Act 2015 ("CRA");

3.1.2. Second, she said that in a number of instances she had been charged for works of repair for which the landlord was solely responsible by reason of s. 11 Landlord & Tenant Act 1985; and

3.1.3. Third, she said that in a number of cases the charges were either not reasonably incurred or were unreasonable in amount for the purposes s. 19 Landlord & Tenant Act 1985. There was no challenge as such to standard of the works which were done and/or services received.

3.2. In the skeleton submissions which he submitted in advance of the hearing Mr Moys said that it was the Respondent's position that the Tribunal had no jurisdiction to consider challenges to the terms of the tenancy agreement pursuant to the CRA. We considered that question

afresh with Mr Moys at the outset of the hearing and in the course of that discussion he agreed that as a matter of principle the provisions of a tenancy agreement are susceptible to a challenge pursuant to the Consumer Rights Act 2015 and that, insofar as the question arose directly in connection with the payability of a service charge, the Tribunal had jurisdiction to determine whether the provision in question was liable to be held to be unenforceable under the CRA. He nevertheless submitted that the provisions of the Act added nothing of substance to the Tribunal's jurisdiction to consider questions of reasonableness in connection with s. 19 Landlord & Tenant Act 1985. We do not accept that submission. It seems to us that the question whether a contractual provision which requires a tenant to make payment of a particular sum by way of service charge (such as, for instance, a question that arises in this case: the proportions in which the costs are divided between the units) is unfair and consequently unenforceable pursuant to the CRA is fundamentally distinct from the question whether a charge for which the tenancy agreement provides that the tenant is liable was reasonably incurred and/or reasonable in amount.

3.3. S. 64 of the CRA provides, however, that so-called 'core' terms, ones which specify the main subject matter of the contract, are not liable to be assessed for fairness if they are expressed in plain and intelligible language and are brought to the consumer's attention unless the terms in question have one of the objects or effects prescribed by Part 1 of Schedule 2 to the CRA.

3.4. The learned editors of Service Charges and Management (5th ed.) express the view that it is 'arguable' that a term which provides for the payment of service charge is a core term and it seems to us that in this case the term requiring the Applicant to pay the service charges here in question, in and of itself, was certainly a core term. The amount of the initial provisional service charge was one of the particulars set out on the front page of the tenancy agreement as was the requirement to pay it, together with the rent, in advance on the first of the month.

3.5. It does not seem to us to follow, however, that the terms of the agreement which govern the costs which the landlord is entitled to recover from the tenant by way of service charge and/or the terms as to the calculation and/or charging of those costs are in themselves core terms. But even if that is wrong, they were neither sufficiently prominent that they can be said to have brought the attention of an average consumer nor are they expressed in plain and intelligible language. As appears above, the construction of the relevant provisions is not free from difficulty and requires a considerable amount of referential reading.

3.6. The Applicant also contends that the terms which she says are unfair are within the scope of assessment because they have the following objects or effects which fall within the scope Part 1 of Schedule 2 and that they are therefore liable to assessment of their fairness even if they are core terms:

> "3 A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.
>
> 12 A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.
>
> 14 A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.
>
> 20 A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—
>
> ...
> 2.(b) unduly restricting the evidence available to the consumer"

We shall consider in the case of each challenged term whether it falls within the scope of these provisions.

3.7. In addition to these considerations, it seems to us to be the effect of s. 64(1)(b) that, insofar as the assessment of fairness which the Tribunal is asked to undertake entails an assessment of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under the contract, such an assessment will not be permissible unless the other conditions set out above are satisfied, although it is not really clear how the requirements of prominence and intelligibility or indeed the objects and effects prescribed by Part 1 of Schedule 2 to the CRA fit easily, or at all, into this aspect of the process of assessing the fairness of a term.

3.8. So far as the approach which we should take to considering whether any of the particular terms challenged by the Applicant are unfair is concerned, s. 62 of the Consumer Rights Act 2015 provides as follows:

> "**62 Requirement for contract terms and notices to be fair**
>
> (1) An unfair term of a consumer contract is not binding on the consumer.
>
> (2) An unfair consumer notice is not binding on the consumer.
>
> (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
>
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
>
> (5) Whether a term is fair is to be determined—
>
> (a) taking into account the nature of the subject matter of the contract, and
>
> (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends."

3.9. Thus, a term will be unfair if, "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer." 'Good faith' means, "fair and open dealing", which means that a tenant's,

"necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position"[1] must not be taken advantage of. Furthermore, that question is to be considered in the circumstances prevailing at the time the contract was created and in light of the agreement as a whole.

3.10. The terms which the Applicant complains are unfair are these:

3.10.1. First and foremost, the Applicant complains that it is unfair that the total amount of the Estate Services and indeed the Building Services should be divided equally between the individual units rather than rateably according to the extent to which the costs are attributable to those units or according to the size of the individual units in the same proportions as the rent which varies from property to property according to their size and presumably also desirability.

3.10.2. She says that the demands of the residents of Glebelands House care home are far greater than those of the residents of the Broccoli Cloister and that they ought therefore to bear a greater share of the costs.

3.10.3. She also says that she should not be obliged to pay any of the costs which are attributable exclusively to Glebelands House and complains specifically that she should be required by paragraph 3.3.1.2 of Schedule 3 to pay 16% of the costs of:

(a) the use and maintaining of gas water electricity and drainage services to Glebelands House

(b) business rates/council tax incurred in respect of Glebelands House

[1] See *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52

(c) maintaining renewing and repairing the structure, roof, foundations and fabric of Glebelands House and the external decoration thereof

She said that the force of this submission has greatly increased since the care home and the Cloister were effectively separated because her ability to enjoy the facilities of Glebelands House in now greatly diminished, although she did accept that the residents of the Cloister are still enjoy the considerable benefit of access to the grounds of Glebelands House and that the amenity of the Glebelands Estate as a whole is a significant benefit to her.

3.10.4. Second, she says that it is unfair that the Respondent has issued Assured Shorthold Tenancies in different terms to more recent tenants and she wishes to know how those terms differ from the terms of her agreement.

3.10.5. Third, she says that it is unfair that she, as a rental tenant who has no obligation to keep the building in repair and has no ability to make a claim under the policy of buildings insurance, should have to contribute to the cost of procuring it.

3.10.6. Fourth, she says that it is unfair that she should be required to bear the cost of Public Liability Insurance the benefit of which enures principally, if not exclusively, for the benefit of the landlord.

3.10.7. Fifthly and finally, she says that it is unfair that she should have to bear the cost of the landlord's accountant preparing a certificate summarising the Landlord's Expenses for the year and thus providing an account of the sum of service charge payable by the Applicant. She also makes a number of complaints about the failure as she says of the Respondent to provide her with the certificates which the Landlord was

required to produce at the conclusion of the service charge year.

3.11. Taking those terms in turn our conclusions are as follows:

3.11.1. *The apportionment of the service charges between the units* – It is a curious aspect of the Applicant's tenancy agreement that save as regards paragraph 3.3.1.2, it does not specify the proportion of the Landlord's Building Service Charge Expenses and Landlord's Estate Service Charge Expenses which the Applicant is liable to pay. Paragraph 3.2.5 of Schedule 3 provides that she must pay the Service Charge Percentage of the Landlord's Expenses but the front page of the agreement, which provides for the percentage to be specified, does not specify it. Indeed, it says that it is 'n/a', although as we have said, it did specify the amount of the Initial Provisional Service Charge. In practice, as we have said, since the commencement of the agreement in 2016, the Applicant's proportion of the service charge has been calculated in the manner we have described above, which as the Respondent admits was incorrect to the extent that the Estate Services ought to have been divided by 120 rather than 115.

3.11.2. It seems to us that an assessment of the question whether it is fair that payment of the service charge should be apportioned as it has been in this case is one which requires us to assess the appropriateness of the price which the Applicant is required to pay for the services which she is receiving and that it is therefore not one in respect of which we are entitled to assess its fairness unless it falls within one of the categories of Part 1 of Schedule 2. The only one of those categories which seems possibly to be applicable is 14:

> "14 A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound."

It could probably be said that it is the object and effect of the service charge provisions of this agreement confer a substantial measure of discretion in certain respects upon the Respondent landlord to determine the nature and extent of the services which are to be provided by it to the Applicant and thus the amount payable by the Applicant under the contract. However, it is not correct to say that the agreement does not provide a method for determining the price. Indeed, it makes quite elaborate provisions in this respect. It is also questionable in our view whether it is correct to say that the Landlord is determining the price payable by the Applicant, the service charge is the cost to the Respondent of supplying the services to the Applicant, the price is determined by the providers of the services. This illustrates in our view some of the difficulty which arises in applying the CRA to tenancy agreements in general.

3.11.3. It might also be said that the failure of the tenancy agreement to prescribe the proportion of the cost by means of the 'Service Charge Percentage' also places these provisions firmly within the scope of paragraph 14. However, it seems to us that although the Service Charge Percentage was not prescribed by the Applicant's tenancy agreement, as such, in practice the means for determining was in the sense that the Initial Provision Service Charge, which was prescribed was calculated on the basis which we have outlined above and indeed in the manner which is described in the end of year accounts which were provided to the Applicant.

3.11.4. We therefore conclude in respect of this ground of challenge that we are not entitled to assess the fairness of the apportionment of the service charge between the Applicant and the other residents of the estate. But even if that is wrong, we do not consider the apportionment to be unfair. As the Respondent submitted, it is a significant consideration in this case that there is value to the Applicant in pooling her costs with the other residents and in the enjoyment of the amenities which the Glebelands House estate offers. Furthermore, the likely prospective cost to the Applicant of the service charge, if not the way in which it was apportioned between the other residents, has been absolutely clear to the Applicant from the outset and it is that transparency which seems to be of the essence of the requirement of good faith and imbalance between the parties. There is no suggestion that the Applicant was in any way mislead at the point at which she entered into the tenancy agreement in 2016 or that the Respondent took advantage of any particular disadvantage from which she was suffering at that time.

3.11.5. We are also mindful and in sympathy with the Respondent's submission that the fairness of any service charge provision has to be judged in the context of the inalienable right of the payee to challenge the payability and reasonableness of a service charge by means of an application to the Tribunal.

3.11.6. The same considerations apply to the Applicant's specific challenge to the attribution to her of 16% of the costs of maintaining Glebelands house. The Applicant agreed to accept the tenancy agreement on the terms on which it was offered. It is true that her ability to enjoy the additional amenities offered by Glebelands House has since been diminished but that is a matter in respect of which she is entitled to 'vote with her feet' by giving notice to quit should she wish to do so.

3.11.7. *Failure to share the terms of agreements made with other residents* - We can deal with this second ground of challenge more quickly. There is no contractual provision which can be challenged on the ground of unfairness which bears upon the refusal of the Respondent to share with the Applicant the terms of the agreements into which it has entered with other residents. Quite apart from anything else, the terms of those agreements are almost certainly confidential as between the Respondent and those residents. It is a matter for those residents whether they wish to share them with the Applicant.

3.11.8. *Requirement to contribute to the cost of buildings and third-party liability insurance* – This ground of objection falls into two parts. The first concerns the insurance charge in respect of the Cloister, the second concerns the obligation upon her to contribute to 16% of the cost of insuring Glebelands House gives rise to more difficult questions.

3.11.9. We do not consider that the terms relating to the Applicant's liability to contribute to the cost of buildings and third party liability insurance are core terms of the agreement. We also consider that even if they are, they are terms falling within paragraph 14 of Part 1 to Schedule 2 and thus susceptible to an assessment of their fairness.

3.11.10. The Respondent rightly accepts that the Applicant is not liable to contribute towards the cost of repairs which fall within the scope of s. 11 Landlord & Tenant Act 1985 which applies to the Applicant's tenancy agreement because it is a short lease. It follows that it is the Respondent's liability under the tenancy agreement to keep in repair: the structure and exterior of the building; the installations for the supply of water, gas and electricity to the premises; and the installations for space and water heating. Furthermore, s. 11(2) provides that the Respondent is not to be construed by virtue of s. 11(1) as being under an obligation to reinstate the premises in the case of

their destruction or damage by fire or various other common insurable risks.

3.11.11. The Tenancy Agreement provides that the Respondent is to keep the Flat insured as well as any furniture included in the tenancy and further that, should the flat be destroyed or rendered uninhabitable, the tenant's liability for rent and service charge would cease until the flat was reinstated and rendered habitable. There is however no explicit provision requiring the Respondent to apply the insurance monies to the reinstatement of the Flat.

3.11.12. The Applicant complains that these provisions are unfair because she has no insurable interest in the property being insured. We do not think that is correct. By virtue of her tenancy agreement and by virtue of the provision relieving her of her liability for rent and service charge she does have an interest in the subject matter of the insurance, albeit a relatively insignificant one in practice. In any event, the Landlord, whose responsibility it is to effect the insurance, certainly does have an insurable interest in the flat. The question is whether it is fair that the Applicant should have to contribute to the costs of insuring the Cloister and *a fortiori* Glebelands House for the benefit of the Respondent and especially so when that insurance is effected under the terms of a block policy which operates across the Respondent's 28 sites. Why should, we ask ourselves rhetorically, the Respondent be entitled to pass the entire cost of effecting this insurance (over which the Applicant has no control and very little insight) on to the Applicant and her fellow residents when the vast majority of any benefit from a claim would almost certainly accrue to the Respondent ? In the course of both days of the hearing the Respondent's witness Mr Jaggs was asked a number of questions concerning the way in which the insurance for which the Applicant was being charged was

arranged and what the scope of the cover offered was. These were questions which Mr Jaggs was unable to answer himself and in respect of which no detailed information was forthcoming from the Respondent. Mr Jaggs said that he had asked for more detailed information but that it had not been forthcoming. The answer, we have no doubt, is that because the insurance is effected as part of a block policy and the precise nature of the cover and the apportionment of the premium amongst the various sites is a matter of some complexity. Nevertheless, it does seem to us that the opacity of these insurance arrangements is indicative of a lack of transparency or open dealing and an imbalance of power between the Applicant and the Respondent and thus potentially unfair.

3.11.13. It is convenient to consider this matter together with the question of the Applicant's liability to contribute to the cost of insurance against third party liability as defined by (ii)(b) of the definition of Landlord Estate Service Charge Expenses. Again, we sought further information from the Respondent as to the precise nature of this cover and were told by Mr Jaggs that he had sought further information from his superiors in this regard but that none had been provided. The best information that Mr Moys was able to offer that it would provide cover in respect of a possible claim by a visitor to the site, although we imagine that it might also cover claims against the Respondent by residents of the site also. Be that as it may, it does seem to us that cover of this nature, which seems to be for the sole benefit of the Respondent and to relate to the manner in which it carries on its business, is yet a further step beyond the case made by the Applicant in respect of buildings insurance cover from which it is at least possible that she might benefit, if only to the limited extent of relief from 2 months rent and service charge liability.

3.11.14. Again, we also think that the Respondent's complete lack of transparency, even in the face of Tribunal proceedings in respect of the nature and extent of the cover in question, let alone the attribution of the premium amongst the Respondent's 28 sites, points to an imbalance of power between the contracting parties in this respect which enables the Respondent to pass on entirely a cost of its business to the Applicant and her fellow residents.

3.11.15. In the end, it was Mr Moys' simple submission that the charges were contractually due and payable and that that was effectively an end of the matter. We do not accept that submission. For the reasons we have given, the question of contractual liability absent the CRA is not the end of the matter.

3.11.16. We therefore conclude that the provisions of the tenancy agreement which provide for the Applicant to contribute to the Respondent's costs of procuring both buildings and third party liability insurance are unfair and that those parts of the tenancy agreement which provide for their recovery from the Applicant are unenforceable against her.

3.11.17. *Requirement to bear the costs of an accountant certifying the amount of the annual service charge* – Although we have some sympathy with the Applicant's submission that this is also a cost of the Respondent's business and that she ought not to be responsible for it, we do not consider that these charges fall into the same category as those relating to insurance. The cost of having an accountant check the Respondent's accounts and certify their accuracy is one from which the Applicant benefits, although the extent of that benefit is limited by the provision for the agreement that there can be no effective challenge to figures certified by the accountant. Ultimately these costs are small and are incurred for the benefit of the Applicant and her fellow tenants. They

are not therefore unfair, although that does not mean that they were reasonably incurred if accountants' certificates were not actually ever provided to the Applicant as she claims or they exclude the possibility of any liability on the accountant to the tenants.

4. Run off

4.1. A discrete issue arises as to the liability of the Respondent to refund to the Applicant service charges paid by her to CTBF prior to the Respondent's completion of its purchase on 15th June 2017.

4.2. We were informed that the CTBF had been invited to apply to be joined to these proceedings by the Respondent but had declined to do so. That may be so, but the CTBF was not joined as a party to the proceedings by the Tribunal. Accordingly, it will not be bound by our decision.

4.3. The Applicant's application is for a determination as to the payability of the service charges levied upon her in the years of account since 2017/18. We will make our determination as to the principles according to which the final amount of the service charge payable is to be determined and, insofar as that charge relate to the period during which the Respondent has been the landlord under the tenancy agreement i.e. since 15th June 2017, it will be liable to refund such amounts as may have been over paid but not otherwise.

5. The outstanding challenged items

5.1. Since the Applicant issued her application there has been a progressive whittling down of the matters in dispute such that in advance of the second day of the hearing the parties were able to file two Scott Schedules one showing the matters resolved either at or since the first day of the hearing and the other showing the matters remaining in dispute. We shall direct ourselves to the matters which remain in

dispute, to the extent that they have not already been dealt with above, by reference to the schedule and year of account.

5.2. Before doing so, however, there are a number of recurring grounds of challenge which we can deal with compendiously. First, the Applicant complained that she had not been provided with the prescribed statement of her rights and obligations together with the service charge demands as required by s. 21B Landlord & Tenant Act 1985. The Respondent did not suggest that the prescribed information had ever been provided but unfortunately for the Applicant, the remedy provided by s. 21B(3) for a failure by a landlord to comply with this requirement is the withholding of payment of the service charge. The utility of this remedy may perhaps be doubted in the absence of the prescribed information as this case illustrates. Here the Applicant has at all material times paid the service charge demanded of her in advance by reference to the provisional estimate because she did not have the benefit of the prescribed information; she therefore has no effective remedy in respect of the failure to provide the information !

2017-18

5.3. *Glebeland Plant that serves the common parts* – These costs relate to fire and safety maintenance works. It seems to us that they were reasonably incurred and reasonable in amount, the contrary was not suggested by the Applicant. Insofar as the Applicant challenged these charges on the basis of: apportionment; the failure to provide a certificate and/or the prescribed information; and as to the run off, we have determined these matters above.

5.4. *Management, accountants and other agents' fees* – This is not an entirely apt description of these charges which the Respondent explained were attributable to the cost of the member of staff who was responsible for running the estate. It seems to us that they were reasonably incurred and reasonable in amount. Insofar as the Applicant challenged these charges on the basis of: apportionment; failure to

provide the prescribed information; and as to the run off, we have determined these matters above. As the failure to provide an account's certificate whilst this is undoubtedly a breach of the terms of the Tenancy Agreement, it does not affect the payability of the service charge *per se*.

5.5. *Buildings Insurance of Glebelands House* – We have determined that the terms of the Tenancy Agreement which provide for the payment of these sums by the Applicant are unfair and unenforceable against her.

5.6. *The fire system* – The Applicant did not dispute that the call systems and its associated infrastructure should be in place but said that individual call out charges should be charged back to the resident in question. We find that the charges were reasonably incurred and reasonable in amount. We do not consider that it was unreasonable for the Respondent not to adopt the approach suggested by the Applicant on the basis that there are always likely to be swings and roundabouts benefits/costs in any system for pooling costs; although we were informed that the Respondent was moving to a system where calls were re-charged. Insofar as the Applicant challenged these charges on the basis of: apportionment; the failure to provide a certificate and/or the prescribed information; and as to the run off, we have determined these matters above.

5.7. *Public Liability Insurance* - We have determined that the terms of the Tenancy Agreement which provide for the payment of these sums by the Applicant are unfair and unenforceable against her.

5.8. *Keeping the building and Retained Part in good order* – By the close of proceedings the dispute in this regard had been reduced down to the cost of annual lighting tests in the sum of £294.00 and *ad hoc* repairs to the common parts in the sum of £1,194.40. In our view the explanations of these costs by Mr Jaggs were reasonable and we accept that these costs were reasonably incurred and reasonable in amount.

5.9. *Common parts (i.*e. *Glebelands House*) *costs attributable to the Cloister* – The Applicant challenged her obligation to pay these charges

on the principled basis that it was unfair that she should have to bear a proportion of these costs all of which were attributable to Glaebeland House. We have rejected that challenge for the reasons given above.

5.10. *Contribution to the sinking fund* – The Applicant objects that the CTBF's policy of applying surplus service charges to the sinking fund and the provision made by the Respondent for a contribution of £5,000.00 to be made towards it each year, She says that as an Assured Shorthold tenant such a provision is inappropriate and unfair since she has not long term interest in the property of which she is the tenant and thus no interest in providing for its future development and/or maintenance. She might also have added that it would be possible that the Respondent would decide to apply some or all of the money held in the fund to a cost which it now admits she is not liable to contribute, such as the cost of repairing some part of the building which falls within the covenants implied by s. 11 Landlord & Tenant Act 1985. In fact, it was Mr Jaggs' evidence that the Respondent has plans for expenditure out of the sinking fund on various projects including repairing subsidence in the Courtyard, upgrading the exterior lighting and perimeter fencing.

5.11. It is the Respondent's case that this is a cost which the Applicant agreed to pay and that it is reasonably incurred and reasonable in amount.

5.12. In principle, it seems to us to be correct that it is reasonable for the Respondent to make provision against substantial future costs by way of a sinking fund. It is after all a well-established practice and the cost split between 120 residents is reasonable in amount. The more troublesome question in our view is whether the contractual provision requiring her to contribute to the sinking fund is fair for the purposes of the CRA. This is not a matter which the Applicant raised explicitly in her Amended Statement of Case although many of the arguments to be made in respect of it were made by her in connection with other matters about which she did complain. We therefore take the view that although the matter does not arise before us, this is an exceptional case in which it is right for us to express our view in the hope that it may

possibly be of assistance in resolving or averting possible arguments in the future. In our view, although the obligation to contribute to the sinking fund is not a core term and, even if it is, it was not made patent to the Applicant when she signed the Tenancy Agreement and is a term which leaves to the discretion of the Respondent the amount which the Applicant has to pay, the term is nevertheless fair because it provides a means by which to smooth the burden of service charges which could arise in the course of the Applicant's Tenancy Agreement. It is also fair because the term is subject to the condition of reasonableness and to review by the Tribunal for that purpose.

2018-19

5.13. *Accounting charges* – We have dealt with the Applicant's principled objection to paying this charge on the basis that is unfair above. It is worth noting in this context that the Applicant's share of the sum charged is £36.67. We do have sympathy with the Applicant's grounds for complaint on this score as we have said, but on balance we consider the contractual provision to be fair. The Applicant did not complain that she had not been provided with a certificate in respect of this year of account although there was no copy of it in the bundle.

5.14. *Staff costs* – The Applicant complained that there was a lack of transparency about the way in which these 'staff costs', i.e. its costs of employing people who, to some greater or lesser extent are responsible as part of their role within the Respondent, for managing the Glebelands House Estate have been apportioned. There was exhibited to Mr Jaggs second witness statement a schedule in which the appropriation was set out but there was no explanation as to how that appropriation had been made and so it was impossible on the evidence presented by the Respondent to judge whether that appropriation was fair and reasonable. In our view management costs of £465.21 per unit is high. We accept that the standard of the accommodation and the

amenity of the Glebelands Estate as a whole is also high, we nevertheless find that given the absence of any solid evidence upon which we might base a conclusion that such high costs were reasonably incurred that they are not reasonable in amount and we therefore reduce them to a figure which we consider to be reasonable given the factors which we have mentioned to £350.00 p.a..

5.15. *Security systems* – We have considered this challenge above and do not accept it.

5.16. *M & E Maintenance* – The only dispute in this regard concerned what were described as the electrical consumables. Mr Jaggs explained that this charge related to a 5 yearly LED lighting upgrade and we accept that it was reasonably incurred and reasonable in amount.

5.17. *Life safety systems maintenance* – The Applicant did not ultimately challenge this item.

5.18. *Internal repairs & maintenance* – Mr Jaggs explained that these costs related to the rearrangement of a linked corridor in Glebelands House so as to make it usable as an office and to the costs of a similar operation in the Cloister. It seems to us that these types of costs are necessary periodically and that they are part of the smooth functioning of the estate. The costs are small, the Applicant's share is £38.87, and reasonable.

5.19. *Insurance and Sinking Fund* – We have dealt with these items above.

2019/20

5.20. In considering this year of account we shall only address the items with which we have not already dealt as a matter of principle and which remained in dispute following the conclusion of the second day of the hearing.

5.21. *Auditing of the service charge accounts* – The Applicant complained in respect of this year of account that the certificate with which she had

been provided related to accounts for Academy House and that the certificate provided by Grant Thornton explicitly limited their liability for it to the fullest extent possible and that they assumed no responsibility to anyone other than the Respondent.

5.22. Although it is correct to say that the rubric to the certificate does refer to the service charge accounts of the Academy House Estate, it is headed "Accountant's report of the factual findings to the landlord (Greensleeves Homes Trust) of the Broccoli Cloister Property", in these circumstances, we think it most probable that there has been some confusion on the part of Grant Thornton as to the naming of the property the accounts for which it was supposed to be auditing. In the circumstances this is understandable, if not excusable. What is not acceptable in our view and supports our conclusion that the costs of this certificate should not be recoverable from the Applicant is the fact that by the certificate the accountants, Grant Thornton purport to exclude any liability to the Applicant for the content of the certificate. It is the entire purpose of such certificates that tenants should be able to rely upon them in order that they can be reasonably assured that some independent oversight has been exercised in the auditing of the accounts provided by a landlord. If the only person entitled to rely upon this certificate is the Respondent, it cannot have been obtained for the benefit of the tenants and cannot therefore be an expense properly recoverable by way of service charge. It was also not reasonable for the Respondent to engage Grant Thornton on this basis and note that the certificate provided by BDO Stoy Hayward in respect of the previous year of account was not so limited.

5.23. *Staff costs* – For the reasons given above we consider that the reasonable costs of managing the Glebelands House Estate ought not to have exceeded £350.00 in the absence of any or any proper evidence from the Respondent to explain a higher charge.

5.24. *Internal repairs and maintenance* – Mr Jaggs told us that these charges related to the repair of a balcony balustrade and specifically the

re-staining of it after it had been installed. We accept that these charges were reasonably incurred and were reasonable in amount.

5.25. *External repair and maintenance* – Two items were in dispute, the costs of repairing an aerial and a 50% share of pest control costs. We accept that these costs were reasonably incurred and that they were reasonable in amount.

2020-21

5.26. In considering this year of account we shall only address the items with which we have not already dealt as a matter of principle and which remained in dispute following the conclusion of the second day of the hearing.

5.27. *Accountant's certificate* – The Applicant makes no specific complaints about the certificate provided in respect of this year of account but she does nevertheless also complain that despite these accountants' certificates these service charge accounts are full of errors and unlawful charges many of which have now been acknowledged to be such. It is difficult to resist the force of this submission and yet it should also be acknowledged that it is not the purpose of the audit to check every single invoice, nor to determine whether the charges themselves are lawful and it is on this basis that we consider this charge was reasonably incurred and reasonable in amount, cursory though the oversight may seem to be.

5.28. *Staff Costs* – We re-state our findings in respect of this head of costs above but conclude that it is correct to uprate our assessment of the reasonable fee for this year of account to £375.00 to allow for inflation.

2021-22

5.29. In considering this year of account we shall only address the items with which we have not already dealt as a matter of principle and which

remained in dispute following the conclusion of the second day of the hearing.

5.30. *Staff costs* - We re-state our findings in respect of this head of costs above but conclude that it is correct to uprate our assessment of the reasonable fee for this year of account to £375.00 to allow for inflation.

5.31. *Electricity* – A substantial charge for electricity of £25,859.70 is made in this year of account. It seems that there was a problem with the upload of the data by the external agent whose responsibility this was and the process of reconstructing the account is currently in progress. It is anticipated that a refund will be forthcoming in due course. On this basis the Respondent asked that this head of charge should be removed from the account until the final amount of the charge has been settled. This seems to be an appropriate course to us.

5.32. *Gas* – A charge of £25,155.50 is made in respect of gas consumed for the purpose of heating the buildings. The Applicant complains that the reason for the high charges in part at least if that the radiators are not serviced and some are stuck on. There was no evidence before as to the extent to which these complaints might have contributed to the costs of gas and so we do not feel able to say that the costs which were incurred in heating both space and water were not reasonably incurred or that they were not reasonable in amount.

5.33. *Internal cleaning* – The Respondent accepted that there had been a problem with the level of service which was being provided by the cleaner retained and that steps have now been taken to remedy that problem. In view of that admission, we consider it is appropriate to make some reduction to the amount payable by the Applicant on the basis that the charge of £1,458.07 was not reasonable in amount given the level of service provided. On the basis of the information before us the amount of that reduction must necessarily be of a rough and ready character but doing the best we can, we consider that it should be reduced to £1,100.00.

6. Summary of conclusions

6.1. We consider that the provisions of the Tenancy Agreement which provide for the Applicant to contribute to the Respondent's costs of insuring the buildings and its public liability insurance are unfair and unenforceable against her by reason of the CRA,

6.2. We have set out our conclusions in respect of the various specific items remaining in dispute between the parties above but we are not in a position to calculate the precise arithmetical consequences of those conclusions in terms of the precise sums due and owing. If the parties cannot agree those amounts between themselves in the light of our findings they may apply to us for further directions/orders in that regard.

6.3. In terms of the run off issue, as we have said above insofar as it is the result of our finding that the Applicant is entitled to a refund in respect of the sums paid by her in respect of the year of account ending 31st March 2018, it will be a matter for her to resolve with the Respondent and the CTBF as to which of them is liable to make any such refund to her.

APPENDIX 1- RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

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

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