FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MS/LSC/2023/0168
Property	:	8 Chantry House, Albert Road South, Southampton, Hampshire, SO14 5BU
Applicant	:	Liam Patrick Moyna
Representative	:	
Respondent	:	Chapel Riverside (Southampton) Management Company Limited
Representative	:	Ms Coleman Gateway Property Management Limited
Type of Application	:	Applications to determine service charges– section 27A Landlord and Tenant Act 1985 Applications that costs not be recoverable as charges- section 20C Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002
Tribunal Member(s)	:	Judge J Dobson Mr MJF Donaldson FRICS Ms T Wong
Date of hearing	:	13th December 2024
Date of Decision	:	14th February 2025

DECISION

Summary of the Decision

1. In respect of service charges related to the management fees, the reasonable service charges are determined to be £150.00 inclusive of VAT per year for each of the years 2020- 2021, 2021- 2022 and 2022- 2023. In respect of service charges related to the costs of works to the gates, the reasonable service charges are determined to be £360.00 in 2021- 2022 and £627.00 in 2022- 2023.

2. The Tribunal grants the Applicant's applications pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of the Commonhold and Leasehold Reform Act 2002 such that the Respondent's legal and litigation costs of the applications may not be recovered as service charges or administration charges.

3. The Respondent shall pay to the Applicant the application and hearing fees of £300.00 within 14 days of issue of this Decision.

The Background

4. The Applicant is the lessee of 8 Chantry House, Albert Road South, Southampton, Hampshire, SO14 5BU ("the Property"). The Respondent is the management company as named in the tri-partite lease of 8 Chantry ("the Lease"). The landlord is Chapel Riverside Development Limited, part of a group including Inland Homes PLC but has gone into administration. It merits pausing to identify that no information was provided as to the effects of the administration or the position of any administrators.

5. The flat is one of twenty- seven situated in a particular block, described as Block A or "the Block" (which descriptions are adopted). There are a number of other blocks of flats in the development ("the Estate"), which has been continued by one or more other developers. Development commenced in the mid- 2010s and all of the blocks of flats are purpose built. There are roadways, parking spaces and other communal areas.

6. The Respondent appointed managing agents to manage the Property and Estate on its behalf. The original agent until 2019 was called Rylands Service Management Limited- and it can reasonably be said that there were problems with the managing of the Property and Estate by that company as the 2018 to 2019 accounts were not certified in respect of most of the year by the accountants instructed, on the basis of inadequate evidence of financial matters. The subsequent managing agents from 2019 onwards have been Gateway Service Management Limited ("Gateway").

The Application and history of the case

7. The Applicant sought determination of service charges for 2018 to 2023 with an estimated value of £7500.00 by way of an application dated 23rd

November 2024 pursuant to section 27A of the Landlord and Tenant Act 1985 ("the Act"). The application was accompanied by a document titled "Complaints" which indicated challenges to the cost of buildings insurance, the gates to the parking area and certain other specific service charge items. It was also accompanied by two Statements of Anticipated Expenditure which had been issued- service cost budgets for the two years, being 2022 to 2023 and 2023 to 2024. Those revealed certain other items marked as being in dispute, including management fees.

8. The Applicant also made an application for an order under section 20C of the Act that the costs of the proceedings should not be recoverable by the Applicant as service charges and an application pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the title of which will continue to be used in full), for an order that the liability to pay an administration charge in respect of contractual litigation costs be reduced or extinguished.

9. Directions were given for a Case Management and Dispute Resolution Hearing, which was held in July 2024 but at which the parties were unable to reach agreement. Further Directions were given for the preparation of the case for final hearing. However, the bundle was not provided as directed and so the application was struck out. An application to re- instate was subsequently granted, new Directions [1- 5] again requiring a bundle and stating the required format and contents. The Applicant produced a PDF bundle amounting to 270 pages in advance of the final hearing (although see further below), although rather longer than it needed to be in consequence of containing three copies of the same lease terms.

The Lease

10. The lease ("the Lease") of the Property (the description used in the Lease is "Demised Premises") was provided [7- 37]. That is an underlease, the developer landlord holding the headlease. It is dated 19th June 2018 and is tri- partite between the Applicant, the Respondent and the landlord. The term of the Lease is 150 years from 19th July 2018.

11. Reference is made in the definitions to what are described as "The Part A Proportion" of 0.219% and "The Part B Proportion" of 4.02%, although the Respondent is able to re-calculate pursuant to clause 7.8. "Block" is defined as "the Building in which the Demised Premises are situate". The "Common Parts" are areas used in common within the Block, whereas "Communal Areas" are broadly those outside of the Block. The sums expended by the Respondent in carrying out its obligations (in the Sixth Schedule) are defined as "Maintenance Expenses" and the parts of the Estate for which the Respondent is responsible are defined as the "Maintained Property" and that is detailed in the Second Schedule. The "Tenant's Proportion" is the Applicant's share of the Maintenance Expenses.

12. The obligations of the Respondent are set out in the Sixth Schedule both in relation to the Estate and the Block, save that clause 6 permits the Respondent to vary or alter the rendering of any services if it "may in its

discretion deem it desirable to do so for the more efficient conduct of the management of the Block or the Estate". The Maintained Property includes, amongst other elements, "accessways". Otherwise, the areas of responsibility are as would be expected and nothing turns on anything precise about them. The costs which may be expended includes costs of employing a firm of managing agents, to be paid as part of the reasonable fees of the Respondent in managing the Estate and undertaking the obligations covered by the Maintenance Expenses. There are separate obligations of the landlord provided for in the Tenth Schedule.

13. The Seventh Schedule sets out the Applicant's share of the costs of the matters within the Sixth Schedule. Paragraph 3 provides that if the Applicant objects to an item of the Maintenance Expenses being unreasonable, he "shall" refer it to be determined by a person appointed by the President of the RICS but neither side suggested that removed the jurisdiction of the Tribunal and the Tribunal considers that it could not have done. The Respondent is required to provide an account of the Maintenance Expenses for the period to 31st March as soon as practicable with the account and an accountant's certificate. Payments are required in advance 1st April and 1st October plus any balance within twenty- one days of the certificate.

14. The Eighth Schedule provides for payment by the Applicant, including a covenant to pay on demand the Respondent's various costs as set out "incurred in or in contemplation of" for example the enforcement of any of the Tenant's Covenants and matters in relation to notices and forfeiture.

The Construction of Leases

15. 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."

16. 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 relevant Law

17. Essentially, pursuant to section 18 of the Act, the Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the Lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a lessee to a lessor for the costs of services, repairs, maintenance or insurance and the lessor's costs of management, under the terms of the Lease. The Tribunal has jurisdiction where the whole or part varies or may vary according to the costs incurred.

18. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable. Section 19 provides that a service cost is only payable insofar as it is reasonably incurred and works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the costs which are to be met through the service charge.

19. The Tribunal takes 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 Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties.

20. 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."

21. There are innumerable case authorities in respect of several and varied aspects of service charge disputes. Many have no direct relevance to this dispute, and none were referred to by the parties. The Tribunal is well aware of the relevant law and has applied it in reaching this Decision. There was no specific legal authority different to the usual ones which was said to apply and no specific element of this application which required the application of anything beyond the established broad principles. In the

circumstances, the Tribunal considers it unnecessary to refer to any individual case authorities, much as it often does so.

The Hearing

22. The hearing was conducted at Havant Justice Centre in person.

23. The Applicant represented himself. The Respondent was represented by Ms Coleman, in- house solicitor with Gateway.

24. The Tribunal raised the issue of the condition of the documentation and the fact that the bundle did not comply with the requirements of the Directions. It was indicated that if the bundle had been considered sufficiently in advance of the hearing, the application may well have been struck out for failure to comply with the requirements of the Directions in respect of the bundle. However, as it had not been possible to consider the bundle in advance, the Tribunal stated that it would proceed with the hearing, dealing with the documents as best practical.

25. The Tribunal also identified the other documents related to the case that it had been able to obtain over and above the contents of the bundle. Those comprised the original application form, a complaint document lodged with the application form and two marked statements of account, documents which would be expected in the bundle. The Tribunal explained that additionally it had briefly considered the previous Directions given. It was established that Ms Coleman had access to those documents.

26. However, Ms Coleman stated that the Respondent's case has been prepared replying to the four-paragraph document [260] which appeared to be the Applicant's statement of case/ witness statement and that the Respondent had not sought to respond to any other matters. She contended that no consideration should be given other than to the matters raised in that statement of case. Mr Moyna clarified that the matters which were pursued by him were now only those in the four-paragraph statement of case, save that he stated that he did not pursue further the window cleaning from 2019.

27. That left two elements of costs and related service charges challenged, namely management fees and matters related to the gates and for the four service charge years 2019- 2020 to 2022- 2023, specifically 1st October to 30th September of each year. There was no challenge within this application to the charges for 2023- 2024.

28. It was established therefore that the application and other documents beyond those in the bundle did not add much, although the Tribunal indicated that as the application said a little about those two topics and that Ms Coleman's client had sight of that, the Tribunal would not ignore the page relevant if the parties wish to make reference to it. If it was also clarified that the document GW2, the exhibits to which contributed much of the content of the bundle, was in fact the Position Statement, as termed, in the bundle.

29. Ms Coleman explained that the Position Statement, as termed, was in fact the Respondent s statement of case. She also explained that she thought that there had previously been a document named GW1 which had been the Respondent's position statement for the purpose of the case management hearing. That was not in the bundle. The confusion arising from exhibits to GW2 in the absence of anything marked as GW2 or indeed any GW1 was noted but there is no need to dwell on that.

30. The Tribunal received the written witness evidence (in effect) from the Applicant [260] and also from Ms Brown of Gateway for the Respondent [156- 162]. Oral evidence was also given by Mr Moyna the Applicant and by Ms Brown, that of Mr Moyna in confirming the written document being acceptable in this instance to make that document a written statement.

31. The Tribunal is grateful to all of the above for their assistance with these applications.

32. The Tribunal did not inspect the Property. The Tribunal was content that the nature of the Building and any matters in respect of which there was a need for visual evidence were demonstrated by photographs so that it was not necessary to inspect in order to the determine the matters remaining for determination.

33. For the avoidance of doubt, the Tribunal makes it clear that it has read the bundle and the other documents as identified above- the Tribunal does not refer to all of the documents in detail in this Decision, it being impractical and unnecessary to do so. Where the Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that the Tribunal has ignored or left them out of account. Insofar as the Tribunal does refer to specific pages from documents which were included in the bundle, the Tribunal does so by numbers in square brackets [ ], and with reference to PDF bundle page- numbering.

34. It should be added, and this is perhaps as good a place to do so as any, that this Decision seeks to focus solely on the key issues in relation to the remaining elements of dispute. Much of the various matters mentioned in the bundle and some at the hearing did not require any finding to be made for the purpose of deciding the relevant issues remaining. The Decision is made on the basis of the evidence and arguments the parties presented, save where clarified by the Tribunal in the hearing, and is necessarily limited by the matters to which the Tribunal was referred.

Consideration of the Disputed Service Charge Issues

35. The Tribunal does not set out the parties' cases at length in advance of discussion of the relevant issues. The Tribunal refers to the relevant parts of the parties' cases in its consideration of the matters below.

36. The Tribunal has limited itself to the specific matters identified by the Applicant as being in dispute and has not sought to consider whether there

may have been any issues with the demands or any other reasons why sums may not be payable. By that comment the Tribunal does not seek to imply at all that there might be such matters, merely the Tribunal simply does not know one way or the other in the circumstances.

37. It should be said that there were different figures within the estimates of expenditure on which payments on account were based to those referred to below, but there were also accounts for the service charge years and so the estimated service costs had been overtaken by actual costs. The Tribunal therefore refers to the actual figures.

Management Fees

38. In relation to the management fees, Mr Moyna explained that he took no issue with the fees from 2019 to 2020, the first service charge year in question. Those fees were charged as shares of the estate charges and of the block charges [51]. It was identified that Mr Moyna was charged by way of service charges 0.219% in respect of the Estate charges, of which the management fee inclusive of VAT was £4,137.00 (so his share was £9.06), and 4.02% in respect of the Block charges, of which the management fee inclusive of VAT was £4050.00 (so his share was £162.81) as the Lease provides. The Tribunal noted that the percentage was markedly different for each element: the starting costs for each element was very similar.

39. It merits passing mention that in the estimated budget the percentage for Estate costs payable by the Applicant at 0.217% was slightly lower than the 0.219% allowed for in the Lease but nothing was said about that and there is no clear evidence that fractionally different percentage was maintained. It is of more note that the first estimated management charges for the Estate were £41,400.00 and that £4137.00 is a much lower figure. Whilst the difference was a marked one, there was no explanation proffered and it is the actual figures that the Tribunal considers.

40. The issue taken by Mr Moyna related to the subsequent years so October 2020 to September 2021, October 2021 to September 2022, October 2022 to September 2023. The challenge was explained to be to the increase in the management fees in each of those years, as Mr Moyna perceived it, and the cumulative increase in the fees comparing the amount of those fees to the fee in 2019 to 2020. Mr. Moyna suggested that the work undertaken had been the same in each and therefore there was no justification for that increase in fees. The increase had not been explained. There also appeared from the papers to be a concern about the level of fees as compared to other expenditure.

41. There was little that Mr Moyna could add to the figures. Ms Coleman established that Mr Moyna had not obtained any alternative quote for management fees for the development.

42. That said, questions were asked by the Tribunal seeking to better understand the figures. The particular matter which arose from that and is of considerable significance, was that in relation to the three years

challenged, rather than there being a separate management fee shown in respect of estate costs on the one hand and block costs on the other hand, as there had been in 2019 to 2020, there was a single figure given under the heading of Block A expenditure [e.g. 63]. Mr Moyna said in evidence that he challenged both elements of management fees but that was before it was identified that there was in fact no Estate costs element stated.

43. In 2020 to 2021 the fees for the Block had apparently increased from £4050.00 [58- certified accounts] to £6723.00 [74- certified accounts], which in percentage terms was a substantial increase. In contrast, the certified accounts showed no management fees for the Estate and by following the usual practice of showing the figures for the previous, demonstrated the 2019- 2020 charges of £4137.00 for management fees for the Estate. The management charges for the Block, with none assigned to the Estate, further increased to £7127.oo for 2021- 2022 [94- certified accounts] and then £8159.00 for 2022- 2023 [114- certified accounts].

44. Mr. Brown was asked about that increase, at least in block management fees. She identified the work undertaken for the fee. She contended that the level of fees that was reasonable. It was her evidence and the Respondent's position that the managing agent fees initially- so 2019 to 2020- were very low to reflect the fees which have been charged by the previous managing agent. She said that the fees were then increased to bring them in line with the usual level of fees charged by the managing agent. However, Ms Brown did not know how the overall amount of management fees had been arrived at, so consequently the service charges which arose from those. She explained that fees were attended to by the commercial team. There was no one from that team at the hearing who was able to give evidence explaining. The Tribunal was prepared to accept the evidence of Ms Brown that she considered the original management fees had been set at an unusually low level, although that did not take matters anywhere in the wider circumstances.

45. Ms Brown was also asked about the cessation of the split between management fees related to the estate and management fees related to the block. She did not know why a single figure had been adopted in replacement of the two figures originally provided but nevertheless suggested that as not all blocks had been constructed, the fees had been put into one schedule for clarity. However, she accepted that if a lessee wished to know the management fees for Estate matters, they would not see that, and she could not point to any provision in the Lease which allowed the particular approach to be taken. Ms Brown said that Gateway had followed the instructions from their client, the Respondent.

46. The fact that the only witness evidence on behalf of the Respondent was from someone who did not know how the fees had been set was not helpful and whilst Ms Brown sought to defend the approach, in those circumstances she had little prospect of doing so.

47. There was no evidence that the Respondent was in fact charging nothing at all to manage the wider Estate, which the Tribunal considered would be

very unlikely where there was a large development and there must be management tasks. However, Ms Brown could not give any breakdown. The effect was that there was no evidence to show that charges in respect of costs of management of the Estate had reflected the provisions of and percentages in the Lease.

48. The Tribunal was very troubled by the fact that the later management fees were shown in the Respondent's statement of case, simply as a single total and the Applicants contribution to those shown as a single percentage of 4.02%. In the absence of any other explanation being given on behalf of the Respondent, the Tribunal inferred from the available evidence that the Applicant had been charged 4.02% of both the management fees related to Block costs and management fees related to Estate costs, although all expressed as Block Costs. In contrast, there must have been costs which not only were incurred in relation to the Estate up to 2019- 2020 but also which continued to be incurred in relation to the Estate thereafter.

49. Whilst the first of those percentages was correct, the second was not- any costs which were Estate ones should have been charged at the much lower percentage. The Tribunal did not consider it appropriate to reach any conclusion as to the reason for the approach from the evidence, or any inference which might have been drawn, the question for it simply being one of the reasonable management fees and the appropriate service charges payable applying the provisions of the Lease.

50. The Tribunal determined the Respondent had failed to meet the challenge to the management fees and demonstrate the charges related to them were reasonable for the work in respect of the Block on the one hand and the Estate on the other after having been apportioned correctly. Indeed, on the information received, the Respondent was in breach of the Lease by charging management fees related to the Estate as if management fees for the Block and so at a greater percentage than permissible.

51. There was no means of identifying exactly the share of the costs which related to the Estate from the evidence provided, given only a single figure across both elements. However, the fact that fees for the Block were £4050.00 and fees for the Estate £4137.00 in 2019- 2020 [58- certified accounts], the last year when they were individually identified, is carefully noted. As there was no challenge to the charges in that year and no suggestion on behalf of the Respondent that those sums had been incorrectly charged, the Tribunal considered a strong guide to the appropriate split between block charges and Estate charges.

52. The Tribunal notes that both approaches, that is to say identifying management costs in relation to the Estate and such costs in relation to the block separately and failing to do so were set out in certified accounts but there is no information as to how those certificates were considered able to be given. Hence, the Tribunal does no more than note the matter, save to observe that there had apparently been sufficient basis to conclude that the separate charges for management fees for each of the two elements were appropriately applied in the years prior to 2020- 2021.

53. The Tribunal was easily able to identify from the evidence and documentation within the bundle and its own experience that the fees were considerably less than the usual. The original fee for 2019- 2020 had rounded to a fee of £136.00 plus VAT in respect of the Block fees and £7.50 plus VAT in respect of the Estate fees. The Tribunal accepted an overall management fee of £143.50 exclusive of VAT and just under £178.00 inclusive of VAT was low compared to the usual level of management fees encountered by the Tribunal even that time. That said, this is a large development at least once complete and so there may be considerable economies of scale. A negotiation as to price might reflect the overall total fees for the entire development that a managing agent could charge.

54. The Tribunal was unable to discern to what extent that fee was specifically a reflection of the level of fees charged by the previous agent and to what extent it reflected the number of apartments flats on the estate overall, including the number which there would be once the development was complete. The Tribunal noted that it might have been agreed that there would be a fee per flat with an addition for the estate or it might be that there would be a single overall sum for which the agent was prepared to work, then apportioned between the flats to produce whatever appropriate figure ended up being chargeable. It did not necessarily follow that the fee was the multiple of any given level charge to an individual flat and certainly not any given multiple of the sort of fee which might often be encountered, particularly in smaller blocks. The Tribunal was hampered and indeed the Respondent's case was considerably hampered, by the lack of the obviously relevant management agreement. The Tribunal simply did not know what the managing agent had agreed with the Respondent.

55. Ms Brown talked about charging the Lessees for the managing agents' fee. However, the Tribunal does not accept that is correct categorisation of matters. The managing agent would have charged its managing agency fees to the management company which instructed it. The management company would then have recharged that cost as service charges, albeit that in practice the managing agent may be instructed to send out the demands to the Lessees for the proportionate share. That does not make the relationship one between the managing agents and the lessees in respect of their fees but rather one between the managing agent and its principal. The service charge to any given lessee was simply the proportion of the reasonable cost of employing the agent, reflecting the provisions of the management agreement.

56. So, the Tribunal did not know what agreement has been reached between the Respondent and its managing agent as to the charges, how the fee had been calculated or how the fee was divided between management fees related to the Block and to the wider Estate. That is save that the two elements were each in a similar sum if 2019- 2020 (ignoring the fees for the previous year which were not certified and of uncertain accuracy).

57. Set against that highly unsatisfactory background, the Tribunal considered that it had to take a cautious approach to the recoverability of any given

level of management fees. The Tribunal had to infer that the fees charged to the Applicant were at the same percentage for both elements given that the only evidence before it was the table contained in the Respondent's statement of case which only provided one percentage.

58. The Tribunal noted the similarity between the fees in 2022- 2023- £8159.00- and those in 2019- 2020 (for the Block and Estate combined)- £8187.00. It was at least possible that the split between the two elements ought to have been the same, so applying the relevant percentages producing a figure of approximately £143 plus VAT- £171.50 or thereabouts. Applying the same methodology, the management fees for earlier years would have been lower- approximately £142.00 inclusive of VAT for 2020- 2021 and approximately £148.00 inclusive of VAT f0r 2021- 2022.

59. In the circumstances, the Tribunal did not accept that it was necessarily correct for the Applicant to say that the management fees had increased. The management fees which were set out in the accounts as relating to the block had increased, but as there were no longer any fees separately identified in respect of the Estate, the Applicant was comparing only the fees stated as related to the Block and not taking account of the remaining fees. That said, it was understandable that the Applicant was unclear in the circumstances.

60. Given the above and mindful of the relatively modest figures involved, the Tribunal considered that the best it could do was to take a fairly broad-brush approach across the four years challenged. In doing so, the Tribunal determined the payable service charge for the Applicant in respect of management fees to be £150.00 inclusive of VAT per year.

61. The Tribunal had regard in setting that figure to the unsatisfactory nature of management revealed, not just the absence of charging the correct percentage but also the issues with regard to the gates discussed below. The Tribunal applied a token reduction for that, considering that as it was only one element- albeit one which was of concern to the Applicant- of many, the reduction should reflect that. The problems with the gates had existed throughout the period but to differing extents.

62. The Tribunal considered variation of the figure year by year bearing in mind that Ms Brown suggested that if nothing else, the fee might rise in line with inflation. However, the Tribunal noted that Ms Brown, did not have any direct knowledge as to whether that had occurred and did not necessarily follow that an increase had been made not least year on year.

63. The Tribunal concludes this element of the Decision by urging the Respondent to charge management fees as the Lease provides for and applying the relevant sum and percentage for each element and explaining how fees relate to the Block or any other block and how they relate to the Estate outside the blocks, such that the lessees can understand the costs for each element and the charges to them for each of those pursuant to the percentages for which their leases provide.

Gates

64. In relation to the gates, it was identified that those gates serve Block A and the charges have been rendered to Block A alone.

65. Mr Moyna explained the gates to be double metal gates across a two carriage-way entrance and exit. They required a key fob to open from both sides. The gates then have sensors and, the Tribunal understood, an automatic operation both admitting vehicles and allowing them to exit. Mr. Moyna's case in the nutshell was that the gates had never been in appropriate condition from the time of the installation and had never properly worked and so no costs related to the gates should be recoverable as service costs and payable by him as service charges. The gates were not working properly at the time of the hearing, he said.

66. By way of example, reference was made in email correspondence [258] to the gate sensors coming out of alignment in adverse weather. However, adverse weather is to be expected and there are many more sets of electric gates to properties in the region. The Tribunal could identify no good reason why adverse weather was any reasonable explanation for lack of alignment and the effect of that. In addition, it was said that there were incompatible motors on the gates, one to each gate [259- an email sent by Ms Brown]. The evidence available indicated that had always been an issue and so was a feature of the gates when installed, hence Mr Moyna said the gates were never in sync.

67. Mr Moyna said that he understood that the last report in respect of the gates stated that. However, it was identified both that the report was not before the Tribunal and that Mr Moyna had not seen it. He considered that the gates should have been replaced at an early stage when under warranty. However, he thought that they would have been covered by an NHBC warranty, but the Tribunal identified that would not have applied to the gates. Ms Brown said that the gate warranty had been for twelve months.

68. The Tribunal considered that there were two elements to potential charges in respect of the gates. Firstly, there was any charge which related to the cost of attending to unavoidable accidental damage and any servicing or other inevitable periodic work. The Tribunal had no difficulty in identifying that any such sums were properly chargeable, as service charges to meet what had been service costs. Secondly, there may be issues which had existed from the outset. The Tribunal rejected the Respondent's case that there was no poor installation and found that there had been issues from the outset but the key question was whether that had lead to service charges being demanded. The Tribunal accepted the Applicant's frustration at the various issues, although that in itself was not determinative.

69. Ms Brown accepted in her witness statement that there had been a number of issues with the gates over the years, which she said Gateway had been

addressed by Gateway or referred to "Inland" "in an attempt to resolve them". The issues included the gates not opening and them having to be left open and problems are identified in each of the relevant service charge years. The gates had been out of service when Gateway took over management.

70. The Tribunal accepts that the Respondent, through its agent, sought to deal with matters relating to the gates but considers that the statement of Ms Brown identifies steps taken but without acknowledgement of the timescale and the long periods in which the position was unsatisfactory. For example, a problem was identified on 2nd May 2020, but it took until 8th July 2020 for that to be resolved. Problems in November 2022 and August 2023 are indicated to have taken similar time periods to be attended to. Rather more significantly, an issue identified in August 2021 is indicated only to have been resolved in July 2022, some eleven months later. The Respondent's contention that it took "swift action" does not fit with those timescales or at least that any initial swift action was effective in achieving swift resolution, much as the Tribunal acknowledges that contractors needed to be approached and matters could not be resolved instantly. The imperfect progress at resolving issues did not identifiably add to cost, although as mentioned above it had a degree of relevance to the level of management fees.

71. Ms Brown said that the Respondent had only been aware of the issue with the gates having two incompatible motors in late 2023 or early 2024 at the time of a second report being carried out by the company Mr Gates (the first report had related to what she referred to as safety edges and the Tribunal understood to be crush protection barriers). Her position was that it been appropriate for the Respondent to charge the Lessees for the works undertaken to that point. However, the Tribunal understands that the report did not identify that the motors had been altered since their installation and so are anything other than an installation issue. She also accepted that work had been undertaken and then the gates had failed again on one occasion within five days- she did not accept twenty- four hours as asserted by the Applicant- but said that was because the sensor was hit, not anything else. She asserted the sensors being hit had been the main issue with the operation of the gates- but see below about protection.

72. The Tribunal considered the costs which had been incurred by the Respondent from 2019 to end of September 2023 and whether they were costs related to the installation as opposed to matters of maintenance. There were various invoices and related documents submitted to the Respondent via its managing agent [127-155]. Detail was variable. However, the Respondent's statement of case identified expenditure of £651.00 in 2019- 2020 [58- certified accounts], £1590.00 as charged as service costs in 2021- 2022 [94- certified accounts, which show £4678.00 but see below] and £1927.00 in 2022- 2023 [114- certified accounts]. There was no expenditure during the other years.

73. The Tribunal noted that cost which related to failings with the original installation was with regard to what is described as guards and safety edges

had been met by the developer to the tune of £3088.00 so there were no service costs producing service charges for that in practice, much as the full cost above is identified as an expense in the accounts. Implicitly that is because the fault was considered to be one related to installation and not to maintenance. The actual sum was not directly relevant to the Tribunal in these proceedings.

74. Other work in part related to servicing. No issue was identifiable with the servicing costs understood to be £360.oo related to these gates in 2022 and £123.oo in 2023. The Respondent sufficiently demonstrated that the servicing did not arise from any potential defect at the time of installation. Part of an invoice in January 2023, to the tune of £504.00, related to the cost of replacement of a heavily worn lock, which the Tribunal considered likely to reflect wear and tear and not the installation. The Tribunal found on balance, although the lack of clarity meant neither side case was especially strong, that in response to the Applicant's challenges the Respondent had failed to demonstrate the collision(s) did not have an effect in part the consequence of matters lacking from the outset and possibly until the work paid for by the developer in August 2022. Perhaps most significantly, it was difficult to discern the exact cause of the problems which the invoices indicated arose with circuits, a fuse and the control panel. In particular, it was difficult to discern those arose independently of the problems with the gates from the outset.

75. Given problems with the gates from the outset, including the matters paid for by the developer in August 2022 and the work not yet undertaken referred to below, the Tribunal was not persuaded by the Respondent that it had met the challenge for any period up to August 2022, except with regard to servicing. In respect of that element, the difference in cost between 2022 and 2023 was marked but the Tribunal had nothing upon which it could properly conclude either sum was not a reasonable one. Following August 2022, the Tribunal took the same approach, save that it also allowed the cost of the replacement pedestrian lock.

76. The Tribunal therefore allowed £360.00 in 2021- 2022 and £627.00 in 2022- 2023.

77. The Tribunal does make other observations about costs related to the gates in the hope that it may assist in avoiding further proceedings.

78. Ms Brown's evidence was that it was considered appropriate to charge to the lessees the cost which would be incurred in replacing the motors to the gates, as the Tribunal understands it, at approximately £5500 plus VAT. In response to a specific query about the Respondent pursuing the developer, it was identified that the developer is a director of the management company. Ms Brown appeared to confuse a little the position of the managing agent and the management company by suggesting that managing agent could not very well take proceedings against its client. Of course, the managing agent has no liability itself in respect of the gates. It only works on behalf of its client. It could not take proceedings against its client, unless for the breach of a contract between the two companies.

79. The Tribunal however considered it clear that any cost which arose because of the defective condition of the gates from the outset ought to be attended to by the developer. Whilst clearly it was difficult for the Respondent to have taken action against the developer to attend to the gates – and probably impractical where a company is in administration– the fact the developer is a director of the Respondent is no good reason not to pursue it from the perspective of the lessees.

80. It is also, the Tribunal considers, a questionable reason for seeking to charge as service costs the cost of putting right matters which were not maintenance of the gates. The Tribunal noted that there may therefore be cost which could be incurred by the management company in remedying the defective gates which it could not recover from the developer, much as they should be able to in principle, and which it could not recover properly as service charges, hence which it would have to bear. Whilst that would certainly be regrettable from the perspective of the Respondent, it is not a basis for properly charging the costs as service costs to be met by service charges.

81. Careful thought will therefore be needed as to whether the sum can be charged to the lessees and what efforts should be taken to avoid that. The Tribunal does not seek to provide the answer on incomplete information and in advance of any application to it about the matter.

Decision in respect of disputed items

82. The effect of the above findings and determinations is that the Tribunal finds the charges for the gates to be payable to the extent of £360.00 in 2021- 2022 and £627.00 in 2022- 2023 and the management fees payable in the reduced sum of £150.00 inclusive of VAT per year.

Applications in respect of costs and fees

83. As referred to above, applications were made by the Applicant that any costs incurred by the Respondent in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable by the Applicant pursuant to section 20C(1) of the Landlord and Tenant Act 1985. In addition, an application was made pursuant to paragraph 5A of the Commonhold and Leasehold Reform Act that the costs of the Applicant's application should not be recoverable as administration charges.

84. Section 20C (3) of the 1985 Act, provides "the ... Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances". The Tribunal is given a wide discretion. The provisions of paragraph 5A are equivalent and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable is the same.

85. The provisions of section 20C were considered in *Re: SMCLLA (Freehold) Ltd's Appeal* [2014] UKUT 58, where the Upper Tribunal held that:

> "although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at paragraph 25), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances" (at paragraph 27).

86. In *Conway v Jam Factory Freehold Ltd*, [2014] 1 EGLR 111 the Deputy President Martin Rodger QC suggested that it was:

> "essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make".

87. Whilst there is caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case.

88. Ms Coleman said in closing that recovery of the costs of these proceedings falls within the contractual costs clause in the Lease. That is very relevant but the Tribunal does nevertheless go on to address the question of whether costs should be recoverable in case notwithstanding that concession the Respondent should ever seek to recover costs.

89. The Tribunal identified that the Applicant had achieved some success in challenging service charges and whist this is not to be dealt with as if the question were akin to an award of costs between parties, success or failure is certainly not irrelevant. In addition, the Tribunal considered that the information provided by the Respondent, both within the proceedings and prior to them was unclear. The Respondent might have done rather more to avoid the proceedings continuing or commencing at all. In addition, on the evidence, the Respondent had failed to charge correctly for the management fees and to divide costs between those for the Estate and the Block. That was significant to the Applicant's understanding the fees and to compliance with the Lease.

90. Taking matters in the round in light of the law, the Tribunal concluded that it is just and equitable to disallow recovery of legal and litigation costs pursuant to both section 20C and paragraph 5A. The section 20C and paragraph 5A applications are therefore granted.

91. In terms of fees for the application, the considerations are not exactly the same. For example, the contractual rights and obligations do not apply. In contrast, the outcome is all the more relevant. The Tribunal determined it appropriate to require the Respondent to repay the fees for the application to the Applicant.

RIGHTS OF APPEAL

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 by email at rpsouthern@justice.ogv.uk

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.