



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00BE/LSC/2019/0461**

**HMCTS code
(paper, video,
audio)** : **V: CVPREMOTE**

Property : **Regency Court, 89 – 111 High Road,
South Woodford, London, E18**

Applicant : **Palmhurst Regency LLP**

Representative : **Seddons Law LLP**

Respondent : **Regency (South Woodford)
Management Company Limited**

Representative : **Cavendish Legal Group**

Type of application : **For the determination of the liability to
pay service charges under section 27A of
the Landlord and Tenant Act 1985**

Tribunal members : **Judge Carr
Mr Trevor Sennett**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of decision : **3rd November 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was, V:SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing/ The documents that the tribunal was referred to are in a bundle of 519 pages, together with AGM minutes of 17th October 2019 and comprising 4 pages, skeleton arguments from counsel and bundles of authorities. The tribunal has noted the contents of all of these documents. The order made is described at the end of these reasons. The parties said this about the process: it was far more tiring than a face to face hearing. The tribunal thanked the parties for the well organised electronic bundle and their helpfulness in the hearing.

Decisions of the tribunal

- (1) The tribunal determines that the sum of £ 40,386.00 charged for legal fees in service charge years 2018 and 2019 is **not payable** by the Applicant.
- (2) The tribunal makes the determinations as set out under the various headings in this Decision.
- (3) The tribunal determines that the Respondent shall pay the Applicant £ 300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.
- (4) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Applicant in respect of the service charge years 2018 - 19 .

The hearing

2. The Applicant was represented by Mr Letman of Counsel at the hearing and the Respondent was represented by Mr Kell of Counsel. Mr Chan a director of the RTM attended the hearing and gave evidence. Mr Chai from the Respondent solicitors was also present at the hearing.

3. At the start of the hearing the Respondent made an objection to the late inclusion of AGM minutes dated 17th October 2019. This was in breach of directions and provided very little opportunity for the Respondent to respond to the matters set out in those minutes. The Respondent asked for the minutes to be excluded from consideration.
4. The Applicant resisted the application to exclude the minutes on the basis that document was in fact the Respondent's document and that the Respondent was fully aware of the contents of those minutes.
5. After a brief adjournment, the tribunal determined not to exclude the minutes. This was on the basis that it was the Respondent's document and that the contents were clearly no surprise to them. The tribunal made it clear that if the Respondent considered that the use of the document was causing it any prejudice during the hearing, that it was free to renew its application.

The background

6. The property which is the subject of this application is a purpose-built development built in 2005 and comprising 167 residential flats. The development is made up of Regency Court (blocks A,B and C) which comprises 120 flats and Eaton Court, Block D, which comprises 40 flats
7. Neither party requested an inspection, and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
8. The Applicant holds long leases of 32 flats in the property which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the sample lease provided by the parties are set out below.
9. The Freeholder is Palmhurst Regency Freehold LLP. The Applicant has connections with the freeholder as it comprises the same members. The Freeholder acquired the freehold in 2012.
10. The Respondent is the management company and is party to the leases of the flats.
11. The legal costs in dispute in this case arise following the grant of an Airspace lease and the redevelopment of a bicycle storage room into residential accommodation – Flat 117.
12. The chronology of the relevant events preceding this application is as follows:

- (i) The freeholder made a series of planning applications culminating in permission being granted for the development of new apartments above the roof of Eaton Court.
- (ii) On 14th October 2016, the freeholder granted the Airspace Lease to South Woodford Limited for a premium of £850,000 and a rent of £2,400 per annum. Unbeknown to the Respondent at the time, it is a purported party to the Airspace Lease.
- (iii) In 2017 the freeholder obtained planning permission and proceeded to convert the communal bicycle storage room into Flat 117.
- (iv) In 2018 the Respondent discovered it was a party to the Airspace Lease following an unrelated enquiry by leaseholders as to the possibility of enfranchisement. The Respondent learned that it had been entered into the lease by way of signature of Mr Daniel Shafron who at the time was a director of the Respondent, and an employee of the freeholder.

The issues

13. At the start of the hearing the parties identified the relevant issues for determination as follows:
- (i) The payability and/or reasonableness of service charges for 2018 and 2019 totalling £40,386.00 (the original figure having been reduced by a credit note of £5,424.00) relating to legal costs incurred by the Respondent in clarifying its legal position in respect of an airspace lease granted by the landlord for part of the building. In particular:
 - a. Legal costs (Edwards Dulhie Solicitors) £23,892.002
 - b. Land Registry Fees - £30.00
 - c. Counsel's Fees of Christopher Cant - £11,304.00
 - d. Counsel's Fees of Rory Brown - £8,664.00
 - e. Late payment fees of £1,920

- (ii) Applications under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002

14. The relevant terms of the lease are as follows:

- (i) **Clause 1** “Definitions and Interpretation” defines, inter alia, the following:

“Manager’s Expenses” means solicitors’ counsel’s surveyors’ and other consultants’ and professional fees bailiffs fees and management charges incurred by the Manger [...]

“Service Charges and Services” have the meanings ascribed to such expressions in part 1 of Schedule 9 and the percentage contribution to the same as set out in paragraph 10 of the Particulars 20.

- (ii) **Clause 2** “Demise and Reddendum” provides the following payment provisions for the tenant during the term:

2.2 on demand all other moneys payable or repayable by the Tenant to the Landlord or the Manager under this Lease and

2.3 on demand all costs charges and expenses which the Landlord or the Manager may from time to time incur in relation to or as a result of any breach of any obligation of the Tenant under this Lease [...]

- (iii) **Clause 4** “Tenant’s Covenants” provides:
The Tenant COVENANTS with the Landlord and the Manager and the Owners to observe and perform the obligations of the Tenant contained in Schedule 2 (the Tenants covenants) Schedule 3 (as to regulations) Schedule 7 (as to insurance) and Schedule 9 (as to services) or otherwise arising under this Lease.

- (iv) **Clause 6** “Manager’s Covenants” provides :
The Manager COVENANTS with the Landlord and the Tenant to observe and perform the obligations of the Manager contained in Schedule 5 and Schedule 7 (as to insurance) and Schedule 9 (as to services) or otherwise arising under this Lease.

- (v) **Sch 9, Part 1, para 1** “Definitions and Interpretations” provides, inter alia, the following definitions:

“Annual Expenditure” means the aggregate expenditure incurred or to be incurred by the Manager during a Service Year in or incidentally to providing or in respect of all or any of the Services (after giving credit for any 7 insurance money received by the Manager under any policy in relation to matters comprised in the Services which the Manger is obliged to effect under this Lease)

“Services” means the service facilities amenities and items of expenditure specified in part 2 of this Schedule 24.

(vi) **Sch 9, Part 1, para 3** “Provision of the Services” provides, inter alia, the following (emphasis added) [46]: 3.2 The Manager may withhold add to extend vary or alter the Services or any of them from time to time so long as in doing so the Manager complies with the principles of good estate management and acts reasonably in all the circumstances 3.3 If at any time during the Term the property comprising the Estate is increased or decreased on a permanent basis or the benefit of any of the Services is extended on a like basis to any adjoining or neighbouring property or if some other event occurs a result of which is that any of the service charge percentages are no longer appropriate to the Premises the service charge percentage(s) in question shall be varied with effect from the beginning of the Service Year following the date of service of written notice by the Manager on the Tenant of such event in such a manner as shall be determined to be fair and reasonable in the light of the event in question by the Manager’s surveyor [...].

(vii) **Sch 9, Part 2** “The Services” provides at paras 1, 21 and 22 the following:

1. Maintaining repairing preserving protecting cleaning decorating renewing replacing or rebuilding the Building any Houses and those parts of the Estate forming Communal Facilities including all the structural parts thereof not forming any part of the premises demised under long leases (which shall include inter alia the foundations main walls exterior roof and 8 drains of the Building) the Common Parts and the Common Media and any other common service facilities and redecorating the exterior surfaces of all windows and window frames and contributing towards the maintenance repair preservation protection decoration renewal replacement or rebuilding of any areas or structures or to any services or facilities the use and enjoyment of which is common to the Estate and other premises adjoining or near thereto [...]

21. Providing such further services as may from time to time be consistent with the principles of good estate management and/or preserving the amenities of the Estate

22. Employing or retaining any solicitor accountant surveyor valuer architect engineer managing agent or management company or other professional consultant or adviser in connection with the management administration repair and maintenance of the Estate including the preparation of any accounts certificates and statements relating to the Annual Expenditure and the collection of the Service Charge

15. The Applicant's argument in summary is that sums demanded are not payable because
- (i) They fall outside of the relevant service charge provisions of the lease
 - (ii) The sums claimed were neither reasonably nor properly incurred and are excessive and irrecoverable by virtue of section 19(1) (a) of the 1985 Act
 - (iii) In relation to the legal costs, contrary to section 19(1) (b) the services to which the sums claimed related were not to a reasonable standard
16. The Respondent asserts that the sums demanded are payable under the terms of the lease and reasonably incurred. The Respondent stresses the complexity and significance of the legal position in which it found itself.
17. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Are the service charges recoverable under the relevant terms of the sample lease?

The Applicant's argument

18. Key to the Applicant's case is that legal advice taken by the Respondent in a dispute with the freeholder is not a service to the lessees. The Applicant opens its argument by arguing that there is very limited information about the purposes of the expenditure on legal advice that is being recharged via the service charge account.

19. There is limited information about the purposes of the legal advice. Documentation relating to the legal costs prepared by the Respondent's solicitors describes the matter as 'dispute with freeholder'. The invoices describe the activities but otherwise are opaque.
20. There is some information about what the various legal costs were for in a letter from the Respondent dated 29th June 2019. As regards costs related to the airspace lease the letter asserts, 'The extent of the work is to clarify the legal position of the Regency Management Company following the discovery that it had been unlawfully made a party to the lease of the airspace above Easton Court'. The letter continues with an explanation that advice was sought from two counsel, firstly to advise on the implications of the lease itself and secondly to advise on the legality of the circumstances surrounding the execution of the lease.
21. The letter also provides some explanation of legal costs relating to the conversion of the bike store to a flat. The costs are described as obtaining advice firstly on whether any legal obligations have been placed upon the management company with regards to the conversion and if so what they comprise, and secondly as to whether the tenant of the new flat when let on an Assured Shorthold Tenancy has any obligations to contribute towards a service charge.
22. There is some information in the minutes of the Respondent's AGM on 17/10/19 which refer to a discussion about whether to pursue a claim against Daniel Shafron, a former director of the Respondent (appointed by the freeholder) in connection with his apparent signature of the airspace lease. A letter dated 17th April 2019 from Darlington solicitors acting for Mr Shafron to Edwards Duthie the Respondent's solicitors, indicates that what was contemplated by the Respondent was a Companies Act claim against him.
23. The Applicant suggests that the costs were really about investigating the possibilities of pursuing a claim against Mr Shafron and are therefore not recoverable.
24. The Applicant also points out that there is also very limited information relating to the late payment charges. It is not apparent whether they reflect any actual costs incurred by the Respondent or are simply levied as a penalty.
25. The Applicant suggests that the Respondent relies on paragraph 3.2 of Part 1 of Schedule 9 to the Lease and paragraph 22 of Part 2 to justify recharging the legal costs. In support of the recovery of the late payment charges the Respondent relies upon the definition of 'managers expenses' and clause 2 of the lease.

26. Having argued that there is a lack of clarity over the purpose of the charges the Applicant argues that the various legal costs claimed do not fall within the scope of the service charge provision of the lease at all. The Applicant rejects the position that the charges can be justified based on good estate management. This, argues the Applicant, is a principle, as referred to in the lease and is not itself a service for which a service charge is payable. The Services are the real services extensively but specifically defined under Part 2 of Schedule 9 to the lease.
27. The Applicant submits that obtaining legal advice on the implications for the Respondent of the lease, on the legality of the circumstances surrounding the execution of the lease or the Respondent clarifying its own legal position and liabilities in relation to the lease of the former bike store do not fall within the types of services that are the subject of Part 2 of Schedule 9. Those services relate to the maintenance of the Estate and the provision of facilities and amenities for lessees.
28. The Applicant draws on the words of the Deputy President of the Upper Tribunal in *Fairbairn v Etal Court Maintenance* to argue that the legal costs incurred by the Respondent have been, 'incurred in the management and administration of the Respondent company'. In this case the Upper Tribunal was rejecting the argument that the costs of unsuccessfully defending a tenant's claim for disrepair were recoverable costs in managing the building.
29. In relation to the late payment charge the Applicant argues that there is no provision for them under the terms of the Lease.

The Respondent's argument

30. The Respondent has chosen not to waive privilege and therefore is not disclosing the instructions, or the advice received from its lawyers.
31. The Respondent also notes that it has no source of income other than what it can raise through the provisions of the leases of the property.
32. The Respondent argues that the fees which are challenged are within the services as set out in the lease and contends that they are recoverable.
33. The fees relate to advice received from solicitors and counsel in relation to:
 - (i) Determining the status of the development and the Airspace lease

- (ii) Determining the obligations of the Respondent in light of the building of new flats and removal of the bicycle store
 - (iii) Determining the rights of the Respondent to collect a service charge from the new units and/or under the Airspace lease and/or from the freeholder.
34. The Respondent says that the late payment fee relates to the costs of and to the Respondent of chasing the Applicant for payment.
35. The Respondent argues that the Airspace Lease/the Skyline Apartments potentially affects R's position as management company and therefore it requires legal advice. In particular:
- (i) The Airspace Lease obliges R to provide services to the Skyline Apartments by way of building insurance, maintenance and cleaning of the extended structure and new communal space, concierge's service as well as the provision of metered cold water to individual flats. These amount to 4.6% of the annual estimated service charge or just over £ 20,000 p.a. (as at 2020).
 - (ii) There are concerns over snagging and latent defects with the Skyline Apartments which concerned the Board
 - (iii) The construction work has substantially exceeded the time allowed under the Airspace Lease causing disruption to the provisions of services
 - (iv) There is no evidence that PRFL has appointed a monitoring surveyor as required by the Airspace Lease. There is no evidence of a Certificate of Completion being provided
 - (v) At the moment, there is a substantial water ingress from the new structure into an existing flat. There are also various damages and health and safety issues caused by construction workers which despite R's requests SWL have not addressed
36. In connection with the construction of Flat 117 the following issues required legal advice:

- (i) The maintenance of and the electricity supply to the room which was converted has always been borne by R
- (ii) During the conversion of Flat 117, the builders were using the communal electricity and water without R's consent
- (iii) Towards the end of the conversion PRFL connected Flat 117 to the communal electricity supply
- (iv) Flat 117 was sold by PRFL to Palmhurst Residential Pelham LLP, with no provision for the new tenant to contribute to the service charges, despite Flat 117 continuing to enjoy the full benefit of the services The appropriate Service Charge to this flat would be around £2,000 p.a.

37. The Respondent takes issue with the Applicant's interpretation of the letter dated 29th June 2019 and the AGM minutes dated 17th October 2019. As far as the letter is concerned the Respondent argues that its contents demonstrate that the issues concerning the Respondent were all issues pertaining to R's legal position and how it affects its rights and obligations in collecting service charges.
38. As to the AGM minutes, the Respondent argues that this also reflects the issues that concerned the Respondent and distinguishes between the £38,000.00 odd that is spent on preliminary advice and a further budget for contentious litigation to pursue Mr Shafron. Therefore, there is a clear divide between the monies spent on advice so that the Respondent can understand its position and carry out its duties lawfully and any money that would be spent on litigation against a third party.
39. The Respondent argues that taking advice from a solicitor on either its obligations or its ability to recover service charges falls within paragraph 22. Obligations fall within 'repair and maintenance of the Estate' and service charge recovery within 'the management and administration' as well as the 'collection of the Service Charge'. Further, although counsel is not expressly referred to in that section, they fall within 'other professional adviser'.
40. The first aspect, relating to the status of development, is connected to the Respondent's management. Paragraph 1 applies in that it obliges the Respondent to protect and maintain the structural parts of the Property which is engaged in light of the fact that any proposed development would entail the destruction of the present structures and construction of new ones.

41. Further or alternatively, in order to comply with paragraph 1, paragraph 22 needs to be utilised and so recourse to professional advice is permitted if it is unclear precisely what the paragraph 1 obligation is.
42. Alternatively, paragraph 21 (again linked to paragraph 22) provides for preserving the amenities of the Estate which was sufficient to include legal costs in *Assethold v Watts* [2014] UKUT 0537 (LC).
43. The Respondent was not able to point to a particular clause of the lease to justify the late payment charges. However, the Respondent argued that it should be read into the tenant obligations as it is implicit that there should be a default fee as it is a normal expenditure.
44. The Respondent takes issue with the Applicant's interpretation of the letter dated 29th June 2019 and the AGM minutes dated 17th October 2019. As far as the letter is concerned the Respondent argues that its contents demonstrate that the issues concerning the Respondent were all issues pertaining to R's legal position and how it affects its rights and obligations in collecting service charges.
45. As to the AGM minutes, the Respondent argues that this also reflects the issues that concerned the Respondent and distinguishes between the £38,000.00 odd that is spent on preliminary advice and a further budget for contentious litigation to pursue Mr Shafron. Therefore there is a clear divide between the monies spent on advice so that the Respondent can understand its position and carry out its duties lawfully and any money that would be spent on litigation against a third party.
46. The Respondent disputes the Applicant's interpretation of Fairbairn distinguishing it on the basis that the charges in that case were not recoverable primarily because they arose by virtue of a failure of the landlord to comply with its covenants in the lease.

The Applicant's reply

47. The Applicant states that Mr Shafron was not an employee of the freeholder, but an employee of Palmhurst Securities Limited.
48. It disputes the Respondent's argument as to the purpose of the advice.
49. It asserts that the explanation of the late payment charges is opaque and inadequate.
50. In particular it disputes that counsel's fees are covered by paragraph 22 as argued by the Respondent.

The tribunal's decision

51. The tribunal determines that the service charges are not recoverable under the terms of the sample lease.

Reasons for the tribunal's decision

52. The burden of showing that the fees relate to legal advice within the scope of the service charge provision of the lease falls on the Respondent.

53. The tribunal did not consider that an assertion by the Respondent that the legal advice was for matters that fell within the clauses of the lease sufficient to make the costs payable.

54. In the absence of information on the instructions to the Respondents' solicitor and Counsels, the Tribunal has trawled chronologically through the documents provided for an indication of what these instructions may have been. The documents indicated the following:

(i) At a Directors (of the Management Company) general meeting on 13 April 2016 [312] with Mr Chan in the chair, Mr Gunby was instructed to liaise with the freeholder as to commencement of work at Eaton Court and to act as communicator between freeholder and board. It was also recorded that the Board was concerned as to the legalities of whether an extension to Eaton Court could be built, the implementation of the works and how they could be carried out without breaching the terms of quiet enjoyment. It was agreed that Maryam Farah (a director) 'would instruct a solicitor on a budget of £500 to clarify the legal position of the management company and what actions they should be doing and what they are allowed to do.'

(ii) There was an AGM on 2nd August 2016 when Mr Gunby advised that the Eaton Court development was for 6 flats and explained the process that a notice served on the residents [right of first refusal] and after the notice period expires the freeholder can sell the air space on the same terms as that offered to 'residents'.

(iii) It is clear from an email string [348-350] that, the then managing agent and company secretary, Mr Gunby of B Bailey and Co Ltd provided a copy of the head lease to Mr Chan, then chair of the Board of the Respondents, in respect of the proposed development of six flats in the airspace of Eaton Court in October 2016. Minutes of the directors meeting 30 November

2016 with Mr Chan in the chair [320] included an item on Eaton Court development where Mr Gunby advised, ‘...the management company have no control over the development as the lease allows the freeholder to develop. The only grounds residents have is breach of quiet enjoyment which would have to be issued individually.’ It is also recorded that there was a ‘need to wait for Counsel’s report for further advice on the issue and the party wall surveyor may be able to find some middle grounds.’

- (iv) Reference to advice from Counsel is to be found in the Board Minutes of discussion of 30 January 2017 with Mr Chan in the chair [324] stating, ‘We have received the Counsels advice but thinks they have missed the point perhaps not clear in initial instruction...’. Mr Chan is also minuted as agreeing that, ‘the management company should stay out of any issues as would be a personal matter between the individual and freeholder. Management company has no rights to resolve problems ...Management company should not be doing the job of the freeholder which will carry risks.’ Counsel advice stated, ‘...service charge can be charged when lease is signed.’ A note to this meeting is that the Counsel’s report cost £2400.
- (v) At the Board discussion on 15 March 2017 [326] Mr Chan indicated that any issues are between the leaseholder and the freeholder and nothing to do with the management company. At this meeting, Mr Gunby, who is a Chartered Surveyor, advised the Board on Service charge demands for monies from the developer of the new flats at Eaton Court.
- (vi) The minutes of Board discussion on 10 May 2017 [329] records Mr Ganby updating on the Eaton Court development and stating he believed ‘all advice provided has agreed with Counsel’s advice’; however, Mr Chan disagreed. The development was considered at subsequent Board discussions on 16 August 2017 [332], 13 September 2017 [335] and 6 February 2018 [337] with Baileys providing details of service charge apportionments, figures and confirmation that demands backdated to when sale of the airspace was completed had been sent. Mr Gunby also advised that the developers had also agreed to redecorate the front and rear of Eaton Court thus saving the service charge.

- (vii) From the minutes of a directors meeting on 25 October 2018 [341] mention is made of 'the airspace investigation' with Mr Qureshi explaining that the management company needed counsel's advice to see 'if there was a strong case (against former director Daniel Shafron) of legal remedies available and how much of the costs could be recovered'. Agreement to proceed with Mr Qurechi's solicitor was recorded.
- (viii) On 17 October 2019 [supplementary pdf] an AGM was held with Mr Qureshi in the chair. At the meeting, he informed the residents that Land Commercial Surveyors Ltd had taken over management from B Bailey & Co Ltd on 1 July 2019. Under AOB an item headed legalities of granting of lease of flat formerly Bike Store referred to a dispute regarding a lease signed by Daniel Shafron. The leaseholder was having the benefits of services on the estate without charge being raised. Mr Qureshi told the meeting that £38,000 had been spent on legal fees (but no qualification as to what this related to was provided in the minutes). He asked if those present would be in favour of the Board pursuing the case with solicitors. Mr Qureshi proposed a budget of £10,000 to pursue Daniel Shafron for the unlawful signing of the lease and a vote was taken in favour of Daniel Shafron being pursued. It is understood that there are 160 shares in the company and the AGM was attended by 4 directors and representatives of 8 other flats on the estate members of the Respondent.

- 55. The tribunal were concerned that the minutes provided very little clarity on what matters were the subject of the legal advice that the Applicant is being charged for. The tribunal noted that the evidence given to the tribunal by Mr Chan provided no further clarity.
- 56. The tribunal's understanding of the minutes is that the primary concern of the management board was the legalities of the actions taken by the freeholder and by Mr Shafron.
- 57. The tribunal has noted the issues that the Respondent say prompted it to seek legal advice but sees no reference to those matters in the minutes. If concerns about water ingress, snagging etc were so compelling one would have expected them to be reflected in the minutes.
- 58. The tribunal does not agree with Counsel for the Respondent when he argues that there is a clear distinction drawn in the minutes of 17th

October 2019 between the legal matters which are the subject of the £38,000 charges and the additional £10,000 to pursue Mr Shafron. The tribunal reads the minutes as representing a decision to spend a further £10,000 on the same or a closely related matter. There is certainly nothing in the minutes to suggest that the Respondent's interpretation is correct.

59. The tribunal also notes that Mr Gunby had given the board advice about chargeable services which appears to have been confirmed by Counsel. He also gave advice about the freeholder's freedom to develop. Mr Chan indicated that Mr Gunby was not trusted by the Respondent, but even if that was the case, the mistrust must have related to Mr Gunby's relationship with the freeholder, rather than his competence to read and advise on the service charge provisions in the lease. The argument that Mr Gunby had a conflict of interest confirms the position of the tribunal that it was more likely than not that the concerns of the Respondent was its relationship with the freeholder.
60. Having attempted to deconstruct the minutes and having listened to the evidence and the arguments of counsel, the tribunal accepts the interpretation of the Applicant – that the charges currently being disputed relate to obtaining legal advice on the implications for the Respondent of the lease, on the legality of the circumstances surrounding the execution of the lease, the Respondent clarifying its own legal position and liabilities in relation to the lease of the former bike store and the possibility of a claim against Mr Shafron – is more likely than not to have been the subject of the legal advice.
61. Taking this understanding of the focus of the legal advice, the tribunal agrees with the Applicant's interpretation of the relevant clauses of the lease, i.e. that those matters do not fall within the types of services that are the subject of Part 2 of Schedule 9. Those services relate to the maintenance of the Estate and the provision of facilities and amenities for lessees. The tribunal also agrees with the Applicant that the costs are not covered by the phrase good estate management which is not in itself a service for which a service charge is payable.
62. The tribunal also agrees with the Applicant that there is no clause justifying late payment charges and that such a clause cannot be implied into the lease.

Were the service charges demanded reasonably incurred ?

The Applicant's argument

63. The Applicant argues that even if the Tribunal disagrees with its arguments and determines that the legal costs and late payment charges

were covered by the terms of the lease so that in principle the Respondent was entitled to recover them, the costs incurred are outlandish and the amounts astronomical.

64. The Applicant suggests that the issues which appeared to have concerned the Respondent could have been solved by a careful reading of the disputed lease, or by a competent managing agent.
65. The Applicant argues that even if it was rational to consult a solicitor on the issues, the advice required would be minimal, no more than a steer from those solicitors. There is no justification for profit costs of £19,910 plus VAT at an out of London hourly rate of £350 per hour. There is no justification for the instruction of 2 different counsel incurring a combined total disbursement of £16,670 plus VAT. The Applicant suggests that the instruction of two different counsel points to the fact that the legal advice was about possible litigation and not about providing chargeable services.

The Respondent's argument

66. The Respondent argues that the costs were reasonably incurred. The complicated legal and factual scenario on which solicitor and counsel were required to opine justified what might otherwise appear to be high fees.
67. Mr Chang explained that he did not read the lease. Although he is a retired barrister he has never practiced in civil matters and, when he received the disputed lease, chose to send it straight to the solicitor for legal advice. He considered this was a reasonable course of action. Mr Chang also explained that he was not prepared to rely on the advice of the managing agent who he considered had a conflict of interests and had demonstrated some incompetence.
68. Further the Respondent argues that the legal fees were at least commensurate if not substantially less than those legal fees incurred in the developments to which they were concerned.

The tribunal's decision

69. The tribunal declines to make a determination about whether or not the legal costs were reasonably incurred.

Reasons for the tribunal's decision

70. The tribunal has already determined that the legal costs of the Respondent are not service charges for the purposes of the Act.

Therefore, it does not make a determination on the issue of whether the costs were reasonably incurred.

71. Nonetheless for the sake of clarity and completeness it notes its reasoning on this matter to suggest that if it had made a determination it would have determined that the costs were not reasonably incurred.
72. In the absence of transparent instructions to solicitor or either counsel and sight of opinions, the tribunal is left staring into an opaque crystal ball. Time coding and general headings, whether attendance in person, by letter, email or telephone do not assist in determining reasonableness. Attendance at conference to include counsel is again without context. Whilst a sum had been reported for Counsel advice of £2,400 by Mr Chan in January 2017 in relation to the development at Eaton Court, details have not been included in the bundle although Mr Gunby indicated (in Board minutes) that the Counsel advice had been followed. Was advice being sought later on identical issues? It is impossible for the tribunal to reach any conclusion on this question.
73. It is noted that Mr Gunby, who was managing the estate through Baileys for about 6 years, is a Chartered Surveyor with considerable experience and, as such, competent to consider leases, apportionment of service charges and provision of services to an estate of this nature. It is difficult to see why his expertise was overlooked.
74. Mr Kell told the Tribunal that complex issues were at play such as to involve two barristers and many hours of an 'A' grade solicitor's time, however, the exact nature of these complexities remains silent. Mr Chan, himself a member of the legal profession, told us that he had neither obtained a quotation nor set a limit to expenditure by the solicitor or Counsel. There is no reference to limits in any minutes provided to the Tribunal from Board meetings, discussions or AGM except that of £10,000 to pursue Mr Shafron approved at the AGM on October 2019. At that meeting the sum of £38,000 (the sum in dispute before this Tribunal) was reported as already spent on legal costs.
75. Were a forensic assessment exercise to be conducted on the ledger contents of legal costs were the costs deemed recoverable, it is likely that a significant proportion would be reclassified to lower fee earners or the time content reduced. Furthermore, any assessment would utilise the County Court fee scales for an outer London/provinces legal service rather than the £350 per hour charged out in this instance by the 'A' grade solicitor. No breakdown of time spent by Counsel has been shown and the suggestion that an 'A' grade solicitor or any other legal professional needed to summarise that which Counsel has opined, is in our view totally unnecessary and demeaning to the members of the Respondent.

76. Overall there is insufficient evidence before the tribunal to substantiate a determination that the legal costs were reasonably incurred.

Were the services that service charges were charged for provided to a reasonable standard?

The Applicant's arguments

77. Further and without prejudice to its previous arguments, the Applicant argues that the services to which the sums claimed relate were not to a reasonable standard. It contends that it is impossible to see what the legal issues and complexities might be that could justify running up legal costs (to no apparent end as it has transpired) in the sums claimed. The Applicant draws on a number of items to justify its position. For example, on 20/11/18 the solicitors carry out a brief review of the docs, but on the same day a full review. A long letter of advice is then written by the solicitors but within 14 days 2 different counsel are instructed presumably to cover the same ground.

The Respondent's arguments

78. The Respondent repeats its previous submissions in relation to the question of whether the service charges were reasonably incurred. In its opinion the matters in issue were sufficiently complex and serious for the Respondent to ensure it received full and considered advice.

The tribunal's decision

79. Because the tribunal has made a determination that the costs were not payable under the terms of the lease there is no need for it to made a determination about whether or not the services which were charged for were of a reasonable standard. If the tribunal had been required to make such a determination it would have determined that the services for which the service charges were demanded were not provided to a reasonable standard.

Reasons for the tribunal's decision

80. The tribunal's reasoning follows from its reasoning in connection with the issue of whether or not the costs were reasonably incurred.
81. The lack of detail and the opacity of the information which has been provided to it make it impossible to reach a determination on the reasonable standard of the services provided.
82. It agrees with the reasoning of the Applicant.

Application under s.20C and refund of fees

83. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines, that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.
84. The tribunal further orders that the application and hearing fee in the sum of £300 be refunded to the applicant within 28 days of the date of this decision.

Name: Judge Helen Carr

Date: 3rd November 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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

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

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

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).