FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HC/LSC/2021/0075/AW
Properties	:	45 & 46 Watch House Place, Portishead, Bristol BS20 7AU
Applicant	:	Aster Communities
Representative	:	Ms Gibbons of Counsel, instructed by Birketts LLP
Respondent	:	Firstport Property Services Limited
Representative	:	Mr Castle of Counsel, instructed by JB Leitch Ltd
Type of Application	:	Determination of service charges– section 27A Landlord and Tenant Act 1985 Dispensation from the requirement to consult lessees about major works- section 20ZA of the Landlord and Tenant Act 1985
Tribunal Member(s)	:	Judge Dobson Mr M J F Donaldson FRICS Mr T Sennett MA FCIEH
Date of Hearing	:	27th July 2022
Date of Decision	:	30th September 2022

DECISION

Summary of the Decision

1. **In respect of the Applicant's application concerning service charges pursuant to section 27A of the Landlord and Tenant Act 1985, the Tribunal determines that the service charges remaining in dispute, namely the Management fees and the Concierge and on Costs are reasonable.**

2. **In respect of the Respondent's application for dispensation from consultation requirements pursuant to section 20ZA of the Landlord and Tenant Act 1985, the Tribunal grants the application on the condition that the Respondent pays the Applicant's costs of considering the Respondent's application.**

3. **The Respondent's fees in applying to the Tribunal for dispensation shall be paid by the Respondent.**

4. **The Applicant's applications pursuant to section 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 will be considered following receipt of written submissions if further pursued.**

The Applications

5. The Applicant applied to the Tribunal by way of an application dated 18th August 2021 for a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") of service charges for two flats, 45 & 46 Watch House Place, Portishead, Bristol BS20 7AU (collectively referred to as "the Properties" and individually referred to by their specific flat numbers i.e., 45 or 46 as the case may be). The Applicant also applied for a determination in respect of a modest sum (£60.00) of administration charges.

6. The Applicant additionally applied pursuant to section 20C of the Act and Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that costs incurred in connection with the proceedings shall not be recoverable through the service charge or as an administration charge in respect of litigation costs.

7. The application related to two matters in the year- on- year service charges, for what are described as "Concierge and on Costs" and for Management fees (the way the items are described in documents and with the same capitals or lack of them as appropriate), together with three specific one- off charges for major works in respect of balcony works, carpet replacement and redecorations. The Respondent to the application is the Manager of the Properties and the Development as a whole (see further below). The application as originally made related to the service charge years 2010/ 2011 to 2020/2021.

8. The Respondent subsequently applied by application dated 24th June 2022 for dispensation under Section 20ZA of the Act from the consultation requirements imposed by Section 20 of the Act. The application for dispensation related to the three elements of major works referred to above.

Background

9. The Applicant is a registered provider of social housing and the Properties are leased by the Applicant pursuant to under- leases. That had some relevance in that the Applicant manages properties itself. The Applicant is also the lessee of other properties on the Development, although not the subject of these proceedings. The particular Properties are both situated in the same building ("the Block"- the term used in the Leases).

10. The Respondent as named is the same company but under its current name as the Manager originally named in the Leases (see below).

11. The Properties are situated within a development known as Port Marina ("the Development"). There are 915 units within the Development, which is therefore a substantial one. Those include 47 blocks of flats, 200 houses and 28 of what are described as coach houses. The site covers 42 acres. In addition to dwellings, the development includes communal gardens and other open spaces and a three- mile- long (according to what was said in the hearing, or two- mile long if the Respondent's statements of case were accurate) area of wild woodland. Some of the properties are laid out in the style of a "Cornish" fishing village.

12. The freeholder, Annanbury Limited, played no part in the proceedings.

13. The Respondent had additionally originally issued proceedings, number H84YX434 in the County Court for unpaid service charge sums (plus arrears of rent, costs and interest) in July 2021. The Applicant defended those proceedings on various bases as to why the sums were not due. Those proceedings were stayed by Order of Deputy District Judge Joy dated 6th September 2021 until the determination of the Applicant's application to the Tribunal.

The history of the Applications and approach to the Determination

14. Directions were given following a case management hearing on 18th January 2022 in respect of the preparation of the application in respect of service charges for final hearing. Those included reference to the need for the parties to apply themselves. The application was listed for final hearing on 18th May 2022.

15. In addition, it was considered at the hearing whether the Tribunal should permit the application to proceed in respect of all of the years within the application. The Tribunal had identified in its initial Directions listing the case management hearing that the issue would be considered. The Tribunal determined at that hearing that the Tribunal should infer that the

Applicant has admitted the service charges prior to 1st August 2015 by way of the payments made by the Applicant- the reasoning is set out in full in the Directions dated 18th January 2022- and hence the Tribunal had no jurisdiction in respect of such years. The application insofar as it asked for determination of years of service charges from 2010 onwards up to 1st August 2015 was struck out pursuant to rule 9(2) of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. The application was thereafter limited to the years 2015/ 2016 onward.

16. Regrettably, at that final hearing date, the case was nowhere near ready to be tried. Prior to the final hearing as first listed there had been further Directions refusing a late- 4th May 2022- application by the Respondent to adjourn. Whilst none of the points advanced by the parties as to why the case was not ready for trial were especially compelling, on balance and looking at matters overall, the Tribunal agreed to adjourn the hearing to the eventual hearing date. Both advocates made reference at the hearing to the potential impact of the Tribunal's decision on other lessees on the estate and potential further applications which may arise if the Tribunal were to find any of the service charges not to be payable or charges or services to be unreasonable, in amount or otherwise.

17. The Respondent's application for dispensation was made subsequent to that, the Respondent's intention to make such an application having been identified at the 18th May 2022 hearing. The Directions made at the hearing included, amongst other matters, provision for preparation of the parties' cases in respect of dispensation in the event of such application so being made.

18. A bundle this hearing was produced pursuant to a direction made at the hearing on 18th May 2022, containing some 956 pages. It scarcely requires highlighting that is a substantial size. In addition, Skeleton Arguments were produced on behalf of both parties in advance of this hearing.

19. Whilst the Tribunal makes it clear that it has read such of the bundle as relevant in respect of the issues apparently remaining in dispute prior to the hearing, various parts of the bundle were no longer relevant. Substantial parts of the documents, notably many pages of invoices and accounts were not referred to with any specificity in statements of case or witness statements nor subsequently in Skeleton Arguments or in the hearing, such that there was no indication as to what their individual relevance was considered to be, if any. The Tribunal will of course consider statements of case, witness statements and obviously key documents such as the Lease. The Tribunal cannot be expected to wade document by document through a bundle as substantial as 956 pages where the majority of the documents are not ones to which the parties feel any need to draw the Tribunal's attention in the remainder of their written cases. The Tribunal had not therefore read of all documents the parties had not mentioned prior to the hearing and nothing raised in the hearing, in which again most of the documents were not referred to at all, caused the Tribunal to need to read any more of them. The Tribunal is content that it

considered as least as many of the documents within the bundle as it needed to in order to determine the issues remaining in dispute.

20. The Tribunal does not refer to many of the documents in detail in this Decision, it being impractical, not least given the size of the bundle, and also unnecessary. Where the Tribunal does not refer to pages or documents to which the parties had referred and which were still relevant to the issues remaining in dispute and requiring determination, it should not be mistakenly assumed that the Tribunal has ignored or left them out of account. The same applies to contents of the Skeleton Arguments insofar as relevant. The omission to refer specifically to a given argument or matter should not be taken to suggest that it has not been considered to the extent the Tribunal determined appropriate. The omission to refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received.

21. The Tribunal applied the civil burden of proof, namely the balance of probabilities. Any reference to a given party failing to prove its case or demonstrate its point means a failure to do to that standard.

Matters no longer in dispute

22. Helpfully, both Counsel's Skeleton Argument identified that the Respondent had conceded that the sum demanded in respect of balcony works had not been properly demanded and so was not due. The Applicant asked that as it is accepted that this sum has been paid, the Tribunal record that it is due a credit in respect of the sum. The role of the Tribunal is to determine matters in dispute in respect of service charges and not to adjudicate on accounting matters. Whilst the Tribunal is happy to record in this Decision the Respondent's concession and so that no money was due in respect of the balcony works, as to how the payment made is dealt with more generally in the context of the Applicant's service charge account is a matter for the parties to resolve, or to pursue in another forum if required- although it would be both disappointing and surprising for that to be necessary.

23. The Respondent has sought to withdraw its application under section 20ZA insofar as that relates to the balcony works. The Tribunal records, for the avoidance of doubt, that the withdrawal is approved.

24. In addition, in respect of the carpet replacement and external decorations, the Applicant's Counsel explained in her Skeleton Argument that the Respondent accepted that it had suffered no prejudice in consequence of the Applicant's failure to fully comply with consultation requirements, save in respect of costs incurred in respect of its application challenging the major works charges and in respect of the dispensation application.

25. That failure had been asserted to be that not all of the consultation notices had been served on the Applicant's under- lessees. It was contended that the risk to the Applicant had been that it paid sums to the Respondent,

which were not lawfully due because of a failure to comply with the consultation requirements and then because of that failure was not able to recover those sums from its own under- lessees. However, the Respondent having made an application for dispensation and served that application on the under- lessees and the under- lessees having not opposed it, the Respondent accepted that, if the Tribunal were to grant dispensation, that prejudice to the Applicant had been eliminated.

26. The parties agreed that, pursuant to the terms of the Leases, both the carpet replacement and the external decorations were works falling within "Part "C" (Apartment Block Costs)" of each of the Leases. Hence, it followed that the Applicant should be charged its proportion of the costs of these works to the Block, and not a contribution towards the Block's apportionment of the total cost of doing works to all of the buildings in the Development.

27. In addition, in relation to carpet replacement, the Applicant's original challenge was to Block costs for the service charge year 2018/19 in the sum of £3,042. 18), which were taken by the Respondent from the sinking fund for the Block to pay for that carpet replacement. The Respondent's case was set out in some detail in the Skeleton Argument of Mr Castle. The Respondent accepted that it ought to have taken £3,034.65. The Respondent said that it would therefore refund the £7.53 difference to the sinking fund, together with a further £42.57, rounding the sum to £50.00 as said to be paid as a gesture of goodwill. In relation to the external decorations, the Applicant's original challenge was to Block costs for the service charge year 2016/17 in the sum of £2,718.73. It was said in Mr Castle's Skeleton Argument that an £82.93 difference between the quoted cost for the block and the amount charged to the block was indicative of the works costing slightly more than the contractor's quote. The Respondent stated that it would refund to the Block's sinking fund (the Tribunal understands per flat) of £100.00 (so slightly more than the difference) as a gesture of goodwill.

28. Ms Gibbon's Skeleton Argument referred to dispensation about the carpet replacement and balcony works but said nothing about apportionment. The statements of case also appeared to raise an issue as to whether there had already been a concession by the Applicant on the basis of the contents of an email. However, in the circumstances the Tribunal did not need to consider that. In the hearing, Ms Gibbons indicated that the Applicant accepted the position as set out above, so no dispute remained for determination and simply asked the Tribunal to record that the Respondent would give credits as identified above. The Tribunal does so.

29. The only remaining question for the Tribunal in respect of the carpet replacement and external decorations was therefore whether the grant of dispensation should be unconditional or on terms, the term being payment of the Applicant's costs as above.

30. The Respondent also conceded the £60 administration fees charged in relation to non-payment of service charges that the Applicant asserted

were not due are not payable. It indicated doing so on the basis of the modest nature of the sum, but the result is the same irrespective of that. Consequently, the administration fees of £60 are not payable and there is nothing for the Tribunal to determine in respect of them.

31. For the avoidance of doubt, as the Tribunal has not reached any decision in respect of the agreed items, they neither appear, insofar as agreed, in the Summary of Decision above or any Consideration or Decision below.

The Hearing

32. The hearing was conducted as a hybrid hearing, with the Tribunal sitting at Havant Justice Centre and the other participants appearing remotely. The Applicant was represented at the hearing by Ms Gibbons of Counsel. Mr Adams of the Applicant's representative and both Ms Emma Towler and Ms Jenny Wade of the Applicant were also in attendance. Mr Castle, also of Counsel, represented the Respondent. Mr Shane Ramsamy, and Ms Natalie Daniels of the Respondent attended.

33. Oral evidence was given by Ms Towler, a Strategic Lead for Home Ownership and Service Charges employed by the Applicant, for the Applicant and by Mr Ramsamy, the Development manager employed by the Respondent, for the Respondent. The Tribunal had also received written witness statements from those witnesses (and Ms Towler was the signatory to a long and detailed statement of case from the Applicant).

34. A relatively small preliminary issue arose about what was suggested to be additional evidence but does not require discussion here.

The Lease(s)

35. The Applicant is the lessee of the Properties pursuant to two Leases ("the Leases"), each dated the 23rd December 2005. The Leases are both tri-partite. The Leases are made between Bovis Homes Limited of the first part, Peverel OM Limited (the former name of the Respondent) of the second part and Sarsen Housing Association Limited of the third part for terms of 999 years from 1 May 2004 ("the Leases"). The Leases are said by the parties to be in identical form and only that in respect of 45 Watch House Place has been included in the bundle. The lease of 45 ("the Lease" insofar as reference is made to a lease individually rather than the Leases collectively) is therefore the one to which reference is made.

36. Neither Counsel felt the need to refer to any part of the Lease in their Skeleton Arguments or at any time during the hearing. The Tribunal does not therefore set out the provisions of the Lease at great length. It was apparently accepted by the parties that the Lease entitled the Respondent to raise service charges for the elements charged for- "Maintenance Expenses" as defined within the definitions in clause 1 of the Lease being the expenditure to meet the obligations in the Sixth Schedule. There was no suggestion that the service charge aspects in dispute fell outside of matters properly chargeable.

37. The "Maintained Property", that in relation to which the Manager will incur expenditure is defined in the Second Schedule, excluding the internal parts of the relevant one of the Properties but including the internal common parts including decorative parts and the structural parts of the buildings and also including all external and decorative parts, together the communal areas of the Development.

38. The Sixth Schedule sets out the matters for which service charges may be demanded, dividing those between Part A (Estate Costs), Part B (Accessway Costs) and Part C (Apartment Block Costs), together with Parts D and E (Garage Costs and Surface Parking Costs). There is nothing unusual about the remainder of the long list of matters the cost of which is payable by way of service charges and no specific aspect of the matters remaining for determination turns on them.

39. Part F of the Sixth Schedule then identifies other relevant matters in relation to which the Respondent is entitled to incur expenses and to charge through the service charge, divided into Part A for Estate Costs and , for example:

> 2. Providing and paying such directly employed persons (if any) as may be necessary in connection with the management and upkeep of the Maintained Property together with all reasonable and proper overheads whatsoever in connection therewith;
> 7. Generally maintaining and administering the Maintained Property and protecting the amenities of the Maintained Property and for that purpose if necessary employing a firm of managing agents ..... or consultants or similar and the payment of all costs and expenses incurred by the Manager thereby
> 7.1 in the running and management of the Estate .....
> 12. The reasonable and proper fees of the Manager from time to time relating to its management of the Estate
> 15. All other reasonable and proper expenses (if any) incurred by the Manager:
> 15.1 in and about the maintenance and proper and convenient management and running of the Estate .....

40. The Seventh Schedule contains the service charge mechanism with six-monthly payments on account, balance payments or credits an account of the "Maintenance Expense" for each year, to be served with the accountant's certificate.

The relevant Statute Law and Regulations

Service Charges

41. Essentially and pursuant to sections 18, 19 and 27A 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 charge is in section 18 defined as an amount:

> "(1) (a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord's costs of management and

(2) the whole or part of which varies or may vary according to the relevant costs."

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

43. Where appropriate, 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.

44. 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."

Dispensation from consultation

45. In respect of the requirement to consult, section 20 of the Act applies.

46. Section 20(1) provides that the "relevant contributions of tenants" will be:

> "limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
> (a) complied with in relation to the works or agreement, or
> (b) dispensed with in relation to the works or agreement by (or on appeal from) [the tribunal]"

47. Whereas the Act refers to tenants, in practice that means what are perhaps more commonly identified as lessees under long leases and encompasses under- lessees. Hence the relevant of the Applicant's under- lessees and the need for them to have been consulted as referred to above.

48. There are various details which are to be included in a written notice of intention and there are various requirements to be complied with in the remainder of the consultation process, which are not directly relevant to the issues in this case. The requirements are principally found in Schedule 2 Part 2 to the Act.

49. In the event of failure by the Respondent to comply with requirements the liability of a lessee is limited to £250.

50. The Tribunal does not consider it necessary in this instance to set out the requirements of the Act in greater detail or to address the relevant Regulations at greater length.

Case authorities

Service Charges

51. There are innumerable case authorities in respect of several and varied aspects of service charge disputes. However, the only one on which either party relied was referred to in the Skeleton Argument of the Applicant's Counsel.

52. That authority was *Wallace-Jarvis v Optima (Cambridge) Ltd* [2013] UKUT 0328 (LC). The Respondent relied on that authority in support of an argument that it is for the Respondent to show that the costs of management have been reasonably incurred, asserting that there is prima facie evidence that the total cost of management is unreasonably high and so the usual burden of proof, that it is for the Applicant lessee to prove unreasonableness, does not apply. The application of the case to this application is addressed below.

53. In the absence of the parties having referred to other case authorities, the Tribunal does not do so.

Dispensation

54. In respect of dispensation, the appropriate approach to be taken by the Tribunal in the exercise of its discretion was considered by the Supreme Court in the case of *Daejan Investment Limited v Benson et al* [2013] UKSC 14, an authority to which both Counsel made reference in their Skeleton Arguments and oral closing submissions.

55. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

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

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

> "I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in

precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

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

59. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen. If dispensation is granted, that may be on terms.

60. There have been subsequent decisions of the higher courts and tribunals of assistance in the application of the decision in *Daejan*. The most obviously relevant is that of the Court of Appeal in *Aster Communities v Chapman* [2021] 4 W.L.R. 74 applied *Daejan* in the particular context of conditions being placed on the grant of dispensation. One aspect was that Aster determined that if all lessees in a development suffer prejudice because a defect in the consultation process, the Tribunal can make dispensation conditional on every lessee being compensated.

61. Dispensation was granted in *Aster* subject to payments of expenses incurred by the lessee.

62. Whilst neither Counsel had referred to *Chapman* (as the Tribunal will refer to the case in the particular circumstances of this Decision) in their Skeleton Arguments, it was apparent that both were aware of it, and it stands to reason that the Applicant is aware, having been a party in the case. Therefore, the Tribunal considers that the authority can properly be referred to by the Tribunal to the extent necessary.

Consideration of the Disputed Issues

63. The Tribunal does not set out the parties' cases at length, whether written or as advanced in oral evidence and submissions, in advance of discussion of the relevant issues. The Tribunal refers to the relevant parts of the parties' cases in its consideration of the issues below. The Tribunal first addresses the service charge disputes and then after that deals with the grant of dispensation insofar as still required and the question of conditions on the grant of dispensation.

Service Charges

64. The remaining issues for determination in respect of service charges were as follows:

    i) the reasonableness of the Management fees and
    ii) the reasonableness of costs challenged in respect of the Concierge and on Costs

65. As they are both elements of the cost of running the Development and given the way in which the parties approached the case, it is appropriate to take both elements together. They are identified on different lines of relevant financial documents, for example statements of anticipated expenditure with the above descriptions.

66. The Applicant's Counsel accepted in her Skeleton Argument that a management fee of £159.22 per property on the Development is not on its own unreasonable. However, it was argued that the level of the fee relative to the cost of other services being provided is high. The Applicant contends that the additional charging of further sums over and above the £159.22 for Concierge and On Costs is such that the total cost of management of the Development is unreasonably high. Hence, the submission as to the burden of proof.

67. The Respondent's Counsel submitted that the parties' core dispute could "be boiled down to" whether it is reasonable for the Respondent to charge lessees both a management fee and also separately the cost of providing a Development manager and office administrator for the Development and further whether it is reasonable for the Respondent to be charging lessees both for grounds maintenance and also separately for the cost of providing two part-time caretakers for the Development. In respect of the first aspect, it was very much apparent that the Applicant's case was that charging for the manager and administrator on the one hand and a management fee on the other amounted to attempted double- recovery.

68. Ms Towler in oral evidence accepted that another development to which the Applicant referred, Lakeshore involved far fewer buildings- 2 as compared to approximately 150. Mr Castle put the point in cross-examination that any comparison must be fair one and there was a big difference between Lakeshore and the Development, where various of the specifics of the Development had not been considered in detail by the Applicant. Ms Towler had also never been to the Development. She did identify in response to other questioning that the Applicant manages other developments of a similar size.

69. Mr Castle drew out that the Applicant charged fees for management services of in the region of £365 per unit on sites managed by it. Ms Towler accepted that adding the Concierge and On Costs to the Management fees charged to the Properties gave a total of £269.10 inclusive of VAT. The Applicant's case had already explained that the Applicant makes a management charge which includes the costs of at least some of the Respondent's relevant staff.

70. There was also questioning about the Applicant's Somerset properties. It was established that the "custodians" employed by the Applicant undertook relatively limited tasks, with various other matters being included in a 15% management fee. That is to say 15% of the overall service charges, excluding insurance, of the schemes in questions. The point made on behalf of the Respondent was that a number of matters within that

management fee charged by the Applicant were regarded as caretaking tasks by the Respondent.

71. The Applicant made the particular point that the Respondent employs two caretakers where the Development contains 915 properties, whereas the Applicant employs one caretaker for every 2,926 properties it owns, with the reasonable cost of caretaking/ concierge services being considerably lower than that charged by the Respondent.

72. Mr Ramsamy explained in brief evidence in chief that he undertakes management solely for the Development. He gave evidence that a dedicated manager is required because of the nature of the site and because his knowledge of the leases and legal and technical issues meant that he could deal with matters much more quickly than they could otherwise be. His assistant provides administrative support.

73. It was said that Mr Ramsamy and his assistant fell within the Concierge and On Costs, which therefore included that day- to- day management, as opposed to, for example, simply cleaning and caretaking tasks.

74. However, it was elicited by the Tribunal that in fact Mr Ramsamy also has a responsibility for three blocks, which Mr Ramsamy said are small and contained 3 (2 of them) or 4 (the third one) flats, on the other side of the estuary. Mr Ramsamy explained that he oversaw the cleaning and window contracts but that lessees/ tenants would ring the housing office and that it was very rare that he visited or became involved. He said that his time was apportioned with an allowance of 45 minutes per month on those blocks and that the time of the caretakers was similarly apportioned, with the time charged to the budget for those blocks. The Tribunal was inevitably troubled by the obvious discrepancy between that and the earlier evidence of Mr Ramsamy, notwithstanding that the involvement of Mr Ramsamy with the other blocks was, the Tribunal found, extremely limited and that a plausible explanation as to apportionment of time had been provided.

75. Mr Ramsamy also explained the role and tasks of the caretakers. Each works 35 hours per week. Time allocated to weekly checks of lifts, fire alarms, AOV systems, water temperature and similar across the 40- acre site was explained, assuming all to be well and no additional time to be required to deal with repairs. He additionally explained about the site, providing some of the information included in the Background above (where not in dispute).

76. The point was made by Ms Gibbons in cross- examination that the Block includes no lift or fire alarm and as to the limited extent of other elements requiring testing. It was also suggested that there was some duplication in respect of some financial tasks, Mr Ramsamy having referred to checking certain documents produced and relevant to the Developments, the example being given of purchase orders. Mr Castle in closing invited the Tribunal to find that demonstrated the central management functions and local management working together.

77. Other questions were asked about the provision of information, the out of hours service, arranging gardening and arranging of repairs. Whilst those were all entirely reasonable matters for questioning, in the event nothing was elicited which the Tribunal considered of high significance as compared to other features of the case.

78. It was additionally the Respondent's case, as also talked about by Mr Ramsamy, was that the management fee charged by the Respondent as service charges covered corporate costs, such as the cost of the finance department which administered the bank accounts, prepared and issued service charge demands and dealt with usual other tasks such as dealing with invoices and purchase orders. He asserted that the different elements of service charge are split for transparency.

79. The Tribunal sought clarification of a numbers of other matters. It merits mention that one of those was the office from which Mr Ramsamy works. It was established that is also the base for the caretakers and that it is not on the Development but ¾ of a mile away. Mr Ramsamy gave evidence that the residents are aware of the location of the office and that it is also used for, for example, contractors' meetings.

80. Ms Gibbons queried in further cross- examination whether it was common for the Respondent to employ on-site managers. Mr Ramsamy replied that it differed according to the site but that the Development is the second largest managed by the Respondent. He added in re- examination by Mr Castle that the "large and complex" sector of the Respondent envisaged a manager for 30 blocks. Mr Ramsamy agreed with Mr Castle he has 50 blocks (more accurately and assuming the statements of case to be correct, 47, although with additional houses and coach houses as above), and as such said an assistant is required.

81. To a rather more limited extent Mr Castle has identified questions of whether the costs for each of internet services, mobile telephones and an office telephone line (each to be used by the above-mentioned estate (as the Respondent refers to it) staff) are reasonable, and the costs for office supplies for those staff are reasonable.

82. The witnesses were not questioned about office supplies or equipment for the manager and other staff.

83. The parties' positions were re-iterated in closing. Mr Castle also invited the Tribunal to consider the invoices, suggesting most to relate to office supplies with no evidence having been provided by the Applicant of unreasonable sums and others to relate to the office itself, the presence of which he asserted to be appropriate. Ms Gibbons particularly emphasised the management fee as a percentage of the overall service charges, referring to paragraphs 12.10 to 12.12 of Service Charges and Management by Tanfield Chambers, of which both Counsel are members. No specific issue was raised in the hearing about the salaries paid to the Development manager, assistant or caretakers (including the Respondent's position that

those had increased for the purpose of service charges because of a change in VAT treatment of such) or the rent for the office.

84. The Tribunal addresses, before progressing further, the issue as to the burden of proof. *Wallace- Jarvis v Otima Cambridge Limited and Others* related to charges for water and sewerage in a small development containing a mixture of residential and retail units. It was said that the water consumption at the development charged for by the water company was remarkably high, that the lessee drew the lessor's attention to that and that nothing was done by the lessor to cure the problem. As HHJ Huskinson put it:

> "There was evidence that the respondent could have (but had not) done something about this…..".

85. The Judge found that there had for a substantial period been a clear reason for concern and that the water charges were extremely high for the properties involved. There was no explanation at all for that. The prima facie evidence before the Upper Tribunal (in proceedings in which the lessor did not participate) was of charges unreasonably high. The Judge held that in those circumstances, it was for the lessor to show that the charges were costs reasonably incurred and further that they had not produced any such evidence.

86. It will be appreciated that those facts differ somewhat from the facts of this application, not least because the costs were charged by a third party and passed on by the lessor, although also because of a lack of explanation in that case for the level of charges, whereas in this application, the Respondent has charged for services it provides and has provided an explanation.

87. Having considered the evidence provided, the Tribunal determines that whilst the overall cost of each of the Management fees and the Concierge and on Costs were high- over £100,000 per annum each- given the number of units, the nature of the Development and the costs per property, there is not prima facie evidence that the costs of management were unreasonably high. The burden therefore remained on the Applicant to prove the service charges to be unreasonable on the evidence as a whole. The Tribunal had regard to the evidence and explanations provided by the Respondent.

88. It is, important not to confuse the Tribunal's consideration of whether the charges were unreasonably high such as to impact on the burden of proof with the Tribunal's subsequent and separate determination as to the reasonable level of such charges although the Tribunal considers that having not succeeded in respect of the burden of proof, the Applicant was then in some difficulties on the evidence provided.

89. The Tribunal noted that the Applicant had its own method of calculating management fees, by way of a percentage of other service charges, which is not the same as the usual approach taken to management of long leasehold

properties by a professional management company. The Tribunal did not for that reason find the level of fees charged in money terms by the Applicant to its own lessees and/ or tenants to be especially useful evidence, although the fact that the Applicant charged a higher sum to sites it managed served to indicate both that charges will vary from site to site and that as a headline figure the total charges to the Properties for Management fees and Concierge and On Costs was within a range of figures which are charged. The Tribunal agreed that the approach taken by the Applicant was not evidence of any market norm.

90. The Tribunal agreed with the Respondent that the Applicant sought to compare two different things in its management of its own properties and the Respondent's management of the Development. There was a lack of information about any developments more similar to the Development. There was insufficient evidence for the Tribunal to identify any proper apportionment of what was accepted to be minimal time spent by Mr Ramsamy on the three other small blocks (10 flats compared to 910 on the Development) and in particular to identify that there was any, or any more than de minimis, impact on the cost to this Development.

91. The Tribunal does not seek to suggest any criticism of Ms Towler or her evidence, there was simply a limit to that evidence. The Tribunal repeats its concern about the evidence of Mr Ramsamy that he only manages the Development where he later altered that evidence under further questioning, albeit that the Tribunal accepted what he then said and no further basis for challenge to the service charges for this Development arose. The Tribunal applied a degree of caution to the remainder of his evidence. However, in the event there was nothing which, having weighed that evidence and the other available evidence, altered the Tribunal's conclusions.

92. The Tribunal noted that the Development is a relatively unusual one, including as it does the woodland in addition to the garden and other open areas described above. The Tribunal considered that the employment of a specific manager for the Development was one of a number of reasonable ways in which management could be provided and that the costs were within a range of reasonable levels.

93. The Tribunal also accepted the difference between the tasks and services included in the wider management fee on one the hand and those included in the costs of the manager and other staff for the Development itself on the other. The Tribunal found that the approach to management adopted by the Respondent, both in terms of the approach and cost, was one of a number of potentially reasonable ones. That includes charging lessees both a management fee and also separately the cost of providing a Development manager and office administrator (and caretakers) for the Development, given that the Tribunal accepted those to each provide different elements of the management. The Tribunal noted that potentially the elements could have been rolled up into a single management fee but agreed that, in principle, it is preferable to have those split to provide better information. The Tribunal found there to be no unusual and unreasonable overlap

between the management costs and the Concierge and On Costs and did not find there to be an attempt at, or actual, double- recovery.

94. The Tribunal did not consider that points such as a lack of lifts to the Block assisted the Applicant where the charges were for caretakers for the Developments as a whole and then apportioned. The Tribunal considered that a charge for the Development and then apportionment of it was a reasonable approach and not that, not uncommonly, lessees identify that a particular matter amongst many does not benefit them specifically- ground floor flats in blocks with lifts where there are charges for checks and repairs to the lift is an obvious example if of a somewhat different nature. Mr Ramsamy accepted, quite properly, that different parts of the Development required a different level of services, but he stated, and there was no clear evidence that he was incorrect, that each block had a service level apportioned to it. The fee of £269.10 was for this Block and not universal across the Development.

95. The Tribunal accepted Mr Castle's submission that there was no evidence of the market rate for management and similar fees in the local area. However, the Tribunal considered the level of charges and applied its experience of a considerable number of other cases involving management and similar charges, the services included, and the costs charged. The fees for management and caretaking across the Development as a whole was substantial: the fees for each of the Properties was not and was not unreasonable. The Tribunal noted that no issue had been raised by the Applicant in respect of the quality of the work undertaken.

96. The Tribunal further noted that the Applicant had accepted that the Respondent is renting office space for the relevant staff and found that the fact or renting an office was not unreasonable in itself and had not caused the service charges related to management and caretaker activities to be unreasonably high. The Tribunal could not identify anything unreasonable in itself or in amount in respect of office and other equipment and other expenditure.

Decision-

97. The Tribunal decided that the management costs and Concierge and On Call costs charged by the Respondent are reasonable.

Dispensation

98. The Applicant's case is summarised above.

99. The Respondent's position was that the Applicant had not, at least prior to the Applicant's Skeleton Argument, raised any prejudice. Hence, the Respondent invited the Tribunal to grant dispensation without conditions. Mr Castle argued that there had to be prejudice by way of the Respondent having incurred unreasonable cost. He noted that it was the Applicant's under- lessees who had not been fully consulted and that they haven't raised prejudice and incurred costs. In contrast, the Respondent had

complied with consultation requirements in respect of the Applicant. There was some implicit criticism of the Applicant by the Respondent in statements of case for not making its under- lessees aware, although it was not apparent whether the Respondent knew exactly what the Applicant had done in that regard and in any event it did not resolve the failing in the consultation.

100. Ms Gibbons disputed that the relevant test was that set out by Mr Castle and submitted that it was open to the Tribunal to grant dispensation on such terms as it thought fit. The Tribunal determined that its discretion is wide and certainly wide enough to encompass imposing a condition of payment of fees or legal costs where appropriate in the circumstances of the given case.

101. The Tribunal noted that the Respondent ought to have consulted all lessees long ago and that the application for dispensation had been made very late, even in the context of the life of these proceedings, being submitted after the date on which the final hearing would have taken place but for the substantial failure of either party to prepare its case as directed.

102. The Tribunal accepted that the Applicant had been at potential risk of being unable to recover cost from its own under- lessees and that there was reasonableness in investigating the merits of the Respondent's late application for dispensation and of incurring legal costs in doing so. That said, once the Respondent had made the application and the Applicant's under- lessees had not objected, it was very likely that the application for dispensation would be granted. The Tribunal noted the potential argument that not all of the Applicant's costs should be awarded but rather a lesser sum, a matter to which the Tribunal gave careful consideration. Equally, the Respondent had not, as far the Tribunal could identify on the information presented, agreed to pay any costs of the Applicant and hence the Applicant had been reasonably entitled to pursue that aspect of the dispensation application further.

103. However, on balance and giving most weight amongst the relevant factors to the considerable indulgence granted to the Respondent in granting dispensation from consultation for a matter, even to the limited extent required, where the consultation ought to have taken place some years ago, the Tribunal determined it to be appropriate to award the Applicant's costs in respect of the Respondent's application for dispensation in full, subject to assessment if the sum cannot be agreed.

104. It should be added that the Tribunal took some account of the point, as advanced by Ms Gibbons, that the Respondent had issued proceedings in the County Court in respect of service charges which were not due- at the time, dispensation had not been granted and the Respondent had failed to check compliance. The Tribunal also noted that one of the bases of the Applicant's defence of those proceedings was failure to comply with consultation requirements, including failure to serve on the Applicant's under- lessees. The Tribunal also took some account of her further point that it was only very shortly before the hearing that the Respondent had

accepted not having complied, whereas the Applicant had pointed out the need for the Respondent to serve on the Applicant's under- lessees when the consultation was undertaken and in its response to the consultation notice. However, that was not determinative.

Decision-

105. Taking matters overall, the Tribunal determines that the grant of dispensation from consultation requirements to the Respondent in respect of the carpet replacement and external decorations is conditional on the payment by the Respondent of the Applicant's costs of investigating the Respondent's application for dispensation.

Applications in respect of Costs and fees

106. As referred to above, applications were made by the Applicants in the application form 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 or recoverable as administration charges.

107. 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".

108. The Tribunal is given a wide discretion. The provisions of paragraph 5A are not the same but the effect of them is similar and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable will usually involve the same considerations and produce the same result. There will be exceptions to that but there is no obvious reason to identify this case as one.

109. The provisions of section 20C were considered in Re: SMCLLA (Freehold) Ltd's Appeal [2014] UKUT 58, where the Upper Tribunal held (at paragraph 27) that:

> "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".

110. In Conway v Jam Factory Freehold Ltd [2014] 1 EGLR 111, the Deputy President Martin Rodger QC suggested that, when considering such an application under section 20C, it was:

> "essential to consider ..... 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".

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

Tribunal will always bear in mind the potential practical and financial consequences of the approach taken, albeit that is only one of a number of relevant considerations.

112. The Tribunal is very much mindful that there was no reference to such applications made in the hearing. The Tribunal accepts that at least in part that was a failing on the part of the Tribunal to raise the matters with the parties and identify their up to dates positions and whether Counsel sought to make any submissions. Consequently, the Tribunal has not made any decision in respect of those applications and takes the approach set out below.

113. On the current information, the Tribunal considers that the Applicant has achieved a modicum of success but has failed in what the Tribunal considers to be its principal challenge, namely to the Management fees and Concierge and on Costs. Taking account of that and the circumstances generally, the Tribunal is not currently persuaded that it would be just and equitable to grant the Applicant's applications. However, the Tribunal has kept an open mind as to whether it may be persuaded by submissions which may be made.

114. The same position applies in respect of any fees paid to the Tribunal in respect of the Applicant's application.

115. The Tribunal directs as follows:

i) If the Applicant does not wish to pursue the section 20C and Paragraph 5A applications further, the Applicant shall so inform the Respondent and the Tribunal within 14 days of issue of this Decision;

ii) If in the alternative, the Applicant does wish to pursue the applications, the Applicant shall provide written submissions (no more than 2 pages of A4) to the Respondent and the Tribunal within 14 days of issue of this Decision;

iii) Assuming the service of such written submissions by the Applicant, the Respondent shall provide written submissions (no more than 2 pages of A4) to the Applicant and the Tribunal within 14 days;

iv) The Tribunal will then consider those written submissions and review the position generally and issue a determination of the applications as soon as practicable.

116. The Tribunal determines, for the avoidance of doubt, that the Respondent's fees in applying to the Tribunal for dispensation shall be paid by the Respondent.

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.gov.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.