12800

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/18UK/LSC/2017/0112
Property	:	Forest Park Lodges High Bickington Umberleigh Devon EX37 9BN (Phase 1)
Applicant	:	Jane Walker and Peter Wickson (1), Paul & Barbara Walker (2), Andrew Wickham (3), Gale Ortanga (5), Philip Naylor and Rachel Saracoglu (6),Tracey and John Culshaw (7), Ann and Bill Beck (7), Joy and Ian Martin (9), Duncan and Sally Hoare (10), Sarah and David Ball (11), Barbara and Bill Cummings (12), Nick and Lorraine Humphris (12a), Warren and Kirsten Millington (13), Alan Ross (14), Mr and Mrs J Scott (15) and Gail Bradley (17).
Representative	:	Philip Naylor and Duncan Hoare
Respondent	:	Elsayed Mohamed Aly and Diane Aly
Representative	:	Fiona Roche (Solicitor) Laker Legal
Type of Application	:	Application for determination of reasonableness of service charges Sections 27A and 20C Landlord and Tenant Act 1985 (the Act) (as amended)
Tribunal Members	:	Judge C. A. Rai T. N. Shobrook FRICS Chartered Surveyor M. C. Woodrow MRICS Chartered Surveyor
Date and venue of Hearing	:	22 and 23 March 2018 Exeter Magistrates Court, Heavitree Road, Exeter, Devon. EX1 2LS
Date of Decision	:	3 May 2018

SUMMARY OF DECISION

1. The Tribunal has determined that it has jurisdiction to determine this application. The Respondent submissions that alleged breaches of certain specified covenants in the leases of the Property deprived the Tribunal of jurisdiction under the Act because the Property is not a dwelling are rejected.

2. The Tribunal has determined which service charges the Applicant is liable to contribute towards in 2016 and 2017. These are referred to later in this decision at the end of the sections relating to each year.

3. The Tribunal has determined which service charges are likely to be recoverable by reference to the schedule of costs for the 2017 Accounts provided in support of the service charge demanded by the Respondent for 2018. It cannot make a determination of reasonableness of those costs without access to more information than is contained in the Bundles.

4. The Tribunal makes an Order under Section 20C of the Act that any costs incurred by the Respondent in relation to this determination are not relevant costs for the purpose of service charges.

5. Full reasons for its Decision are set out below.

Background

6. The Applicant applied to the Tribunal in December 2017 for a determination as to the reasonableness of service charges demanded by the Respondent from the Applicant. The Application relates to 2016 and 2017 (past years) and 2018. He also sought an order to be made under Section 20C of the Act and under paragraph 5 of Schedule 11 of CLARA.

7. Directions made by Judge Tildesley dated 4 January 2018 required that:-
   7.1. The Applicant provide confirmation from the lodge owners that Philip Naylor is the nominated representative for the Applicant and advise if they would be acting in person or not;
   7.2. The parties assist the Tribunal with regard to proposed dates for a Hearing;
   7.3. That the Respondent provide copies of relevant service charge accounts and estimates for 2016, 2017 and 2018 (the relevant years) with demands and the summary of tenants rights; a statement referring to the relevant service charge provisions in the lease; legal submissions in support of the service charges claimed; a full response to all disputed service charges for the relevant years with copies of all relevant documents and signed copies of any witness statements.

8. The Applicant was tasked with responsibility for preparing the Hearing Bundle and was directed as to what it should include and how it should be indexed.

9. The parties were invited to submit written representations in relation to the section 20C or Paragraph 5 application.

10. The Tribunal received the hearing bundles in two parts, 1 & 2, (the Bundle) in accordance with the timescale set out in the Directions. The Respondent's statement suggested that the Tribunal had no jurisdiction to deal with the Application because none of the lodges are "dwellings". His legal representative referred to case law but did not provide copies of all the cases to which she had referred.

11. The Tribunal office wrote to the parties requesting that written argument be provided prior to the Hearing if the Respondent sought to challenge its jurisdiction to determine the Application.

12. A written statement was sent to the Tribunal office by the Respondent's representative on the day before the Hearing which was too late to enable it to be circulated to the Tribunal members. It was accompanied by another supplementary bundle of 138 pages prepared by the Respondent which included some case law but also copies of the Land Registers, a transfer deed, a template letter copy planning permissions and sample advertisements (Bundle 3). The statement and Bundle 3 had been sent to the Applicant.

13. Copies of that statement and Bundle 3 were provided to the Tribunal before the commencement of the Hearing. As there was no objection by the Applicant to the late production of Bundle 3 the Tribunal agreed to consider it and the Judge advised the parties that she would read the Bundle before the start of the second day of the Hearing and make a brief statement as to whether or not the Tribunal was minded to accept the Respondent's arguments prior to continuing the Hearing.

The Inspection

14. Forest Park Lodges is a development of seventeen lodges set on a steep woodland site broadly in three rows each of which is fronted by a tarmac road, (the Estate). Sixteen of the seventeen lodges, (the Property) are owned by those owners who collectively comprise the Applicant on individual long leases. Access is gained via a long unmade track and then a narrow tarmac road which leads through the adjoining estate sometimes referred to as "Phase 2", of other more recently constructed lodges developed by Mr Rodney Smith the adjoining landowner, who sold the freehold of Forest Park Lodges to the Respondent at the beginning of 2016.

15. On the first day, prior to the Hearing, the Tribunal members inspected the Property accompanied by its clerk Andrew Webber, Philip Naylor and Duncan Hoare representing the Applicant and Mr Aly representing the Respondent.

16. The Tribunal was shown infrastructure relating to the separated water and electricity supplies on the edge of Phase 2 and bulk gas storage tanks. It also inspected the roads within the Estate, the banks behind the lodges which were and remain the subject of gardening works undertaken by the Respondent referred to in the Application, a plastic tool box and the proposed site of the three new lodges for which the Respondent has recently obtained planning permission.

17. It also inspected the wooden fence which marks the boundary between Phase 1 and Phase 2. Lastly it was shown some new timber fencing erected on the lowest part of the Estate constructed on the boundary between it and the adjoining woodland and noted the discarded heras type metal fencing left on the ground in the vicinity of the fence which had replaced it.

The Hearing

18. The Tribunal told the parties that it would provide written reasons if it decided that it had jurisdiction to determine the Application.

19. It was agreed that the Applicant would explain its case in relation to the individual service charges which it disputes and that the Respondent be given the opportunity to respond in relation to each item disputed. It was agreed that each year would be considered in turn but where appropriate it would be disclosed if the services or amounts disputed were, or were likely to be, disputed in more than one year and if the submissions of the parties were the same in relation to each year.

20. Each party was told it would have the opportunity to sum up its case at the end of the Hearing and raise any other relevant issues which might arise.

21. The Tribunal reminded the parties that its jurisdiction related solely to the Application and that it had no jurisdiction under the Application to consider other matters which the Respondent had raised.

22. Mr Naylor spoke for the Applicant assisted by Mr Hoare and Miss Roche spoke for the Respondent with assistance from Mr and Mrs Aly.

2016
The Applicant's case

23. Philip Naylor referred to the following matters to which the Application relates:-

23.1. The method of calculation of the service charges demanded as set out in the Lease - The Respondent issues an invoice for ground rent and service charge to individual owners at the beginning of the service charge year which runs from January to December. [The invoice relates to both ground rent and service charge but the Tribunal can only consider the service charge].

23.2. Clarification as to the reasonableness of certain specific items of expenditure for which service charges have been demanded.

23.3. Whether the standing charges for the utilities specifically water electricity and LPG gas recharged by the Respondent are reasonable.

23.4. Clarification of the unit cost of those same utilities and whether these are reasonable.

23.5. Guidance as to whether or not the Respondent is holding service charge funds on trust in accordance with his statutory obligations and his duties with regard to those funds and generally whether he is complying with those statutory duties in relation to accounting and the accounts produced by the Respondent.

23.6. The consequences of the absence of a summary of rights and obligations and the name and address of the freeholder on the service charge demands issued by the Respondent.

24. The utility standing charges appear to be much higher than the charges which the Respondent is paying to the supplying party. It has been difficult for the Applicant to establish exactly what amounts the Respondent is being charged. Based on the invoice included at Page 449 of the Bundle the standing charge for water is 12 pence per day and the standing charge for electricity is 42 pence per day. The Applicant has no information regarding the LPG save for the annual gas tank rental costs of £82.00. Assuming that these charges are applied each lodge would be liable to pay an annual charge of £43.80 and £153.30 respectively. However each of the 17 lodge owners is being invoiced £54.92 for water and £98.55 for gas and electricity combined.

25. Since the Respondent's income from this "recharge" is substantially in excess of the cost to him the Applicant believes that the amount of the recharge is unreasonable and suggested that the Respondent was in breach of the OFWAT and OFGEM requirements. Whilst it accepted that in addition to the actual cost the Respondent would be entitled to charge for administration he considers that the amounts demanded are unreasonable.

26. The Applicant has limited information regarding the LPG charge as it has not been provided with a copy of the supply contract. It believes that the provisions of the Lease prevent the Respondent from recovering in excess of the costs to him as the obligation in clause 4 (2)(ii) of the Lease is that the Lessee pay for all electricity gas and water supplied to the Demised Premises "and indemnify the Lessors against any charge in respect of the same".

27. The Applicant also questioned the duration of the supply agreement and enquired if it might be a "Qualifying Long Term Agreement".

28. The Applicant acknowledged that the water and electricity supply were supplied by the owner of Phase 2 until very recently when the supplies were separated. Having now established the South West Water charge for the area it was clear that the Applicant is being recharged more than the statutory charge which it considers to be a breach of the OFWAT conditions of resale of water.

29. The Applicant is also concerned that the recharge for electricity is in excess of what the Respondent is paying. This is because in his submission, [Page 325 of the Bundle], the Respondent states: - "The Respondents informed all tenants that the electricity unit rate will

increase by 1 p to compensate the Respondents for the VAT costs. The Respondents do not feel this nominal increase is unreasonable".

30. The Applicant summarised what it wanted from the Tribunal as being:-
30.1. Clarification of the calculation of the service charged demanded in each year; and
30.2. A refund or credit in respect of any overcharge of service charge or ground rent; and
30.3. A determination as to the appropriate levels for utility standing charges and unit costs; and
30.4. A refund or credit in respect of over charges.

Respondent's Case

31. The Respondent claims he is entitled to increase service charges either by reference to the annual increase in RPI or, once he has accounts for the previous year, and if the amount recovered for the preceding year was less than the amount spent, (as shown in the accounts), he is entitled to recover any shortfall.

32. The Lease refers to the Service Charge as being:-
(a) a sum of Two Hundred and Fifty Pounds or if greater such sum multiplied by the RPI maintained by the Government on the 1 October in the previous year divided by 178.4 being the amount of the index on 1 January 2003.
or
(b) a sum which shall be **one twentieth** of the sum calculated in accordance with the Fourth Schedule hereto and payable in accordance therewith.
[in each case subject to value added tax payable].

33. The Respondent told the Tribunal that he had decided that increasing the Service Charges in proportion to the annual increase in RPI would be insufficient to cover his estimated service charge costs in 2016 so he decided to implement a 9% increase. He said he could have a charged 10% increase. He did not explain why. Once he received certified accounts he divided the actual expenditure by 20 in accordance with the Fourth Schedule to the Lease and decided to re-credit the service charges paid by sixteen lodges. He said he has frozen the service charge payments for 2017 and 2018. [It was implied, although not stated, that the refund represented the difference between the 1/20 share and the amount invoiced].

34. He says it is his choice whether he demands index linked increases in service charges or 1/20 of the expenditure in the previous year.

35. Miss Roche stated that consideration of the ground rent is outside the Tribunal's jurisdiction.

Tribunal Decision and Reasons

36. The Respondent has a statutory obligation to provide a summary of rights and obligations **with** service charges demands. (Section 21B of the Act).

Demands for rent must contain the landlord's name and address. (Section 47 of the 1987 Act). Section 22 of the Act enables a tenant to require that the landlord afford him reasonable facilities for inspecting accounts receipts or other supporting documents which clarify the service charges demanded. The consequence of any failure to comply with the legislation is that the amounts demanded may be withheld by the tenants without consequences until the compliant demands are issued. Section 42 of the Landlord and Tenant Act 1987 (the 1987 Act) requires service charge contributions to be held on trust.

37. From unsolicited information supplied to the Tribunal by the Respondent after the Hearing it appears that service charges are being paid into his personal bank account. If that is the case he should ensure that these payments are retained in a separate account to comply with section 42 of the 1987 Act.

38. The Tribunal has no jurisdiction to order credits or refunds if over payments have been made. Its jurisdiction is limited to what is contained in sections 27 and 18 of the Act and limited to a consideration of whether the service charge payments demanded are relevant costs and if so whether the amounts demanded are reasonable. [Both of these sections of the Act are set out later in this decision]. Neither does the Tribunal have jurisdiction to determine the ground rent save and except a tenant under a long lease of a dwelling is not liable to make a payment of rent unless the landlord has given him a notice relating to the payment which notice must be in a prescribed form compliant with section 166 of CLARA.

39. Utility standing charges can be passed on to the Applicant by the Respondent. The only other amounts that are recoverable are those amounts which the Respondent has paid, whether to the adjoining landowner or to a utility supplier. Very limited information as to the amounts paid by the Respondent to the adjoining landowner for utilities has been provided by the Respondent. The cost of the LPG storage tank rental is not disputed. Whilst it is reasonable for the Respondent to add an administration charge to the invoices, he cannot add other arbitrary amounts. It is impossible for the Tribunal to determine how much is recoverable so it has relied upon the Applicant's calculations for 2016 at page 209 of the Bundle which appear to be based on the actual information available to the parties. These are the amounts to which he referred at the Hearing and which are set out in paragraph 24 above.

40. Copies of some service charge demands for 2016 are at pages 140 – 141 of the Bundle. The amount invoiced should have been calculated either on the basis of an accountant's certificate or the actual expenditure for the preceding year (shown in accounts) but neither was available when the demands were issued, or by increasing the amount demanded or charged in the previous year by the increase in RPI. The amount demanded on the service charge invoice refers to an RPI adjustment **and** the cost of new management. The Respondent is only entitled under the Lease to increase the amount demanded by the increase in RPI which calculation is agreed. See page 322 of the Bundle which is part of the Respondent's statement and which refers to the sum of £364. Until agreed accounts for

2016 are available, £364 is the amount recoverable. [Other challenges by the Applicant of the amounts included in the service charges accounts for 2016 are dealt with under 2017, as has the question about the nature of the LPG supply contract].

2017
The Applicant's case

41. The 2016 accounts are at pages 455 – 458 of the Bundle. Headings used in the 2016 accounts are inaccurate. It was suggested, although this cannot be confirmed that this it may be a result of the accounting package template used by the Respondent's accountant.

42. The Applicant questioned the accuracy of the Respondent's statement that the 2016 accounts were prepared for him on his initiative. Mr Hoare stated that these accounts were only provided in response to pressure from the Applicant.

43. The Applicant's reservations about the 2016 Accounts are a contributory factor in the disagreement between Applicant and Respondent as to whether the 2016 Accounts should be relied on. Their criticism of the Accounts has been exacerbated by the Respondent sending unhelpful and sometimes unpleasant emails to the Applicant. No copy of the Accountant's invoice for his costs for producing the 2016 Accounts has been provided which has increased the friction between the parties.

44. The Applicant seeks a determination that the £360 charge in the service charges for these accounts is not reasonable until the Accounts are presented in an acceptable form and a copy of an invoice for the accountant's costs is produced.

45. The Applicant told the Tribunal that he has been unable to inspect copies of all the invoices upon which the 2016 Accounts are based. He is reluctant therefore to accept that the Accounts are sufficiently accurate to provide a reliable basis for estimating service charge expenditure in 2017. He questions how the accounts could have been accurately prepared if not all of the invoices for the costs shown were available to the Respondent's accountant, (which he assumes to be the case if copies cannot be produced to the Applicant).

46. The Applicant does not understand the basis of the Respondent's calculation of the amount of the service charge demanded in 2017. The Respondent acknowledges the demand represents an 8% increase but the Applicant does not accept that it can increase the amount demanded by an arbitrary percentage. It would accept that the Respondent can divide the total costs for the year by 20 which is broadly the formula set out in clause 1 (b) of the Lease being a one twentieth of the sum calculated in accordance with the Fourth Schedule and payable in accordance with it.

47. Mr Hoare told the Tribunal that until the Respondent bought the freehold of the Estate in 2016 the previous owner had simply increased service charges annually in proportion to the increase in the Retail Price Index. The Respondent had done something different. The service charges

demanded by the Respondent are higher than would have been demanded if the familiar increase was applied although confusingly the invoices refer to a RPI increase. When this was questioned the Respondent had advised the Applicant that he could increase the amount demanded by a higher percentage if he chose to do so. He had mentioned an entitlement to increase the service charges by up to 10%. He also miscalculated the amount of the RPI increase.

48. Certain items of expenditure included in the accounts are challenged by the Applicant. These are:-
48.1. Legal costs of £92
48.2. Earthworks at £1,240
48.3. Labour costs for the Respondent of £3,096
48.4. Management fees of £326
48.5. Tool box at £114
48.6. Fence Panels at £208.44
48.7. Gas Tank Rental at £82
48.8. Meeting costs of £55 (no invoice)
48.9. Accountant's costs of £360

49. The Applicant's suggest that legal costs cannot be recovered under the provisions of the Lease and furthermore the amount charged is part only of an invoice which does not make it clear why the part charged relates to the costs incurred that should be part of the service charges.

50. The earthworks relate to the bulldozing and preparation of a level terrace on the lower part of the Estate. According to the Applicant the track leading to this area was strengthened to enable the preparation of the ground for the construction of three new lodges. No Applicant requested these works on "health and safety" grounds.

51. The labour costs apparently relate to gardening which has been charged at £18 per hour per person which is above a comparable local rate for a skilled and or experienced gardener. In addition there is no written record of either the dates on which works were undertaken or the number of hours of labour claimed which might assist in verifying the reasonableness of the charges included in the service charges. However, the Applicant accepts that some works have been carried out and is willing to pay for gardening works if hours are properly recorded together with the dates upon which works are undertaken.

52. The charge for the Respondents time is mingled with management fees charged at an hourly rate which the Applicant considers to be "double counting". It accepts that a charge of 5% of the allowable expenditure can be added to the service charge to compensate the Respondent for management costs but not that it can separately charge for the hours it spends "managing" the Estate and then, in addition, add a 5% supplementary charge

53. The tool box was provided solely to provide a space for the Respondent to store tools. Had a local gardener been employed he would have supplied and used his own tools.

54. Some fence panels have been replaced in the boundary fence separating the Estate from Phase 2. The Applicant has obtained confirmation that Mr Smith paid for these panels and although he asked the Respondent to contribute he did not. This cost cannot be included in the service charge if it has not been paid.

55. The gas tank rental should be a "standing charge" relating to the supply of the LPG. Had the standing charges been properly invoiced and "broken down" it could have appeared in those invoices.

56. The meeting expenses incurred during a site visit by the Respondent appear to relate to a "free bar" and snacks which it provided for the residents. Without an invoice supporting the charge, it is not reasonable.

57. The accountancy fee for the 2016 Accounts would be reasonable if the works to which it relates, being the preparation of the accounts, was in an acceptable form. However no copy of an invoice has been supplied and the Applicant is not satisfied with the Accounts and is unwilling to pay for them until these are amended and produced in a satisfactory form.

58. The absence of invoices showing the utility charges invoiced by the owner of Phase 2 have made it difficult to establish whether the amounts invoiced are correct, both in relation to standing charges and unit costs.

59. The Applicant contends that, regardless of whether any regulations limit the amount recoverable from him, the Respondent is not entitled to make a "profit" on such charges but can only recover his costs on an indemnity basis because that is what the Lease provides.

60. At the date of the Hearing no copy of the LPG contract had been supplied by the Respondent so the Applicant procured information from Avanti the same supplier used by the Respondent, which company's website quoted a 29.9 pence unit charge with a cap on increases of 3 pence in any given 6-month period for new contracts.

61. After the hearing the Respondent produced a copy of the LPG supply contract. It referred to a rate of 52 pence per litre. Avanti had increased the unit charge by 6.9 pence per litre from 1 November 2017. However the Respondent charged the increased rate backdated to March 2017 and only reduced the rate when individual lessees questioned the timing of the increase.

62. The Applicant therefore believes that it may be appropriate to market test LPG supply costs and that the Respondent is obliged to supply the LPG at a reasonable cost.

63. Other concerns were raised regarding a failure in the supply of gas during the winter which took some time to rectify. The Respondents do not live locally and cannot respond immediately to an emergency.

64. The same concerns in relation to the standing charges for water and electricity that were raised by the Applicant in relation to 2016 apply to 2017. The Tribunal would again refer to the Applicant's calculation contained at page 214 of the Bundle which relies on such information as

is available to it. The Applicant, being aware of a contractual dispute between the Respondent and the owner of Phase 2, questioned if payments (collective payments) for utilities were being passed to him or held in a ring fenced account pending resolution of this contractual dispute. This concern was apparently raised because in the summary of costs for 2018 the Respondent suggests that the shortfall in utility charges collected from the leaseholders of Forest Park and apparently being demanded from the owner of Phase 2 must be underwritten by the Applicant. The basis of the Respondent's calculation of the shortfall is unclear to the Applicant since all the leaseholders at Forest Park pay and have apparently always paid for electricity and water based on their metered consumption

65. The Applicant seeks the following:-
    65.1. Guidance with regard to accounting standards and budgets for service charges; and
    65.2. Refunds or credits for any items which are determined not to be reasonable; and
    65.3. Confirmation that the Respondent cannot charge in excess of the unit charges he is paying for utilities; and
    65.4. An order requiring that the Respondent disclose the utility invoices; and
    65.5. Guidance as to whether the LPG contract is a Long Term Qualifying Agreement; and
    65.6. Confirmation that the Respondent cannot pass on any costs claimed by the owner of the adjoining estate in relation to any dispute regarding the separation of the water and electricity supply and historical charges for those services.

The Respondent's case

66. The Respondent stated that all of the leaseholders received certified accounts for 2016 together with invoices for inspection. He says he does not understand on what basis these accounts have been questioned by the Applicant and suggested that by raising any query the Applicant is questioning the qualifications and competence of his accountant.

67. The Respondent told the Tribunal that despite there being a deficit in the service charge accounts he "gave the tenants £28 to keep them happy". He says that this credit will move to the 2017 accounts.

68. The Respondent suggests that he received an invoice for legal costs from his solicitor but decided that only some of the advice provided related to the Estate. The Applicant refers in his statement to two clauses in the Lease being clauses 4(16) and 4(17) which he refers to in relation to this recovery of costs.

69. The Respondent believes he can recover the costs of the earthworks because he was obliged to undertake the works to make the lower part of the Estate safe. Alternatively the works can be construed as landscaping which is a recoverable cost. He suggested that his solicitors advised him that he could charge the cost to the service charge account. The Tribunal were referred to an email exchange at page 59 of the Bundle in

which it is suggested that the cost of the works "could be included as repair". That email is dated 24 January 2017. The only record of payment for the works appears is an email between James Brown and the Respondent dated 10 March 2017 in which the works are referred to as "Retained Land Maintenance and repair"

70. The Respondents believe that it was entitled to charge the costs of the tool box to the service charge account as its use was solely in connection with the Estate and justifiable because the tools stored in it are available for general use.

71. The fence panels were purchased by Mr Smith to repair the boundary fence.

72. The Respondent made no submissions regarding the gas tank rental.

73. There was no response from the Respondent as to the reason it could not provide an invoice for the cost of the snacks and drinks provided at the meeting.

74. The Accountants costs have been considered later with the Applicant's concerns regarding the 2016 Accounts.

75. The Respondent said that he has spent £4,000 in legal costs to separate the water and electricity costs, which costs he asks the Tribunal to award to him when considering the costs aspects of this application and he respectfully refers the Tribunal to the Lease costs and interest terms. [Page 326 of the Bundle].

76. The Respondent stated that the OFWAT and OFGEM guidance does not apply to occupiers of holiday accommodation but only to homeowners.

77. He maintains that he has set out the details of the utility unit charges and how these are calculated and these are reasonable and the Applicant is not being over charged.

78. He states that the unit charge for water has remained the same since 2004 and the utility bill provided by the previous owner confirms this is so. He simply passed on the charge made to him for water and electricity by the owner of Phase 2. The water and electricity supplies were separated in November 2017.

79. He says he has not charged the Applicant VAT on the electricity so has increased the unit rate to compensate for this.

Tribunal Decision and Reasons

80. There is a statutory obligation for the Respondent to provide service charge accounts. However the Lease also contains obligations regarding the certification by the lessor's accountant of the next years' service charge if it is likely to be more than that charged in the previous year. It is unlikely to be possible to know how much should be demanded at the beginning of a service charge year to cover anticipated expenditure unless the Respondent is able to produce an accurate record of the costs

he has incurred in the preceding year to that in which service charge demands are issued.

81. This would have been unlikely in 2016 save and to the extent that the Respondent was able to rely on the information provided by his seller. At the Hearing it was suggested that the 2014 accounts, [Page 424 of the Bundle] were produced by the seller to assist with the Respondent securing a business loan to enable him to purchase the Estate. All of the statements made by him and Miss Roche at the Hearing implied that he did not have sufficient information to enable him to accurately estimate the costs of services for 2016.

82. Service charges demanded in January are more likely to be based on estimated expenditure for the previous year plus anticipated estimated expenditure for the current year which is why the Respondent, should he wish to rely upon the wording contained in the Lease, supply the Accountants Certificate in the form referred to in the Fourth Schedule to it. No copy of an Accountants Certificate has been produced to the Tribunal or referred to by either party. The Tribunal has therefore assumed it does not exist.

83. The 2016 Accounts contain a signed certificate that the service charge statement is a fair summary complying with the requirements of the Fourth Schedule of the Lease listed in paragraph 88 below.

84. A very simple Profit and Loss account states the "Income" as a single figure with no indication as to what it comprised and with expenses summarised under three headings, one of which is "rent rates power and insurance costs", which are not the headings listed in the Fourth Schedule to the Lease. The lessor has no obligation to insure the leasehold properties. Insofar as rates are payable for the freehold estate the Respondent is not entitled to recover these costs as service charges unless he can demonstrate these charges relate to common parts.

85. The Tribunal would have expected the 2016 Accounts to have listed a summary of the expenses the Respondent actually incurred such as gardening; the costs of contributing towards the adjoining landowners fencing; the costs of the gas tank rental and other relevant expenses similar to those listed in the 2017 schedule of costs (page 495 of bundle).

86. During the Hearing it was acknowledged that the Applicant would be minded to accept that if service charges were increased by the correctly calculated RPI increase at the beginning of each year and invoiced in this amount those invoices would be paid, provided that draft accounts were produced and circulated to all lessees in accordance with the provision of the Fourth Schedule to the Lease.

87. The Fourth Schedule to the Lease requires production of a Certificate from the Lessor's accountant as soon as possible after 1 January in each year "certifying" the amount of the service charge, which if such charge shall be greater than the sum paid in advance in any year shall be a debt due and owing to the Lessors and with any balance payable with the service charge for the ensuing year.

88. The Certificate should contain a summary of the Lessors expenses as set out in paragraph 3 of the Fourth Schedule to the Lease and include costs of:-

88.1. Complying with Lessors covenants in clauses 5 (2) and 5 (3) of the Lease
88.2. Cleaning and where necessary lighting the common areas
88.3. Gardening and landscaping the Estate and Retained Land
88.4. Providing and maintain any service or amenities that may be requested in writing by a majority of the lessees of the Lodges
88.5. Fees of the Lessors accountants
88.6. Costs of management which shall not exceed (effectively) 5% of the costs of other services provided.

89. As considered later in the Decision, the 2016 Accounts were apparently only commissioned following pressure from the Applicant who continues to question if the 2016 Accounts are compliant in relation to the requirements of the Lease, (and legislation).

90. The Tribunal determines that until the Respondent can produce an Accountant's certificate which complies with the provisions of the Fourth Schedule to the Lease or agreed accounts for that years' service charges he may only demand the amount of the service charge demanded in the previous year, but increased by RPI using the correct calculation, which should be set out in the invoice to avoid any misunderstanding. The following sums are specifically not recoverable:-

Legal costs	92.00
Earthworks	1240.00
Management Fees	326.00
Fence Panels	208.44
Meeting costs	55.00
Accountancy	360.00
Total	**2281.44**

91. The amount initially demanded can be adjusted, (if necessary), once the Accounts for the previous year are produced. Presumably an adjustment will be inevitable as the index linked increase should apply to the actual expenditure and not the amount of the Service Charge demanded in the previous year and this won't be confirmed until agreed accounts are prepared.

92. For those reasons the Tribunal determine that "the 2016 Accounts" do not constitute a certificate which is a summary of the Lessors expenses in accordance with the Fourth Schedule to the Lease. Neither is it a service charge account in accordance with the obligation contained in the Act. The Respondent has signed the 2016 Accounts so is aware of its content and the omissions and cannot "hide" behind an assertion that his accountant is professionally qualified to avoid responding to questions about those Accounts raised by the Applicant.

93. The amount shown in the service charge accounts for legal costs of £92 is one half, (rounded up), of the invoice dated 14 February 2017 at Page 164 of the Bundle. That invoice although it contains no itemised breakdown seems to have been issued just after the email exchange

between the Respondent and his lawyer, referred to below, which prompted him to include the cost of earthworks in the service charge. The Tribunal assumes that it was issued following receipt of advice given to the Respondent as to the costs he could recover through the service charges. The sections of the Lease to which the Respondent refers specifically relate to the recovery of costs in relation to proceedings or contemplation of proceedings under section 146 notice under the Law of Property Act 1925. Clause 4(16)[4(18)] and costs incurred by the Lessors in relation to recovery of arrears of rent, clause 4(17) [4(19)].

94. From its inspection of the Estate, the Tribunal is satisfied that the earthworks undertaken have been undertaken wholly and exclusively in connection with the preparation of the site of the three new lodges.

95. The email from James Brown to the Respondent refers to works carried out in February 2016, April 2016 and June 2016. The planning permission dated 7 September 2017 refers to a pre-commencement condition requiring amongst other things Construction Management Plan including the means for enclosure of the site. It is inconceivable that the levelling of a site which must be enclosed during construction can be considered to be either landscaping or a repair for the benefit or health and safety of the Applicant.

96. For all of those reasons the Tribunal determines that the cost of the earthworks is not a service charge which falls with the definition in section 18(1) (a) of the Act. It is not recoverable from the Applicant.

97. The Applicant has questioned whether the costs of gardening works undertaken by the Respondents personally and charged to the service charge account are reasonable. It stated that there is no accurate record of the hours worked. The hourly rate charged of £18 was later reduced with the agreement of the Applicant to £15. The Applicant stated that a local gardener could undertake similar work, including removal of the garden waste, for £12 per hour.

98. There was a lively debate between the parties and their representatives at the Hearing as to whether minutes of a meeting between the parties correctly recorded what had been agreed about the hourly rate the Respondent should be entitled to recover for gardening services which he personally supplied. The Tribunal cannot discern with any accuracy what may have been agreed save that there seemed to be mutual agreement that a higher charge may be appropriate in relation to supervision works.

99. The Tribunal has inspected the Estate and accepts that the terrain is steep resulting in works of the type apparently carried out by the Respondent being quite difficult. It may not be work which could easily be outsourced to third parties. At the time of its inspection the steep parts of the Estate were tidy and appeared to have been maintained appropriately. What degree of skill is required is difficult for the Tribunal to assess but it has formed the view that it may difficult to find

a local gardener to do such work for the quoted local rate of £12 per hour.

100. For that reason the Tribunal accepts that a charge of £15 an hour is a reasonable charge if it includes anyone undertaking the work providing his own tools and removing waste.

101. Hours worked by the Respondent together with dates must be recorded and shown on invoices so that a record is maintained to enable accurate service charge accounts to be produced by the Respondent who must also keep a proper record of income to enable him or his accountant to complete his own taxation returns. Providing invoices showing the hours spent and dates on which the work was carried out are provided, the costs will be recoverable. Until this information is available the costs cannot be verified or recovered for the amount demanded but the Tribunal accepts that some costs are recoverable if the parties could agree an amount because it is accepted that gardening works had been regularly undertaken on the Estate.

102. The provision of a tool box was contentious because the Respondent has sought to recharge the cost to enable him to charge for the gardening at a higher hourly rate than the local rate.

103. Given that the Respondent told the Tribunal that no lessee owns a garden it cannot be reasonable to suggest he is entitled to claim the cost of the tool box because he has made the contents available for communal use. The Applicant can have no use for or need of tools if he has no garden areas to maintain. However it is not unreasonable for the Respondent to provide storage facilities for his own use on the Estate to enable him to manage the Estate. It may not be reasonable if that tool box were to be used in connection with the storage of anything connected to the development of the new lodges. The Tribunal determines that the cost of the tool box is recoverable and that the actual cost incurred in 2017 is reasonable.

104. Given that Mr Smith the owner of Phase 2 states that no payment has been received from the Respondent, the £208.44 shown in the service charge accounts for the fence panels is not recoverable. That amount is exactly twice the amount shown on the invoice dated 25.09.2016 supplied by Mr Aly after the Hearing. The invoices at pages 167 -169 and 173 – 175 of the Bundle, (two of which are duplicated and one of which is a credit note), total £187.32 so are of no assistance whatever. The Tribunal, in reliance on the copy email from Mr Smith at page 172 of the Bundle, determines that this amount is not recoverable because no payment has been made to Mr Smith, although it would have allowed the recovery of these costs if it was satisfied that the Respondent had paid Mr Smith. The cost is not justifiable on the basis of the invoices issued to Mr Smith and from the evidence supplied it appears that the amount shown in the 2016 Accounts is incorrect.

105. The amount shown for gas tank rental should be part of the utility standing charge but the actual cost is recoverable as long as there is no possibility of the Respondent double counting this charge. The Tribunal

determines it is recoverable but agrees with the Applicant that in future years it should be part of the utility standing charges.

106. The meeting charges would be recoverable if an invoice for those charges can be provided but are not recoverable without an invoice or receipts for the items provided by the Respondent.

107. The Tribunal has already dealt with the accountant's fee which is not recoverable; there is no invoice and it does not believe that the accounts to be accurate or in a form which is compliant with the Act.

108. As stated earlier in this Decision, the Tribunal has no jurisdiction to award credits or refunds. It determines that the Respondent can only recharge the utility standing charges and unit costs on an indemnity basis. If he is paying VAT, which he is unable to reclaim, he can recover what he is paying, inclusive of the tax. The Tribunal does not understand the reference by the Respondent to him "consuming" the VAT. He states that he is not VAT registered therefore he is not entitled to charge an additional amount because he is not obliged to tax the supply.

109. At the Hearing he said, and Miss Roche confirmed this, that the only invoice the Respondent received from the owner of Phase 2 which relates to the utility charges, [electricity and water], including standing charges is at page 449 of the Bundle.

110. After the Hearing the Respondent produced another invoice from the owner of Phase 2 dated 1 April 2016 titled "Revised bill to include your over charges before completion date 4 January 16. Revised updated 25 September 2016".

111. The Respondent claimed that there is a shortfall in the amounts collected from the Applicant based on his seller's calculations, (presumably in respect of the period since January 2016 when he purchased the Estate), and asked that the Tribunal award this amount to him because the Tenant is obliged to indemnify him in respect of these charges.

112. His request is confusing in that the Respondent states he was over charged by his seller and paid £9,463.44 but collected £5,489.67. Neither figure is verified by reference to invoices. Page 449 of the Bundle is an invoice from the owner of the adjoining estate for £6,985.88 from January 2016 to September 2017. However there is a spreadsheet of charges demanded and collected on page 454 of the Bundle.

113. Whilst it would be reasonable for him to charge a fixed administration charge to compensate him for the costs of apportioning the invoices between seventeen lodges, what he cannot do is to charge an administration charge and charge for his own time. He may choose a method of recovering the cost of his time but it would be sensible if he recorded this transparently to ensure that it is clear in service charge

estimates and accounts for subsequent years which would enable him to substantiate that any charges he makes are reasonable charges.

114. It would appear from the limited information supplied to the Tribunal that the Respondent is charging the Applicant more per unit for the LPG than he is paying. Furthermore it appears that the current contract may not be competitive. He is only entitled to recover a unit charge equivalent to what he is paying plus a fixed charge to cover tank rental or other associated fixed costs which he can demonstrate have been paid. The simplest way for the Respondent to do this is to provide the invoices for such costs.

115. The copy contract relating the supply of LPG by Avanti, provided by the Respondent after the Hearing, is a twelve month renewable contract which is not a Qualifying Long Term Agreement as defined in section 20ZA(2) of the Act. That contract refers to a rate of 46 pence per litre on 4 January 2016. An invoice dated 19 March 2018 refers to a unit charge of 52 pence per litre (+VAT) which is consistent with November 2017 increase, however the Applicant refers to a charge of 63 pence per litre. The VAT rate applicable to LPG is 5% so the actual cost of the gas appears to be no more than 55 pence per litre.

116. However, should it be considered financially advantageous to the parties to enable them to secure a lower unit cost, and the Respondent enters into a contract which is within that definition, the Respondent is legally obliged to comply with section 20 of the Act. The parties may also find it helpful to refer to **The Service Charges (Consultation Requirements) (England) Regulations 2003 No. 1987** ("the Regulations").

117. Finally the Tribunal cannot offer guidance to either party or "award costs" in relation to the separation of the utility supply. The Tribunal's jurisdiction is limited to the sections of the Act pursuant to which the Application has been made. Any application for costs made by either party subsequently should be made in accordance with the Tribunal's jurisdiction in the Act and **The Tribunals Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 No. 1169.** The Tribunal also refers both parties to the guidance in the Upper Tribunal decision in **Willow Court Management Company (1985) Limited [2016] UKUT 290 (LC).**

2018
The Applicant's case

118. The calculation of the service charge demanded remains in dispute because it is not being calculated in accordance with the Lease and because service charge accounts for the previous year are unlikely to be available on January 1 in the subsequent year. The Applicant states that there is no budget for 2018 despite the Respondent agreeing to provide one, see page 89 of the Bundle which is a written note of meetings between the Applicant and Respondent on 31 May and 1 June 2017.

119. The Applicants remain concerned for all the reasons already expressed, that it is being overcharged for utilities either by way of standing charges or unit costs or both. Furthermore there is concern that the Respondent will try to pass on the costs of separating the services supplied to the Estate from the services until now supplied through and by the owner of Phase 2.

120. The same concerns relating to the hourly charge made by the Respondent for gardening still apply in this year as no record of hours worked and on which dates has been provided to the Applicant. The Applicant remains unhappy at the hourly rate of £15 rather than the £12 which it considers to be the "local rate".

121. The Applicant again, as he did in relation to the previous year highlight that he is unwilling to pay for both management hours and a management charge (at an hourly rate). Whilst he has referred to this as being an administration charge it is not as defined in Schedule 12 of CLARA and is within the definition of a service charge in the Act.

122. The Applicant is unwilling to pay for garden tools. Given that the tools are being used solely by the Respondent to provide services for which he is charging in excess, (in the Applicants view), of the local rate he should supply tools at his own cost. However the Tribunal determines that the cost of these tools is recoverable if these tools are used wholly and exclusively on the Estate and for maintenance and gardening purposes within the Estate.

123. The Applicant has also queried both the Western Power Supply charge and connection charge of £1,013 and £684.06. The Respondent decided to separate the supply from Phase 2 and costs encountered as a result of his decision cannot be passed on to the Applicant.

124. The costs included for fencing were unnecessary and should not be recharged. These two items appear on the Schedule of costs at page 495 of the Bundle.

125. Although a charge for the supply and fitting of a safety mirror (£44.51) has been listed, the mirror has not been fitted.

126. Item 44 of the 2017 Schedule of Costs is a sum of £476 to debit the credit of £28 paid to the lodge owners in relation to an overcharge on the 2016 accounts which in the Applicant's view would relate to the 2018 accounts but only if there is a deficit between amounts collected and spent.

The Respondent's case

127. It was acknowledged that there had already been sufficient discussions about how service charges should be estimated and invoiced. The 2017 Schedule of Costs is an attempt to improve the communication and estimate the costs of necessary or required works.

128. The Applicant had in particular questioned the charge listed as item 6 on the Schedule for a six hour meeting. In fact the hours recorded

related to other meetings and not just the very short meeting with Nick Humphris which on the Respondent's own admission was brief. It was accepted that the narrative is deceptive. The Respondent stated that he kept a spreadsheet and recorded what he did or had done before "charging" his time. He has not provided a copy to the Applicant.

129. The Respondent thought that it was a cost effective way of providing gardening services for him to do the work and charge for his work and the tools. He said that he could have hired tools and recharged the cost but he thought it better to buy the tools and charge those costs to the service charge account.

130. He is sympathetic to the request for more information regarding the utility costs and stated it will be much easier now that the supplies are separated. Both he and his representative reiterated that the only information he has in relation to the payments demanded by Mr Smith are the invoice at page 449 and the email "completion statement" at page 452 of the Bundle.

131. He is adamant that he has improved the electricity supply and can therefore recharge the costs incurred. He says unless the costs were paid there would be no guarantee of a supply but the items 40 & 41 refer to "electrician costs for new supply connection and upgrade to phase 1 lodges" and the "costs for a new supply with Western Power Electricity company".

132. Two charges, (invoices), for fencing the bottom of the site were paid because the fence was initially put in the wrong place and then taken down and put up in the correct place. The Respondent considers that the fencing is landscaping and that the cost is therefore recoverable under the lease. He did not explain why the fence was necessary or why the metal heras fencing which it had replaced had not yet been removed. He suggested that there was a public right of way.

133. The Respondent explained that the mirror had been purchased but not yet fitted and the Applicant commented that whilst the narrative is misleading the item was agreed. The Respondent agreed that item 44 which was the credit for the refund of service charges would be removed.

134. On behalf of the Respondent and generally in response to the Application, Miss Roche raised the issue of legal costs already incurred. She said she had set out the issues in her response and referred the Tribunal to pages 313 and the subsequent pages of the Bundle.

135. In relation to the section 20 Application made by the Applicant she said that there are a number of factors which the Tribunal should take into account.

136. Firstly the Respondent wants to make a costs application. Secondly she requested that the Applicant did not circulate the notes it had made of what had been said at the Hearing to other leaseholders and that the privacy of the discussions be respected. [The Judge advised her that the

Hearing is a public hearing and nothing said during the Hearing could therefore be "private".]

137. She went on to refer to clause 4(19) in the Lease [Clause 4(21)]. [This is the clause which requires that the Lessee perform the covenants and conditions referred to in the freehold title (Title Number DN384469) and indemnify the Lessor in respect of any liability for breach].

138. She accepted that the Respondent could improve his management of the Estate but she referred to the Tribunal's comments that indicated that the matters in dispute were capable of resolution. She cannot rewrite the lease and she believes that the way it is written has contributed to the misunderstanding between the parties.

Tribunal's Decision

139. For reasons which are expanded upon at the end of this Decision the Tribunal determines that the calculation of the service charge shown on the demands issued in January 2018 must either be based on actual expenditure shown in accounts for the preceding year or based on an Accountant's Certificate of anticipated expenditure or by reference to the same amount as invoiced the previous year, (2017) adjusted by any increase in RPI.

140. The Respondent can only recover the costs of the utilities and the standing charges at the rate it is being charged for them. It can add a reasonable administrative charge for preparing and distributing the invoices but it cannot add anything else to those accounts. The charge recoverable should be calculated by the Respondent in the same way as the Applicant has done 2016 and 2017. He must establish the standing charge for water and electricity, work out a daily rate and then divide this between the 17 lodges. If the only standing charge relevant for the supply of the LPG is the storage tank rental figure this figure should be divided between the 17 lodges and will constitute the "standing charge" for 2018.

141. Whilst it is reasonable for the Respondent to charge for gardening services, provided the amounts charged are supported by invoices with a record of the dates on which works are carried out and a full record of the "hours worked", the Applicant must be able to "audit" the charges by being given a record of the hours charged and the dates upon which works were carried out.

142. The Respondent cannot add a management charge to the service charge and charge separately for "management hours".

143. The cost of garden tools is recoverable if these tools are exclusively used by the Respondent to enable him to supply services to the Estate and it can be demonstrated that the cost is "reasonable".

144. The Western Power charges are not recoverable.

145. Whilst the Tribunal accepts that some charge for landscaping such as fencing the lower part of the Estate fall within the service charge

headings in the Lease, there is no evidence that there was any need for this fencing which replaced fencing which was already in situ. Both amounts shown on page 495 of the bundle being £433.61 and £289.12 cannot be recovered as service charges.

The Applicant's Summary

146. Mr Hoare confirmed that it wished to resolve the current disputes and to learn lessons for the future. He felt that the efforts made to assist the Respondent had been rejected and deemed to be "micro management".

147. The Tribunal has heard much about the lack of transparency in its dealings with the Respondent. He said if information supplied is clear and transparent it assists all parties. The Applicant appreciates the efforts that the Respondent has made to improve the Estate however his efforts to promote honesty and trust in conducting meetings and recording outcomes have not been effective as illustrated by an item on the Service Charge Schedule – "Fixing and purchase of mirror" when the mirror is not fixed and not in place. He accepts that this is illustrative of the poor record keeping of the Respondent and not of his duplicity.

148. The Applicant remains concerned that the Respondent would not be able to deal with an "on site" emergency. It wants also to avoid intimidating correspondence such as the "template" letter from Laker Legal dated 6 March 2018 at page 77 of Bundle 3 apparently sent to all of the leaseholders, which caused much concern and distress to lessees whether or not such an outcome was intentional.

149. The Applicant is grateful to the Tribunal for clarifying the issues it has commented on specifically at the Hearing. They are not trying to "micro manage" services.

150. The outcomes that they seek are clarification of the service charge demands, refunds, credits, what standing charges can be demanded and what accounting standards are acceptable. They believe that all charges made must be supported by invoices which are available to them for inspection. They are unwilling to pay for the Respondent's costs and liabilities relating to his dispute with Mr Smith.

Respondent's summary

151. Miss Roche said that the influence of the previous owner Mr Smith had pervaded the Respondent's ability to provide clear transparent accounts on account of his ongoing problems with the dispute between him and Mr Smith. She expressed a view that the working relationship between lessor and lessee could be improved and will be improved in the future.

152. She accepted that her client had misunderstood the extent of his financial and other obligations. This was as a result of his ignorance and she hoped that this would be taken into account in minimising any penalty the Tribunal might be minded to impose.

153. In response to questioning from the Tribunal it was established that the Respondent was unfamiliar with the RICS code and ARLA code.

154. When challenged directly about the notices displayed on the Estate regarding the need to record occupancy the Respondent admitted that he had written and displayed them and suggested to the Applicant that the Local Planning Authority might want to visit the Estate.

155. Following the Applicant's summary, she said that the Respondent accepted the majority of the points made. The parties will never agree about the "altered minutes" but in general the whole exercise has been worthwhile and she believes that it will aid a resolution between the parties. Going forward she does not accept that emergencies cannot be dealt with and is grateful that the Respondents attempts to improve the Estate have been recognised.

156. Her client had instructed her to send the letter dated 6 March 2018 and she is therefore unable to comment further. Both parties must bear responsibility for how their dealings progressed and she hopes both will be more respectful in the future. Her client would like assistance in the future and expresses a desire to help leaseholders with their holiday lettings. Her client will comply with Orders made by the Tribunal as he wants to make a fresh start.

Reasons for the Decision

The Law

157. This application has been made for a determination of reasonableness of certain identified elements of the service charges demanded by the Respondent for 2016 and 2017, which service charges have been incurred and also demanded in respect of 2018 and in relation to which not all of costs have yet been incurred. The Applicant has also asked that the Tribunal make an order under section 20C. In addition the Respondent has referred to section 166 of the **Commonhold and Leasehold Reform Act 2002 (CLARA)**. In its directions the Tribunal referred to schedule 11 of CLARA. At the Hearing it also referred to **The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 [SI 1169]** (the Rules).

158. Sections 27A and 20C of the Act are set out below. It was agreed at the Hearing by both parties that liability to pay is not an issue and that the lease enables the Applicant to recover service charges but guidance was sought by both parties on the interpretation of various provisions within the Lease.

S18 Meaning of "service charge" and "relevant costs".

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—
(a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] [FN1] or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purposes—
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.[...]

S19 Limitation of service charges: reasonableness.

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

[...] [FN1]

(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.[...] [FN2]

[FN1] and [FN2] repealed subject to savings specified in SI 2004/669 Sch.2 para.6 by Commonhold and Leasehold Reform Act (2002 c.15), Sch 14 Para 1

S27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.[...] [FN1]

[FN1] inserted subject to savings specified in SI 2004/669 Sch.2 para.6 by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s 155 (1)

S20C "Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(c) in the case of proceedings before the Lands Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.".] [FN1]

[FN1] substituted subject to savings specified in SI 1997/1851 Sch.1 para.1 by Housing Act (1996 c.52), Pt III c I s 83 (4)

S20ZA Consultation requirements: supplementary

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

S 166 Requirement to notify long leaseholders that rent is due

(1)A tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice.

(2)The notice must specify—

(a)the amount of the payment,

(b)the date on which the tenant is liable to make it, and

(c)if different from that date, the date on which he would have been liable to make it in accordance with the lease,

and shall contain any such further information as may be prescribed.

(3)The date on which the tenant is liable to make the payment must not be—

(a)either less than 30 days or more than 60 days after the day on which the notice is given, or

(b)before that on which he would have been liable to make it in accordance with the lease.

(4)If the date on which the tenant is liable to make the payment is after that on which he would have been liable to make it in accordance with the lease, any provisions of the lease relating to non-payment or late payment of rent have effect accordingly.

(5)The notice—

(a)must be in the prescribed form, and

(b)may be sent by post.

(6)If the notice is sent by post, it must be addressed to a tenant at the dwelling unless he has notified the landlord in writing of a different address in England and Wales at which he wishes to be given notices under this section (in which case it must be addressed to him there).

(7)In this section "rent" does not include—

(a)a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b)an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

.....

159. The Bundle contained copies of two sample leases relating to Lodge 6 and Lodge 10. The Tribunal has noticed that some of the clauses in the lease of Lodge 6 have been numbered incorrectly. However the parties agree that for the purpose of this determination the leases of the 16 lodges belonging to the Applicant are similar. When referring to **the Lease** and to numbered clauses or paragraphs in the lease the Tribunal is referring to the Lease of Lodge 10 at pages 329 - 353 of the Bundle but will state with the correct clause numbering in square brackets to enable cross reference to the clauses in other leases.

Jurisdiction

160. In the written statement, (which accompanied Bundle 3), in which she questioned the Tribunal's jurisdiction, Miss Roche asked the Tribunal to accept that the Lodges are not dwellings. She quoted the cases of **King v. Udlaw LRX/186/2006**, **Phillips and Francis [2010] EWHC B28 (QB)** and the more recent case of **Iveta Nemcova v. Fairfields Rents Limited LRX/142/2015 and UKUT 303 (LC) and** referred to other cases which had been considered and referred to in the **Nemcova** case.

161. She stated that some of the lodges are used for commercial purposes. She suggested, albeit without producing actual written evidence, that some owners pay a commercial property tax instead of Council Tax. She sought to rely upon the user clause in the Lease which refers to the permitted use of the property being as a holiday home for period of up to six continuous months and for no more than 10 calendar months in any calendar year, [paragraph 9 of the first schedule].

162. Her submission is that on the basis of paragraph 3 of the Application form the Applicant has admitted breach of the user covenants and therefore should be deprived of the jurisdiction of the Act because the lodges are not dwellings. She accepted that although the decision in **King v Udlaw** was that holiday homes were not dwellings the later case of **Phillips v Francis** determined that holiday homes fall within the jurisdiction of the Act and this latter decision is the one which is followed by the Tribunal.

163. In support of these arguments some of which are also set out in the Respondent's statement at pages of the Hearing Bundle Miss Roche refers to various clauses in the Lease which are set out below:-

Clause 4
THE LESSEE for themselves and their successors in title HEREBY COVENANT with the Lessors as follows:-

4 (11) [4 (9)]
To perform and observe all and singular the restrictions stipulations and conditions set out in the First Schedule hereto

4 (12) [4 (14)]
To perform and observe all the restrictions stipulations and obligations lawfully imposed by the Planning or Local Authority or by any other competent Authority.

4 (13) [4 (15)]
Not to assign charge or underlet part only of the Demised Premises the same being expressly prohibited.

4(14) [4 (16)]
Not to underlet the Demised Premises Provided that this shall not prevent the Lessee from letting the demised Premises for holiday purposes Provided that no letting shall be for a holiday period greater than five weeks at a time.

4 (19) [4(21)]
To perform and observe all the covenants and conditions and provisions contained in the Property and Charges Register of Title DN384469 (excluding financial charges)

Clause 5
THE LESSORS HEREBY COVENANT with the Lessee as follows:-
5(2) (a)
To keep the Estate (excluding the Demised Premises and the other Lodges on the Estate) and every part thereof and the roads and footpaths and the said services in good condition and repair and the grass properly trimmed.
5 (2) (b)
To keep the sewers and the sewage plant serving the Estate in good working order

5 (4) (i)
To require every Lessee to whom they shall grant a Lease of any Lodge on the Estate to covenant with the Lessors to observe similar covenants to those set out on behalf of the Lessee
5 (4) (ii)
To reserve in such Leases rights similar to those set out herein
5 (4) (iii)
(if so required by the Lessee) to enforce covenants similar to those on the part of the Lessee contained herein entered into or to be entered into by the Lessee of the other Lodges on the Estate upon the Lessee indemnifying the Lessors against all cost and expenses in respect of such enforcement and providing security and /or payment on account in respect of such costs and expenses as the Lessors may reasonably require

The First Schedule
Paragraph 8
Not to use the Demised Premises for any illegal or immoral purpose.
Paragraph 9
Not to use the Demised Premises for any business trade or commercial purpose but to use it as a private holiday residence or for holiday letting only PROVIDED THAT no person shall occupy the Demised Premises personally for more than six calendar months continuously or for more than ten calendar months in any calendar year

The Fourth Schedule
Paragraph 1
The lessors shall from time to time determine and give notice to the Lessee of the amount for the service charge and this sum shall be payable to as the service charge on the succeeding payment being the 1st January in each year in respect to the year commencing the 1st day of January
Paragraph 2
The Lessors Accountants as soon as practical be after the 1st day of January in each year shall certify the amount of the service charge and if such charge shall be greater than the sum paid in advance in any year of

the Term by the Lessee as previously paid by the Lessee as previously provided the balance of the said sum shall be a debt due and owing to the Lessors and payable with the service charge for the ensuing year and conversely if such charge shall be less than the sum so paid shall be held to the credit of the Lessee and shall be taken into account in determining the service charge for the ensuing year

Paragraph 3

The said Certificate shall contain a summary of the Lessees expenses which shall constitute the following:-

(a) The cost of complying with the Lessors covenants contained in Clause 5 (2) and Clause 5(5) of the Lease (in respect of which the Lessors shall be entitled if appropriate to charge for their own time at a reasonable rate)

(b) The cost of cleaning and where necessary lighting the are as used in common by the Lessee and other Lessee (sic) and the Lessors

(c) The cost of gardening and landscaping the Estate and the Retained Land

(d) the cost of providing and maintaining any service or amenities that may be requested in writing by a majority of the Lessee of the Lodges comprised on the Estate and which may be provided by the Lessors at such request

(e) The fees of the Lessors accountants

(f) The cost of management which shall not exceed the management allowanced permitted from time to time by any appropriate government Department and which in any event shall not exceed 5% of the cost of the services otherwise provided

164. "Dwelling" is defined in clause 38 of the Act and means a building or part of a building occupied or intended to be occupied as a separate dwelling ...." There is no reference in the Act to permanence or the reason for the occupation.

165. The interpretation of dwelling has been considered in a whole string of tribunal cases. The Tribunal determines that since the permitted use of a lodge is as a holiday home a lodge falls within the definition of a dwelling and therefore the leases are within the Act. Miss Roche acknowledged that the Tribunal would determine this.

166. The Tribunal has not found anything in any of the cases quoted by Miss Roche which suggests that a breach of a covenant regarding user in a lease of a dwelling would deprive it from being within the jurisdiction of the Act. The Applicant stated that the Respondents allegations that one or more Applicant was paying a commercial business rate were unsupported by evidence.

167. Even if the Respondent had persuaded the Tribunal of the merits of her argument she would have had to have demonstrated a breach of each lease of the Applicant's Property. She gave no consideration of the consequences of the Tribunal accepting her argument in relation to only some of the lessees, not all of whom are party to the Application.

168. The Tribunal has not found any evidence that the Applicant is in breach of any of the covenants and/or obligations within the leases to which the Respondent has referred as allegedly having been breached.

169. These covenants and obligations are considered in the order in which they are contained in the Lease albeit the Respondent did not set out its arguments in this order either at the Hearing or in the Respondent's statement or in the statement which accompanied Bundle 3.

170. Clause 4(11) [4 (13)] of the Lease simply requires the Lessee to observe the restrictions stipulations and conditions set out in the First Schedule. Clause 4(12) [4 (14)] refers to restrictions stipulations conditions and obligations lawfully imposed by the Planning or Local Authority or by any other competent Authority. No evidence as to breach of these covenants has been provided by the Respondent. It is useful to consider these covenants together with paragraphs 8 and 9 of the First Schedule.

171. The Respondent has submitted that one or more Applicant is using its lodge for commercial purposes because using it for holiday letting for the whole year is a breach of paragraph 9 of the First Schedule and changes the nature of the use of the lodge from "restricted" residential use to a commercial use because the lessees can generate income or even profit from such use. It has also suggested, without any actual evidence being supplied, that some lessees pay commercial business rates.

172. No evidence of illegality or immorality has been provided to the Tribunal. During its inspection the Tribunal saw several notices displayed on fencing within the Estate, which during the Hearing the Respondent admitted that he had produced and displayed. These notices which resembled official planning notices stated that occupation of a lodge for holiday use for more than ten months in the year was a breach of the planning consent authorising the use of the lodges within the Estate. The notices also stated that the freeholder is required to retain records of all persons who occupy the accommodation for holiday use.

173. Such a condition is contained in the planning permission dated 4 May 2017 granted to Mr Aly permitting the construction of three holiday lodges and relates to the commencement of the use of those lodges for holiday purposes. [Pages 83 – 88 of Bundle 3]. That condition cannot retrospectively be applied to restrict or regulate the use of the existing seventeen lodges as the notice produced and displayed by the Respondent states. The condition applies only in relation to the three new lodges once the permission is implemented and the lodges built and occupied in accordance with it.

174. A copy of the planning consent authorising the use of twenty lodges as holiday accommodation only is contained in Bundle 3, [pages 93 – 106]. It contains no restrictions regarding the use of the lodges throughout the year.

175. Paragraph 9 of the First Schedule to the Lease states that the lodges cannot be used for any business or commercial purpose but must be used as a private holiday residence or for holiday letting only. The Respondent

interprets these two uses as being mutually exclusive but for reasons which are set out later the Tribunal rejects this interpretation. The proviso to Paragraph 9 states that "no person shall occupy the lodge personally for more than six calendar months continuously **or for more than ten calendar months in any calendar year".** [Tribunal's emphasis].

176. This paragraph should be read with clause 4 (14) [4 (16)] by which the lessee covenants "not to underlet the Demised Premises Provided that this shall not prevent the Lessee from letting the demised Premises **for holiday purposes** Provided that **no letting shall be for a holiday period greater than five weeks at a time".** [Tribunal's emphasis].

177. The Tribunal interprets these clauses, read together, in the context of the entire Lease, to mean the permitted use of the Property which is also the authorised planning use is for holiday accommodation throughout the year. The property can be occupied by the lessee **or** let as a holiday let for no more than five weeks at a time. If the property is occupied by a lessee or a member of its family or anyone authorised by him (as opposed to a paying occupier), that person must not remain for longer than six months consecutively or for more than ten months in any period between January 1 and December 31 in any year. A lessee could occupy a lodge for five and half months from January to the middle of June. The lessee could return to a lodge at the beginning of September and remain in occupation until the middle of February in the following year. The Tribunal determines that such occupation would not be in breach of the covenant in paragraph 9 of the First Schedule because the lessee would not be a person in occupation for more than ten months in a calendar year or for more than six continuous months.

178. The Leases are granted for a term of 999 years and alienation, (the ability of the lessee to part with the lease), is not restricted save that the lessor has a right of pre-emption which means he is entitled to the right to buy back the lease on specified terms.

179. It would appear from the evidence provided to the Tribunal there have been some changes in ownership during the service charge years to which the Application relates and as referred to later in this Decision, at least one current lessee is considering the sale of his lodge.

180. The Tribunal does not accept that it can have been intended that the lessees be restricted to **either** occupying the lodges for their own holiday use **or** letting them to paying occupiers for holiday use and rejects such an interpretation of paragraph 9. Neither does it accept that there is anything in the Lease which prevents occupation for holiday use at any time during the year.

181. It **does accept** that the planning use, (legal use) is as a holiday residence but no evidence of permanent occupation of any lodge has been provided so no breach of such covenant has been demonstrated. Only the Local Planning Authority can enforce a breach of planning use.

182. For all of those reasons the Tribunal does not find that there is a breach of any of the covenants in the Leases relating to user. This finding is only relevant with regard to the jurisdictional arguments. The Tribunal has no jurisdiction under the Application to determine breach of covenant as a prerequisite of forfeiture.

183. In relation to the other covenants, (listed above), no evidence has been provided regarding breach of stipulations in the freehold title contained in DN666689 copies of which are provided at pages 54 – 57 of Bundle 3. The Tribunal had not found that the freehold title contains any such stipulations.

184. The reference made by Miss Roche on behalf of the Respondent to Clause 5 4) (iii) of the Lease is confusing as this is simply an obligation on the part of the lessor to impose similar covenants to those in the lease if it creates further leases and **if required by a lessee** (subject to his costs being paid or secured) to enforce any breach of covenant on behalf of another lessee. This is a standard covenant in a lease because there is no contractual liability between individual lessees (no privity of contract) as the contractual obligations in the lease are owed only to the lessor, which means only the lessor can seek legal enforcement of a lessee's covenant.

185. Although unnecessary to determine this, when making this Decision, the Tribunal considers that the use of a property by an occupier either as holiday home or as home let for occupation by persons on holiday from their main residences will not change the nature of the use of the property or prevent it from being a dwelling, if that is its primary use. From its inspection it appears that the lodges were constructed to be used as dwellings and that such use is entirely consistent with the permitted user clause in the Lease and the planning consent authorising their use as holiday accommodation.

186. Whilst it is also, for all the reasons set out above, unnecessary to comment on the case law to which the Respondent has referred the Tribunal believes that in cases where "dwelling" has been interpreted differently it has been to facilitate a decision made on the specific facts of the case. This was acknowledged in the **Nemcova** case to which the Respondent referred.

187. The **Nemcova** case concerned an application for a determination to the FTT that the lessee was in breach of the user covenant in her lease because she had let her flat out on a short term basis to occupiers who rented it using Air B&B and other advertisements. Other lessees within the block containing the flat were unhappy about this use and had complained to the freeholder about the lettings stating that these breached the user covenant in the Respondent's lease which restricted the use of the flat to use as a private residence.

188. It was found by both the FTT and the Upper Tribunal that the Respondent's use was in breach of the user covenant in her lease notwithstanding that it was not found that any occupier used the flat other than for residential use. The Respondent's argument that the actual use of the flat by temporary occupiers was consistent with the

private residence user covenant was not accepted. The actual purpose of the occupation did not prevent the Upper Tribunal finding that regardless of the purpose for which the temporary occupiers were using the flat the Respondent occasionally letting it to third parties although this was intermittent and in between periods when she was in occupation was a breach of the covenant. It stated however that consideration of breach is such cases are likely to be fact specific.

Section 20C Application

189. Whilst neither party provided written submissions this was discussed with both parties at the Hearing. The Tribunal determines that all or any of the costs incurred or to be incurred by the Respondent (as Landlord) are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant. It has not been necessary to consider an application under paragraph 5 of Schedule 11 of CLARA as the Application does not relate to administration charges as defined in that paragraph. It is satisfied that the Respondent's actions have prompted the Application.

General comments on the reasons for the Decision (other than jurisdiction)

190. Whilst the Tribunal is sympathetic to the argument put forward by the Respondent that he is entitled to choose whether to recover an index linked increase in Service Charges or a fraction (1/20) of the actual expenditure for the previous year, this requires him to keep accurate records of expenditure and ensure that service charge accounts are prepared and supplied to the Applicant as soon as these have been drafted. The failure to produce a copy of his accountants invoice for preparing his accounts is evidence of the Respondent's inability to comply with his contractual obligations.

191. Furthermore the Lease requires that the Respondent's accountant certify the amount of the Service Charge payable for the year in which these are demanded. There is no evidence that this has been done for any of the years to which this Application relates save and except a budget of anticipated service expenditure for 2018 has been prepared and is the subject of ongoing discussion between the Applicant and Respondent. Given that the Respondent wishes to increase and improve the services to the Forest Park it is incumbent upon him to keep proper records and produce estimates in accordance with both his obligations in the Lease the relevant statutes.

192. The omissions and errors in the 2016 Accounts lead the Tribunal to conclude that for whatever reason these have not been prepared in reliance on complete or accurate information. The error in relation to the cost of the fence panels both with regard to the amount in the accounts and the invoices is an example of why the Tribunal has concluded this but some fault must be attributed to the Respondent who has countersigned these accounts as being accurate.

193. It is clear from information which the Respondent sent to the Tribunal after the Hearing that he is collecting the service charges in his personal bank account. Had all credits and debits relating to service charges been ring fenced in a service charge account the accounting exercise may have been easier enabling the production of accurate accounts.

194. The Tribunal is unhappy that the Respondent failed to disclose a copy of the existing LPG supply contract until after the Hearing. It was also dismayed by the fact that, notwithstanding that both the Respondent and his representative told the Tribunal he had no information regarding the unit costs of water and electricity, he produced further demands received from the owner of Phase 2 after the Hearing. The fact that this later demand was referred to as "a revision" would suggest to it that there must have been ongoing negotiation between the Respondent and the owner of Phase 2 with regard to charges for these utilities.

195. Miss Roche referred the Tribunal to page 454 of the Bundle to demonstrate a shortfall in the amounts demanded by Mr Smith for electricity and gas and the amounts received by the Respondent from the lessees but one of the debits relates to payments made before the Respondent acquired the Estate for the period October – December 2015 which on the basis of the "Completion Statement" at page 452 were identified precisely in January and presumably billed to the lessees by the previous owner.

196. No information has been provided regarding the supply of water and electricity to the Estate and how it was metered when supplied to the Respondent but it has been measured and the supply to each individual lodge is metered.

197. Until the Respondent bought the Estate, water and electricity were supplied without any recorded suggestion of there being an under payment. The Tribunal has not been provided with information as to what amounts were collected from the leaseholders during this period but if the amounts were based on metered consumption by both the Respondent and the owner of Phase 2, it is difficult to understand the Respondent's claim that any shortfall is payable by the Applicant. The Tribunal does not understand on what basis the Respondent suggests that the Applicant is bound to indemnify him in respect of any "back payments" due to the former owner. He would have to provide clear evidence of why the metred utilities were incorrectly measured and who was responsible for any error. His own completion statement refers to "an accurate record of consumption" prior to the completion date.

198. Emails exchanged between the Applicant and Respondent (copies of which were produced in the Hearing bundles) appeared co-operative and indicated willingness on both sides to resolve the disagreement in relation to the service charges. This does not alter the Respondent's duty to recover service charges in accordance with both his contractual entitlement and the statutory obligations which regulate recovery of service charges.

199. Accountancy costs incurred in connection with the production of the Certificate or Accounts are recoverable under the Lease but only if it can be demonstrated these costs are reasonable and reasonably incurred.

200. It was reasonable for the Applicant to question the information received from the Respondent and his accountant if it is inaccurate or misleading or he cannot follow the way in which the accounts are written. The accountant can only process the information with which he is provided so it is reasonable for the Applicant to question the Respondent about invoices and costs.

201. The Tribunal has already identified that, on the basis of the copy invoices supplied to the Tribunal, why the accounts may not be entirely accurate which leads it to question if the information the Respondent has supplied has been complete given the way in which he has drip fed some information to this Tribunal. For instance the cost of fence panels does not match the invoices produced albeit these were issued to Mr Smith and not the Respondent and demonstrates that these were not checked when the 2016 Accounts were produced.

202. It is also reasonable to expect the Respondent's accountant to be able to produce an invoice for its costs.

203. The accountant was instructed and retained by the Respondent so it was unhelpful and unprofessional of the Respondent to suggest that one or more Applicant should contact the accountant directly.

204. At the Hearing Mr Naylor suggested that he had told the Respondent he could be disadvantaged by the Leases referring to lessees contributing one twentieth of the costs incurred when currently there are only seventeen lodges.

205. The Tribunal can only make a determination based on the provisions in the Lease, the information supplied to it by the parties and the legislation with which the Respondent is obliged to comply. His ignorance of the law or the difficulties which he says he encountered in relation to the acquisition of the Estate or the failure of the previous owner to comply with his contractual obligations do not absolve him of criticism in providing inaccurate calculations and service charges demands.

206. The fact that he has now expressed a willingness to engage with the Applicant and is seeking to improve the management of the Estate, although laudable, does not mitigate or excuse his failure to comply with his contractual covenants in the leases and his statutory obligations.

207. Whilst this has not influenced its Decision, the Tribunal was concerned to receive correspondence from the Applicant after the Hearing, enclosed with which were copies of emails from the Respondent stating that the Tribunal was considering "breaches of the lease" in relation to forfeiture. The Tribunal clearly stated the extent of its jurisdiction to both parties and their representatives at the Hearing.

208. It is also unhappy that, despite the Respondent being asked not to send further evidence other than the LPG contract to the Tribunal following the Hearing, he ignored that request and sent thirty or more pages of further information.

209. The Respondent has displayed notices within the Estate suggesting that alleged breaches of the existing planning consent would be monitored by the Local Planning Authority. These notices misrepresent the conditions in the existing planning consent.

210. The Respondent's behaviour has exacerbated the dispute between the parties and resulted in the Application.

211. The Tribunal has been unable to find any reasonable explanation why the Respondent instructed his lawyer to send the letter dated 6 March 2018 to the Applicant [pages 77 – 82 of the Bundle 3]. It agrees with the Applicant that the content and tone of that letter is intimidating. The Tribunal found the explanation given by Miss Roche, that she sent it because her client instructed her to do so, unsatisfactory.

212. The content of that letter causes this Tribunal some alarm as it states that the "parent planning permission" requires that the lodges be used for holiday accommodation only. The letter then states that subsequent planning permissions have upheld this restriction. A subsequent planning permission is not a judgement; it may repeat a condition in an earlier permission or it may change it; it cannot uphold a restriction. The letter then refers to an arbitrary selection of clauses in the Lease and states that the Respondent proposes to stipulate the 10 month period for use of the holiday lodges and close the complex for a 2 month period. Following that paragraph is a demand that the recipient confirm it acknowledges the proposed variation which it is accepted will require an addendum to the Lease and then it contains a paragraph the Tribunal is minded to interpret as a veiled threat:-

"We should be obliged to hear from you with confirmation of the above and/or your response. In the event that any Tenant fails to confirm compliance with the lease covenants stipulated above and/or is not agreeable to a variation to First Schedule clause 9, then our Client is left with no option but to make the appropriate application to the relevant Property Tribunal to seek confirmation of these matters and any other relevant directions or orders which may result in legal costs".

213. The Tribunal has explained in paragraph 177 above that the restrictions as to use do not prevent lodges being occupied for holiday use by any person personally for up to six months continuously or ten calendar months in any year. Whether deliberately or by way of omission the relevant clause which is paragraph 9 of Schedule 1 omits the word "personally".

214. The inaccurate misleading and threatening content of the letter sent, apparently on the insistence of the Respondent, coupled with his own admission that he had exhibited warning notices deliberately made to look as if these were erected by the Local Planning Authority does not

suggest to the Tribunal that the Respondent is willing to improve his relationship with the Applicant.

215. Whilst it hopes that in the future the Respondent will accept that service charges must be demanded in accordance with the Lease and the Act and other legislation which controls what is recoverable, it is not confident that this will happen. His current service charge demands all refer to the RPI increase but the increases in the service charges demanded do not accord with the percentage increase in RPI which appears to the Tribunal to demonstrate a deliberate intention to mislead the recipients.

216. The Lease contains a proviso at clause 2 (ii) that "the Lessors may at their expense provide a separate electricity supply to the Demised Premises" yet the Respondent is seeking to pass on costs in relation to the separation of the electricity supply. [Page 15 of the Bundle].

217. In an email from Rodney Smith to Nick Arthur of Slee Blackwell (solicitors) dated 4 January 2016 [Page 452 of the Bundle] states "I have agreed to pay the costs of subdividing the site utilities" yet Miss Roche asked for an award of costs from the Tribunal to reimburse the Respondent in respect of his legal costs to achieve the separation of supplies.

218. Miss Roche also sought to justify the Respondent's claim for costs by referring to clauses in the Lease which do not entitle the Lessor to claim costs in relation to this Tribunal. She refers to what she terms the "Costs Clauses" being Paragraph 3 of the Fourth Schedule, Clauses 4(19) [4(17)], 4(23) [4(21)] and Clause 5(4)(iii).

219. Paragraph 3 of the Fourth Schedule sets out the items which the Accountants Certificate should summarise, none of which are legal costs.

220. Clause 4 (19) refers to the Lessors entitlement to recover costs incurred in connection with the recovery of arrears of rent or other monies from the Lessor which is not relevant to her claim.

221. Clause 4(21) refers to the performance and observance of the covenants referred to in the Property and Charges register of the freehold title DN384469. There are no covenants in Charges Register and Property Register refers only to rights. [Pages 70 – 76 of Bundle 3]. The Tribunal does not understand why she refers to this clause

222. Clauses 5(4)(iii) refers to a Lessors covenant requiring that he, should a Lessee require him to do so enforce covenants against any other lessee similar to those covenants entered into by the Lessee (in that lease) but only if the Lessee indemnifies him in respect of all costs and expenses of such enforcement. The Tribunal explained this to Miss Roche at the Hearing but she maintained that her client could rely upon this clause to justify a costs application.

223. Whilst it is satisfied that there is no provision in the Lease which would enable recovery of the Respondent's legal costs as relevant costs given that the Respondent and or his legal representative has suggested to it

that any "Cost Clause" might assist him, it considered it appropriate to make a Section 20C Order.

Judge C. A. Rai

(Chairman)

Appeals

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

    a. Be received by the said office within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

    b. 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

2. If the application is not received within the 28-day time limit, it must include a request for an extension of time and the reason for it 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.