FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/19UH/LSC/2020/0073
Property	:	Variously 14 properties within Fernhill Heights, Charmouth, Dorset, DT6 6AU as listed on the attached schedule
Applicant	:	14 lessees as listed on the attached schedule. Lead Applicant Miss Baagoe, 16 Fernhill Heights, Charmouth, Dorset, DT6 6AU
Representative	:	
Respondent	:	Galliard Homes Limited
Representative	:	Mr Beresford (Counsel) instructed by JPC Law
Type of Application	:	S27A Landlord and Tenant Act 1985 - Liability to pay and reasonableness of service charges
Tribunal Member(s)	:	Judge R Cooper Mr M Woodrow MRICS Mr D Johnson
Date and venue of hearing	:	Remote hearing by CVP 19th January 2021
Date of Decision	:	18th May 2021

DECISION

In this decision references to the page number of the documents are referred to thus [ ].

© CROWN COPYRIGHT

The Application

1. The 14 Applicants are leasehold owners of various holiday properties (or 'Units') situated in Fernhill Heights, Charmouth, Dorset, DT6 6AU ('Fernhill Heights'). Ms Ulla Baagoe, is lead Applicant on behalf of all 14 leaseholders party to this application and she holds the lease of 16 Fernhill Heights (originally unit 6).

2. The Respondent, Galliard Homes Limited ('Galliard'), is the freehold owner and developer of Fernhill Heights. The Respondent appears to have purchased the land in or around April 2001 (although the transfer was not registered until 22nd May 2001).

3. The Tribunal received an application from the Applicants dated 22nd July 2020 under s27A Landlord and Tenant Act 1985 ('the 1985 Act') seeking determination of the liability to pay and reasonableness of service charges for the years 2016, 2017, 2018 and 2019.

4. On 23rd September 2020, at a telephone case management hearing Ms Baagoe and Mr Mansfield represented the Applicants and Mr Griffin of Counsel, instructed by JPC Law, appeared for the Respondent. Directions were given on 5th October 2020, which have been complied with.

5. Following the directions of 5 October 2020 and the explanation therein, there was no inspection of the holiday complex.

Background to the application

6. Fernhill Heights is a holiday complex comprising 51 leasehold units ('Units') of holiday (rather than permanent) residential accommodation built on land on the outskirts of Charmouth in Dorset. The leasehold owners of those Units are referred to in this decision as 'the Tenants'.

7. The freehold land originally registered under title DT184316 on which the 51 leasehold Units were built also included Fernhill Hotel and Fernhill House and extensive grounds; a woodland, a fishing lake, a swimming pool on a terrace immediately adjacent to the hotel ('the Sun Terrace') and a crazy golf course. There is mention of a tennis court in the leases of the Units, but it appears this has never existed. The Respondent also owns adjacent land (the land to the south of Langmoor Manor registered under title number DT247864) over which some of the Units have appurtenant rights.

8. On 28th June 2001 the Respondent sold Fernhill Hotel and the immediate adjacent land, which included the swimming pool and sun terrace and crazy golf course ('the Hotel'), to John and Anna Hancock, and Bronwen Cound (title absolute registered on 15th October 2001 under DT290360).

9. On 29th April 2002 the Respondent sold the freehold of Fernhill House ('the House') to Stephen and Sally Coles (title absolute registered on 24th May 2002 under DT296862). Both transfers granted and reserved rights to the Respondent as well as the leaseholders of the units.

10. Ms Baagoe holds 16 Fernhill Heights under the terms of a 999-year tri-parte lease dated 22nd January 2002 between the Respondent, Fernhill Estate Management Company ('FEMC') and David Cummings (the tenant). The lease was transferred to her on 24th May 2016. The leases of all 51 units are said to be in identical terms.

11. FEMC was incorporated as a company on 2nd April 2001 and was established to manage Fernhill Heights Estate. Its original directors were also Directors of Galliard. Shares in the company were allotted to each of the 51 Tenants in or around 2003. However, in October 2006 the Respondent exercised its powers under Clause 8(l) of the lease, and took back management responsibilities from FEMC. Since that time the Respondent has employed a management company to manage the complex, collect rents and service charge. The initial management company was Torbay Management Services ('TMS'), but since 2014, Crown Property Management Ltd ('CPM') has performed that role. Mr Darren Stocks is the Director of CPM.

12. Although stripped of its management function in relation to Fernhill Heights, FEMC as a company has not been wound up. Nigel Smith is one of the current directors and is Company Secretary, and a party to this application.

13. In or around 2006 an unincorporated association, Fernhill Heights Residents Association (FHRA), was established. It is not a Recognised Tenants Association (RTA) under s29 LTA 1985, and not all Tenants are members of FHRA. Mark Jones is a member of the Committee and has served as both Chair and Secretary, and is a party to this application. His evidence is that less than 50% of the 51 leaseholders had ever been members of FHRA.

14. There has been a very long running dispute regarding the non-payment of contributions allegedly owed by the owners of the Hotel and House to the Respondent towards the running costs of Fernhill Heights Estate that were due under the terms of their respective transfers. FEMC were said to have taken proceedings in the past to recover moneys owed. It is said that the Hotel's contribution was 20% and the House's contribution was 5%. The original transfers exhibited to the Respondent's response refer to these % contributions in the Transferees' covenants ([222] and [207]). However, the Office Copy Entries that appear in the bundle do not provide for any percentage contribution. The relevant clauses of the Transferees' covenants in the original transfers appear to have been deleted (for example [70]). Mr Smith says there was a challenge by FEMC in 2010 to a proposed variation in the contributions payable by the Hotel from 20% to 17.5%. He says there was a later attempt to reduce

the contribution payable by the House in or around 2017 from 5% to 3% respectively, but there is no other documentation supporting this.

15. It is said that the Respondent issued proceedings in Yeovil County Court against the owners of the House in 2014 (under claim number C80YM016) and against the current owners of the Hotel in 2016 (under claim number C80YM000 ('the Litigation'). Although the proceedings against the House were purportedly settled in 2017, there is no documentation regarding this in the bundle. Litigation against the Hotel is said to have been settled by consent in 2019, but no final sealed Consent Order has been produced. The signed Consent Order produced by the Respondent shortly before the hearing incorporates 'Heads of Agreement' between the parties signed on 14th February 2019.

16. In summary, under that agreement the Respondent was to pay £15,000 to the owners of the Hotel as a contribution to the cost of removing and landscaping the Crazy Golf Course, the owner of the Hotel is to have sole responsibility to manage, maintain and repair the sun terrace (including swimming pool) and area where the crazy golf course was previously situated. The Hotel is entitled to all the rights reserved under the Transfer (including rights of access to the rest of the estate land, use of roads and car parks, rights to water, use of septic tank etc.) but is not required to pay any financial contribution in respect of the general maintenance of the estate. The Tenants are entitled to use the swimming pool for which no contribution will be payable in future.

17. The terms of this agreement were to be incorporated in a deed of variation to be registered with HM Land Registry, but as yet it appears that no such Deed has been executed or registered. No arrears of contribution owed by the Hotel appear to have been recovered as a consequence of the Litigation.

18. In relation to the House, it is now said to be in receivership.

The Issues for the Tribunal

19. In summary, the issues identified at the directions hearing requiring determination are as follows;

    (i) Whether the legal and professional costs incurred by the Respondent in respect of dispute or disputes with the Hotel and House ('the Legal Costs') are payable by the Tenants as service charge, and if so whether the amounts so charged are reasonable.

    (ii) Whether payment for the Legal Costs was made from a reserve fund, and

    (iii) How estate costs and service charges should be apportioned between the Tenants, the House and the Hotel.

20. The Applicants also make associated applications in respect of the Respondent's costs under s20C of the 1985 Act ('s20C') for the benefit of themselves and all 51 leaseholders at Fernhill Heights. They also seek an order under Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ('paragraph 5A').

21. The Respondent asserts that issues (ii) and (iii) above fall outwith the jurisdiction of the Tribunal.

The Law

22. The law relevant to this application is set out in Schedule 2 to this decision.

23. Section 18(1) of the 1985 Act defines 'service charge' as 'an amount payable by a tenant … which is payable, directly or indirectly, for services … and … the whole or part of which varies or may vary according to the relevant costs'. Section 18(2) defines 'relevant costs' as 'the costs or estimated costs incurred or to be incurred by or on behalf of the landlord … in connection with the matters for which the service charge is payable.'

24. Under s27A of the 1985 Act the Tribunal has the jurisdiction to determine whether a service charge is payable and, if it is;

(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.

25. A service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard (s19 of the 1985 Act). When service charges are payable in advance, no more than a reasonable amount is payable.

26. Under s20C a leaseholder may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

27. A leaseholder may also apply to the Tribunal under paragraph 5A for an order which reduces or extinguishes the tenant's liability to pay an "administration charge in respect of litigation costs".

The Leases

28. It is common ground that the leases of all 51 leasehold units are all in identical terms. The relevant provisions of the lease of 16 Fernhill Heights found at [78] to [102] can be summarised as follows.

29. The lease is a tripartite agreement between the Respondent, FEMC and the leaseholder or 'Tenant' for a term of 999 years from 6th April 2001.

30. Clause 1 defines various terms within the Lease.

    (i) '*The Estate*' is defined as meaning *'the estate to be known as the Fernhill holiday complex Charmouth Bridport Dorset registered under title numbers DT184316'.*

    (ii) *'The Unit'* is the individual residential unit identified in Plan 1 and *'The Block'* is the block in which the unit is situated.

    (iii) *'The Common Parts'* means *'such parts of the Estate as are for the time being not comprised or intended in due course to be comprised in any lease granted or to be granted by the Landlord'*

    (iv) *'The Tennis Court', 'the Swimming Pool Area', 'the Crazy Golf Area', 'the Sun Terrace'* and *'the Parking Area'* are all identified on Plan 2 by various colours or markings.

31. By Clause 2 the Respondent demises the individual Unit together with rights set out in the First Schedule (including rights of access and the use of facilities such as the Swimming Pool) and excepting and reserving the rights set out in the Second Schedule (which included free passage of water, gas and electricity, access for the Landlord and FEMC to undertake works etc.), subject to the obligation to pay Rent half yearly on 1st January and 1st July.

32. Each Tenant covenants (in Clauses 3 and 4) to observe and perform the obligations in the Third and Fourth Schedules (to the extent the latter are mutually enforceable between Tenant and lessees of other parts of the Estate). The Company and Landlord each covenant (in Clauses 5 and 6 respectively) to observe and perform the obligations set out in the Fifth and Sixth Schedule respectively.

33. Clause 8 sets out a number of matters expressly acknowledged by the parties '*for the sake of clarity'*. In summary (and reference to Landlord also includes the Company) these include the following;

    "8(a) In the management of the Estate and the performance of the obligations of…the Landlord….hereinafter set out ….the Landlord….shall be entitled to employ or retain the services of any employee agent consultant service company contractor engineer or other advisers of whatever nature as …the Landlord….may require and the expenses incurred by …the Landlord… shall be deemed to be an expense incurred… in respect of which the Tenant shall be

liable to make an appropriate contribution under the provisions as set out in the Third Schedule hereto"

34. Clause 8 also confirms *inter alia* there is no obligation on the Landlord to provide any service or system not already in existence (8(d)). Nor is it prevented from providing or installing any system or service *'for the purposes of good estate management'* (8(e)), or removing or altering such a system or service (8(f)). It provides for the service of notices (8(g)), the entitlement of the Landlord to borrow money (8(h)) and to refer service charge demands or certification to the lands tribunal or any relevant tribunal or other court (8(i)). Clause 8(k) entitles the Landlord to vary Service Charge proportions in the event it changes the number of lettable units or carries out development of any Block or the Estate and 8(l) provides the mechanism for the Landlord to take back (either temporarily or permanently) the management responsibilities of FEMC.

35. The Third Schedule sets out the obligations of each Tenant and in particular the payment of service charge. Paragraph 2(b) of the Third Schedule requires the Tenant

    "To pay forthwith on demand a fair and reasonable proportion (to be determined conclusively by the Landlord acting reasonably) of any outgoings expenses or assessments which may be attributable to or imposed or assessed on the Unit together with any other part or parts of the Estate…."

36. Paragraph 10(a) of the Third Schedule requires the Tenant:

    "To pay and keep…. the Landlord… indemnified against a due and fair proportion of all reasonable costs charges and expenses which… the Landlord…. shall incur in complying with the obligations set out in the Sixth Schedule hereto or in doing any works or things to the Estate or for the maintenance and/or improvement of the Estate and/or any other costs charges or expenses which ….the Landlord… designates from time to time."

37. Paragraph 10(b) of the Third Schedule provides as follows;

    "…..the parties agree that if…. the Landlord ….shall consider that any part or parts of the costs charges and expenses which ….the Landlord…shall incur …. shall be the subject of contributions from persons other than the lessees for the time being of the Block and/or the Estate then the …. Landlord …. shall be entitled but not obliged to reduce the amount of the costs charges and expenses in question to which the Tenant is obliged to contribute by such sums as the… Landlord …. shall in its absolute discretion consider reasonable rather than allocating the total amount of those costs charges and expenses and…. the Tenant acknowledges that the discretion conferred … under … this clause is an absolute discretion which shall be exercisable by… the Landlord…. in such manner and upon such Terms and at such times as … the Landlord …. shall consider appropriate"

38. Paragraph 11 of the Third Schedule sets out the requirement for payment on 1st January and 1st July each year of half of the amount estimated by the Landlord or Company as payable under clause 10 with provision for a balancing payment once final amounts payable were determined. It

confirms service charge payments made are held on trust, are payable as additional rent, and paragraph 11(a)(iii) provides for creation of a reserve fund *'on account of those items of expenditure which are of a periodically recurring nature (whether recurring by regular or irregular periods)'*. Paragraph 13 of the Third Schedule confirms that the costs (including legal costs) of forfeiture or other enforcement action against the Tenant for breach of covenant or the service of notices or provision of information are recoverable through the service charge.

39. The Fourth Schedule contains the obligations of the Tenant as regards their use of the property and the requirement to allow access.

40. The covenants in the Fifth Schedule *inter alia* require the Company to repair, maintain, insure, provide facilities and keep proper accounts and provide certificates of the amounts due by Tenants under the Third Schedule.

41. The Landlord covenants in the Sixth Schedule *inter alia* to grant mutually enforceable covenants to other Tenants and perform the obligations of the Company if it goes into liquidation or is struck off.

42. Paragraph 1 of the Sixth Schedule expressly provides as follows;

> *"If so requested by the Tenant to use all reasonable efforts to enforce the covenants contained in such other Leases of units on the Estate as may be granted upon the Tenant indemnifying the Landlord on a full indemnity solicitors and own client basis against all costs and expenses in respect of such enforcement and providing from time to time security in respect of such costs and expenses as the Landlord may reasonably require."*

<u>The Applicants' case</u>

43. The Applicants' case is set out in the application and the statements at [4 - 17]. In summary, they say that their leases do not permit the Respondent to recover the Legal Costs through service charge, that the Respondent has wrongly used reserves for the payment of those costs and they seek clarification of the apportionment of the estate costs and service charges and in particular seek documentation from the Respondent which it has to date refused to produce.

<u>The Respondent's case</u>

44. The Respondent's initial response to the application is set out at [20]. In summary, the Respondent initially claimed that the legal action against the House and Hotel had been instigated at the request of FEMC who had been made aware of the escalating legal fees and had approved them. They said that the House and Hotel were treated as part of the Estate and were liable to make contributions towards the expenses of running the complex, including the maintenance and repair of the common parts used by the 51 leaseholders.

45. Mr Beresford in his Skeleton Argument and final submissions on behalf of the Respondent says the terms of the lease (in particular clauses 8(a) and paragraph 10(a) of the Third Schedule) allow the Respondent to recover legal costs of action taken against the House and Hotel. Additionally, he submits the Tribunal has no jurisdiction to consider the use of the reserve fund or the question of apportionment of the costs and expenses recoverable through the service charge.

The hearing

46. Due to the restrictions of the Covid-19 pandemic, the hearing took place remotely by video on 19th January 2021. Neither party had objected to the hearing taking place in this way.

47. Ms Baagoe represented the case of the 14 Applicants and evidence was heard from Mr Smith, Mr Jones and Mr Lawrence. Although Mr Beresford accepted that Mr Smith, Mr Jones and Mr Stocks' evidence was all relevant to the first limb of the application, he sought to exclude the evidence of Mr Lawrence which he said did not assist in dealing with the issues and it was not for the Tribunal to consider the question of reasonableness. Having briefly retired, the Tribunal concluded it was not appropriate to exclude this evidence. The Tribunal was considering s27A of the 1985 Act including whether legal costs were payable under the lease and if so, whether the costs were reasonable and reasonably incurred.

48. For the Respondent, Mr Beresford presented their case. Evidence was heard from Mr Darren Stocks. All the witnesses were asked questions by the Tribunal panel and the respective representatives.

49. Due to a number of preliminary issues, the nature of the video hearing, and breaks during the course of the day, the hearing of evidence was only concluded shortly before 4pm. Following discussions with both representatives, agreement was reached for the parties to provide written final submissions. The hearing was then adjourned part-heard with directions given for final written submissions as to the principal issues; namely

    (a) Whether the Litigation Costs are recoverable from the applicants under the terms of their leases ('the Legal Costs Issue'),

    (b) Whether payment of those Litigation Costs was made from a reserve fund which should be restored, and whether this issue falls within the jurisdiction of this Tribunal ('the Reserve Fund Issue'), and

    (c) Apportionment of the service charges (past and future), and whether this issue falls within the jurisdiction of this Tribunal ('the Apportionment Issue').

50. Written submissions were received from both parties, following which the Tribunal re-convened to make its decision.

The Tribunal's consideration

51. The primary issue dispute between the parties concerns the entitlement of the Respondent to recover Legal Costs from the Leaseholders amounting to some £101,126.00 (for 2016 to 2019 inclusive and for future years). This requires the Tribunal to construe (or interpret) the terms of the Applicants' leases, and determine whether they permit the Respondent to recover from the Tenants via the service charge the Legal Costs it has incurred in what appears to be a long running dispute and litigation with the owners of the House and the Hotel over their respective contributions to the costs of maintaining the estate which are said to be due and owing under the terms of their transfers.

The Applicants' case

52. Much of the Applicants' case relates to their concern at the lack of transparency and accountability of the Respondent in relation to the costs of management of the Fernhill Heights holiday complex, the operation of the Service Charge accounts, and in particular the Respondent's failure to provide documents, certificates and information (particularly regarding contributions payable by the Hotel and House and the costs of the Litigation).

53. The Applicants complain that the Legal Costs were paid from the reserve fund without consultation, without being provided for or referred to in the budget, without being itemised in any of the interim service charge demands and without any information or documentation being provided to the Tenants regarding the expenditure. They complain that effectively the 51 Tenants have been paying 100% of the costs of managing and maintaining the holiday complex (i.e. without the benefit of the 25% contribution from the House and Hotel) and without any consultation or warning. They say the Legal Costs amounted to more than £250 per Leaseholder yet there had never been any consultation under s20 of the 1985 Act. Furthermore they say the litigation has been unsuccessful in that the contributions the Hotel and House should have made towards the running costs of Fernhill Heights remain outstanding.

54. In relation to the reserve fund, the Applicants say the Legal Costs have wrongfully been taken from the reserve fund which now has a negative balance in excess of £10,000. They say £143,522.47 should be should be restored to the fund with interest.

55. The applicants also seek information from the Tribunal, and documentation from the Respondent, as to the proper apportionment of the Estate costs for future years and changes to the share that will be paid by the House and Hotel.

The Respondent's case

56. In summary, the Respondent submits that the Legal Costs are recoverable from the Leaseholders under the terms of their respective leases. Clause 8(a) permits the Respondent to employ or retain *'advisers of whatever nature as…the Landlord may require'* and this is clear enough to include legal professionals. It is not necessary for the lease to make specific mention of lawyers, proceedings or legal costs for legal fees to be recoverable. Furthermore, the legal costs that have been incurred are in connection with the management of the Estate and the performance of the Respondent's obligations. The Respondent also submits that paragraph 10(a) of the Third Schedule also allows independently for recovery of these costs.

57. In relation to the Reserve Fund issue, the Respondent submits this matter cannot be determined by the Tribunal. It amounts to a claim for breach of trust and restitution, which falls within the jurisdiction of the County Court.

58. In relation to the question of apportionment, the Respondent submits this is more a request for information and clarification and falls outwith the jurisdiction of the Tribunal under s27A of the 1985 Act.

<u>The Tribunal's determination</u>

(a) The Legal Costs Issues

59. In order to determine whether the Legal Costs fall within the service charge provisions and are payable under the terms of the lease, the first question to consider is why the costs were actually incurred.

<u>The Litigation and Legal Costs</u>

60. Mr Beresford confirmed the Litigation against the owners of the House and Hotel related to recovery of arrears of contributions due under the deeds of transfer between the Respondent and the respective owners. This appears to be accepted by the Applicants.

61. Mr Stocks and Ms Baagoe made reference to the Hotel's contribution to the Estate costs being 20% and the House's share as 5% (i.e. 25%). This also appears to be reflected in the service charge statements from 2016 to 2019 where the leaseholders contribute a 1.47% (reflecting a 1/51 share of 75%). Mr Smith in his evidence refers to earlier attempts to reduce the respective shares to 17.5% from the Hotel in or around 2010 and to 3% from the House (in or around 2017), but no supporting documentation is before us. Whilst there is reference in the original Deeds of Transfer provided by the Respondent to these percentage contributions in the Transferees' covenants, Office Copy Entries relating to the House and Hotel appearing in the bundle (at [66] and [73]) and those provided by the Respondent shortly before the hearing all appear to show the clauses relating to this contribution had been deleted from the Transferee's covenants at the material time.

62. The Applicants say the arrears of contribution amounted to approximately £68,000. They say the Hotel owed contributions of £53,289.54 [30] and the House £14,639.81 [31]. However, there is no supporting documentary evidence before the Tribunal confirming these arrears figures, and it is clear from the Applicants' repeated requests for information that little information has been forthcoming from the Respondents. Mr Jones confirmed that committee members of FHRA had only found out by chance about the arrears. Mr Lawrence confirmed in cross-examination that no information had been provided about these arrears of contribution when he purchased his property in 2016.

63. The only documentation regarding the legal proceedings, apart from the parties' respective statements, is an unsigned Consent Order in respect of the litigation against the owners of the Hotel [110], draft Heads of Agreement [112-113] and a draft Deed of Covenant and Variation to Transfer [114 -125] provided by the Applicants. Shortly before the hearing, a signed (but unsealed) copy of the Consent Order and Heads of Agreement was provided by the Respondent. From these documents it would appear that agreement had been reached between the owners of the Hotel and the Respondent in February 2019 whereby (in summary),

(i) the hotel would henceforth be solely responsible for the management, maintenance and repair of the Crazy Golf Area and the Sun Terrace (which includes the swimming pool)

(ii) the Respondent would pay the Hotel the sum of £15,000 as a contribution towards the Hotel's costs of removing the crazy golf course and re-landscaping the Crazy Golf Area.

(iii) the Hotel would continue to have rights of access to the Fernhill Heights estate and services (which includes *inter alia* the roads, carparks, water supply and septic tank)

(iv) the Hotel and its successors in title would be relieved of making any contribution to the Respondent towards the costs of running the Fernhill Heights estate, and

(v) the Tenants of the original 51 units would continue to have access to the Sun Terrace including the swimming pool (provided they complied with the rules) and would not be required to contribute to its maintenance and repair.

64. Nothing is said in the Consent Order or Heads of Agreement about any payment of the arrears of the contributions alleged to be owed by the Hotel, simply that unspecified claims and counterclaims were determined on the terms of the Heads of Agreement and both sides would be responsible for their own legal costs.

65. There is also no documentation regarding the dispute and litigation with the House. Mr Smith says this was settled by way of a Tomlin Order in or

around 2017. Darren Stocks in his evidence said the House went into receivership shortly thereafter. He also confirmed that the Respondent had recovered £7,500 from the House, but nothing in respect of the Hotel as a result of the Litigation. To that extent the Tribunal found the Litigation had been unsuccessful. It also appeared to be the case that although there was reference in the Heads of Agreement to a Deed of Covenant and Variation of Transfer being registered with HM Land Registry setting out the terms of the agreement, the draft Deed and Variation has not as yet been executed or registered.

66. Although Mr Stocks in his evidence said the litigation had been initiated at the request of the leaseholders, and they were fully aware of the litigation the Tribunal found this not to be the case.

67. Mr Stocks asserted that the agreement reached benefitted the Tenants in that they would no longer be required to contribute to the maintenance and upkeep of the swimming pool (said to be £10,000 p.a.). However, the Appellants say the compromise provides little benefit to the 51 leaseholders. The arrears of nearly £68,000 have not been recovered and the Tenants will be responsible for 100% of the costs of maintaining the Estate, including services (such as the septic tank, water and roads) used by the Hotel and House.

68. Given that one of the issues for the Tribunal to determine under s27A of the 1985 Act was whether any legal costs payable under the lease were reasonable and had been reasonably incurred, the Tribunal found the absence of documentary evidence surprising. There were no invoices, bills or evidence of payment. The Applicants were clearly unable to provide any, as such documentation was not in their possession. Furthermore, information about the Legal Costs appears to have been repeatedly requested by the Lead Applicant (and others) from the Respondent ([166] to [192]) apparently to no avail. The only evidence before the Tribunal was the line item *'Legal and Professional'* being applied to the '*Block Costs'* expenses in the unaudited accounts. These costs amount to a total of £101,126.00 - £21,315.00 from 2016 [135], £31,853.00 from 2017 [144], 23,839.00 from 2018 [152] and 24,119 from 2019 [161]). The Respondent has not disputed those figures, or that they were legal and professional costs incurred other than in the disputes with the House and Hotel.

69. When it came to providing detailed information regarding the sums involved in the Litigation, the Tribunal found Mr Stocks a less than impressive witness. He was vague and unable to provide clear information to the Tribunal about the arrears owed by the House and Hotel. Nor could he provide detail about the legal costs that had been incurred, apart from to say that CPM simply paid the invoices provided by JPC law as and when presented. He admitted *'with hindsight'* that it might have been better to make explicit reference in the service charge demands to 'legal costs' (rather than 'contingency'). Of note, he confirmed that the contribution of £15,000 payable by the Respondent to the owners of the Hotel under the Heads of Agreement for the removal

of the crazy golf course would also have been paid from the Reserve Fund.

70. Although Mr Stocks told the Tribunal that the Respondent had only commenced legal action against the House and Hotel at the instigation of the Tenants, the Tribunal finds this not to be the case. Although all 51 Tenants are shareholders of FEMC, the Company's management obligations had been taken back by Galliards on 10th October 2006 when it opted to serve the Initial Election Notice pursuant to clause 8(l) of the leases. There was some evidence of communication between Mr Stocks and a few of FHRA's committee over the management and running of FH (including the failure of House and Hotel to pay contributions), and evidence that Mr Stocks attended some FHRA meetings and that individual officers may have supported or encouraged the legal action in 2016 [248]. However, FHRA is not formally recognised by the Respondent and has no legal standing. Furthermore, only about half of the Tenants were ever members of FHRA. Mr Stocks confirmed that CPM had never corresponded directly with all of the Tenants regarding the Legal Costs or the Litigation.

The construction of the leases

71. In relation to the construction of the lease and whether these Legal Costs were payable as service charge, the Tribunal starts with general principles of interpretation and the specific clauses of this particular lease and its context. The Supreme Court in *Arnold v Britton* [2015] UKSC 36 gave definitive guidance on interpretation. Lord Neuberger (at paragraph 15) set out the approach that courts or tribunals should follow;

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'... And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".*

72. The Supreme Court also confirmed there is no special rule of interpretation for leases and no requirement that terms in a lease should be construed restrictively (at paragraph 23). The Tribunal must therefore start with the ordinary and natural meaning of the relevant words in their immediate context and the cumulative impact of the clauses when read as a whole. In this appeal, the Respondent relies on two clauses in the lease, which Mr Beresford says independently of each other allow for the recovery of legal costs incurred in the Litigation against the Hotel namely clause 8(a) and paragraph 10(a) of the Third Schedule.

73. Paragraph 2(b) of the Third Schedule sets out each Tenant's obligation to pay the service charge. Each Tenant covenants to pay *'a fair and reasonable proportion....of any outgoings expenses or assessments which may be attributable to or imposed or assessed on the Unit together with any other part or parts of the Estate'*. If the costs are properly recoverable under clauses 8(a) or 10(a) of the Third Schedule then the Tenants must contribute to them through the service charge.

Clause 8(a)

74. At its core Clause 8(a) allows for recovery of the costs of engaging *'any employee agent consultant service company contractor engineer or other advisers of whatever nature'* for the *'management of the Estate and the performance of the obligations of...the Landlord...'*.

75. Mr Beresford accepts that Clause 8(a) is a widely drawn clause, but says this is unsurprising given the length of the term of the leases and the size and nature of the holiday complex. He submits the parties would expect that in 999 years circumstances might arise that would require Galliard to engage advisors (including lawyers) and that any number of estate management issues might arise given the size and amenities on the complex (including the possibility of legal action against third parties). He says the phrase *'or other advisers of whatever nature'* could not be more permissive, and the natural and ordinary meaning of the words could not possibly exclude legal advisors.

76. The Tribunal accepts that the natural and ordinary meaning of the phrase *'or other advisers of whatever nature'* in clause 8(a) is capable of including legal advisors. However, those words must be read in context, and the Tribunal must determine whether the words are sufficiently clear and unambiguous to say that a reasonable person having the background knowledge that would have been available to the parties at the time they entered into the lease would have understood it to include solicitors and other legal advisors and the initiation of litigation against third parties. For the reasons more particularly set out below, the Tribunal finds that Clause 8(a) cannot be construed as allowing the Lessor to recover the costs of legal advice or litigation in respect of the House and/or Hotel.

77. Arguably the natural and ordinary meaning of the words *'other advisers of whatever nature'* could include a legal advisor. However, this residuary category is immediately preceded by a list of occupations the Tribunal considers can properly be identified as those who would be engaged in connection with the maintenance of the physical infrastructure and services of Fernhill Heights (rather than individuals involved in the asserting and enforcement of legal rights), particularly when considering the Landlord's obligations in the Fifth Schedule.

78. The Tribunal accepts it is not always necessary for there to be an express reference to solicitors or lawyers before legal costs are recoverable. In

Greyfords v O'Sullivan [UKUT] 0683 (LC) Martin Rodger QC confirmed that Taylor LJ's remarks in Stella House v Mears [1989] 1 EGLR 65 that legal costs may not be recovered unless there is specific mention of lawyers had '*wrongly been elevated to a statement of principle*'. However, Martin Rodger QC also confirmed it was improbable '*that parties to a lease would regard general words as sufficient to express an intention that...the landlord's cost of litigation between them should be a charge on the whole body of leaseholders*'.

79. The Tribunal is strengthened in its view that more precise words are required before litigation costs against third parties can be recovered under this clause, as there is express reference to solicitors, legal costs and court proceedings elsewhere in the lease (Clause 8(i), paragraphs 13(a), (b) and (c), and 14(b) of the Third Schedule and paragraph 1 of the Sixth Schedule). These matters demonstrate that the parties to the lease had clearly contemplated that legal proceedings might be required particularly relating to the enforcement of covenants and recovery of contributions payable for services and maintenance of the amenities. If the parties to the lease had intended such a widely drawn clause as clause 8(a) to cover litigation costs incurred against third parties (and in particular the House and Hotel) as Mr Beresford seeks to suggest then, given the substantial potential costs that can be involved in litigation and the awareness of the parties to this lease that legal advice or proceedings might be necessary to enforce obligations, the Tribunal is satisfied that clearer words would have been used.

80. The Tribunal is not persuaded by Mr Beresford's submission that paragraphs 13 of the Third Schedule and paragraph 1 of the Sixth Schedule deal with radically different circumstances. Paragraph 13 of the Third Schedule provides for recovery from an individual Tenant the costs (including legal costs) incurred by the Lessor in forfeiture proceedings for breaches of covenant, and paragraph 1 of the Sixth Schedule allows for the recovery of the Lessor's legal costs on an indemnity basis in relation to proceedings against one Tenant at the instigation of another to enforce covenants. Paragraph 14 of the Third Schedule provides for the Tenant to indemnify the Landlord *inter alia* from all actions, claims and proceedings arising from Tenant failure.

81. Whilst it is true they do not expressly relate to the service charge provisions these provisions clearly demonstrate the parties were aware that litigation might be required to regulate relationships between individuals as regards payment for services and amenities provided and the enforcement of covenants for the benefit of all on the Estate. In any event, clause 8(i) clearly relates to service charge disputes and allows to the costs of referral to the lands tribunal or other courts to be recovered.

82. Furthermore, paragraph 10(b) of the Third Schedule shows that the parties envisaged that third parties such as the House and Hotel would contribute to the costs of providing services and amenities on the Estate.

83. The Tribunal therefore finds it would have been in the contemplation of the parties that there might be a dispute regarding payment of such costs (in the same way there was the possibility that Tenants might not pay their share of the service charge). If the costs of litigating against third parties were to be recoverable from the body of leaseholders through the service charge, then it would have been quite simple for the parties to have said so (as with paragraph 13 of the Third Schedule), by expressly referring in Clause 8(a) (or elsewhere) to solicitors and legal costs. As Lord Neuberger said in <u>*Arnold v Britton*</u> (at [17]), *'parties have control over the language they use in a contract'*.

84. In any event, even if the Tribunal were wrong to have reached that conclusion, and the phrase *'other advisers of whatever nature'* does encompass engaging lawyers, such costs are recoverable only so long as they are incurred *'[i]n the management of the Estate and the performance of the obligations of…the Landlord..'*. Whilst Mr Beresford submits this only needs to be *'in connection'* with those twin purposes, that is not what the lease says.

85. Contrary to Mr Stocks' assertion [244], the Estate does not include the Hotel and House. *'The Estate'* is expressly defined in the lease as *'the estate to be known as the Fernhill holiday complex Charmouth Bridport Dorset registered under title numbers DT184316'*. The documents before the Tribunal show that DT184316 excludes the Hotel and the House and the land on which they are situated. The Hotel is a separate freehold title registered as DT290360 [67] and includes the sun terrace and swimming pool. Fernhill House is registered as a separate freehold title under DT296862 [73]. Not only are they both freehold properties, but their respective transfers (executed on and 28th June 2001 and 29th April 2002) also clearly define the 'Estate' as being all that land under title number DT184316 '*excluding the Property*' (i.e. the Hotel or House).

86. The facts and circumstances of the parties at the time the leases were entered into can, in part, be inferred from the leases and the transfers in respect of the Hotel and House. The Tribunal is satisfied there was clear intention (seen from the plans attached to the lease) that 51 separate units were to be developed and sold as leasehold properties for holiday lets rather than permanent residences, and that the Hotel and House were not to be so demised. It is also clear from the Schedule of leases attached to DT184316 at [57] to [60] that whilst the leases are all for a term of 999 years commencing 6th April 2001, the vast majority of the Units were first sold after the transfer of the freehold of the Hotel to its original owners.

87. We were strengthened in the view that the parties were aware of the intention for the House and Hotel to be sold off by Mr Smith's evidence to the Tribunal regarding circumstances at the time the leases were entered into. He had acquired his lease in July 2001 and had attended the promotional launch weekend of 7/8th April 2001 prior to purchase. He recalled being informed the Hotel was to be sold, but said the

swimming pool and crazy golf course would remain within the curtilage of the Estate. He says this original intention appeared to have changed during the course of sale negotiations. We were satisfied, therefore, that it was in the contemplation of the parties that the Hotel and House that occupied land previously falling within DT184316 were to be sold whether together or separately and would therefore not form part of the Estate.

88. The question then for the Tribunal is whether the costs incurred by Galliard in engaging solicitors and initiating litigation against the House and Hotel could fall within the natural and ordinary meaning of the *'management of the Estate and the performance of the obligations of..the Landlord..'*.

89. Mr Beresford submits that legal costs are recoverable as falling within the meaning of *'management of the Estate'* and relies on *Assethold v Watts* [2014] UKUT 0537 (LC) [41] and Greyfords v O'Sullivan [UKUT] 0683 (LC) as authority for this. However, as *Arnold v Brittan* makes clear, each lease must be construed on its own particular facts. Decisions of the Upper Tribunal demonstrate that similar words appearing in leases, such as *'management of the estate'* or *'proper and reasonable management'* may have different meanings in different contexts (*Assethold* at [41]).

90. Indeed, this is demonstrated in the cases expressly relied on by the Respondent. Martin Rodger QC in *Greyfords* did, as Mr Beresford submits, confirm '*that "management" may sometimes include obtaining professional advice, including legal advice*' (at [37]). However, on the facts of that case, he held the lease in question was not sufficiently clearly drafted to allow recovery of legal costs of two rounds of unsuccessful litigation against an individual long leaseholder who failed to pay for major works. The particular clause at issue in that case was a widely drawn clause (not dissimilar from Clause 8(a)) that included a requirement to contribute towards *'all other expenses (if any) in and about the maintenance and proper and convenient management and running of the Development'*. The 'Development' in that case was a complex comprising commercial premises (garage, showroom and workshops) below twelve flats, five of which were held on long leases whilst the remainder were retained by the Lessor and let out on assured shorthold tenancies. Martin Rodger QC reaffirmed the broad principle that parties to a contract should be clear when defining payment obligations (following *Francis v Philips* [2014] EWCA Civ 1395). Where parties intend a lessor to be entitled to payments in addition to rent, the extent of the obligation must be clearly set out.

91. In *Assethold v Watts*, however, a general clause was considered sufficient to allow for recovery of the initial costs of initial injunction proceedings to ensure that protection afforded under the Party Wall Act 1966 was not lost to the building in question (later costs incurred were not recoverable). In that case Martin Rodger QC held (at [59]), *'[t]he parties must be taken to expect that, in an agreement intended to last*

for 125 years, circumstances may arise which they do not specifically contemplate at the time of contracting and in which expenditure by the Landlord may be necessary or desirable in their mutual interests. The object of a provision such as clause 6 is to allow for the recovery of such expenditure through the service charge so long as it is for the proper maintenance, safety, amenity and administration of the Building.'

92. When construing this lease, and whether costs incurred in litigation against the Hotel could fall within the phrase *'management of the Estate'* in clause 8(a) we consider the natural and ordinary meaning of the words in context. Mr Beresford says there can be no doubt the legal costs were incurred in the '*management of the Estate'* because the Respondent sought to recover sums the Hotel and House were liable to pay under their respective transfers. He says the Respondent is obliged to maintain the Estate under Schedule 5, and the concept of *'management of the Estate'* must include the Landlord taking steps to recover sums required towards the upkeep and maintenance of the Estate *'whether from leaseholders or third parties'*.

93. The Tribunal accepts that an inability to recover contributions might hamper the Respondent from being able to carry out its obligations under the Fifth Schedule. However, that does not mean in and of itself that the term 'management of the Estate' automatically encompasses taking litigation to recover contributions, as was seen in Greyfords. Unlike the circumstances in Assethold, this is not a case where litigation was taken to protect rights or prevent third party interference for the preservation of the physical Estate itself (see [62]). The Tribunal finds when reading clause 8(a) as a whole that the focus is on the management of the physical environment, infrastructure, services and amenities of the Estate. The Tribunal is strengthened in this view by the references elsewhere in Clause 8 to the Landlord's entitlement to install, remove or change systems or services *'for the purposes of good estate management of the Estate'* (clauses 8(e) and (f)).

94. The Tribunal is satisfied when considering the potential for dispute and/or difficulties of collecting contributions and enforcement of covenants are matters that were clearly within the contemplation of the parties at the time the Estate was created and the leases drafted. There is express provision in the lease for this in relation to the 51 Tenants of the Units (for example Clause 8(i), and paragraphs 13 and 14 of the Third Schedule and paragraph 1 of the Sixth Schedule). There was clearly contemplation of contributions being paid for shared services by the owners of land carved out of the original freehold land as this is provided for in paragraph 10(b) of the Third Schedule. On balance when looking at these matters in the round the Tribunal finds that had the parties intended the legal costs of litigating with the neighbouring properties over use of or contribution to shared amenities clearer words would have been used.

95. In any event, although the Upper Tribunal found in Assethold that the lease term whilst general and wide was sufficient to allow recovery of

legal costs, this Tribunal finds it was drafted in a significantly different manner to the lease clause in issue in this appeal. In Assethold the lease permitted the Lessor to recover the cost of doing '*all works installations acts matters and things.....for the proper maintenance, safety, amenity and administration of the Building'*. Protecting the building against potential damage or incursion through a party wall award would fall naturally within that term.

96. On balance, the Tribunal finds that a reasonable reader having the background knowledge of the sale of the Hotel and House and the shared services and amenities would not understand clause 8(a) to mean that the Respondent was entitled to recover costs from the 51 leaseholders in respect of litigation against those third parties under the terms of contracts to which the leaseholders were not privy. Nor is there anything in the lease indicating that the *'performance of... the Landlord's obligations'* would encompass the taking of legal proceedings against third parties.

97. The Tribunal finds that clearer words than the wide and general Clause 8(a) are required.

Paragraph 10(a) of the Third Schedule

98. Mr Beresford asserts that the Litigation Costs are recoverable independently under paragraph 10(a) of the Third Schedule whereby the Tenant covenants to keep the Landlord indemnified against

    (i) *a due and fair proportion of all reasonable costs charges and expenses which...the Landlord....shall incur in complying with the obligations set out in the Sixth Schedule*

    (ii) *in doing any works or things to the Estate or for the maintenance or improvement of the Estate*

    (iii) *any costs charges or expenses which ....the Landlord may designate from time to time.*

99. The Sixth Schedule contains nothing that could be construed as including the costs of the Landlord enforcing the covenants contained within the transfers of the House and Hotel. Paragraph 1 simply relates to the mutual enforceability of covenants between Tenants.

100. The Tribunal also finds the Litigation Costs cannot in any way be construed as costs of '*doing any works or things to the Estate or for the maintenance or improvement of the Estate*'. We are satisfied given their ordinary and natural meaning that could only include physical works to the land or structures on the Estate and would include acts such as building, repairing or replanting.

101. The only question therefore is whether the legal costs incurred in proceedings against third parties could potentially fall within the catchall

phrase *'and/or any costs charges or expenses which...the Landlord..may designate from time to time'* . Mr Beresford submits that the natural and ordinary meaning of this wide and general clause allows the Respondent to recover the Litigation Costs through the service charge. He says the Landlord would not be acting capriciously or irrationally in designating the Litigation Costs as expenditure to be paid through the service charge, as the litigation was for the benefit of the leaseholders as a whole.

102. The Tribunal rejects that submission for the same reason such a residuary clause was rejected in *Greyfords* (see [78] above). Whilst *Arnold v Britton* confirms the words in a clause should be given their natural and ordinary meaning, in this case that reading would indicate the Respondent was free to designate any costs or charges as payable, no matter how frivolous or distant from the subject of the contract. In *Arnold v Britton* the relevant clause in dispute was a term providing for the service charge to increase by 10% each year on a compound basis, and it was those words that were to be given their natural and ordinary meaning.

103. However, *Greyfords* which was handed down after *Arnold v Britton* confirmed the 'broad principle' that parties to a lease may expect the extent of their obligation to make payments under a lease to be clearly spelled out. For the reasons set out above at [74] to [96] the Tribunal is satisfied that if the parties clearly had intended that the costs of litigation against third parties such as neighbouring properties should be included in the liabilities then clearer words than this generalised residual term would be needed.

104. In conclusion, therefore, the Tribunal finds that the recovery of the Respondent's legal costs incurred in the dispute and litigation against both the House and the Hotel are not permissible under the terms of this lease for the years 2016, 2017, 2018 and 2019, or for future years.

105. The Tribunal was hampered in making findings as to the extent of the Legal Costs, by the Respondent's failure to provide information about the legal costs it has incurred. No detailed schedule was provided setting out the costs incurred in each service charge year. The only information available to the Tribunal is the line item *'Legal and Professional'* appearing in the Block Costs of the end of year income and expenditure accounts for the respective years in issue, which amount to £101,126 over the four- year period. Mr Stocks confirmed in evidence this solely related to the dispute with the House and Hotel.

106. This lack of transparency is perhaps down to the Respondent's position as regards the Tribunal's jurisdiction to consider moneys spent by the Respondent from the reserve fund (see below). However, for the reasons more particularly set out in [113] below the Tribunal does have the power under s27A of the 1985 Act to consider whether and the extent which a service charge is payable under the terms of a lease (regardless of where the money comes from).

107. On balance, having considered the evidence in the round, and in the absence of any evidence from the Respondents demonstrating that the line item appearing in the end of year accounts is anything other than the costs incurred in the dispute with the House and Hotel the Tribunal finds the Respondent was not permitted to recover as service charge under the terms of the lease the following;

£21,315.00 for the year ending 31st December 2016 [135]
£31,853.00 for the year ending 31st December 2017 [144]
£23,839.00 for the year ending 31st December 2018 [152]
£24,119.00 for the year ending 31st December 2019 [161]

108. The Respondent is also not permitted to recover Legal Costs relating to the dispute with the House and Hotel over their contributions to estate costs and the Litigation for the 2020 and future service charge years.

(b) The reserve fund issue

109. The Applicants' case is that Galliard was not entitled to use moneys from the reserve fund (called the Residents' Fund) to pay for its Legal Costs, that the fund stood at £98,820 as at 31st December 2015 and by the year ending 2019 had been depleted to minus £10,728 without any of it being spent on '*items of expenditure which are of a periodically recurring nature*' (Clause 11(a)(iii) Third Schedule). The Applicants argue that £143,522.47 (plus interest) should be restored to the Residents Fund and be deposited in a separate interest-bearing account in accordance with the RICS Code of Practice [34].

110. The Respondent submits this aspect of the claim is outwith the jurisdiction of the Tribunal as it is effectively a breach of trust claim and the Tribunal lacks jurisdiction to make an order for restitution, as confirmed in *Solitaire Property Management Company Limited v Holden* [2012] UKUT 86 (LC).

111. Mr Beresford further submits that if the Tribunal finds that legal costs were recoverable under the lease, it would have no jurisdiction to consider under s27A of the 1985 Act either whether the amount of the legal costs were reasonable or were reasonably incurred. In this, he relies on *Eshraghi v 7/9 Avenue Road (London House) Ltd* [2020] UKUT 208 (LC) (paragraph 67).

112. Following the decision in *Solitaire*, the Tribunal accepts Mr Beresford's submission it has no jurisdiction under section 27A (or any other power) to consider whether a breach of trust has occurred in respect of the moneys held on trust in the reserve fund. Nor does it have the power to order repayment of money held in trust. These matters fall under the jurisdiction of the County Court.

113. However, as *Eshraghi* makes abundantly clear (at [52] to [54]) the fact that the money used to meet an item of expenditure (in this case legal costs) is

held on trust in a reserve fund does not mean that the First Tier Tribunal cannot consider (under s27A) whether the expenditure can be recovered as a service charge, whether the expenditure is reasonable and has been reasonably incurred as Mr Beresford seeks to suggest. As Martin Rodger QC confirmed in *Eshraghi,* regular service charge contributions made by leaseholders to meet anticipated expenditure in the current year are held on the statutory trust imposed by s42, Landlord and Tenant Act 1987 for the benefit of the contributing leaseholders. At paragraph [53] he rejected a submission made in similar terms to those of Mr Beresford. *'If, as Mr Upton submitted, the costs of litigation were off limits to investigation by the FTT because they had been drawn down from the reserve fund rather than being demanded as contributions towards anticipated expenditure, it would not be possible for an application to be made under section 27A in respect of any works which had been funded from reserves. If, for example, money accumulated in a reserve fund was used to replace the roof of the building, or to install new window, the effect of Mr Upton's argument would be that the FTT would be unable to consider whether the relevant costs had been reasonably incurred or the works had been done to a reasonable standard. Those questions are squarely within section 27A, from whatever source the work is funded.'*

114. As the Tribunal has determined that the Legal Costs of the dispute with the House and Hotel are not recoverable as service charge under the terms of the lease it will be for the Respondent now, in the light of the Tribunal's findings at [104] to [108] to take whatever action is needed in accordance with its fiduciary and legal duties as the trustee of the reserve fund. In the event it does not, the Tenants' remedy will lie in the County Court.

(c) The apportionment issue

115. The Applicants seek clarification and information from the Tribunal as regards the future apportionment of costs for the management of the estate and the contributions payable by the House and Hotel, and submit as leaseholders they should all have been consulted regarding any changes. It is clear from the 'letters of reservation' written by Ms Baagoe to the Respondent, and the evidence of Mr Smith and Mr Jones that there has been considerable frustration on the part of some of the leaseholders at the lack of transparency, documentation and the failure to consult Tenants about changes which ultimately have a significant bearing both on costs payable and amenities available to the Tenants of Fernhill Heights.

116. The Respondent says this part of the application is not properly framed within an application under s27A of the 1985 Act, and falls outside the jurisdiction of the Tribunal.

117. The Tribunal does have the power under s27A to clarify the terms of the lease as regards the service charge provisions as set out in paragraph 24 above. In this lease, Paragraph 2(b) of the Third Schedule sets out each Tenant's obligation to pay the service charge. Each Tenant covenants to pay *'a fair and reasonable proportion....of any outgoings expenses or*

assessments which may be attributable to or imposed or assessed on the Unit together with any other part or parts of the Estate'. The percentage share is unspecified. Mr Stocks in his evidence confirmed, historically Tenants have been required to pay 1/51 of the costs attributable to the Block, in other words the costs are shared equally between the 51 leaseholders of the Units. In relation to the costs to which the Hotel and House previously contributed a 25% share, the proportion payable by each tenant was calculated as 1.47% (i.e. 1/51 of the 75% share of costs).

118. Paragraph 10(b) of the Third Schedule provides that if the Respondent seeks a contribution from individuals other than lessees of the Units and/or Estate then it may but is '*not obliged to reduce the amount of the costs charges and expenses…to which the Tenant is obliged to contribute'*. That clause makes clear this ability to seek a contribution, and the amount of any resulting reduction in the Tenants' share of the costs is a matter for the Company (i.e. FEMC) and/or the Landlord alone to decide '*in its absolute discretion',* a discretion that the Tenant acknowledges. As Mr Beresford accepts, where there is such an absolute discretion it cannot be exercised arbitrarily, unreasonably or capriciously.

119. It is clear from the Applicants' statement of case and final submissions that a key expectation from this application was the disclosure of documents and clarification of information from the Respondent regarding arrangements for management of the Fernhill Heights holiday complex. Much of this appears to have arisen on account of the lack of clear information from the Respondent and its managing agents (including CPM). Although Mr Stocks in his evidence said he had always answered Tenants' questions this would unfortunately appear not to be the case. Ms Baagoe's 'letters of reservation', the statement of case and the witness evidence of Ms Baagoe, Mr Lawrence, Mr Smith and Mr Jones all demonstrate that relevant information and documentation about management of the complex has not been forthcoming. The Applicants have other remedies if documents and information requested under the 1985 Act are not forthcoming, but this Tribunal's jurisdiction is confined to the application for determination of service charge payable under s27A of the 1985 Act.

The applications under 20C of the 1985 Act and paragraph 5A of Schedule 11 of the 2002 Act

120. Having reached those conclusions, the Tribunal considers it just and equitable and is minded to make orders under section 20C and paragraph 5A preventing the Respondent from recovering its costs in connection with these proceedings from the Applicants as the principle issue in dispute (whether legal costs are recoverable through the service charge) is determined in the Applicants' favour. These orders will take effect unless the Respondent makes representations within 14 days from the date of the decision.

121. Under rule 13(2) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 the Tribunal has a discretion to require a

party to reimburse to any other party the whole or part of the fee paid by the other party. Rule 13(2) is not caught by the provisions of rule 13(1) under which the Tribunal operates as a no costs forum unless one of the parties has acted unreasonably.

122. The Applicants have paid £100 application fee and a £200 hearing fee. As the Applicants have been successful in the primary element of their application the Tribunal also is minded to order the Respondent to reimburse the Applicants with £300. This order will take effect unless the Respondent makes representations within 14 days from the date of the decision.

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.

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Schedule 1 – the Applicants

Mr. and Mrs. Garry and Valerie Atterton
No 1 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. and Mrs. Melanie Ann and Nicholas Paul Cadwell
No 3 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. and Mrs. Martin and Sara Coulson
No 7 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. Paul Simon Brook
No 8 Fernhill Heights, Charmouth, Dorset DT6 6AU

Ms. Ulla Baagoe
No 16 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. and Mrs. J. Lawrence
No 23 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. and Mrs. Brian Mitchard
No 31 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. Julian Brockless
No 35 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. and Mrs. Brown
No 39 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. and Mrs. Sean and Shelley Larcombe
No 40 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. **John Mansfield**
No 44 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. and Mrs. Mark and Joy Jones
No 45 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. and Mrs. Lisa and Richard Thomas
No 47 Fernhill Heights, Charmouth, Dorset DT6 6AU

Mr. D.J. Broad
No 50 Fernhill Heights, Charmouth, Dorset DT6 6AU

Schedule 2 – the Law

The Landlord and Tenant Act 1985 Act (as amended) provides:

Section 18 Meaning of "service charge" and "relevant costs"

18(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 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 purpose—
(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.

Section 19 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 provision 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.

Section 20c 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....the First-tier Tribunal....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 person specified in the application. ...

Section 27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate 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 the appropriate 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 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.

(4) No Applications 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 as having agreed or admitted any matter by reason only of having made a payment.

...

Paragraph 5A to Schedule 11 of the 2002 Act (as amended) provides:

Limitation of administration charges: costs of proceedings

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable
..