UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – estimated charges – cost of providing accommodation for holiday park wardens – assessment of "fair and equitable proportion of sums expended and liabilities incurred" – previous inconsistent decisions of First-tier Tribunals – appeal allowed in part

IN A MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MARTIN FRANCIS
REBEKAH FRANCIS

Appellants

-and-

JOHN SANDOZ
MOIRA STEER
(AND OTHER LEASEHOLDERS OF CHALETS AT ATLANTIC BAYS HOLIDAY PARK)

Respondents

Re: Atlantic Bays Holiday Park
St Merryn, Cornwall

Martin Rodger QC, Deputy Chamber President

Exeter Law Courts
29 June 2021

The appellants, *Mr and Mrs Francis*, represented themselves
Mr Rawdon Crozier, instructed by Coodes Solicitors, for the respondents.

The following cases are referred to in this decision:

Arnold v National Westminster Bank plc [1991] 2 AC 93

Aviva Investors Ground Rents GP Ltd v Williams [2021] EWCA Civ 27, [2021] 1 W.L.R. 2061

Hemmise v London Borough of Tower Hamlets [2016] UKUT 109 (LC)

Knapper v Francis [2017] UKUT 3 (LC), [2017] L. & T.R. 20

Retirement Lease Housing Association Ltd v Schellerup **[**2020] UKUT 232 (LC), [2021] 1 P. & C.R. 11

Oliver v Sheffield City Council [2017] EWCA Civ 225, [2017] 1 W.L.R. 4473

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46, [2014] AC 160

Introduction

1. The Atlantic Bays Holiday Park at St Merryn, Cornwall is a 25-acre site on a former RAF base which was developed for holiday use in the 1970's. It includes areas occupied by permanent holiday chalets and lodges, and separate areas for touring caravans and a camping field. Communal facilities are provided on the Park for the use of residents and visitors. In 2008 the appellants, Mr and Mrs Francis, acquired the freehold interest in the Park from the St Merryn Holiday Estate Management Company Ltd, a company whose shareholders were the long leaseholders of chalets on the Park.

2. All of the chalets (except the 17 owned by Mr and Mrs Francis) are let on long leases which include a covenant by the Park owner, now binding on Mr and Mrs Francis, to maintain the Park and provide certain services. The leases also include provision for the leaseholders to pay service charges to meet the cost of those services. Each year the leaseholders are required to pay an estimated charge, with a balancing charge or credit being applied at the end of the year.

3. Since their acquisition of the Park from the leaseholders' company in 2008 Mr and Mrs Francis and the leaseholders have been in almost constant dispute over the cost of providing services.

4. On 14 January 2020 the appellants' managing agent issued invoices to each leaseholder for the estimated service charge for 2020. The estimated charges totalled £1,933.70 for each unit, a sum calculated by dividing the total anticipated expenditure for the year by 176, that being, by the appellants' assessment, the total number of chalets on the Park. The total anticipated expenditure included a sum of £18,000 as the cost of accommodation for the site manager and two wardens.

5. Many leaseholders failed to pay, as they had failed to pay previous demands for estimated and final service charges. On 5 March 2020 Mr and Mrs Francis applied to the First-tier Tribunal (Property Chamber) (the FTT) under section 27A, Landlord and Tenant Act 1985 for a determination of the reasonableness and payability of the estimated charges.

6. The respondents to the application were identified in a list of 93 current leaseholders.

7. By its decision issued on 23 September 2020 (revised on 18 June 2021 to take account of VAT) the FTT determined that the amount that it was reasonable for leaseholders to pay in advance for 2020 was £1,474.89 plus VAT. That figure was arrived at by a number of adjustments to the appellants' budget including in particular the omission of the sum of £18,000 for accommodation costs for the manager and wardens. The FTT also considered that the total expenditure should be divided by 177, rather than 176, to arrive at the contribution for each leaseholder.

8. With the permission of this Tribunal, the appellants now appeal against two aspects of the FTT's decision, namely, the omission of any sum in respect of the manager's and wardens' accommodation, and the use of 177 as the divisor when calculating the contribution of each leaseholder.

9. At the hearing of the appeal Mrs Francis represented herself and her husband. The respondents were represented by Mr Rawdon Crozier. I thank them both for their helpful submissions.

The leases

10. The chalets on the Park are held on a standard form of lease, each for a term of 999 years. The leaseholder's obligations include, at clause 2(q), a covenant to pay the service rent defined in clause 4. The service rent is payable annually within 14 days of written demand after the annual accounting date. The same clause obliges the leaseholder to pay such sum as the Lessor (the Park owner) may reasonably require on account of the service charge on the annual accounting date in every year.

11. Quantification of the service rent is dealt with in clause 4 of the lease. Omitting unnecessary words that provides as follows:

> "The service rent … shall be a fair and equitable proportion … [of] the aggregate of the sums actually expended or the liabilities incurred by the Lessor … in connection with the management and maintenance of the Estate and the provision of such services as herein described and in particular without limiting the generality of the foregoing shall include the cost of the matters referred to in the Schedule 3 hereto."

The clause also provides that the "fair and equitable proportion" referred to is to be determined by a certificate given by the Lessor, and that the accounting period is to be the period ending on 31 December each year.

12. By clause 3(b) of the lease the Park owner covenants to carry out and provide the services listed in Schedule 3, the cost of which is to be recouped through the service rent. These services include the maintenance of the Park (referred to in the lease as "the Estate") and also, by paragraph 6:

> "Management of the Estate and its appurtenances including where applicable the charges wages pension contributions insurance and provision of uniforms and working clothes of any staff employed by the Lessee [*sic*] and the provision of telephones (if any) and also the cost of providing tools appliances cleaning materials bins receptacles together with any amount of fees paid to architects agents surveyors and solicitors employed by the Lessor in regard to the management of the Estate."

The reference to "staff employed by the *Lessee*" is clearly a mistake and ought to refer to staff employed by the Lessor (the Park owner).

The effect of the charging provisions

13. The effect of the charging provisions has been settled in previous litigation between the parties (in particular by the County Court in October 2011). It is clear that the Park owner is entitled to recover contributions from each leaseholder towards "the sums actually expended or the liabilities incurred by the Lessor … in connection with the management and maintenance of the Estate". Whether a sum or liability is recoverable by the Park owner depends on whether it was spent or incurred in connection with the management of the Park. Those sums and liabilities include, but are specifically not limited to, the cost of the matters referred to in the Schedule 3.

14. It is also clear that the amount to be paid by each leaseholder is not a proportion of the total which has been fixed at the commencement of the lease but is to be a "fair and equitable proportion" which may vary from time to time as circumstances change. By clause 4 of the lease the parties agreed that the relevant proportion should be "determined from time to time by the Lessor". Because the effect of that agreement would be to give the Park owner the last word on an issue concerning the amount payable by leaseholders it is overridden by section 27A(6), Landlord and Tenant Act 1985; to the extent that clause 4 would make the Park owner's view of what was fair and equitable binding on the leaseholders it is rendered void. In the event of a dispute it is for the FTT to determine what is the fair and equitable proportion for each leaseholder to pay (as the Court of Appeal has explained in *Oliver v Sheffield City Council* [2017] EWCA Civ 225, [2017] 1 WLR 4473 and *Aviva Investors Ground Rents GP Ltd v Williams* [2021] EWCA Civ 27).

The facts

15. As the FTT explained in its decision, the Park is divided into several sections. Short term visitors pay a fee for the use of the camping or caravan fields but do not contribute directly to the service charge paid by the leaseholders. The cost of services provided to the Park as a whole is apportioned between the different parts of the site, and the leaseholders contribute to that part of the total which is assessed as of being of benefit to them. For example, the appellants arrange for insurance of the Park under a single policy, and the premium is split between the chalets and lodges on the one hand, and the other areas. The appellants meet the cost apportioned to the caravan and camping areas as an expense of their business and pass on the cost apportioned to the chalets and lodges through the service charge.

16. Although the appellants do not hold lease of any of the 17 chalets or lodges which they own, it has been their practice since they acquired the Park to contribute the same amount to the service charge for each of their units as the leaseholders do for each of theirs. I was told by Mrs Francis that their managing agent is instructed to issue service charge demands and estimates to the appellants as if their chalets and lodges were held on leases in the standard form.

17. The fact that the appellants contribute in the same proportion to the cost of services is also taken into account by them in determining the "fair and equitable proportion" of total expenditure and liabilities which each chalet is to pay. The approach which had been taken before the appellants acquired their interest in the Park had been that each chalet or lodge would contribute the same amount to the cost of services provided to the residential part of the Park. The appellants have continued that practice and the lodges and chalets which they own are taken into account when the fair and equitable proportion is assessed. As the number of permanent residential units on the Park has increased (as a result of the expansion of the site and the construction of additional lodges) the proportion payable by each unit has reduced. There were previously 166 units but there are now either 176 or 177 units, depending on the view taken of the building occupied by the wardens.

18. The appellants' two sons are employed by them as wardens on the Park. As part of their programme of expanding the Park the appellants built an additional lodge to provide accommodation for the wardens. They chose a location in the centre of the Park and the work was completed at some time before January 2020. The appellants also employ a Park manager who is provided with accommodation in his own chalet or lodge.

19. In size and external appearance the wardens' lodge is no different from the other permanent units on the Park, but its internal arrangement is rather different. The typical lodge has three bedrooms and a single living area, but the wardens' lodge is divided into two separate units, each with one bedroom and its own living area and shower/bathroom. The lodge is served by a single water and electricity supply, but each half also has its own entrance and there is no internal door connecting the two parts of the building. The two parts of the building are therefore, substantially, self-contained and they are occupied separately by the two wardens.

20. The appellants took the view that the wardens lodge should be counted as one unit rather than two when assessing the fair and equitable proportion payable by each leaseholder. They therefore divided the total budgeted expenditure by 1/176 to arrive at the sum to be demanded as the on-account payment for each lodge or chalet for 2020.

21. When drawing up the 2020 service charge budget the appellants included £18,000 in respect of "accommodation cost for manager/wardens". They considered they were entitled to do so following a decision of the FTT delivered on 31 March 2016 which determined the amount payable on account for 2015 and included the same sum, £18,000, in respect of staff accommodation. The leaseholders had argued (see paragraph 21c of the decision) that there was no provision in the lease allowing the recovery of the cost of staff accommodation and that the figure should be deleted entirely. The FTT disagreed and included the full amount in the budget it approved. It did not deal expressly with the leaseholders' argument that the lease did not allow for such a charge, but it reduced the figures budgeted for the manager's and wardens' salaries by an aggregate of £25,000 because the budget included an amount for accommodation for both (see paragraphs 53 and 54). The FTT emphasised that its determinations were for the reasonable on-account charges only, and that that "does not necessarily mean that the same figures will apply on the determination of the actual costs for the year if those costs are referred to the Tribunal for a determination as to reasonableness."

22. The issue of a charge for warden's accommodation was considered again by the FTT in a decision given on 9 March 2017 covering the annual service charges for the years 2008 to 2012. The FTT refused to allow the recovery of the cost, explaining (at paragraph 76):

> "This was a notional cost to the landlord of providing the accommodation. It did not involve the actual expenditure of money by the landlord and so is not recoverable under the terms of the leases. This "cost" is therefore disallowed."

Although the 2017 panel consisted of the same Judge and Member who had made the 2016 decision they did not refer to it, or comment on the apparent inconsistency between their approach to final and on-account charges in different years.

23. The FTT's 2016 decision (but not its 2017 decision) was the subject of an appeal to this Tribunal by the leaseholders (*Knapper v Francis* [2017] UKUT 3 (LC)). The entitlement of the Park owner to charge a sum on-account as a contribution towards the cost of warden's accommodation was not an issue in the appeal.

The FTT's decision

24. The FTT dealt first with what it called "the divisor". It approached the issue as a question of fact: how many units were there on the Park? It did not refer to the expression used in the lease (the "fair and equitable proportion"). After describing the sub-divided unit occupied by the two wardens the FTT expressed its conclusion, as follows:

> "The Tribunal, having identified the unit in question, and there being no dispute between the parties that there were otherwise 176 units on site (including the disputed unit in question), finds that the disputed unit consists of 2 independent units, such that the total number of units is 177. In so deciding, the Tribunal was particularly persuaded by the fact that it was not possible for the occupier of one half to access the other half internally. To all intents and purposes, the division of the building has been such as to create 2 separate independent units, notwithstanding the sharing of water and electricity supply."

In calculating the sum payable by each leaseholder, the FTT therefore divided the appellants' total relevant expenditure by 177.

25. When considering the issue of accommodation costs, the FTT noted the different approaches taken in 2016 and 2017 and recorded Mrs Francis as arguing that the sum was recoverable by virtue of clause 4 and paragraph 6 of Schedule 3 to the lease. The FTT agreed with the 2017 decision that this was "a notional cost and not a sum actually expended as would be required by clause 4". If expenditure had actually been incurred in the provision of accommodation close to the site it was "likely" that the cost would be recoverable, but a notional cost could not be recouped through the service charge.

26. This Tribunal granted permission to appeal because of the inconsistency in approach between the previous decisions of the FTT and because the FTT had not considered the

actual costs incurred in relation to the wardens' and manager's accommodation. Permission was given in relation to the "divisor" because the FTT had not addressed the question of what was a fair and equitable proportion, and because the issue of apportionment of liability between the Park owner and the leaseholders appeared to the Tribunal to be related to the recoverability of a sum for the accommodation provided for the wardens and manager.

The appeal

27. The main issue in the appeal is whether a sum can be recouped through the service charge as an "Accommodation cost for Manager/Wardens", that being the disputed entry in the 2020 budget. The secondary issue is whether the FTT's approach to the assessment of the fair and equitable proportion was a permissible one.

The effect of the two inconsistent FTT decisions

28. I will first consider the consequence of the previous inconsistent decisions of the FTT on the recoverability of accommodation costs: in 2016 the FTT had allowed the recovery of an accommodation charge as part of the estimate for 2015; in 2017 it had disallowed the same charge for 2008 to 2012.

29. This is the first occasion, as far as I am aware, in which the Tribunal has had to consider the position of two parties, each of whom has a decision of a first-tier tribunal in their favour in earlier proceedings between them which raised the same point. When the issue comes before the FTT again are the parties bound by one of the earlier decisions, and if so, by which one? The question is not whether this Tribunal is bound by a decision of the FTT, as clearly it is not. The question is whether the rights of the parties had been settled by the first FTT decision, with the result that the FTT ought thereafter to follow the first decision whenever the issue arises for consideration again, so that, on any appeal from the FTT, the losing party ought to be prevented from arguing in favour of an interpretation of the lease inconsistent with the FTT's original un-appealed decision.

30. Despite the Tribunal having identified this as an issue of significance when granting permission to appeal, neither party focussed their submissions on it at the hearing. Mrs Francis understandably limited her comments to saying that she could not understand why the issue was not treated by the FTT as having been settled by its 2016 decision. Mr Crozier submitted that the 2016 decision did not bind the parties in later proceedings essentially because the 2016 proceedings had been concerned with an on-account demand for a different year. He also suggested that the relevant arguments had not been fully considered in 2016. After the hearing he helpfully referred me to the decision of the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46.

31. In the absence of submissions on both sides of the argument this is not an appropriate place to consider in any detail the legal principles discussed by Lord Sumption JSC in *Virgin* at paragraphs [17] to [22]. Of the cases considered by Lord Sumption the closest to the facts of this case is *Arnold v National Westminster Bank plc* [1991] 2 AC 93 which concerned the interpretation of a rent review clause in successive rent reviews. For the purpose of the second rent review the House of Lords held that public policy and justice required that in

special circumstances a party ought to be allowed to argue again a point which it had previously argued and lost in earlier proceedings. The special circumstances in that case included that the law relating to the interpretation of the rent review clause had been shown by subsequent decisions to have been misunderstood by the original court. The claimant was therefore allowed to reopen the argument it had lost in the first rent review. Some of the other factors which influenced that decision are also potentially relevant in this case, including the fact that the parties were in a continuing contractual relationship of landlord and tenant which, if the original decision which could now be seen to be incorrect was to bind them, would be conducted on a different footing from the one they had in fact agreed.

32. In *Hemmise v London Borough of Tower Hamlets* [2016] UKUT 109 (LC) this Tribunal (HHJ Behrens) considered the application of *Arnold* in circumstances where a previous decision of the FTT on the meaning of a service charge clause had not been the subject of an appeal and the same issue had arisen again in a later year. The Tribunal was firmly of the view that the decision of the original FTT had been wrong. It ruled that justice would not be served by perpetuating a wrong decision over the whole life of the lease, and that special circumstances existed which meant that the Landlord was not prevented from arguing the point of interpretation on which it had failed before the original first-tier tribunal.

33. The most significant feature of this case is that, unlike *Arnold* or *Hemmise*, the Tribunal is here faced with inconsistent decisions of two previous first-tier tribunals between (mostly, as there have been some sales) the same parties. The Tribunal must either decide which view of the meaning of the lease is correct, or it must choose between the previous decisions on some other basis. In my judgment the existence of inconsistent first-tier decisions between the same parties on the same point is in itself a special circumstance meaning that the doctrine of issue estoppel ought not to be applied.

34. Other factors support that approach. First, for reasons which I will explain shortly, it is clear to me that the FTT's 2016 decision proceeded on an incorrect assumption about the meaning of the service charge provisions in the lease so far as they concerned staff accommodation. Secondly, the issue for determination in the 2016 decision was the reasonable amount for each leaseholder to pay in advance for one year, and the question of what charge the Park owner was entitled to levy for staff accommodation costs for that year was one small part of that issue, which the FTT did not address in clear terms (although it is clear that it proceeded on an assumption that accommodation costs could be recouped). Thirdly, the FTT itself reminded the parties that its decision was of only limited effect and that the reasonableness of charges actually incurred (as opposed to prior estimates) could be revisited. Fourthly, the issue of interpretation of the lease was then reconsidered by the FTT in 2017 when it reached a clear and specific conclusion contrary to the assumption it had made the year earlier (although in relation to different years). Finally, neither decision was appealed on this point.

35. In all of these circumstances it seems to me not only to be just, but also to be necessary, that the Tribunal decide this appeal on its substantive merits and not simply on the basis of that one of the parties is bound by the earlier of the two un-appealed decision of the FTT.

Accommodation costs

36. Turning to the substantive issue, Mrs Francis explained that three members of staff were housed in accommodation provided by the appellants as their employers, the manager and the two wardens. The FTT had disallowed the cost of this provision on the basis that it was "notional" but the appellants incurred real expenditure on these units, such as for insurance and utilities charges and for repairs and maintenance, as well as foregoing the opportunity to let the units at a profit. Mrs Francis suggested that it was illogical to permit (as the FTT would have done) the cost of the appellants renting accommodation for staff off the Park (which would be more expensive and much less efficient from an operational point of view) yet refuse recovery of a charge for accommodation provided in a location which enabled the staff to do their job properly. The FTT had allowed the recovery of the charge in 2016 and had reduced the sum allowed for staff salaries because the budget included that accommodation cost, and there was no reason to take a different approach. The FTT had allowed the recovery of the charge in 2016 and had reduced the sum allowed for staff salaries because the budget included that accommodation cost, and there was no reason to take a different approach.

37. For the respondents Mr Crozier submitted that the FTT had been correct to find that only actual expenditure could be recovered, and that notional charges for providing staff accommodation in property belonging to the Park owner were not "sums actually expended or … liabilities incurred by the Lessor".

38. The Tribunal has recently considered the relevant authorities on the recoverability of notional accommodation charges in the context of sheltered housing schemes in *Retirement Lease Housing Association Ltd v Schellerup* **[**2020] UKUT 232 (LC), [2021] 1 P. & C.R. 11. At paragraph 16 the effect of the authorities was summarised as follows:

> "As these cases illustrate, the question whether a leaseholder is obliged to contribute towards the rent foregone by a landlord in fulfilling an obligation to provide accommodation for a resident member of staff is not a question of principle to which the same answer will be given in every case. In each case the answer will depend on the language used. The authorities do illustrate that, in the right context, it is not a misuse of language to refer to income foregone as a "cost", but beyond that there is little to be gained by tribunals comparing the language with which they are concerned with different provisions agreed between different parties. The focus should be on the words of the lease**,** read as a whole and in their relevant context, with the well-known principles of contractual interpretation in mind."

39. The relevant language in this case allows the Park owner to recover "the aggregate of the sums actually expended or the liabilities incurred by the Lessor … in connection with the management and maintenance of the Estate and the provision of such services as herein described". The rent which a landlord could have obtained by letting a unit of accommodation to a paying tenant rather than using it to house a member of staff is not, in my judgment, a sum "actually expended"; the parties' choice of language limits the landlord's entitlement to the recovery of money which has actually been paid out, and does

not extend to circumstances where a potential receipt of money has not been taken advantage of. Nor is possible to describe a rent foregone as a "liability incurred" by the landlord; it is not a liability at all.

40. The costs which may be recovered under clause 4 are costs actually expended. As the FTT correctly recognised, and Mr Crozier also acknowledged, the principle of the Park owner recovering the cost of providing accommodation for an employee engaged in the management and maintenance of the Park should not be controversial. The expense of employing a Park manager or warden falls naturally within the scope of "management and maintenance of the Estate", and if there are operational reasons why staff reasonably need to live on the Park itself the costs associated with providing accommodation for them ought also to be recoverable. What the appellants cannot do is recover a sum which they have not "actually expended" because the language of the lease is restrictive. The practical difficulties and expense of housing a warden off-site, in accommodation rented for that purpose, are not relevant, and the FTT's reference to that possibility was simply to illustrate the difference between a cost actually expended and a notional cost of providing accommodation in a lodge which already belongs to the appellants.

41. I therefore agree with the FTT in its decision under appeal and with the decision of 9 March 2017 that a notional staff housing cost representing letting income foregone by the landlord cannot be recovered as part of the service rent.

42. But that is not the end of the matter. The appellants say that the costs incurred by them in providing the accommodation are not all "notional" costs. They contribute to the cost of providing services for each of the chalets or lodges used to house staff members and they pay the utilities costs, business rates, insurance and maintenance costs of the accommodation.

43. When I put to Mr Crozier the proposition that the annual budget ought properly to include a figure for expenses which would actually be incurred in connection with staff accommodation, he had two answers. The first was that the figure included in the 2020 budget was said to represent the income which could have been obtained from letting the flats, and it had not been claimed by reference to costs actually incurred, The second was that the contribution made by the appellants towards the costs of running the Park as a whole through their payment of a sum equivalent to the service charge, was not a cost actually incurred.

44. Neither of these answers seems to me to be a persuasive reason, in principle, why a portion of the figure of £18,000 rejected by the FTT should not be included in the budget to cover costs which were actually to be incurred in respect of manager's and warden's accommodation. As to the first point, the figure in question is an estimate, and while the appropriate figure must be reasonable it need not be precise or based on a particular method of assessment. As to the second, all of the costs included in the estimated service charge were costs to be incurred by the appellants in 2020; the appellants' accounting practice of raising a service charge demand of themselves should not be allowed to obscure the fact that the FTT was satisfied that £1,475 was a reasonable pre-estimate of the expenses the appellants would incurred in 2020 in respect of each unit on the Park. The costs of utilities

and maintenance for the staff accommodation itself was additional to that expense incurred by the appellants. It therefore seems to me to be permissible for the appellants to be allowed a sum to reflect their estimated expenditure on actual accommodation costs for their staff subject to their being evidence to support it.

45. The FTT did not make such an assessment and it would be open to this Tribunal to do so if there was evidence on which the assessment could be based. Both parties emphasised that they did not want this matter remitted to the FTT for further consideration. I regret that it is not possible on the facts found by the FTT or the evidence provided to it for me to determine, even on an estimated basis, how much the appellants spend annually on utilities, insurance, maintenance and other expenses associated with the manager's and wardens' accommodation. Any figure I provided would simply be a guess without any underpinning in evidence.

46. I therefore decline to include a figure for the costs of providing staff accommodation in the 2020 budget. I emphasise, however, that that does not prevent the appellants from including a figure for actual expenditure in the 2020 end of year service charge accounts.

The fair and equitable proportion

47. The difficulty I have with the FTT's treatment of what it called the "divisor" issue, is that by focussing on the issue of whether the unit occupied by the Park wardens was one unit or two, it did not ask the question posed by the leases. The original parties to the leases had agreed that each leaseholder would pay a fair and equitable proportion of the Park owner's expenditure in running the Park. That choice may have been made because of the relatively complex nature of the Park and the fact that expenditure on services and management was to be incurred not only for the benefit of the leaseholders, but also for other users of the Park, or it may have reflected an appreciation that the Park might change over time. But whatever the parties' reasons for adopting the fair and equitable proportion as the measure of each leaseholder's contribution, that is the standard to be applied whenever an apportionment issue has to be considered.

48. I was told that the chalets and lodges were all about the same size but, even if there are variations in size, there is an obvious logic in an equal division of expenditure between all users of the Park (to the extent that it is to be attributed to the permanent residents). It would be impractical to apportion the service charge by reference to the actual use by each leaseholder. The same approach has been taken since the grant of the first leases and there is no reason to doubt that, in general, it is a fair and equitable method of apportionment.

49. But the construction of the new wardens' chalet raises an issue which has not previously arisen. A unit no larger than the other permanent units on the Park is now occupied as two self-contained units. The parties did not disagree about the basic facts, but rather about the consequences of those facts for the apportionment of the cost of services. The FTT's determination that the building was "to all intents and purposes … 2 separate independent units" simply restated those basic facts without asking the question whether it was fair and equitable in the circumstances for a slightly smaller contribution to the cost of services to be apportioned to each leaseholder because two wardens were separately accommodated in a

single building. The FTT's conclusion, that each leaseholder's contribution should be calculated by dividing the total by 177, may have been one possible answer to the question of how costs should be apportioned fairly and equitably. But the FTT did not arrive at its conclusion by asking itself that question, which is the only relevant question, and its determination must therefore be set aside.

50. Given the very small sums involved in this appeal and the long history of disputes and appeals, neither party wanted the issues in this appeal to be returned to the FTT for further consideration, and it is obviously more convenient for this Tribunal to substitute its own decision.

51. It does not seem to me to be possible to determine the fair and equitable proportion for each leaseholder to pay following the addition of the wardens' chalet without considering the purpose for which that building is occupied. The wardens are employed to assist in the management of the site and the provision of the services for which the service charge is paid. In those circumstances it might be thought surprising that the proportion of those costs payable by each leaseholder should vary depending on the style of accommodation provided for them. The appellants might have made a persuasive case that the provision of accommodation for wardens was one of the services provided to the leaseholders and other Park users, and should not be regarded as a benefit to them as Park owners so as to justify any reduction in the proportion payable by each leaseholder. But the appellants did not make that case. Instead they propose that the wardens' accommodation should be treated as a single unit for which they should contribute in the same proportion as leaseholders contribute for their single units.

52. It is also relevant to recall Mr Crozier's argument that the appellants should not be permitted to take into account the notional service charge they contribute for the manager's and wardens' accommodation when calculating the total expenditure to be used when determining the amount of the service charge. That is because, he argued, the appellants' own notional contribution is not a sum expended or a liability incurred, it is a reduction in the amount they collect from others which the language of clause 4 of the lease is not apt to cover. Yet if that is the approach to be taken (as I agree it ought to be) it seems to me clearly to be unfair and inequitable for the apportionment of contributions not also to take into account the fact that the wardens are accommodated to enable them to provide services to the leaseholders. To reduce those contributions further because the building in which the wardens are accommodated is subdivided into two separate units seems to me to give no weight to the purpose of their being accommodated at all.

53. I have no doubt that the apportionment for which the leaseholders argue is not fair and equitable. The only alternative proposal is that put forward by the appellants and rejected by the FTT, which in my judgment is fair and equitable. On that basis I determine that the fair and equitable apportionment should be undertaken by dividing the total relevant expenditure by 176, not 177.

Disposal

54. I therefore allow the appeal on the "divisor" issue and substitute a divisor of 176 for the FTT's 177. On the evidence, I refuse to disturb the FTT's assessment that no sum should be included in the 2020 budget as an estimate of recoverable staff accommodation costs, but for the reasons I have given the appellants may include any expenditure actually incurred in the 2020 end of year accounts.

55. The net effect of these determinations is that the total estimated costs for 2020 remain at £261,056.25 plus VAT, while the contribution of each leaseholders is increased to £1,483.27 plus VAT.

Martin Rodger QC,

Deputy Chamber President

26 July 2021