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

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| **Case Reference** | : | CHI/24UJ/LSC/2021/0118 |
| **Property** | : | 59 Endeavour Way, Hythe Marina Village, Hythe, Southampton SO45 6LA |
| **Applicant** | : | Heather Quillish |
| **Representative** | : | Scott Bailey LLP |
| **Respondent** | : | Hythe Marina Village Ltd |
| **Representative** | : | Clarke Wilmott LLP (solicitors) |
| **Type of Application** | : | Section 27a Landlord and Tenant Act 1985 (service charges), s.20C Landlord and Tenant Act 1985 and para 5 of Sch.11 to the Commonhold and Leasehold Reform Act 2002 |
| **Tribunal Members** | : | Judge Mark Loveday |
| **Date and venue of hearing** | : | 20 July 2022 - Decision without a hearing (Rule 31) |
| **Date of Decision** | : | 26 July 2022 |

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## DETERMINATION

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## Introduction

1. This is an application for a determination of liability to pay service charges under s.27A Landlord and Tenant Act 1985 ("the 1985 Act").

2. The Applicant is the lessee of 59 Endeavour Way, Hythe Marina Village, Hythe, Southampton SO45 6LA. The Respondent is the landlord. The application dated 16 December 2021 seeks determinations in respect of various items of relevant costs incurred during the 2020/21 service charge year.

3. Directions were given on 4 February 2022 and 11 April 2022. On 1 July 2022, a Deputy Regional Judge considered whether the case was suitable for paper determination, and his directions make it clear he was fully aware of the issues raised by both parties. He directed that the Tribunal would make a decision without a hearing under Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The parties are both represented by experienced solicitors and did not object to this course of action.

4. Before proceeding to make a determination, this Tribunal has given further consideration to whether the matter is suitable for a paper determination, It has considered the cautionary advice given by the Deputy President in <u>Enterprise Home Developments LLP v Adam</u> [2020] UKUT 151 about adopting the Rule 31 paper procedure where there may be issues of fact. But it is satisfied the Tribunal has made clear what is expected of the parties and that they have been able fully to participate in the proceedings. In particular, both parties (which it is repeated, are represented) have been given an opportunity to respond to evidence submitted by the other side. This Tribunal concludes that it can deal with the case fairly and justly without a hearing on the papers alone.

## The facts

5. Hythe Marina Village is a modern mixed-use development on the western shore of Southampton Water, comprising a 206-berth marina, 226 waterside homes, shops, restaurants, bars and a hotel. The residential and commercial properties are arranged along the sides of the various boating berths. There are also three separate blocks containing services for the boatowners, including showers and laundry facilities, known as Blocks A, B and C. Block C includes public toilets accessible to both berth owners and leaseholders.

6. The managing agents for the Village changed during the course of the 2019/20 service charge year. The Respondent initially employed Savills as agents, but they were replaced by Rendall & Rittner Ltd with effect from 14 August 2019.

7. The agents prepared a service charge budget dated April 2019, which anticipated that the Respondent would incur relevant costs of £801,003 during the 2019/20 service charge year in relation to the Village. A contribution towards these was apparently sought by way of interim service charge demands.

8. On 21 January 2021, the Respondent produced annual end of year accounts audited by Messrs UHY Hacker Young. These included detailed income and expenditure accounts for 2019/20. In February 2021, the agents prepared a

service charge reconciliation and expenditure report for the 2019/20 service charge year, which dealt with various apportionments (see below) and which included a detailed summary of expenditure. In essence, the actual expenditure shown was £701,615, which was less than the anticipated expenditure. A credit of £299.73 was therefore made to the Applicant's service charge account and no balancing service charge demands were made at year end.

9. One aspect of the service charge accounting which had an impact on several issues before the Tribunal was the apportionment of costs between the Village and the commercial parts of Hythe Marina. Under clause 9.3.2 of the Lease, the Respondent's apportionment of overall costs for the Marina site is described as "the Reversioner's Share". In practice, the split is calculated in accordance with the terms of a Management Agreement Deed dated 24 July 1985, as varied ("the Deed"). Since 2008, the "Reversioner's Share" has been 64.899% of the overall management costs for the site, with the owners of the commercial users of Hythe Marina being responsible for 35.101% of overall costs. These apportionment percentages are not disputed in this application.

## The Lease

10. The lease of 59 Endeavour Way dated 19 January 1999 demised the premises and a mooring berth for a term of 999 years less 10 days from 25 March 1984. The material covenants of the Lease are set out in **Appx.I** to this decision.

## The material before the Tribunal

11. In accordance with the directions, each party filed statements of case. The Applicant relies on a Statement of Case dated 1 March 2022 and Reply dated 24 May 2022. The Respondent relies on a Statement of Case (drafted by counsel) dated 28 April 2022. The statements of case exhibit numerous documents and the Respondent has also filed witness statements from Mr David Rush, Mr Ian Aiken, Ms Karen Gray, Mr Richard Broadribb and Mr Stuart Probee.

12. Of this evidence, it is helpful at this stage to refer to the witness statement of Mr Stuart Probee dated 27 April 2022. Mr Probee is the Portfolio Accountant at Rendall & Rittner and has undertaken an analysis of the costs involved. He sets out this analysis in a spreadsheet annexed to his statement at SP2, which is referred to below.

## The issues

13. The Applicant challenges nine categories of relevant costs and applies for orders under s.20C of the Act and para 5A of Sch.11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

14. The Applicant's Statement of Case also originally questioned the accuracy of the figures for relevant costs which the Respondent used for calculating the service charges. These figures appeared hard to reconcile with the figures given in the annual accounts. In his witness statement, Mr Probee explained that the discrepancy was down to the treatment of VAT, and this seems to have satisfied the Applicant about the accuracy of the figures relied upon by the Re-

spondent. In paras 4-5 and 7 of her Reply, the Applicant accepted Mr Probee's explanation and also accepted that the apportionment between the residential and commercial elements was generally correct.

**Issue 1: Electricity Common Parts (£18,472.81)**

15. According to Mr Probee's spreadsheet, the electricity supplied to the common parts amounted to £62,813.27 in 2019/20. Of that, £40,765 was payable by the residential lessees at the Village, including the Applicant, in accordance with the Deed.

*Argument*

16. The Applicant challenged part of the costs which related to the supply of electricity to Block C. It should be said that the sums involved are relatively modest. Mr Richard Broadribb is the Respondent's Property Director for Hythe Marina Village. According to his witness statement dated 27 April 2022, only about £325 of electricity costs was incurred in relation to Block C in 2019/20, out of a gross Estate electricity expenditure of £28,464.07. This meant the average contribution by each of the residential lessees to the Block C electricity costs was about 93 pence. And in any event, the Applicant only challenges *part* of these costs.

17. The Applicant argues the overall electricity costs for Block C should be further apportioned between the showers and laundry facilities on the one hand, and the WCs on the other. In essence, the Applicant accepts at para 1.2 of her Statement of Case that "the costs … for supplying electricity to the public conveniences" properly "form part of the service charge". But she suggests the residential lessees gain no benefit from the showers and laundry facilities. In her Reply at para 10, the Applicant points to the lack of any specific reference in clause 8.3 of the Lease to "showers" or "laundry facilities", whereas "public conveniences" are specifically mentioned. She does not say what proportion of the relevant costs of electricity should be disallowed as being attributable to the showers and laundry facilities alone.

18. The Respondent argues in para 20 of its Statement of Case that clause 8.3 of the Lease permits the landlord to include all the electricity costs for Block C in the service charges. The overall apportionment in the Deed mentioned above already takes into account the relative use of the WCs and berth owners' facilities. In any event, it was impracticable to split the costs, because there was no separate meter for the WCs and the other facilities within Block C.

*Decision*

19. The Applicant does not clearly distinguish between contractual recoverability and arguments under s.19(1) of the 1985 Act. But in any event, the Tribunal is satisfied the relevant costs of supplying electricity to the showers and laundry facilities in Block C are recoverable under the Lease, and that they were reasonably incurred under s.19(1) of the 1985 Act. Given the very modest sums involved, it is only necessary to set out the primary reasons for this:

(a) The costs of supplying electricity to the showers and laundry facilities in Block C do not fall naturally within the words of clause 8.3 of the Lease. But the Tribunal finds the cost of supplying electricity to the showers and laundry elements of Block C are covered by the widely drawn "sweeper" provision at clause 8.12 of the Lease. They are a "thing ... necessary or advisable for the proper maintenance ... [or] ... amenity of the Village.

(b) The Applicant's interpretation would cause impermissible uncertainty, which a court or tribunal leans against when interpreting the meaning of a contractual term. One cannot realistically "split" the electricity charges incurred in respect of Block C between the two parts (or indeed realistically split any other costs of repairing or decorating the roofs and walls of Block C). It is far more likely the parties intended that the all the costs for supplying electricity to Block C would dealt with together. Any differential benefit to the residential lessees was intended to be reflected in the overall apportionment of costs between the Village and the commercial users.

(c) As to whether these costs were reasonably incurred, the Tribunal does not accept the narrow formulation of "benefit" relied upon by the Applicant. Leaseholders are commonly obliged to contribute to costs relating to parts of a building or estate which they have no access to – or indeed that they are prohibited from accessing (such as plant rooms, roofs and foundations). Laundry and shower facilities form part of the typical "offer" that a marina provides. They are in principle little different to a driveway exclusively used by residents on the opposite side of the Marina, and not accessible to this property.

(d) In any event, on the evidence presented, the Tribunal is not satisfied the leaseholders derive no actual benefit from the showers and laundry facilities. It notes the Lease allocates a boating berth to the Applicant. The showers and laundries in Block C appear to be available to lessee berth owners - even if they prefer to use the much more convenient private bathrooms and laundry facilities within their own homes.

20. The Tribunal therefore finds the relevant costs of £40,765 for electricity supplied to the common parts were payable under the Lease and reasonably incurred under s.19(1) of the 1985 Act.

## Issue 2: Wages (£165,544.49)

21. According to Mr Probee's spreadsheet, the gross costs of wages for the common parts of the Village was £255,080.77 in 2019/20. Of that, £165,544.49 was payable by the residential users of the Village, including the Applicant, in accordance with the Deed.

*Argument*

22. The Applicant challenged part of the costs of employing Mr Aiken, the Estate Supervisor. Mr Aiken worked partly at the Village and partly at Ocean Village, another site owned by the Respondent in Southampton. In para 2.2 of her Statement of Case, the Applicant initially submitted the supervisor worked 3 days a week at the Village, and 2 days a week at Ocean Village. However, in

para 25 of her Reply, the Applicant accepted that a 25%:75% apportionment was a reasonable split between at the Village and Ocean Village for Mr Aiken's wages/salary costs.

23. The Respondent was unwilling to give details of Mr Aiken's gross salary, or to stater the element of the overall wages bill of £165,544.49 which was attributed to the Supervisor's pay. But it said Mr Aiken's overall salary was allocated between the two sites using a 15%:85% apportionment. The Respondent relied on a witness statement from Mr Aitken dated 27 April 2022, where he stated that he divided his time between the two sites as he deemed necessary. In para 4, Mr Aiken stated that "in an average week, I typically spend at least four days at the Village, and I try to ensure that I am present at the Village on one day during the week". Even when at Ocean Village, Mr Aiken was often carrying out work at the Village remotely. But the division of his time was flexible, and it did fluctuate from one week to the next.

24. The directions gave the Applicant an opportunity to respond to Mr Aitken's evidence, and the response was given in paras 22-24 of the Reply. To summarise, the Applicant suggested:
    (a) There was a Supervisor's office at the Village, but none at Ocean Village. Whilst the Applicant accepted the Supervisor carried out work for the Village whilst physically present at Ocean Village, the opposite was also the case. Indeed, most of the paperwork functions for Ocean Village were conducted from the office at the Village, and the Applicant produced photographs of documents and files relating to Ocean Village in Mr Aiken's office.
    (b) There was an email from the Village Residents Association dated 7 February 2022, which referred to a meeting with Rendall & Rittner (presumably in 2019). The email suggested the agent would be splitting the Supervisor's time "3 days in [Hythe Marina Village] and two in [Ocean Village]".
    (c) There was an email from Mr Probee dated 4 January 2022, which stated that "at the time of the accounts 15% of the cost was credited when we know it should be 25%. The additional 10% will be shown in in this year's accounts".
    (d) There was a further spreadsheet circulated before the application, where the Respondent's Residential Property Manager stated "apologies, the actual split is 75% Hythe and 25% Ocean Village. If there is any adjustment needed, these will be reflected in the account to March 2022".

*Decision*

25. Once again, the specific legal basis of the challenge to these costs is not explained. But the Tribunal assumes the argument is that part of the relevant costs of employing the Supervisor were not reasonably incurred under s.19(1) of the 1985 Act.

26. In essence, both sides agree the apportionment of Mr Aiken's gross pay between the two sites should broadly reflect the relative time spent by the Supervisor at Hythe Marina Village and Ocean Village. Given that Mr Aiken does

not keep time sheets, any calculation of the time spent by him at each site is likely to be little more than a fairly rough estimate. This is reflected in the figures ultimately relied on by each side, which adopted rounded percentages (15%:85% and 25%/75%).

27. Given the agreement that the allocation of costs between the two sites should broadly reflect the stime spent by Mr Aiken at each, the decision is essentially a question of fact as to how much time was spent administering the Village and Ocean Village. And reviewing the material before it, the Tribunal considers the most important evidence is that of Mr Aiken himself. Mr Aiken says in his statement that each week he typically spends "at least four days at the Village" and one day at Ocean Village. Mr Aiken is the person best placed to say how much time he devotes to each site, and there is no obvious reason why this statement is wrong or unreliable. The statement is also consistent with the agreed position that most of Mr Aiken's time is spent supervising the larger site at Hythe Marina Village, where there is an office.

28. The Tribunal attaches less weight to the emails and spreadsheets produced by the Applicant:
    (a) Even if much weight can be attached to the hearsay evidence of what was said by the managing agents at a meeting on an unknown date in 2019, the indirect evidence of the agent's expressed intentions does not outweigh the direct evidence of Mr Aiken as to time actually spent at each site.
    (b) The context of the email from Mr Probee dated 4 January 2022 is far from clear.
    (c) The context of the spreadsheet is again far from clear. But in any event, the percentage suggested is hard to reconcile with the statement in the same spreadsheet that Mr Aiken "spends approximately half a day every now and again at Ocean Village".

29. But the Tribunal does accept the point made by the Applicant, supported by evidence, that that Mr Aiken partly manages Ocean Village while sitting in his office at Hythe Marina Village. Indeed, this is not inconsistent with Mr Aiken's own evidence of remote and flexible working.

30. The Tribunal therefore starts with Mr Aiken's (uncontested) evidence that in 2019/20, he was physically present at Hythe Marina Village for an average of four days a week. This represents a 20%:80% split of time between the two sites. It does not then add anything for remote working from Ocean Village, because there is evidence that part of the time spent on both sites was taken up managing the other site remotely. The problem for the Tribunal is that it has no way of assessing the relative amount of remote working on each site. But doing its best, the Tribunal finds the remote working from each site should cancel itself out. It therefore does not go beyond the 20%:80% apportionment of costs between the two sites based on time spent by Mr Aiken at each location.

31. The Tribunal makes three further observations:
    (a) The ultimate effect on the Applicant's individual service charge of this finding is likely to be modest.

(b) The Tribunal has insufficient evidence to calculate the effect on the Applicant's service charge, because it does not have details of the Supervisor's gross pay. That will have to be recalculated by the Respondent.

(c) This decision is very much based on the limited evidence available to this Tribunal about Mr Aiken's activities during the 2019/20 service charge year. It may be that in other service charge years, time sheets may be available to support a different apportionment of Mr Aiken's time between the two sites.

32. The Tribunal therefore finds that part of the relevant costs of employing a Supervisor were not reasonably incurred under s.19(1) of the 1985 Act. 80% of the Supervisor's wage costs should be taken into account for time worked at Hythe Marina Village before the apportionment in the Deed is undertaken. And insofar as this is less than the 85% allocated by the Respondent to Hythe Marina Village, the additional relevant costs were not reasonably incurred.

**Issue 3: Security Staff (£40,765)**

33. According to Mr Probee's spreadsheet, the cost of employing security staff for the common parts of the Village amounted to £62,813.27 in 2019/20. Of that, £40,765 was payable by the residential users of the Village, including the Applicant, in accordance with the Deed.

*Argument*

34. At para 3.2 of her Statement of Case, the Applicant challenged these costs on the basis that she was only aware of one security guard on site. Even if a guard worked a 12-hour shift, a figure of £62,813.27 was excessive. She further referred to two invoices relating to "additional security as requested by Ian Aitken" dated 31 October 2019 (£2,157.36) and 30 September 2019 (£3,595.60). The invoices were for periods which partly overlapped. In December 2020, the Respondent changed the security firm that provided security from Corporate Facilities Services to Orion Safeguarding Ltd. The final Corporate Safeguard Facilities invoice dated 1 December 2019 (£4,640.08) again partly overlapped with the Orion invoice dated 24 January 2020 (£1,989).

35. The Respondent provided a copy of the Corporate Facilities and Orion Safeguarding contracts. The former charged £12.75 per hour and the latter £14 per hour + VAT (double on bank holidays). These were typical for the market, and inclusive of all agency costs and overheads. Staff were required to be on site 10 hrs each day. But the number of staff had varied from time to time.

36. As to the double counting, this was accepted by the Respondent. Ms Gray assessed these overpayments at an average of £4.16 per leaseholder. A credit of £5,242.08 was due to the Respondents, and this would be made in the 2021/22 accounting year. But the agents had replaced Corporate Facilities because they were concerned about their performance. The Respondent therefore withheld payments of £6,467.85 for this. The Applicant and the lessees were better off as a result than if they had bene credited with the 'double counting' overpayment.

37. In paras 27-30 of the Reply, the Applicant argued that the two sums of £5,242.08 and £6,467.85 were not the same thing. Both should be credited against the figure for security staff.

*Decision*

38. This is again an issue under s.19(1) of the 1985 Act.

39. The general suggestion that the costs of providing security are excessive is not made out. No evidence has been provided to support an hourly rate of £12.75 to £14 + VAT or that the contracts provided for too many hours.

40. Of the total sum paid for security staff, it is admitted there has been some double counting. The Tribunal therefore upholds the contention by the Applicant that costs of £5,242.08 were not reasonably incurred.

41. As to the withheld payment of £6,467.85, that sum has not been paid to the contractor. It has not therefore been "incurred" at all. In a sense, the withheld payment represents a finding the Tribunal might otherwise have made that part of the on-site security was not of a reasonable standard under s.19(2) of the 1985 Act. But the Tribunal agrees the two items are not the same thing, and the Respondent needs to give credit for this figure in addition to the double counting.

42. The Tribunal therefore finds the following relevant costs for security staff were not reasonably incurred under s.19(1) of the 1985 Act:
   (a) £5,242.08 ("double counting")
   (b) £6,467.85 (withheld payment)

**Issue 4: Communal Television systems (£7,398.91)**

43. According to Mr Probee's spreadsheet, the cost of Communal Television for the common parts amounted to £11,400.94 in 2019/20. Of that, £7,398.91 was payable by the residential users of the Village, including the Applicant, in accordance with the Deed.

44. In paras 31-32 of her Reply, the Applicant agreed liability to contribute to these costs.

**Issue 5: Gardening (£51,180.65)**

45. According to Mr Probee's spreadsheet, the overall cost of gardening amounted to £78,962.53 in 2019/20. Of that, £51,180.65 was payable by the residential users of the Village, including the Applicant, in accordance with the Deed.

46. It is common ground that the Respondent engaged Positano Ltd t/a Lyndhurst Landscaping and Management to provide both landscaping and maintenance services – although as appears below, other contractors may also have provided gardening services.

*Argument*

47. In her Statement of Case, the Applicant stated that the Respondent had provided numerous invoices from Lyndhurst Landscaping which related to the relevant cost of gardening. In essence, she did not consider the invoices supported the Respondent's figures.

48. In Annex 14 of its Statement of Case, the Respondent supported Mr Probee's evidence by providing an analysis of various invoices from Lyndhurst Landscaping and Maintenance. There was a minor discrepancy due to a small error with Lyndhurst invoice no.4985 (which was reversed in the following service charge year). The Respondent also provided the contract with Lyndhurst Landscaping and three sample invoices.

49. In paras 34-40 of her Reply, the Applicant referred to the above analysis at Annex 14. She calculated that the gardening invoices amounted to only £62,399.88 inclusive of VAT. She had also seen two further invoices from other gardening contractors amounting to £738. She therefore argued the relevant costs should be limited to those supported by the invoices in Annex 14 plus the two others. Her case was that the Tribunal should allow relevant costs of £62,399.88 + £738 = £63,137.88. This was obviously well below Mr Probee's gross figure of £78,962.53.

*Decision*

50. The issue here is simply whether there are invoices from gardening contractors to support the rival figures advanced by the two parties. In resolving this issue, the Tribunal is hampered by the fact that neither party saw fit to provide a complete run of gardening invoices. The Tribunal has only been presented with secondary evidence of the relevant gardening costs, namely the analysis of the Lyndhurst Landscaping invoices at Annex 14 of the Respondents' Statement of Case (which both parties rely upon). There is also the concession by the Applicant that there are invoices from other contractors amounting to £738, albeit this is not mentioned by the Respondent.

51. Doing its best with the secondary evidence available, the Tribunal has undertaken its own assessment of the gardening costs in Annex 14 of the Respondents' Statement of Case. This is attached at **Appx.II** to this decision. The Tribunal calculates the gardening invoices from Lyndhurst Landscaping add up to £74,858.26 (inclusive of VAT). To this must be added the two additional invoices for £738 mentioned by the Applicant. On the basis of the limited evidence which the parties chose to provide to the Tribunal, there appear to exist gardening invoices for £75,596.26. This is fairly close to Mr Probee's gross figure of £78,962.53 (inclusive of VAT), and it is certainly far higher than the alternative figure for gardening costs advanced by the Applicant. Given that Mr Probee's evidence has provided reliable in other contexts, the Tribunal accepts his spreadsheet evidence that the Respondent incurred gross gardening costs of £78,932.53 in the 2019/20 service charge year. When apportioned in accordance with the Deed (albeit with a slight discrepancy which has apparently now been reversed), the relevant costs taken into account in calculating the Applicant's service charge were £51,180.65.

**Issue 6: Planter Works (£32,565.92)**

52. According to Mr Probee's spreadsheet, the overall cost of General Maintenance amounted to £95,739.79 in 2019/20. Of that, £62,133.96 was payable by the residential users of the Village, including the Applicant, in accordance with the Deed. The only issue relates to the cost of work to planters on one of the estate roads. The Applicant identified four invoices for these works, amounting to £50,178.62. That cost has of course to be apportioned between the residential users of the Village and the rest of Hythe Marina Village. The relevant costs in issue are therefore £32,565.92.

53. Shamrock Way runs along the western side of the development and is open to the sea on the other side. The planters in question can only loosely be described as such. The development at this point is on a slightly higher level than the road, and the change in levels is achieved by a low retaining wall with flowerbeds behind. There are various photographs at Annex 16 to the Respondent's Statement of Case. As originally constructed, the retaining wall was formed by vertical treated timber planks topped with timber strips. According to one of the work invoices at Annex 21 to the Respondent's Statement of Case, these ran for approx. 67.5m, and the retaining walls varied from 400mm to 900mm in height. The timber planks in the photographs plainly held back a substantial weight of earth, with flowerbeds, shrubs and bushes behind. And they directly faced the sea. The photographs show that in one place the planks had buckled outwards, and the planters were cordoned off with temporary metal fences.

54. It is common ground that in 2019-20, works were carried out to replace the timber planks with brickwork. The photographs mentioned above show the new brick retaining wall.

55. According to para 28 of Mr Broadribb's witness statement, the decision to renew the wooden planters was made in 2020. The Respondent considered the wooden planters had quickly become worn and unsightly. Rather than continuing to replace the planters like for like, knowing they would soon become weathered, quotes were obtained for renewing with brick. Brick planters would have greater longevity, ultimately reducing the maintenance costs recovered from the residential leaseholders going forward. Mr David Rush, Chair of the Resident's Association, also provided a witness statement. In essence, although initially slightly more expensive, brick planters would last significantly longer and therefore represent much better value for money. The Residents' Association agreed the large wooden planters located across the Village should be replaced with brick, while the smaller and standard size planters should remain in wood or composite wood facing. This was due to concerns being raised regarding the appearance of the Village generally and overall long-term value for money. The vast majority of residents agreed with the decision to replace the wooden planters with brick.

*Argument*

56. The focus of the argument between the parties was on contractual matters, not s.19(1) of the 1985 Act.

57. The Applicant argued that the planter replacement was a work of improvement, not repair. She referred to the sweeper provision at clause 8.12 of the Lease. She submitted that:
    (a) For works to be works of repair, there must be as a starting point the proposition that that which is to be repaired is in a physical condition worse than that in which it was some earlier time: Quick v Taff-Ely BC (1986) QB 809). Works to instal something which was not previously in place are not and cannot be works of repair.
    (b) As to the replacement of wooden surrounds to planters with brick surrounds, those are not works carried out to eradicate an inherent defect in the design and construction of the planters (which may be repaired): Ravenseft Properties Limited v Davstone (Holdings) Ltd (1980) QB 12). Nor, the Applicant contends, could such work be described as profit-saving measures taken to avoid the reoccurrence of some form of deterioration.
    (c) The Applicant accepts that where there is a choice of methods to carry out a repair, the choice rests with the Respondent, provided the choice is reasonable. To replace a wooden structure with a brick structure is not a choice which is reasonable. The courts have, for obvious reasons, historically addressed the definition of 'repair' by reference to buildings. But it is submitted that the same approach should be adopted in relation to the repair of common areas such as in this case, large planters.
    (d) In Brew Brothers Limited v Snax (Ross) Limited (1970) 1 QB 612 at 640, Sachs LJ stated:

    > "It seems to me that the correct approach is to look at the particular building, to look at the state which it is in at the date of the lease, to look at the precise terms of the lease, and then to come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant, it must not be looked at in vacuo. Quite clearly, this approach involves in every incidence a question of degree …".

    (e) That was expanded upon in Holding & Management Limited v Property Holding & Investment Trust Plc & Others (1990) 1 All E.R. 938, CA in which Nicholls LJ stated:

    > "Thus, the exercise involves considering the context in which the word 'repair' appears in a particular lease and also the defects in remedial works proposed. Accordingly, the circumstances to be taken into account in a particular case either one or other of these heads will include some or all of the following: the nature of the building; the terms of the lease; the state of the building at the date of the lease; the nature and extent of the defects sought to be remedies; the nature, extent and costs of those remedial works; at his expense the proposed remedial works are to be done; the value of the building and its expected lifespan; the effect of the works on such

value and lifespan; current building practice; the likelihood of a re-occurrence if one remedy rather than another is adopted; the comparative cost of alternative remedial works and their impact on the use and enjoyment of the building by the occupants. The weight to be attached in these circumstances will vary from case to case. This is not a comprehensive list. In some cases, there will be other matters properly to be taken into account".

(f) It is understood that timber planters have been in place for over 20 years. If the timber planters were in need of repair by way of replacement, it is suggested that is not an unreasonable lifespan. Indeed, other timber planters have, and still are, being replaced with timber. However, to replace with brick is something entirely different to that which already existed. Such works go beyond repair.

58. In its Statement of Case, the Respondent denied the works were works of improvement:

(a) The planters that were replaced were wooden structures which had reached the end of their lives, having rotted. The wet coastal environment will exacerbate the unavoidable tendency of wooden planters to decay.

(b) The Respondent is liable under the terms of clause 8.1 to "maintain in good and substantial repair and condition and where necessary [to] renew rebuild reinstate or replace" them. It is also under an obligation to "maintain" the landscaped areas under clause 8.2. Furthermore, the walkways and roads must be kept in the same condition (including renewal replacement and rebuilding) by clause 8.3. To the extent necessary, the sweeper provision in clause 8.12 was also engaged.

(c) It is thus clear that the Respondent's obligations extend well beyond simple 'repair' (albeit the Respondent's case is that the works to replace the planters were in fact repairs properly so called). The use of the additional words including 'renew' 'rebuild' 'reinstate' and 'replace' reflects the obvious point that the Lease is a very long-term contract; the parties cannot be taken to have intended that the precise materials used for the landscaping at the Village (and other parts of the Village) would never change from time to time where parts are renewed / replaced as necessary. The installation of the brick planters is just such an evolution. At the end of the day, the replacement is a planter and serves the same function and it cannot sensibly be described as an 'improvement' in a legal sense.

(d) In any event, a repair does not cease to be a repair if it also effects an improvement: Wandsworth LBC v Griffin [2000] 2 EGLR 105.

(e) In the circumstances, it is obvious that work to replace the planters with new planters constructed in a more durable form was a course of action both open to the Respondent under the terms of the Lease and an eminently reasonable course of action to pursue to avoid continual replacement at relatively regular intervals.

*Decision*

59. The Tribunal agrees with the Applicant that the same approach should be adopted in relation to the repair of common areas as applies to the repair of buildings.

60. It considers the material provisions of the Lease are clauses 8.1 and 8.12. Clause 8.1 is the primary obligation, and it is not simply expressed as a covenant to "repair". There is an obligation to maintain the Village in "good and substantial … condition" and "where necessary [to] renew rebuild reinstate or replace". These words go beyond a mere covenant to "repair": *Dilapidations: The Modern Law of Law and Practice* (7th Ed) at 4-27. As already observed, clause 8.12 is intended as a widely worded sweeper clause. And again, it is not limited to "repairs". The landlord may undertake works of "maintenance … renewal re-building safety [and] amenity". It agrees with the Respondent these covenants are read against the background that the Lease involves long-term commitments on the part of landlord and lessee. It also agrees the parties cannot have intended the same original materials should be used for landscaping the Village throughout the 999-year duration of the Lease.

61. As to whether these covenants were engaged, the Tribunal has no doubt that they were. The photographs and the evidence of the witnesses shows that parts of the Village, namely the planters, were in a worse physical condition than they were at some earlier time. In some cases, the timber retaining sides of the planters had already failed. Whether this was due to the moist air in the exposed location on the seafront at Hythe or moisture from the earth within the planters or other causes is perhaps irrelevant. The planters were in disrepair.

62. The Tribunal also considers it is material that the primary obligation in clause 8.1 is not specifically to repair etc., the planters or their retaining walls/parts. The obligation is to repair, etc. the "Village" as a whole, and even thought the planters are large items, they are subsidiary parts of the item that must be repaired, re-built or renewed etc.

63. The more important issue is whether the substitution of timber retaining walls with brick goes beyond the landlord's obligation. The oft-quoted words of Sachs L.J. in Brew Brothers suggest it is a question of degree. And the considerations identified by Nicholls L.J. in Holding and Management are always relevant. But the specific issue of improvements was more clearly addressed in Wandsworth LBC v Griffin, where a landlord proposed to replace a flat roof of a block of flats with a pitched roof and to replace metal single glazed windows with uPVC double glazed ones. The first issue which arose was whether the works went beyond works of repair. The Lands Tribunal observed that:

> "It does not seem to me that a repair ceases to be a repair if it also effects an improvement. In my judgment, the works carried out by the appellants did constitute repair, if they were indeed cheaper than the alternatives, taking into account both initial and future costs."

64. The Tribunal finds that the works were within clause 8.1 of the Lease, for the following reasons:

(a) As explained above, the words of the covenant contemplate much more than mere repairs. In "maintaining" the Village in "good condition", the parties must have contemplated permanent works to end periodic and frequent failure of wooden elements of the Village.
(b) The words "rebuild", "reinstate" and "replace" are also apt to describe the provision of something different to what was there before.
(c) The proposed works did not provide something entirely new. Once the new brick retaining walls are in place, the planters are still an item which performs exactly the same function as the original and in the same location as before. The Tribunal agrees the installation of brick retaining walls simply renews the former wooden ones. It is an evolution, not a revolution.
(d) The retaining walls are a subsidiary part of the planters, albeit vital subsidiary parts. There was no proposal to relocate the soil etc., or to move the planters.

65. In any event, the Tribunal finds that the works were within clause 8.12. An improved provision is "advisable for the proper ... safety [and] amenity of the Village".

66. It follows that the Tribunal finds the works to the planters fell within the provisions of the Lease.

## Issue 7: Quay wall steps (£6,000)

67. Within the sum for General Maintenance is the £6,000 cost of replacing steps at 45-50 Endeavour Way. There are invoices for the works and photographs at Annex 22 and 23 of the Respondent's Statement of Case.

68. The photographs show a set of lightweight timber steps with four rungs leading from the quay up to the patio/balcony behind one of the properties. The timber is weathered and evidently in very poor condition. There are then photographs of more substantial galvanised steel staircases with handrails, which are evidently the subject of this dispute. At the top, the steps appear to be secured with a bracket or brackets to the surface of the patio/balcony areas of the private properties. The steps are then secured to the retaining wall at the edge of the quay wall. They are then secured to the ground close to the concrete surface which forms the edge of the quay, where various boats are tied up in individual births. All parties describe the concrete paved edge of the quay at the foot of the steps as the "quay wall". In fact, the steps are all located in a slightly recessed area of the quay wall, and the photographs show several such recesses along its length, each providing space for pairs of steps for two properties.

*Argument*

69. In its Statement of Case, the Applicant's argument was straightforward. The steps lay wholly within the areas of the quay wall demised to individual leaseholders, and they did not fall within the communal areas. The responsibility for the maintenance and repair of the steps rests with individual leaseholders. Such costs should not be recoverable as part of the communal service charge.

70. In its Statement of Case, the Respondent contends the steps were replaced as part of a 15-year rolling programme of replacement works across Hythe Marina Village. In essence, it raises three arguments:
    (a) First, as a matter of interpretation, the areas where the steps are located form part of the common areas of the Village. The Respondent makes detailed submissions about the terms of the leases of the of the relevant properties and the lease plans. Properly construed, the parties did not intend to and in fact did not demise the indented areas of the quay wall where the steps are located. They very clearly fall outside of the demise, if one looks at the physical features of the land and applies common sense.
    (b) Secondly, the cost of replacing the steps falls within clauses 8.1, 8.2 and 8.3 of the Applicant's Lease. In particular, there was no 'carve out' for lettable units from the obligation to repair walkways in clause 8.3.
    (c) Thirdly, and in any event, the Respondent is entitled to charge the cost of works under the sweeper provision of clause 8.12.

71. The Applicant made detailed submissions at paras 49-63 of her Reply:
    (a) She referred to Land Registry file plans for 44, 47 and 49 Endeavour Way to show the extent of the demise. Although it was accepted the Land Registry plans do not establish whether a particular feature was within the demise or not, in each case the quay wall steps fall within the indentation. They are therefore included in the demise of the individual properties and excluded from the common parts, etc.
    (b) The obligations to "repair" etc., in clauses 8.1 and 8.2 specifically exclude any "lettable units" as defined in the Lease. Steps serving one property cannot be considered "roads", "walkways" or "footways".
    (c) As to the sweeper clause, works to steps serving individual properties are not essential for the proper maintenance and safety of the Village.

*Decision*

72. The Tribunal will deal with each of the provisions relied upon by the Respondent in turn.

73. As to clause 8.1, this is the general obligation for the landlord to repair and maintain "the Village". The "Village" is widely defined by clause 1.5 of the Lease and is apt to include the demised properties and all common areas including the quay wall and the indented area. In passing, it should also be mentioned that the general obligation to repair the Village in clause 8.1 expressly includes "without prejudice to the generality of the foregoing … the roads walkways and footways").

74. The first issue between the parties relates to the closing words of clause 8.1, namely the express exclusion relating to "lettable units". "Lettable Units" are defined by clause 1.6 as follows:

    > "residential or commercial premises forming part of the village which are or are intended or are designed at any material time to be the subject of a separate letting, but shall exclude mooring berths and car parking spaces..."

The Tribunal notes the "lettable units" exception is in turn subject to a further exception for "mooring berths and car parking spaces". In other words, the landlord must repair and maintain mooring berths and car parking spaces, even if they are demised to one of the lessees.

75. The legal question is framed by the parties in terms of whether the areas where the steps are located are "residential premises which are …the subject of a separate letting". The Tribunal's initial reaction is that this question cannot be answered simply by looking at whether the areas are demised by one of the leases of 45-50 Endeavour Way. One also needs to consider whether the areas are "residential or commercial premises" (a quay could easily be described as something else).

76. But in any event, whether the areas are demised by the leases of 45-50 Endeavour Way requires a detailed consideration of the terms of the leases of those properties, the individual lease plans and the factual matrix. The problem for the Tribunal is that neither party has seen fit to provide it with a copy of any of the leases of 45-50 Endeavour Way. Both parties have made detailed submissions about the extent of the demise granted by leases, without providing the leases themselves. The Tribunal cannot gain much assistance from the lease of the subject property, since it is located in a different part of the Marina and has different lease plans[1]. The Tribunal therefore cannot determine whether the cost of replacing the quay wall steps is recoverable under clause 8.1 of the Lease on the material before it.

77. As to clause 8.2, this is the obligation to maintain landscaped and open areas. It is subject to a similar proviso. For the same reasons given above, the Tribunal cannot determine whether the cost of replacing the quay wall steps is recoverable under clause 8.2 of the Lease on the material before it.

78. As to clause 8.3, this is not subject to any express exclusion for lettable units. Indeed, given the express exceptions in clauses 8.1 and 8.2, this was quite deliberately the case. Whether the quay wall steps form part of the "roads bridges pontoons mooring piles car and boat parks slipways public conveniences walkways and footways in the Village" does not therefore depend on whether the steps are in areas let to third parties. The Tribunal does not need to look at any other leases to answer this question, and it may answer the question in the light of the material before it.

79. The Tribunal is of course familiar with the principles for interpretation of leases, helpfully summarised by Lord Neuberger in Arnold v Britton [2015] EWSC 36; [2015] A.C. 1619 at [15].

> "[15] 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

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[1] This is illustrated by the fact that the lease plans for the subject property clearly show "T" marks on various boundary features of various properties at Hythe Marina Village. If such "T" marks were present on the leases of 45-50 Endeavour Way, they could be relevant to the present issue. But the Tribunal will not speculate, or attempt to plug the obvious evidential gap.

available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, 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."

80. One of the important features of the Lease was that the lessor exercised a high degree of control over the parts of the Village close to the water's edge. For example, clause 3.1.2 grants an express right to go onto a small area of the "lower quay wall" hatched blue on the lease plan, rather than any general right to go onto other parts of the "lower quay wall". Similarly, clause 3.1.3.2 grants a right of way over "the roads walkways and footpaths", but it goes on to state that "there is no right of way over the pathway along the quay wall and serving the mooring berth and at right angles to the mooring berth." This control over access to the waterside is entirely understandable, not least because quays are potentially dangerous places, with ropes, bollards, tripping and falling hazards.

81. In a similar vein, the landlord expressly assumed responsibility for providing collective boat and water-related facilities. In clause 8.6 of the Lease, it undertook the potentially onerous task of dredging boat channels to Southampton Water. At clause 8.9, it agreed to employ specialist staff such as "harbour masters and "lock operators". Clause 8.3 itself follows a similar pattern. It provides for the landlord to repair and maintain parts of the Village, including several obviously boat and marine related items such as "pontoons", "mooring piles", "car and boat parks" and "slipways".

82. As to the natural and ordinary meaning of the words "walkways" and "footways", these describe physical things, not legal rights. The words are potentially capable of having a wide meaning. "Walkways" and "footways can include almost anywhere where a person possibly walk with their feet. There is no obvious indication from the words themselves that they might exclude a an area where people can walk along a quayside. Since, physically, people can walk through the indented area of the quay wall, that tends to suggest the steps are located in a walkway or footway. In fact, it is clear from the photographs that boat owners in fact use the quay wall to access their boats in the mooring berths on foot, and the steps themselves are the clearest possible evidence of this use.

83. This is in the Tribunal's view consistent with the overall purpose of clause 8.3. The obligation to repair the quay wall and indented areas enables the lessor to control and maintain the marine-related aspects of the Village. An obligation

to repair the quay wall and the points of access to it would be an important part of this scheme of control. Indeed, securing safe access to the water's edge by assuming an obligation to maintain the quay wall steps fits within the purpose set out above.

84. Such an approach also makes commercial common sense. Repairs to the quay wall and facilities on its (such as bollards and other shore facilities) can be carried out to a uniformly high standard and funded collectively.

85. For all these reasons, the Tribunal finds the walkways and footways referred to in clause 8.3 of the Lease included the quay wall and the indented areas where the steps are located. The landlord was obliged to repair these areas.

86. For the purposes of clause 8.3, the Tribunal sees no other reason to distinguish between the main quay wall and the and the indented areas of the quay wall. Physically, they are indistinguishable from each other on the ground. And effectively the same points apply to the quay wall as apply to the indented areas – which are only a short distance from the water's edge, and which provide access to the quay wall. Whether they are demised to the lessees of 45-50 Endeavour Way is not (as already explained) a material consideration for clause 8.3.

87. The only other issue is whether clause 8.3 obliges the landlord to repair the steps, which were attached to the surface of the indented area of the quay wall. The Tribunal considers the steps are annexed to the ground and they are no different from any other part of the land which the lessor is bound to repair. In any event, they are capable of being described as "walkways" or "footways", and they are therefore subject to the express obligation to repair and maintain. The Lease does not use the term "steps" or "stairs" to distinguish them from "walkways" or "footways", and the Tribunal considers these words are apt to cover the steps in question. The Tribunal does not therefore accept the argument that steps leading to 45-50 Endeavour Way are not "walkways" or "footways".

88. In the light of the above, the Tribunal does not need to consider whether the sweeper provision of clause 8.12 applies. But in the alternative, the Tribunal would have found that the works fell with the widely worded sweeper provision, which is also not subject to any proviso excluding lettable units. New steps on the quay wall quite obviously relate to the safety and amenity of the Village.

89. It follows that the costs of replacing the quay wall steps are recoverable under the terms of the Lease.

**Issue 8: Engineering Insurance (£11,364)**

90. In her Application, the Applicant queried insurance costs shown in the annual accounts.

91. In its Statement of Case, the Respondent explained that only the relevant cost of engineering insurance (£18,951) formed part of the service charges. Of that, £11,364 was payable by the residential us-

ers of the Village, including the Applicant, in accordance with the Deed. The Respondent produced extensive evidence to support the insurance costs.

92. Suffice it to say that in her Reply at para 65, the Applicant accepted that the "it is reasonable to undertake engineering insurance". Although unhappy with the Respondent's explanation, the Applicant did not suggest the costs were not payable under the Lease or make any positive case under s.19(1) of the 1985 Act. The Tribunal therefore need not make any determination in this respect.

**Issue 9: Legal and Professional Fees (£739.85)**

93. In Annex 25 to its Statement of Case, the Respondent provided an invoice for £1,140 from BDO Chartered Accountants for "fees for corporation tax compliance service for the year ended 31st March 2019". Applying the apportionment under the Deed, a sum of £739.85 was payable by the residential users of the Village, including the Applicant.

94. In her Reply at para 67, the Respondent contended that these costs were not recoverable under clause 8.9 of the Lease, which permitted the landlord to recover costs reasonably incurred "for the purpose of performing its obligations [under the Lease] to employ … accountants or other professional persons".

95. The Tribunal agrees with the Applicant. There is an express provision in the Lease relating to the payment by the landlord of VAT etc.: see clause 8.8. But there is no mention of corporate taxes. There is therefore no obligation under the Lease to Corporation Tax. The relevant costs of employing BDO Chartered Accountants for corporation tax compliance is not a recoverable cost under the Lease.

96. In para 68 of her Reply, the Respondent raised a further query about another BDO LLO invoice dated 31 March 2020. But no specific objection was made, and the Tribunal therefore declines to make any determination about the issue.

**Issue 10: Section 20C/Para 5A**

97. Section 20C of the 1985 Act provides as follows:

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

98. The well-known principles applicable to s.20C applications are summarised in Tanfield on Service Charges & Management (5th Ed) at paras 15-06 to 15-11. In the recent case of *Obi-Ezekpazu v Avon Ground Rents Ltd and another* [2022] UKUT 121 (LC), the Upper Tribunal stressed that when considering a section 20C application, "the FTT was not exercising a conventional costs jurisdiction but was determining to what extent" leaseholders "should be relieved of a contractual obligation" which they have "willingly entered into".

*Argument*

99. In paras 62-64 of its Statement of Case, the Respondent submitted that there was no need for a determination of the application under paragraph 5A of Sch.10 to the 2002 Act, as no direct recharge costs could be made to the Applicant under the terms of the Lease. In relation to the section 20C application, the Respondent submitted:
    - (a) It was not just inequitable for the applicant to avoid paying her share of costs of the Respondent in connexion with the tribunal proceedings whilst leaving her fellow leaseholders to pick up their share of the same
    - (b) The Respondent had corresponded with the applicant length on a very wide range of issues to avoid the need for the application to proceed. Details were given in the witness statement Karen Grey in this regard.
    - (c) Prior to the issuing of proceedings, on 10 February the Respondent's solicitors wrote to the Applicant setting out their position in detail.

100. In para 70 of her Reply, the Applicant accepted she need make no para 5A application. But in relation to the s.20C application, the Applicant submitted:
    - (a) There was no provision in clause 8 of the Lease permitting recovery of legal costs.
    - (b) In any event, the Applicant was obliged to make its application by reason of the ongoing failure of the Respondent to address questions and concerns properly and reasonably raised. The extensive correspondence was a result of the managing agent's failure to reply. They had never met the Applicant or offered to meet her. The Applicant had repeatedly and consistently asked copies of documents to address her reasonable concerns as to the level of service charges.
    - (c) The letter from Clarke Willmott did not add anything.
    - (d) Further, the Tribunal should have regard to the extent to which the Applicant was successful.
    - (e) In all the circumstances, it was not just and equitable to make a s.20C order.

*Decision*

101. No determination is made under para 5A of Sch.11 to the 2002 Act.

102. As to the question whether the Lease permits the Respondent to include any of the costs incurred in connection with proceedings in the Applicant's service charge, that is not a matter for this particular Tribunal. If any such costs form part of a future service charge demand, a Tribunal will deal with the issue at that stage.

103. However, the Tribunal does need to deal with the s.20C application. The Tribunal consider it is not just equitable to make such an order:
   (a) The starting point is the presumption in the Obi-Ezekpazu case, namely a contractual obligation to pay.
   (b) In broad terms, the Applicant has been successful on only a few issues. The amounts involved, in monetary terms, are modest. Indeed, some of the issues concerned very small sums indeed.
   (c) There is no evidence that, once the application was issued, either party's conduct of the proceedings can be criticised (other than the failure to provide some material evidence, which was a problem for both parties).
   (d) The letter from Clarke Willmott dated 11 February 2022 was comprehensive and clear. The Application was nevertheless pursued.
   (e) It does not find the alleged lack of co-operation by the managing agents to be made out. Indeed, the statement of Ms Gray refers at para 11 to some 84 separate email queries from the Applicant since December 2021. This suggests a lack of restraint by the Applicant in connection with the Tribunal proceedings.
   (f) The landlord was the Respondent to proceedings. It was quite reasonable to incur legal costs in meeting a detailed challenge to the service charges.

## Conclusions

104. Part of the relevant costs of employing a Supervisor was not reasonably incurred under s.19(1) of the 1985 Act. 80% of the Supervisor's wage costs should be taken into account for time worked at Hythe Marina Village before the apportionment in the Deed is undertaken. And insofar as this is less than the 85% allocated by the Respondent to Hythe Marina Village, the additional relevant costs were not reasonably incurred.

105. The Tribunal finds that the following relevant costs for security staff were not reasonably incurred under s.19(1) of the 1985 Act:
   a. £5,242.08 ("double counting")
   b. £6,467.85 (withheld payment)

106. The relevant costs of gardening are payable, as claimed by the Respondent, in the sum of £51,180.65.

107. The £32,565.92 cost of replacing the wooden planters in Shamrock Way with brick planters fell within the provisions of clause 8.1 (or alternatively clause 8.12) of the Lease.

108. The £6,000 cost of replacing the quay wall steps is recoverable under clause 8.3 (or alternatively clause 8.12) of the Lease.

109. The £739.85 relevant costs of advice from accountants in respect of their "corporation tax compliance service" are not recoverable under the terms of the Lease.

110. No determination is made under para 5A of Sch.11 to the Commonhold and Leasehold Reform Act 2002.

111. It is not just and equitable to make any order under s.20C of the 1985 Act.

Judge Mark Loveday
26 July 2022

## 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.

## APPENDIX 1: MATERIAL LEASE COVENANTS

1.5 "the Village" means the property from time to time comprised in Hythe Marina Village Hythe the current extent of which is shown edged red on Plan No.1 but subject to such variations or extensions as shall from time to time be notified by the Reversioner to the Owner and references to the Village are to the Village and any part of it

1.6 "lettable units means residential or commercial premises forming part of the Village which are or are intended or are designed at any material time to be the subject of a separate letting but shall exclude mooring berths and car parking spaces and a "lettable units" shall be construed accordingly

### 8.REVERSIONERS FURTHER COVENANTS

...

8.1 To clean repair decorate and maintain in good and substantial repair and condition and where necessary renew rebuild reinstate or replace the Village (including but without prejudice to the generality of the foregoing the locks ancillary equipment the lock control building the sea wall the sheet face of the Marina wall the piling the sewage pumping system the services and service conducting media and the roads walkways and footways) but excluding the lettable units.

8.2 To maintain light and clean any landscaped or open areas within the Village (not comprised in any Lettable unit) and to cultivate any trees shrubs or plants in such areas

8.3 To maintain cleanse and keep in good order and condition including renewal replacement and rebuilding and where appropriate properly lighted and sign posted the roads bridges pontoons mooring piles car and boat parks slipways public conveniences walkways and footways in the Village

8.4 To provide maintain and where necessary renew safety equipment in the Village including fire fighting and prevention equipment and life saving equipment

8.5 To purchase such plant and equipment as the Reversioner may consider proper to enable it to comply with its obligations hereunder including the repair maintenance insurance renewal and replacement of any Such plant and equipment

8.6 To maintain and dredge the boat channels both within the Village and the navigation channel within Southampton Water providing access to and egress from the Village including the provision and maintenance of channel markers navigation equipment and waiting facilities

8.7 To effect and maintain such insurances in respect of the Village (other than in respect of lettable units) as the Reversioner shall in its absolute discretion deem advisable or necessary

8.8 To pay and discharge any' rates (including water rates) taxes duties assessments charges impositions and outgoings including the Crown Rent of the foreshore assessed charged or imposed on the Village and the curtilage thereof as distinct from any assessment made in respect of any lettable unit

8.9 For the purpose of performing its obligations hereunder at its discretion to employ on such terms and conditions as it shall think fit one or more surveyors builders architects engineers tradesmen accountants or other professional persons caretakers porters harbour masters lock operators maintenance staff cleaners and such other persons as the Reversioner may from time to time in its absolute discretion consider necessary' and in particular to provide for such persons a fiat or other accommodation free of rent rates or other outgoings to the occupier and any other services considered necessary or desirable by the Reversioner for them

8.10 To employ at the Reversioner's discretion a firm of Managing Agents to manage the Village and discharge all proper fees salaries charges and expenses payable to such agents and/or to such other persons (including the Reversioner) who may be managing the Village including the cost of computing auditing, and collecting the service charges in respect of the Village

8.11 To take al] reasonable steps to enforce (where appropriate) the observance and performance by a tenant of a lettable unit in the Village of the covenants and conditions in the Lease of such lettable unit which such tenant has failed to Observe and perform

8.12 Generally to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Reversioner may be considered necessary or advisable for the proper maintenance repair renewal rebuilding Safety amenity and administration of the Village

# APPX.II: SCHEDULE OF GARDEN COSTS

**Hythe Marina Village (Resi)**

| | | | | | |
|---|---|---|---|---|---|
| Gardening | 4472 | site maintenance | £1,897.90 | £379.58 | £2,277.48 |
| Gardening | 4534 | Watering Apparatus Hire 26/06/2019 | £987.50 | £197.50 | £1,185.00 |
| Gardening | 4531 | site maintenance; Landscape maintenance 30/06/2019 | £9,568.94 | £1,913.79 | £11,482.73 |
| Gardening | 4585 | Grounds Maintenance - July 2019 31/07/2019 | £1,441.54 | £288.31 | £1,729.85 |
| Gardening | 4587 | Non-Scheduled Landscaping Work s 16/08/2019 | £2,422.80 | £484.56 | £2,907.36 |
| Gardening | 4646 | Lop 6no trees. 1 directly outside 12b Shamrock way 2no berry 31/08/2019 | £194.70 | £38.94 | £233.64 |
| Gardening | 4645 | Reduce height of hedge for safety reasons at the entrance to 31/08/2019 | £564.62 | £112.92 | £677.54 |
| Gardening | 4649 | Grounds maintenance 31/08/2019 | £1,020.98 | £204.20 | £1,225.18 |
| Gardening | 4700 | Monthly maintenance 30/09/2019 | £1,040.46 | £208.09 | £1,248.55 |
| Gardening | 4705 | Tree survey | £253.10 | £50.62 | £303.72 |
| Gardening | 4750 | Monthly maintenance 31/10/2019 | £5,542.62 | £1,108.52 | £6,651.14 |
| Gardening | 4776 | Maintenance - Gardening 30/11/2019 | £992.95 | £198.59 | £1,191.54 |
| Gardening | 4853 | clear rock revetments on whole site 17/01/2020 | £1,635.44 | £327.09 | £1,962.53 |
| Gardening | 4860 | Estate Maintenance/gardening; Planting Clearance and Tree Wo 27/01/2020 | £5,529.37 | £1,105.87 | £6,635.24 |
| Gardening | 4921 | Additional Landscaping Work 27/02/2020 | £1,012.42 | £202.48 | £1,214.90 |
| Gardening | 4922 | Replace 14 no. trees, Village Square, Endeavour Way & Astra 27/02/2020 | £5,231.58 | £1,046.32 | £6,277.90 |
| Gardening | 4930 | Additional Work to the bund & removal of trees from Shamrock 06/03/2020 | £915.07 | £183.01 | £1,098.08 |
| Gardening | 4399 | Additional landscaping approved work; Additional approved wo 12/03/2020 | £1,949.68 | £389.94 | £2,339.62 |
| Gardening | 4945 | Grounds maintenance; Scheduled landscaping work 20/03/2020 | £799.03 | £159.81 | £958.84 |
| | | | **£43,000.70** | **£8,600.14** | **£51,600.84** |

**Hythe Marina Village (Comm)**

| | | | | | |
|---|---|---|---|---|---|
| Gardening | 4472 | site maintenance 31/05/2019 | £855.42 | £171.08 | £1,026.50 |
| Gardening | 4534 | Watering Apparatus Hire 26/06/2019 | £445.08 | £89.02 | £534.10 |
| Gardening | 4531 | site maintenance; Landscape maintenance 30/06/2019 | £4,312.88 | £862.58 | £5,175.46 |
| Gardening | 4585 | Grounds Maintenance - July 201 9 31/07/2019 | £649.72 | £129.94 | £779.66 |

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|---|---|---|---|---|---|
| Gardening | 4587 | Non-Scheduled Landscaping Work s 16/08/2019 | £1,092.00 | £218.40 | £1,310.40 |
| Gardening | 4646 | Lop 6no trees. 1 directly outside 12b Shamrock way 2no berry 31/08/2019 | £87.75 | £17.55 | £105.30 |
| Gardening | 4645 | Reduce height of hedge for safety reasons at the entrance to 31/08/2019 | £254.48 | £50.90 | £305.38 |
| Gardening | 4649 | Grounds maintenance 31/08/2019 | £460.18 | £92.04 | £552.22 |
| Gardening | 4700 | Monthly maintenance 30/09/2019 | £468.95 | £93.79 | £562.74 |
| Gardening | 4705 | Tree survey | £114.08 | £22.82 | £136.90 |
| Gardening | 4750 | Monthly maintenance 31/10/2019 | £2,498.15 | £499.63 | £2,997.78 |
| Gardening | 4776 | Maintenance - Gardening 30/11/2019 | £447.54 | £89.51 | £537.05 |
| Gardening | 4853 | clear rock revetments on whole site 17/01/2020 | £737.13 | £147.43 | £884.56 |
| Gardening | 4860 | Estate Maintenance/gardening; Planting Clearance and Tree Wo 27/01/2020 | £2,492.19 | £498.44 | £2,990.63 |
| Gardening | 4921 | Additional Landscaping Work | £456.32 | £91.26 | £547.58 |
| Gardening | 4922 | Replace 14 no. trees, Village Square, Endeavour Way & Astra 27/02/2020 | £2,357.97 | £471.59 | £2,829.56 |
| Gardening | 4930 | Additional Work to the bund & removal of trees from Shamrock 06/03/2020 | £412.44 | £82.49 | £494.93 |
| Gardening | 4399 | Additional landscaping approved work; Additional approved wo 12/03/2020 | £878.76 | £175.75 | £1,054.51 |
| Gardening | 4945 | Grounds maintenance; Scheduled landscaping work 20/03/2020 | £360.14 | £72.03 | £432.17 |
| | | | **£19,381.18** | **£3,876.24** | **£23,257.42** |
| | | | | | |
| | | | **£62,381.88** | **£12,476.38** | **£74,858.26** |