FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LSC/2021/0287**
Property	:	**Various Properties at St. David's Square, London E14**
Applicant	:	**Liam Philip Spender and the several lessees listed in the application**
Representative	:	**Liam Spender**
Respondents	:	**FIT Nominee Limited and FIT Nominee 2 Limited** **Representatives :** **FirstPort Bespoke Property Services Limited** **Freehold Managers Plc**
Representative	:	**Simon Allison of Counsel**
Type of application	:	**Determination of payability and reasonableness of service charges pursuant to s27A LTA 1985**
Tribunal	:	**Judge Shepherd** **Duncan Jagger FRICS** **Mr N. Miller**
Date of Decision	:	**22nd March 2023**

Decision

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1. This case was heard over four days between 16th -19th January 2023. The Tribunal is grateful to the representatives on behalf of the parties, Mr Spender for the leaseholders and Mr Allison for the Respondents. The Respondents retain Freehold Managers plc (FHM) as agents who in turn have engaged First Port Bespoke Property Services Limited ("Firstport")

2. The case concerns the St David's Estate, London E14. This is a relatively newly built estate. It was built between 1999 and 2003 by St George North London a subsidiary of Berkeley group PLC. It is located at the tip of the Isle of Dogs in East London. The estate is made-up of 436 flats across nine blocks. The flats are let on 999 term leases beginning on the 25th of December 1997. The estate also contains 2 retail units and 40 freehold houses. The leaseholders represented by Mr Spender (who is himself a leaseholder) number 101 out of the total of 436. Some of them join only in respect of the section 20C application.

3. The case concerns a dispute over 16 items of service charges levied between 2018 and 2020 (The relevant period). The Applicants allege that these charges are not reasonably incurred. At the date when the matter came before the Tribunal concessions had been made on each side and the parties had managed to narrow the dispute as identified in the Scott schedule. The issues remaining at the date of the hearing were (adopting the list in Mr Allison's skeleton argument):

   All years:

   1. Countryside Contracts: Door Entry Systems, Covered Car Park Gates and Barriers,

   TV Distribution Systems (2018/1, 2018/4, 2018/6, 2019/2, 2019/5, 2019/6, 2020/4,

   2020/8, 2020/11)

   2. Management fees (2018/2, 2019/1, 2020/3

   3. Building insurance commissions (2018/3, 2019/4, 2020/7)

   4. Temporary Staff Expenses (FirstPort Response) (2018/5, 2019/3, 2020/10)

   5. Account Preparation Fees (FirstPort) (2018/7, 2019/9, 2020/12)

   6. FPIS Commission (2018/11, 2019/20, 2020/18)

   7. BDO audit fees (2018/10, 2019/16, 2020/16)

   2019 only:

8. Payment of costs and damages to Mr. Atkinson (repair works only - £5,028): 2019

only, otherwise conceded (2019/7, 2019/12, 2019/18, 2019/23)

9. Invoice from AB Key for PH900 Magnetic Locks and Handles (parts only) (2019/10)

2019 and 2020:

10. Permanent Recruitment Commissions (FirstPort) (2019/19, 2020/15)

11. Fire doors:

a. Invoice 3294 from Smith's Property Maintenance (Replacement Fire Door,

4th Floor Hamilton) (2019/17)

b. Replacement Fire Door (Hamilton House), 10 November 2020 (2020/17)

c. Replacement Fire Door (Dominion House), 15 December 2020 (2020/20)

2020 only:

12. Concierge and on costs element of the Estate Schedule (2020/1)

13. Business and Leisure Centre (2020/2)

14. Survey Fees for the Building Safety Fund (Podium Surveying LLP) (2020/13)

15. Survey Fees for the Building Safety Fund (FirstPort) (2020/21)

4. The Countryside Contracts issue was the most important in terms of value and indeed took up most of the tribunals hearing time.

The relevant law

5. The law applicable in the present case was limited. It was essentially a challenge to the reasonableness of the costs. There was no challenge in relation to payability under the lease, an alleged failure to consult or limitation.

6. The Landlord and Tenant Act 1985,s.19 states the following:

19.— Limitation of service charges: reasonableness.

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

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7. The Tribunal's jurisdiction to address the issues in s.19 is contained in s.27A Landlord and Tenant 1985 which states the following:

27A Liability to pay service charges: jurisdiction

(1) An application may be made to [the appropriate tribunal]2 for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

(3) An application may also be made to [the appropriate tribunal]2 for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

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

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

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

(a) in a particular manner, or

(b) on particular evidence,

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

(7) The jurisdiction conferred on [the appropriate tribunal]2 in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

The Countryside contracts.

8. The Countryside contracts were for 20 - year terms and concern the rental and maintenance of the door video intercom and remote release systems; TV and satellite distribution; covered car park gates and barriers; and business and leisure centre CCTV and alarms. These contracts were entered into between the developer of the Estate and Countryside in 2000. The equipment is rented from Countryside. Accordingly the service charge is covering both the cost of the rental and the maintenance cost. Despite Mr Spender's best efforts he was unable to obtain an answer from Countryside or the Respondent as to the division between the two costs. The Respondents were unable to provide the original written contracts for any of the systems apart from the door entry systems and the tv distribution system. Mr. Williams who appeared on behalf of the Respondents (see further below) admitted that he did not have a copy of any of the Countryside contracts until 2021. This is given as the reason why the Respondents were unaware that the contracts were due to expire on the 6th of July 2020 and therefore took no steps at the end of 2019 to replace the systems.

9. The Applicants said that the sums charged to them for the Countryside Contracts were not reasonably incurred because they were not reasonable in amount. Between 2018 and 2020 expenditure on the Countryside contracts (£590721.43 over the relevant period) formed a large share of the total expenditure. The Applicants made the point which is really central to their argument that it has been prohibitively expensive to rent these systems rather than purchasing them. They consider that they have been lumbered with an earlier bad decision by the developer to rent the systems rather than buying them. They say that during the latter part of 2021 (outside the relevant period) the Respondent estimated the cost of buying a brand new replacement door system at £268,000 when the estate was charged £433,000 in rental and maintenance. The Applicants also relied on evidence from Angela's Jezzard a resident at a neighbouring development called Canary Riverside which had a similar door entry system of similar age where the costs were 29 times less than those of Saint David Square.

10. In response the Respondents said that it was reasonable to incur the cost of the Countryside Contracts each year because the Respondents had no choice but to do this. The system was under contract for 20 years and the cost of breaking the contract was far too high to be considered commercially sensible and the first time the contract could be broken in reality was in July 2020 which was mid pandemic. The Respondents said it was not open to the Tribunal to consider decisions made in 2000 when the contracts were entered into. Most of the leaseholders did not even have a lease at that point. Secondly, they said that none of the Applicants had taken the point prior to 2018. They accepted that there was a failure to take prompt action at the end of the contracts and had offered a concession in that regard.

Business and leisure centre closures/ concierge charges in 2020

11. The Applicants challenged the fact that FirstPort unilaterality shutdown the services at the business and leisure centre and the concierge between the 24th and 25th of March. They also challenged the fact that they reduced the opening hours of the pool and gym to the equivalent of 1 1/2 days a week during the pandemic. Finally, they challenged the fact that FirstPort stopped the concierge accepting parcels during the pandemic. The Applicants said that the strict terms of the lease do not allow this reduction in services and having received the service charge the Respondents were obliged to perform the services. They said that the estate regulations could not be modified unless the change is for the preservation of the development or for the general convenience of the occupiers of the development (clause 5.6 of the lease). The Respondents argued that the pandemic enforced the changes made.

Insurance commissions

12. The Applicants challenged commissions paid to FirstPort Insurance Services Limited. Insurance for the estate was in the form of a block policy. It was arranged by FHM on behalf of the fund. FHM uses Arthur Gallagher as its broker. FirstPort also arranges other insurance for the estate via FirstPort insurance services limited. The Applicants said that that both the FHM fund commissions and FirstPort Insurance commissions are not payable or reasonably incurred because they are in effect rebates to FHM, the fund and FirstPort Insurance Services in exchange for introducing business to the insurers. They said the sums were not reasonably incurred because FHM is not a party to the lease. No work was done by the fund in exchange for the Commission. The Applicants said that FirstPort Insurance Services Limited should receive a reduced commission reflective of the work actually performed.

13. The Respondents said the Applicants were missing the central point that insurance must be placed through a broker who will in turn usually be paid by way of commissions received from the insurer. Whether the Respondents placed the insurance via FirstPort Insurance Services or another broker is irrelevant what matters is whether the cost is reasonably incurred. It is not open to the Applicants to try to claim back a portion of the commission earned by FirstPort Insurance Services Limited. The whole of the cost of the insurance was arranged by the Respondents, they do not receive the commission nor does the Respondent's agent and there's no evidence before the Tribunal to suggest that the rates charge were outside of market norms.

FirstPort Response commissions

14. These are commissions charged by FirstPort Response which provides temporary or permanent staff to FirstPort. FirstPort Response handled 100% of the permanent recruitment and 90% or more of the temporary recruitment on the estate in the period 2018 to 2020. The Applicants alleged that FirstPort Response has charged fees that were above those of any comparable provider.

Mr Atkinson's case.

15. Mr Atkinson is one of the leaseholders on the estate who had a dispute with the Respondents based on his use of the swimming pool and facilities and disrepair in his flat. He was awarded damages in the County Court for disability discrimination. The Respondents originally sought to add the costs of the court proceedings and other costs related to the proceedings to the service charges. At the date of the hearing the Respondents had agreed to withdraw any claim

to add legal costs or damages. They continued to claim £5028 in respect of works carried out to Mr Atkinson's flat. The Respondents maintained that these were collectable under the lease.

Survey fees

16. The Applicants challenged fees charged by the Respondents to the service charge reflecting fees that they paid as part of preparations to apply for the Building Safety Fund (Fire safety works following the Grenfell fire). The fees amounting to £6393 were used to pay for surveys assessing each building on the estate to determine whether the BSF fund would be engaged. The Applicants said the survey reports were of poor quality. They also challenged the cost of a survey carried out by Podium Surveying.

Accounting charges and audit fees

17. The Applicants challenged accounting charges for a variety of reasons including the failure to follow the Code on Residential Service Charge Management produced by the RICS. They said that Nigel Howell the chief executive of FirstPort in an interview stated that they did follow the RICS code but this was not the case. Further the Applicants said that the accounting charges were not reasonably incurred because the accounts have not been prepared to a reasonable standard and they did not contain certificates as to the number of properties on the estate as required by the lease. Further the audit fees did not make clear that there was a long running error in the collection of service charges (see further below).

Management fees

18. The Applicants challenged the management fees charged for the relevant period on the basis that in their view the estate was badly managed. They identified various errors including the failure by FirstPort to cancel the Countryside Contracts; the failure by Mr Williams to monitor the contracts and the failure to properly supervise Mr Williams.

Other items in dispute

19. The other minor items in dispute were the cost of replacement of fire doors and the cost of parts used in the replacement of external door handles. The applicants argued that these were not reasonably incurred.

The hearing

20. Mr Atkinson gave evidence to the Tribunal first. He is wheelchair bound. We are grateful that he was able to attend and provide useful information. He is the leaseholder of 426 St David's Square. He has been in residence on the estate for 16 years. He referred to the county court proceedings in which he had been paid compensation. The county court judge District Judge Carlo Revere in February 2018 gave judgement in his case. The original claim had been brought by FirstPort. This was a claim for service charges, ground rent, debt collection and legal fees. They had obtained judgement in default. This was set aside and the matter was re listed before District Judge Revere on the 24th of November 2017. On the 28th of November 2016 Mr Atkinson issued a defence and counterclaim. The counterclaim was made in relation to a failure to repair by the landlord, discrimination under the Equality Act 2010 and breach of the covenant of quiet enjoyment in the lease by imposing a 30% levy on his swimming instructor's fees and requiring that the instructor could only give lessons at certain times.

21. The outcome of the proceedings was that the landlord was ordered to credit Mr Atkinson service charge account with the sum of £1246.26 in respect of legal fees and debt collection fees which were not reasonable and there was no order for costs on the landlords claim. Damages were entered against the landlord in relation to the disrepair allegations. Judgement was also entered against the landlord in relation to the Equality Act claim and Mr Atkinson was awarded damages of £3000 pounds. Judgement was also entered against the landlord in relation to the covenant of quiet enjoyment claim and the landlord was ordered to pay damages of £500.

22. Mr Atkinson said that notwithstanding the clear finding by District Judge Revere the practise of restricting swimming lessons and imposing a 30% charge on earnings continued even after the pandemic. In practical terms the issue in relation to Mr Atkinson's claim before this Tribunal boiled down to whether the cost of necessary works to Mr Atkinson's property were recoverable from the service charge. The Respondents maintained that the cost of repairs ordered to be undertaken following water ingress from the common parts plus the payment to Mr Atkinson for alternative accommodation whilst the repairs were being done were legitimate charges on the service charge.

23. Ms Jezard gave evidence. She is a leaseholder at the Canary Riverside Estate. The intercom system on her estate is similar to the estate in question. She said that the cost of the system on her estate was considerably less than St David's Square because it was owned and maintained by the freeholder rather than leased. A table comparing the costs on the two estates was provided. The Canary Riverside Estate leaseholders were being charged considerably less. Similarly the cost of the television distribution and car park gates and barriers was higher on the St Davids Square estate.

24. Ms Lucy Miranda Brown gave evidence. She is the Joint Leaseholder of Flat 224 St David's Square. She works as a head - hunter in financial services recruitment. She has her own recruitment business. She gave evidence challenging the recruitment commission received by FirstPort's sister company, FirstPort Response. Her view was that the commission charged was too high. Much of the site's temporary and permanent recruitment business had been given to FirstPort Response. She also challenged the commission for repeated engagements of the same members of staff. She said the recruitment commissions charged in her sector were lower but accepted that it was a different sector with different priorities. She disagreed that FirstPort Response staff were likely to be more loyal and trained for the purpose of their employment. She accepted that it was harder to get staff presently. She also gave evidence about the reduced swimming pool service and parcel holding service.

25. Liam Spender gave evidence himself . He explained that he was representing 87 leaseholders on the estate. He said he was a solicitor with Higher Rights of Audience. He was currently involved in high value contentious corporate insolvency work and complex commercial litigation. He maintained that FirstPort we're in continuing breach of the covenant of quiet enjoyment as a result of its failure to change its approach to management of the swimming pool following Mr Atkinson's county court judgement. He also said that FirstPort had been issuing incorrect service charge demands for the business and leisure centre and estate schedules since at least 2014. He complained that FirstPort did not respond to questions it did not wish to answer. He detailed the occasions in which FirstPort had failed to provide information he had requested. He challenged the fact that FirstPort had failed to properly certify service charge demands with information about the number of units on the estate. His investigations had shown that leaseholders had been overcharged £52000 for the period 2018-2020.

26. Mr Spender also spent considerable time complaining about the withdrawal of services at the estates' business and leisure centre as a result of the pandemic. He said the centre was closed between 24 March and 27 July 2020, between 5 November 2020 and 2nd December 2020 and again between 21 December and

31 December 2020. When the centre was open the hours were reduced. In addition, he complained about the concierge stopping the function of holding parcels and post for the residents between 24th March 2020 and 31st December 2020. He said these deductions in service amounted to a derogation from grant and a breach of the Landlord's covenant of Quiet Enjoyment. No deduction had been made in the service charge collected.

27. Mr Spender also gave evidence in support of his argument that Countryside Communications contract was expensive and the service charges incurred on it were not reasonable. He said the Respondents should have procured the replacement of the system in 2019 or 2020. He provided a table of the costs of the contract which he said were "eye watering". He provided comparable evidence of estates nearby where the costs were considerably lower largely because the systems are owned and not rented on these estates.

28. Mr Spender challenged the Respondents' account preparation fees firstly because there appeared to be double charging of costs that should be included in the management fee and the accounts were defective for a variety of reasons given. He also challenged the audit fees for what he called sloppy audit practice.

29. Mr Spender also challenged the electricity unit costs and metering charges and other minor expenditure. Perhaps of more note was his challenge to the surveying fees associated with the Building Safety Fund. He highlighted errors in the survey report prepared by Mr Schwier on behalf of the Respondents which contained pictures of the wrong blocks and miscalculated the height of the blocks. He also said the cost of the survey carried out by Podium Surveying was excessive.

30. The Head of Service Charge Accounting at FirstPort Robert Montgomery gave evidence. He justified the charges for the accounts preparation fee outlining the tasks performed. He denied that there was any double charging and said the costs were distinguishable from the management costs. He denied that the accounts had been prepared negligently. The charges for the account preparation fees were reasonable because there was considerable work involved over and above the management costs. If the accounting had been carried out externally the cost would have been higher. He said that although FirstPort were not RICS regulated they followed the code. They were registered by ARMA

31. Mr Ahmed is the Service Charge Accounting Manager for FirstPort. He accepted that on account demands issued at Saint David's Square contained what he called a minor error for a number of years. He investigated this issue and found that the billing system had applied the incorrect apportionment

percentage to the estate costs and business and leisure centre cost schedules with leaseholders inadvertently charged 0.2155% of the expenditure rather than 0.21084%. This resulted in a small overcharge to leaseholders at the beginning of each service charge year for example £41.43 per leaseholder in 2021. Mr Ahmed said however that the correct apportionment percentage was applied at the end of year billing process so that the overcharge was corrected at the end of each service charge year. In relation to the allegation about missing certificates he cited that the number of property and car parking spaces have been unchanged since completion of the estate.

32. Mr Schwier, the Building Surveying Manager of First Port said he was a qualified building surveyor and a chartered member of the Chartered Institute of Building. He said that following the Grenfell tower fire in June 2017 owners and managers of high rise buildings had been required to take various steps to investigate and rectify issues relating to cladding and the associated fire risks. In December 2019 the Government issued an advice note which required the external wall system on a building either to be comprised of materials that are of limited combustibility or to have achieved the BR135 classification. In order to comply with the requirements of the note his surveying team began a detailed review of all developments within the portfolio. This work was carried out during 2019.

33. The aim was to establish the height of each building and to identify the materials that were used on each. There were twelve people carrying out a survey. In fact, Mr Scwier carried out the majority of the work himself with the occasional aid of graduates. In St David's Square he initially undertook a desktop assessment of the buildings. Information available from site inspections, photos on Google Earth and Google Street View were used to establish whether any of the 8 buildings of the relevant height presented potential fire safety concerns. Four invoices were raised in relation to the work done by Mr Schwier's team which total £4321.98. He went on to describe the registration of the buildings with the BSF. He disagreed with Mr Spender that his surveys were inadequate. He accepted that a mistake had been made in the production of the evidence pack for Hamilton House. He also detailed the podium survey. The BSF requested further information regarding the heights of a number of the buildings in Saint David's Square. He concluded that it would be necessary to have a laser height survey of the buildings carried out. He approached Podium for a quote. They confirmed a total price of £3830 plus VAT to measure six buildings.

34. Melanie Harvey is the Response resourcing manager at FirstPort. She dealt with the issue of employment on the estate. She said that St. David's Square benefits from a number of dedicated staff members. As well as the development manager and the assistant development manager the site has a 24 hour concierge and cleaning operatives. FirstPort was responsible for sourcing and

employing these staff on behalf of the Respondents and occasionally used recruitment agencies including FirstPort Response to do so. She said that the Response division of FirstPort was intentionally set up to operate independently from the rest of FirstPort. Response was a small team of three people providing temporary or permanent staff for FirstPort sites. She said that Response operated in exactly the same way as any other external recruitment agency. The only difference was that Response was employed by FirstPort who was the only client. Like any recruitment agency Response charged a fee for sourcing staff. For temporary staff the fee amounted to a proportion of the hourly rate charged to the site for the provision of the staff member. Where candidates were recruited on a permanent basis a fee of 10% of their starting salary was paid. All of the temporary staff on Response's books are individuals who have already worked on FirstPort sites. Some of them are permanent FirstPort employees. Therefore, the temporary staff supplied to sites by Response are already inducted using FirstPort systems and procedures. For example, a concierge supplied by Response will already be familiar with the systems for dealing with resident emails and parcel collection. Ms Harvey accepted the hourly rate for a temporary staff member was £15.16 This leaves a margin of £3.74 per hour for Response She gave examples of competitor charge rates. She said that they paid lower hourly rates to their stuff. In addition payments for holiday periods were lower.

35. The development manager of FirstPort Property Services Limited, Robert Williams gave evidence. He said he was responsible for overseeing the day-to-day running operation, the cleaning staffing, upkeep and the maintenance of St David's Square. He said St David's Square was a luxury development and he strove to ensure that it remained as such by ensuring that the day-to-day management ran smoothly. He addressed the issue of the swimming pool. He said that the swimming pool had been operational and open to all residents save for when the government required it to be shut during the pandemic. When the swimming pool reopened following the first lockdown in July 2020 the opening was delayed by a couple of days until the 27th of July because a booking system was being used to book slots. This was in order to keep the number of residents using the facilities at one time at a level which met the requirements of social distancing. The cleaning was carried out between the slots and deep cleans were carried out each day including using a specialist fogging machine which was purchased for the site. He said that following the county court decision involving Mr Atkinson adjustments were made to the use of the swimming pool in order to accommodate all residents at Saint David's Square. He said that the decision of the court did not mean that restrictions couldn't be imposed just that any imposed restrictions must be reasonably and properly communicated. The previous restriction was that swimming lessons could only take place with approved instructors during specified hours. Following the court decision this restriction was relaxed and residents can have lessons at anytime using any instructor of their choice save when organised swimming lessons are taking place. The swimming pool was open from 6:00 AM to 11:00 PM everyday.

36. In relation to the Countryside Contracts Mr. Williams said that each of the contracts were for a fixed 20 year term. The contracts were entered into prior to the leases being granted and the fixed term came to an end in July 2020. He said that up to that point the contracts were fixed and there was no scope for negotiation or removal of the contract except via a break clause which required a payment of four times the fee at termination. He said it wouldn't be cost effective to terminate as the exit fee would be required but fees also would need to be paid to any new supplier. At the end of the contracts Countryside are entitled to remove their equipment then a new supplier will need to be engaged with new equipment installed. He said on the 9th of March 2020 he wrote to Darren Rawlings the managing director of Countryside Communications to confirm that as the contract was expiring in 2020 he was keen to arrange a meeting to discuss the options available and the position going forward. At that point he said he thought the contracts were to expire at the end of 2020. This was based on the fact that the purchase orders are typically raised on a calendar year basis. Mr Rawlings responded to provide details of options available however at this point the COVID pandemic was in place and contractors could not do site visits.

37. The decision was taken to allow the contract to rollover for another year. He thought that the contract would continue throughout 2021 and restarted efforts to re- tender the contract on the 10th of June 2021. On 5th August 2021 he emailed the major works team with a view to starting section 20 consultation. Observations were received in response to the consultation including from Mr Spender. Two key options were available which was shown on a ballot of leaseholders. The options were to continue with the Countryside contract in other words renting the equipment and continuing with the rental or entering a new contract with a different supplier where equipment would be purchased. In the latter case it would take seven years to recover the cost of the purchase. Unsurprisingly perhaps by a small majority the leaseholders preferred the first option as a result of this Countryside's contracts were still in play in 2022.

38. Mr Williams confirmed that he did not have any of the Countryside contracts at the time that relevant decisions were made. Neither did he ask anyone if they had a copy of the contracts. He attached only the TV rental and maintenance contract and the video door entry contracts to his witness statement. He was unable to say how many times Countryside had been called out for maintenance.

39. In response to the allegation about the withdrawal of the concierge parcel service Mr Williams accepted that the service had been withdrawn between the 24th of March 2020 and the 31st of December 2020. This was done in order to limit the spread of COVID. Instead of the concierge taking the parcels initially

it was confirmed to residents that parcels were expected to be delivered directly to properties where possible if there was no answer the concierge would take them.

40. Mr Soyanka gave evidence but he was a recent addition to FirstPort and his evidence was of limited value.

41. Mr Ahern is the finance director of FirstPort. He said the basis of the management fee was a fee which was fair and reasonable for the premises and in line with guidelines with the RICS service charge residential management code and the ARMA code of conduct. He said that the management fee was well within the market rates for comparable developments. He said that the management fees were set by reference to the size, location and complexity of the site. The estate was large and complex with multiple blocks of leaseholder flats, a business and leisure centre including a swimming pool and gymnasium. The current management fee for the estate was £137,478 plus vat which equated to an average fee of £289 plus VAT per unit during the relevant period. The fees had varied. In the year ended 31st of December 2018 the fee was approximately £248 plus VAT per unit. In the year ended 31st of December 2019 the fee was £256 plus VAT per unit and in the year ended 31st December 2020 the fee was £266 pounds plus VAT per unit. The increase from 2018 to 2019 was 3.6% and 3.9% from 2019 to 2020 which was in line with the market He confirmed the management fee did not include the cost of preparation of end of year accounts nor the audit of the accounts. Mr Ahern also gave evidence in relation to the audit costs, the recruitment costs and the employers liability insurance.

Determination

Countryside Contracts

42. Mr Spender said the charges were unreasonable. He said the Respondents had offered a 25% deduction after the 6th of July 2020 to reflect Mr Williams' mistake about the end of the contracts. He said that the terms of the contract were unreasonable and unsatisfactory. He said the decision to enter the contracts was irrational. Mr. Williams had been put forward to give evidence on this issue but it was clear that other people higher in ranking had made the decision. He said the documentary evidence was unsatisfactory and there were missing key documents. Some of the contracts were missing and at the time Mr. Williams made the decision when he had no sight of the contracts. He started his role in 2013 and didn't get the contracts from the previous manager. He didn't ask anyone for the contracts. He didn't take legal advice. Mr Spender said if Mr. Williams had properly checked the contract or got legal advice on them it was potentially arguable that they were unenforceable. He referred to the table in his statement which showed that the cost of the contracts was

"eyewatering" in comparison with other schemes where the equipment was owned. The decision to enter the contract was flawed and the leaseholders were still suffering as a result of it.

43. Mr Allison said there was not much in dispute in terms of the factual evidence. There were five contracts in identical terms that could not be terminated until July 2020. He conceded that FirstPort should have terminated the contract sooner around July 2020 but this was in the middle of the pandemic. The Respondents had accepted a reduction of 25% full 2020 to reflect the late decision. Mr. Williams had thought the contract ended at the end of 2020 he was wrong. It was not commercially sensible to exercise the break clause before that. He said that comparing this system to systems in which the equipment was owned was not comparing the like for like therefore the comparison with Canary Riverside was not reasonable. He said that Mr Spender could have got expert evidence on this but failed to do so. He said in relation to the question of reasonableness of the charges the question was has the landlord reasonably incurred the costs (Waaler paras 34,36,37 and 39 to 41). The important question was whether the costs are reasonably incurred. What was the landlord to do in this situation? He had to pay because he was under a contract. This in itself made the costs reasonably incurred.

44. The Tribunal has considerable sympathy with the Applicants' arguments in relation to the Countryside Contracts. The rental arrangement made by the developer in 2000 was short sighted and paid no heed to the leaseholders who were foisted with what was on any account a bad deal for them. Unbeknown to them they were purchasing properties with expensive rental systems covering all of the essential communal systems – Door Entry; TV distribution and Car Park Gates and barriers. The 20 year contract was on any account onerous. The rent was high and the equipment was not owned which meant that the Respondents and in turn the leaseholders were effectively held to ransom. If they didn't pay the equipment would be removed. The clauses in the contract apparently precluded an easy early exit before the 20 years was up. The Respondents had not tried to exit the contract before it was ending anyway. This was clear from Mr Williams' evidence. Mr Williams was an unsatisfactory witness. As it came out his evidence merely confirmed that he had no real understanding of the contracts he was trying to defend. He didn't even have copies of the contracts at the relevant time when he made the decisions in relation to their termination. This is extraordinary. More extraordinary is the fact that he didn't even know when the contracts were due to end.

45. Mr Allison argued that it was not open to the Tribunal to revisit a bad deal made in 2000. We agree with that. We are looking at the years 2018-2020 only and must confine our consideration to these years. In these years the leaseholders were still the victims of the bad deal. Nothing had improved. They were paying

the high rental costs. If the Respondents or the developer had bought the system the leaseholders would not be paying rental costs. They would only be paying the cost of maintenance which Mr Spender has demonstrated is considerably less. The argument that leaseholders bought into the scheme and are stuck with the consequences only works if they were aware of the details of the Countryside contracts in particular that they didn't own the equipment. This was not the case on the evidence heard by the Tribunal. Moreover, it's not fair to say that because the Respondents could not extract themselves from the bad deal before it had expired the leaseholders should also suffer. If the costs are not reasonably incurred then the leaseholders should not be liable for them. The bad deal made in 2000 was still a bad deal in 2018 and its not fair to foist upon the leaseholders the consequences of it. If the landlord enters into or adopts a financially unsound arrangement does that mean the tenants have to pay nonetheless for the full term of the contract? – the answer must be no because otherwise s. 19 Landlord and Tenant Act 1985 would serve no purpose. The tenants are only liable for the amount reasonably incurred and the landlord who entered into or adopted the bad deal must pay the rest.

46. In the present case it was not reasonable for the tenants to meet the rental cost and they should only be liable for the cost of maintenance and repair for the years in question. Mr Spender has put considerable work into calculating the leaseholders offer in relation to the cost of the contracts for the relevant years. His calculations are sound but rely on assumption in relation to the relative costs of rental and maintenance. Countryside would not give him a clear answer as to the rental cost. Comparisons can be made with other estates for the maintenance costs and the Tribunal may have to resort to these . In the first instance however it asks the Respondents to detail and justify the costs of the contracts for the relevant period without the rental fee. Mr Spender will have the opportunity to make further submissions on those figures. If proper figures are not forthcoming the Tribunal intends to make a broad bush assessment. Directions are given below.

Temporary and permanent recruitment commissions

47. Mr Spender said the services provided by FirstPort response were not provided to a standard to justify the costs claimed. He compared the costs charged by an agency called PMR and said that FirstPort Response's costs should be re calculated by reference to those. He said Response should charge lower costs because they were different and more expensive from an independent agency. He said that no benefits should be obtained as a result of employing a permanent member of staff. Also he said the overheads were being charged through the management fee. The training of staff by Response he said had been exaggerated and in fact the staff on site probably did the training. He said that

the leaseholders were paying twice for the same services in terms of the management fee and the recruitment fees.

48. Mr Allison said that the comparison with PMR was not reasonable because we didn't know what profits they were obtaining. He said that the landlord and FirstPort response had been transparent. The cost of the temporary staff was within the market levels albeit at the upper end of the scale but FirstPort Response paid higher hourly rates. There were benefits of internal training. He said that the Response cost was separate from the management fee and there was no "double dipping" going on. In relation to permanent recruitment the rates were competitive in fact PMR was more expensive.

49. The difference between the parties in relation to the recruitment commissions was comparatively small. The Tribunal considers that the cost of temporary recruitment should be the same as PMR. There is no real justification for the difference between Response and PMR. Most training would be carried out on the job and one might expect an "in house" employment provider to be cheaper whereas Response are at the top end of charges. The leaseholder's offer of £21951.19 is considered reasonable.

Accounting fees

50. Mr Spender said that the quality of services provided were not up to standard. He said that the accounts had not been prepared in accordance with the RICS code. There was the issue with the certificates referred to above and he said that the audits were not up to scratch. In relation to the certification point he said most leaseholders would not know how many properties were at the scheme and so would not be able to work out their proportion. He said therefore that the service charge machinery didn't work unless the number of units was known by the leaseholders. He repeated that mistakes had been made in the calculation of apportionment. He said the auditors should have checked if the accounts complied with the service charge machinery. The protective measures had failed which meant the leaseholders were over charged. The accountants did not do their job properly.

51. Mr Allison said there were two charges involved in this dispute the accounts preparation fee and the auditing fee. He repeated that the accounts were not part of the management fee. He said in relation to the certification point this was not a condition president under the lease. The apportionments were shown on demands sent to leaseholders. The number of units had remained the same and was likely to for the foreseeable future. In any event clause 5.3 of the lease allowed a variation. He said the FirstPort had held their hands up as to the mistake in accounting and the mistake had been rectified. The auditors did pick

up the discrepancy in April 2021 but delayed until December 2021 in sorting it out to which some criticism could be levelled at them.

52. The accounts we're not prepared in accordance with the RICS code despite the fact that FirstPort apparently held itself out as complying with the code. In addition there should have been certification on the demands sent out albeit that this was not a condition precedent. It is clear that mistakes were made in relation to the accounting and these were only discovered by Mr Spender himself. Accordingly it is considered that a deduction in the fees is appropriate but 50% is considered too much and a 20% deduction is considered more appropriate for each of the years in question. The audit fees are allowed in full.

Doors

53. This item was a relatively minor item which concerned the fitting or three fire doors in which the quality and cost of the work was challenged by the leaseholders. Mr. Williams had said that the doors were hydraulic and therefore more expensive. Mr Spender had spoken to his father who is a carpenter and said that the doors cost between £300 and £400 and therefore the costs (approx. £2500 per door) seemed excessive. Mr Allison said that the difference in costs is not great, the fire doors needed adjustment strips, glaze hinges etc.

54. The Tribunal considers that the materials used for the fire doors were clearly overpriced. We allow £400 per door plus labour of £600 per door making a total of £1000 plus VAT.

Insurance Commission

55. The leaseholders said the charges were excessive and proposed a reduction of about 2/3. Mr Spender said it was a point of principle as FirstPort were already getting the management fee. Lisa Amy the director of insurance had put in a witness statement but not attended. He said that limited weight should be given to her evidence. There were a number of questions that Mr Spender would have liked to have asked Lisa Amy but was unable to ask. It was impossible for him to get a like for like quote in relation to the block policy.

56. Mr Allison said it was wrong to challenge the commission as a matter of law. He said that the Tribunal was not here to assess the Commission received by the insurance broker. FirstPort Response were part of the same entity but were a separate entity and were entitled to charging Commission.

57. Mr Allison is correct that the premium was not proven to have increased by the commission therefore the Tribunal has no role in this matter. There were no comparators in any event.

Magnetic locks

58. The cost of the locks was £6194.40 and the leaseholder said that they should be reduced to £2000. Mr. Williams had said that the doors were bespoke doors that had to be cut to size and box and cabling was needed.

59. The challenge here relates to the cost of the materials used. The Tribunal considers that the materials were overpriced and takes note of the comparables used by Mr Spender and the cost is reduced to £3701.44.

Building survey fees

60. Mr Spender said that these fees are unreasonable. Hamilton House had been wrongly measured also the Podium report was very expensive.

61. The Tribunal was impressed by Mr Schwier's evidence. He accepted that he'd made a mistake in one of the surveys at least. His charges were low despite the fact that he'd had the onerous task of carrying out measurements of every property and owned by FirstPort. It was likely that mistakes would be made and they were. In relation to the Podium costs it is clear that these costs are largely reflective of the fact that the firm has the relevant equipment available to carry out the measurements at short notice which they did. These fees are allowed in full.

Concierge and business and leisure centre costs

62. Mr Spender said the changes to the parcel holding and deduction of the service in the Business and Leisure Centre meant that services had not been provided to a reasonable standard. He said it was incongruous for a luxury service to be deducted in this way. The parcel service had always been part of the concierge service. In relation to the pool hours he said the reduction in hours was unnecessary and excessive.

63. Mr Allison said that was it open to the landlord to make estate regulations depending on the conditions. The guidance in relation to the Covid pandemic had meant that the landlord could take measures to comply with the regulations. He said the question was had the landlord acted rationally and fairly? He said the changes to the parcel service were sensible in light of COVID. He said that the alteration to the pool times what also reasonable in the context of the Covid pandemic

64. The tribunal considers that Mr Spender is being unrealistic in relation to the challenge to the reduction in the parcel service. The Respondents tried to manage the service during a time of a global pandemic. The methods used we're not ideal but at least they sought to carry out reasonable adjustments to deal with a pandemic. Similarly in relation to the deduction in hours of the swimming pool these were unprecedented times and the Respondents were in a position where they had to comply with regulations imposed by the government in order to check the spread of the disease. Swimming pools and leisure centres were affected countrywide and in this case the Respondents were right to carry out deductions in service which allowed proper cleaning to take place. Again, it may not have been a perfect solution but it was a solution and the alternative of continuing as normal was not a real alternative available. All of the costs are allowed in relation to the concierge and business and leisure centre. The Tribunal strongly sympathises with Mr Atkinson's and other leaseholder's experiences but the pandemic was unprecedented.

Management fees

65. Mr Spender said there had been recurrent problems with the service provided. The service charge demands were calculated wrongly, the accounts did not contain certificates and the failure to replace Countryside illustrated a glaring error.

66. Mr Allison said the service had not fallen below that of a reasonable provider. The Respondents held their hands up in relation to not knowing about the termination of the contract and agreed a reduction in order to reflect this.

67. The Tribunal accepts that there were mistakes made in the management of the estate. It was unimpressed by the evidence of Mr. Williams. There were mistakes made in the accounting systems. Mr. Williams failed to keep tabs on the Countryside Contracts and didn't even have copies of the contracts during the relevant time which is flabbergasting. He appeared unaware of his responsibilities as a manager and was defensive when asked questions about

his role in the decisions made. In light of these deficiencies in management the tribunal would impose at 10% deduction in the charges for each year.

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68. Mr Spender has put a considerable amount of time and effort into preparing his challenge. He has been successful on most of the challenges including the central challenge in relation to the Countryside Contracts. The Tribunal will exercise its discretion and make an order preventing the landlord from seeking to recover its costs from the service charges.

Further order

69. The Respondents are required to provide a breakdown of the costs of the Countryside Contracts for the relevant period illustrating specifically how much is attributed to rent and how much to maintenance. The said breakdown shall be provided within 14 days of receipt of this determination. The Applicants are at liberty to provide any further submissions in relation to these costs within 14 days of receipt of the breakdown. If the Tribunal does not receive the breakdown from the Respondents it shall determine a breakdown itself. Appeal rights will run from the determination of the breakdown.

Judge Shepherd

22nd March 2023