Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0056/03/20

In the Matter of Flats 9, 19, 22 and 30, The Cliff Apartments, Lon-Y-Don, Trearddur Bay, Anglesey LL65 2UZ

In the matter of an Application under Sections 19 and 27A of the Landlord and Tenant Act 1985

Applicants: (1) RICHARD AND LOUISE HAMPSON (No. 9)
(2) MARK HUGHES (No. 19)
(3) KEITH AND JANE STANIER (No. 22)
(4) LAWRENCE AND SANDRA O'TOOLE (No. 30)

Respondents: (1) SCANLANS PROPERTY MANAGEMENT LLP
(2) CLIFF APARTMENTS MANAGEMENT COMPANY LIMITED

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ORDER

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Before: Tribunal Judge E. W. Paton (Legal Chair)
Mr. H. Lewis (Surveyor Member)
Mr. H. Jones JP (Lay Member)

Sitting at the Residential Property Tribunal, Oak House, Celtic Springs, Cleppa Park, Newport NP10 8BD

BY REMOTE VIDEO HEARING ON THE CLOUD VIDEO PLATFORM (CVP)

UPON HEARING the Applicants in person by the First Applicant Mr. R. Hampson, and the Respondents by Mr. J. Southern, a director of the Second Respondent

IT IS DETERMINED AND ORDERED AS FOLLOWS:-

1. No valid service charge demands were served by or on behalf of the Second Respondent on the Applicants for any of the years 2014 to 2020 inclusive, so no sums for service charge were or are due and payable for any of those years (this also applies to the advance demand made for the current year 2020).

2. Under the terms of the leases of the Cliff Apartments held by the Applicants, the Second Respondent is entitled to recover, via service charge, relevant and reasonable costs incurred in relation to the maintenance, repair, management

and operation of the indoor swimming pool shown hatched green on the “Plan 1” attached to the leases.

3. Subject to the decision in paragraph 1 above, the amount of relevant costs reasonably recoverable via service charge in relation to the said indoor swimming pool for each of the years 2017, 2018 and 2019 was £10,000.

DATED this 3rd day of November 2020

E PATON
CHAIRMAN

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DECISION

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Before: Tribunal Judge E. W. Paton (Legal Chair)
Mr. H. Lewis (Surveyor Member)
Mr. H. Jones JP (Lay Member)

Sitting at the Residential Property Tribunal, Oak House, Celtic Springs, Cleppa Park, Newport NP10 8BD

BY REMOTE VIDEO HEARING ON THE CLOUD VIDEO PLATFORM (CVP)

The Applicants appeared in person by Mr. R. Hampson
The Respondents appeared by Mr. J. Southern, a director of the Second Respondent

Introduction: background

1. These are applications made by four owners of long leasehold flats at The Cliff Apartments, Trearddur Bay, Anglesey, for determination, under section 27A of the Landlord and Tenant Act 1985, of whether service charges were or are payable under their leases of those apartments in respect of the years 2014 to 2020 inclusive, and if so in what amounts. The First Applicants, Mr. and Mrs.

Hampson, are the 'lead' applicants and are authorised to represent the other Applicants. Mr. Hampson appears on behalf of all those Applicants. No other flat owners (there are 26 flats in total) have joined in the applications.

2. The Cliff Apartments are on the site of a former hotel. It appears that the hotel was closed and converted to holiday flats at some time in the 1960s. The site was later acquired by Anglesey Sales Limited, who about ten years ago modernised the buildings and the flats, for their sale off to private owners on long leases. We are told that the first such sale was in about 2011, and the last in 2016. We have not been shown an up to date office copy of the registered title, but it appears that on or about 30th November 2016, after the sale of the last flat, the freehold of the site was transferred by Anglesey Sales Limited to the Second Respondent Cliff Apartments Management Company Limited. Mr. John Southern, who appeared for the Respondents, is one of the directors of that company. Most of the Applicants have previously been directors of the company, but have since resigned. The First Respondent is the current managing agent appointed by the company.

3. We emphasise that we are not concerned with any issues of corporate governance and management, or any of the apparent clashes of personalities or arguments which have arisen between some of the parties, generating at times heated correspondence. These applications are concerned solely with the recoverability and amount of certain service charges under the leases of the flats. Similarly, while it is evident that in some respects the leases were poorly drafted and unclear, this is not an application to vary those leases under sections 35 to 40 of the Landlord and Tenant Act 1987. It is our task to interpret and apply the leases as they are.

4. We have not had the benefit of a site visit, but the general position is reasonably clear from the plans and photographs we have seen, and a very helpful video which was provided by the Applicants (with the Respondents' agreement). There is a main building, formerly part of the hotel, in which the 26 flats are located. Around it are some car parks, driveways and other external areas. Adjacent to but separate from the Cliff Apartments, there is another development of flats on the site, known as Plas Darien. These are separately owned and let on long leases.

The pools

5. Across a large open rear car parking and turning area, on the north-east corner of the site, are two freestanding buildings at an angle of about 45 degrees to each other. These house two separate indoor swimming pools. The pool on the left/west is separately owned by another person or body, and appears now to be operated as a public or commercial pool trading as "Instant Swim". It therefore has nothing to do with Cliff Apartments or these applications, save in relation to one matter discussed further below.

6. The pool on the right/east is (see below) part of the Cliff Apartments property. It is a yellow brick rectangular building, with a slate pitched roof. In the video we could see an entrance keypad to the left of the door, and a sign on the door

stating “The Cliff Apartments – Private Swimming Pool”. Inside, the chlorinated pool appears to be around 10m x 3m. The building is heated and lit, and there are items such as a defibrillator, a lifebuoy ring and a cover on the pool, but no changing areas, toilets or showers. There are pumps, filters and conduits serving the pool but we could not see those in the video.

7. Separate from (and not to be confused with) the two indoor pools described above is a third, outdoor pool. This is situated within a large open patioed area to the east of the indoor pools, surrounded by a high white rendered wall. The pool itself is larger than the indoor pool, consisting of a main oblong shaped pool with a shallower paddling pool at a right angle to it in an approximate “T” shape. On the video we could see this pool area from above, filmed from an upper walkway serving the Plas Darien apartments. We were told that, although it appears to be chlorinated and maintained, it has in fact been closed in recent years, although there was some suggestion that it may re-open in 2021.

The leases

8. We have seen the Hampsons’ lease of Flat No. 9, and are told that all the leases at Cliff Apartments are in the same form, albeit granted on different dates between about 2011 and 2016. The Hampsons’ lease is dated 15th February 2013 and is for a term of 999 years from 26th April 2011. The original parties to the lease were Anglesey Sales Limited (the Lessor, then the freehold owner of the whole site), Cliff Apartments Management Company Limited (the Company) and the Hampsons. As a result of the above transfer of the title, the Company (the Second Respondent) is of course now also itself the Lessor under the lease, although it was separately a party to each lease from the outset in its capacity as “the Company”.

9. The leases contain provisions, as one would expect, for the demanding and payment of service charges. The key provisions are as follows:-

   i) “the Property” is defined as “All that land with building erected thereon situate and known as Cliff Apartments more particularly shown edged red on the Plan 1 annexed hereto”.

   Plan 1 shows the areas edged in red as, broadly, the main building and its surrounding car parks and external areas; and also the right/easternmost of the two indoor swimming pools described above. That pool is also hatched green on that plan. So it is clear, and was common ground, that the indoor pool forms part of “the Property” referred to in the lease.

   “The Building” of which the flat forms part is shown edged in blue on that plan.

   “The Outdoor Swimming Pool”, as described above, is said to be shown edged yellow on the plan, although this colouring was not clear on our copy. Its location relative to the Property is, however, reasonably clear: while the actual shape of the pool itself is not depicted, two “squiggles” on the rectangular area in that location are presumably intended to denote the pool

ii) by clause 2(i) the Lessee covenants with both the Lessor and the Company

"..to contribute and pay by way of further rent the proportion mentioned in the Sixth Schedule hereto of the costs expenses outgoings and matters mentioned in Part I of the Fourth Schedule ('the Service Charge') and it is further agreed that Parts II and III thereof shall be incorporated into this lease".

The extent of the service charge matters within that Fourth Schedule is considered in more detail below.

The proportion specified in the Sixth Schedule is 1/26th "or such other proportion as the Company may specify in its reasonable opinion". No other proportion has been specified by the Company.

iii) by clauses 2(ii) to (iv), the contractual mechanism in the leases for the demanding and payment of service charge is that :-

- the Company or its managing agents are first to estimate the service charge contribution in advance, for the year ending on 31st December
- the lessee is then to pay his/her/their share (i.e. 1/26th at present) of that estimate service charge amount, by four equal quarterly instalments on 1st January, 1st April, 1st July and 1st October
- at the year's end the Company is to ascertain and certify the final actual expenditure for that year, and the Lessee must either pay any balance due (if the actual expenditure exceeded the estimate) or else be credited with any amount overpaid.

By clause 3(1)(b) the Lessee is to make such payments by direct debit.

10. Part I of the Fourth Schedule contains the various heads of expenditure for which the service charge contribution may be demanded. There are thirteen separate paragraphs, which we will not set out in full. The most relevant ones for present purposes are the following:-

- 1(a) "the costs and expenses incurred by the Company in carrying out its obligations under clauses 4 and 5 of the Lease". Clause 4 contains the Lessor's repairing obligation in relation to the "Main Structure", service conduits and installations, the "Common Parts" and the exterior of window frames, while clause 5 contains the obligations to give quiet enjoyment and to enforce covenants against other lessees.

- 1(b) "the costs and expenses incurred by the Company towards the maintenance costs of the Outdoor Swimming Pool"

-3 : "All rates (including water rates) taxes assessments and outgoings payable in respect of the Property (but other than the flats and premises comprised therein) and without prejudice to the generality of the foregoing to include all gas billed by the supplier on one meter to the Property together with all electricity

billed by the supplier and sub-metered to each Flat by the Company together with all water billed by the supplier to one meter on the Property"

-4. "The fees and disbursements paid to any managing agents appointed by the Company in respect of the Property and in connection of rents and service charges from the lessees of the flats in the Building"

On this point, Part III paragraph 17 of the Fourth Schedule also provides that:

"The Company for the purpose of rendering any repairs services or other amenities referred to (directly or be [sic] inference in this Schedule may employ such person or persons and contract with such person or persons company or companies as it thinks fit."

- 7. "All other expenses (if any) incurred by the Company in and about the maintenance and property and convenient management and running of the Property including in particular any interest paid on any money borrowed by the Company to defray any expenses incurred by it and specified in this Schedule"

- 8 [allows for the recovery of VAT and other tax on expenditure]

- 9. "All costs and expenses (other than those specified above) of whatsoever kind incurred by the Company (including any proper sum for future and contingent liabilities and any reasonable reserve) and a certificate under the hand of the secretary of the Company as to the amount under this paragraph at any time shall be conclusive (save in case of manifest error)"

Other provisions include paragraph 10 (maintenance of boundary walls, fences, entrance ways, drives, forecourts, grounds etc.), paragraph 11 (provision to raise a reserve fund, to be held on trust in accordance with Part II of the Fourth schedule paragraphs 15 and 16), paragraph 12 (exterior lighting) and 13 (maintenance costs of accessway coloured brown on Plan 1).

11. One final clause of the leases to note, of some relevance to these applications, is contained in the Second Schedule, which sets out the various rights and easements granted to the Lessee. These include (in addition to the usual rights of way, rights for services, support etc.), at paragraph 8:

"The right to use the indoor swimming pool shown hatched green on Plan number 1 and the Outdoor Swimming Pool".

Paragraph 9 of the same Schedule provides that:

"All of the above easements rights and privileges are subject to and conditional upon the Lessee contributing and paying as provided in Clause 2 of this Lease".

12. Statutory rights and obligations

13. In addition to those contractual lease provisions as to the demanding and recovery of service charge, since these are leases of "dwellings", the demanding

and payment of service charge is further subject to the various statutory rights, obligations and mechanisms under the Landlord and Tenant Acts 1985 and 1987, and the regulations made thereunder. The most important and relevant of these, for the purposes of these applications, are the following:-

i) by section 21B of the 1985 Act, "a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants in relation to service charges", and a tenant may withhold payment of a service charge which has been demanded from him if this requirement is not complied with. The sum demanded is not therefore due and payable unless and until this requirement is complied with.

ii) since these properties are in Wales, the relevant summary of rights and obligations to be served is that prescribed by regulation 3 of the Service Charges (Summary of Rights and Obligations and Transitional Provisions) (Wales) Regulations 2007 [SI 2007/3160 (W. 271): "the Welsh regulations"]. Without setting this out in full, the key points to note are that the summary must be in both Welsh then English, in precisely the form set out in the regulations; and must refer to the tenant's right to make an application to a "leasehold valuation tribunal", the name by which this Tribunal is still known in Wales, as opposed to its English counterpart the First-Tier Tribunal (Property Chamber). Whilst trivial errors in the summary of rights and obligations may to some extent be disregarded and will not invalidate the demand with which it is served (see Countryside (Residential) South West Limited v. Mark Tudor Roberts [2017] UKUT 0386 LC – incorrect font size, or English language version preceding the Welsh one), service of completely the wrong summary, or no summary at all, clearly has the effect prescribed by section 21B. The sums demanded are not payable until a valid demand is served.

iii) By section 47 of the 1987 Act, any written demand for service charge must contain the name and address of the landlord or (if that address is not in England and Wales) an address at which notices may be served by the tenant on the landlord. If the demand does not contain that information, then it ".shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished.".

iv) By section 48 of the same Act, the landlord must also furnish the tenant with an address at which notices may be served on him by the tenant, and similarly, where a landlord fails to comply with this obligation, any rent, administration or service charge otherwise due from the tenant "shall be treated for all purposes as not being due.." until the landlord complies.

v) by section 20B of the 1985 Act, ".(1) .if any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred… (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would

subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

vi) by section 27A(1) of the 1985 Act, the Tribunal's jurisdiction on an application extends to determining "whether a service charge is payable, and if it is, as to.." [amongst other matters]

..(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."

vii) by section 19 of the 1985 Act, the amount of all residential service charges payable is to be "limited accordingly" to the extent to which the relevant costs on which they are based were "reasonably incurred", and to which any works or services provided were of a "reasonable standard".

The issues in these applications

I. formal validity of all demands 2014-2020

14. In these applications, the Applicants have challenged the formal validity of all service charge demands from 2014 to 2020 inclusive, in the sense of compliance with both the requirements of the lease and the above statutory provisions. The Tribunal's directions of 5th June 2020 in any event required the Respondent to file evidence of compliance with these requirements. It will therefore be necessary to consider those issues for each of the years in issue.

15. If any sums previously demanded and paid were not in fact due, because of non-compliance with some or all of the above requirements, then two matters should be understood by the parties.

16. First, this Tribunal simply determines whether the relevant service charges were or are payable. It cannot give money judgments for the refund of sums previously paid towards service charges which were not contractually or statutorily due (by reason of some or any of the above provisions). If any person therefore wishes to pursue recovery of any such sums against the party to whom s/he paid them, that would be a matter for them separately to pursue in the County Court. It should be noted that by section 27A(2) of the 1985 Act, the Tribunal's jurisdiction under section 27A(1) is exercisable "whether or not any payment has been made", and by s27A (5), a tenant of a dwelling "..is not taken to have agreed or admitted any matter by reason only of having made any payment".

17. Second, the Respondents in particular should be aware of the implications of section 20B of the 1985 Act as set out above. If any previous demands for service charges were invalid, the Respondents may now be too late, in respect of some of the amounts in question, now to re-serve fresh and compliant demands for those sums. More than 18 months will now have passed since the relevant costs underlying those service charges were incurred. As at the date of the hearing (13th October 2020), that applied to any relevant costs incurred before 13th April 2019, and time continues to run. A fresh and otherwise compliant demand now

made for those sums would be likely to be met by a defence under section 20B. But again, those are matters for parties to pursue and argue, if they so wish, elsewhere. They do not directly arise within the applications before us.

II. Recoverability of expenditure incurred in relation to the 'red' indoor pool

18. So far as the substance of the service charges is concerned (as opposed to the formal validity of any demands for them), only one issue is pursued by these applications. This relates to what has been called the "indoor swimming pool", or "Red" pool described above at paragraph 5, although confusingly (as stated above) it was denoted on Plan 1 to the leases as being hatched green. This only relates to the most recent years in issue, which appear to be the first years in which any charges have been levied in respect of this pool.

19. One curious feature of the case, and the position at Cliff Apartments, is that the Outdoor Swimming Pool, which the lease purports to grant a right to the lessee to use, and for whose maintenance and repair express provision is made in the lease at Fourth Schedule paragraph 1(b), is in fact owned by another party. Although we have not been shown any registered titles, we understand this pool to be owned by the residents' management company which also owns and manages the adjacent Plas Darien development. The complexities to which this arrangement might give rise (i.e. Cliff Apartments lessees having a 'right' granted to them over someone else's property) do not arise in the applications before us, since this pool has been closed in recent years, and no issue arises as to any charges previously made in respect of it.

20. The only dispute and issue of principle in these applications is over the Respondents' right, or otherwise, to levy contributions via service charge for the maintenance, repair and management of the indoor "Red" pool. There is no comparable express and specific provision in relation to this, as there is for the Outdoor pool. The first issue of substance to consider is therefore whether, as a matter of interpretation of the leases, expenditure on the indoor pool falls within some, or any, of the various heads of recoverable service charge expenditure in the Fourth Schedule, as set out above.

III. The amounts of expenditure relating to the indoor pool

21. Subject to that issue of principle and therefore recoverability, the actual amounts of expenditure attributable to the indoor pool were not at all clear from the documents provided to us. One matter on which the parties were to some extent agreed was that the accounting and general information in this and other respects was very poor. Mr. Southern to some extent blamed the previous firm of managing agents, but whatever the reason, it was necessary to piece together such information as there was to obtain some sort of picture. Mr. Hampson himself had carried out a deal of work and analysis in this regard, much of it when he was still on better terms with the Company and had volunteered his assistance to make sense of the incomplete information it had.

    The position which emerged from such evidence as there was is as follows.

22. In the initial years after the Cliff Apartments flats were first sold off, no charge was made to lessees via the service charge for the costs of running, maintaining, heating and lighting the indoor pool. It appears that those costs were effectively absorbed by Anglesey Sales Limited, either as a concession or act of generosity, or through oversight. So, in relation to the years before us in these applications, no sums were claimed via the service charge in relation to the indoor pool in the years 2014, 2015 or 2016.

23. In 2017, there was an AGM of the Company (on 28th January 2017), and a figure of £7000 for "pool maintenance" was stated in a "budget summary" of proposed expenditure. The pool was mentioned in the AGM minutes, with the newly appointed directors resolving to "review pool management and implement any agreed changes".

24. A document described as "Trial Balance Report for Period ending 30/11/2017", apparently prepared by the then managing agents Regalty Estates, lists under "R&M Pool Maintenance" a figure of £10,297.57. This figure, rounded down to £10,297, later appeared in what purport to be Company financial statements and accounts for the "year ended 30th November 2017" prepared by a firm of Rochdale accountants, dated 24th April 2018. We heard, however, that none of the parties in fact saw these accounts at the time, and they first appeared much later when disclosed in 2019 to a prospective purchaser of a flat.

25. This is something of a mystery, but the simple fact is we have not seen a single document or invoice referable to that figure of £10,297. Neither party produced any such document for the hearing, although the onus was on the Respondent, pursuant to the directions order of 5th June 2020, to do so. We had literally nothing to go on. It was not even possible for anyone to say to whom, or for what, £10,297 was paid in that year.

26. The position for 2018 is marginally clearer, but only because of the efforts and arithmetic of Mr. Hampson. A "budget for the financial year commencing 1/12/2017" produced and served by the Company's then agent showed an estimated figure of £6000 for "R&M Pool Maintenance". It also appears that from August 2018, the Company (via Regalty Estates) decided to pay Anglesey Holidays Limited, a company controlled by Mr. and Mrs. Abrahams which also managed the neighbouring indoor pool, a monthly sum for pool maintenance and cleaning. We have seen one sample monthly invoice, in the sum of £697.50. This arrangement continued month by month until it was terminated in October 2019 when the Company appointed new managing agents.

27. We also saw two invoices which suggest that the cost of electricity and gas attributable to the Cliff Apartments indoor pool was paid by the Company. The arrangements for this appear to be somewhat odd and unsatisfactory. There are no separate electricity or gas meters serving the Cliff Apartments pool. There are meters situated on the adjoining property, the other indoor pool to the west. The owner or operator of that property, Anglesey Sales Limited, has main meters for the supplies to both pools, but apparently has a sub-meter to measure its own use for its own pool. The invoices we have seen consist of that company apparently deducting its own sub-metered amounts from the total bills, and

asking the Company to pay the balance, by a process of elimination. By a letter/invoice of 20th December 2018 from it to the Company, it claimed re-imbursement of £2580.10 of charges for "electricity used for the Red Pool at the Cliff site" for the period 16/08/17 to 26/11/18. By a letter of 5th March 2019 it claimed re-imbursement of £2814.76 for "Gas used at the Red Pool at the Cliff site" for the period 16/08/17 to 26/11/18. Mr. Hampson calculated that these correspond to average monthly amounts of £188 for gas and £177 for electricity.

28. We have not seen any further invoices but we presume that this practice continues. Again, while this is not the subject of an application before us, it is highly unsatisfactory for the Company to pay electricity and gas charges in this way, via "sub-invoicing" from a neighbouring owner based on meters on other land over which it has little control. Mr. Southern told us that the Company is looking into changing this, presumably by the installation of separate metered supplies.

29. Adding together the sums presumably paid to Anglesey Holiday Limited for pool maintenance from August to December 2018, the presumed monthly amounts of electricity and gas costs, and some further sums for pool materials and plant maintenance for which he told us he had seen invoices at the time he prepared a spreadsheet of these costs, Mr. Hampson therefore calculated that some £10,593 had been spent in the year 2018 on the indoor pool. These calculations were carried out by him, in part, because figures appearing in the 2018 version of the "Financial Statements" which we saw – which again were not apparently shared with lessees at the time – showed only a figure of £3559 for pool maintenance, while a "trial balance" document produced by the then managing agent stated a figure of £4862.15 for this item

30. The position for 2019 reverts to the previous state of uncertainty and lack of information. It appears that the budget for pool maintenance in this year was again set at £6000, but in the most recent set of accounts, dated 5th June 2020, produced by a new firm of accountants and now with the year end of 31st December 2019, contains £14,080 for "pool maintenance", £8080 over the stated budget. The Respondents were directed on 5th June 2020 to provide all accounts and supporting invoices relevant to the matters in dispute. It is therefore frustrating to the Tribunal that not a single invoice or document has been produced referable to that figure, which is the single biggest item in those accounts and the only matter in dispute in these applications. We are left only with the inference that £697.50 per month will continued to have been paid to Anglesey Holidays Limited for pool maintenance from January to October 2019, and that some charges will have paid to Anglesey Sales Limited for electricity and gas use. Mr. Southern told us in oral evidence that the Company and its new agent have now employed a new pool maintenance agent, a Mr. Paul Moffatt, who also operates and conducts lessons out of the neighbouring pool, and charges what they consider a more reasonable sum of £375 per month for maintenance of the Cliff Apartments indoor pool. We were not shown any invoices in this regard.

31. While we make some allowance for the fact that the Second Respondent is a residents' management company, and that Mr. Southern was doing his best as

a director to represent it and deal with a difficult situation, such a situation is very poor and unacceptable in a section 27A service charge application before this Tribunal. The Applicants have squarely put both the recoverability and amounts of those sums in issue. The Company has an apparently competent professional agent, which is also the First Respondent to these applications. The onus is on them to justify any sums they have spent and claimed through service charges in respect of the indoor pool, and the directions made clear that they were to provide all the relevant documents and invoices supporting such charges. The figure of £14,080, in accounts only just produced (on 5th June 2020) must have come from somewhere, and be based on something, but no effort has been made to explain what this is. If the Respondents found the demands of defending these applications too challenging, or did not properly understand their obligations, they could have appointed solicitors to assist them, and potentially sought to recover those costs through the service charge provisions. They chose not to do so, and the Tribunal has therefore been left groping in the dark, with only a few scraps of evidence and information about how that expenditure is comprised.

32. In relation to 2020, the budgeted estimate for costs referable to the indoor pool was broken down into various components in the "statement of anticipated service charge expenditure" for that year which accompanied the 2020 advance demand (discussed in more detail below). These figures were in fact partly prepared by Mr. Hampson at a time when he was a director of, or at least assisting, the Company. They add up to some £6050, comprising £1050 for "pool electricity", £1000 for "pool gas", £2500 for "pool general maintenance", £500 for "pool insurance", and £1000 for "Water Pump Maintenance". It is not clear whether the £600 estimate for "Water Hygiene Risk Assessment" applies to water at the Property generally or just the pool.

Decisions and reasons on the issues

33. Against that backdrop, we will take each of the issues – formal validity of demands, recoverability in principle of indoor pool expenditure, and amounts of such expenditure – in turn.

I. Validity of demands

34. This is the most straightforward of the issues before us, and we can deal with it relatively shortly. We are not satisfied that there has been a single valid demand for service charges served on the Applicants, for any of the years we are considering, namely 2014 to 2020 inclusive.

35. In relation to the initial years, 2014 to 2017 inclusive, the practice for service charge demand and payment appears simply to have been a continuation of a practice begun in about 2012, whereby the Lessor and the Company had set a service charge figure, somewhat arbitrarily as it appears to us, of a £780 contribution per lessee/flat, and asked each lessee to pay it by a £65 monthly standing order. It seems that lessees generally paid those sums.

36. These charges were demanded by nothing more than a simple letter sent to each lessee in those years, of which we have seen some examples, in which the

Company (usually by Sue Chandler or Robert Songhurst on its behalf) said something like:

"The total service charge for the year ending 31st December xxxx [we saw examples from 2011 to 2016] is £780, a charge of £65.00 per month and will remain the same until further notice.

Payment can be made for the total amount by cheque at the beginning of each year, or set up as monthly standing order… We would appreciate payment by the 5th of each month."

The Company then gave details of its bank account with HSBC in Holyhead to which the payments were to be made.

37. This practice was still in place at the date of the Company AGM on 28th January 2017. At that AGM, there appears to have been discussion of budgets, spreadsheets, a reference to there being £20,000 in the bank, the potential appointment of managing agents, and the provisions of the leases in relation to maintenance of an access road. Mr. Hampson had requested a summary of expenditure and accounts for Cliff Apartments in respect of the previous 4 years, but it was recorded that the Company had been unable to provide this information or obtain it from Anglesey Sales Limited, who had recently transferred the freehold to the Company. It was recorded that "It was agreed that we could not do much about this and that we should move forward".

38. The very next item in the minutes then records that "After some debate about appropriate provision for future risks, it was agreed that the service charge should be doubled to £130 per month immediately, and that this would be reviewed in 6 months by the directors, once they have had more time to review the budgets in detail.". We have not seen any separate letter then sent to lessees demanding that sum. Mr. Hampson's evidence was that he and his wife, and other lessees, mostly just adjusted their standing orders and paid these sums.

39. The service charges for those initial years therefore appear to have been demanded, and paid, without any regard for the actual provisions of the leases, let alone the statutory requirements imposed in relation to all tenancies of dwellings under which service charges are payable. Without wishing to 'over egg' the point:-

i) there was no, or no evidence-based, proper estimate made by the Company of the likely expenditure for the coming year, as required by clause 2(ii) of the leases. The figure of £780 (which, multiplied by 26, equals £20,280) appears, if not to have been plucked from thin air, simply set at that level arbitrarily and not reviewed for several years.

ii) the "demands" for service charge payment, consisting at most of letters in the above form, demanded payment in a manner and on dates not authorised by the leases, which prescribe only quarterly payments in advance on the specified dates towards the estimated annual amount

iii) the demands were not accompanied by any summary of tenants' rights and obligations, as required by section 21B Landlord and Tenant Act 1985 and the Welsh regulations referred to above

iv) the demands did not contain the name and address of the Lessor, which at least prior to about August 2016 when it is said to have transferred the freehold to the Company, was Anglesey Sales Limited. This was contrary to section 47 of the Landlord and Tenant Act 1987.

v) nor does there appear to have been compliance with section 48 of the 1987, requiring an address for the service of notices on the lessor. The "standing order" letters just gave the name and address of the Company itself

vi) there was no, or we have seen no evidence of, any end of year calculation and certification of expenditure. We have seen no accounts, or evidence of demands for payment of any further sums in excess of the £780 if actual expenditure exceeded £20,280, or credits to lessees if it was less than that amount.

40. Despite the January 2017 AGM minutes speaking of managing agents, lease provisions, "section 20" [of the 1985 Act] and the doubling of the service charge to £130 per month with immediate effect, we have not even seen a letter, akin to the previous ones described above, asking for payment of this increased amount. In any event it is clear that, as for the previous years, no valid demand was sent for those service charges, compliant with both the leases and the statutory provisions. The lessees just appear to have paid the sums anyway.

41. The statutory protections for tenants of dwellings were enacted for good reasons. They exist to protect such tenants from arbitrary and peremptory demands for service charge made without a proper evidential and accounting basis, and to alert them to their rights to demand information of such charges and (if they so wish) challenge them before a Tribunal. They apply to all tenants of dwellings, and they applied here at all relevant times. It is no excuse for any lessor or management company to say that they were unaware of such legal requirements, or that they thought that they did not apply, or that the tenants all seemed happy enough just paying sums when asked to do so.

42. Further, there is no excuse for a lessor or management company authorised or required by leases to demand and collect service charge, then spend it on the matters authorised by the leases, not to read those leases when doing so. The provisions in the leases here are simple and common enough, and very clear. The Company, under the control of its then directors, simply ignored them. It demanded payment of an arbitrary figure of £780, either all in one advance payment or monthly, and (as far as we have seen) then produced no end of year accounts to compare estimated to actual expenditure.

43. The specific or personal blame for those matters is largely irrelevant to the task before us. The Company has been a single and consistently existing entity since the inception of the leases, and the service charge demand and collection obligations fall on it. If its officers between 2014 and 2017 chose not to comply

with the leases and statute, or were ignorant of their obligations, or chose not to take advice on them, it is the Company which bears responsibility.

44. The clear position is therefore that service charges for the years 2014 to 2017 inclusive were never properly demanded, and so were not due and payable when they were "demanded" and then paid. As stated, what any individual lessees and the Company now do about that historic position is a matter between them.

45. Later in 2017, the Company appointed a managing agent, Regalty Estates, based in Congleton in Cheshire. They wrote to introduce themselves to lessees on 13th October 2017, enclosing a "statement of account" showing the recent service charge payment history of the lessee in question.

46. Regalty, on behalf of the Company, then issued a service charge demand to lessees dated 1st December 2017. This demand:-

    i) was expressed to be "for the Financial Year 1st December 2017 to 30th November 2018"

    ii) was for a sum of £1920

    iii) requested payment "by standing order on a monthly basis at a rate of £160"

    iv) was accompanied by, or at least based on, a "budget for the financial year commencing 1/12/17", which showed an estimated total service charge figure of £50,220, of which (as referred to above) £6000 was for "R&M Pool Maintenance"

    v) did contain, headed "freeholder detail", the name, but not the address, of the Company; stating the address instead as "c/o Regalty Estates Limited" at their own address

    vi) was accompanied by a "Summary of Tenants' Rights and Obligations", but the English version under the relevant English statutory instrument – not the version applicable in Wales under the Welsh regulations referred to above. So the summary was in English only, and referred to the tenant's right to apply to the "First-Tier Tribunal".

47. For reasons which should be obvious, this demand, although an improvement on the letters which had gone before, was still not compliant with either the leases or the statutory provisions. Regalty had adopted a "financial year" at odds with the clear terms of the leases, which quite clearly provide that the relevant year is to run from 1st January to 31st December. They had at least made some sort of estimate of the annual budget, but in addition to (and perhaps because of) their incorrect accounting period, this 1st December 2017 demand was premature. Under the lease they were required to estimate expenditure for the calendar year 2018, then make a proper demand for it in accordance with the lease, in response to which the lessee would then be liable to pay the estimated annual figure in advance quarterly instalments, the first of which would fall due on 1st January 2018. There would then be a certification of actual 2018 expenditure at the end of that calendar year, and further demands or credits accordingly. Yet this

December 2017 demand appeared to require immediate monthly payment by standing order of £160 to their bank account.

48. In addition, the demand did not comply with section 47 LTA 1987, as it failed to state the Company's address (the Company by that time also being the lessees' landlord as well as still being "the Company" within the provisions of the leases). More seriously, although this is not the first (and will not be the last) time an English-based agent has made this error, it served the wrong summary of tenants' rights and obligations. The summary served was derived from the English, not the Welsh, regulations. Service of the latter is a compulsory statutory requirement for properties situated in Wales. It is no excuse or defence to say that the residents could all speak English anyway, or that the English summary is more or less the same. It is not the same. The English summary refers to the "First-Tier Tribunal", which has no jurisdiction in Wales in these matters, which are reserved to this Tribunal (in the name stated at the heading of this decision) under the auspices of the Welsh Government.

49. Regality Estates Ltd served a largely identical demand the following year on 26th November 2018, in the same form and for the same sum (£1920), this time for "the Financial Year 1st December 2018 to 30th November 2019", accompanied by the same (incorrect) summary of rights and obligations.

    For the same reasons as set out above in relation to the previous demand, this demand too was invalid, for non-compliance with both the lease and the statutory provisions referred to. So, the sums demanded and paid in respect of both of those service charge years 2018 and 2019 were not due and payable.

The 2020 demand

50. The Company, Mr. Southern told us, were dissatisfied with Regalty Estates as an agent, even without then knowing the full extent to which the above demands were defective. They therefore appointed a new agent, the First Respondent Scanlans Property Management LLP, in or about September 2019. Scanlans then prepared and served the service charge demand for the year 2020. This was sent on or about 7th January 2020 with a letter to the lessees accompanied by a Statement of Anticipated Expenditure for the year 2020 (in the total sum of £45,500, of which the lessee's proportion was £1750), and a Request for Payment for the first quarter's sum of £437.50 due for the period 1st January to 31st March 2020. As set out above, in the Statement of Anticipated Expenditure, some £6050 was referable to the indoor pool.

51. This demand did now use the correct accounting year and dates for payment. It also, on the "Request for Payment", referred to sections 47 and 48 of the 1987 Act but then gave as the Company's "address for service of notices":-

    "C/O Scanlans Property Management LLP 3rd Floor Rear Suite Boulton House 17-21 Chorlton Street"

52. As well as that not even being a complete address, it is not the address of "the landlord" for the purposes of section 47(1)(a), although it may be an address for services of notices for the separate purposes of section 48. Section 47 requires the demand to contain the landlord's address, save only where that landlord's address is "not in England and Wales", in which case an address for services of notices will suffice under s47(1)(b).

53. It was also accompanied by a Summary of Rights and Obligations. This may just be a factor of the quality of the copies provided to us, but this summary was in a peculiar light blue on white font which is not easy to read, and in what appears to be a small font size, although we cannot be sure that it is less that 10 point. Putting aside, however, any issue over whether this summary was "legible" or in the correct font size, it was once again the wrong summary – the English, not the Welsh, one.

54. So these latest demands were likewise invalid, and the sums demanded under them were and are not yet due, by reason of their non-compliance with both section 47 Landlord and Tenant Act 1987 and section 21B Landlord and Tenant Act 1985, incorporating the Welsh regulations.

55. Such demands will therefore have to be served again on all lessees in the correct form if these sums are to be payable. This is unlikely to present any great financial or practical difficulty, as we are still in the year 2020, so that by definition the relevant costs to which 2020 service charges relate will all have been incurred in this year, and so their recovery will not yet be barred by section 20B of the 1985 Act. It is a matter for the Respondents whether they re-invoice lessees a series of advance demands based on the 2020 estimated figures, or now simply wait until the year's end, certify the actual expenditure for 2020, and make demands based on that.

II. Recoverability in principle of maintenance and running costs of indoor pool

56. In our judgement the costs incurred by the Company in maintaining, cleaning and operating the indoor pool are recoverable under the terms of the leases, despite the somewhat unclear and poor drafting of those leases and the absence of an express and specific clause referring to this item.

There are several reasons for this.

57. First, as stated, it is clear and was common ground that the indoor pool forms part of "the Property" within the definition of the leases, being edged in red on Plan 1 to those leases. So perhaps the simplest basis for recovery of the costs associated with the indoor pool is the Fourth Schedule paragraph 7:

> "All other expenses (if any) incurred by the Company in and about the maintenance and property and convenient management and running of the Property including in particular any interest paid on any money borrowed by the Company to defray any expenses incurred by it and specified in this Schedule" [emphasis added]

58. The first use of the word “property” in that paragraph is almost certainly a typographical error or slip for “proper”, but in any event this paragraph covers any “maintenance” of “the Property” not already covered elsewhere in the Schedule, and also any “convenient management and running” of “the Property”. In our judgement this plainly extends to the costs incurred in maintaining, cleaning and operating the indoor pool. To call this a “catch all” provision is not a pejorative term. Such clauses are common, and exist precisely to cover the eventuality, as here, that not every single item of potential expenditure by a lessor and management company is specifically enumerated in the lease. The width and scope of such a clause is controlled by its necessary referability to “maintenance….convenient management and running” of a defined “Property”, and also of course the statutory condition as to reasonableness imposed by the 1985 Act.

59. This paragraph is more apt to cover the indoor pool than the more nebulous and (on its face) unlimited paragraph 9 referring to “all costs and expenses of whatsoever kind..incurred by the Company”, which (had it been the only paragraph relied upon) we would almost certainly have read as being subject to an implied condition that such expenditure had to relate to the maintenance or management of the Property.

60. The fees paid to agents or contractors to clean and manage the pool (previously Anglesey Holidays, now Phil Moffatt) are also a recoverable head of expenditure under Fourth Schedule paragraph 4 (“managing agents appointed by the Company in respect of the Property” and paragraph 17:

> “The Company for the purpose of rendering any repairs services or other amenities referred to (directly or be [sic] inference in this Schedule may employ such person or persons and contract with such person or persons company or companies as it thinks fit.”

61. If any further basis were required, maintenance and repair at least to the indoor pool’s pumps, pipes, conduits, gas, electric and water installations would appear to fall clearly within the aspect of the Lessor’s repairing covenant at clause 4(1)(b) of the lease, since those items are “..in under or upon the Building or the Property”, so such expenditure pursuant to that repairing covenant would be recoverable via the Fourth Schedule paragraph 1(a) (costs of carrying out obligations under clauses 4 and 5).

62. There is slight uncertainty, arising from more poor drafting, over whether the lessor’s obligation under clause 4(1)(a) to repair “the Main Structure” extends to the brick building in which the indoor pool is housed, since “Main Structure” (singular) is not defined in the lease, but “Main Structures” (plural) is defined as:

> “..the roof the foundations the main structural walls and the floor joists and ceiling joists but excluding the floorboards and ceilings within the Flats and any non-structural partition walls within the Flats and including where the context admits the Common Parts as hereinafter defined.”

63. While again it would have been clearer if this had been spelled out, in our judgement that repairing obligation to “the Main Structures” extends to such structures on all parts of “the Property”, not just “the Building” part of it in which the Flats are situated, and so extends to the indoor pool building too. There is no reason to read it narrowly so as to exclude that part of “the Property”. The definition should be read as a general and wide one, to which the exceptions and ‘carve outs’ in relation to the floorboards, ceilings and walls of the Flats are the only exceptions. Further, the fact that the clause goes on to extend the obligation to “the Common Parts” where the context admits shows that it was not to be confined just to the main structure of “the Building”. While it was clear that the indoor pool itself is not one of the “Common Parts” within the lease definition (which extends essentially to drives, accessways, garden areas and the like), as stated it is clearly part of “the Property”, and it would be positively odd if the lessor’s repairing obligation was excluded in relation to that part.

64. Our judgement above is fortified by the fact that the lease expressly grants the lessee the right to use the indoor pool (in the Second Schedule paragraph 8), then attempts to tie the enjoyment of that and all the other rights and easements granted in that Schedule to contributing and paying service charge in accordance with clause 2 of the lease. This might not have been enough by itself, if recovery of service charge for the indoor pool costs was not otherwise covered by any of the paragraphs in the Fourth Schedule, but combined with them it points to a clear intention that the subject-matter of those rights and easements (other examples of which are conduits, services and the Common Parts) were to be the subject of expenditure recoverable via the service charge.

65. We add for completeness’s sake that the Second Schedule paragraph 9 does not, however, give a lessee the option of disclaiming any particular individual right (such as the right to use the indoor pool) and then not paying any service charge referable to it. It simply provides the lessor and Company with an additional remedy and ‘lever’ (withholding of rights) in the event of non-payment to any extent of the service charge. If a sum is recoverable as service charge under the provisions of the Fourth Schedule, and lawfully demanded of a lessee in accordance with the lease and statutory provisions, it is payable (subject only to any applications and arguments about reasonableness under sections 19 and 27A of the 1985 Act).

66. Finally, we repeat that the rather odd situation arising in relation to the Outdoor Pool does not arise for consideration in these applications – the oddities being that it was and is a right granted over property belonging to someone else, and that there is an express Fourth Schedule service charge head which embraces Company expenditure on the “maintenance costs” of this Outdoor Pool [paragraph 1(b)] when it is not obvious why the Company is under any obligation to “maintain” someone else’s pool. The parties, and perhaps the owners of the Outdoor Pool and the Plas Darien lessees, will have to arrive at some workable solution by which the Company is able to provide (and the Cliff Apartments lessees are able to exercise) the right to use that pool which the leases grant, probably in return for some form of agreed use and maintenance contribution to the Plas Darien management company.

III. Amounts of relevant costs incurred in relation to indoor pool: reasonableness

67. We have already covered, in some detail, the lack of documentation and disarray which exists over the sums actually spent on the indoor pool in the years 2017, 2018 and 2019.

68. Further, to the extent that many of the "relevant costs" incurred in this regard were incurred more than 18 months ago – namely, all the costs for 2017 and 2018, and now a portion of 2019 – they were never the subject of any valid demands for payment of service charge, for the reasons set out above; and it would probably now be too late for the Company to serve fresh and compliant demands for those years, by reason of section 20B of the 1985 Act, subject to any defences or counter-arguments the Company might have.

69. As stated, what any lessees and the Company do about that situation is a matter between them, for other proceedings. Whether any lessees wish to bring proceedings in which they attempt to recover previously paid services charges from the Company, when that Company is a resident-controlled management company for the flats in which they live, and what the consequences would be for them and other residents if they did, is a matter for them.

70. Nevertheless, since we have been asked to consider the reasonableness of the amounts incurred in relation to the indoor pool in each of these years, we will do so as best we can; even though this is subject to our overarching conclusion under heading I above that no sums of service charge, for anything, have ever been validly demanded and so due and payable.

71. Doing the best that we can, and having regard to the limited information available, we can see that there must necessarily and reasonably be costs incurred each year in relation to:-

    i) the regular cleaning, filtration and maintenance of the pool and its equipment

    ii) the costs of any contractors employed to carry out those functions, and the costs of materials and parts

    iii) heating, lighting and other electricity for the pool and building. It is an indoor pool and it is reasonable to expect that it is kept warm and well lit

    i) less frequently, but potentially, general maintenance and repair to the fabric of the building, externally and internally; and to its drains, pipes and other services.

72. It is not for us to decide the precise standard to which, or manner in which, the pool is to be operated. There appears to be a difference of opinion between lessees over whether it should be open all the year round, or only at some times of year; and possibly also over whether it should be maintained and cleaned to the level one might expect of a public pool, as opposed to a more homely pool in someone's 'back garden'. Those views seem to differ as between those lessees who are owner-occupiers, and those who sub-let for holiday use. Those are classic operational matters within a landlord and the Company's discretion,

acting as it sees fit according to the views of its lessees and members, as to which there is a range of reasonable views and therefore levels of maintenance. So long as the level it adopts in any particular year is one at which it could reasonably arrive, then expenditure to that extent is likely to be reasonable. This may differ from year to year in future years, if the majority view of lessees and Company members changes. These are classic matters of discretion in any leasehold development e.g. whether some particular facility or part is maintained or run on a 'shoestring' or a more generous basis. If any lessee, of either view, is dissatisfied with the level of expenditure in this or any other respect, they are entitled to pursue their legal remedies before this Tribunal (as to reasonableness of amounts) or in the County Court (if they consider the Company is in breach of its maintenance obligations by not doing enough).

73. That being so, for the years in question our judgement is as as follows. On a somewhat 'broad brush' basis, we consider that a round sum of £10,000 per year for all of the above indoor pool items was a reasonable amount in each of the years 2017, 2018 and 2019. The best evidence of this came from Mr. Hampson's amalgamated figures for 2018 (£10,593) which factored in the pool maintenance agents' costs, the electricity and gas and some other items for plant and materials. This was very close to the otherwise wholly unexplained figure of £10,297 for 2017. We round down the figure for each of those years to allow the lessees the benefit of any margin of error in how the energy costs were calculated and allocated. For 2019, we are not inclined to be so generous about the lack of information and evidence. As stated, there was no evidence whatsoever as to why the apparent actual figure for the indoor pool in that year was stated to be £14,080. The maintenance agents used were not replaced until late in that year (October), and there is no evidence of any other change or new item. The reasonable figure for 2019 should therefore remain as £10,000 as for the previous years.

74. The present year 2020 is currently only the subject of estimated expenditure. As stated, the Company (itself or by its agent Scanlans) will have to serve fresh and compliant demands before any service charge for this year can be recovered at all. Whether the expenditure on the indoor pool in this year equals or exceeds the estimate of c. £6050 made at the start of the year will be a matter for the end of year account and certification. If, once validly demanded, any lessee considers that the final service charge for that year is unreasonable in amount, in relation to the indoor pool or any other elements, they are free to apply to this Tribunal for a determination under section 27A. Our determination of the reasonable figure of £10,000 for the indoor pool expenditure in 2017, 2018 and 2019 should not be seen as 'set in stone' or a 'tariff', since circumstances may change year to year (particularly in this year of the Covid-19 pandemic), as may therefore expenditure. Each year must be considered on its own merits and evidence.

75. We therefore make the above determinations on the issues set out above, which are also set out in our Order. Since all parties represented themselves throughout, it does not appear that any issue as to the recoverability of legal costs, or therefore an application under section 20C of the 1985 Act, arises.

Dated this 3rd day of November 2020

Ewan Paton

Chair