FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HA/LSC/2017/0069
Property	**:**	31 Chandler Close, Bath, BA1 4ZG and others
Applicant	**:**	Chandler and MBE Residents Association
Representative	**:**	Mr John Fitzpatrick
Respondent	**:**	Curo Places Limited
Representative	**:**	Mr Andrew Dymond of Counsel, instructed by Anthony Collins Solicitors LLP
Type of Application	**:**	Section 27A Landlord and Tenant Act 1985- determination of service charges
Tribunal Member(s)	**:**	Judge J Dobson Judge M Davey
Date and venue of hearing	**:**	27th April 2022 The Law Courts, Bath- in person
Date of Decision	**:**	29th July 2022

DECISION

Summary of the Decision

1. **In respect of the Applicant's Application concerning service charges pursuant to section 27A of the Landlord and Tenant Act 1985, the Tribunal determines that the service charges in dispute for the Additional Services are not payable.**

2. **The Tribunal grants the Applicant's applications pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of the Commonhold and Leasehold Reform Act 2002 and awards the Applicant any Tribunal fees paid in the course of pursuing the applications.**

Short summary of reasons

3. The Tribunal is mindful of this Decision being lengthy and so considers it appropriate in this instance to highlight the key conclusions, the reasons for which are more fully explained in the main body of the Decision. Those are as follows:

   i) The Tribunal determines that the term in question is not an unfair contract term insofar as it permits the Respondent to add as services and so charge for through service charges matters not previously dealt with by the Respondent;
   ii) The Tribunal determines that the term in question is an unfair contract term insofar as it permits the Respondent to add as services and charge for matters which it previously attended to without charges (beyond rent and any service charges for other services);
   iii) The relevant person to consider is a reasonable tenant of social housing. Where such a tenant had been a local authority tenant prior to a stock transfer that is relevant. Where there is sheltered social housing, the relevant person is a reasonable tenant of sheltered housing and so likely to be more vulnerable.
   iv) Such a reasonable tenant would on balance have agreed the sort of term in i) above in individual negotiations, albeit the term struggles to pass a test of open and fair dealing and there are features which weigh against it doing;
   v) Such a reasonable tenant would not have agreed the term including ii) in individual negotiations and the term does not pass a test of open and fair dealing;
   vi) The relevant term can be severed from the remainder of the contract, including other parts of the same clause, but cannot itself be split, such that the effect of ii) is that the term is void. The remainder of the relevant clause and the other terms stand.

The Application

4. The Applicant applied to the First-tier Tribunal (Property Chamber) (the FTT) for a determination under section 27A of the

Landlord and Tenant Act 1985 ("the 1985 Act") of liability to pay the service charge in respect of grounds (including trees) maintenance, play areas, laundry, clearance (of items dumped) and electrical inspections for communal areas.

5. The Applicant also applied pursuant to section 20C of the 1985 Act and Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that costs incurred in connection with the proceedings shall not be recoverable through the service charge or as an administration charge in respect of litigation costs.

Background to the Application

6. The Applicant is, as the name indicates, a resident's association. It represents the residents of four streets, namely Chandler Close, Meadow Gardens (the M in the name), Burleigh Gardens (the B) and Empress Menen Gardens (the E). The properties within the ambit of the resident's association comprise a variety of different types of dwelling. There are sheltered bungalows and flats and also non-sheltered flats and houses. The Application is a representative one on behalf of such of the residents as authorised the Applicant to apply on their behalf. No issue was taken with that.

7. The Respondent is a registered provider of social housing. The residents are or are predominantly assured tenants. Whilst the application relates to service charges, it therefore does so in the context of a tenancy agreement rather than a long lease.

8. The housing estate which includes the four streets ("the Estate") was originally owned by Bath and North East Somerset Council ("the Council"). The Estate was transferred to Somer Community Housing Trust pursuant to a large-scale voluntary transfer of housing stock in 1999. The Respondent was formed in 2012, following the amalgamation of Somer and two other housing associations. Certain of the residents were originally tenants of that Council. Most of the residents became tenants after the transfer from the Council to Somer.

9. The Respondent maintains the communal grounds, including trees, and play areas (of which it was indicated there are two), and clears items dumped on the Estate. The Council had done so for some years before then. The Respondent also undertook testing of electrical installations in relation to the communal areas of blocks of flats and provided a laundry.

10. In respect of tenants whose tenancies commenced more recently than the end of April 2010 ("the Post- 2010 Tenants), the tenancy agreements are in a form which includes a requirement to pay service charges for the costs of those tasks insofar as relevant. (The Applicant relied on a part of the minutes of a meeting in 2011 which refers to the more recent tenants paying towards play area upkeep through general rents but that is by some distance insufficiently certain to confirm

payment by rent as opposed to service charges and because a service charge can be expressed as being paid as part of rent, the Tribunal does not read anything into those words being used in that context. Nothing turns on the point in any event.)

11. Until 2017, no separate charge was levied for those matters on tenants whose tenancies commenced before the end of April 2010 ("the Pre- 2010 Tenants").

12. In 2016, the Respondent made a decision to use a particular clause of its standard tenancy agreement to introduce a charge for the costs of the tasks (with the exception in respect of laundry of Meadow Gardens) as services for which it could charge. In August 2016, the Respondent gave a "Preliminary Notice" to the Pre- 2010 Tenants which said:

> "You currently receive a service(s) that we are not charging you for. We're proposing that in future we include these in your tenancy agreement and charge you for them."

13. Objections were submitted. In January 2017, the Respondent gave a formal Notice of Variation. As at April 2017, a change to the standard tenancy terms of tenancies which commenced before April 2010 was made, expressly to cover grounds maintenance and the other items, such that the tenants were then obliged to pay for those matters. The sums were not large by property (the highest yearly charge for the particular services which the Tribunal could identify was £4.55.

14. It is that change which gave rise to this dispute.

15. The Applicant has not provided the tenancy agreement of each tenant but rather three tenancy agreements, discussed further below. For ease of reference those are referred to collectively by the Tribunal as "the Sample Tenancy Agreements" and individually as a "Sample Tenancy Agreement". The Tribunal understands those to be broadly representative of the types of tenancy agreements of tenants within the Applicant residents' association.

16. It necessarily follows from the above dates that any tenant currently affected by the change must have been a tenant for several years now and remain a tenant. The Tribunal received no evidence as to how many such Pre- 2010 Tenants there still were by April 2017 but surmises that there are now likely to be fewer as some such tenancies have ended for one reason or another in the intervening five years.

The history of the Application

17. This Application has an unusual history but one which provides relevant background to the determination made by the Tribunal.

18. Proceedings were first pursued by both the original first applicant, a Mr Anthony Pimlett, back in June 2017 and by the Applicant by application dated 20th July 2017. Both sought a determination of liability to pay and the reasonableness of services charges. The original first applicant did so for the service charge year 2017/18 and in relation to grounds maintenance alone (for the different estate on which he resided) being the only additional item for which he would incur service charges. The original second applicant, now the Applicant, sought a similar but different determination, namely of the matters for the period April 2017 onward and including the additional elements referred to above. This Application was stayed pending the outcome of the application brought by the original first applicant. For a significant time, no progress was therefore made with this Application.

19. There were two questions raised for determination by the Tribunal, in both applications. Firstly, and where grounds maintenance)and in this Application other matters) had been provided without charge since he became a tenant in 2008, it was argued that the Respondent had no power under the terms of his tenancy agreement to add it as a service for which it could charge. That was a question of construction of the terms of the particular tenancy agreement. Secondly, it was contended that, even if the tenancy agreement did permit its addition, the term was void by virtue of the Unfair Terms in Consumer Contract Regulations (SI 1999/2083) ("the 1999 Regulations").

20. Although the original first applicant, Mr Pimlett raised both issues, in the event and in a Decision dated 19th March 2018 (CHI/00HA/LSC/2017/0060), the Tribunal decided only the issue of construction, ruling in favour of Mr Pimlott which rendered the answer to the second question not relevant. The Tribunal determined that the Respondent was unable to charge for matters which had previously been undertaken without separate charge, determining "extra Services" (see discussion of the terms of the tenancies below) to be services that were extra to those being provided by the Respondent at the time of the tenancy agreement. Permission to appeal was granted. However, in a Decision dated 18 April 2019, [2019] UKUT 0130 (LC), the Upper Tribunal (Lands Chamber) (HH Judge Nicholas Huskisson) dismissed the appeal on the construction point. The Upper Tribunal judgment alluded to this application. The Upper Tribunal gave the Respondent permission to appeal to the Court of Appeal.

21. The Court of Appeal reached a different conclusion, overturning those earlier decisions in its judgment reported as *Curo v Pimlett* [2020] EWCA Civ 1621 and confirmed in its Order dated 2nd December 2020. The Court of Appeal held that the terms of the original first applicant's tenancy agreement, in particular clause 2.10.1(iii), did allow the Respondent to charge for services extra to the services listed in the tenancy agreement including services which were already at that time being provided to the tenants, noting there to be

no reference in the tenancy agreement to services that were in fact provided by the Respondent, as opposed to those listed in the agreement. The Court of Appeal found support from the other sub-paragraphs of the clause that the Respondent "may stop providing any of the Services if it reasonably believes it is no longer practicable to do so" and that it may "provide the same service in a different manner", which sub-paragraphs refer back to the services "listed in the Tenancy Agreement" and entitle the landlord, subject to consultation with the tenants, to vary the tenancy agreement in those ways.

22. It was noted in the judgment of the Court of Appeal that only in clause 2.10.1 does the word "Services" appear with a capital "S", but even then "service" appears in sub-paragraph (ii) with a lower case "s". Richards LJ expressed the opinion that nothing turns on the use of the upper or lower case, which he considered appears to be haphazard. The point had greater potential relevance in that case concerned with answering the first question than it does in respect of the second question. However, the Tribunal will use a capital “S” when referring to services as listed in the Sample Tenancy Agreements and as sought to be added by the Respondent for ease of distinction between those and any other use of the word. The Services which were listed will be referred to as “Listed Services”. The further Services sought to be added will be referred to as the “Additional Services”.

23. The judgment of the Court of Appeal that the Additional Services could be added meant that the second question required answering, and was remitted to the Tribunal for determination of whether clause 2.10.1(iii) in the tenancy agreements is an unfair term and therefore not binding for the purpose of the 1999 Regulations.

24. Directions were given by the Tribunal to take the determination of that question to a final hearing within the original first applicant’s application. The instant Application remained stayed pending the outcome of that. However, Mr Pimlett subsequently withdrew his application ending that case. Necessarily, the stay on this Application lifted. Directions were therefore also given to bring this Application to final hearing.

25. One issue which arose was whether the first question had been determined in respect of this Application as well as being determined in relation to Mr Pimlett's application. The Respondent’s Counsel submitted that it had. The Tribunal disagreed. The Tribunal determined that Mr Pimlett’s case had not been treated as a lead case in a formal sense and that this case had not been stayed pending the outcome of that where any decision in a lead case would bind this one but rather the Tribunal considered that the stay of this Application was a practical administrative step. Consequently, the decision of the Court of Appeal did not specifically relate to the Application of this Applicant.

26. In any event, the second and unanswered question required determination by the Tribunal, namely of the potential unfairness of the contract term. For completeness, it merits recording that the Directions made it clear that the Tribunal would not determine whether the level of any service charges demanded in respect of the Additional Services was reasonable.

27. The Respondent produced the bundle of documents relied on by the parties in relation to the issues for determination. The PDF bundle of statements and case and evidence ("the Main Bundle") amounted to 629 pages. Mr John Richardson on behalf of the Applicant prepared a 4- page Skeleton Argument undated but received with an email 27th January 2022. Mr Andrew Dymond, Counsel on behalf of the Respondent, also provided a Skeleton Argument**,** also undated together with a number of attachments comprising statute law, caselaw and commentary. The Skeleton Arguments, authorities and related documents were also placed in a PDF bundle, totalling 422 pages.

28. Whilst the Tribunal makes it clear that it has read those bundles, the Tribunal does not refer to many of the documents in detail in this Decision, it being impractical and unnecessary to do so. Where the Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that the Tribunal has ignored or left them out of account. Insofar as the Tribunal does refer to any specific pages from the Main Bundle, the Tribunal will do so by numbers in square brackets [ ], and with reference to PDF bundle page- numbering. The Tribunal does not refer to page numbers of the Skeleton Arguments etc bundle.

29. There has been a rather longer delay in this Decision being produced than the usual, even allowing for the re- convene referred to below. It is only appropriate to apologise to the parties for the delay since then and for any frustration and inconvenience arising. The Tribunal sincerely does so.

30. The Tribunal has been very much mindful of the long life of the Application and inevitable desire on the part of the parties to receive the Decision and, if possible, draw a line under the case, although equally a desire on the part of the Tribunal to take the time required in order to produce a decision with which the Tribunal is satisfied, albeit that the life of the case is thereby extended.

31. This Decision seeks to focus on the key issues. It will be appreciated that this is a lengthy Decision, as the Tribunal considers befits the legal issues. Even so, it cannot cover every last factual detail. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Not all of the various matters mentioned in the bundle or at the hearing

require any finding to be made for the purpose of deciding the relevant issues in the Application.

The Hearing

32. The hearing was conducted at The Law Courts, Bath, in person. Whilst two days was allowed, in the event it was possible to appropriately conclude the hearing in one day, although that did not allow time for the Tribunal to consider the cases presented and formulate the basis of a decision. It was necessary to organise a re-convene at which the Tribunal could carefully consider matters and determine the decision which it proposed to make. That occurred on 15th May 2022, the soonest that could be arranged.

33. Mr Fitzpatrick represented the Applicant. Mr Dymond represented the Respondent. The Tribunal is very grateful to both for their assistance with the Application.

34. The Applicant originally proceeded represented by Mr John Richardson, the Chair of the Residents Association. An element of confusion arose during the life of the Application because he was originally identified as applicant rather than the Applicant. He dealt with matters on behalf of the Applicant up to but excluding the final hearing, being unable to do so. The representative at the hearing, Mr Fitzpatrick, stepped in at that time.

35. Mr Fitzpatrick raised a question with regard to the first question, namely the construction of the Sample Tenancy Agreements. The Tribunal explained the position as outlined above, namely that the Tribunal did not consider the Applicant to specifically be bound by the judgment of the Court of Appeal in the original first applicant's application. However, the Tribunal also explained to Mr Fitzpatrick that the Tribunal would be required to follow the judgment of the Court of Appeal as to construction of the Sample Tenancy Agreements unless a distinction could be drawn between those and Mr Pimlett's tenancy agreement. The Upper Tribunal and the Court of Appeal would similarly be bound by that decision. It was explained that unless the Applicant wished to proceed to the Supreme Court and the Supreme Court disagreed with the Court of Appeal, the answer in respect of construction would therefore remain the same.

36. It was also of relevance that it had not been identified at any earlier point that the Applicant wished to proceed in relation to the first question and the Tribunal considered that the Respondent may well not reasonably be prepared for dealing with it. Consequently, it was noted there may need to be an adjournment of that part of the case or the case as a whole.

37. Mr Fitzpatrick informed the Tribunal that the Applicant would not seek a determination by the Tribunal of the first question in those circumstances.

38. The Tribunal received written witness evidence from Julie Evans, Executive Director of Property at the Respondent [116-131]. Ms Evans also gave oral evidence and that comprised much of the time of the hearing.

39. Ms Evans was questioned by Mr Fitzpatrick about the consultation process and the lack of record in the reply of the Respondent to the tenants' responses opposing the variation. Unconvincingly, she asserted the reply was an amalgamation of the main strands, although more plausibly it was said that play areas were only raised at Chandler Close.

40. Mr Fitzpatrick also put to her that the minutes of the 2011 meeting indicated that the play areas would not need to be paid for, although Ms Evans did not accept that. Ms Evans also said that the play areas came to the Respondent as part of a package at the time of stock transfer. Mr Fitzpatrick also put that Mr Richardson presumed the two playground areas to be part of the Council's responsibility at the time of his tenancy, although Ms Evans said that presumption was incorrect. (Mr Richardson could not address the point given that he was not present.)

41. Ms Evan's evidence was that some areas of grounds are maintained by the Respondent. She accepted that some areas are maintained by the Council, although she was not sure as to what they were and could not confirm Mr Fitzpatrick's example of grass verges.

42. In relation to the laundry, Mr Fitzpatrick put to Ms Evans that washing machines and dryers had been introduced to a communal use hall with a coin box, so that the users had to pay and those not using did not pay. That was later altered and the machines became free to use, of benefit to those who did but of little import to those who did not. He contrasted that with payment through service charges even for those not using. Ms Evans was unable to comment and so although the Tribunal received Mr Fitzpatrick's assertions, it did not receive evidence- there were no other witnesses.

43. Ms Evans explained that there was a report in 2016, following which the board of the Respondent approved the variation of the pre-2010 tenancy agreements. Notably she said that the Respondent was not recovering the cost of delivering the services. Ms Evans identified that one difficulty with the play areas was that when tenants had exercised the right to buy, there had been no provision for them to contribute, although a charge was provided for after around 2010 or 2011. She stated that the play areas had not been funded from rent prior to 2010 but from general income of the Respondent.

44. Ms Evans noted in response to questions from the Tribunal that the Respondent faced increasing responsibilities, such as for fire safety and "green issues". She stated that the Respondent receives

approximately £64 million in rental income and receives income from the sale of properties which it builds for that purpose as affordable housing. The purchase price for properties bought under the right to buy must be passed to the Council.

45. Ms Evans identified the figure of forty- four properties occupied by Pre- 2010 Tenants, most of which are sheltered housing with older residents and/ or ones with relevant medical conditions, although with a mix of tenants for the general properties. She said that the split in terms of method of rent payment had been 70% from housing benefit and 30% private paying for general properties, although indicated that had altered. There are more tenants of sheltered housing in receipt of pensions and benefits, although some work.

46. She had not, Ms Evans explained, been involved in the sign up of any of the tenants under the Sample Tenancy Agreements. There was no sign- up process when former Council tenants became tenants of the Respondent, although there was later, with a checklist. Ms Evans asserted that her colleagues would have gone through matters in detail. She could not say exactly what that covered in respect of each of the Sample Tenancy Agreements, not being present.

47. Following the conclusion of the evidence, both sides made oral closing submissions in respect of the question of unfair terms in a consumer contract supplementing their written cases, albeit in fairly brief terms. The Tribunal does not recount those but does refer to them below where relevant. The parties' representatives confirmed that they had said all that they sought to.

The Tenancy Agreements and terms

48. Three Sample Tenancy Agreements have been disclosed by the Applicant and are relied on. The terms of those individual ones of the Sample Tenancy Agreements are similar but not identical. The Respondent submits those differences are not material. The Tribunal disagrees where explained below and observes that in any event, other circumstances are.

49. Turning firstly to the agreement [133 to 152] in respect of the resident who has been a tenant the longest, the tenant is Mrs Joyce Reynolds (Mr Cecil Reynolds and her were originally the tenants but Mrs Reynolds is now the sole tenant as her husband passed away in 2010. The property of which she is a tenant is 3 Chandler Close.

50. There is a box containing the following wording:

> "Description of your Home"

51. The Tribunal adopts that term "Home" when describing the relevant dwellings. In Mrs Reynold's case, the Home is stated to be a 3- bedroom house. It is not sheltered housing, whereas the other two

of the Sample Tenancy Agreements are for sheltered housing. The agreement is dated 31st March 1999, with the tenancy commencing on that date.

52. The Sample Tenancy Agreement of Mrs Reynolds comprises two parts: the Particulars of Tenancy and the Conditions of Tenancy Agreement. The latter is specifically referred to and incorporated into the former by a provision on the final page of the former. All of the Sample Tenancy Agreements, and indeed Mr Pimlett's agreement share that format.

53. The Sample Tenancy Agreements of Mrs Reynolds includes certain clauses in addition to those in one or more of the examples discussed below. There are rent guarantee provisions which reflect the fact that her husband and herself were originally tenants of that Council. The date of the agreements aligns with the stock transfer.

54. The particulars of tenancy contain the details specific to the tenant, including the rent and service charges. It recorded the weekly rent and service charge as £57.80**.**

55. More specifically, the agreement states:

> "The details of how the rent is made up is shown in the box below"

56. However, that is followed by a line stating:

> "Total rent and Service Charge Payable .....£57.80"

57. There is a box below that. In the box is wording reading:

> "Your service charge is made up of the following:".

58. The remainder of the box is empty.

59. The Tribunal finds that the entire sum of £57.80 was therefore rent. There were no charges for Listed Services and indeed there were no Listed Services.

60. On the second of the two pages and approximately halfway down is the following statement:

> "I/we have read, understood and accept the terms and conditions contained within this tenancy agreement which include the standard terms and conditions attached."

61. The Conditions of Tenancy Agreement are thereby incorporated and contain terms in standard form, including the following provisions relevant to this appeal.

62. Clause 1 is headed:

"RENT AND SERVICE CHARGES"

63. That heading and the nature of it are returned to further below.

64. Clause 1.6.1 provides, under the headings "Service Charges (where applicable)" the following:

> "1.6.1 If you receive any service with specific charges from the Trust they will be listed in the Particulars of Tenancy.
>
> You will pay a service charge for those services."

65. Clause 1.8 sets out, under the heading "Service Charge Increase after Rent Guarantee Period":

> "1.8.1 The annual service charge will be based on how much the Trust estimates it is likely to spend during the year to provide the services to you.
> 1.8.2 Within 6 months after the end of each year the Trust will work out and certify whether its estimate was too high or too low compared to what was actually spent to provide the services during the year and will serve you with a copy of the Certificate.
> 1.8.3 The Trust will pay you any overpayment you have made during the relevant year of the service charges or will require you to pay any deficit (or arrangement to pay in instalments may be made). Alternatively the Trust will adjust your service charge for the following year to take into account whether you has paid too much o too little during the previous year. This adjustment will be shown separately to any other changes in your service charge."

66. Of less immediate regard but still of significance, as explained below, clause 1.1 to 1.4 of the Conditions are concerned with rent. That includes at 1.4 an explanation of rent increases after the Rent Guarantee Period and how to challenge increases in rent.

67. Clause 2 contains the landlord's obligations and under the heading "Services". Most notably for these purposes, clause 2.10.1 provides:

> "The Trust agrees to provide the Services (if any) listed in the Tenancy Agreement and for which you pay a service charge providing that, subject to consultation with tenants:
>
> (i) the Trust may stop providing any of the Services if it reasonably believes it is no longer practicable to do so; or
>
> (ii) provide the same service in a different way; or
>
> (iii) it may provide extra Services if it believes this would be useful."

68. It is that clause which lay at the heart of the judgment given in respect of the first question arising from the original first applicant's

application and which, or rather part of which is the term which the Applicant contends to be unfair. That point is clarified below.

69. The clause is found on page 9 of the Conditions. The headings are in the same typeface and the same size font but in bolder type.

70. Under the heading "Altering the Agreement", clause 6.3.1 provides:

> "Except for changes in rent or service charges the terms of this Tenancy may only be changed if you and the Trust agree to the changes in writing."

71. It follows- and the Court of Appeal identified at paragraph 29 of its judgment- that once matters become Services, being in effect added to the list, changes to the charges for them can then be made without the tenant's agreement.

72. At clauses 6.5 and 6.6, reference is made to a complaint process and to the Housing Ombudsman and the Housing Corporation, as was.

73. The second of the Sample Tenancy Agreements [240 to 259] relates to a tenancy granted to Mr John Richardson and Mrs Sandra Richardson on 1st July 2003 in respective of 31 Chandler Close.

74. The "Home" is in this instance as follows:

> "Two bedroom, sheltered Bungalow."

75. The Tribunal pauses to observe that Mr Fitzgerald said in closing that the criteria for the sheltered housing was that prospective tenants were at least fifty-five years old or suffered from medical conditions. Whilst there had been no evidence given about that, the Respondent did not disagree and in the Tribunal's experience, the criteria is likely to have been that or thereabouts. The Tribunal accepts that criteria. Ms Evans' witness statement indicated [119] that Mr and Mrs Richardson had been nominated to Somer on medical grounds.

76. The particular clauses are numbered 1.4.1 and 1.5.1 rather than 1.6.1 and 1.8.1. That change is noted to reflect removal of the provisions in respect of a rent guarantee period. The Tribunal understands that to be in consequence of Mr and Mrs Richardson having not been tenants of the Council and so any rent guarantee provided for in consequence of the stock transfer does not apply.

77. This agreement does list service charges in addition to the weekly rent, providing for those matters as follows:

"Weekly Rent	.....75.62.....
Weekly service charge	.....15.64.....
Total	.....91.26.....

78. As with the agreement for 3 Chandler Close, that is followed by a statement about the rent:

> "The details of how the rent is made up is shown in the box below."

79. In this example, that statement follows one stating that the rent is calculated over forty- eight weeks.

80. In the box below and under a heading "Rent and Service Charges" the rent is set out and then there are three further entries as follows:

"central [?] control support	1.08
service charges	1.05
Residential warden	13.51"

81. Service charges are identified as something other than the central support and warden but not themselves broken down. There are no charges for Listed Services, simply a single generic entry. It is tolerably clear that some Services were provided as there are charges for them but beyond that, matters are unclear.

82. The agreement does not include reference to Rent Guarantee, which is to be expected because the Richardsons were not tenants at the time of the stock transfer. Hence 1.4 and 1.7 as found in Mrs Reynold's agreement do not appear, or a separate item at 1.5, and so the provision headed "Service Charges" is found at 1.4.

83. The equivalent provision to 1.8 in the agreement of Mrs Reynolds is numbered 1.5. That is in substantively the same terms, save that the heading is necessarily different, reading instead:

> "Changes in the Service Charge"

84. Save for the change of numbering identified above, the other Conditions of Tenancy Agreement are the same as for 3 Chandler Close.

85. The final of the Sample Tenancy Agreements [335x to 356] grants a tenancy of 72 Chandler Close. The tenant is Mr Michael Messer and the date of the agreement is 23rd October 2008 with the tenancy commencing on 27th October 2008. The description of "Your Home" is:

> "1 bed sheltered 1st floor flat"

86. The agreement lists the following (excluding items crossed through and with the second entry fully hand) and in the same place as the others of the Sample Tenancy Agreements do:

> "Weekly Rent £62-34

Support Charge	£ 11-70	
Weekly Service charge	£.....2-67	
Total		£76.71

87. In the box below is contained the following:

"Rent and Service Charges

rent	= £62-34
Emergency Alarm	= £ 2-19
Sheltered Housing Officer	= £ 9- 51
Communal cleaning and elect.	= £ 1-81
Communal water charge	= £ 0- 39
Management charges, +	= £ 0-47
Reconciliation Actua Total	£76-71

88. It appears to the Tribunal that the Alarm and Officer charges form the Support Charge and the remaining items the Weekly Service Charge, although the agreement does not say so in terms. The apparent elements of the service charge are broken down into three parts.

89. The other relevant clauses in that agreement are numbered the same as those in respect of 3 Chandler Close. The Conditions include the rent guarantee provisions, although it is unclear why when the tenancy agreement post- dates the stock transfer by several years and there has been no suggestion that Mr Messer was ever a tenant of the Council. Ms Evans said in her statement that he had support from his GP for a move from his previous accommodation and mention is made of health factors, particularly balance issues.

90. It is not in dispute that grounds maintenance, play areas and laundry were not Listed Services in any of the three Sample Tenancy Agreements produced by the Applicant in this Application. Clause 1.4.1 or 1.5.1 as the case may be, did not therefore apply to those matters before the notice of variation given in January 2017, irrespective of the position thereafter.

The relevant Law

91. Prior to addressing the evidence received and the findings made by the Tribunal, the relevant legal background is dealt with. Whilst the basis on which this matters falls within the jurisdiction of the Tribunal is relevant, the more significant matter of law in respect of this particular Application is that of the applicability of the 1999 Regulations.

Service Charges generally

92. Essentially, pursuant to section 18, 19 and 27A of the Act, the Tribunal has the power to decide about all aspects of liability to pay

service charges and can interpret the Lease where necessary to resolve disputes or uncertainties. Service charge is in section 18 defined as an amount:

> "(1) (a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord's costs of management and
> (2) the whole or part of which varies or may vary according to the relevant costs."

93. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable (section 27A). Section 19 provides that a service charge is only payable insofar as it is reasonably incurred and works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges. The amount payable is limited to the sum reasonable.

94. The Tribunal takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account."

95. There are innumerable case authorities in respect of several and varied aspects of service charge disputes, but none have obvious direct relevance to the key issue in this dispute.

Unfair Contract Terms

96. It will be appreciated that the less usual and more significant aspect of this dispute is whether the provision allowing the Respondent to add as Services matters provided previously without separate charge but not forming part of the Listed Services is an unfair contract term and so void.

97. There was no dispute between the parties that the relevant legislation and caselaw in respect of unfair contract terms applies to terms contained in tenancy agreements as it does in respect of other types of contract. Indeed, in *R (Khatun and ors) v Newham LBC* [2004] EWCA Civ 55 the Court of Appeal held that the 1999 Regulations applied to a local authority tenancy agreement. Whilst the Respondent is not a local authority, in the Tribunal's opinion there is

no obvious reason why a different approach ought to be taken to tenancy granted by a registered provider of social housing, whether the particular tenant was formerly the tenant of a local authority or not. Thus, whilst accepting that argument was not received, the Tribunal is inclined to the preliminary view that the same conclusion would very likely have been reached had the point been in issue.

The Regulations

98. Starting at the beginning in respect of the other relevant law, the 1999 Regulations implemented Council Directive 93/13/EEC on unfair terms in consumer contracts. As identified by Mr Dymond, there is no material difference between the Regulations and the Directive. As such, no specific reference will be made to the Directive in this Decision.

99. The 1999 Regulations followed the Unfair Contract Terms Act 1977. The Regulations do not apply to contracts entered into on or after 1st October 2015. Since that time, the Consumer Rights Act 2015 Part 2 has applied instead. In that event, the question of whether the Disputed Term is a core term, as defined, would be relevant and the position is different in respect of individually negotiated terms. However, there is no merit in dwelling on that, where the 2015 Act does not apply to contracts entered into on earlier dates.

100. Material parts of the 1999 Regulations provide as follows:

> **Unfair terms**
>
> "5 (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
> .....
>
> **Assessment of unfair terms**
>
> 6 (1) ... the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract or another contract on which it is dependent.
> .....
>
> **Effect of unfair term**
>
> 8 (1) An unfair term in a contract concluded with a consumer by a seller or a supplier shall not be binding on the consumer".

101. The Disputed Term was not individually negotiated. Consequently, if the term is found to be unfair, it is void. A term is unfair if contrary

to the requirement of good faith if it causes a detrimental significant imbalance, and in deciding that the nature of the goods and services and the circumstances existing at the time of the contract shall be taken into account. One set of all of the circumstances may produce a significant imbalance whereas another does not and vice versa. Likewise, with one type of goods or services as compared to another.

102. Schedule 2 to the 1999 Regulations contains what is described as an:

> "indicative and non-exhaustive list of the terms which may be regarded as unfair."

103. Colloquially, that list has been referred to as "the grey *list"*. *A term which is included in the list has been said- Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (C-237/02); [2004] ECR I-3403; [2004] CMLR 13- see further below:

> "need not necessarily be considered unfair and conversely a term which does not appear in the list may nevertheless be unfair"

104. In consequence, the Tribunal does not give particular weight to the question of whether the relevant provision in this instance falls within any of the types of terms on the list. Inevitably, not all terms or types of terms which may be unfair can be detailed. Equally, the unfairness or otherwise of a term is affected by the particular circumstances of the contract.

105. The Schedule does make references to terms under which the supplier can unilaterally alter the terms but where notice must be given and the consumer is free to dissolve the contract. The practical usefulness of such a right in the circumstances of a tenancy of social housing is considered below.

106. Keeping to the effect of *Freiburger*, Mr Dymond also highlighted that it states that unfairness will know what the national law is and so the legal context can render something fair which may otherwise appear unfair. He gave an example in relation to forfeiture.

Significant imbalance and good faith

107. In terms of caselaw, the position in respect of significant imbalance and good faith has most recently been addressed substantially in the judgment of Lord Neuberger in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] AC1172.

108. The *ParkingEye* case concerned the payment of £85 for overstaying in a privately owned shopping centre car park. Mr Beavis had parked in the car park at the shopping centre where a two- hour period of parking was offered free of charge. However, he remained parked

beyond that period. Accordingly, the parking operator sought to make a charge. Whilst not relevant the legal principles, the position of Mr Beavis was not one likely to engender a sympathetic response.

109. The situation in *ParkingEye* was plainly quite different factually to the taking out of a tenancy for a home from a provider of social housing. However, this is not the place to comment further on that, the point being addressed below.

110. The Supreme Court found that Mr Bevis had accepted the terms of the parking contract by parking his car in the car park. The Supreme Court further held that the payment was not an unlawful penalty and was not an unfair term.

111. Lord Neuberger said as follows:

> "105 The reason is that although it arguably falls within the illustrative description of potentially unfair terms at paragraph 1(e) of Schedule 2 to the Regulations, it is not within the basic test for unfairness in regulations 5(1) and 6(1). The Regulations give effect to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L95, p 29), and these rather opaque provisions are lifted word for word from articles 3 and 4 of the Directive. The effect of the Regulations was considered by the House of Lords in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481. But it is sufficient now to refer to *Aziz v Caixa de Estalvis de Catalunya Tarragona i Manresa (Catalunyacaixa) (Case C-415/11) [2013 All ER (EC) 770*, which is the leading case on the topic in the Court of Justice of the European Union.....The judgment of the Court of Justice is authority for the following propositions:
> (1) The test of 'significant imbalance and good faith' in article 3 of the Directive (regulation 5(1) of the 1999 Regulations) 'merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated': para 67. A significant element of judgment is left to the national court, to exercise in the light of the circumstances of each case.
> (2) The question whether there is a 'significant imbalance in the parties' rights' depends mainly on whether the consumer is being deprived of an advantage which he would enjoy under national law in the absence of the contractual provision: paras 68, 75. In other words, this element of the test is concerned with provisions derogating from the legal position of the consumer under national law.
> (3) However, a provision derogating from the legal position of the consumer under national law will not necessarily be treated as unfair. The imbalance must arise 'contrary to the requirement of good faith'. That will depend on whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations': para 69.
> (4) The national court is required by article 4 of the Directive (regulation 6(1) of the 1999 Regulations) to take account of, among other things, the nature of the goods or services supplied under the contract. This includes the significance, purpose and practical effect of the term in question, and whether it is 'appropriate for securing the

> attainment of the objectives pursued by it in the member state concerned and does not go beyond what is necessary to achieve them': paras 71-74. In the case of a provision whose operation is conditional on the consumer's breach of another term of the contract, it is necessary to assess the importance of the latter term in the contractual relationship."

112. The key point indicated at (3) above, and translated into the general circumstances of this case would be whether the Respondent dealing fairly and equitably with its Pre 2010 Tenants could reasonably assume that they would have agreed to the relevant term enabling the adding of Services and so charges being levied for those in individual contract negotiations. That is quite particular and, the Tribunal considers, not that which someone reading the 1999 Regulations might immediately identify. Nevertheless, the judgment in ParkingEye states the position in very clear terms.

113. Lord Neuberger went on to say the following:

> "106. In determining whether the seller could reasonably assume that the consumer would have agreed to the relevant term in a negotiation it is important to consider a number of matters. These include, at point AG75: 'whether such contractual terms are common, that is to say they are used regularly in legal relations in similar contracts, or are surprising, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favour of the user of the term in relation to the substance of the term in question, the consumer is not left without protection**.**'"

114. Those statements relate to regulation 5(1). The protection may avoid a significant imbalance in favour of the supplier. Arguably the matters set out are also some of, or akin to some of, the circumstances which may arise when considering regulation 6(1).

115. At paragraph 108 of his judgment, Lord Neuberger added to the matters set out above by the European Court of Justice the requirement for the person being considered to be a reasonable person rather than the consideration being of the approach of the particular person in question. His Lordship stated that the question was not whether the individual consumer would have agreed to the particular term but rather whether a reasonable person in the same position would have done so. If that person would not, the requirement for good faith has not been met.

116. In that instance, Lord Neuberger considered that such a reasonable person would have done so. He noted that the motorist would receive two hours parking for free but with the risk of being charged a relatively significant sum if they overstayed. As he put it:

> "The risk of having to pay it was wholly within the motorist's own control".

117. That objective element is a common enough concept. Given the scenario was a simple one of the motorist who had parked a car taking advantage of two hours free parking and overstayed, thereby breaching the contract, the particular characteristics of the reasonable person in that situation did not require detailed analysis. It is not wholly impossible that there may be particular characteristics of particular reasonable motorists which might provide relevant circumstances, disability and relevant medical conditions for example, but in the main the Tribunal considers that it may sensibly be expected that motorists will be much of a muchness when it comes to a simple question such as overstaying parking.

118. Lord Neuburger did not need to develop the concept of the relevant reasonable person any further in that case and certainly not in respect of the question of the relevant reasonable person in a dispute involving social housing. Rather inevitably, the Supreme Court did not therefore do so.

119. Most situations will not however be so clear cut and the characteristics of the reasonable person under consideration will have to be identified. The present case is not a clear- cut situation.

The reasonable tenant

120. The Tribunal considers that the more specific question to address is therefore whether the Respondent dealing fairly and equitably with its Pre- 2010 Tenants could reasonably assume that a reasonable such tenant would have agreed to the relevant term in individual contract negotiations bearing in mind relevant matters, including how common or otherwise the terms are, the objective reason for the terms and the protection given to the tenant, although assessing those matters in all of the circumstances of entry into the contract. The Tribunal accepts the submission of Mr Dymond that it is the reasonable tenant who must be considered.

121. In order to answer that question, the Tribunal determines the characteristics of such a reasonable tenant must therefore be identified, so findings are required of the characteristics of a reasonable tenant and of the accommodation provided by the Respondent. That involves rather more consideration than was required in ParkingEye, although perhaps not so much more so than compared to many consumer cases.

122. There will inevitably be a range of different characteristics of different tenants of the Respondent. The reasonable tenant to be considered cannot share all of those. However, there are some features which many tenants of social housing are likely to have, and which are a reflection of their likelihood of applying for a tenancy of social housing and a reflection of the ability to obtain one, such that the Tribunal determines that the reasonable person to be considered should properly be regarded as having some or all of those features. It

is also appropriate in the opinion of the Tribunal to consider whether there may be a different reasonable tenant in respect of sheltered accommodation as compared to other accommodation.

123. The Tribunal does not regard the identification of the reasonable person to be considered to be an exercise in finding facts. The application of the features of the reasonable person as determined will require applying to findings of fact made but the identification of the appropriate reasonable person is, the Tribunal considers, a matter of law. That said, factual matters and evidence of those are relevant.

124. The Tribunal notes that the Respondent's Allocations Policy states the following:

> "When allocating properties the Trust needs to ensure that it fulfils its charitable objectives. For this reason, at least 80% of applicants housed should fall into at least one of the following categories:
>
> People of retirement age
> Disabled people or those in receipt of incapacity benefit
> People whose financial situation does not enable them to access housing in the private rented or owner occupied sector"

125. The Tribunal determines from the evidence in the bundle that the reasonable tenant of the Respondent (and quite possibly of social housing generally but where there is no direct evidence of the wider picture and the Tribunal is not required to reach a determination about it), should therefore be regarded as being at the lower end of the income scale and receive a limited income and may well be in receipt of a pension or welfare benefits or both. The reasonable tenant will also be somewhat more vulnerable than the average across the population as a whole, because of at least one of age, medical matters and finances. Many will also have disabilities or medical conditions.

126. Such a person will need to take care with managing day-to-day expenses to avoid running into debt and is quite likely to have debts which are being paid off and reduce the other expenditure possible. Some caution should be expected with incurring additional costs and as to the benefit to be achieved by doing so where that will reduce the scope for other expenditure.

127. The evidence indicates that some of the dwellings on the four streets are houses of the sort intended to be occupied by families and the Tribunal infers that to be the case. Some such persons will have children. They may or may not be of an age to use play areas. They may use other open areas for ball games and the like. Older tenants will not be likely to have children (in the sense of ones pre-adulthood).

128. A number of the properties are sheltered housing. The witness statement of Ms Evans states of the Allocation Policy:

> "It also contains a section on Older Persons setting out the criteria for sheltered Housing as someone aged over 60 with a support need."

129. The Tribunal was unable to locate that within (presumably part of) the policy provided but accepts the statement as correct. Necessarily, the occupants of such sheltered housing must meet the criteria to be offered such housing.

130. Those will experience medical conditions which render them eligible. They will necessarily, be elderly- at least 60 years old and often rather older. There must be a medical condition or something else which causes them to have support need. Such tenants are even more vulnerable than the generality of the Respondent's tenants as compared to the average person.

131. Many tenants, especially those in sheltered housing, will be limited in the maintenance they themselves could undertake and so would require that to be undertaken by others, for example the Respondent.

132. Consequently, there will be various practical and financial limits on the reasonable tenant. The reasonable tenant of sheltered accommodation is the same but with likely greater medical issues and higher age.

133. The Tribunal determines that the reasonable person who is entering into a tenancy agreement with the Respondent is likely to find necessary or at least beneficial one or more of the Additional Services but to be concerned that expenditure by them on such is worthwhile. In contrast, such a person is unlikely to find appealing services which are considered to involve expenditure without sufficient benefit.

Good faith more generally

134. The Tribunal moves on from agreement in individual negotiations in respect of good faith specifically. Good faith was considered generally in the decision in the *Director General of Fair Trading v First National Bank PLC* [2001] UKHL 52. That is somewhat older than either *Aziz or ParkingEye*.

135. The judgement of Lord Bingham given in the House of Lords (the predecessor court of the Supreme Court as it now is) explained as follows:

> "17) A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations significantly in his favour..... The requirement of good faith in this context is one of open and fair dealing.

Openness requires that the term should be expressed fully, clearly, and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the consumer. Fair dealing requires that a supplier should not whether deliberately or unconsciously take advantage of the consumers necessity, indulgence, lack of experience, unfamiliarity with the subject matter, weak bargaining position……. Good faith in this context is not an artificial or technical concept; …. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote"

136. It must be clarified before moving on that Regulation 4(1) as was is now Regulation 5(1) as set out above and not a separate provision.

137. Importantly, the regulation must be applied bearing clearly in mind the objective which the 1999 Regulations are designed to promote, where plainly that objective is the protection of consumers, including tenants. Therefore, the 1999 Regulations must be applied in a manner which seeks to achieve that.

138. Whilst Lord Neuberger stated that it was sufficient to refer to *Aziz* in the context of the *ParkingEye* case and significant imbalance, and it was not said that the decision of the House of Lords and the judgment of Lord Bingham ceased to apply and Regulation 5(1) is not the entirety of the 1999 Regulations.

139. The Tribunal does not consider the judgmenst of Lord Bingham and Lord Neuberger to be irreconcilable. A reasonable consumer is unlikely to agree to a term so weighted in favour of the supplier so as to tilt rights and obligations significantly in the supplier's favour, or to agree terms which are not expressed clearly legibly and fully and which may contain concealed trips of pitfalls unless necessity, unfamiliarity and lack of strength of bargaining position, by way of examples, cause that, in which event those matters cannot be ignored. Any other approach risks failing to have proper regard to the objective of the Regulations.

140. In *ParkingEye*, the Supreme Court was considering a quite particular set of circumstances and some distance away from more usual types of consumer contract. Even more so from the instant case. The fact that in assessing unfairness, account must be taken of all of the circumstances, goes to emphasise that whilst the legal principle is the same, the effect of its application may be quite different.

141. In any event, the assumption of the supplier must, per Aziz, be reasonable. The Tribunal finds that such reasonableness must take proper account of the circumstances and characteristics of the consumer in question. The Tribunal considers that those factors identified by Lord Bingham must form an important part of that.

Other caselaw

142. In respect of other caselaw and in cases more akin to the current one, firstly the Applicant particularly relied on the judgment of the High Court in *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch). That case involved a term in a tenancy agreement of a registered provider of social housing and variation of the agreement to enable charging for service. It is also a case in which the tenant succeeded. It is quite understandable why the Applicant places reliance on it.

143. However, in the event, the Tribunal does not find the decision especially useful in determining the outcome in the context of this case. The outcome of the case does not, with hindsight, appear surprising. Two sub- clauses were contradictory. Given the determination that the sub-clause requiring tenants to agree applied and no decision was required beyond that, the Tribunal does not consider that this judgment therefore lends much support to the Respondent either.

144. It was argued on behalf of the Respondent that the fact that two subclauses of the agreement were contradictory was relevant to the expressed opinion that there was no fair and open dealing. A contrast was sought to be drawn with clauses which were not contradictory. The Tribunal does not, on the other hand, find that assists greatly in determining the answer in respect of a given clause not containing contradictions, merely that it was a further feature of the particular circumstances of *Peabody*.

145. Nevertheless, in respect of the part of the sub-clause which might otherwise have permitted a variation, the Judge observed of the clause:

> "it is such a sweeping and one- sided provision, that even if it had been clearly and unambiguously set-out and explained, I doubt whether it could be held to be fair".

146. In the Tribunal's opinion, the judgement in *Peabody* lends support to a broadly- drafted clause being less likely to be found fair and so in contrast a more narrowly- drafted clause being more likely to be found fair, although such a broad- brush distinction can only go so far.

147. The Judge also observed, in a further comment not central to the decision, that regulation by the Housing Corporation, as then relevant, was not sufficient for the landlord to have carte blanche in the field of variations so that the terms of the tenancy agreement would be whatever the landlord said from time to time. However, that was particular to the sweeping clause which the Judge was considering and so is of only limited assistance to the Applicant in any argument about protection in this instance where the provision is rather narrower. The Tribunal considers that a careful approach to any relevant question of protection of the tenant is required in the different circumstances of this case, where the clause is rather more

limited, and the point may be more directly relevant. *Peabody* does not provide for how that approach is to be undertaken

148. Mr Dymond also referred to a decision of the Court of Appeal in *Du Plessis v Fongary Leisure Parks Ltd* [2012] EWCA Civ 409. That was a case in which there was variation of a fee for a pitch for a park home. The owner wished to change the fee structure.

149. As Mr Dymond noted, the Court of Appeal held the relevant term was fair as part of a carefully balanced review procedure and where the park home- owner could challenge the legality of the increase to the pitch fee. Reference was also made to the absence of such a term on the "grey list". The Tribunal accepts that there is some similarity with the circumstances of the present case in terms of the procedure and the challenge to the amount of the fee/ charge.

150. However, the Tribunal also considers that situation to be somewhat different. A pitch fee was already payable pursuant to the licence agreement, there was nothing new being charged for. The question was as to the nature of that fee and increase to it. The procedure for review of a pitch fees is a matter within the Tribunal's jurisdiction and in relation to which the Tribunal is very familiar. The matter was a rather more limited one than in this instance, notwithstanding that the increase in the fee was relatively substantial. It is more akin to a determination of the reasonableness of the level of a service charge where there was no dispute about the entitlement to charge as such rather than to the question of the entitlement to add and charge for extra services not previously identified.

151. Whilst plainly the decision is far from irrelevant, in light of those features the Tribunal finds the assistance to be derived from that decision to be relatively limited.

152. The effect of all of the above is that there is authority in respect of the application of the 1999 Regulations but nothing close to being on all fours with the circumstances of this case and the rather different circumstances of *Peabody* and *Du Plessis* are the closest identified examples of the 1999 Regulations being applied.

153. For completeness, the specific provisions relevant to this Application are somewhat of their time given that the 1999 Regulations have now been revoked by the Consumer Rights Act 2015. The corresponding rights under that Act do not apply to tenancy agreements entered into before 1st October 2015. That Act is not retrospective.

Consideration of the Disputed Issues

154. The Tribunal does not set out the parties' cases at length in advance of discussion of the relevant issues. The cases were set out extensively in writing, supplemented by recorded oral evidence and submissions.

The Tribunal refers to the relevant parts of the parties' cases in its consideration of the issues below. The first task is to identify the matter in dispute.

What is the term argued to be unfair?

155. At first blush the answer to this question may seem obvious, indeed the question itself might be regarded as unnecessary. It is abundantly clear that the provisions in issue are to be found in clause 2.10.1, which is repeated:

> "The Trust agrees to provide the Services (if any) listed in the Tenancy Agreement and for which you pay a service charge providing that, subject to consultation with tenants:
>
> (i) the Trust may stop providing any of the Services if it reasonably believes it is no longer practicable to do so; or
>
> (ii) provide the same service in a different way; or
>
> (iii) it may provide extra Services if it believes this would be useful."

156. However, it merits identifying that there are 3 sub- clauses. Neither (i) or (ii) have been challenged by the Applicant. Leaving aside any potential relevance of those as part of the circumstances to be considered, the Tribunal determines that those are not in dispute in these proceedings. In a similar vein, the initial wording of the clause is not in dispute. The Tribunal agrees with Mr Dymond that sub- clause iii) can be severed from the remainder of the clause.

157. It is not argued by the Applicant that the Respondent should not be able to provide the Listed Services or to charge for those. Indeed, it is not argued by the Applicant that the Respondent should be unable to provide services additional to those matters that it was attending to at the time of entry into any of the Sample Tenancy Agreements. The argument centres on the asserted unfairness of such services including as Additional Services matters previously attended to but without separate charge. There is no clause or sub-clause which refers to such matters specifically.

158. The Tribunal also agrees with Mr Dymond that sub- clause iii) is not capable of division. There is, as he submitted, only one set of wording, so that it is (iii) as a whole which must be the provision in issue, "the Disputed Term" as the Tribunal will refer to it below. Mr Fitzpatrick sought to argue that the clause could be re- written. Irrespective of any merit that might be considered to have, the Tribunal does not have the jurisdiction to do it.

159. It follows that if the Applicant is successful, the Respondent will be unable to <u>add</u> any Additional Services to the Listed Services in the absence of agreement of the Pre- 2010 Tenants or a variation of the

tenancy agreements more generally. The remainder of clause 2.10.1 will stand.

The position at the time of each of the Sample Tenancy Agreement and findings of fact about other relevant considerations

The position at the time of entry into each of the Sample Tenancy Agreements and the contracts entered into

160. The reference to the "nature of the goods or services for which the contract was concluded" and to "all the circumstances attending the conclusion of the contract" includes the legal framework and the factual matrix at the time at which the contract is made (also identified in *Freiburger*).

161. Richards LJ giving judgment in the Court of Appeal in *Curo v Pimlett* was concerned that to read the relevant sub-paragraphs, as referring to the services in fact provided by the landlord, as opposed to those listed:

> "would have the effect of making these provisions depend on a factual investigation of the position prevailing at the relevant time..... If the relevant time is the date of the tenancy, it would foreseeably produce inconsistent results for different tenancy agreements with identical provisions, depending on their commencement dates, and require a factual investigation of the precise extent of the services being provided without charge at those dates."

162. However, that was in the context of construction of the provisions of Mr Pimlett's tenancy agreement, the first of the two questions posed in both that application and the current one. In contrast, the Tribunal is considering the second question and not the first.

163. When addressing the question of the fairness or otherwise of the Disputed Term, the Tribunal considers the European caselaw is clear that it must have regard to the situation which existed at the time of the given tenancy agreement being entered into. The factual matrix at the time of the agreement containing the provision(s) asserted to be unfair lies at the heart of the matter now for determination.

164. It is not lost on the Tribunal that there is a period of some four and a quarter years between the tenancy of Mrs Reynolds and that of Mr and Richardson or that there is a period of five and a quarter years from then until the tenancy of Mr Messer. However, the Tribunal has received no evidence that anything physically altered in relation to the dwellings or the Estate. The Tribunal determines that there is an element of distinction between the situation at the time of Mrs Reynolds' tenancy and the latter two but not materially between the situations at the time of those latter two themselves.

165. The position at the time of each of the Sample Tenancy Agreements was that they were each of a Home set within gardens and grounds which were properly maintained by the Respondent or its predecessors, where both the tenant and the Respondent knew that the grounds were maintained by the Respondent and where there was nothing to indicate any prospect of alteration in this position. The same applies in respect of play areas and clearance and at least the existence of a laundry.

166. The Tribunal infers, absent any contrary evidence adduced by either party, that the grounds and play areas were in an at least satisfactory condition at the time of the stock transfer and so when the tenancy of Mr and Mrs Reynolds with the Respondent began. The Respondent took over the Estate in that condition following the stock transfer agreement. The Respondent maintained the grounds and play areas from the point of the stock transfer and onward.

167. The Sample Tenancy Agreements in each of the three instances made no reference to payment by a tenant of a service charge towards the Respondent's costs of maintaining the grounds or the other Additional Services.

168. On the other hand, in respect of the point made by the Upper Tribunal in the application of the original first applicant that the rent paid by the tenant "would be a rent appropriate for a bungalow in grounds which could be expected to continue to be maintained without further charge to the tenant", the Court of Appeal held that there was no evidence before the Upper Tribunal to support it. That specific matter as to the level of rent and in particular what may be expected for it, is not found by the Tribunal to form part of the position at commencement of the Sample Tenancy Agreements.

169. The parties in each instance entered into an agreement for the letting of a Home. Whilst the Tribunal quotes the Sample Tenancy Agreements because it considers that the way in which the Respondent presented matters, the use of term "Home", also provides emphasis that the Respondent let, and the tenant received, a Home and not just a set of bricks and mortar, it is perhaps unnecessary to do so. Home is a term which would be understood by all.

170. The agreement would last for an indeterminate length of time and potentially a significant number of years. The Tribunal finds that to be a relevant distinction from many types of consumer contracts, where provision is either specifically time limited or is likely to be for a limited period in practice and may be a one- off event (the parking of a vehicle in a given car park for a portion of a day provides an obvious contrast with the letting of a Home, as previously observed). In each of the three instances, the parties contracted for the provision of a Home for the given tenant and anyone else within the household or intended household, subject to any limits as to occupiers.

171. The Tribunal has no evidence as to what any of the tenants with the three Sample Tenancy Agreements were told by a housing officer or similar at the time of their agreement being entered into, or indeed what any other tenant was told, about the Disputed Terms or any other term and therefore addresses matters in relation to the particular Sample Tenancy Agreements in light of the wording used in those agreements. Any issue which may have arisen with subjective evidence of what was intended does not arise.

172. The Tribunal finds that a notable distinction between the situation as at the time of the tenancy of Mrs Reynolds as compared to that of the other two tenants under the Sample Tenancy Agreements is that Mrs Reynolds had been a secure tenant of the Council.

173. The Council was not only her landlord but also the local authority and so with responsibility for a range of matters as local authorities are. There is no evidence to suggest that Mrs Reynolds was given any indication that there would be any practical impact on her, save for the simple matter of the name of her landlord and the name of the type of tenancy (assured rather than secure) changing and was informed that any features or protections would differ.

174. The Tribunal finds that the Council will have attended to matters as part of one or other of those roles. Local authorities do attend to grass areas and to play areas, for example, as part of their wider role and without specific charge to the tenants or other residents of the immediate area. The cost is a small part of the much greater costs of provision of wider services by the local authority and charged for through Council Tax/ business rates in combination with such part of national taxes as is provided by the national government to the given local authority as part of its funding.

175. On the other hand, local authorities do charge tenants or lessees on estates for some services provided for the communal benefit of residents of those estates. Those services will be identified in the given case and it will be apparent why the matters paid for by those residents are funded from such service charges and not from the local authority's wider budget.

176. The Tribunal finds that the reasonable tenant would be likely to struggle to know, unless it were spelled out, exactly where the line was drawn between at least some matters falling into specific responsibilities of the landlord as a landlord and more general ones in its role as a local authority. The maintenance of grounds and play areas and the clearance of items dumped are obvious examples. The Tribunal finds that Mrs Reynolds would have known that items were charged as service charges if the Council specifically charged her for them but would otherwise have been likely to simply identify the matters as ones the Council dealt with and with nothing to distinguish between any responsibility as her landlord and its responsibility as the local authority.

177. Hence, the position as at the time of the stock transfer is that anything not a Listed Service was known to be being attended to but without it being clear as to the basis for that and particularly whether it was attended to as a landlord or as a local authority.

178. The Tribunal has received no evidence that Mrs Reynolds received any details of what the Respondent would do in its specific role as her new landlord as compared to anything which went hand in hand with other duties on the Respondent arising from the stock transfer. The Tribunal infers that no such explanation was given by the Respondent of matters which the Respondent contends would assist it. It was in the ability of the Respondent to provide any if it relied on such.

179. Hence the Tribunal finds that Mrs Reynolds did not know and had not reason to know that all of the Additional Services were matters which should be regarded as Services and which could be added to the Listed Services (of which in fact there were none).

180. The Tribunal finds there to be a distinction in that regard between the grounds maintenance and play areas and clearance on the one hand and the communal laundry and electrical testing on the other. The first three items are those which local authorities attend to other than funded by service charges: the latter two are rather more specific and are not the sort of matters which a local authority would usually attend to, nor are they ones which a reasonable tenant would have expected them to attend to in the role of being a local authority.

181. The Tribunal finds that Mrs Reynolds would have been likely, if asked, to have identified the latter two as being provided in the capacity of landlord. However, the Tribunal does not consider that as the resident of a self- contained house, she would have given any thought to electrical testing in blocks of flats or have given any thought to the laundry. There is no evidence of her use of the laundry. It would only have been if she had directed to the matters that she would have been likely to identify a distinction.

182. Mrs Reynolds did know that she had paid rent to the Council and that she would pay rent to the Respondent.

183. In addition, and returned to further below, given that Mrs Reynolds was already a tenant of the Council and living in 3 Chandler Close as her home, in order to avoid the terms of her Sample Tenancy Agreement, she would have been required to give up her Home. She did not enter into a contract with the Respondent from the outset of living there.

184. As for what was contained in the tenancy agreement she and her husband entered into with the Council is unknown- it was not produced to the Tribunal. There is no evidence of a similar provision and hence the Tribunal proceeds on the basis that there is none.

185. The Tribunal also noted that Ms Evans in her witness statement [117] said she understood that tenants of the Council were given the opportunity to see the transferring tenancy agreement as part of the consultation process ahead of the ballot agreeing to the transfer. However, as she was not indicated to have specific first- hand knowledge and there was no other evidence, the Tribunal has not given weight to that suggestion.

186. Plainly, the position of the latter tenants with agreements which form part of the Sample Tenancy Agreements were not in the same situation at the time of entering into their contracts. They had not been Council tenants of the same Home prior to the stock transfer.

187. They did enter into tenancy agreements as new tenants with the Respondent. Their situations prior to their tenancies with the Respondent are not known to the Tribunal and there is very limited information as to why they became tenants. The Tribunal only has the limited indication from Ms Evans. Therefore, that can play not part in the determination of this Application even if there may otherwise have been anything of which account could properly have been taken.

188. However, the Tribunal infers the tenants did know that the grounds were being maintained, that there were play areas and that items dumped were cleared. That much would have been visible to them- and therefore they would have inferred that at least some of the subject matter of the Additional Services was being dealt with one way or another. There is no evidence that they knew how that was funded. including, as also returned to below, Mr Richardson knowing whether he was paying for them or not.

189. There were Listed Services on their tenancy agreements. Those did not, or at least not identifiably, include the Additional Services. The tenants knew that they were asked to pay rent.

190. The Tribunal has noted the case advanced by the Applicant that the three tenants understood that anything provided by the Respondent other than the Listed Services was paid for out of rent income (or if not then some other income unrelated to the tenants).

191. The Tribunal finds that the reasonable tenant would have shared that view. Therefore, such reasonable tenant would have considered that anything dealt with by the Respondent other than a Listed Service, if any, which the tenant paid for was part and parcel of that for which they paid rent.

192. The Respondent's case is that is not the correct position and in effect that such matters as the Additional Services were not intended to be funded from rent. However, the simple fact is that the matters were dealt with by the Respondent and so were funded, one way or another and not through service charges.

193. Whichever way, the tenants were not receiving any separate charge for the Additional Services over and above their rent payments.

194. Ms Evans noted in her witness statement that the Respondent has a sign-up checklist to be completed as part of the sign- up process, indicating the areas covered by the housing officer and including service charges. However, there is no hint of what that included and certainly nothing which confirms that the Additional Services or any other extra services may be added. The checklist for Mr Messer for example [357] has some forty- six boxes ticked, one of which simply reads:

"Service charges explained"

195. The Tribunal does not find the checklist to go far enough to offer any assistance.

196. There was also a stock transfer agreement between the Council and the Respondent. There was no evidence presented that the tenants under the Sample Tenancy Agreements had any knowledge of what that did and did not require the Respondent to do in respect of the Estate and whether the Respondent was obliged to maintain grounds maintenance and play areas, for example for that reason. The Tribunal considers that they would not therefore have based their approach on that in any way.

197. Hence, the Tribunal considers this factor weighs against the reasonable tenant accepting the Disputed Term in individual contract negotiations.

198. For the avoidance of doubt, and whilst it fits imperfectly into this part of the Decision, it merits recording before going further that no part of the Tribunal's findings are affected by whether or not any given tenant may or may not have wished to make use of any matters being attended to at the time of entry into the Sample Tenancy Agreements and not charged separately for but later sought to be added as Additional Services. All else aside, the tenant would not have known which items might be added.

<u>Are such contractual terms common or surprising?</u>

199. It may be the case that the same approach to the tenancy terms is a common one. The Tribunal has of course seen tenancy agreements previously.

200. However, no tenancy agreements other than the Sample Tenancy Agreements were before the Tribunal in this case.

201. The Tribunal has not attempted to remember how other tenancy agreements may have been laid out nor to search for copies of tenancy

agreements which are not specific to dwellings in the four streets and which neither party sought to produce and rely on and so were not in evidence.

202. Neither was the Tribunal provided with any other evidence as to whether tenancy agreements of other registered providers of social housing, which the Tribunal considers to be the class of agreements relevant in considering this factor, contain clauses covering such matters generally. Equally, there is no evidence presented by either party as to in what form such agreements include such clauses to establish whether the specific Disputed term is common or surprising.

203. The Tribunal considers that it can only properly proceed on the evidence presented to it and not on the basis of any enquiries it might have made as to terms of other suppliers.

204. The Tribunal also does not have any version of a tenancy agreement of a Post- 2010 Tenant. The Tribunal has received no evidence as to the manner in which the Disputed Terms and the immediately related terms as to removing Services or varying how Services are provided have been dealt with in such more recent tenancy agreements.

205. In the circumstances, the Tribunal is unable to make any finding on the evidence available to it in this Application as to whether the Disputed Term is either common or surprising and would not give the matter weight one way or the other in weighing up the fairness or otherwise of the term, instead treating the matter as neutral.

Is there an objective reason(s) for the term?

206. The Tribunal has no difficulty in finding that there is an objective reason for the term on the face of the Sample Tenancy Agreements.

207. The Disputed Term completes the triumvirate of provisions which collectively give the Respondent flexibility in respect of Services which it can charge for and the ability to adapt to changing circumstances over the course of what may be, indeed very commonly will be, a relatively long- term contractual relationship. The Disputed Term is to be considered with reference to other terms of the Sample Tenancy Agreements and the immediate ones are of the most obvious relevance.

208. In addition, the ability to add the particular Additional Services would place the Post- 2010 Tenants in the same position as the Pre- 2010 Tenants. The Tribunal can well understand that having two distinct different situations for two different sets of tenants on the Estate could be problematic in a variety of ways, notwithstanding that the pool of pre- 2010 Tenants is a reducing one.

209. On the other hand, there may well be- the Tribunal does not have enough tenancy agreements of different ages to know- a number of

differences between different tenants in any event. The Respondent indicated in the course of the proceedings that there are several iterations of its tenancy agreements. Hence it appears likely that are a number of different situations simultaneously existing more generally. The Tribunal does not find that surprising, given that drafting tends to evolve over time and as issues or potential improvements are identified, terms tend to be altered to reflect that.

210. However, the Tribunal understands from the Respondent's case, which the Applicant did not challenge in this regard, that the differences between different versions of tenancy agreements do not go to provide a clear distinction as to matters for which tenants can be charged in the manner of the distinction between the Pre and Post 2010 Tenants. Absent any tenancy agreement which post- dates 2010 having been provided to the Tribunal, the Tribunal can make no specific finding.

211. The evidence of Ms Evans was that thee is a distinction between tenants who exercised the right to buy before approximately 2010 or 2011 and those who exercised the right to buy after. It is not clear whether any service charges or other charges applies to those properties and how the distinction impacts.

212. The Tribunal finds that this consideration would on balance- and without all matters pointing the same way- go towards the Disputed Term being accepted by the reasonable tenant.

213. The particular operation of the term is another matter. There is nothing to suggest that the Respondent deliberately included the term at the time in order to use it in the manner it has been used or anything similar which is relevant to the Disputed Term itself.

<u>Despite the shift in the contractual balance, does the consumer have protection?</u>

214. It is abundantly clear that the decision whether to provide the Additional Services or other extra Services is that of the Respondent.

215. In terms of the question of protection for the tenant, it is a relevant matter in considering the fairness or otherwise of the clause that the Respondent's belief that the provision of the extra service would be useful must be genuine, and there must be genuine and prior consultation with tenants.

216. The belief must be rational and made after consideration of all obviously relevant considerations and the exclusion of all irrelevant considerations. Consultation is a right to be asked for views on the proposed change. The reasonable tenant cannot in any way dictate what the answer then is. That is a matter for the Respondent.

217. Richards LJ commented on those matters when delivering the judgment of the Court of Appeal, Reference was made to *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661 in respect of the exercise of discretion. That case involved the consideration by the Supreme Court of the exercise of a discretion provided for in the contract between the parties, the Court applying public law principles to that. The court in Braganza also addressed the potential for conflict of interest where the decision would affect the rights of the decision maker as well as the other contracting party, being a reason for adopting an approach akin to that taken in relation to decisions of public authorities. Reference was made to the rationality of the decision, rationality being preferred as a term to unreasonableness. Nothing arising from that case has been identified as being in dispute and so the Tribunal does not dwell on it.

218. Richards LJ also observed that additional protection is provided by the Respondent's statutory status as a registered provider of social housing, and the internal complaints procedure and the right to take complaints to the Housing Ombudsman. The opinion was expressed that the landlord is a responsible provider of sheltered accommodation.

219. Whilst that judgment of the Court of Appeal must command considerable respect, the fairness of the provisions was not the question being answered by the Court, which was the first question of construction. The observations made were not ones forming part of the specific answer to that question. The second question was not the subject of full submissions before the Court of Appeal, which necessarily could not know which points may be made and strength of such.

220. The Tribunal is not bound by the opinions and comments having read and heard the parties' case on the particular point to be decided. Nevertheless, it gives the observations of Richards LJ the considerable respect appropriate and finds that the matters set out above are correct. They should properly be weighed in considering whether or not the provisions re unfair. They do not preclude the provisions being unfair.

221. Mr Dymond additionally submitted that the Respondent is subject to regulation by the Regulator of Social Housing and has at all times been regulated by its predecessors. The Tribunal finds those matters also to be correct.

222. Consideration is required of the extent of those elements of protection provided and the impact of that on the reasonable tenant. The Tribunal takes each in turn.

Genuine belief that the provision of the extra service would be useful

223. The first element of potential protections as set out above is the need for the Respondent to have a genuine belief that the provision of the extra service would be useful. The Tribunal finds that usefulness must be usefulness as providing something to the tenant, as opposed to providing something to the Respondent.

224. The Tribunal finds the reasonable tenant would receive some re-assurance from the Respondent needing to have a genuine belief in usefulness, and indeed needing to be able to demonstrate the basis for that belief. However, the reasonable tenant would not, the Tribunal finds set great store by that. The reasonable tenant would be most likely to regard the requirement as somewhat nebulous and the ability to challenge the Respondent's asserted belief quite limited- the question is not one of whether in fact a decision could in principle be challenged, whether by way of judicial review or otherwise but how the reasonable tenant would perceive the situation.

225. The Tribunal finds that a reasonable tenant aware of the fact that the Respondent is able to add Additional Services both of matters previously dealt with without separate charge and new matters would be relatively re-assured in respect of the new matter. The Respondent would be doing something it was not previously required to and would be unlikely to do so without purpose.

226. The Tribunal finds that the reasonable tenant would not consider there to be much protection where the Respondent could add as Services matters which it performed already and so charge for them. The reasonable tenant would be dubious about the Respondent's motivation and the genuineness of any expressed belief as to usefulness for the reasonable tenant.

227. The reasonable tenant would not of course know the use to which the Disputed Term would be put. However, the findings made about the manner in which the term has been operated, goes to demonstrate that doubts on the part of the reasonable tenant would not have been fanciful and nor is it inappropriate to find that the reasonable tenant would have had such doubts.

Consultation

228. The Respondent is also contractually obliged to consult. The Tribunal proceeds on the footing of that being a genuine consultation, properly carried out, with appropriate information given to the tenants and a time to respond reasonable to the matters being dealt with.

229. The Tribunal again considers that the reasonable tenant would find some reassurance in the fact that there would be a consultation, but not a lot. The reasonable tenant would understand that the decision would be one for the Respondent to make and necessarily the Respondent would be consulting because of the requirement to do so

and about something which it had decided it wished to do. Otherwise, there would be nothing to consult about.

230. The reasonable tenant would be likely to regard this as a better protection than that immediately above. At least the tenant can be informed, can express views and have an expectation of some sort of response.

231. The reasonable tenant would realise that whilst the tenant could express views on the Additional Services or any other proposed extra Services, the tenant could have no certainty, even solid expectation, that the Respondent would decide against the course proposed in light of those. Dependent upon the experiences of the reasonable tenant at that point, the tenant may be more or less doubtful that any response given would produce any change to the course the Respondent was initially minded to adopt.

232. There was of course a consultation undertaken by the Respondent in 2017, which received 44 responses, although did not discernibly alter the outcome. However, the Tribunal is very much mindful that was a particular process carried out pursuant to the Disputed Term and that an event some years later does not determine the reasonableness of the term in the Sample Tenancy Agreements themselves, although it again demonstrates any concerns held by the reasonable tenant not to be fanciful.

Internal complaints procedure

233. The other protection identified by Richards LJ is the ability to pursue the Respondent's complaints procedure.

234. The Tribunal finds that the reasonable tenant would derive a degree of comfort from there being such a procedure and that issues could be raised without the need for an application to an external body. However, the Tribunal finds that the reasonable tenant will be most likely to have relatively modest expectations of issues being resolved as to the Additional Services or other such Services through an internal complaints process.

235. The tenant is likely to consider that a decision has been made well up in the Respondent's structure to add Services to any Listed ones and that any complaint is unlikely to prevent the Services being charged for. The tenant is likely to have little belief that the decision would be reversed. That is especially so where there has been a consultation and the decision of the Respondent has not changed.

Ombudsman or Regulator and Tribunal application

236. The Tribunal finds that the relevant reasonable tenant would be relatively unenthused by a protection which was reliant on an application to the housing ombudsman or similar process, which the

reasonable tenant was unlikely to have ever encountered before and which the reasonable tenant was unlikely to have any understanding of – including particular the potential outcome and the likelihood of that outcome.

237. The housing ombudsman provides a very useful function. Other regulators similarly. The Tribunals findings in the context of the Disputed Term should in no way be taken to imply otherwise, However, the question is not the merits of the ombudsman and regulator but rather the extent to which the reasonable tenant would regard them as providing relevant protection in respect of the Disputed Term.

238. The Tribunal finds that the reasonable tenant would be likely to be put off by the need to pursue an application, by perceived formality of the process and by lack of clarity of the outcome likely to be achieved and so whether that would produce anything of tangible benefit- fear of the unknown as Mr Fitzpatrick expressed it.

239. The Tribunal finds that applies even more so in respect of formal proceedings. The Applicant of course has launched proceedings but in very particular circumstances. Other persons of course do so. However, whilst Tribunal procedures aim to be relatively informal and the Tribunal seeks to create an environment in which parties can represent themselves with a fair and proper opportunity to present their case, there is little in the experience of the Tribunal to suggest that most parties issue Tribunal proceedings, or any proceedings, other than as a last resort.

240. Parties can be unclear as to the remedy obtainable, as to the evidence relevant and as to the process more generally. Advice is often sought and not always found. The Tribunal infers, finding it a small step to take, that the likelihood is that many such potential parties are put off from applying at all. Protection which is based upon the outcome of what can be time-consuming proceedings to pursue with an uncertain outcome some months into the future is not a protection on which the reasonable tenant is likely to place great weight.

241. The ability to apply to the Tribunal and the protection provided by that in any event has its limits. Leaving aside where the fairness of the term is in issue, the Tribunal would be required to apply the terms of the agreement and any appropriate law in deciding whether the particular service charge were payable and as to the reasonableness of charges. It could not, unless they were not payable under the agreement, prevent the tenant being liable for charges at all, albeit not necessarily the sum demanded. The Tribunal rejects Mr Dymond's contention that the Landlord and Tenant Act 1985 provides a high level of protection, at least from the perspective of the reasonable tenant.

242. It is also of relevance that whilst clause 1 of the Sample Tenancy Agreements explain with some care how to challenge an increase in rent, there is nothing within the Agreements which mentions how to challenge any matter in relation to service charges. The Tribunal finds that lack of information in obvious contrast to the information about challenging increases in rent detracts from protections offered by the ability to apply.

Overall

243. The Tribunal considers that from the perspective of the reasonable tenant, the protections identified are likely to be largely theoretical rather than practical and consequently are unlikely to weigh heavily. There is, rather inevitably, a need for caution in applying any perspective as a lawyer or Judge where the relevant person is a reasonable tenant of social housing and therefore in a somewhat different situation when it comes to proceedings and other forms of dispute resolution. The Tribunal has had careful regard to the points made by both sides in this case in making the above finding.

244. The Tribunal finds having weighed the matters above that the reasonable tenant would not regard the protections as sufficient and that weighs against the term being agreed by the individual tenant.

<u>The freedom of the consumer to dissolve the contract</u>

245. The reasonable tenant does have a corresponding right to cancel the contract.

246. However, in the instance of a tenancy agreement, in order to dissolve the contract, the tenant would have to give notice to leave the Home occupied by the tenant and any family or other member of the household, such that the whole household would have to leave. The tenant, and all members of the household. would in the normal course need to obtain alternative accommodation. As Mr Fitzpatrick identified, that is a big and life- changing matter.

247. The Tribunal considers that there is a marked contrast between the ability to cancel the usual type of consumer contract and the need to relinquish one's Home and indeed the Home of one's family and other household members. The impact is not just on the consumer but potentially others who have no contractual rights but would be markedly affected by their Home being relinquished.

248. That Home may have been occupied for a considerable time. The expectation may well have been of continuing to occupy for considerable time to come. A Home is rather more than a set of bricks and mortar as has been eloquently expressed in previous authorities.

249. Consequently, the right to terminate the tenancy agreement because the consumer wishes to avoid the effects of application of the

Disputed Term is arguably of limited benefit. The level of impact on which the Tribunal considers that would be likely to be required for the reasonable tenant to be content to relinquish a home goes far beyond the sort of situation which the Tribunal considers was contemplated in Schedule 2. The consequence for the tenant of employing the remedy of dissolving the contract is excessive.

250. The Respondent asserts that there is ample availability of social housing in the area. Hence, there is a realistic prospect it appears to be argued that a tenant could exercise the right to dissolve the contract and find a similar dwelling elsewhere. However, whilst that mitigates against an even more serious position for the tenant, one in which the tenant was forced into private rented accommodation, it also- and the Tribunal finds somewhat surprisingly- misses the point.

251. It misses the fundamental point about a Home. In addition, having made a Home in a given location, which will commonly mean friends, services, perhaps a GP and/ or schools, and similar, the fact that not too far away but still somewhere else, the reasonable tenant who wishes to avoid the cost of the Additional Services or other extra Services can obtain in principle a different property is a wholly inadequate solution, the Tribunal finds. That ignores any potential issues as to waiting lists and other delays and so how likely such accommodation would be available at the time needed.

252. The Respondent also cited there being retirement living options within a few miles but at least three out of four were developments by well known developers of retirement properties for sale at significant prices which the Tribunal considers to be in no way equivalent to the sheltered housing on the Estate.

253. The Tribunal therefore finds the freedom to dissolve the contract to be largely illusory and that the impact of such is that the reasonable tenant would not find that any solution, which goes to add weight to the unfairness of the contract.

Open and fair dealing

254. The layout of each particular one of the Sample Tenancy Agreements differs, albeit that the words of the particular relevant provisions are the same (if not consistently numbered across the three). Each is in two parts as previously noted.

255. The Applicant argued that the effect of the Sample Tenancy Agreements being in two parts was that "the man in the street" would "go to" the part signed rather than the other part. In effect, the Tribunal considers that the Applicant argued that the relevant provisions were not therefore sufficiently clear and prominent. In any event, the Tribunal considers that in light of the case authorities, clarity and prominence is relevant and so a finding should be made as

to that or the lack of that. The Tribunal takes each issue of clarity and prominence in turn.

256. Turning firstly to clarity, the Tribunal determines that the Disputed Term is not clear. The Tribunal regards the Respondent's case that the Sample Tenancy Agreements are clear to be optimistic.

257. The Disputed Term would enable the Respondent to add Services to those Listed, subject to genuine belief as to usefulness. Where there are Listed Services, it is apparent what they are. It is apparent that they are Services because they are listed as being such.

258. There is nothing in the Sample Tenancy Agreements, the Tribunal finds, which indicates what Services otherwise are and what may or may not be such a Service. The Tribunal is very well aware that what amounts to a service or services has been defined by case authorities over the years but the question is not what the Tribunal knows about services but rather what the relevant reasonable tenant would know about Services.

259. That is particularly relevant in the case of a transferred tenant such as Mrs Reynolds or other tenant whose tenancy agreement contained no Listed Services. On the face of those tenancies, the Respondent was undertaking various tasks but none of them were identified as amounting to Services. There was not even anything to indicate what may or may not be a Service.

260. It is also notable that in an agreement such as that of Mr and Mrs Richardson, there are no Listed Services but there are services. There must be services because there are Service Charges so described which must be paid in order to contribute to the cost of them. However, as noted above, there is no explanation as to what Services the service charges are for. It would be difficult to find that any of the Sample Tenancy Agreements clear where even those Services for which there were service charges from the outset are not identified

261. Service/ Services is not defined in the Sample Tenancy Agreements. There is no list of matters which might be likely to constitute Services (still less any indication of what might not be) or indication of what may be a service as opposed to another obligation on the Respondent. If the reasonable tenant were to wonder whether a given matter amounted to a Service, there is nothing (save where services are explicitly listed) within the Sample Tenancy Agreements which would enable the tenant to know or even to take an educated guess.

262. In a similar but more specific vein, the Sample Tenancy Agreements do not state what the Respondent already does but considers that it does not need to do, not being a Listed Service or another obligation of a landlord. Or to put it another way, there is nothing stating there are matters being dealt with by the Respondent

but which the respondent did not regard as services for the purposes of the tenancy agreement.

263. There is nothing indicating that any such matter may be a Service and so capable of being added as an "extra Service" pursuant to clause 2.10.1. Therefore the particular mischief that the applicant considers to arise is not mentioned or even hinted at in the Sample Tenancy Agreements, giving nothing which the reasonable tenant might see alerting that tenant to even the possibility of such matters becoming treated as Services for the purpose of charging for them.

264. The Tribunal accepts that the Respondent can add Services and matters it previously attended to but were not listed as Services. That much is abundantly clear from the judgment of the Court of Appeal in *Curo v Pimlett*. The Tribunal of course accepts the judgment of the Court of Appeal that the items previously being attended to without resulting service charges fell outside of the Services for the purposes of the agreement.

265. However, that is not the same as it being clear to the reasonable tenant as to matters already attended but without being Listed Services falling into the scope of extra Services. There is nothing within the agreement which might identify to the reasonable tenant that the Respondent considers such matters to be ones which might be added as services and might then become chargeable.

266. The Tribunal considers that in a consumer contract, if the supplier is to be able to make charges for matters previously provided but without charge, consumer protection requires that such a provision is clearly identified and that the effect of the provision is spelt out in obvious and unequivocal terms.

267. The Tribunal finds that the effect of the particular provision in the Respondent's tenancy agreement was not clear. Not only were the individual tenants apparently unaware but it took the case to progress to the Court of Appeal before the matter was identified. As The Applicant submitted, it can hardly be a matter clear to a reasonable tenant of social housing if it takes the learned judgement of the Court of Appeal to identify that matters already attended to but not listed as Services and charged for by way of service charges are capable of being extra Services.

268. Secondly, the Tribunal considers prominence.

269. Notably, the heading to clause 1 is prominent. The wording is in white on a black background (at least black as photocopied for provision to the Tribunal).

270. As identified above the heading to clause 1 is in capital letters and identifies two elements that it relates to, "RENT" on the one hand and "SERVICE CHARGES" on the other. The Tribunal finds that is therefore

where the reasonable tenant would expect to find the provisions that relate to those two elements, rent on the one hand and service charges on the other.

271. The rent is comprehensively referred in clause 1, across almost a full page and with increases in rent at clause 1.3, only a few lines of text into the Conditions within the Sample Tenancy Agreements.

272. The first reference to Service Charges towards the start of the Conditions and under that prominent heading is clause 1.6 (or clause 1.4 as the case may be), which, to re-iterate it, simply states:

> "1.6.1 If you receive any service with specific charges from the Trust they will be listed in the Particulars of Tenancy.
>
> You will pay a service charge for those services."

273. The next provision relates to changes in service charges". That refers to how much will be spend on providing the Services. There is no reference to those Services changing. The Tribunal finds that the natural reading of the words would lead the reasonable tenant to expect that if there are Service for which service charges are payable, those will be the ones listed and that will be the extent of the matter. There is nothing under the prominent heading which says anything else about service charges and the Services to which they relate.

274. The Disputed Term, clause 2.10 is to be found on page 9 or 10 as the case may be of the Sample Tenancy Agreements, which comprises in total across the Particulars and Conditions 21 or 22 pages, so very much around the middle. There is nothing within clause 1 which hints that there may be any other clause relevant to Services and the amounts payable for them three pages further on, whether providing details of any relevant Service or at all.

275. If a tenant reads the first couple of pages, which the Tribunal finds the reasonable tenant is likely to do, there is no suggestion that the tenant should have cause to consider the remainder of the tenancy agreement in order to be aware of further provisions in relation to the matters covered on those pages.

276. There is another prominent heading on page 4 of the Conditions part of the document. That reads:

> "THE TRUST'S OBLIGATIONS"

277. The Tribunal finds that the reasonable tenant would understand that to provide details of the matters which the Respondent must attend to. There are four columns of provision.

278. The heading "Services" is in the last of those. The heading appears in bold type. However, that is exactly the same as any of the many

other headings in the Conditions of Tenancy. The font size is the same as for the main body of the clauses, although those are not in bold.

279. The Tribunal finds that there is no other prominence given to clause 2. 10 than any other provision in the eighteen pages of Conditions. Indeed, the clause is relatively difficult to find.

280. The Tribunal finds that a reasonable tenant would have been unlikely to be drawn to the provisions some pages on in the Conditions from reference to service charges that Services might be added. Even more so where the agreement contained no Listed Services in the first place. For tenant such as Mrs Reynolds, there being no listed Services stated as being provided, the provision of Services would, the Tribunal finds, have been a very minor matter for the tenant in the absence of the matter having specifically been drawn to the tenant's attention.

281. In the next column after that containing the heading Services (the Conditions have two columns to a page) is another prominent heading:

"YOUR RIGHTS AND SECURITY OF TENURE"

282. The Tribunal finds that heading is far more likely to draw the eye and refers to something of obvious importance to the reasonable tenant. Whilst the Tribunal does not for a moment suggest that 2.10 had been deliberately placed close to that more prominent heading so that the prominent heading draws the eye away from it- there is nothing from which the Tribunal could contemplate drawing such an inference- that is an effect in practice.

283. The Tribunal considers that the matters referred to above could have been addressed relatively simply by the Respondent such that the Respondent's ability to add Services, and most particularly to add as Services matters which it was already attending to without separate charge, was more prominent.

284. There could have been a comment in or around the box on the Sample Tenancy Agreements which made reference to service charges to indicate that there may be additional services and with charges for them. The relevant clauses could have been indicated, pointing the tenant to them. In addition, clause 1.6.1 or the equivalent clause could have contained some or all of the provisions in clause 2.10.1.

285. Alternatively, the clause could at least have identified that there were other relevant provisions about services and service charges so as to alert the tenant to the fact of there being other relevant provision in the tenancy agreement and avoid the tenant only being alerted to that if clause 2.10.1 were found some further pages on.

286. The Tribunal considers that the Respondent gave appropriate prominence to the main part of the cost to the tenant payable to the Respondent for the Home but failed to give appropriate prominence to the other part of that cost, namely the service charges, at least insofar as there be the Additional Services or other extra Services which could add to such charges.

287. The final clause which merits mention is clause 6.3.1, which provides that terms other than rent and service charges may only be changed in the event of agreement.

288. The Tribunal does not find the Respondent's ability to alter the amount of the charge for the Services without the tenant's consent to be of significance. It is a sensible, indeed well nigh inevitable position. The cost of providing the services would be expected to vary from period to period and consequently the level of charges to meet that cost would be expected to vary. If the Respondent were not able to alter the charge without agreement, it may not recover the cost. If the Respondent could not alter the rent, that could cause obvious difficulties.

289. Clause 6.3.1 is clear in terms of its wording. The clause does less well in term of prominence, being almost at the very end (the last clause is 6.6) of a very long document. There is again a heading the same size as the bulk of the text albeit in bold. The prominent heading a little above it reads:

"GENERAL"

290. That heading name does not suggest anything that follows is of much import. However, 6.3.1 is not the Disputed Term and does nothing to add to or detract from the wording of that provision and so does not require further discussion.

291. The Tribunal finds as a fact that the Disputed Term, clause 2.10.1, is not prominent or clear.

292. The Tribunal notes that the extraction of the particular relevant clauses to quote them in a decision such as this one and the placing of them next to or near to each other in that decision may go to suggest that they are all simple to find and to consider in relation to each other. However, the proper context is how they appear in the original document.

<u>The reason for the Respondent adding the Additional Services</u>

293. The Tribunal considers that it would be remiss not to refer to the motivation asserted by the Applicant to be behind the Respondent's decision to add the Additional Services in 2016/ 2017. That is a point made repeatedly on the Applicant's behalf and plainly significant in the eyes of the Applicant.

294. The Tribunal identifies the Respondent's relevant case to be that Services were to be added. Equally, the Applicant's relevant case to be that matters previously attended to without charge would be categorised as Services and to provide additional elements that could be charged for.

295. The Applicant asserted that the reason for the Respondent adding the Additional Services was because there was a cap on rent chargeable with the effect that the income received from rent would fall in real term and the fact that service charges were unaffected by that. Therefore, a way of combatting that and maximising the level of income received in the future was to cease to attend to any matters out of general rent income that could be regarded as Services and not the provision of housing. Instead the categorisation of matters which the Respondent previously provided out of rental income as services enabled the Respondent to charge additional sums to the rental income and would not be constrained by any limits on rent or increases of rent in subsequent years. The Applicant asserted that anything which the Respondent did not have to meet the cost of from rental income was financially helpful to it.

296. The Applicant pointed to a document termed a "Concept Note" prepared by CIH Consultancy in March 2017, which asserted as its key conclusion that the requirement for rent reduction strengthened the case for separating service costs from rent, although that document itself, if not necessarily the approach it advocated, necessarily post-dated the notice which the Respondent had served in January 2017 and the earlier decision taken which prompted that service. As to whether the Respondent had sight of the earlier paper which the Concept Note described itself as an update to or any equivalent document is not known and not immediately relevant. It may be noted that the document assumed there to be both rent itself and service charges within the rent, hence the ability to separate. The services would already be charged for. The situation described is not the same as the instant one, although the suggested merit of maximising income might be thought shared.

297. The Tribunal agrees that the fact that the timing of the desire to charge tenants for the Additional Services follows on from the imposition of other limits on the Respondent's income from rent and therefore potentially tightening of margins is a matter which has relevance in the circumstances. The attraction of that to the Respondent would have been, the Tribunal finds, an obvious one.

298. The Tribunal received no evidence from the Respondent that it was motivated by any provision of certainty- as least subject to the Respondent's ability to cease to provide Services for its tenants. The Tribunal identifies in the evidence nothing which would properly support a conclusion that the Respondent sought to add the additional

services to those Listed Services in order to provide any benefit to a tenant.

299. The Tribunal finds as a fact, having carefully considered those contrasting cases and the evidence provided that the reason for the Respondent's approach was not to provide any certainty to the reasonable tenant that the Additional Services would be attended to. The Tribunal considers that the Respondent's approach was a response to limits on other income and a way in which additional funds could be obtained to meet a cost. The Tribunal finds the Respondent's motivation was as asserted by the Applicant. The Tribunal finds that the reason was to increase the Respondent's income. The Tribunal accepts in that regard that the Respondent needs to be able to fund the matters it attends to.

300. However, the above relates to the operation by the Respondent of the Disputed Term, not the term itself and so a different point. The Tribunal is not conducting a judicial review of the Respondent's decision making or any similar process. The Tribunal is considering the Disputed Term. It is important, for the Applicant in particular, to understand that the specific use to which that term has been put forms no part of the answer to the question which the Tribunal is asked to determine. The inclusion of this section in the Decision should not mislead as to that.

301. The particular effect of the particular application of the particular term in 2016/ 2017 does not therefore assist the Tribunal in deciding whether the Disputed Term itself is fair or unfair.

Applying the law to those facts and consideration

302. The factors discussed above are just that. It is necessary to weigh them, and the findings reached about them, to come to a conclusion. The answer is not simply achieved by tallying up the number of factors pointing one way or another. They are not necessarily of equal significance and in any event a simple tallying exercise could not amount to a proper consideration of the issue.

303. The Tribunal considers that the answer is to be arrived at by having regard most particularly to the purpose of the 1999 Regulations, namely the protection of the consumer. The Tribunal considers that set against that background and given the findings of fact, the answer to the question of whether the Disputed Term is unfair, follows with some inevitability.

304. The Tribunal reminds itself of the words of used in Aziz that significant imbalance and good faith merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated and that a significant element of judgment is left to the national court, in this instance this Tribunal, to exercise in

the light of the circumstances of each case, the nature of the assessment being provided for in Regulation 6.

305. The Tribunal therefore turns to the effect of the findings of fact made in light of the relevant law discussed.

306. The Tribunal determines that considering the relevant considerations as identified by Lord Neuberger and looking at all of the circumstances, the reasonable tenant of the Respondent would not have agreed in individual contract negotiations the Disputed Term with the effect it has been held to have.

307. In this instance, it has been established that Services fall into the two distinct categories of those which relate to matters attended to before but not as Listed Services and those which were not attended to before but which the Respondent may decide to provide in the future.

308. The Tribunal determines that such a tenant would have agreed a term which enables the Respondent to deal with the first, so matters as Services which it did not deal with previously and on the basis of the charge being rendered to the tenant for that, despite potential reservations as to incurring an additional expense on a limited budget and as to whether the matters would benefit the particular tenant individually.

309. The Tribunal accepts that other protections and constraints are relevant. It is mindful that it has made findings of the insufficiency of various protections and other findings which might suggest a reasonable tenant would not so agree. Weighing the various factors in their legal context, however, the Tribunal determines that the reasonable tenant, with reservations, would have concluded overall that such a term was acceptable in contact of this nature if that were the entirety of the matter.

310. The Tribunal considers that a tenant may well have some concerns about the addition of Services at additional cost in a wide sense. The reasonable tenant on a limited budget, with day to day expense to meet and with financial constraints would, the Tribunal finds, be concerned to an extent by any additional cost, irrespective of receiving something in return. The reasonable tenant facing financial constraints will, the Tribunal considers, need to make decisions about expenditure and to weigh up the cost involved against the benefit that the tenant considers likely to be received. Different reasonable tenants might reasonably be expected to reach different conclusions- not everyone is the same- but the process is likely to be broadly similar.

311. An increase in rent would be likely to be offset by an increase in welfare benefits in many cases, albeit not by increase in income from earnings where relevant. An increase in service charges is most likely to reduce the funds available for other expenditure. The tenant would not pay more for something where the tenant does not have the

opportunity to weigh up the cost against the benefit and has the incomplete and potentially unattractive right to pursue the protections identified above.

312. The operation of the term is not within the control of the tenant. Returning to the contrast between the facts of *ParkingEye* and this instant case, the motorist accepted a specific risk in return for an obvious benefit- free parking for the first two hours- and where the operation of the term said to be unfair was within the control of the motorist. The motorist was then himself in breach of contract. The situation in respect of a social housing tenant with an assured tenancy of a Home of is perhaps about as far as one can get in consumer contracts from a charge to an over- stayer in a shopping centre car park.

313. The tenant has the right to be consulted. However, such a right does not carry with it an ability to insist on or otherwise compel a given outcome. The Respondent is, subject to the consultation being reasonable in a broad sense, entitled to discount the views expressed by the tenant. The tenant has other partial protections if prepared to pursue them with uncertain outcome. All that the tenant has control of is giving up the tenancy, about which it is unnecessary to repeat the observations made above.

314. Consequently, the Tribunal considers that some tenants would not agree even to Services not previously attended to being added and charged for. Nevertheless, the Tribunal finds that the reasonable tenant would accept at least a degree of extra charge where there was an identifiable additional service provided of benefit to the tenant.

315. The Tribunal finds that the reasonable tenant would not have considered there to be a sufficient benefit with sufficient protection for sufficient reason to have individually agreed a clause which would enable matters which the Respondent had hitherto attended to - and so which the tenant had obtained the benefit of- without those being Listed Services which the Tenant was charged for, to separately and additionally be charged for by the Respondent and so at additional expense to the tenant. The Tribunal determines that a reasonable tenant asked the question of whether they would agree the Disputed Term in an individual negotiation for a new tenancy would respond in the negative.

316. The Tribunal takes careful account of the judgment of the Court of Appeal *Curo v Pimlett* that the tenant obtains a benefit in that the Respondent would, upon adding the Additional Services to the Services in the Sample Tenancy Agreements, then have an obligation to provide them, although that is of course subject to the Respondent's ability to cease to provide the Services and so the Tribunal considers the benefit to be a somewhat uncertain one.

317. However, in respect of the Additional items, the tenant does not receive anything new, merely the Respondent now being contractually obliged to provide them. The Tribunal considers that such a reasonable tenant would, reasonably, give most weight to the fact that the tenant would be incurring additional expense and is likely to be on a tight budget in the first place without receiving anything identifiable not received already. The Tribunal finds that the fact that the Respondent would have to provide the services, as opposed to being able to cease to do so (if practicable without hindering its business of letting properties for rent), would not be regarded by such a tenant as a sufficiently tangible benefit that the tenant would agree.

318. There is a contrast between the Respondent providing a service not previously provided and for which the tenants receive a benefit commensurate with the cost they incur and those costs are reasonable as compared with a situation such as this one where the tenant receives nothing that was not received already other than legal obligation on the Respondent to provide that service, at least until the Respondent concludes that it is not practical to do so. The cost of a service in return for a service is one thing. The cost of a service in return for a greater likelihood it will be provided in the future is another.

319. In return for the Respondent's obligation, the tenant does not pay a sum which merits any added gain to the tenant because the Respondent has to provide the Services as opposed to not being compelled to, unless it ceases to believe it practical to do so. Instead, the tenant has to pay for the entirety of the cost of provision of the Additional Services. The Tribunal finds that a reasonable tenant unhappy about that prospect that he or she may later feel pressurised to accept something in the absence of a sufficiently practical alternative.

320. The Tribunal determines that adding that to the other matters found above and which would be weighed by the reasonable tenant, the balance changes.

321. The Tribunal re-iterates that the actual service charges for the Additional Services have been very low. It may well be that such a level of charges would not cause much concern to a reasonable tenant. However, that level of charges is a consequence of how the Disputed Term has been used and not about the term itself. The Tribunal also finds it unlikely that the reasonable tenant would have known what the Additional Services or any other potential extra services have been likely to cost. Hence, the cost as it has turned out to be so far at least would not have been relevant to the reasonable tenant's decision.

322. The Tribunal does not consider that the reasonable tenant would regard the benefit achieved by the Respondent having the obligation to provide the service was sufficient to merit being charged the entire cost of providing that service.

323. The Tribunal also finds that the particular situation that the Respondent is able to add to the list of services items already being undertaken but not on that list, and that there is nothing in the Sample Tenancy Agreements to clearly, or indeed at all, explain that, amounts to a pitfall or trap as has been termed.

324. The Tribunal determines that the clause does go beyond what is necessary to achieve flexibility in the provision of Services. It does so not because it allows the addition of Services in general but rather because the construction of it as held enables the Additional Services or other Services which are items previously attended to by the Respondent and not extra to what the tenants previously received.

325. The Tribunal has considered the fact that the Respondent could potentially use clause 2.1.10(i) as the basis for deciding to cease to provide the Additional Services because it is not practicable to provide them without being paid for doing so. That may relate to the cost of provision and the need to fund that. The Tribunal has noted the implication of that in the Respondent's case.

326. The Tribunal determines that is a matter which might cause some concern to a reasonable tenant but not one which would be likely to alter the approach of that tenant, to the wider situation. The Applicant's case submitted that in practice the Respondent would not be able to cease to deal with the Additional Services matters, particularly the grounds maintenance and playground because of the impact on the condition of the Estate and on the ability of the Respondent to let its properties, implicitly also therefore on the reputation of the Respondent. The Tribunal considers that the Respondent would have been mindful of good maintenance of communal areas being conducive to the well- being of its tenants [124].

327. The Tribunal determines that the financial and reputational risks to the Respondent of that would be considerable. The Estate becoming known to be poorly maintained would be likely not only to cause difficulties with letting on the Estate but also the Respondent's other properties. The Tribunal considers that the laundry is different to the others to that extent- a lack of a laundry is one thing, overgrown grounds with detritus and poorly maintained play areas is another. However, that relates to the particular matters sought to be added as Additional Services in practice. Those would not have been known to the reasonable tenant ahead of time.

328. Nevertheless, the Tribunal considers that the reasonable tenant would give considerable regard to practical constraints on the Respondent and so the risk of the Respondent ceasing to attend to matters which it had previously felt appropriate, or at least most of them, would weigh relatively lightly in comparison to the other factors above

329. The Tribunal finds that applies even more so for a tenant with an agreement in the form of the Sample Tenancy Agreement of Mr and Mrs Richardson. A tenant who is being charged service charges for Services already, without the agreement stating what those are would be even less likely to agree a term allowing the Additional Services or other such Services. As the Tribunal finds that it is impossible on the face of the agreement for a reasonable tenant, or indeed the Tribunal, to know whether the Additional Service are in fact additional services or whether any of them were already being charged for, the Tribunal considers it even less likely that a reasonable tenant would agree to what may or may not be further Services at cost of further service charges.

330. Further, the Tribunal finds the Disputed Term, insofar as it enables the Respondent to charge for matters previously attended to without separate charge, to be especially unfair to a former secure tenant of the Council such as Mrs Reynolds, given the findings made above.

331. Whilst the Sample Tenancy Agreement of Mr Messer does not have a generic charge for Services in the way Mr and Mrs Richardson's does and Mr Messer was not apparently a tenant of the Council, despite the Rent Guarantee and similar clauses in his agreement, that only goes to remove additional features relevant to the conclusion in the other two instances. It does not go to alter the outcome of the central matters and prevent the Disputed Term being unfair in respect of matters previously attended but sought to be added as additional Services.

332. Mr Messer, and indeed Mr and Mrs Richardson, are in sheltered accommodation and more vulnerable. That vulnerability would lend further weight to unfairness to such a tenant of sheltered housing and to such a tenant not agreeing to the ability of the Respondent to charge for matters attended to without separate charge.

333. The Tribunal has carefully considered whether sub- clause 2.10.1 (iii) could somehow be construed so as to treat matters being attended to prior to being added as Listed Services on the one hand and wholly new items on the other hand separately. That may have produced a determination that the Additional Services and other extra Services could be provided where the matters being attended to were new ones.

334. It is of no little relevance that a finding that clause 2.10.1(iii) is an unfair term not only prevents the Respondent charging for matters which were not listed Services at the time of the given tenancy agreement being entered into, but also prevents the Respondent from adding other services. It is also of no little relevance that difficulties may be caused to the Respondent. On the other hand, any decision reached will inevitably impact on one party or another and so that cannot be the key question for the Tribunal.

335. The Tribunal determined that there is nothing in the wording within the Disputed Term which would enable that approach to be taken and the finding that the Disputed Term is unfair prevents any Additional Services for which service charges would be rendered.

336. The Tribunal concludes that, given the nature of the provisions in the tenancy agreement, the lack of prominence or highlighting or of the reference to the Disputed Term or to the location of the Disputed Term mid the conditions and the absence of anything else to draw the tenant's attention to the clause, the agreement also fails the test of open and fair dealing.

337. The Tribunal is sympathetic to pressures on the Respondent, including pressures which may arise from any limit to its sources of income. The Tribunal is very much aware that the Respondent is a registered provider of social housing and not a business seeking to maximise profit.

338. Nevertheless, whilst that is plainly a relevant feature, it can only go so far in these circumstances.

339. Where the question is one of the protection of a consumer, any motivation on the part of the supplier to increase its income, necessarily at the expense of the consumer, and any limit to the supplier's income because the term in issue is found unfair might sensibly be expected to produce exactly the result that it does. It is the consumer's interests which are paramount and not those of the supplier.

340. The Tribunal determines that the reasonable tenant would not have agreed to the Disputed Term.

Decision

341. In so far as the provision therefore permits the Respondent to add matters previously attended to without separate charge to the Listed Services and to charge for them through service charges, the Tribunal therefore finds that provision to be an unfair term in a consumer contract pursuant to the 1999 Regulations and thereby void.

342. For the avoidance of doubt, the Tribunal does not find that the ability to add, alter or remove services in general is an unfair contract term for the reasons indicated above. The Tribunal's determination is therefore limited to the specific situation that the Respondent seeks to add the charge for items previously provided without that separate charge and for the particular reasons explained above.

343. The Tribunal has given careful consideration to the impact of the above determinations on provisions contained in the particular tenancy agreement. The fact that the effect of the Decision is that the Respondent cannot add any Additional Services to the Listed Services

is simply a consequence of the particular drafting of the relevant provision in this case, which does not distinguish Additional Services in respect of matters not previously attended to from ones which were.

344. The service charges in dispute are therefore not payable.

Costs and fees

345. As referred to above, applications were made by the Applicants that any costs incurred by the Respondent in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable or recoverable as administration charges. The Respondent stated that it would not seek to charge the costs of the proceedings as service charges or administration charges and hence arguably any decision reached on this element of the case is academic. However, given that there are applications before the Tribunal and for the avoidance of any possible uncertainty, it appears to the Tribunal appropriate to make a decision about the applications, as it said in the hearing that it would.

346. Section 20C (3) of the 1985 Act, provides "the … Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances". The Tribunal is given a wide discretion. The provisions of paragraph 5A are not the same but the effect of them is similar and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable will usually involve the same considerations and produce the same result. There will be exceptions to that but there is no obvious reason to identify this case as one.

347. The provisions of section 20C were considered in *Re: SMCLLA (Freehold) Ltd's Appeal* [2014] UKUT 58, where the Upper Tribunal held (at paragraph 27) that:

> "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances".

348. In *Conway v Jam Factory Freehold Ltd* [2014] 1 EGLR 111, the Deputy President Martin Rodger QC suggested that, when considering such an application under section 20C, it was:

> "essential to consider …… the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make".

349. Whilst there is caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case. The Applicant has been successful. The element alone is not determinative, although it is never irrelevant. It is relevant that service

charges do not provide the main or only source of income for the Respondent in the manner in which they often do in lessor and lessee disputes. In contrast, the Respondent's case demonstrated the receipt of income from rent, from house building and from other activities. The Tribunal will always bear in mind the potential practical and financial consequences of the approach taken, albeit that is only one of a number of relevant considerations. There is nothing to affect the outcome of weighing the other factors.

350. Taking matters overall, the Tribunal considers it to be just and equitable to grant the applications. The section 20C and paragraph 5A applications are therefore granted.

351. In addition, the Tribunal awards the Applicant any fees paid to the Tribunal in respect of this application, which shall be paid by the Respondent within 28 days. The Tribunal assumes that the Applicant residents' association has a bank account into which such sum can be paid or that otherwise the parties can come to an appropriate arrangement in respect of the payment.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case by email at rpsouthern@justice.gov.uk

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

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

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