FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BS/LSC/2020/0079**
Property	**:**	**Flat 5A, Harrytown Hall, Romiley, Stockport SK6 3BT**
Applicant	**:**	**Ms Carly Collinson**
Represented by	**:**	**Mr P Freeman**
Respondent	**:**	**Harrytown Hall Maintenance Limited**
Represented by	**:**	**Bridge Law Solicitors Limited**
Type of Application	**:**	**Landlord and Tenant Act 1985 – section 27A** **Landlord and Tenant Act 1985 - section 20C**
Tribunal Members	**:**	**Tribunal Judge C.Wood** **Tribunal Member S Latham**
Date of Decision	**:**	**12 May 2022**

DECISION

Order

1. The Tribunal orders as follows:

   (1) the Tribunal has no jurisdiction to make a determination in respect of service charge payable by the Applicant under clause 3(i)(d) of the lease of the Property dated 8 February 1985, ("the Lease") by reason of the Applicant's agreement to the Respondent's method of apportionment which is an agreement within section 27A(4)(a) of the Landlord and Tenant Act 1985;

   (2) there is no estoppel by convention by reason of the Applicant's acquiescence with the Respondent's method of calculation of the Applicant's apportionment of the service charge payable under clause 3.(i)(b) of the Lease;

   (3) the "due proportion" of the total costs and expenses payable by the Applicant under clause 3.(i)(b) of the Lease shall be determined by reference to the proportion the gross internal area of the Property bears to the aggregate gross internal areas of all the flats comprised within the Building, where "gross internal area" is defined in the report dated 10 May 2021 by Mr.S.McKay of SRM Consultancy (NW) Limited, and, where GIA excludes all areas of less than 1.5m in height;

   (4) the "due proportion" payable by the Applicant is 12.4% of the expenditure incurred under clause 3.(i)(b) of the Lease;

   (5) the phrase "for the time being" in clause 3(i)(b) of the Lease bears its ordinary and accepted meaning, namely, "for the present; until some other arrangement is made";

   (6) there is an estoppel by convention by reason of the Applicant's acquiescence with the Respondent's practice to provide and charge, by way of service charge, the costs of window cleaning to the Building and is liable to pay a "due proportion" of the total costs thereof; or, alternatively,

   (7) the Respondent is entitled to charge the costs of window cleaning at the Building as being part of "…expenses incurred …to in and about the maintenance and proper and convenient management and running of the Hall" under clause 3.(v)(f) of the Lease.

2. Having regard to the orders made in paragraph 1 of this Decision, the Tribunal determines that it is just and equitable in the circumstances to limit the costs of these proceedings recoverable by the Respondent as service charge to 10% of those costs. The Applicant's application under section 20C of the Landlord and Tenant Act 1985 is granted on these terms accordingly.

3. The Tribunal orders that no orders for costs are made against the Applicant under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, ("the Rules"), in favour of Mr. A.Leigh-Newton and/or the Respondent.

Background

4. By an application dated 23 October 2020, ("the Application"), the Applicant sought a determination under s27A of the Act of the reasonableness of, and liability to pay, certain service charges for the service charge years October 2015 – September 2021.

5. Two video Case Management Conferences were held on 10 February 2021 and 20 August 2021, at which both parties attended and/or were represented.

6. Directions dated 24 September 2021 were issued pursuant to which both parties submitted written representations.

7. A remote video hearing was arranged for Monday 11 March 2022 at 10:30 at which both parties attended and were represented.

8. The Tribunal did not inspect the Property.

Law

9. Section 27A(1) of the Landlord and Tenant Act 1985, ("the 1985 Act"), provides:

An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to-

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

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

(e) the manner in which it is payable.

10. The Tribunal is "the appropriate tribunal" for this purpose, and it has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

11. The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It means:

… an amount payable by a tenant of a dwelling as part of or in addition to the rent–

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

12. In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

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

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

and the amount payable shall be limited accordingly.

13. "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

14. Section 27A(4) of the 1985 Act provides-

No application under subsection (1)…may be made in respect of a matter which-

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

15. Section 20C of the 1985 Act permits the Tribunal to order that the costs incurred by the landlord in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or by any other person specified in the application for the order. The Tribunal may make such order as it considers just and equitable in the circumstances.

Issues for determination

16. At the hearing, the parties confirmed to the Tribunal that the Application was restricted to the following issues:

(1) the basis of apportionment of service charges under:

(a) clause 3(i)(d) of the Lease in respect of the maintenance, cleaning and decoration of the internal parts of the Building;

(b) clause 3(i)(b) of the Lease in respect of the services provided in respect of the external structure of the Building and the external areas;

(2) the obligation on the Respondent to distinguish between monies collected as a reserve fund for internal areas from those collected as a reserve fund for the external structure/areas; and,

(3) the inclusion of the costs of external window cleaning as service charge expenditure.

(4) The Applicant confirmed to the Tribunal that she no longer intended to pursue before it a determination of "reasonableness" in respect of any specific items of service charge expenditure.

(5) The Applicant had raised a further issue regarding the Respondent's failure to issue service charge demands, although the Applicant's right to include this as an issue to be determined by the Tribunal so late in these proceedings was challenged by the Respondent.

(6) The Application also includes an application under s20C of the 1985 Act in respect of the right of the Respondent to charge costs incurred in respect of these proceedings as service charge.

17. Two applications under Rule 13(1)(b) of the Rules have been made by the Respondent for costs' orders against the Applicant in favour of Mr.A.Leigh-Newton and the Respondent.

Evidence

18. Applicant's submissions

The Applicant's oral and written submissions are summarised as follows:

(1) the Applicant wishes to see the service charge expenditure under clause 3.1(b) apportioned in accordance with the terms of the Lease, namely, by reference to the proportion which the "net lettable area" of the Property bears to the aggregate "net lettable area" of all the flats in the Building;

(2) for the reasons set out in Mr.S.McKay's report dated 10 May 2021, ("the Expert's Report"), the Applicant is agreeable to the term "gross internal area", ("GIA"), being used in place of "net lettable area" in clause 3(i)(b) of the Lease, as being a more appropriate term;

(3) the Applicant disputes the exclusion of basement areas to flats in the calculation of the aggregate GIA;

(4) the Applicant claims that it is explicit in the wording of clause 3(i)(b), specifically by inclusion of the words "for the time being", that the "due proportion" may change over time to take account of changes in GIA;

(5) the Applicant states that the GIA has changed because of alterations to three of the flats at the Building since the original conversion in the 1980s;

(6) the Applicant disputes the Respondent's claim that to require the Respondent to change the proportions to take account of changes to the internal GIA of a flat would impose a disproportionate or costly burden on it: clause 2(vii)(a) of the Lease requires the Lessee to obtain prior written approval from the Lessor and the Respondent to any internal alterations, and it could be made a condition of such consent that such Lessee pays the costs of the necessary survey to establish the new proportions payable by all of the lessees;

(7) the Applicant also referred to the spreadsheet which she has provided to the Respondent which could be used every year to facilitate the quick and easy calculation of the "due proportion" payable by each of the lessees, including where there has been a change to GIA;

(8) the Applicant considers that an 1/8th apportionment of service charges under clause 3.(i)(d) is pragmatic in the circumstances: although it appears that there was an agreement in 1987 by the then lessee of Flat 7 to voluntarily pay 1/8th of the service charge expenditure incurred on the internal communal areas, it is clear from the lease of Flat 7 now presented to the Tribunal that it does, in fact, include the same clause 3.(i)(d) as in the leases of Flats 3, 3a, 4, 4a, 5, 5a and 6, thereby obliging the lessee of Flat 7 to contribute 1/7th of such expenditure;

(9) the Applicant has no objection, in principle, to the establishment of reserve funds but considers that, because of the lessees' differing contributions towards external and internal expenditure, the funds should be identified and maintained in separate accounts;

(10) the obligation to clean windows lies with the Lessee in clause 2(iii) of the Lease, specifically, "…to keep…all fixtures and fittings …in good and substantial repair and condition and properly painted decorated and cleansed including the glass in the windows and the window frames". By contrast, there is no provision in the Lease obliging or permitting the Respondent to provide window cleaning services to the Building and the Applicant is not liable to contribute to the cost accordingly;

(11) the Applicant disputes that the responses to pre-contract enquiries made at the time of her acquisition of the property in March 2016 were sufficient to put her on constructive notice that the written terms of the Lease were not the only basis on which the service charge was calculated and apportioned, as claimed by the Respondent. Specifically, the response to the question as to how service charge proportions are calculated was, "Carried forward from the original way, set up by Willans, who converted the property and from whom we bought the freehold", which does not suggest any deviation from the terms of the Lease, whilst the response to the question requesting a copy of any regulations which have been raised since the date of the Lease was "None". The Deed of Covenant entered into by the Applicant in March 2016 expressly obliges her to "duly pay all the service charge and all other sums becoming due under a lease dated 23 May 1983 made between RR & J Willan Limited (1) HHML (2) and Mr.& Mrs. DG Flory (3)" which the Applicant claims is indicative of compliance with the Lease terms;

(12) the Applicant also challenges the Respondent's practice of setting a fixed amount payable as service charge, only increased by agreement of the shareholders/leaseholders at the AGM, as further non-compliance with the terms of the Lease; and

(13) the Applicant claims that she has never been in receipt of a service charge demand, as required under the terms of the Lease, and that the Service Charge Statement, which should be issued "…as soon as reasonably may be after the Thirtieth day of September in each year in respect of the year ended on Thirtieth September…" (clause 3(iii)), are always issued 9-12 months after the end of the relevant service charge year and sometimes up to 15 months after its end, which cannot be regarded as within a reasonable period.

19. Respondent's submissions

The Respondent's oral and written submissions are summarised as follows:

(1) as preliminary points, the Respondent referred to:

(a) difficulties associated with the age/drafting of the Lease which have not helped in the resolution of the issues before the Tribunal; and

(b) the nature of the Respondent which is not a "professional landlord" but a not-for-profit management company owned and run by the lessees with the principal objective of controlling current costs whilst establishing reserves for future costs.

(2) The principal defence to the Applicant's claim is that there is an estoppel by convention based on the Applicant's acquiescence with the Respondent's method of calculation of the apportionment of service charge between leaseholders which prevents the Applicant from now disputing her liability to pay service charges calculated in accordance with that method. In support of this, the Respondent references the Upper Tribunal decision in Admiralty Park Management Co. Limited v Mr. Olufemi Ojo [2016] UKUT 421, ("the Admiralty Park decision").

(3) The Respondent claims that the following events are evidence of the Applicant's acquiescence with its apportionment method on and following her acquisition of the Property in March 2016:

(a) the response to the Applicant's pre-contract enquiry regarding calculation of the service charge proportions was sufficient to put the Applicant on constructive notice that the Respondent's method of apportionment was otherwise than in accordance with the terms of the Lease, shifting the onus onto the Applicant's solicitors to make such further enquiry as necessary. Their failure to make any further enquiry was an issue between themselves and the Applicant;

(b) the Respondent rejects the Applicant's claim that the Deed of Covenant amounts to confirmation that the Respondent was acting in accordance with the terms of the Lease;

(c) the Applicant was a director of the Respondent from 11 September 2016 – 8 August 2020 and was involved in the Respondent's management, including being responsible with other directors for service charge expenditure and recovery of service charges from lessees. In particular, in her capacity as a director, the Applicant signed the accounts for the financial years 2016/17, 2017/18 and 2018/19;

(4) there is a fundamental inconsistency in the Applicant's case: she supports the "pragmatic" apportionment of 1/8th in respect of service charge expenditure incurred under clause 3.(i)(d) of the Lease based on an agreement in 1987 between various lessees, although clearly not in accordance with the Lease, but disputes the Respondent's method of apportionment of service charge expenditure incurred under clause 3.(i)(b) which is also not in accordance with the Lease but likewise agreed decades previously between the-then leaseholders/ shareholders. The conclusion is that the Applicant is willing to accept the Respondent's non-compliance with the terms of the Lease where it benefits her financially,(ie a 1/8th, rather than a 1/7th apportionment), but not where she believes it may have the opposite result.

(5) The same inconsistency of approach is evident in the Applicant's position with regard to alterations affecting the GIA of a flat, where she seeks to ignore the 1986 agreement between the then-leaseholders that subsequent alterations to a flat should not alter the "due proportion" of the lessees, where again, it appears to be to her advantage to do so.

(6) The term "for the time being" in clause 3(i)(b) of the Lease should be interpreted as meaning "fixed in stone".

(7) The cost and disproportionality of having to re-calculate the proportions if any alterations are made to a flat should be taken into account, together with the difficulty for the Respondent in undertaking the required survey in the absence of any right in the leases permitting it access to a flat for this purpose.

(8) If the Tribunal rejects the Respondent's claim of estoppel by convention, then using GIA as the most appropriate measure in the circumstances, the Expert's Report shows that, based on the original lease plans, the "due proportion" payable by the Applicant is 13.2%, or, taking into account the alterations made to three of the flats since the original conversion, as at April 2021, 11.2%, or, based on the "adjusted GIA", 12.4%.

(9) Since the Applicant's acquisition of the Property in March 2016, the Respondent has calculated her service charge as 12.17% of total service charge expenditure, being the sum of its apportionment under clause 3.(i)(b) and a 1/8th apportionment under clause 3.(i)(d), lower than both the "due proportion", as based on the original lease plans (13.2%), and the adjusted GIA (12.4%), and not significantly greater than the "due proportion" as at April 2021, (11.2%). Where it appears that there has been an underpayment by the Applicant, the Respondent is not be seeking to recover this.

(10) In the interests of consistency, however, if the Tribunal were to accept the Applicant's position that apportionments should be made strictly in accordance with the Lease, the Applicant would be liable for a service charge based on either an 13.2% apportionment in respect of external expenditure, (original lease plans), or 12.4% (adjusted GIA to take

account of subsequent alterations) under clause 3(i)(b), together with a 1/7th apportionment in respect of internal expenditure under clause 3(i)(d). Again this would result in an under-payment by the Applicant.

(11) With regard to the Applicant's challenge to the inclusion of window cleaning as service charge expenditure, the Respondent again claims an estoppel by convention based on the Applicant's acquiescence. The provision of window cleaning by the Respondent has been apparent to the Applicant since her acquisition of the Property and not disputed until recently.

(12) The same argument applies in respect of the reserve fund where again the position has been apparent to the Applicant since 2016. Further, there is no statutory requirement under s42 of the Landlord and Tenant Act 1987 to hold reserve funds in separate accounts.

(13) The Respondent disputes that there is anything wrong with its established practice of agreeing a fixed amount of service charge, increased periodically by agreement of the shareholders/leaseholders.

(14) With regard to the issue of the service charge statements of account, whilst maintaining its challenge to the right of the Applicant to introduce this as an issue for determination within the Application, s21(4) of the 1985 Act requires that a summary statement is provided by the later of 1 month from the date of request and 6 months from the end of the relevant accounting period.

(15) The Respondent disputes that clause 2(vii) of the Lease would cover the cost of the survey required for the re-calculation of the aggregate GIA.

(16) Whilst the Applicant may have provided a technical solution by the use of her proposed spreadsheet to facilitate the calculation of service charges, its use would have to be a matter for agreement between the Respondent/its directors and all of the shareholders/leaseholders.

(17) In response to questions from the Tribunal:

(a) the Respondent confirmed its view that the wording of clause 3(i) (c) permits establishment of a reserve fund in respect of both external and internal expenditure, and that the mixing of the funds was not prejudicial to those leaseholders who did not contribute to the upkeep of the internal areas as it was in their interests for the internal areas of the Building to be properly maintained; and,

(b) it is appropriate to exclude the basement areas from the calculation of GIA as either there is no access to the basement from the relevant flat, or the height of the basement is, in each case, less than 1.65 metres in height.

20. With regard to the costs' applications under Rule 13(1)(b) of the Rules, the Respondent claims as follows:

(1) Mr.A.Leigh-Newton: Mr.Leigh-Newton was named as the Respondent on the Application. This was not accidental but is indicative of a personal vendetta waged by the Applicant against him. When contacted by the Respondent, the Applicant refused to withdraw the Application and Mr.Leigh-Newton/the Respondent were compelled to make an application for the Application to be struck out. Further, Mr.Leigh-Newton was compelled to attend the video Case Management Conference on 10 February 2021, at which this issue was resolved by the Tribunal Judge's direction to the Applicant to submit a request to amend the Application substituting the Respondent for Mr.Leigh-Newton. The Applicant's conduct in issuing proceedings against Mr.Leigh-Newton was unreasonable and Mr.Leigh-Newton has incurred costs accordingly which he seeks to recover by the application under Rule 13(1)(b);

(2) the Respondent: the Respondent's claim for a costs' order is based on the following:

(a) the nature of the Respondent including that it is "not a professional landlord and is not run for profit, is owned by the leaseholders, its only source of income is service charges, and that, if no costs' order is made, some or all of the leaseholders will bear these costs";

(b) the Applicant's pre-proceedings conduct has caused acrimony among the other leaseholders and has disrupted the Respondent's running of the Building which prior to this dispute, was harmonious, and which may now present an existential threat to the Respondent and/or the risks of further litigation;

(c) whatever the outcome of the proceedings, the parties will have to continue to have an ongoing relationship, where the Respondent will remain her landlord and may or may not continue as management company, and all the leaseholders will have to continue to live together in the Building;

(d) the Respondent has made repeated offers of mediation which the Applicant has refused;

(e) the Applicant has the advantage of being able to limit her costs unlike the Respondent. In particular, due to the nature of the issues raised/the time period covered by the Application/the amount of paperwork/the combination of factual issues and points of law, it was not suitable for the Respondent to act in person;

(f) it appears that the Applicant is only willing to agree to a settlement based on her own proposal; and,

(g) it was unreasonable to make the Application because, even if the Applicant succeeds in her claims, any reduction in the amount that she is determined liable to pay will be "trivial"

Reasons

21. Preliminary

(1) The Tribunal endorses the Respondent's comments regarding the difficulties presented by the terminology and drafting of the Lease.

(2) The Tribunal noted that both parties were in agreement regarding the use of the term "gross internal area" in substitution for the term "net lettable area" in clause 3.(i)(b) of the Lease.

(3) The Tribunal reiterates its statements made at the hearing, in response to the Respondent's statements regarding its nature and composition and the assertion that it is not a "professional" landlord, namely, that this does not, in any way, negate from the Respondent's obligation as management company to act in relation to the management of the Building in accordance with the terms of the Lease and with any codes of practice and/or legislation relevant to the issues raised by the Application.

22. Apportionment of service charge expenditure – clause 3(i)(d) of the Lease

(1) The Tribunal notes as follows:

(a) on the granting of the leases for the Building, a mistake was made by providing that, in clause 3(i)(d) of each of 8 leases for the Property and Flats 3, 3a, 4, 4a, 5, 6 and 7, the lessee was liable to make payment by way of service charge of 1/7th of the total expenditure incurred under that clause. Notwithstanding this mistake, as a matter of equity, the Respondent would not have been entitled to insist on recovery of more than 100% of the total expenditure from the 8 lessees i.e. by insisting on receipt of 8/7ths;

(b) from its reading of the 1986/7 documentation, there was confusion at that time about the nature and effect of the drafting error affecting the 8 lessees. Specifically, it appears that it was mistakenly thought that the lease of Flat 7 did not contain the same clause 3.(i)(d) as in the other 7 leases. This confusion has also appeared in the parties' submissions;

(c) it is clear from the copy of the lease of Flat 7 made available to the Tribunal that it does contain the same clause 3(i)(d) as in the Lease (and presumably in the leases for the other 6 flats);

(d) the evidence before the Tribunal is that the leaseholders in 1986 decided not to effect a formal variation of the leases in favour of what was described as a pragmatic agreement to an apportionment of 1/8th;

(e) the Applicant has expressly confirmed her agreement, in these proceedings including, without limitation, during the course of

the hearing, to an apportionment of 1/8th in respect of the expenditure incurred under clause 3(i)(d);

(f) the Tribunal is satisfied that the Applicant's agreement to this apportionment is an agreement within s27A(4)(a) of the 1985 Act with the effect that the Tribunal has no jurisdiction to make a determination in this respect.

23. Apportionment of service charge expenditure – clause 3(i)(b) of the Lease

(1) Estoppel by convention

The Tribunal rejects the Respondent's arguments that the Applicant is estopped from challenging the Respondent's apportionment of the service charge expenditure under clause 3(i)(b) for the following reasons:

Response to pre-contract enquiry

(a) the Tribunal regards the Respondent's response to the Applicant's pre-contract enquiry regarding the calculation of the service charge proportions as insufficient to put her on constructive notice of the method adopted by the Respondent to calculate service charge proportions;

(b) specifically, the pre-contract enquiry response stated that the proportions have been "carried over from the original way, set up by Willans". In the letter dated 4 December 1986 from the Respondent, it is explicit in stating that "…with regard to the apportionment of the service charges, these are laid down in the leases which have been accepted by all the leaseholders". Although the Tribunal notes that this letter was sent in response to an enquiry regarding apportionment under clause 3(i)(d), the Tribunal is satisfied that the response was a statement of the Respondent's general approach towards apportionment of service charge expenditure as at that date;

(c) the evidence suggests therefore that "the original way, set up by Willans" was to act in accordance with the terms of the Lease and, as set out in the Expert's Report, based on the lease plans, would mean an apportionment of 13.2%;

(d) the Tribunal was also referred to the "Tom and Joan" correspondence and to the 1988/89 accounts, from which it appears that by this date the method of apportionment had changed, although the reasons for this are not clear. As at this date, it appears that the "due proportion" for the Property was 12.6%;

(e) the Respondent's evidence was that the apportionment it has applied in respect of the Applicant since 2016 was 12.17%, a "blended" rate of 11.2% under clause 3.(i)(b) and 1/8th under clause 3.(i)(d). Again it is unclear how this apportionment has been calculated;

(f) the Tribunal notes therefore that whatever was meant by the response to the pre-contract enquiry, it is clear from the evidence presented to it that the Respondent's current method of apportionment applied since 2016 is different from what appears to have been Willans' "original way" (i.e. as "laid down in the leases"), and different again from the method adopted at the time of the 1988/89 accounts;

(g) having regard to the above, the Tribunal is satisfied that the pre-contract enquiry response was not an accurate statement of the method of apportionment of service charge adopted by the Respondent as at March 2016 or since, and cannot therefore have fixed the Applicant with notice (constructive or otherwise) of such method.

The Applicant's role as a director of the Respondent

The Tribunal further rejects the Respondent's claim that the Applicant's role as a director of the Respondent from 2016 – 2020 put her on notice of the method of apportionment for the following reasons:

(a) by contrast with the facts in the Admiralty Walk case, it was not possible from studying the Respondent's Service Charge Statements to ascertain the method of apportionment applied by the Respondent;

(b) there is no evidence from the copy AGM minutes produced to the Tribunal by the Respondent that the method of apportionment was ever discussed at these meetings;

(c) the Respondent cites as evidence of the Applicant's knowledge of the method of apportionment her role as a director signing the accounts. In the absence of any information regarding the calculation of leaseholders' apportionments in those accounts, the Tribunal does not consider signing them provides any evidence of acquiescence or acceptance of such method of apportionment; and,

(d) the Respondent's evidence regarding the Applicant's time as a director was of conflict and "nitpicking" which suggests to the Tribunal that the Applicant was unhappy with the Respondent's management, rather than her acquiescence with its policies/approach, (although the Tribunal also accepts that there is no evidence before it of the Applicant raising issues about service charge apportionment).

Deed of Covenant

The Tribunal does not consider that the Deed of Covenant provides any determinative evidence of the method of apportionment.

24. "Net Lettable Area"/"Gross Internal Area"

The Tribunal notes the parties' agreement for the reasons set out in the Expert's Report of the use of the term "gross internal area" as a more appropriate term than "net lettable area" in clause 3(i)(b) of the Lease.

25. <u>"Due proportion"</u>

(1) The Tribunal dismisses the Respondent's argument that the term "for the time being" in clause 3.(i)(b) of the Lease means that the proportion is "set in stone" as at the date of the Lease. Such interpretation is counter to the ordinary meaning of that phrase which is "for the present; until some other arrangement is made". The Tribunal is satisfied that the use of the term in the Lease anticipates future change, and specifically, that the "due proportion" of a lessee may change.

(2) The Tribunal is also unpersuaded by the Respondent's arguments that the re-calculation of the proportion by reason of a change in the GIA of a flat would impose an unacceptably onerous and/or costly burden on the Respondent, for the following reasons:

(a) clause 2(vii)(a) of the Lease requires a lessee wishing to make any alterations or additions affecting the internal appearance of a flat to seek prior written consent from the Lessor and the Respondent and additionally requires the lessee to pay "…the full cost and expense of the Lessor and the Maintenance Company incurred in granting such consent";

(b) accordingly, the Respondent will have prior notice of any alterations which might give rise to an alteration to the GIA of the flat, and thus a change to the service charge proportions;

(c) as conditions for its consent, the Tribunal considers that the Respondent would be entitled to require the provision of information relating to the proposed alterations e.g. architect's plans, and either to require the lessee to undertake a survey to confirm the GIA following completion of the alterations, or to consent to the grant of access to the Respondent for the same purpose;

(d) further, the Tribunal is satisfied that the clause would allow the Respondent to charge the cost of any survey as an expense incurred by the Respondent in the granting of its consent; and,

(e) the evidence before the Tribunal is that, in the 30+ years since the Building was originally converted, there have been alterations to 3 of the 11 flats which have resulted in a change to the GIA, and thus the proportions. This is not indicative of an "onerous" burden upon the Respondent.

(3) The Tribunal considers that it is reasonable to determine the "due proportion" under clause 3(i)(b) based on the adjusted GIA, as this takes account of alterations since the original conversion of the Building. No evidence was presented to the Tribunal of any further alterations to the aggregate GIA since April 2021, (the date of the Expert's Report). The "due proportion" payable by the Applicant is therefore 12.4% of the total service charge expenditure incurred under clause 3(i)(b).

26. Reserve fund – clause 3.(i)(c)

(1) The Tribunal is satisfied that clause 3.(i)(c) is capable of being construed to allow for the establishment of reserve funds for both internal and external maintenance, repair and re-decoration.

(2) The Tribunal also notes that the Applicant has no objection, in principle, to the establishment of reserve funds to meet future costs of upkeep for both the internal and external areas of the Building.

(3) The Tribunal notes that the Respondent as the "Maintenance Company" under the Lease and responsible for the management of the Building is bound by the Service Charges Residential Management Code (3rd Edition), ("the Code").

(4) The Tribunal refers, in particular, to Part 7 paragraph 7.6 (Holding service charge funds in trust) which provides: "If leaseholders contribute towards different costs (e.g. one group of leaseholders contributes towards the lift, whilst another group contributes towards gardening), the funds should be differentiated."

(5) The Tribunal has no jurisdiction in the context of the Application to make any order in this respect but, in view of the parties raising and addressing this issue in their submissions, the Tribunal regards it as appropriate to recommend that the Respondent considers the establishment of two reserve fund accounts which reflect the differing contributions of the relevant leaseholders to those funds.

27. Service Charge Statements/service charge demands

(1) Notwithstanding the Respondent's challenge to the admissibility of this issue so late in the proceedings, oral submissions were made at the hearing by both parties regarding the provision of service charge accounts to the Lessee. Again, this is not a matter upon which the Tribunal has jurisdiction to make a determination in the context of the Application. In view of these submissions, the Tribunal offers the following comments:

(a) the relevant provision is Clause 3.(iii) of the Lease which provides for the provision to the Lessee of an auditors' certificate, containing the information as set out in the clause, "…as soon as reasonably may be after the Thirtieth day of September in each year…".

(b) this constitutes a contractual obligation distinct from the statutory right for a tenant to require/obligation upon a landlord to provide a summary of relevant costs under s21 of the 1985 Act; and,

(c) "as soon as reasonably may be" is a determination of fact having regard to all the circumstances. Limited evidence was presented to the Tribunal in this respect but it considers it unlikely that a period of 15 months for the provision of the service charge statements would be regarded as reasonable.

28. Section 20C

The determination of a s20C application is made having regard to what is just and equitable in the circumstances. Having regard to its determinations on the Application, the Tribunal determines that it is "just and equitable" to grant the Applicant's s20C application to the extent that the Respondent is limited to regarding 10% of its costs incurred in the proceedings as "relevant costs" chargeable as service charge.

29. Costs' applications under Rule 13(1)(b) of the Rules

(1) In favour of Mr.A.Leigh-Newton: the Tribunal had regard to the grounds for the making of a costs' order against the Applicant in favour of Mr.Leigh-Newton as summarised in paragraph 20(1) of this decision.

(2) The Tribunal dismisses the application for the following reasons:

(a) it is clear to the Tribunal that Mr.Leigh-Newton played (and may continue to play) a substantial role in the management/administration of the Respondent and that his address was used for the Respondent's correspondence;

(b) it is not uncommon for the names of landlords/management companies to be incorrectly completed in s27A applications and, in many cases, this is rectified by simple agreement between the parties and/or notification of the error to the Tribunal office;

(c) for reasons which have not been made clear to the Tribunal, in this case, the Respondent's lawyers did not pursue either of these quick and cost-effective remedies but chose instead to demand that the Applicant withdraw the Application. The Tribunal fully understands the reason why the Applicant would resist such a request;

(d) in the face of the Applicant's refusal, again it appears that the Respondent's lawyers did not consider contacting the Tribunal office but instead pursued a strike-out application;

(e) it is clear that, following the CMC, the issue was easily resolved by the Tribunal requiring the Applicant to request the amendment of the Respondent's name;

(f) whilst the Tribunal accepts that relations between the parties was strained before the issue of the Application, there was no evidence before the Tribunal that the naming of Mr.Leigh-Newton as the Respondent was part of any "personal vendetta" against him being pursued by the Applicant.

(g) The Tribunal is satisfied that Mr.Leigh-Newton has failed to establish that the Applicant's mistake in initially naming him as the Respondent in the Applicant constitutes unreasonable behaviour justifying the making of an order under Rule 13(1)(b).

(3) In favour of the Respondent: the Tribunal had regard to the Respondent's grounds for its application as summarised in paragraph

20(2) of this decision. The Tribunal dismisses the Respondent's application for a costs' order against the Applicant under Rule 13(1)(b)as the Respondent has failed to establish that the Applicant acted unreasonably by bringing or in her conduct of the Application. Specifically:

(a) certain of the grounds are irrelevant because they relate to events which preceded the institution of proceedings by the Applicant, or relate to the characteristics of the Respondent as a "not for profit/non-professional management company", or to predictions made by the Respondent as to the possible consequences for relations between the parties and/or between the parties and other leaseholders following the conclusion of the proceedings;

(b) the refusal of a party to mediate is not to be regarded in itself as evidence that a party has acted unreasonably. Further, it appeared to the Tribunal that there was a similar resistance on the Respondent's part to consider the Applicant's attempts at reaching an agreed settlement of the issues;

(c) it is not a bar to making an application under s27A of the 1985 Act that the amounts in dispute are small, and nor is it in itself evidence that a party has acted unreasonably in bringing proceedings. Further, in this matter, the Tribunal was clear at the outset of the hearing that its determinations would be of principle, rather than determinations as to the reasonableness of specific items of expenditure; and

(d) the issues to be addressed in the Application were the same for both parties. It was a matter for the Respondent to choose whether or not it sought legal advice and/or representation during the proceedings, but neither its decision to do so nor the Applicant's decision not to do so were evidence of the Applicant having acted unreasonably.

C Wood
Tribunal Judge
12 May 2022