FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CS/LSC/2018/0010**
Court Reference	**:**	**D89YX282 (County Court at Birmingham)**
Property	**:**	**14 Queens Court, Harborne, Birmingham B32 2LE**
Applicant/Claimant	**:**	**Holding and Management (Solitaire) Limited Represented by Mr Ben Stimmler of Counsel instructed by JB Leitch Solicitors**
Respondents/ Defendants	**:**	**(1) Mr John Neary O'Hara (2) Ms Janet Livingstone Stevenson In person but speaking through Mr John Neary O'Hara**
Type of Application	**:**	**Variable rent charges, administration charges, interest and costs on Transfer from the County Court at Birmingham by Order of Deputy District Judge Fawcett**
Tribunal Judge sitting As a Judge of the County Court	**:**	**Judge Anthony Verduyn**
Tribunal Valuer Member as an Assessor Under CPR Part 35.15	**:**	**Mr Vernon Ward FRICS**
Date of Hearing	**:**	**27th November 2018**
Date of Decision	**:**	**9th January 2019**

DECISION

BACKGROUND

1. These proceedings were issued in County Court Money Claims on 18th September 2017. The claim was for "unpaid variable rent charges, administrative charges, interest, fees and/or legal expenses" and relates to a management scheme for 5 detached houses comprising Queens Court, Harborne. It appears judgment in default of Defence was entered, but this was set aside by Deputy District Judge Fawcett by Order of 12th February 2018 and, pursuant to the Civil Justice Council pilot scheme for flexible deployment, the proceedings were transferred to the First-tier Tribunal, Property Chamber, Residential Property division to be decided by a Tribunal Judge sitting as a Judge of the County Court (under Section 5(2)(t) and (u) of the County Court Act 1984 as amended by Schedule 9 to the Crime and Courts Act 2013). The Judge was to sit with a valuer member of the Tribunal as assessor. Directions were given by Regional Judge Jackson on 24th May 2018 regarding statements of case, witness evidence and preparation for trial.

2. At the outset of the hearing, and for the avoidance of doubt, I confirmed that I was hearing this case in my capacity as a Judge of the County Court, meaning as a District Judge in this instance. Furthermore, the case appearing not to have been allocated, was now allocated by my order to the Small Claims Track, with the flexibility of procedure consequent upon that allocation under CPR Part 27.8. Consistent also with Tribunal procedure and CPR Part 27.8(4), evidence was not taken on oath. I also reminded those attending that Mr Ward FRICS, was sitting with me only in his capacity as an assessor under CPR Part 35.15. He has had no part in this decision, which is purely my own, and he has assisted me as an assessor through his attendance at trial and only where identified below. Even then, his assistance has been purely in relation to matters within his expertise and I have decided to what extent (if any) to accept his assessment.

3. The Applicant was represented at the hearing by Mr Ben Stimmler of Counsel and the Respondents, Mr O'Hara and Ms Stevensons, by Mr O'Hara as a lay representative and litigant in person. Mr O'Hara has stated that he speaks on behalf of the other householders affected by the management scheme, but they are not parties to these proceedings and are not bound by my decision accordingly: it only relates to the matters arising from the Statements of Case and between the formal parties to the litigation. No objection was made by either party to the procedure I outlined and, therefore, adopted.

4. Prior to the hearing, I attended Queens Court in the company of the assessor and was shown round by the parties' representatives. Queens Court is a development of five detached houses on a short cul-de-sac off Queens Park Road, Harborne. Of the houses themselves, four are arranged around the head of the cul-de-sac whilst the fifth is situated to the south of the roadway as one enters the development. The management scheme has been set up to deal with:

    a) The maintenance and upkeep of the roadway;
    b) A short, grassed border situated to the north of the roadway;

c) A small planted area to the south of the roadway towards the head of the cul-de-sac; and
d) The foul pumping station and the electricity supply relating thereto until it's adoption by Severn Trent on 1 October 2016.

3. The costs of the management scheme relate to the following items:

a) Grounds/site maintenance in respect of 2 a) to c) above;
b) Servicing and maintenance of the pumping station until 1 October 2016, when it was adopted by Severn Trent plc;
c) Electricity for the pumping station until adoption;
d) Public liability insurance for the roadway and until 1 October 2016 for the pumping station;
e) Managing agents' fees. This would be the charges of the agents who deal with the management scheme, i.e. the placing and monitoring of the various contracts, site inspections and keeping books and records of the costs relating to the scheme;
f) Accountancy/Audit fees. These costs relate to charges of accountants for preparing annual accounts of the scheme;
g) Reserves. It would be expected that an amount would be collected towards future repairs of the roadway and pumping station (until adoption); and
h) It would be customary and prudent to include an item for miscellaneous items to deal with unexpected or one-off costs.

5. The legal structure of the management scheme was created by the Transfer of the Respondents' property dated 5th September 2006 between Antler Homes Midlands Limited as transferor and the Respondents as transferee:
"6. IN consideration of the covenant on the part of the Company [i.e. the Applicant] hereinafter contained the Transferee grants to the Company perpetual yearly estate rent charges of (a) a fixed sum charge of Five Pounds (£5.00) (b) a sum (herein referred to as 'the variable rent charge') to be calculated and paid under the terms of Schedule 5 to this panel such rent charges to be forever charged upon and issued out of the Property …
"10. IT IS HEREBY AGREEED AND DECLARED that: …
(c) If any sums due to be paid by the Transferee under the terms of this Transfer or any part thereof shall be unpaid after becoming payable the Transferee shall pay to the Company interest upon such sum or sums as shall remain unpaid at the rate of four per cent (4%) per annum above the base rate (or its equivalent) from time to time of Barclays Bank Plc … calculated on a day to day basis from the date of the same becoming due down to the date of payment …
"SCHEDULE 3 OF PANEL 13 (Obligations and restrictions to be observed by the Transferee) …
12. To pay to the Company on a full indemnity basis all costs incurred by the Company or its Solicitors in enforcing payment of any monies payable under the terms of this Transfer …
"SCHEDULE 5 OF PANEL 13 (Computation of the Variable Rentcharge)
1. The Variable Rentcharge shall be 20% of the Company's expenses and outgoings and other heads of expenditure as set out in Part I and Part II of Schedule 6 to this panel (hereinafter called the 'due proportion') in respect of

each Rentcharge Year [i.e. 12 months ending on 30th September] and shall be estimated and adjusted as hereinafter provided …"

"SCHEDULE 6 OF PANEL 13 PART I (Obligations of the Company)

Subject to the due performance by the Transferee of his obligations to pay the rent charges hereby grated in manner herein provided, the Company covenants that it:-

1. Will whenever reasonably necessary light maintain cleanse repair renew and maintain the Landscaped Areas, the vehicular and pedestrian Roadway and Paths … the foul water pump and storm drain comprised in the Estate …

3. Will effect insurance against the liability of the Company to third parties and engineering insurance and insurance against such other risks in respect of the Estate and in such amount and through such insurers underwriters and through such agency as the Company shall in its absolute discretion think fit.

4. Will carry out periodic risk assessments in connection with the Estate in accordance with good estate management.

5. Will incur such other expenses as are reasonably necessary for the maintenance and proper and convenient management of the Estate as it shall think fit …

6. Will meet the fees and disbursements paid to any accountant solicitor r other professional person in relation to the preparation auditing or certification of any accounts of the costs expenses outgoings and matters referred to in this Schedule and the collection of the rent charges granted by this Transfer and the transfer of other properties on the Estate …

"SCHEDULE 6 OF PANEL 13 PART II (Company's expenses and outgoings and other heads of expenditure)"

There follows a comprehensive list of such expenditure in 10 paragraphs, including under paragraph 3 the fees and disbursements of any managing agent appointed in connection with the collection of the rentcharges.

6. The Applicant appointed Firstport Property Services Limited as its managing agent under the management scheme.

7. The claim in the Court proceedings was framed in terms of £736.72 as a debt under the variable rent charge account, interest at the contractual rate (£10.91 accrued and increasing at a daily rate of 7p) and contractual costs then specified at £565. The debt comprised £545.20 as a half-yearly variable rent charge payable in advance for the period 1st April 2017 to 30th September 2017, an upward adjustment of £126.32 for the year 1st October 2015 to 30th September 2016, a follow up letter charged at £60 and legal review fee also charged at £60.

8. No defence was filed in the original claim, but the set aside application was made on the basis that the correct charge was £600 p.a. consistent with a settlement agreement terminating earlier proceedings in 2015.

9. The Applicant's Statement of Case in the Tribunal reduced the upward adjustment from £126.32 to £71.52 and abandoned the claim to administrative charges of £120. The claim is now for £616.72 and contractual costs. Accounts for the year end to 30th September 2016 and 2017 were also provided with an Analysis of Service Charge Expenditure. In practical terms, therefore, the matter has moved on somewhat from when first pleaded.

10. The Respondents' Statement of Case is far more wide-ranging and raises the following issues:
(a) It is asserted that in May 2006 the Respondents (and other purchasers) were compelled to agree to the terms of the Transfer or lose their deposits;
(b) There was and is no choice as to service provider, and services are typically provided by companies within the group of the Applicant, hence there has been no re-tendering during the 11 years of the management scheme. Consumer law should be adopted to address this inequity;
(c) In 2011 and 2015 litigation was settled on the basis of payment of £600 p.a. per household. The agreement in each case was stated to be with no order for costs, and in full and final settlement, but costs have been taken from the reserve fund of £3,050 in 2015 and another sum in 2011 (giving rise to £7,000 being deducted in total);
(d) Estimates of the rentcharges were in the sum of £592 p.a. in 2006, but are being charged at more like £1,100 p.a. The Respondents seek to pay £500 p.a. now that the foul water pump has been adopted by Severn Trent plc;
(e) Charges are excessive for (i) gardening (£300 to £350 p.a. is appropriate, not £600 pa.); (ii) maintenance of the foul water pump (£250 p.a. from a local company, rather than £1,200 for a Bournemouth based company); (iii) non-existent common entry system; (iv) electricity, which was unpaid for to a provider in any event; (v) management, accounting and audit fees totalling £1,714 p.a.; (v) the fund for driveway replacement, which has been depleted by legal costs.

11. I had the benefit of reading the witness statement from Mr Neil Andrew Taylor, regional manager of Firstport Property Services Limited, responsible as managing agent for the Applicant in respect of the management scheme. Questions were raised of him by Mr O'Hara. I also had the benefit of evidence from Mr O'Hara himself, although he had not filed a witness statement in addition to his Statement of Case. Copious documentation was provided by the parties.

12. Before turning to the relevant evidence from the witnesses and filed documents to address the reasonableness of the sums charged, I will dispose of some of the more wide-ranging points taken by Mr O'Hara.

13. In respect of the Respondents ' assertion that they were compelled to enter into the rentcharge based management scheme, this cannot be over-turned now or in the manner anticipated. Even assuming that the Transfer was capable of challenge (and I find impossible to believe that the purchasers, including the Respondents, did not have legal advice available to them in such a substantial purchase), the delay in making challenge has been inordinate and twice claims based upon the rentcharge were brought to Court and compromised by the Respondents without this issue apparently being raised. The terms of the transfer have been, in effect, repeatedly affirmed by the Respondents and they are fixed with them accordingly.

14. It is correct that the Applicant cannot be changed at the behest of the Respondents under the terms of the Transfer, but that is the result of the scheme contracted for by the Respondents and there is no identified basis in

law by which I can rewrite this arrangement; especially having regard to the affirmation of the contract referred to above. The use of associate companies may be relevant to the reasonableness of the sums charged, but is not objectionable *per se*. In fact, the contractors have not been connected in evidence with either the Applicant or the managing agent.

15. In respect of the settlement terms in 2011 and 2014 some further consideration is required.

16. The 2011 proceedings resulted in the order at page 194 of the bundle. I note that, although the Respondents were the Defendants in that case, the Claimant was not the Applicant but Antler Homes Midlands Limited. The Order takes the form of a "Tomlin Order" whereby the parties agree to stay the proceedings on terms of settlement set out in a schedule. If the terms of the schedule are broken, the aggrieved party can apply back in the proceedings to enforce them. Any matter relating to the Court's costs jurisdiction has to appear on the face of the order, and there it says there is no order as to costs. This only has the effect of resolving any claim for costs under that Court jurisdiction, but it does not in terms preclude a party continuing to pursue a contractual right to costs. Indeed, it is not unusual for a party with such a contractual right, to seek its costs under more favourable contractual terms than those applicable through court powers. The terms of the schedule to the Order say nothing of costs that may be recovered under the covenant in paragraph 12 of Schedule 3, and given that the Applicant Company was not party to the proceedings, it is not clear to me why pursuit of its costs (if any, and none should arise under proceedings to which it was not a party) would be precluded in the 2011 proceedings. If costs did form part of the claim (and hence were compromised by "full and final settlement" in the schedule to the Tomlin Order) or if costs were expressly agreed to be compromised and somehow omitted from the schedule to the Tomlin Order, then that is a matter which must be pursued with Antler Homes Midlands Limited either directly or through liberty to apply provisions in the Court Order. Nothing before me allows me to interfere in the terms of settlement in 2011 and there is no evidence before me sufficient for me to decide any issue relating to the terms of settlement in 2011. Indeed, insofar as the Schedule to the Tomlin Order appears to have anticipated matters being resolved on or before 21st September 2011, and such a schedule usually takes effect as a contract, it appears to me that it may be that limitation will have intervened to prevent matters being re-opened. I do not have to decide such a point, because the Claimant in that case is not a party in this one.

17. Having noted all this though, I remind myself that these proceedings related to Antler Homes Midlands Limited, and paragraph 12 of Schedule 3 deals with costs incurred by the Applicant. How any such costs of the Applicant can arise in proceedings to which it was not a party is entirely unclear. Furthermore, no provision in the Transfer has been identified to me, or is apparent on the face of the Transfer, that entitled the Applicant to deduct monies due to it under paragraph 12 of Schedule 3 from funds paid under the variable rentcharge. Under Clause 10(b) of the Transfer such funds are held in trust for the Transferee (i.e. the Respondents) until expended. This must mean expended in accordance with Schedule 6, and not Schedule 3. This is because the funds held in respect of the rentcharge are not merely those from the Respondents,

but 80% from other freeholders and for whom they are also held on trust. The Applicant cannot take such funds to indemnify an individual liability arising otherwise than under the terms of the variable rentcharge. It follows that if money were taken by the Applicant in respect of costs referable to the 2011 proceedings, it should be restored to the trust fund and held for the purposes of that trust. The funds cannot be used in the manner apparently suggested here, and the Applicant must pursue any claim under paragraph 12 of Schedule 3, if entitled at all, under separate proceedings.

18. The 2014 proceedings at least involved the same parties as are before me now. They were settled by a consent order dated 26th January 2015 at page 197 of the trial bundle. Payment by the Respondents of £3,000 was stated to be in "full and final settlement of the claim". The particulars of the claim are not set out in detail, but are stated to be "fixed rent arrears up to 30 September 2014 and variable rent arrears up to 31 March 2014". The problem for the Respondents is that costs incurred in enforcing payment of monies due under the transfer are not part of the variable rentcharge under Schedules 5 and 6, but a covenant under paragraph 12 of Schedule 3. It appears, therefore, that the terms of the order did not necessarily compromise the Applicant's right to its costs. The correspondence that gave rise to the order may resolve whether the liability was compromised, but those documents have not been disclosed. What I do note, again, is that no provision in the Transfer has been identified to me, or is apparent on the face of the Transfer, that entitled the Applicant to deduct monies due to it under paragraph 12 of Schedule 3 from funds paid under the variable rentcharge. Under Clause 10(b) of the Transfer such funds are held in trust for the Transferee (i.e. the Respondents) until expended. This must mean expended in accordance with Schedule 6, and not Schedule 3. Indeed, the funds held in respect of the rentcharge are not merely those from the Respondents, but 80% from other freeholders and for whom they are held on trust. It follows that the money should be restored to the trust fund and held for the purposes of that trust. The funds cannot be used in the manner apparently employed here, and the Applicant must pursue any claim under paragraph 12 of Schedule 3, if entitled at all, under separate proceedings.

19. For the avoidance of doubt, it follows from the above that £3,050 apparently taken from the rentcharges trust fund in respect of the 2014 proceedings must be restored, and any claims to be pursued against the Respondents under those proceedings must be dealt with separately, if such claim arises at all.

20. Turning to liability under the rentcharge provision, I will first consider the relevant law.

21. Estate rentcharges are preserved in law under Section 2(4)(b) of the Rentcharges Act 1977 ("the 1977 Act") for circumstances like the current one:

> "meeting, or contributing towards, the cost of the performance by the rent owner [i.e. the Applicant] of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land".

Rentcharges intended to create assets or income streams are being phased out, and new ones are barred from creation, and to prevent evasion, new rentcharges under Section 2(4) of the 1977 Act are governed by Section 2(5):

> "A rentcharge of more than a nominal amount shall not be treated as an estate rentcharge for the purposes of this section unless it represents a payment for the performance by the rent owner of any such covenant as is mentioned in subsection (4)(b) above which is reasonable in relation to that covenant."

The Respondents submission to me that Antler Homes Midlands Limited may have "sold" the rentcharge to the Applicant touches upon this issue. It was said that the Applicant should be made to disclose what money (if any) changed hands. I do not consider that an appropriate step in these proceedings, because the rentcharge arrangement is plainly valid for the purpose of ensuring a scheme of maintenance, repair and insurance for the shared roadway, and striking down the rentcharge would not be appropriate and could be against the interests of the paying parties. Furthermore, any such order for specific disclosure would have required a direction at a procedural stage rather than the taking of such a point at trial. In any event, the solution is the proper application of Section 2(5), which would remove any value from any inappropriate transaction relating to a legitimate rentcharge. In one of the rare recent cases where a rentcharge has been considered by the Courts, Canwell Estate Co Ltd v Smith Brothers Farms Ltd [2012] EWCA Civ 237; [2012] 1 WLR 2626, Mummery LJ stated at [53]:

> "Consideration of subsection (5) may arise when an attempt is made to enforce payment of the contribution and the objection is taken that the amount is not reasonable, because it relates to costs that have not in fact been incurred, or the costs should not have been incurred at all, or that the costs actually incurred are excessive."

At [60] he explains the approach further:

> "at the point when the rent owner seeks to recover payment of a contribution to the costs from an owner of the land affected, the rentcharge cannot be relied on ('shall not be treated as a rentcharge') and 'will fail' (using the words of the explanatory note of the Law Commission), if the payment sought by the rent owner against the landowner is not reasonable in relation to the performance of the covenant. In those circumstances the registered estate rentcharge does not automatically cease to be an estate rentcharge or cease to be valid: it simply becomes unavailable to the rent owner as a means of recovering a particular contribution to costs that are not reasonable in relation to the performance of the covenant."

22. Whereas the Respondents suggest to me that some form of (unspecified) consumer law should be invoked to relieve the strictness of the rentcharge, I find it unnecessary to go so far: the effect of Section 2(5) of the 1977 Act is that only reasonable sums are recoverable under the rent charge and costs that have not been incurred, should not have been incurred or are excessive are unenforceable.

23. The Respondents framed their objections to the charges in two ways: firstly, generally, observing that they had expected to pay in the order of £600 per year (£500 since the foul pump was adopted by Severn Trent plc); and, secondly, specifically, addressing elements that comprise the charges.

24. Mr Neil Andrew Taylor, regional manager of the managing agent, Firstport Property Services Limited, employed since 1995 was called by the Applicant. He proved his statement and was asked questions by Mr O'Hara, including many to do with invoices and issues for years not subject to the claim. Mr O'Hara also produced a large, and somewhat disorganised, volume of documents. Mr O'Hara gave evidence and was questioned on behalf of the Applicant.

25. Whilst it is necessary to consider the details of the charges levied by the Applicant, it is appropriate to reflect firstly upon the wider picture. The land being maintained through the rentcharge is small. It is almost entirely comprised on a surfaced roadway serving the properties charged. Save for some sweeping of leaves etc., the roadway is really of significance only insofar as eventually it will need resurfacing and this would warrant the establishment a reserve fund. The grass and shrub areas are very small: the grass to one side of the drive would barely justify the description of a verge and the shrubs are modest and in one location. It is perhaps unfortunate that these small parcels of land were not included in the freehold disposals. There is the foul water pump arrangement, which requires servicing and insuring, but the burden of this ceased as of 1st October 2016 and the electricity it required was never billed for by any supplier. There is necessarily an insurance obligation, with management and accountancy costs to be taken into consideration.

26. The estimated expenditure of the Applicant in the year ending 30th September 2016 was £3,650 plus £1,800 for reserves, hence £1,090 per property. The outturn disregarding legal and professional fees and prior year items was £3,158.37 plus £1,800 for reserves, hence £991.67. The estimate for 2017 was virtually identical, but the outturn was £892.22; the bulk of the difference being accounted for by the foul pump falling out of the equation.

27. At the hearing analysing these figures was difficult. There was only good comparable evidence in relation to ground maintenance; otherwise, the Applicant presented virtually no evidence of market testing (electricity supply costs being an exception) and Mr O'Hara was largely constrained to question and comment on material supplied by the Applicant (for example, apparent differences between estimates and outturns, on some of which Mr Taylor was simply unable to comment). The example of ground maintenance is instructive, though.

28. Mr Taylor explained that gardening is carried out by MAN Gardening Services Limited. The work includes mowing lawns, sweeping leaves, attending to shrubs, beds and borders. The charge was £500 p.a. including VAT for 20 visits as quoted 11th February 2013. He adduced evidence that a competitor had quoted £1,824 for 19 visits and MAN was the cheapest.

29. Mr O'Hara, however, obtained a quote from Mr Glynne Smith at £350 per year for fortnightly mowing March to September, weeding, spraying, and tidying shrubs (page 158). Counsel for the Applicant objected that this was not to the specification used by the managing agent, and a further quote at £300 (page 159) did not have any specifics at all. Mr O'Hara expressed the view that the

quality of gardening carried out was not good and the strip of grass was in poor condition. Although the latter point was not borne out at the inspection and I do not find that qualitative complaints are established in this case.

30. Having seen the area of land in question. I have no doubt that the ground maintenance charge is unreasonable. Indeed, there was no explanation for why the annual sum of £500, which I find to be excessive in its own right, becomes about £575 when translated into the accounts.

31. Furthermore, given the limited extent of the land being maintained under the service charges, I formed the strong impression that Mr O'Hara may be correct in his view that charges were collectively too high.

32. As noted already, the difficulty for me is the general paucity of evidence. I have, however, the considerable and appropriate advantage of being assisted by an assessor with very considerable and relevant experience, as a valuer chair in the Tribunal since 2010 and Deputy Regional Valuer Member of the First-tier Tribunal since June 2018. He had opportunity to hear the submissions and oral evidence for the parties, and to consider the copious and disparate documentation.

33. Appended as a Schedule to this decision are two tables prepared by Mr Ward as an assessor after the hearing and presenting his opinion in respect of reasonable charges, with electricity and insurance adopting actual figures from the year end 2017 accounts. The taking of actual figures for electricity and insurance is appropriate, because there is evidence from the Applicant of market testing and collective purchase of electricity (charges for which have in part been rebated, when it became apparent that supply to the pump was not actually being billed to the Applicant). The outturn on insurance costs also appears to have been reasonable in the years in question and Mr O'Hara did not pursue arguments to the contrary.

34. Having reviewed the documentation myself and considered the oral evidence of Mr Taylor and Mr O'Hara, I find that the Schedule prepared by the assessor should be adopted by me in this case. I will briefly explain my decision by examining the heads used in the tables against the evidence received and my consequential assessment of reasonable charges.

35. In respect of ground maintenance, I have set out the available evidence above. It seems to me, and I find, that even with the more detailed specification used by the Applicant's managing agent, the sum of £500 is capable of being reduced. Market testing does not appear to have been thorough-going and it was possible to secure significantly cheaper services, but the reduction likely would be from £500 all in to £400, but probably then attracting VAT. On this basis, the figure of £480 inclusive of the assessor seems to me to be correct and I accept it.

36. Plant and machinery costs do appear to have been consistently excessive in this case with estimates of £1,000 and outturn in the order of £777.60 for the final year. There was no good evidence for market testing and the suppliers, although independent of the Applicant and managing agent (contrary to Mr

O'Hara's suggestion otherwise), appeared to be national (latterly GW Pumps Limited based in South Yorkshire). There was no satisfactory evidence to justify not having sought local based suppliers for what was, after all, a modest facility freely adopted by Severn Trent plc as at 1st October 2016. Figures appear to have varied from year to year, also: £265 (to year end 30th September 2014), £800 (2015), £777.60 (2016) and £79.60 (2017). The drop in the last year was when responsibility ceased, but why almost £80 was spent on insurance for the pump is unclear. Against this background, I am again satisfied that the proper approach is to adopt the assessment in the Schedule and allow £400 plus VAT in the final year before adoption.

37. Management fees of £890 is plainly excessive for 5 freehold houses subject to a rentcharge. The statutory burden on the management company is modest compared to leasehold estates and about £15 per month per property cannot be justified. Given that management duties would also reduce with the foul water pump no longer being a responsibility under the rentcharge, I have considered whether the assessor applying £120 plus VAT per year per property to be too generous to the Applicant, but I take account of the fact that a reasonable charge is not always necessarily the cheapest charge, and so allow the sum adopted by the assessor.

38. Accountancy fees of £339 to 30th September 2016, mutated into accounts preparation fees of £600 and audit fees of £104.40 in the same period ending 2017, against an estimate of £351. The assessor preferred a figure of £250 plus VAT and I unhesitatingly adopt that figure. The expenditure was unreasonable in 2016 for what was required to be done, but in 2017 the increase when the workload dropped is completely disproportionate.

39. The figure for reserves consistently adopted by the Applicant is £1,800, but no justification was provided for this and the roadway has remained in good condition without apparent maintenance to date. It is a cul-de-sac with minimal traffic to residential properties and it seems to me that the assessor is correct to adopt £100 per house. Further, I note and accept that a general contingency of £100 plus VAT against all liabilities is allowed by the assessor.

40. The upshot is that I accept the assessor's assessment that a reasonable sum for the period when the foul water pump was a burden is properly £615 per household per year, dropping to £500 when the pump is excluded. This accords with the figures proposed by the Respondents and contended for by Mr O'Hara based on the available documentation. Whilst not strictly on point, I note that it is also broadly consistent with he settlement that resolved earlier proceedings in 2015.

41. Applying these findings to the proceedings as brought by the Applicant is not entirely straightforward. A running account appears at page 31, but is hard to rationalise. The order dated 26th January 2015 resolved sums due to 31st March 2014 (i.e. mid accounting year) in the sum of £3,000 and £2,980 came in from solicitors on 3rd March 2015 (the £20 deduction is unexplained). The proper treatment of the balance of that year is unclear and has not been in issue before me.

42. For the year October 2015 to September 2016, the Applicant made charges in advance of £1,090 to which they now seek an adjustment figure of £71.52, totalling therefore £1,261.52. For the year October 2016 to September 2017 advance charges were £1,090.40, of which the Applicant now seeks half at £545.20.

43. The Respondents paid £600 on each of 31st March 2015, 23rd September 2015 and 9th November 2016. On the basis of my findings, and accepting Mr O'Hara's contention that his payments should be taken as intended to represent the sum he considered appropriate i.e. £600 per year, this would appear to be mean he has paid £1,200 for the year subject to adjustment and £600 for the year in which advance payment is sought, when his reasonable liability for those two years was £1,115.

44. This does not mean the account would be in surplus, because it appears that only £600 was paid in respect of the 18 months from April 2014 to September 2015, but the Tribunal is not seized of that period in terms on the claim.

45. In summary then, the upshot is that on the sums sued upon, the Respondents had paid sufficient to discharge their apparent liability prior to the issue of proceedings. The Applicant was keen at the hearing not to consider any period save that of the invoices in question, but these appear not to have been due at issue when reasonable rentcharges have been assessed. The total account may or may not be in deficit, depending on what was reasonably due for the period since the compromise of earlier court proceedings (and, indeed, the treatment of costs discussed above), but that cannot be addressed as part of the Applicant's claim because it was not the basis of that claim.

46. Turning to the question of costs, the Applicant has failed to prove any liability for the sums claimed in these proceedings, now allocated to the small claims track, and therefore having lost is not entitled to its costs in the normal course of proceedings. There was the matter of the setting aside of the judgment entered against the Respondents, which was before Deputy District Judge Fawcett. He made no order as to costs when he set aside judgment on 12th February 2018, and so they too do not fall for consideration under the normal course of proceedings before me.

47. Turning to any contractual claim in costs (and one has been pleaded in these proceedings), the enforcement of the rentcharge is not a matter within the terms of Schedule 6 of the Transfer, where merely collection is referred to. The indemnity claimed by the Applicant under paragraph 12 of Schedule 3, and this states that the Respondents are: "To pay to the Company on a full indemnity basis all costs incurred by the Company or its Solicitors in enforcing payment of any monies payable under the terms of this Transfer …" This does not apply because the Applicant has failed to enforce any payment of monies payable under the terms of the Transfer in these proceedings. The sums it received for the relevant periods were not due given the payments made and hypothecated to those years by Mr O'Hara. The Applicant did not seek to pursue the balance (if any) on the running account and it is not for me to try to rationalise the large volume of figures provided there, especially given the dubious treatment of legal costs in respect of proceedings concluded in 2011 and 2015. In the

circumstances, therefore, I also dismiss the application in respect of contractual costs: the claim for these costs fail because the liability under the contract is not established.

48. If either of the parties is dissatisfied with this decision, they may apply to the County Court Circuit Judge for permission to appeal, but such application by way of notice to appeal (Form N164) must be made within 21 days of the date of this decision (CPR Part 52,.12(2)(b)).

Tribunal Judge Dr Anthony Verduyn sitting as a District Judge of the County Court
Dated 9th January 2019