



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CAM/22UL/LSC/2019/0020**

Property : **Flats 25, Lucam Lodge, The Garners,
Rochford, Essex SS4 1DS**

Applicants : **Notting Hill Genesis**

Respondent : **James Alan Pearson**

Date of Transfer Order : **2nd October 2018**

Type of Application : **To determine the reasonableness and
payability of Service Charges (Section 27A
Landlord and Tenant Act 1985)**

**To determine the reasonableness and
payability of the Administration Charges
(Schedule 11 Commonhold & Leasehold
Reform Act 2002)**

**For an Order to limit the service charges
arising from the landlord's costs of
proceedings (Section 20C Landlord and
Tenant Act 1985)**

Tribunal : **Judge JR Morris
Mr S Moll FRICS
Mr J Francis QPM**

Date of Hearing : **21st August 2019**

Date of Decision : **19th September 2019**

DECISION

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Decision

1. The Tribunal determines it has no jurisdiction to change the contractual apportionment which applied prior to the lease variation in 2016.
2. The Tribunal determines that the Management Charge and Staffing costs for the years in issue are reasonable and payable.
3. The Tribunal determines the service charge contributions to the sinking fund for the years in issue were reasonable and payable.
4. The Tribunal determines that the service charge of £7,508.81 demanded for the years in issue is reasonable and payable.
5. The Tribunal does not find it just and equitable in the circumstances to grant an order under section 20C of the Landlord and Tenant Act 1985.

The issues regarding payment of the Service Charge and Costs were heard by Judge Morris sitting alone as a Judge of the County Court, pursuant to amendments made to the County Court Act 1984 and the Decision and related Order are issued separately.

Reasons

Application

6. This is an application by way of transfer from the County Court to the Tribunal of claim no. E4QZ3Y85 by an order dated 2nd October 2018 by District Judge Ashworth. The order requires the Tribunal to make a determination as to the reasonableness and payability of service charges pursuant to section 27A of the Landlord and Tenant Act 1985 and to determine the reasonableness and payability of the Administration Charges (Schedule 11 Commonhold & Leasehold Reform Act 2002).
7. The transfer is also of all the other issues including ground rent, contractual costs, court fees and interest to be dealt with by the First-tier Tribunal Judge sitting alone pursuant to amendments made to the County Court Act 1984 by which judges of the First-tier Tribunal are now also judges of the County Court. This means that in a suitable case, the judge can also sit as a judge of the County Court and can decide issues that would otherwise have to be separately decided in the County Court and this might result in savings in time, costs and resources. These matters will be dealt with in a separate written Decision and Reasons.
8. Directions were issued on 8th April 2018 with some timetable variations agreed by the parties and the Procedural Judge.

The Law

9. A statement of the relevant law is attached to the end of these reasons.

Background and Description of the Property

10. The Tribunal did not inspect the Property or the Development in which it is situated but from the previous Decisions it was described as follows:
11. The Property is in a fairly large complex of 43 self-contained purpose-built flats in adjoining buildings built in the 1980s of brick cavity wall construction under tiled and slated roofs with weather boarding to the 4-storey central section. The Development includes communal facilities and amenity areas. The communal facilities include a communal living room, kitchen, dining room and a guest room. There is also a laundry with washing machines and tumble dryers. There are relatively extensive grounds and a car park.
12. The Development provides a range of assisted living, sheltered and supported accommodation to residents who are over 55 years of age. In 2007 it was found that the residential warden flats were no longer required and have been sold on a leasehold basis. This increased the flats from 41 to 43. In addition, the range of care and services provided at the Development has changed.
13. Due to these changes the service charge provision within the original leases became out-dated and required variation. As a matter of contract, the total percentage service charge aggregated 117% of expenditure. There was an unsuccessful application to vary the Lease in 2013 (case reference CAM/22UL/LVT/2013/0002). The Lease was varied by a tribunal in 2016 (case reference: CAM/22UL/LVT/2016/0001). This resulted in the service charge share for the Development aggregating to 100% and the share relating to the Property changed from “one twenty sixth” to 2%.

The Lease

14. A copy Lease was provided for the Property. The Lease is dated 6th February 1989 and is for a term of 99 years from 25th March 1988. The ground rent is set out in the Fourth Schedule as follows:
£52.00 for the first 33 years of the term;
£120.00 for the next 33 years of the term
£180.00 for the remainder of the term.
15. The Lease is between Springboard Chelmer Housing Association Limited (Freehold Lessor although referred to in the Lease as the Association) (1) and Gwendoline Susanna Knight (the Tenant) (2). Springboard Chelmer Housing Association Limited was taken over by Genesis Housing Association Ltd in 2011 and Genesis Housing Association Ltd, together with three other Housing Associations, was amalgamated to form Notting Hill Genesis (the Applicant) on 20th April 2011.
16. The Freehold Reversion of the Lease was assigned to Notting Hill Genesis in July 2018 as evidenced by the Official Copy of the Register, Title Number EX747706 provided. The Leasehold interest was assigned in November 2007 to James Alan Pearson (the Respondent) as evidenced by the Official Copy of the Register, Title Number EX556268.

17. The relevant provisions of the Lease are as follows:
18. Clause 1 Clause 3(2) specifies the service charge share to be one twenty sixth part. This has since been varied as from 15th August 2016 to 2%.
19. There is the usual provision for the Landlord to insure the Property and to reclaim the premium from the Tenant.
20. Clause 3(2) relates to the service charge and states:

To pay to the Association without any deduction by way of further and additional rent 2% of the expenses and outgoings incurred by the Association in the repair and maintenance renewal and management of the Buildings and the estate the provision of services therein and the other heads of expenditure incurred by the Association in the performance of its covenants hereinafter contained including the fees of its Managing Agents and Accountants or other professional persons plus Value Added tax (if applicable) such further additional rent (hereinafter called the "service charge") ...

21. Clause 3(8)(e) relates to commissions which are paid into a sinking fund and states:

Upon any such assignment of the Premises to pay the Association at the time of each assignment a sum that shall represent one per cent of the purchase price paid by each Lessee on the occasion of his acquisition of the premises for each year (apportioned if necessary on the basis of complete months) (such tenure to be calculated from a date that is two years after the date hereof or the date of acquisition by each Lessee whichever shall be the later) of the Lessee's tenure of the Premises under this Lease (up to a maximum of ten years tenure) and which the Association considers reasonable sum to provide a Sinking Fund for depreciation and the costs and anticipated costs of provision renewal and replacement of any plant within the Estates...upgrading and improvements to the Estate and other items of future contingent capital expenditure or provision as are not included in the periodical service charges...

22. Clause 3(2)(f) relates to a sinking fund from service charge contributions and states:

The expression "the expenses and outgoings incurred by the Association" as hereinbefore used shall be deemed to include not only those expenses and outgoings and other expenditure hereinbefore described which have been actually disbursed incurred or made by the Association during the year in question but also such reasonable part of all such expenses outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever dispersed incurred or made and whether prior to the commencement of the said term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof ...

The Issues

23. The Applicant's claim in the County Court was for arrears of service charges of £7,508.81 and ground rent of £234.00 in respect of the years ending 31st March 2012 to 2018.
24. It appeared to the Procedural Judge issuing Directions that the Applicant was also claiming administration charges for both non-payment of service charges and ground rent. Although the Tribunal does not have jurisdiction to deal with the amount and enforcement of ground rent, it can deal with the reasonableness and payability of any administration charge levied for non-payment of the ground rent. As stated above, issues including ground rent, contractual costs, court fees and interest will be dealt with by the First-tier Tribunal Judge sitting alone as a Judge of the County Court, pursuant to amendments made to the County Court Act 1984.
25. At the hearing, Mrs Stephanie Lovegrove, Counsel for the Applicant, informed the Tribunal that the ground rent was not in issue and no administrative charges were being claimed, although costs and interest were being claimed and the case for these would subsequently be presented to the Judge sitting alone as a County Court Judge.
26. From the statements of case of the Applicant and the Respondent, the issues for the Tribunal in respect of the reasonableness and payability of the Service Charge are:
 - 1) *The apportionment of the service charge and the amount payable.* The Respondent submits that the apportionment of the service charge prior to 2016 was incorrect and that he should be credited with the service charge he alleges he has overpaid between 2007, when the Lease of the Property was assigned to him, and 2016 when the Lease was varied. He also submits that the Applicant's Statement of Account relating to the Property is not clear and he questions the amount payable.
 - 2) *The Management Fees.* The Respondent submits that the Management Fees are not payable under the Lease and in any event are excessive.
 - 3) *The Sinking Fund.* The Respondent submits that the amount of the sinking fund is excessive and a portion of it should be distributed to the leaseholders.
27. With regard to the first issue the Applicant provided a Statement of Account for the Service Charges relating to the Property on pages 44 to 46 and 81 to 87 of the Bundle. This sets out the debits to the account on demanding the estimated service charges and the credit adjustments where the actual costs were less than the estimate. There is a payments column where payments made by the Respondent are recorded and a column showing the running balance. There is also a comments column describing the credit/debit or payment. The Statement of account starts at 2nd April 2012 from a nil balance after payment of a cheque by the Applicant to the Respondent following the

Leasehold Valuation Tribunal Decision. The account in essence with some annotations is as follows:

Date	Charge £	Payments £	Balance £	Comments
02/04/2012	1,095.61		1,095.61	Estimated Service Charge April 2012
11/04/2012	127.85		1,223.46	Adjustment to Estimated Service Charge April 2012
24/04/2012	-59.46		1,164.00	Adjustment to Estimated Service Charge April 2012
26/04/2012	-103.50		1,060.50	Management Fees Adjustment February 2011
27/04/2012	103.50		1,164.00	Management Fees Adjustment February 2011
27/04/2012	103.50		1,267.50	Management Fees Adjustment February 2011
01/10/2012	1,164.00		2,431.50	Estimated Service Charge October 2012
31/01/2013		2,187.00	244.50	Payment from Respondent
14/02/2013	-155.00		89.50	Management Fee removed April & October 2012
27/02/2013		103.50	14.00	Management Fees Adjustment February 2011
				<i>Estimated Service Charge 2012/2013 £2,173.00</i>
01/04/2013	1,121.40		1,107.40	Estimated Service Charge April 2013
12/04/2013	6.25		1,113.65	Additional Service Charge April 2013
24/04/2013	36.34		1,149.99	Additional Service Charge April 2013
17/05/2013	-232.39		917.60	Removal of Service Charge April 2013
01/10/2013	931.60		1,849.20	Estimated Service Charge October 2013
				<i>Estimated 2013/14 Service Charge £1,863.20 Sinking Fund £25.02 Total£1,838.18</i>
17/12/2013	-372.23		1476.97	Surplus 2012/13
03/04/2014	971.32		2,448.29	Estimated Service Charge April 2014
16/08/2014	-191.24		2,257.05	Surplus 2011/12
19/09/2014	-27.50		2,229.55	Removal of Service Charge April 2014
01/10/2014	943.82		3,173.37	Estimated Service Charge October 2014
				<i>Estimated 2014/15 Service Charge £1,887.64</i>

				<i>Sinking Fund £25.02 Total £1,862.62</i>
17/11/2014	237.22		3,410.59	Deficit 2013/14
18/02/2015	-237.22		3,173.37	Revised Deficit 2013/14
18/02/2015	195.33		3,368.70	Revised Deficit 2013/14
06/04/2015	968.18		4,336.88	Estimated Service Charge April 2015
01/07/2015		2,000.00	2,336.88	Payment from Respondent
01/10/2015	968.18		3,305.06	Estimated Service Charge October 2015
				<i>Estimated 2015/16 Service Charge £1,936.36 Sinking Fund £25.02 Total £1,911.34</i>
27/10/2015	587.07		3,892.13	Deficit 2014/15
20/11/2015	-587.07		3,305.06	Reverse Deficit 2014/15
20/11/2015	100.23		3,405.29	Revised Deficit 2014/15
04/04/2016	980.98		4,386.27	Estimated Service Charge April 2016
01/10/2016	980.98		5,367.25	Estimated Service Charge October 2016
				<i>Estimated 2016/17 Service Charge £1,961.96 Sinking Fund £25.02 Total £1,936.94</i>
04/11/2016	-80.29		5,286.96	Surplus 2015/16
12/04/2017	876.87		6,163.83	Estimated Service Charge April 2017
01/10/2017	876.87		7,040.70	Estimated Service Charge October 2017
				<i>Estimated 2017/18 Service Charge £1,753.74 Sinking fund £19.40 Total £1,734.34</i>
06/10/2017	-372.82		6,667.88	Surplus 2017/18
12/04/2018	826.87		7,494.75	Estimated Service Charge April 2018
11/05/2016	14.06		7,508.81	Amended Estimated Service Charge October 2018
	11,799.31	4,290.50	7,508.81	

28. The amount outstanding and claimed is £7,508.81.
29. Because the Statement of Account is a journal documenting all the day to day movements in the account, it was appreciated by the Applicant that this was not very easy to follow and therefore a simplified version was set out on page 87 of the Bundle. As the content is essentially the same this is not reproduced here. The above journal Statement of Account is reproduced as the Respondent referred to a number of entries in the course of the hearing.

30. With regard to both the first and second issues the Applicant provided Statements of Account for the Service Charges for the years in issue for the years ending 31st March 2012 to 2018. The total actual costs and the difference between them and the estimated costs together with the Respondent's apportionment are set out in the table below:

Years ending 31 st March	Actual Block/Estate Costs	Estimated Costs for the Property	Actual Costs for the Property	Difference between actual & estimated (- = deficit)	Estate/block contribution
	£		£	£	%
2011/12	68,165.50	1,910.12	1,718.88	191.24	
2012/13	93,258.10	2,173.00	1,800.77	372.23	
2013/14	70,687.64	1,838.18	2,033.51	-195.33	2.33/2.45
2014/15	66,903.23	1,862.62	1,962.85	-100.23	2.33/2.45
2015/16	59,408.72	1,911.34	1,831.05	80.29	2.33/2.45
2016/17	61,348.89	1,936.94	1,564.12	372.82	2.00
2017/18	71,332.50	1,734.34	1,573.98	160.36	2.00
			12,485.16		

31. The Tribunal carried out a reconciliation between the Property Service Charge Account and the Annual Service Charge Account. It was noted that the Statements of Account for Service Charge included the sinking fund contribution within the estimated charge whereas the Annual Service Charge Account set out the Sinking Fund separately. As identified in the table below.

Years ending 31 st March	Estimated Costs for the Property	Add Deficits	Sinking Fund	Amount Due	Less Payments and Surplus Credits	Total Due
	£	£	£	£	£	£
2011/12					191.24	
2012/13	2,173.00			2,173.00	372.23	
					2,187.00	
2013/14	1,838.18	195.33	25.02	2,058.53		
2014/15	1,862.62	100.23	25.02	1,987.87		
					2,000.00	
2015/16	1,911.34		25.02	1,936.36	80.29	
2016/17	1,936.94		25.02	1,961.96	372.82	
2017/18	1,734.34		19.40	1,753.74		
2018/17	840.93			840.93		
Total				12,712.39	5,203.58	7,508.81

32. The Management Fees extracted from the Service Charge Accounts for the years in issue are as follows:

Years ending 31 st March	Management Charge
	£
2011/12	215.00
2012/13	220.00
2013/14	220.00
2014/15	220.00
2015/16	275.00
2016/17	220.00
2017/18	275.00

33. With regard to the third issue of the sinking fund the Applicant provided a statement of account for the years in issue which is set out in the table below.

Years ending 31 st March	Opening Balance	Contributions	Expenditure	Interest	Closing Balance
	£	£	£	£	£
2011/12	183,213.46	6,684.73	37,745.93	81.84	152,234.10
2012/13	152,234.10	13,756.90	7,720.71	810.01	159,080.30
2013/14	159,080.30	12,165.42	0	867.99	172,113.71
2014/15	172,113.71	14,040.76	167.08	836.81	186,824.20
2015/16	186,824.20	1,518.58	0	355.48	188,698.26
2016/17	188,698.26	4,912.54	9,175.43	608.42	185,043.79
2017/18	185,043.79	256.64	25,062.00	374.09	160,612.52

Hearing

34. A hearing was held on 21st August 2019. The Applicant was represented by Mrs Stephanie Lovegrove of Counsel, and was attended by Ms Eileen Wright, the Commercial Business Manager within the Applicant's Care and Support Department and Ms Seren Ozgen, Service Charge Partner for Care and Support, both witnesses for the Applicant. Mr James Pearson, the Respondent, represented himself.
35. As the transfer relates to the submission by the Respondent that the service charges are unreasonable and not payable, the Respondent put his case first which was responded to by the Applicant.

Evidence & Determinations

Apportionment of the Service Charge and Amount Payable

Respondent's Case

36. The Respondent provided a written Statement of Case précised and paraphrased as follows:
37. When the Applicant purchased 25 Lucam Court in 2007 he was informed by the Applicant's predecessor that the service charge share was 2.5%. This appeared excessive as the flat was one of nine units which were the smallest in the development of 44.
38. The Respondent contended that in a previous case regarding the reasonableness and payability of the service charges in 2011 (case reference: CAM/22UL/LSC/2011/0067) the Applicant confirmed that the service charge recovery percentages added up to 100.8%. Subsequently in 2016 it was disclosed that the actual recovery rate was 117.6%. As a result, the previous tribunal was misled. In the 2016 case the Applicant said that it had adopted an internal correction mechanism but this is refuted.
39. The Respondent was misled when purchasing the Property as the Applicant failed to inform him that the service charge shares were inaccurate. Therefore until 2016 when the Lease of the property was varied the Respondent has paid inflated service charges.
40. In addition, the Applicant has failed to correct the situation although it agreed to review the position and accepted that payments would not be made until such time that revised recoveries were agreed and backdated. Unfortunately, the staff involved have now left the Applicant.
41. Following the 2016 decision to reduce the service charge contribution to 2% the Respondent seeks a retrospective correction for these charges back to 2007 for each account as agreed in principle with the previous members of the Applicant's staff.
42. At the hearing Mr Pearson said in oral evidence that when he bought the flats in 2007, seven had new leases and two, including the Property, had existing leases which were assigned to him. It was apparent to him that the apportionment of 1/26th did not seem correct and it was questioned and he was told a percentage apportionment of 2.5% would be applied. This still seemed high. He said that at the 2001 tribunal hearing the Applicant said that the apportionments added up to 100.8% but in the 2016 hearing it was said the added to 117%.
43. He said that the Applicant had claimed that if the apportionments were as prescribed in the leases then the whole would have added up to 117% but it had made adjustments so that the amount that was charged produced a return of 100.8% until the 2016 variation which made it 100%. Mr Pearson said that, if there was an adjustment to reduce the whole to 100.8% then he had not

benefited from it. On the contrary he had paid 2.5% for the Property since 2007. If during that time the apportionment for other flats was reduced to make the whole add up to 100.8% then he had been subsidising those flats. He said this was evidenced when the apportionments in the leases were varied because the apportionment for the Property was reduced to 2.0%. Therefore, he submitted that his Service Charge demand for the years in issue, indeed back to 2007, should be credited with the equivalent of 0.5% which he had overpaid. He said that the difference between his being charged 2.0% and 2.5% between 2007/8 and 2015 /16 was, he calculated, £3,441.24.

44. There followed some discussion. It noted that 1/26th in percentage terms was actually 3.86%. Consideration was given to why the Property, which was one of the smaller flats, in a Development of 41 flats when the Lease was granted, was allocated a service charge apportionment of 1/26th or 3.85%. Although this was before the time when Ms Wright worked for the Applicant nevertheless, she said that she believed that the Property may have been originally designated for a person who required substantial care and support and that this was reflected in the service charge. Mr Pearson said that she was probably correct but that did not justify the continued high apportionment when the Property was no longer designated in that way.

Applicant's Case

45. The Applicant provided a written Statement of Case supported by two witness statements of Ms Eileen Wright, Commercial Business Manager in the Applicant's Care and Support Department, and Ms Seren Ozgen, Service Charge Partner for Care and Support. The Statement of Case and witness statements are précised and paraphrased as follows. The Statement of case and Witness Statements were confirmed at the hearing.
46. The Applicant denied having misled the Respondent or his solicitors at the time of sale.
47. The Statement of case and Ms Wright's Witness Statement gave the background to the Applicant's ownership of the Development and a description of the Development. It was also said that 42 of the flats are privately owned and held on long leases including the warden flats numbers 42 and 44. Number 12 is owned by the Applicant but is about to be sold to a private individual on a long lease.
48. Ms Wright explained the Applicant's present situation with the Respondent. She said that by virtue of paragraph 3(2) of the Lease the respondent covenanted to pay the Applicant a contribution towards its expenses incurred by the Applicant in the repair, maintenance, renewal and management of the Development, the provision of services and other expenditure incurred by the Applicant in fulfilling its covenants. The financial year for the preparation of accounts runs from 1st April to 31st March. In accordance with 3(2)(g) of the Lease two interim payments are sought from the Respondent on 1st April and 1st October respectively of each year. The estimates of service charges to be levied in the following year are sent out in about February of each year and, where possible, audited final accounts are sent to the Leaseholders in about September following

the end of the financial year. In addition, the respondent is sent statements of account on a quarterly basis.

49. Ms Wright added that the Respondent has been in arrears since 27th February 2013 and no payments have been made since 1st July 2015. The arrears at the date the proceedings were issued were £7,508.81 and a copy of the Statement of Account was provided. The Respondent continues to refuse to make payments and the arrears are currently £9,200.61.
50. At the hearing Mr Pearson said that the Statement of Account was difficult to understand and that there were a number of adjustments which reflected poorly on the management.
51. Ms Wright said that she appreciated the Statement of Account was difficult which is why she had prepared a simplified the statement on page 87. The Statement showed the day to day movements including internal adjustments where the estimated costs were reviewed and deficits and surpluses together with payments. She suggested the adjustment to the estimated costs showed good management.
52. Ms Wright then addressed the percentage contributions to the service charge in her written statement. She said that under the terms of the Lease the Respondent's liability amounted to one twenty-sixth which would have been 3.85% of the total expenditure.
53. She said that over the years the Development had increased in size and that as a matter of contract the total percentage service charge recovery aggregated to 117.9% of expenditure. The Applicant's predecessors thought it was inappropriate to collect 117.9% and adopted an internal correction mechanism to rebate all long lessees. The Respondent's proportion was initially 2.5% of the total expenditure. Similar adjustments were made to other premises at Lucam Lodge, leading to a total percentage recovery aggregated to 100.8% of expenditure, from about 2012/13 there was a further correction bringing the aggregate recovery to 99.98%.
54. An unsuccessful attempt was made to vary the service charge apportionments in 2013 but this was successfully achieved in 2016 and the apportionment related to the Property was reduced to 2.0%.
55. Ms Wright said that the assertion by the Respondent that the Applicant agreed to review the service charge percentages and that no payments would be sought until the revised recoveries were agreed and backdated is denied. There is no evidence of such agreement in any of the notes or emails between the parties nor was there any reference to such an arrangement in the hand over notes provided by her predecessor to her. She said there did not appear to be any contact with the respondent since the variation was made in 2016.
56. Mrs Lovegrove for the Applicant addressed the Tribunal on the evidence referred to above stating that the contractual percentage of 3.85% had in fact not been charged and that the lesser amount of 2.5% was not unreasonable. She also submitted that the Tribunal did not have jurisdiction to alter the contractual

percentage in this instance. She referred to the Upper Tribunal case of *Gater v Wellington Real Estate* [2014] UKUT 0561 (LC). In that case the service charge clause said that the tenants should pay a “due and fair proportion of the Service Cost”. Martin Roger QC at paragraph [61] drew a distinction between the lease clause in that case and clauses “where the parties have agreed that service charges will be apportioned by a predetermined formula, such as a fixed percentage...In such cases the tribunal has no jurisdiction under ss. 19 or 27A of the 1985 Act to substitute a different apportionment that was made clear in *Schilling v Canary Riverside Development PTD Ltd* (2005) LRX/26/2005”.

57. Mrs Lovegrove submitted that following the above cases, in this case the parties agreed a specific fraction in the Lease and the Tribunal has no jurisdiction to change that. The parties did subsequently agree a percentage of 2.5% which Mr Pearson had accepted and he was estopped from denying that was the agreed contribution until the lease was varied in 2016.

Tribunal's Decision

58. The Tribunal appreciated the point Mr Pearson was making. He felt aggrieved because he had questioned the amount of the Property's contribution to the service charge of 2.5% when he purchased it in 2007, only to find that in 2016 the amount was reduced to 2.0%. He felt he had been subsidising the service charge of other flats.
59. The Tribunal addressed the points raised as follows:
60. Firstly, the Tribunal found that, notwithstanding his misgivings about the apportionment of the service charge, Mr Pearson had agreed to his being assigned a lease which required a contribution of 1/26th which equated to 3.85% to the service charge and was his contractual liability.
61. Secondly, the Tribunal found that Mr Pearson had been told at the time of purchase that he would only be charged 2.5%. This is borne out by the amount that was subsequently demanded, which was 2.5%.
62. In the course of discussion Mrs Lovegrove made some mention of estoppel, and the Tribunal agree that both Mr Pearson and the Applicant might both have been estopped from denying that the agreed percentage was 2.5% and that this is the amount that was charged until the lease variation in 2016.
63. Thirdly, the Tribunal found that it may be that Mr Pearson's contribution could be said to have “subsidised” the service charge of other flats until 2016. However, this was not to an extent that was unreasonable. As mentioned at the hearing, if such subsidising occurred it was no more than happens in respect of other leases where the ground floor flat is required to pay a contribution to the cleaning and decoration of the upper floors or the maintenance of the lift. Items, which the ground floor tenant may claim, he or she receives no direct benefit. Perhaps a more pertinent example is where all the flats of a building make an equal contribution to the service charge under the lease, although some flats are larger or have more bedrooms than others.

64. In addition, the Tribunal noted that the 2.0% contribution of 2016 was calculated after the sale of the long leases on the two warden flats, which prior to that sale would not have paid a contribution. If these two flats had still been warden flats not paying a contribution at the time of the variation in 2016 then, the 2.0% contribution calculated at that time would probably have been marginally higher.
65. Fourthly, the Tribunal found that the Applicant and its predecessor had not acted unreasonably when it was realised that the contractual service charge apportionments led to a total percentage recovery aggregated to more than 100%. They made an attempt to rationalise the situation, including reducing the apportionment from 3.85% to 2.5% in respect of the Property at the time of the assignment to Mr Pearson.
66. Fifthly, the Tribunal finds that the 2016 variation is from 2016 and cannot be retrospective.
67. Finally, on this issue, the Tribunal refers back to its first finding and agrees with Mrs Lovegrove's submission with reference to *Gater v Wellington Real Estate* [2014] UKUT 0561 (LC). In this case the parties have agreed a specific fraction i.e. 1/26th, in the lease, and the Tribunal has no jurisdiction to substitute a different apportionment. Whereas the parties can and did agree a different apportionment for the period 2007 to 2016, the Tribunal has no jurisdiction to do so.
68. The Tribunal therefore determines it has no jurisdiction to change the contractual apportionment which applied prior to the lease variation in 2016.

Management Charges

Respondent's Case

69. Mr Pearson initially claimed a refund of the Management Charges on the basis that the Lease does not allow these to be charged unless an external agent is used to perform the duties. He conceded that this issue had been determined previously by the tribunal in 2011 and that Clause 3(2) of the Lease allowed for a management charge.
70. Mr Pearson also contended that the amounts charged for the Management Fees are excessive given that the Applicant is a not for profit organisation and the poor level of accounting and financial control. Mr Pearson said that in each year there was a charge for staff costs and management fees. He said that he could not see how he could be liable for both. What did the "staff" do that the "management" did not and vice versa.
71. The Tribunal noted that the charges for Management and Staffing in the Service Charge accounts as follows:

Years ending 31 st March	Management Charge	Agency Staff Cost	Cleaning	Staff costs	Total
	£	£	£	£	£
2011/12	215.00		2,735.42	22,929.04	25,879.46
2012/13	220.00		2,075.33		2,295.33
2013/14	220.00	21,780.73	2,075.33	1,053.96/78.31	25,208.33
2014/15	220.00	8,971.66		25,723.86	34,695.52
2015/16	275.00		786.17	31,599.95	32,661.12
2016/17	220.00	284.14	390.92	31,030.42	31,925.44
2017/18		348.81		31,130.38	31,479.19

72. The Respondent said that he had made two formal requests for full information regarding the account and budgets but had not received a reply.

Applicant's Case

73. Ms Ozgen in her Witness Statement said that the Service Charge Team are responsible for preparing the service charge estimates and final accounts. They also serve the demand for the interim payments based on the estimates payable on account of the service charge.
74. Having prepared the estimates which are often revised e.g. in 2011/12 the sum of £2,296.60 was reduced to £1,917.04 and in 2012/13 the sum of £2,119.22 was increased to £2,328.00 to try to keep any surplus or deficit to a minimum.
75. She said that the Respondent had not raised objections to any specific service charges and she believed the accounts were accurate and recoverable. She added that she was not aware of any formal requests for full information regarding the account and budgets. She said that the Respondent had been notified that the supporting invoices could be made available for inspection at the Applicant's offices at any time during working hours on reasonable notice but no request has been made.
76. Ms Ozgen gave oral evidence saying that she was part of service charge team which was part of the management team which was at head office. They prepared estimates, sent out service charge demands, collected the service charge and prepared and sent out the final accounts. They also answered queries about the accounts and dealt with arrears.
77. She said that other parts of the management team inspected properties, arranged for landscaping, maintenance and repairs, and liaised with contractors. The accounts team arranged for payments to be made.
78. Mr Pearson asked whether the costs of the section 20 consultation procedure was included in the Management Fees. Ms Ozgen said that the preliminary work in determining whether specific works would require a section 20 procedure were included but there was an additional charge for the actual process of

issuing notices, preparing the works specification and administering the tendering process.

79. Ms Wright in her Witness Statement said that in 2012/13 the Applicant had introduced a method of calculating management fees based on a flat rate dependent on the number of services provided. From 2012/13 the Applicant provided 10 services to the Respondent. However, except for 2015/16 when the Respondent was charged £275.00 for 10 to 13 services, the Respondent has been charged £220.00 per annum which is the amount charged when between 6 and 9 services are provided. The Respondent has therefore been undercharged for all the years since 2012/13 except 2015/17. A copy of the scale of charges was on page 78 and a list of the services provided on page 79 of the Bundle.
80. Ms Wright said that she believed the charges are reasonable and that the scheme is well managed and in good condition. The Applicant provides two lifts and a Tunstall communication system.
81. Ms Wright went on to explain that the Applicant employs one full time Leasehold Officer to manage the scheme and there is also a part time General Assistant who provides office cover and does internal cleaning. A contribution to the salary of the Lead Service Delivery Manager, who manages the Leasehold Officer and the General Assistant, are also included under the service charge heading of “staff costs”.
82. In oral evidence Ms Wright in response to Mr Pearson’s question regarding the difference between the Management and the Staff costs Ms Wright confirmed that the staff costs were for the salaries of the Leasehold Officer and General Assistant with a small contribution to the Lead Service Manager.
83. She said the Leasehold Officer deals with the day to day running of Lucam House and East Street, another block of flats nearby. The Officer’s salary is split between the two. The Officer ensures that the standards required for health and safety are met. The Officer does not engage contractors but does ensure that the work they are employed to do is carried out e.g. repairs and landscaping. If between the visits of members of the survey team from headquarters, repair or other work becomes necessary, the Officer reports it to the team for action. The Officer has some access to the accounts and so can offer advice to residents with the payments for rent and service charges. The Officer does not handle payments. The Officer arranges social events and visits from organisations. The Officer would assist with any problems that a resident may have and is available to deal with emergencies while on duty. There is a 24-hour helpline and a Tunstall communication system.
84. The General Assistant carries out internal cleaning and is available to assist the Leasehold Officer but is also able to cover for the Leasehold Officer for holidays and in the case of illness. Having two personnel reduces or negates the necessity for employing agency staff which tend to be more expensive and do not know the residents.

85. Ms Wright said that the Lead Service Delivery Manager oversees the running of this and other developments and has regular meetings with the Leasehold Officer and General Assistant as necessary.
86. The Management Charge is the same for all schemes and covers the costs of the 'back office' or headquarters. At headquarters there are the following teams: finance, legal, survey, human resources, leasehold, service charge and procurement. In addition to engaging contractors, arranging for repairs and maintenance, making payments and calculating and collecting service charges, the teams also arrange annual fire risk and health and safety assessments as well as legionella checks. Ms Wright said there was a team who dealt with the section 20 consultation procedures for major works. Although the management charge covered their preliminary work, as mentioned earlier there was an additional charge for carrying out the procedure itself.
87. Notwithstanding his complaints about staffing and management costs Mr Pearson conceded the development was run well on a day to day basis.

Tribunal's Decision

88. The Tribunal found that there was a difference between the staffing and management costs and that the roles of the Leasehold Officer and General Assistant were distinct from that of a managing agent.
89. The Tribunal found that the staffing costs paid for the Leasehold Officer, who was analogous to a warden or court manager at other similar developments. The role was both administrative and pastoral with the significant advantage for the residents of being on site every day. The General Assistant carried out cleaning and cover for the Leasehold Officer ensuring full time availability of a member of staff.
90. The Tribunal found that the management cost was for the same service as a would be provided by a managing agent.
91. The costs having been distinguished, in the absence of evidence to the contrary the Tribunal determined that the Management Charge and Staffing costs for the years in issue are reasonable and payable.
92. The issue with regard to the Respondent having requested full information regarding the account and budgets did not affect the determination as accounts had been provided following Directions.

Sinking Fund

Respondent's Case

93. The Respondent claimed a refund of amounts charged to the sinking fund. Whilst the Lease allows for payments to the sinking fund from the Service Charge it also states that funds received on the assignment of properties (referred to as commissions) are to be paid into the sinking fund. As the

commissions have proved to be substantial and sufficient for major works it is unreasonable to make a further charge through the Service Charge.

94. In support of this the Respondent stated that the lifts had undergone a considerable refurbishment and there remained substantial reserves. The previous 2011 tribunal also recommended that the fund should be limited to £150,000. Any charge to the tenants under the service charge which increases the fund above this is unreasonable. He submitted that any current surplus in excess of £150,000 should be credited to the tenants account and refunded.

Applicant's Case

95. Clauses 3(2)(f) and 3(8)(e) of the Lease provide for the creation of a sinking fund and the funds are to be added to from sale commissions payable to the Applicant on each assignment of the Lease.
96. In 2011 the tribunal concluded that £150,000 should be sufficient to cover expenditure and that no further funds should be transferred to the sinking fund.
97. No contributions were sought from leaseholders until the financial years 2014/15 and the contributions up to that point were from commissions. In 2014/15 only £956.42 was sought and the Respondent's contribution was £25.02. In 2015/16, and 2016/17 similar sums were sought for which the Respondent's contribution had only been £25.02 per annum for 2013/14, 2014/15, 2015/16 and 2016/17 respectively. In 2017/18 £971.42 was sought and the respondent's share was £19.40 per annum in 2017/18.
98. Although the sinking fund is currently £184,836.31 cyclical works are due in 2022 which will include works on the roof, windows and painting. Then anticipated costs is £30,000 to £40,000.
99. It was added that there is no provision in the legislation or the lease for the reimbursement of sinking funds to leaseholders. The commissions are not part of the service charge and the Tribunal has no jurisdiction over them.
100. In oral evidence Ms Wright said that since 2011 there had been some major items of expenditure and it had only been possible to maintain a good sinking fund balance due to the commissions received. These commissions are from the sale or assignment of flats on the Development and therefore are sporadic and could not be relied upon as a steady income to the fund. Therefore, it was considered necessary to maintain a service charge contribution which has since 2011 been modest because of the commissions.
101. Mrs Lovegrove said that the service charge contributions to the sinking fund were separate from the sinking fund commissions and referred to the provisions in clause 3(2)(f) and 3(8)(e).

Tribunal's Decision

102. The Tribunal noted the last point made by Mrs Lovegrove and on reading the provision considered that clause 3(8)(e) relating to the sinking fund made up of

commissions, was for capital expenditure. Clause 3(2)(f) relating to setting aside funds from the service charge for anticipated expenditure of a periodically recurring nature (whether recurring by regular or irregular periods).

103. With regard to the size of sinking fund from either source the Tribunal found that the Development not only included the structural common parts but also had grounds and other facilities to maintain from the sinking fund. It found that the nature of the Development as accommodation for older persons, some of whom may be vulnerable, required a high standard of maintenance and the prompt attention to repairs and capital works was necessary. A large sinking fund facilitated this and ensured that an undue burden was not placed on leaseholders, who may be of limited means, when work was required.
104. The Tribunal also found that the commissions were not a regular income but their receipt provided a healthy sinking fund for capital expenditure and enabled the service charge contributions to be kept to a minimum. The Tribunal determines the service charge contributions to the sinking fund for the years in issue were reasonable and payable.

Section 20C Application

105. The Respondent sought an order under section 20C of the Landlord and Tenant Act 1985 for a determination limiting the landlord's costs of the proceedings heard on 26th June 2019 from being included in a service charge.
106. Rather than charge the costs of the proceedings to the service charge Mrs Lovegrove said that the Applicant would be seeking to recover the costs of the proceedings from Mr Pearson in the County Court, under clause 3(7)(c) by which the tenant covenants:

To pay all costs charges and expenses which may be incurred of the Association or its Managing Agents in connection with the recovery of arrears of the service charge...

107. The Tribunal found that clause 3(2) enabled the Applicant to recover legal costs under the service charge.
108. In deciding whether or not it is just and equitable in the circumstances to grant an order under section 20C of the Landlord and Tenant Act 1985 the Tribunal considered the conduct of the parties and the outcome of the proceedings.
109. Neither party has acted unreasonably in respect of the Tribunal proceedings. Although the issues raised by the Respondent were not without merit, nevertheless the Tribunal found in favour of the Applicant on all matters. The Respondent did not adduce any evidence to show that he had raised the issue of the Management Charge and Staffing costs with the Applicant previously or that he had taken legal advice with regard to the apportionment. If he had done so the matter may not have come to the Tribunal.

110. The Tribunal found that the Applicant was justified in pursuing its claim to recover the service charge arrears.
111. The Tribunal therefore does not find it just and equitable in the circumstances to grant an order under section 20C of the Landlord and Tenant Act 1985.

Judge JR Morris

ANNEX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX 2 - THE LAW

1. Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002
2. Section 18 Meaning of “service charge” and “relevant costs”
 - (1) In the following provisions of this Act “service charge” 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, improvement 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
 - (2) The relevant costs are 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 of which the service charge is payable.
 - (3) for this purpose
 - (a) costs include overheads and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period
3. Section 19 Limitation of service charges: reasonableness
 - (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-
 - (a) only to the extent that they are reasonably incurred; and
 - (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
 - (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.
4. Section 27A Liability to pay service charges: jurisdiction
 - (1) An application may be made to a leasehold valuation 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.
 - (2) Subsection (1) applies whether or not any payment has been made.
 - (3) An application may also be made to a leasehold valuation tribunal for a determination whether if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any

specified description, a service charge would be payable for the costs and if it would, as to-

- (a) the person by whom it would be payable,
- (b) the person to whom it would be payable,
- (c) the amount which would be payable,
- (d) the date at or by which it would be payable, and
- (e) the manner in which it would be payable.

- (4) No application under subsection (1) or (3) may be made in respect of a matter which—
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or
 - (b) on particular evidence,of any question which may be the subject of an application under subsection (1) or (3).
- (7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.