FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/17UK/LVT/2019/0001**
Property	**:**	**Bretby Hall, Bretby Park, Burton-on-Trent, Staffordshire DE15 0QQ**
Applicants	**:**	**Mr & Mrs C Pratt (1)** **Mr C J Hulme (2)**
Representative	**:**	**Mr D Dovar (Counsel)**
Respondents	**:**	**Bretby Hall Freeholders Ltd (1)** **Bretby Hall Management Company Ltd (2)** **Bretby Park Estate Management Company Ltd (3)**
Representative	**:**	**Mr J Howlett (Counsel) instructed by Nelsons, Solicitors**
Type of application	**:**	**Application for a variation of a lease under section 35 of the Landlord and Tenant Act 1987**
Tribunal member	**:**	**Judge C Goodall** **Mrs A Rawlence MRICS**
Date and place of hearing	**:**	**15 October 2019 at Derby Magistrates Court**
Date of decision	**:**	**3 December 2019**

DECISION

Background

1. The Applicants in this case are two of the 30 lessees who own apartments or cottages (collectively called the "Units") within a property known as Bretby Hall, Bretby, Staffordshire ("the Hall"). They are asking the Tribunal to make an order varying their leases under section 35 of the Landlord and Tenant Act 1987. Mr & Mrs Pratt own apartment 17, and Mr Hulme owns apartment 13.

2. The First Respondent is the freehold owner of the Hall and some surrounding land. The Second Respondent ("the Manager") is a tenant owned management company appointed directly in the leases of the Units to manage the Hall. The Third Respondent ("the Estate Manager") is also appointed in the leases of the Units to manage additional areas of land in the wider estate. The Tribunal understand that all three Respondents are tenant owned.

3. In very broad terms, the costs and expenses incurred by the Manager and the Estate Manager are recoverable from the lessees of the Units. A dispute has arisen concerning the provisions in the leases which allow recoverability of these expenses, which the Applicants seek to resolve through this variation application. The Respondents all resist the application.

4. The application was submitted on 30 April 2019. Following a case management conference, directions were issued for disposal of the application on 5 July 2019. A hearing took place on 15 October 2019 at which both parties were represented. This decision is the Tribunal's determination following its consideration of the papers submitted and the submissions and representations made at the hearing.

Inspection

5. The Hall is set in parkland alongside adjoining other building which include residential flats, a few substantial private dwellings, and a nursing home. The whole site is south east of Burton-on-Trent and is accessed via a tarmacked driveway from the A511. It has an interesting history. There has been a mansion in Bretby since 1209, and in 1777 the 5th Earl of Chesterfield demolished the old mansion and erected the present hall. It passed through the families of the Earls of Chesterfield, Lord Porchester and the Earls of Carnarvon until it was acquired by the Wragge family and sold to Derbyshire County Council in 1926. In the interwar years it because a hospital until it was decommissioned and sold to a private developer in the late 20th century. It is a Grade 2* listed building.

6. Between about 2000 and 2006, the Hall was redeveloped for residential use.

7. For the purposes of this case, the key features of the Hall are that it has four wings known as the north, south, east and west wings, with a central courtyard. Vehicular and external pedestrian access to the courtyard is only available through an archway in the west wing. Units in the south, east, and

west wings can access the central courtyard from the internal common parts of those wings. There is no access to the central courtyard from the north wing. Although windows in the north wing overlook the central courtyard, the Tribunal was informed that those at ground level are blank windows.

8. The Units in the south, east and west wings are accessed via external doors into communal areas off which the individual Units have their own front doors. They are set on three floors, with staircases and two lifts serving all three floors. The Units in these wings have the nature of apartments; they are divided horizontally and are accessed via communal corridors or entrance halls.

9. The north wing contains 6 Units and was converted and its Units sold towards the end of the development period; slightly later than the other three wings, though it appears from a schedule of sold units that the Tribunal was provided with that the final sale of some west wing Units took place after the first sale of a north wing Unit. The north wing Units each have their own external front door, accessed from a fenced off and locked garden area situated to the north of the north wing, so that area is inaccessible to the lessees in the south, east and west wings.

10. There are some external garages located next to the north wing garden area. The Tribunal is now aware, and was not told, of the ownership of those garages, save that the First Applicant said he has the use of one of them.

11. In the leases, the Units in the south, east and west wings are described as apartments. There are 24 of them, numbered 1 -23 and 30. They are identified in this decision as the "Apartments". The 6 north Wing Units are described as cottages. They are Unit numbers 24 – 29. They are identified in this decision as the "Cottages". All 24 of the lessees of the Apartments are the "Apartment Lessees" and the 6 lessees of the Cottages are the "Cottage Lessees".

The Landlord and Tenant Act 1987 ("the Act")

12. Section 35 of the Act provides:

> 35 Application by party to lease for variation of lease.
>
> (1) Any party to a long lease of a flat may make an application to [the appropriate tribunal] for an order varying the lease in such manner as is specified in the application.
>
> (2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—
>
> …

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease.

...

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

Details of the variations requested

13. The application is for the Applicants' lease to be varied as follows:

a. To add the words "and the Eleventh Schedule" to the end of the definition of Maintenance Expenses in clause 1.1.11 of the Leases;

b. To add the words "and the Eleventh Schedule" to the end of paragraph 1 of the Seventh Schedule;

c. To add the words "and paragraph 1.1.10 of the Eleventh Schedule" after the words "Sixth Schedule" in line 2 of paragraph 3 of the Seventh Schedule;

d. To add the words "or the Estate Manager" after the words "the Manager" wherever those words appear in paragraphs 5, 6, and 7 of the Seventh Schedule;

e. To add the words "or the Eleventh Schedule" after the words "in the Sixth Schedule" in line 3 of paragraph 5 of the Seventh Schedule;

f. [First Applicant only] To amend the fixed percentage figure of 6.16% given on page 2 of the First Applicant's lease to an amount which when aggregated with the proper contribution for the other leaseholders amounts to 100%.

14. Variations (a) to (e) above are made under section 35(2)(e) of the Act as it is said that the leases make inadequate provision for the recovery by the Third Respondent of its expenses. We describe this element of the application as the "Estate Manager's Costs Recovery Issue". It is an oddity in this case that the Applicant seeks a variation that appears to benefit one of the Respondents, which that Respondent resists.

15. Variation (f) above is sought because the Applicants argue that their leases do not apportion the service charge costs in a rational way and they seek to rectify that alleged error. We shall describe this as the "Apportionment Issue". The Respondents, through their counsel, conceded at a late stage that the current apportionment between the contributing lessees does not allow recovery of 100% of the expenditure, and therefore section 35(2)(f) is engaged.

16. The terms of the leases are relevant to both the Estate Manager's Costs Recovery Issue and the Apportionment Issue. These are now set out.

The Leases

17. There are two forms of lease. One form of lease has been used for the Apartments, and the other for the Cottages. The first form of lease is described as an "Apartment Lease", and the second form as a "Cottage Lease". The detail below about the Apartment Lease is taken from the First Applicant's lease dated 11 April 2003 made between Regional Homes Ltd (1), who was the developer, the Manager (2), the Estate Manager (3) and the First Applicant (4). The detail about the Cottage Lease is taken from a sample lease provided, which is the lease dated 17 December 2003 of unit 27 between the same first three parties as in the Apartment Lease and Andrew Thomas Dollamore and Camille Laurie Sutherland. We have assumed that the Apartments are all let on the same terms as are contained in the Apartment Lease, and similarly that the Cottages are let on the terms of the Cottage Lease.

<u>The Apartment Lease</u>

The land definitions

18. The lease is granted for a term of 125 years for a premium and a ground rent of £150 per annum.

19. There are nine separate definitions of areas of land in the lease, being:

    a. The Development
    b. The Maintained Property
    c. The Estate
    d. The Building
    e. The Properties
    f. The Demised Premises

g. The Communal Areas
h. The Parking Spaces
i. Accessway

20. The Development is all the land in title number DY297957 together with any adjoining land and building in the vicinity which may be added or acquired by the developer.

21. The Estate is defined as:

> "1.1.5 "Estate" means the Lessor's Bretby Hall Park Estate which in this lease means all the land in respect of which the Lessor is or was the registered proprietor under title number DY297957."

22. The Maintained Property is defined in the lease as:

> "1.1.12 "the Maintained Property" means those parts of the Development which are more particularly described in the Second Schedule and the maintenance of which is the responsibility of the Manager and the Estate Manager."

23. The Second Schedule describes the Maintained Property as:

> "FIRST the Parking Spaces the Communal Areas the drying areas (if any) bins porters office and gardeners stores (if any) refuse storage areas SECONDLY (if any) the entrance halls passages landings staircase lifts corridors and other parts of the Building which are used in common by the owners or occupiers of any two or more of the Properties including the carpets or floor coverings therof therein and the glass in the windows of such common parts together with all decorative parts ancillary thereto THIRDLY the structural parts of the Building including the roofs gutters rainwater pipes foundations floors and walls bounding individual Properties therein and all external parts of the Building including all window frames and all Service Installations not used solely for the purpose of individual Properties together with all external decorative parts ancillary thereto FOURTHLY the Estate EXCEPTING AND RESERVING from the Maintained Property:
>
> 1. the glass and windows of all Properties SAVE FOR the external decorative parts thereof
> 2. all interior joinery plaster work tiling and other surfaces and finishings of walls the floors down to the upper side of the joists slabs or beams supporting the same and the ceilings up to the underside of the joists slabs or beams to which the same are affixed to the Properties

3. the Service Installations which exclusively serve the individual Properties and

4. the exterior doors of the Properties SAVE FOR the external decorative parts thereof which for the avoidance of doubt shall form part of the Maintained Property"

24. We note that the Maintained Property includes the Estate, the Communal Areas, the Parking Spaces, and both the communal areas of and the structural parts of the Building. Because the Communal Areas, the Parking Spaces and the Building are all within the area of land comprising title number DY297957, the Maintained Property is all within the Estate. It would appear it is not intended to include such parts of the Building (if there are any) which are not communal areas or structural parts within the definition of Maintained Property.

25. The Building is defined as:

> "1.1.2 "the Building(s)" means the land and the building(s) hatched red on the Layout Plan (for the purpose of identification only) and known as Bretby Hall, Bretby comprising several properties and all structural parts thereof including the roofs joists tiles and other coverings gutters rainwater pipes foundations floors all walls bounding individual Properties therein and ground floor terraces and all external parts of the Buildings and all service installations not used solely for the purpose of individual Properties."

26. The Properties are defined as:

> "1.1.14 "the Properties" means the apartments being units of separate residential accommodation forming part of the Building other than the Demised Premises."

27. The Demised Premises are the individual apartments demised by each separate lease and which are identified in the Third Schedule of each lease and by reference to a plan attached to each lease. The demise includes (a) doors and windows but not external decorative surfaces, (b) all interior non structural faces and finishes up to the underside of the joists, slabs or beams to which they are attached, (c) floors and finishes down to the upper side of the joists slabs or beams supporting them, (d) plaster face of all external structural walls, (e) the internal non-structural walls which divide the property from adjoining properties the common parts of the Building, and (f) half of all internal walls dividing the property from adjoining properties or Communal Areas. It is noted that (e) and (f) appear to be contradictory.

28. The main structural parts of the Building, including the roof, foundations, structural floors, main walls, structural walls and external parts are not included within the Demised Premises.

29. The Communal Areas are defined as:

> "1.1.3"the Communal Areas" means all gardens and grounds forming part of the Maintained Property and shall include the land shown (for the purpose of identification only) hatched green on the Layout Plan to be used on a non-exclusive basis."

30. The Parking Spaces are defined as:

> "1.1.13 "The Parking Spaces" means and includes the car parking spaces on the Development from time to time shown for the purpose of identifications only hatched yellow on the Layout Plan or as designated from time to time by the Lessor in its absolute discretion."

31. The Accessway is defined as:

> "1.1.1"Accessway" means and includes the land shown (for the purposes of identification only) hatched blue on the Layout Plan to be used on a non-exclusive basis (subject always as provided in the Fifth Schedule)."

The lessee's payment obligation

32. The lessees have agreed to make payments for services through these following lease clauses. The demise of the apartment at clause 2.2 of the lease is subject to the lessee:

> "Yielding and paying during the Term by way of rent … on demand by way of additional rent the Lessee's Proportion.

33. In clause 3.1 the lessee covenants with the Manager and the Estate Manager to observe and perform the covenants contained in the Eighth Schedule.

34. Paragraph 1.2 of the Eighth Schedule is a covenant to:

> "pay to the Manager and the Estate Manager or its authorised agent the Lessee's Proportion at the times and in the manner herein provided."

35. Although there is no direct covenant by the lessee to comply with the covenants contained in the Seventh Schedule, that Schedule does contain a paragraph which is expressed as a lessee's covenant as follows:

> "7. The Lessee shall pay to the Manager the Lessee's Proportion of the Maintenance Expenses …"

36. Establishing what the words "Lessee's Proportion" means is clearly crucial to understanding what the lessee has to pay under this lease.

37. Pages 1 and 2 of the lease state that the document is a lease between named parties, followed by some definitions (though these are not expressed to be definitions). The lease then starts again on page 2 by saying it is a lease between the parties already given as the parties, followed by some recitals and then operative clauses. Definitions are set out in clause 1.1 of the lease. There are three definitions of "Lessee's Proportion", one given in the initial set of

definitions on page 2, the second given in clause 1.1.9, and the third set out in paragraph 1 of the Seventh Schedule as follows:

> Page 2 - "The Lessee's Proportion : [a fixed percentage is given which is 6.16% in the First Applicant's lease and 1.84%in the Second Applicant's lease. See Table 1 below for the percentage figures for all leases]"
>
> "1.1.9 "The Lessee's Proportion" means the proportion of the Maintenance Expenses payable by the Lessee in accordance with the provisions of the Seventh Schedule."
>
> Seventh Schedule paragraph 1
>
> 1. The Lessee's Proportion means the amount attributable to the Maintenance Expenses in connection with the matters mentioned in the Sixth Schedule

38. "Maintenance Expenses" are defined in clause 1.1.11 as:

> "the moneys actually expended or reserved for periodical expenditure by or on behalf of the Manager or the Estate Manager or the Lessor at all times during the Term in carrying out the obligations specified in the Sixth Schedule."

The Manager's and the Estate Manager's obligations to provide services – the Sixth Schedule

39. Following on from the definition of "Maintenance Expenses", we now need to establish what obligations on the part of the Manager and the Estate Manager are set out in the Sixth Schedule. One of the difficulties in understanding this lease arises from the fact that in reality the paragraphs in the Sixth Schedule are not obligations; they are descriptions of costs that might be incurred in the management of a residential estate. It is also the case that there are no obligations entered into by either the Manager of the Estate Manager contained in the Sixth Schedule. Their obligations are contained in the Tenth and Eleventh Schedules – see below.

40. The Sixth Schedule is divided into three parts, being Estate Costs, Building Costs, and General Costs. There are no definitions of these categories. We take it to be that the paragraphs within each part are the costs that are intended to be expended under each description.

41. The Estate Costs listed in the first part of the Sixth Schedule refer to:

    1. keeping the Communal Areas which exclusively serve the Development in a neat and tidy condition and tending and renewing any lawns flower beds shrubs and trees forming part thereof as necessary and maintaining repairing renewing and where necessary reinstating any boundary wall hedge or fence (if any) on or relating to the Communal Areas including any benches seats ponds fountains garden ornaments sheds structures or the like;

2. keeping the Accessways, the Parking Spaces, the Communal Areas (again) and the Ground Floor Garden Terraces in good repair and clean and tidy. [There is no definition of Ground Floor Garden Terraces.];

3. repairing, maintaining, inspecting, and as necessary replacing, reinstating or renewing the Accessways, the Parking Spaces and the Service Installations forming part of the Communal Areas.

42. The Estate Costs also include arranging rubbish collection for rubbish on the Communal Areas Accessways or Parking Spaces, electricity, water and sewerage charges and insurance charges for the Communal Areas, Accessways and Parking Spaces which exclusively serve the Development, and ancillary costs (including CCTV, security or fire prevention systems) relating to other communal facilities whether for the benefit of the Building or the Development as a whole.

43. The meaning of most of the items identified with a commencing capital letter in the preceding paragraph have already been given above. "Service Installations" have not been explained. These are:

> "1.1.16 "Service Installations" means sewers drains pipes wires cables ducts and other like media for the supply of water electricity gas (if any) drainage or telephone or for the disposal of foul and surface water or other utilities.

44. The second part of the Sixth Schedule contains the Building Costs. These are:

> "1. Inspecting rebuilding repairing repointing renewing maintaining servicing redecorating recarpeting or otherwise treating as necessary and keeping the Building and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof
>
> 2. Redecorating the external parts of the Building including all doors door frames windows and window frames and carrying out all remedial work to the structure of the Building so often as in the opinion of the Manager is reasonably necessary
>
> 3. Keeping cleaned as may be necessary the common entrance halls passages landing and staircases and all other common parts of the Building (if any)
>
> 4. Cleaning as necessary the external faces of the windows in the Building

5. Arranging if necessary for the emptying of receptacles for rubbish for the use of the lessees of the Building or (at the Managers absolute discretion) employing any caretaker concierge or security personnel

6. Providing inspecting maintaining renting renewing repairing reinstating replacing and insuring the fire fighting appliances (if any) communal telecommunications reception apparatus electronic door entry system(s) lifts and such other equipment relating to the Building (if any) by way of contract or otherwise as the Manager may from time to time consider necessary or desirable for the carrying out of the acts and things mentioned in the Schedule

7. Electricity water and sewerage charges for the Building"

45. The third part of the Sixth Schedule refers to General Costs. There are sixteen paragraphs, essentially allowing charges to be made for costs of management. Importantly, there is an express cost in paragraph 15 whereby the General Costs include:

> "The costs of the Estate Manager of performing its obligations as mentioned in the Eleventh Schedule."

46. Six of the items in the General Costs relate to the Maintained Property, as follows:

1. Insuring any risks for which the Manager may be liable as any employer of persons working or engaged in business on the Maintained Property or as the Manager of the Maintained Property or any part thereof in such amount as the Manager shall reasonably think fit

2. Providing and paying such persons as may be necessary in connection with the upkeep and security and management and running of the Maintained Property …

3. Paying all rates taxes [etc] … in respect of the Maintained Property

…

7. Generally managing and administering the Maintained Property and protecting the amenities of the Maintained Property …

…

13. Such sum as shall be considered necessary by the Manager (whose decision shall be final as to questions of fact) to provide a reserve fund or funds for items of future expenditure to be or expected to be incurred at any time during the Term in connection with the Maintained Property

14. Operating maintaining repairing (if necessary) renewing or replacing the lighting water and power supply apparatus from time to time of the Maintained Property …

The Manager's and the Estate Manager's obligations to provide services – their covenants

47. The covenants of the Manager and the Estate Manager to provide services derive from clause 5 of the lease, in which they covenant, respectively, to perform the obligations on the part of the Manager and the Estate Manager contained in the Tenth and Eleventh Schedules of the lease.

48. The Manager's covenants in the Tenth Schedule are set out in 6 paragraphs. Paragraphs 2 to 6 only impact what service charge is payable tangentially. Paragraph 1 is crucial; the Manager covenants:

> "To carry out the works and do the acts and things set out in the Sixth Schedule as appropriate to each type of dwelling."

49. There are three provisos to this covenant which limit the Manager's liability in certain circumstances, but these limitations are not material to this decision.

50. The Eleventh Schedule contains the Estate Manager's covenant with the Lessee:

> "1.1 To carry out the following works and services …
>
> 1.1.1 repairing, cleaning, maintaining and renewing the Accessways and forecourt serving the Estate including any verges walls or fences which are not the responsibility of any other person to a standard appropriate for the apartments on the Estate
>
> 1.1.2 repairing, cleaning, maintaining and renewing the foul and surface water drain serving the Estate ("the Private Drain") and any service installation (but only insofar as the Management Company shall consider it necessary and the same shall not be the responsibility of any other person)
>
> 1.1.3 repairing, cleaning maintaining and renewing the street lighting serving the Estate ("the Street Lights")
>
> 1.1.4 keeping the communal landscaped areas within the Estate ("the Landscaped Areas") in good order and condition including any necessary inspections, maintenance, renewals, mowing, trimming, pruning, tree surgery, and

complying with all proper requirement of any relevant authority

...

51. The next eight obligations in the Eleventh Schedule deal with insurance, and administration issues and do not directly affect this decision.

The payment mechanism – the Seventh Schedule

52. Under paragraph 7 of the Seventh Schedule, one half of the amount estimated by the Manager of the Lessees Proportion of the Management Expenses is payable to the Manager in advance on 1 January and 1 July in every year throughout the Term.

53. Under paragraph 6, an account for each year's charges for the year to 31 December is to be prepared as soon as is practicable and served on the lessee.

54. Under paragraph 7.2, the lessee must pay any balance due when the account for each year is produced within 21 days, and if there is any credit, that shall be credited against future payments.

The Cottage Lease

Land definitions

55. The Cottage Lease is again granted for a premium with a ground rent of £150 per annum. The term is 999 years as opposed to 125 years for the Apartment Lease. The definitions of Development, Estate, Accessway, and Parking Spaces are the same as in the Apartment Lease.

56. The Maintained Property definition is also identical to clause 1.1.12 in the Apartment Lease, but the provisions of the Second Schedule (to which the definition refers) are not the same.

57. The Second Schedule in the Cottage Lease describes the Maintained Property as (with the differences between the Second Schedule in the Apartment Lease being identified by the deletions in the text below):

> "FIRST the Parking Spaces the Communal Areas ~~the drying areas (if any)~~ bins porters office and gardeners stores (if any) refuse storage areas SECONDLY ~~(if any) the entrance halls passages landings staircase lifts corridors and other parts of the Building which are used in common by the owners or occupiers of any two or more of the Properties including the carpets or floor coverings therof therein and the glass in the windows of such common parts together with all decorative parts ancillary thereto THIRDLY~~ the structural parts of the Building including the roofs gutters rainwater pipes foundations floors and walls bounding individual Properties therein and all external parts of the Building including all window frames and all Service Installations not

used solely for the purpose of individual Properties together with all external decorative parts ancillary thereto ~~FOURTHLY~~ THIRDLY the Estate EXCEPTING AND RESERVING from the Maintained Property:

1. the glass and windows of all Properties SAVE FOR the external decorative parts thereof
2. all interior joinery plaster work tiling and other surfaces and finishings of walls the floors down to the upper side of the joists slabs or beams supporting the same and the ceilings up to the underside of the joists slabs or beams to which the same are affixed to the Properties
3. the Service Installations which exclusively serve the individual Properties and
4. the exterior doors of the Properties SAVE FOR the external decorative parts thereof which for the avoidance of doubt shall form part of the Maintained Property"

58. There is no definition of "Building" but instead there is a definition of the "Adjoining Building". The wording of the definition of that phrase is set out below. We note that it is virtually, but not completely, identical to the definition used in the Apartment Lease to describe the Building. The difference is the non-inclusion of the words deleted in the definition below:

> "1.1.2 "the Adjoining Building(s)" means the land and the building(s) hatched red on the Layout Plan (for the purpose of identification only) and known as Bretby Hall, Bretby comprising several properties and all structural parts thereof including the roofs joists tiles and other coverings gutters rainwater pipes foundations floors all walls bounding individual Properties therein ~~and ground floor terraces~~ and all external parts of the Buildings and all service installations not used solely for the purpose of individual Properties."

59. The definition of "Communal Areas" in paragraph 1.1.3 is identical to that contained in the Apartment Lease, but that definition refers to the "Maintained Property", which has a slightly different meaning in the Apartment Lease to the one contained in the Cottage Lease (see above).

60. The definition of "Properties" is (with additional wording to the definition in the Apartment Lease being shown in italics):

> "1.1.14 "the Properties" means the apartments being units of separate residential accommodation forming part of the *Adjoining* Building *and the Walled Garden House* other than the Demised Premises."

61. Of course, the phrase "Adjoining Building" in the Cottage Lease adopts exactly the same definition as the phrase "Building" does in the Apartment Lease. In

the Cottage Lease, there is no definition of what is meant by "Walled Garden House".

62. The definition of "Demised Premises" is virtually identical in the Cottage Lease to the definition used in the Apartment Lease. The difference is that where the Apartment Lease has used the word "Building", the Cottage Lease uses the words "Adjoining Building" instead. The specific cottage/apartment is described as a "house" rather than as an "apartment", and it is referred to as being "one of the Walled Garden Houses".

The lessee's payment obligation

63. The wording in the Cottage Lease is identical to the wording identified above in relation to the Apartment Lease in respect of the lessee's payment covenants.

The Manager's and the Estate Manager's obligations to provide services – the Sixth Schedule

64. The Estate Costs set out in the first part of Schedule Six are identical to the costs described in the Apartment Lease.

65. The "Building Costs" identified in the second part of the Sixth Schedule differ from the Apartment Lease. The wording below is that used in the Apartment Lease amended to show the wording used in the Cottage Lease:

"1. Inspecting rebuilding repairing repointing renewing maintaining servicing redecorating recarpeting or otherwise treating as necessary and keeping the ~~Building~~ *Demised Premises and the Adjoining Walled Garden Houses excluding the Adjoining Building* and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof

2. Redecorating the external parts of the ~~Building~~ *Demised Premises and the Adjoining Walled Garden Houses* including all doors door frames windows and window frames and carrying out all remedial work to the structure of the ~~Building~~ *Demised Premises and the Adjoining Walled Garden Houses* so often as in the opinion of the Manager is reasonably necessary

~~3. Keeping cleaned as may be necessary the common entrance halls passages landing and staircases and all other common parts of the Building (if any)~~

3. Cleaning as necessary the external faces of the windows in the ~~Building~~ *Demised Premises and the Adjoining Walled Garden Houses*

4. Arranging if necessary for the emptying of receptacles for rubbish for the use of the lessees of the ~~Building~~ *Development* or (at the Managers absolute discretion) employing any caretaker concierge or security personnel

5. Providing inspecting maintaining renting renewing repairing reinstating replacing and insuring the fire fighting appliances (if any) communal telecommunications reception apparatus electronic door entry system(s) lifts and such other equipment relating to the ~~Building~~ *Development* (if any) by way of contract or otherwise as the Manager may from time to time consider necessary or desirable for the carrying out of the acts and things mentioned in the Schedule

6. Electricity water and sewerage charges for the Building"

66. The wording of the third part of Schedule Six in the Cottage Lease is identical to the wording in the Apartment Lease.

The Manager's and the Estate Manager's obligations to provide services – their covenants

67. The obligations of the Manager and Estate Manager in clause 5 of the Lease and the terms of the Tenth and Eleventh Schedule are the same in both the Apartment Lease and the Cottage Lease.

The payment mechanism – the Seventh Schedule

68. The relevant provisions in the Seventh Schedule are also the same in both the Apartment and the Cottage Leases.

General comments

69. Although there is no definition of "Walled Garden Houses" in the Cottage Lease, the phrase (with capitalised initial letters) appears eight times in the lease. In addition, the undefined phrase "Adjoining Walled Garden Houses" appears five times. Despite there being no definition of "Building", the word with a capital initial letter, appears six times in the Lease.

Apportionment

70. All leases (of whichever type – except the leases of apartments 18 and 30) contain a fixed percentage figure on page 2 which confirms the "Lessee's Proportion" applicable to that lease.

71. The figures given in all leases are shown in Table 1 below. It should be noted that flat 18 was originally planned to be a larger size apartment, but towards

the end of the build out period, the developer decided to split it into two apartments, to be numbered 18 and 30. Unfortunately, no "Lessee's Proportion" figures were inserted into either of these leases at their completion. In practice, the lessees of these two apartments have historically been charged 1.5% of the service charge each. Adding that percentage means that the recoverable proportion (by virtue of apartments 18 and 30 voluntarily agreeing each to pay 1.5%) of the service charge costs is 99.7% - i.e. less than the whole of the costs. The parties are agreed that as the recoverable percentage is less than the whole, section 35(2)(f) of the Act is engaged so that a ground for making a variation order in respect of apportionment is made out.

Table 1. "Lessee's Proportions" set out in the leases

	Apt	Date of lease	LEASE %
	1	05/09/2001	10.82
	2	02/08/2002	7.50
	3	06/09/2001	8.04
	4	11/05/2001	3.84
	5	10/07/2001	3.91
	6	15/06/2001	4.65
	7	18/06/2001	5.52
	8	17/11/2000	1.71
	9	27/02/2001	3.40
	10	20/04/2001	0.97
	11	20/04/2001	2.50
	12	02/04/2001	2.32
	13	20/04/2001	1.84
	14	04/01/2001	2.76
	15	09/03/2001	2.28
	16	02/03/2001	1.90
	17	11/04/2003	6.16
	18&30	16/06/2006	
	19	25/09/2002	3.59
	20	30/04/2003	2.64
	21	18/09/2006	3.59
	22	01/11/2002	2.64
	23	18/09/2006	3.26
	24	14/07/2004	1.75
	25	02/02/2004	1.50
	26	14/02/2003	1.50
	27	17/12/2003	1.95
	28	17/02/2005	1.85
	29	12/12/2003	2.30
Total			96.69

Structure of this decision

72. Now that the nature of the application, the law, and the terms of the leases have been identified, we will firstly consider the Estate Manager's Costs Recovery Issue. Secondly, we will consider the Apportionment Issue. That issue requires us to consider firstly whether the leases require that the service charge recovery provisions require costs to be divided differently between the Apartments and the Cottages (as is argued by the Applicants). Once we reach a determination on that issue, we will then need to determine whether we will vary the percentage figure inserted in the Applicants' leases as the "Lessees' Proportion", and if so what figure we will change it to.

Estate Manager's Costs Recovery Issue

73. The issue here is whether the Estate Manager is able to recover its costs. The Estate Manager's costs are the costs it incurs in providing the services set out in the Eleventh Schedule, and of course the Estate Manager has covenanted to perform those services for the benefit of the lessees in clause 5 of the leases.

74. All lessees have covenanted to pay the Lessee's Proportion of the Estate Managers costs in paragraph 1.2 of the Eighth Schedule.

75. The Tribunal understands why the First Applicant does not believe the lease is correctly drafted. The problem is that the definition of Lessee's Proportion refers to the Maintenance Expenses. Those are the expenses incurred (by either the Manager or the Estate Manager) in carrying out the obligations in the Sixth Schedule, and the Sixth Schedule does not contain the obligations of the Estate Manager – those are in the Eleventh Schedule.

76. It is the Manager who has directly covenanted to carry out the works and do the acts and things set out in the Sixth Schedule. The Estate Manager does not provide a covenant in that form. So it does appear as if there is a promise by the Estate Manager to provide services, but the costs of those services are not recoverable from the lessees as the lessees only have to pay their proportion of the Maintenance Expenses, and that term only refers to the costs incurred by the Manager in carrying out the obligations in the Sixth Schedule.

77. There is however a reference to the Estate Managers costs in paragraph 15 of the third part of the Sixth Schedule. That paragraph says simply "the costs of the Estate Manager of performing its obligations as mentioned in the Eleventh Schedule". Unfortunately, this phrase is not expressed as an obligation. It is not qualified in any way by an active verb, such as "Collecting the costs…". So it is not easy to be precise about its meaning.

78. We do, though, note that the definition of Maintenance Expenses makes a direct reference to the moneys expended by the Estate Manager.

79. When interpreting a lease, a Tribunal needs to identify the intention of the parties by reference to what a reasonable person having all the background knowledge that would have been available to the parties, and using the language in the contract, would have understood them to mean (*Arnold v Britton [2015] AC 1619)*.

80. Our interpretation of the leases is that the parties must have intended the Estate Manager's costs to be recoverable from the lessees. That must surely have been the intention behind the covenant in the Eighth Schedule. This is supported by inclusion of the Estate Managers costs in the definition of Maintenance Expenses. And paragraph 15 of the third part of the Sixth Schedule specifically refers to the costs incurred by the Estate Manager in performing its obligations in the Eleventh Schedule. However badly worded the lease is, our interpretation is that it is tolerably clear that the Manager is to collect the costs incurred by the Estate Manager as part of its own costs, using the mechanism in the Seventh Schedule.

81. On the basis of this interpretation, it is not necessary for there to be a lease variation as requested in paragraphs 13(a) to (e) above, and that aspect of the application is refused.

82. We have been told that the Estate Manager's costs are not divided between the lessees in the percentages set out in the leases, but are divided equally. There is a suggestion also that the Estate Manager collects its costs directly from the lessees, rather than through the Manager. We do not think that our interpretation of the leases supports this current practice (if we have correctly identified it), but that is a matter for the parties to resolve between them, and this requires no determination from us.

The Apportionment Issue

The parties' positions

83. Both counsel at the hearing accepted that the aggregate of the proportions in the leases under which the service charges can be apportioned do not total 100% in aggregate, and therefore that section 35(2)(f) of the Act is engaged.

84. On the question to what variation to make to the leases, Mr Dovar argued that the correct interpretation of the leases was to the effect that the costs relating to the Cottages were not costs to which service charge payers in the Apartments should contribute. His case was that floor area should be used to apportion between Units, but that the Apartment owners should pay 100% of the costs of the part of the Hall in which the Apartments are located, leaving the Cottage Lessees to pay for their section of the Hall. In other words, the Cottage Lessees and the Apartment Lessees do not contribute to a common pool.

85. If the Tribunal were to accept this point, Mr Dovar's case was that the lease should be varied so that the First Applicant should pay 6.21% of the reduced costs of providing services just to the Apartments (i.e. split between 24 lessees, not 30). If the Tribunal did not accept this point, and determined that there was a common pool to which all lessees contribute, the First Applicants percentage should be reduced to 5.07%, this being the percentage of the First Applicant's floor area of 2,560sq ft against the total area of 50,525sq ft.

86. Mr Dovar drew the Tribunal's attention to the fact that the Cottage Lease is different to the Apartment Lease, in particular:

    a. The references throughout to use of the expression "Cottage" as opposed to "Apartment";

    b. A different definition of the "Building"; the Cottage Lease does not use that definition, but rather uses the phrase "Adjoining Building". The impact is that the term "Building" in the Apartment Lease refers only to that part of the building in which the apartments are located;

    c. The Cottage Lease does not require the Manager to maintain the Adjoining Building, whereas the Apartment Lease does require the Manager to maintain the Building;

    d. The second schedule in the Cottage Lease excludes reference to the common parts being included within the definition of Maintained Property.

87. The essence of Mr Dovar's argument was that if, as the Respondents' contend, there is no difference in the service charge provisions between the Apartments and the Cottages, why was different wording used in the two lease forms? The Apartment Lessees contribute to different cost headings to the Cottage Lessees and the contributions cannot be taken together in order to calculate the service charge.

88. Mr Howlett did not accept Mr Dovar's interpretation of the leases to the effect that there is no common pool of service charge costs. He pointed out that the definition of both the "Building" in the Apartment Lease and the "Adjoining Building" in the Cottage Lease referred to the whole of Bretby Hall, which on the plan includes the north wing. Mr Howlett agrees that the drafting of the leases is not elegant, but he says the leases work coherently. The monies expended by the Second and Third Respondents fall within the definition of Maintenance Expenses and thus within the "Lessee's Proportion". The Apartment Lease does not treat the Cottages any differently from the rest of the dwellings comprised within the Building as defined.

89. Mr Howlett did agree that the Cottage Lease is problematic with regard to repair and maintenance of Bretby Hall. However, he pointed out that the application is not to make any variations to the leases of the Cottages.

90. On the question of what, if any, variation to make, Mr Howlett pointed out that if the Tribunal were to reduce the First Applicant's percentage contribution, that would increase rather than reduce the difference between the recoverable service charge cost percentage and 100%.

91. Mr Howlett also said that the fixing of the percentage would not appear to have been intended to be based on area alone. In the absence of evidence that there was a common intention that area should be the only criterion, it cannot be said that the Applicants have been prejudiced, or that their proportions are incorrect.

92. He urged the Tribunal to reject the application to vary the Lessee's Proportion.

History of the fixing of the "Lessee's Proportion"

93. The Respondents provided a joint statement setting out the history of the development from which the following account is taken.

94. The developer of the Hall was Regional Homes Ltd, which set the "Lessee's Proportions" contained in the leases. The Respondents do not have personal knowledge of the rationale for these apportionments. However, in February 2002, a group called the Bretby Hall Resident's Steering Committee wrote to all leaseholders. It is unclear what remit this group held, but it appears uncontroversial that the group were at least in possession of information concerning the developer's detailed proposals for the apportionment of service charges.

95. The February 2002 letter said (inter alia):

"1. While we all knew we would have to pay a Service Charge before we signed our lease and moved in, lack of information and some confusion made it impossible to judge whether we would be paying a fair percentage.

2. Regional Homes now say that they discussed several options with CPM who were asked to explain those options to us – they didn't. The principal options were a charge based on unit floor area and a charge based on floor area but modified to account for other factors related to use of services.

3. Regional Homes chose the latter option and instructed CPM and The Smith Partnership [the solicitors who drew up the leases] to apply those figures. The Smith Partnership then added confusion by inexplicably including different figures in some leases.

4. Unsurprisingly there are now some anomalies. People in similar units in Bretby Hall are paying different amounts – up to twice as much. The lowest charge is under 1% and the highest charge is over 10%.

…

5. Examination of the budget shows that about 70% is for services that everyone enjoys and only about 30% is for services that benefit some but not all units. This suggests there should be only a small variation to account for differential use of services.

…"

96. The Tribunal was supplied with a witness statement by Mr Alan Clay, who is now the lessee of apartment 26 (one of the Cottages). He says that he was in discussions with the developer in 2002/2003 concerning the purchase of either apartment 8 or 26. He was provided with a list of 2003 service charges dated 9 August 2002. That list gave the same percentage figures as are set out in Table 1 except that:

a. There are only 29 apartments listed;
b. The figure given for apartment 18 is 3.69%;
c. The figure given for apartment 22 is 2.95% rather than 2.64%;
d. The figure given for apartment 28 is 1.85% rather than 1.86%.

97. To explain (a) above, it is common ground that towards the end of the development period, apartment 18, which is in the west wing, was divided into two apartments, numbered as apartments 18 and 30. No percentage figure for the Lessee's Proportion was inserted into their leases. The lessees are apparently paying 1.5% of the service charge each at present.

98. The Tribunal has not been provided with any further evidence that was contemporaneous to the period in which the leases of the Units were granted which explains or justifies the allocation of the percentages inserted in the leases as the Lessee's Proportion.

99. In their joint statement of case, the Respondents state that the Lessee's Proportion figure in the lease of Unit 9 was overstated by the developer's solicitors, and the figure for Unit 4 was understated, but no further detail was given.

100. There have been after the event efforts to rationalise the Lessee's Proportion figures in the leases. In proceedings between the parties under reference BIR/17UK/LIS/2015/0037, suggestions were made that a number of factors might or did influence the chosen percentage figures. The factors suggested included:

- No access to common areas by the lessees of the cottages;

- Ground floor front doors for some apartments mean no necessity to use the common areas;
- First or second floor apartments should pay more as they have to use lifts / stairwells;
- Lease comes with a garage;
- Volume of an apartment should be taken into account;
- Some apartments have roof terraces and some have gardens (these being all the Cottages and one Apartment);
- Allocation of car parking spaces;
- Access to cellars.

101. The Tribunal was provided with some minutes of the AGM of the Second Respondent held on 18 Nov 2016. There is reference in those minutes to a statement by Mr Harper, company secretary, to the effect that some of the percentage figures inserted in the leases were varied in the negotiations with the first purchasers of each apartment.

102. In practice, the second and third Respondents do charge 100% of their costs to the lessees. The difference between the lease proportions of 96.69% and 100% (i.e. a difference of 3.31%) is achieved by:

a. Charging Units 18 and 30 1.5% each;
b. Charging Unit 22 2.95% rather than 2.64%;
c. Charging Unit 28 1.86% rather than 1.85%, and;
d. Charging Unit 2 7.49% rather than 7.5%.

103. Obviously, the floor areas are accepted by both parties as having at least some relevance to the appropriate apportionment of service charge costs. The parties agreed the floor areas for the Units as set out in Table 2 below. For convenience, the lease proportions already given in Table 1 are also included in Table 2:

Table 2 – Unit floor areas and lease percentages

Apt	AREA	%age of total	LEASE %
1	6217	12.31%	10.82
2	3115	6.17%	7.50
3	3665	7.25%	8.04
4	1938	3.84%	3.84
5	1094	2.17%	3.91
6	1930	3.82%	4.65
7	2428	4.81%	5.52
8	1700	3.36%	1.71
9	1717	3.40%	3.40
10	964	1.91%	0.97
11	888	1.76%	2.50
12	964	1.91%	2.32

	13	929	1.84%	1.84
	14	1149	2.27%	2.76
	15	1149	2.27%	2.28
	16	958	1.90%	1.90
	17	2560	5.07%	6.16
18&30		1500	2.97%	
	19	1490	2.95%	3.59
	20	1226	2.43%	2.64
	21	1263	2.50%	3.59
	22	1090	2.16%	2.64
	23	1292	2.56%	3.26
	24	1478	2.93%	1.75
	25	1185	2.35%	1.50
	26	1272	2.52%	1.50
	27	1824	3.61%	1.95
	28	1603	3.17%	1.85
	29	1936	3.83%	2.30
TOTALS		50524	100.00%	96.69

Discussion

The Tribunal's conclusions on the "common pool" issue

104. The Apartment Lease and the Cottage Lease are identical in structure. The wording is identical save in respect of the differences pointed out above.

105. We considered Mr Dovar's argument that there is no common pool of service charge costs. Save in one respect, we do not accept that there are separate pools of service charge expenditure. Our principal reason is that, whilst all parties accept that the aggregate of the service charge proportions is not 100%, the figure is close enough to indicate that the draftsman was probably striving to achieve that figure.

106. If the Cottage Lessees alone are to be responsible for the Cottages, how are those costs to be divided? Taken together, the percentage contribution from the Cottage lessees only totals 10.85%. Similarly, if the Apartment lessees are responsible for 100% of the costs attributable to the Apartments, how are these to be recovered if the fixed percentages in the leases of the Apartments only total 85.84%? This is a strong indicator against the intention of the draftsman to create separate pools of expenditure. It strongly suggest an intention to create a common pool, even if the actual percentages used have gone wrong.

107. We note that the obligations in the Sixth Schedule cover expenditure on services that are common to both the apartments and the cottages, and in relation to which there is no variance between the wording in the two forms of lease. So, under the first part of the Sixth Schedule, the costs of maintaining

and servicing the Communal Areas, Parking Spaces, and Accessways (which all have common definitions in both forms of lease) are costs to which all 30 lessees contribute in their proportions. Were the proportions to total 100%, that element of the service charge would work correctly.

108. The Applicants' "separate pool" argument also requires that the reference to the Building in the Apartment Lease should mean the Apartments only. We do not accept that argument. The plain words of that definition are that the Building means the land and buildings known as Bretby Hall, Bretby. We think that this must mean the whole of Bretby Hall – all four wings. We are fortified in taking this view by the fact that the plan, even though it is said to be for identification only, clearly marks the whole Hall, including the Cottages, in red hatching. Therefore, any reference in the Apartment Lease to the Building, and in the Cottage Lease to the Adjoining Building, means the whole of Bretby Hall, including the Cottages.

109. Our conclusion is that the leases were intended to create a common pool of expenditure which would be recoverable as a service charge from all lessees at the Hall, apportioned by fixed percentages that should have totalled 100%.

110. In so far as we are able to take it into account, our view is that the extrinsic evidence that we have seen in the marketing material for the Hall, and in the initial discussions about apportionment in 2002 and 2003 whilst leases were still being granted, supports our conclusion in the previous paragraph. The leases are extremely similar, structurally identical, and appointed the same parties to manage both the apartments and the cottages. For instance, the 9 August 2002 schedule of percentages provided by Mr Clay, said to have been provided to him by the developer, did total 100%, which is highly suggestive of an intention to create a common pool.

Why do the leases not achieve 100% costs recovery?

111. We considered the question of what percentage figures should have been used. It is clear that things went awry in the inputting of the percentage figures on the grant of each individual lease. Firstly, the percentages did not total 100% when all the leases were granted, and secondly, not all the leases were in identical form.

112. We do think that something has gone seriously wrong with the drafting of the Cottage Lease. Its literal interpretation is that the Manager does not have a responsibility to the Cottage Lessees to keep in repair the structure of the Hall, including the structure of the part of the Hall in which the Cottages are located. This is because those lessees only have to contribute towards the expenses of the Manager in carrying out its obligations set out in the Sixth Schedule. Paragraph 1 of the second part of that schedule, in the Cottage Lease, does not include an obligation to rebuild, repair and maintain the Hall, including its structural parts.

113. Instead, in the Cottage Lease, the Manager has to maintain the Demised Premises and the Adjoining Walled Garden Houses (paragraph 1 of Part 2 of the Sixth Schedule). Maintenance of the Adjoining Building is expressly excluded. The Demised Premises are the Cottage Lessees' own flats, including the floors, ceilings, carpets, walls, doors and windows. The Tribunal has never seen a long residential lease where a developer has imposed a covenant upon a manager to look after the inside of an apartment and has specifically excluded any responsibility for that manager to look after the structure. We think it should be the other way round; the individual lessee maintains his/her own flat and the Manager maintains the structure. The arrangement in the Cottage Leases is almost certainly in breach of the Council of Mortgage Lender's Handbook, and this would affect the mortgageability of the Cottages. It also conflicts with the lessee's covenant to maintain the Demised Premises that appears in paragraph 5 of the Eighth Schedule to the Cottage Lease. In addition, there is no definition of Adjoining Walled Garden Houses, so the obligation to maintain whatever is intended by that phrase is unclear.

114. As the Cottage Lessees only have to pay their percentage towards the costs incurred by the Manager, which do not include the costs of maintaining and repairing the structure and exterior of the Hall, they would be entitled to refuse to pay that portion of the service charge. But although that might seem advantageous for them, they are in the invidious position of not having any contractual commitment from the Manager to maintain the structure of the Cottages. So as the structure and exterior of the Hall deteriorates, there would be no party to the lease who would have an obligation to repair.

115. We therefore believe the inclusion of an obligation upon the Manager in the Cottage Lease to maintain and repair the Demised Premises was a clear error. It is possible that the developer intended to impose an obligation upon the Manager to maintain and repair the structure of the six cottages together, which the lease draftsman intended to identify through a definition of Adjoining Walled Garden Houses, or possibly just Walled Garden Houses. The difficulty is that if that were so, the lease would have had to be drafted in a very different way. Our tentative view is that the intention of the parties was to have all lessees of whichever part of the Hall make contributions to the maintenance and repair of the whole Hall.

116. What therefore was the purpose of the different wording in the Cottage Lease? It must have been intended for some purpose. We think that there is one difference that is discernible from the drafting. We note the express exclusion in the Cottage Lease of the obligation that appears in paragraph 3 of Part 2 of the Sixth Schedule in the Apartment Lease requiring that the cost of cleaning the common entrance halls passages landing and staircases and all other common parts of the Building be borne by the Manager subject to recovery through the service charge. We also note the exclusion within the definition of the Maintained Property in the Second Schedule of the Cottage Lease of those same areas – the entrance halls passages landings staircases etc. We think that

by not including these costs within the scope of the Sixth Schedule in the Cottage Lease, the draftsman clearly intended to exclude liability for the Cottage Lesees to pay towards the costs of the cleaning of those common areas. That makes logical sense too, as the Cottage Lessees do not use or have access to those common areas.

117. We have therefore reached the following conclusions:

a. The Apartment Lease obliges the Manager to keep the whole of the Hall (i.e. including the Apartments and the Cottages) in repair, though it is unlikely the Manager will be called upon to perform that obligation in respect of the Cottages by the Apartment Lessees.

b. The scheme under both forms of lease is to have a common pool whereby recovery of the costs of performing the services identified in the Sixth Schedule is recoverable from all 30 lessees by fixed proportions totalling 100%.

c. The Cottage Lease is defective in that it contains no obligations upon the Manager to maintain any part of the structure and exterior of the Hall. Similarly, it contains no obligation upon the Cottage Lessees to contribute towards repair and maintenance costs of the structure and exterior of the Hall.

d. It is apparent that the Cottage Lessees were not intended to be required to contribute towards the costs of cleaning the common entrance halls passages landing and staircases and all other common parts of the Apartments.

e. By virtue of the different definition of Maintained Property under the two forms of lease, the Cottage Lessees are also not required to contribute towards any costs incurred under part three of the Sixth Schedule in so far as these relate to the entrance halls passages landings staircase lifts corridors and other parts of the Apartments used in common by two or more lessees including the carpets or floor coverings, the glass in the windows, and all decorative parts ancillary thereto.

f. In the absence of any more sophisticated attempt to draft the leases to reflect the intentions set out above, the developer and the draftsman intended to adopt fixed percentage contributions from all lessees "based on floor area but modified to account for other factors related to use of services". The modification should have reflected the fact that the Cottage Lessees do not have to contribute towards the common areas we have identified above, which we shall call the Common Parts Costs.

g. It is accepted that the existing Lessee's Proportions do not add up to 100% and they are therefore unsatisfactory.

What variation order should we make, if any?

118. We have only been asked to vary the percentage contribution towards service charge costs in respect of the Applicants' leases of apartments 13 and 17. There is no application before us to vary any leases to deal with the defects in the Cottage Lease which we think exist.

119. We have reached the conclusion that there is no logical or rational basis to justify the existing percentage contributions. The percentages used in the leases seem to us to be random. We rely upon the following factors:

    a. Acceptance by the Respondents that the percentages applied to Units 4 and 9 were respectively understated and overstated in the leases by the developer's solicitors;

    b. Inability to identify any consistent methodology for determination of the percentage figures used in the leases;

    c. Analysis of Table 2, which does not relate square footage to percentage contribution in around four fifths of leases. Examples are - Units 8 & 9, which are very similar in size, and located one above the other in the East Wing, yet one is paying nearly double the other and Units 11 and 13 which are similar, yet the smaller unit is paying proportionately significantly more than the other;

    d. The anecdotal evidence that the developers were willing to negotiate smaller service charge contributions to early purchasers.

120. The Respondents have accepted that section 35(2)(f) is engaged, and we consider that we may therefore make a variation order.

121. The essence of the power in section 35 is that a variation order can be made to cure a defect in a lease that falls within the section. Of course, one way of curing the defect would simply be to increase the First Applicant's percentage contribution towards the service charge so that the aggregate of all charges would then be 100%. The Respondents would be content with this approach, though they surmise it is not what the Applicants seek. We reject it. It would be quite unfair for us to do that.

122. Section 35 of the Act is one of the statutory provisions in the Act that allow a lease variation. Where a section 35 application is made, section 36 allows any other party to the lease to make an application to the Tribunal for an order which effects a corresponding variation of other leases as are specified. The option therefore existed for the Respondents (or any of them) to regularise the position in relation to all other leases in the event that we found in favour of

the Applicants. They chose not to do take that option, and that is their right, but that is the solution to an outcome to this application that may not result in the Lessee's Proportions totalling 100%.

123. We also draw the Respondents attention to the provisions of section 37 of the Act, as that provides a mechanism for a lease variation where unanimity amongst lessees is not achieved.

124. Our view is that we should make a variation so that the percentage figure we adopt for Units 13 and 17 is based upon a rationale that, when fairly applied to all other Units, would result in the total service charge proportions totalling exactly 100%.

125. A starting point for a fair rationale is the square footage of each apartment. This a known quantity and was always accepted as being at least a factor in the apportionment figures.

126. We have considered whether garages included within the lease should be taken into account. There in one garage included within the demise of the First Applicant's apartment. However, the garages are located around the outside of the external garden area to the north of the Cottages. They are separate constructions and do not form part of the Hall. They are not included within the area hatched red on the layout plans for either form of lease. The Manager therefore has no obligation to maintain the garages, so each lessee of a garage has the full cost or maintaining and repairing it. It would be unnecessary therefore to impose an additional service charge cost upon a garage owner.

127. Our greatest difficulty in fixing a fair percentage is that we have concluded that the Cottage Lessees, under the wording of their leases, do not have to contribute towards the Common Parts Costs.

128. The only way that we can see that will allow a determination of a single percentage figure without making significant further amendments to the leases is to determine what percentage of the overall expenditure in an average year is spent on the Common Parts Costs and to weight the percentage figures in such a way that the Apartment lessees alone bear those costs in an average year. This would mean that there would be swings and roundabouts; the Cottage lessees may pay too much in one year and too little in another. But the impact will be that the resulting percentages will be proportionately reduced for the Cottage lessees.

129. The better option, requiring carving out of the Common Parts Costs in the service charge demands, is not available because we have only been asked to vary the percentage figure, not for any other variation. It is for the parties to propose lease variations, not for the Tribunal to draft them.

130. We are unable to calculate a single percentage figure as we do not have any evidence on which we can rely to fix what we would regard as a correct percentage figure to insert into the leases of apartments 13 and 17.

131. We therefore direct that within 28 days both parties should make proposals for their preferred scheme which would achieve the objectives we have set out in paragraph 124 above. Their schemes should include any supporting documentation to show how their proposal is calculated, including copies of historical service charge accounts and invoices to identify the Common Parts Costs and the overall service charges in those years.

132. Upon receipt of these proposals, the Tribunal will make a final determination of the percentage figures that should by inserted into the Applicants' leases by way of variation. The Tribunal is willing to make this final determination on the basis of the parties written submissions, and without requiring a further hearing if the parties consent.

133. If no proposals are received within the time scale set out above, the Tribunal will determine that the percentage figures to be inserted by way of variation will be based on floor area alone.

134. As we do intend to make a variation order to the percentage service charge cost payable by the Applicants, we ask the Respondents to reflect on whether they wish to regularise the percentages payable by all lessees so there is a common and rational basis for all the fixed percentages. Should any party wish to propose any alternative redrafting to that proposed by the Applicants, or should any party wish to bring a section 36 or section 37 application to the Tribunal even at this late stage, the Tribunal would endeavour to accommodate such applications.

Appeal

135. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)