FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/22UN/LAM/2022/0002**
HMCTS code (audio, video, paper)	**:**	**P: PAPERREMOTE**
Property	**:**	**Brannam Court High Street, Dedham Colchester, Essex CO7 6DE**
Applicant	**:**	**Katherine Fenton**
Respondent	**:**	**Mary Nicolette Mann (Dr Nicky Hart)**
Type of application	**:**	**Application for permission to appeal**
Tribunal members	**:**	**Judge David Wyatt Mr G F Smith MRICS FAAV REV**
Date of decision	**:**	**3 February 2023**

DECISION

Covid-19 pandemic: description of determination

This has been a remote decision on the papers. The form of remote decision was P:PAPERREMOTE. A hearing was not held because it was not necessary; all issues could be determined on paper. The documents we were referred to are described in paragraph 4 below. We have noted the contents.

Decisions of the tribunal

1. The tribunal has considered the request for permission to appeal based on the grounds of appeal provided and decided that:
   (a) the tribunal will not review its Decision; and
   (b) permission to appeal is refused.

2. In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the party who applied for permission to appeal may make further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission to appeal.

3. Where possible, you should send any such further application for permission to appeal **by email** to Lands@justice.gov.uk, as this will enable the Upper Tribunal (Lands Chamber) to deal with it more efficiently. Alternatively, the Upper Tribunal (Lands Chamber) may be contacted at: 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL (telephone: 020 7612 9710).

Reasons

4. Our substantive decision determining payability of service charges and all matters up to the time of the hearing in relation to the application for appointment of a manager was made on 23 December 2022 (the "**Decision**"). At 21:46 on 20 January 2023, the Respondent sent an application for permission to appeal, setting out their grounds of appeal. We have taken that document, and those described in the Decision, into account. If and to the extent that the application was late because it was received after 5pm on 20 January 2023, we extend the time for the application to the time it was received.

5. We consider that none of the grounds of appeal have any realistic prospect of success. For the benefit of the parties and of the Upper Tribunal (Lands Chamber) (if any further application for permission to appeal is made), we comment below on points raised by the Applicant. Please read these comments with the Decision, which explains the background and the expressions used. References below in [square brackets] are to those paragraphs in the Decision.

General

6. The parties were given ample opportunity to produce any evidence they wished to rely upon, as noted in the Decision [21-22]. Our Decision gives summaries of the critical points and our assessments of the evidence; it is not exhaustive. In particular:

   (a) we took into account the evidence produced to us of conduct before and after the 2019 Decision [15-18], including the criticisms in that decision of the leaseholders and the fact that the Respondent had paid for substantial costs before funds had been advanced. We considered that on the evidence produced about what had been done and what had been sent to leaseholders (by the Respondent personally and, before that, by Whybrow as her managing agents) the leaseholders had probably paid as much as was reasonable to expect them to pay [78]. We understood the

additional difficulties of carrying out work during the Covid pandemic which began after the Respondent had decided to stop using managing agents. However, the Respondent has owned the Property since the early 1990s and remains responsible for what was done by her agents [77];

(b) our inspection was not a survey of the building. What we saw when we inspected was part of the evidence and the parties were given ample opportunity to point out at the inspection anything they wished to refer to at the hearing; and

(c) at the hearing, we asked questions of the expert, Mr Greenwood, and explained that where he was not being questioned his evidence (which was not challenged by the Applicant) was accepted.

Service charge apportionments

7. As in the 2019 Decision, the Applicant relied on Sheffield City Council v Oliver [2017] EWCA Civ 225 and other authorities, as referred to and provided with Miss Gourlay's skeleton argument. In essence, these confirm that under section 27A(6) of the 1985 Act an agreement is void in so far as it provides for a landlord (or the like) to determine a service charge proportion, because that is a question which may be the subject of an application under section 27(A)(1) or (2) to determine payability of service charges, so it is for the tribunal to determine such proportions.

8. The relevant agreement is in the definition of "*Service Charge*" in the lease(s), which begins: "*…the aggregate of such fair and reasonable proportion of the Building Expenses and of the Estate Expenses respectively as the Landlord may from time to time determine…*" and continues as set out at [10]. At the hearing, the Respondent did not dispute that it was for the tribunal to decide the appropriate proportions, in place of the landlord [50]. The Respondent now seeks to challenge this on appeal, referring to "*2021: Criterion v McKinley*". That appears to be a reference to Criterion Buildings Ltd v McKinsey and Co Inc [2021] EWHC 216 (Ch), which relates to commercial premises. Section 27A(6) of the 1985 Act applies in relation to determination of service charges payable under leases of dwellings.

9. We did not say that the Respondent's measurement survey only came to light in 2022. The Applicant said and it was not disputed that the Respondent had set out with her earlier correspondence a summary of the survey and had disclosed the actual survey during the course of these proceedings [46 and 52]. It was not suggested at the hearing that the current proportions were based on rateable values; like the previous tribunal, we were told they had been assessed by the former managing agents based on internal floor areas [50], which appeared likely, and the Respondent said these were probably taken from inaccurate lease plans rather than actual measurements.

10. Our decision was that for the reasons we explained [at 51-55] the evidence produced to us (including the measurement survey produced for the Respondent) was not sufficient to justify changing the proportions which, the Respondent confirms, have been charged throughout her ownership, for more than 25 years, and those proportions were fair and reasonable. That decision relates only to the historical service charges we were asked to determine (under section 27A of the 1985 Act) and potentially, if we ultimately decide to appoint a manager, the service charges which might be collected by that manager on account of estimated costs (under any provisions in a management order under section 24(2) of the 1987 Act).

Name: Judge David Wyatt **Date:** 3 February 2023