FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/45/UC/LIS/2022/0036**
Property	**:**	**9 Walberton Park, The Street, Walberton, Arundel BN18 0PJ**
Applicant	**:**	**Walberton Park Management Company**
Representative	**:**	**Richard Alford Counsel PDC Law**
Respondent	**:**	**John McDermott & Valerie McDermott**
Representative	**:**	**John McDermott**
Type of application	**:**	**Transferred Proceedings from County Court in relation to service charges and administration charges**
Tribunal member(s)	**:**	**Judge Tildesley OBE**
Venue	**:**	**Havant Justice Centre 13 March 2023 12 May 2023**
Date of Decision	**:**	**16 June 2023**

DECISION

Summary of Decision

1. The Respondents are liable to contribute and pay to the Applicant on demand nine per cent of all costs charges and expenses from time to time incurred or to be incurred by the Applicant in carrying out the obligations and each of them under the Fourth Schedule of the lease.

2. The Respondents are liable to pay by way of service charge the sums of £2,892.60 for the period of 25 December 2021 to 24 June 2022 and of £2,322.03 for the period of 29 September 2021 to 24 March 2022.

3. The administration charges of £60 dated 19 November 2021, and £120 dated 26 November 2021 are reasonable and payable by the Respondents.

4. The administration charge of £250 for referral to Property Debt Collection Limited is not reasonable and not payable by the Respondents.

Background

5. The Applicant is the registered proprietor of the freehold property known as Walberton Park, Walberton under Title Number WSX235109. The Applicant is a leaseholders' management company with each leaseholder holding one share in the company. The Respondents are the registered proprietor of the leasehold title to Flat 9 under title number WSX240455.

6. The Applicant started proceedings in the County Court, and claimed the following amounts:

    - Service charge for the period 25 December 2021 to 24 June 2022: £3,214.00.
    - Reserve fund for the period 29 September 2021 to 24 March 2022: £2,581.14.
    - Administration charge, late payment fee 19 November 2021: £60.00.
    - Administration charge, referral fee 26 November 2021: £120.00.
    - Administration charge, referral fee of £250.

7. In addition the Applicant claimed ground rent of £25 in respect of the period 25 December 2021 to 23 June 2022, contractual costs and court fees.

8. On 10 December 2022 Deputy District Judge McCloskey transferred the claim to the Tribunal for determination of those issues falling within its jurisdiction, and also authorised the Tribunal Judge sitting as a Judge of the County Court to deal with all issues in the claim.

9. This decision is concerned with the matters falling within the Tribunal's jurisdiction which are set out in [6] above. The sole issue in dispute is the percentage rate of contribution (Tenant's Proportion) payable by the leaseholder of Flat 9 of the service charge for the property. The lease for Flat 9 specifies a rate of nine per or such other fair proportionate part to be determined by the Landlord. In 2010 the Landlord decided on a rate of 10 per cent for Flat 9. The Respondents argue that the rate of 10 per cent is not fair and equitable and that in default they should pay a rate of nine per cent as specified in the lease. The Applicants dispute this and state that 10 per cent is a fair and proportionate contribution for Flat 9.

10. The Respondents sought to widen their dispute by suggesting that the Tribunal should determine what is a fair and just proportionate contribution of service charge based on the square metre measurement of each flat for all the flats at Walberton Park. In this instance the Tribunal did not have jurisdiction to make declarations or determinations of the amount or proportion of service charges payable by any other flat in the property. The Order of Deputy District Judge McCloskey limited the Tribunal's jurisdiction to the Tenant's Proportion payable by the Respondents as leaseholders of Flat 9 in respect of the service charges claimed.

11. The Tribunal heard the Claim on 13 March 2023 when the parties attended by means of the common video platform. Mr Richard Alford of Counsel appeared for the Applicant. Mr Darren Dalton of Hobdens Property Management, the managing agent, attended as a witness for the Applicant. Mr John McDermott appeared for the Respondent. Mr Richard Whitehead, the former owner of Flat 9 and past Chair of the Board of Directors, and Mr Andrew Melvill Pitt Priest owner of Flat 12 attended as witnesses for the Respondents. The Application went part heard on the 13 March 2023 with the hearing resuming on 12 May 2023. At which Mr Alford, Mr McDermott and Mr Whitehead appeared in person at Havant Justice Centre. Mr Dalton joined the hearing by video link. Mr Priest was unable to attend the resumed hearing.

12. The Applicant had prepared a bundle for the first hearing which was admitted in evidence. The bundle did not include the Respondents' response to the Claim which the Applicant said it had not seen. The Applicant prepared a supplemental bundle for the resumed hearing which included a second witness statement from Mr Dalton. Mr McDermott sent a reply to Mr Dalton's second witness statement. Following the hearing on 13 March 2023 the Tribunal directed that the Applicant was not permitted to supplement its evidence unless permission was given by the Tribunal. At the hearing on 12 May 2023 the Tribunal decided to admit the legal advice and the board minutes referred to at paragraphs 21(c) and 21(g) of Mr Dalton's first witness statement, and permitted examination in chief and cross examination of Mr Dalton on the exhibits. The Tribunal considered that if those documents were not admitted the Applicant would be prejudiced. The

Tribunal did not admit Mr Dalton's second witness statement, and Mr McDermott's reply.

13. Mr Dalton, Mr McDermott and Mr Whitehead gave evidence in person and were cross examined on their evidence. Mr Bob Maddams executor of Mr John Patrick Maddams and owner of Flat 10, Mr Abrahams of Flat 14, Mrs Rosemary Burgess of Flat 15 and Mr Brian and Mrs Carol Osment of Flat 16 provided witness statements. The Tribunal took note of the witness statement but formed the view that it was unable to take account of them because it was dealing solely with the Tenant's Proportion for Flat 9. The Tribunal did not admit the statement of Mr Priest because he was in the Republic of South Africa when he gave his witness statement.

14. The Tribunal gave its decision orally at the end of the hearing on 12 May 2023. Judge Tildesley then sat as a Judge of the County Court and gave judgment in respect of the amounts owing but he reserved his decision on contractual costs to enable Counsel to make submissions on the Court of Appeal decision in *Khan v Tower Hamlets LBC* [2022] EWCA Civ 831.The Defendant was given a right of reply.

The Lease for Flat 9

15. The original lease was dated 16 August 1984 and made between Graham Newman Eyre and Jean Dalrymple Eyre ('the landlord') of the first part, Michael Anthony John Parker and Cynthia Eileen Parker of the second part ('the tenant') and The Walberton Park Management Company ('the company') for a term of 99 years from 25 December 1981.

16. A new lease was granted on 16 July 1999 and made between The Walberton Park Management Company (the Landlord) of the first part and D D Leigh (the tenant) of the second part for a term of 987 years from 16 July 1999.

17. The new lease defines "The Lease as being the one granted on 16 August 1984", and contained the mutual covenants on the part of the Landlord and the Tenant to observe the covenants in the 1984 lease.

18. The Clauses of the 1984 lease dealing with the Tenant's covenants relevant to this dispute are as follows:

> **3(3)(a)** "To contribute and pay to the Company on demand nine per centum or such other fair proportionate part to be determined by the Company (hereinafter called the "Tenant's Proportion") of all costs charges and expenses from time to time incurred or to be incurred by the Company in carrying out the obligations and each of them under the Fourth Schedule hereto as set out in the Notice referred to in paragraph 18 of the Fourth Schedule … (hereinafter called the "service charge")…"
>
> **3(3)(b)** If required by the Company pay to the Company on demand such sum in advance and on account of the service charge (hereinafter

called the "Advance Payment") as the Company shall in its discretion specific as being a fair and reasonable interim payment…"

3(16) "To pay to the Landlord on demand all costs charges and expenses (including legal costs and surveyors' fees) which may be incurred or otherwise become payable by the Landlord in respect of the preparation of a schedule of dilapidations or under or in contemplation of any proceedings in respect of the Apartment under sections 146 or 147 of the Law of Property Act 1925 or in the preparation or service of any notice thereunder respectively notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court"

3(28) To indemnify and keep the Landlord and the Company full indemnified during and after the term of this lease against all actions proceedings costs claims demands expenses losses and all other liabilities of any nature whatsoever arising as a direct or indirect result of the any failure by the Tenant to observe and perform his obligations under or by virtue of this lease.

The Facts

19. Walberton Park is a residential development located in three acres of grounds centred around an 1820's Grade 2* Star Listed building designed in Greek Revival Style by Sir Robert Smirke and known as Walberton House. In 1982 Sir Graham Richard Eyre QC, the then owner of Walberton House[1] obtained planning permissions to build eight apartments on the west side of the Old House which became known as the West Wing. The design of the West Wing reflects the style of the Old House and is constructed over two floors with four flats on each floor. Sir Graham Eyre then applied for and was granted planning permission to build a new house on adjacent land, naming it Walberton House and renamed the old property Walberton Park. Subsequently Sir Graham Eyre converted the Old House into five flats and two Mews houses. In 1983 the freehold of Walberton Park was offered to the residents who formed a management company, Walberton Management Company Limited ("the Company"), to buy the freehold. Each dwelling owner holds one 15th of the shares in the Company.

20. The leases of the eight flats in the West Wing stated a percentage that each leaseholder had to pay towards the overall costs of the estate which represented in total 44 per cent of the total charge. The owner then of the Old House presumably contributed the remaining 56 per cent of the expenditure. When the Old House was converted into seven units, the total contribution of those seven units towards the service charge as per their individual leases came to 54 per cent which left a shortfall of two per cent. This shortfall was not identified for over 20 years because of decision taken by the Company in 1985.

[1] Referred to as "the Old House".

21. Around August 1985 the Company agreed a scheme of apportionment of service charges for the 15 Flats[2] on Walberton Park. The scheme of apportionment took account of the rateable values for the Flats and their approximate sizes. This produced an outcome of six per cent for four Flats and seven per cent for the other four Flats in West Wing, and a range of contributions from five and half to eight per cent for the seven Flats in the Old House. Flat 9 had the highest percentage contribution of eight per cent. The split between the West Wing and the Old House was 52:48 per cent for their respective contributions to the service charge. This scheme of apportionment remained in place until 2007.

22. On 23 July 2007 an Extraordinary General Meeting (EGM) of the Management Company decided that the leaseholders in the West Wing would pay the percentage service charge contribution as specified in their individual leases, which replaced the scheme of apportionment agreed in 1985. The leaseholders of the West Wing had called for the EGM because they believed that they were paying an unfair share of the service charges which was affecting the sale of their Flats. The resolution proposing to revert to the percentage contribution specified in the leases was carried by eight votes to seven votes with the leaseholders of the West Wing voting in favour and the leaseholders of the Old House voting against.

23. The effect of the Vote at the EGM was that there was a shortfall of two per cent in respect of the overall service charge for Walberton Park. At the Board Meeting following the EGM the Board proposed that all properties should revert to the percentage service charge contribution cited in the respective leases with the exception of Flat 15 whose contribution should rise by two per cent. This proposal was put out to consultation by the then managing agents, Whitehead PMS.

24. The Board took advice from Mr Kenny of CK solicitors on various dates from 2007 to 2009 on the apportionment of service charges and its proposal to increase the percentage for Flat 15. Mr Kenny advised the Board that if the leaseholder of Flat 15 took the matter before the Tribunal there was substantial risk that the decision to increase the service charge to Flat 15 by two per cent may be unreasonable. Mr Kenny, however, was in favour of the Company issuing an application to the Tribunal to resolve the overall dispute regarding apportionment of service charges. Mr Kenny stated that such a course of action had the advantage of a Tribunal decision binding on all the parties.

25. In March 2010 Mr Dalton of Hobdens Property Management which had replaced Whitehead PMS as managing agent took legal advice from a different firm of solicitors, Thomas Eggar LLP. The solicitors were in broad agreement with the advice given by CK Solicitors but considered the option to vary the leases by application to the Tribunal was unlikely to succeed and the costs of taking the action and entering into 15 Deeds

[2] 15 Flats include the two mew houses in the Old House.

of Variation were considerable. Thomas Eggar advised that under the terms of the lease that the Board could set the level of contributions and this could be communicated by letter. Thomas Eggar suggested approaches that might be considered reasonable including having the property surveyed in order to calculate the proportion of floor area as against total floor area. Thomas Eggar advised against the Old House taking on the additional two per cent, and splitting the two per cent equally between the leaseholders. Thomas Eggar stated that the decision of the Board could be challenged by a leaseholder before the Tribunal. Thomas Eggar added that a Tribunal would be very sympathetic to the Company wanting to achieve 100% recovery and might only go against any decision of the company if it was manifestly unfair. Thomas Eggar urged the Board to stand up to their responsibilities to ensure that the service charges can be collected. The best approach would be to commission a survey and be bound by and implement its recommendations as to apportionment. Finally Thomas Eggar advised that there should be some consultation with resident members of the Company.

26. On 1 April 2010 the Management Company instructed Hurdley Atkins, Chartered Surveyors, to determine appropriate service charge payments by way of percentage allocation to rectify drafting errors in the original individual apartment leases.

27. Hurdley Atkins approached the task by deciding that the contribution of each individual Flat would be derived from the internal floor area of the Flat as described in the lease as a proportion of the total internal area of all the Flats.

28. Hurdley Atkins was also asked to comment on a solution proposed by the Board to deal with the two per cent shortfall which was

> Apartment 11-to increase by 1.5% to 8.5%.
> Apartment 15- to increase by 1.5% to 8.5%
> Apartment 16- to decrease by 1% to 8%.
> All other apartment contributions to remain as existing.

29. Hurdley Atkins commented that the benefit of this proposal would resolve the two per cent shortfall if all leaseholders were in agreement. Hurdley Atkins suggested that the proposal could, therefore, be put forward for a vote.

30. Hurdley Atkins, however, advised the following on the apportionment of service charges:

> "I am aware there are concerns on the apportionment of service charge costs between the purpose built accommodation and the older converted apartments which in my opinion could be addressed as follows.
>
> The annual service charge budget be apportioned separating the cost specifically between the old and new buildings whilst continuing equal percentage payments for all fifteen apartments where the use and

enjoyment is equal for all individual apartments regardless of size, position, age etc.

These costs would include maintenance of the communal garden areas, paths, driveways, garages and garage compound.

Each apartment would pay a 1/15th share of these costs.

Maintenance of the building structure fabric, including decorations and cleaning/lighting of the common areas, be separated such that apartment numbers 1 to 8 are responsible for that part of the building with the remaining apartments forming the older converted accommodation being responsible for the costs involved in maintaining that part of the building".

31. Hurdley Atkins set out their assessment of the percentage allocations based on the individual floor areas for the maintenance of the building structure in Schedule II of the report. Hurdley Atkins' calculations removed from the floor areas for the Flats external terraces but included balcony areas, and cellars. Schedule II provided separate percentage allocations for the Old House and the West Wing for the costs of maintaining the individual parts of the building. Under Schedule II the recommended percentage for Flat 9 was 19.5 per cent of the costs for maintaining the Old House shared between the seven leaseholders.

32. On 14 June 2010 the Directors of the Company held a board meeting to discuss agreement of service charge allocation following receipt of the Hurdley Atkins' report. The meeting was chaired by Mr Whitehead, the then owner of Flat 9. Four other directors were present: Ms Stopforth, Dr Whitehouse and Mr Dobbie all of the West Wing and Ms Crofts of Flat 16 in the Old House. Mr Dalton did not attend the meeting.

33. The minutes recorded that the only item on the agenda was to agree on percentages of service charges to be allocated to each property. Ms Stopforth tabled a proposal for the lease percentages which was supported by a spreadsheet detailing the past expenditure of the West Wing and the Old House respectively[3]. Mr Whitehead expressed his unhappiness with Hurdley Atkins' suggestion to include balconies and cellars in the calculation of the floor area, and proposed they should be excluded. The Board did not agree with Mr Whitehead. The minutes recorded Ms Stopforth's suggestion that the Board should stick to the advice of the surveyor as this would cause problems in the future if any leaseholders decided to challenge the Board's decision. Ms Crofts proposed that the percentages which Ms Stopforth had circulated were accepted by the Board. Four directors voted for the proposal with Mr Whitehead against. The proposal was as follows:

Apartment 9 – to increase by 1% to 10%
Apartment 11 – to increase by 1% to 8%

[3] Mr Dalton stated that he did not have a copy of the spreadsheet prepared by Ms Stopforth for the board meeting.

Apartment 12 – to increase by 1% to 8%
Apartment 15 – to increase by 1% to 8%
Apartment 16 – to reduce by 2% to 7%

34. On 23 June 2010 Mr Dalton informed the leaseholders of the Board's decision on 14 June 20210 by letter which read as follows:

> "As you are aware, the Board of Walberton Park Management Co Ltd have been considering how to resolve the problem of the lease percentages not adding up to 100%.
>
> Following legal advice, it was agreed to employ a Chartered Surveyor to provide an opinion on how the service charges should be apportioned and the Board have now considered this advice and reached a conclusion.
>
> With reference to your lease, Clause 1(3)(a) states as follows:
>
> "To contribute and pay to the Company on demand x% or such other fair proportionate part to be determined by the Company of all costs, charges and expenses…"
>
> Having given due regard to the surveyor's advice, the Board have concluded that the following changes to the lease percentages will apply from the start of the new financial year on 1st July 2010:
>
> Apartment 9 – to increase by 1% to 10%
> Apartment 11 – to increase by 1% to 8%
> Apartment 12 – to increase by 1% to 8%
> Apartment 15 – to increase by 1% to 8%
> Apartment 16 – to reduce by 2% to 7%
>
> The percentages paid by all other apartments will remain as per their leases".

35. Mr Dalton considered that the Board had acted more than reasonably and responsibly in trying to resolve an issue that had affected the Development since about 1985. According to Mr Dalton, the Board had followed the legal advice by appointing a surveyor and had stood up to its responsibilities to collect a service charge. In his view, the Board reached a pragmatic solution which had lasted for more than 12 years. Mr Dalton pointed out that the Respondents were fully aware of the history of the matters because they had lived in Flat 10 before purchasing Flat 9 in March 2017, and since then had been paying the service charge in full up and until September 2021 at the rate of 10 per cent. Mr McDermott had also been a past Chair of the Board.

36. Mr Dalton was not present at the Board Meeting on 14 June 2010. Mr Dalton did not know the origin of the proposal put before the Board by Ms Stopforth. Mr Dalton was not aware of any director declaring a conflict of interest at the Board meeting. Mr Dalton accepted there had been no consultation with leaseholders about the proposal.

37. Mr McDermott accepted that he and his wife owned the largest flat in the building, and that they were happy to pay a properly assessed percentage of the annual service charge. What they were unhappy about was that with 15 lessees in total seven lessees were subsidising eight lessees. In Mr McDermott's view this was not just, fair or equitable and he was seeking to amend this injustice that had been in existence for the last 12 years.

38. Mr McDermott insisted this was not a matter of affordability and they were prepared to pay, immediately, whatever the Court decided was their legal liability. Mr McDermott was concerned about the amount of punitive costs incurred by the Respondent. Mr McDermott asserted that all they had been asking was for the Board to engage with them to sort out an historic maladministration matter to the benefit of all lessees on the Walberton Park Estate. Mr McDermott said he had been raising this matter for a number of years since moving in to Flat 9. Mr McDermott produced a letter from his solicitors, Dean Wilson LLP dated 17 January 2022 to the Board requesting it to consider an application to the Tribunal for a variation of the leases at Walberton Park to rectify the issue of apportionment once and for all. Mr McDermott pointed out that after the decision by the Board in April 2010 most of the leaseholders at the Old House had sold up and moved on.

39. Mr McDermott said that the Board had ignored the recommendations of the Hurdley Atkins report which he alleged was due to the inbuilt majority of directors from the West Wing on the Board. Mr McDermott produced a Chart setting out the inequity of the management charges between Flats 1-16. Mr McDermott relied on column C which he described as "Hurley" True %" which gave 8.91 per cent as the allocation for Flat 9. Mr McDermott had calculated this percentage on the internal floor areas of the flats but had excluded the floor area of the cellar from the calculation.

40. Mr McDermott disagreed with Counsel's proposition that the costs for maintaining the Old House would inevitably be higher than the costs for maintaining the West Wing. Mr McDermott pointed out that he had recently contributed to the costs of replacing the roofs of the West Wing.

41. Mr McDermott said that he had made payments in connection with the service charge: £700 (27 January 2022), £2,374.08 and £25, (29 January 2022), £2,423.09 and £2,399.6 and £24 (19 February 2022) which had been returned by the Managing Agent. However, Mr Dalton accepted that following legal advice the Managing Agent had accepted payments of service charge from the Respondents from April 2022.

42. Mr Whitehead stated the he joined the Board in October 2007 and it was then he realised how "toxic" the atmosphere was between the residents of Flats 1-8 (West Wing) and Flats 9-16 the Old House. Mr Whitehead was of the view that attempts by the Board to resolve the

"missing" two per cent and the unfair original apportionment of the percentages amongst the 15 properties were constantly thwarted by the residents of the West Wing. Mr Whitehead believed that the residents of the West Wing were not prepared to countenance any alteration to the service charge percentages in their leases because they did not consider they should pay for the higher costs associated with the Old House.

43. Mr Whitehead asserted that at the Board Meeting on the 14 June 2022 the three directors from the West Wing ignored the lack of relationship between the square metres of each apartment and the service charge being levied against them and also ignored their original proposal put to Mr Hurdley regarding how to solve the 2% shortfall. They, instead, decided to increase the percentage of Flats 9,11,12, and 15 by one per cent and to reduce Flat 16 by two per cent. Mr Whitehead said that Ms Croft of the Old House supported the Directors of the West Wing because she would achieve a two per cent reduction in her service charge.

44. Mr Whitehead said that the toxic atmosphere created by certain leaseholders in the West Wing was a major reason for him selling Flat 9 in November 2010.

45. Mr Dalton stated that the charges of £50 plus VAT and £100 plus VAT imposed on 19 November 2021 and 26 November 2021 represented the reasonable costs of the managing agent in monitoring the Respondent's accounts, issuing reminder letters and ultimately referring the matter to a solicitor. Mr Dalton pointed out the agent had not charged for the first reminder letter and had warned the Respondents of these costs if they did not settle their account. The reminder letters related to the demand for the contribution to the West Wing reserve fund in the sum of £2,666 dated 20 September 2021, and payable by 11 October 2021. The statement of account for Flat 9 revealed that no payments were made in respect of the service charges demanded from 29 July 2021 to 5 April 2022.

46. The Applicant also claimed a £250 referral fee as an administration charge which was for the instruction of a professional debt collection agency, namely, Property Debt Collection Limited to act on behalf of the Claimant in order to collect the outstanding arrears. Mr Dalton when questioned did not understand the £250 referral fee. The Tribunal formed the impression that Mr Dalton had instructed solicitors to pursue the debt not Property Debt Collection Limited which is a connected company of the firm of solicitors instructed. The letter of 26 November 2021 addressed to the Respondents explicitly stated that solicitors had been instructed to pursue the debt for which an administration charge of £100 plus VAT had been imposed.

Consideration

47. The recent decision of the Supreme Court in *Williams v Aviva Investors Ground Rent GP Limited* [2023] UKSC 6 established that a clause in the lease which permits landlords to reapportion service charges is not caught by the anti-avoidance provision in section 27A (6) of the 1985 provided the clause does not exclude the jurisdiction of the Tribunal. Lord Briggs JSC said at [32] and [33]:

> "32 I have come to the conclusion that to allow subsection (6) to enlarge in that way the nature and type of questions before the FtT under section 27A(1) and (3) is to put the anti-avoidance cart before the jurisdictional horse. In my judgment it was not the purpose or effect of section 27A(6) to deprive that form of managerial decision-making by landlords of its ordinary contractual effect, save only to the extent that the contractual provision seeks to make the decision of the landlord or other specified person final and binding, so as to oust the ordinary jurisdiction of the FtT to review its contractual and statutory legitimacy. I therefore consider, for the reasons given above, that the Oliver case, and the two decisions that the Court of Appeal followed in that case were, to that extent, wrongly decided.
>
> 33 Applied to the provisions in issue in the present case, the construction which I now consider to be correct applies as follows. Those provisions gave the landlord two relevant closely related rights: first to trigger a re-allocation of the originally agreed contribution proportions and secondly to decide what the revised apportionment should be. In both respects the landlord is contractually obliged to act reasonably. The FtT decided that the landlord had acted reasonably in making the re-apportionment which was challenged, and it is not suggested that it fell foul of any part of the statutory regime, apart only from section 27A(6). But that subsection did not avoid the power of the landlord to trigger and conduct that re-apportionment, because the jurisdiction of the FtT to review it for contractual and statutory legitimacy was not in any way impeded. The original question, whether there should be a re-apportionment and if so in what fractions, was not a question for the FtT within the meaning of section 27A(6). The question for the FtT was whether the re-apportionment had been reasonable, and that question the FtT was able to, and did, answer in ruling on the tenants application under section 27A(1)".

48. The questions for the Tribunal in this case are (1) whether the decision taken by the Board on 14 June 2010 to increase the Tenant's Proportion of Flat 9 from 9 per cent to 10 per cent complied with clause 3(3)(a) of the Lease; and (2) whether the decision was reasonable as understood in the context of the statutory protections given to long leaseholders under the 1985 Act. In this regard the Tribunal adopts the construction of reasonableness as applied by the Court of Appeal in *Waaler v Hounslow LBC* [2017] EWCA Civ 45. Thus reasonableness has to be determined by refence to an objective standard not by the lower standard of rationality. The landlord's decision-making process is a relevant factor but this must then be tested against the outcome of that decision.

49. The Tribunal finds the following facts:

a. Around August 1985 the Company agreed a scheme of apportionment of service charges for the 15 Flats[4] on Walberton Park. The scheme of apportionment took account of the rateable values for the Flats and their approximate sizes. This scheme remained in place until 2007.

b. There had been longstanding tensions between the residents of the West Wing and of the Old House about their respective shares of the service charge. This issue came to the fore at the 2007 EGM when the residents of the West Wing voted en masse to revert to the percentage service charge allocations in the lease. The outcome of the vote was that there was a two per cent shortfall in the overall service charge for the property.

c. The Board's focus from 2007 was to find a solution to the two per cent shortfall. The Board took advice from Mr Kenny of CK solicitors who was in favour of the Company issuing an application to the Tribunal to resolve the overall dispute regarding apportionment of service charges. The Board decided not to follow Mr Kenny's advice.

d. Following the appointment of Hobdens Property Management as managing agent in around 2010 Mr Dalton instructed a different firm of solicitors Thomas Eggar LLP to advise on the two per cent shortfall and the apportionment issue. Thomas Eggar considered that the best course was to commission a survey in order to calculate the proportion of floor area of individual flats against the total floor area, and be bound by and implement the recommendations on apportionment. Thomas Eggar also advised that there should be some consultation with resident members of the company. Thomas Eggar advised against the leaseholders of the Old House taking on the additional two per cent.

e. The Board accepted the advice of Thomas Eggar to commission a survey and appointed Hurdley Atkins, Chartered Surveyors, to determine appropriate service charge payments by way of percentage allocation to rectify drafting errors in the original individual apartment leases.

f. Hurdley Atkins advised that the Board should consider apportioning the service charge by separating the cost specifically between the old and new buildings whilst continuing equal percentage payments for all fifteen apartments where the use and enjoyment was equal for all individual apartments regardless of size, position, age etc. The shared costs would comprise the costs of maintaining the communal garden areas, paths, driveways, garages and garage compound.

[4] 15 Flats include the two mew houses in the Old House.

g. Despite the professional advice received from solicitors and the chartered surveyor, the Board was intent on finding its own solution to the two per cent shortfall. The Board first proposed that Flat 15 should bear the whole two per cent. This was then followed with a proposal increasing the contributions of Flat 11 and Flat 15 by one and half per cent with a corresponding one per cent decrease in Flat 16. The eventual proposal which was agreed at the Board involved increases of one per cent for Flats 9, 11, 12 and 15 with a decrease of two per cent for Flat 16.

h. The Board's decision to increase the percentage contributions for Flats 9, 11, 12 and 15 with a decrease for Flat 16 flew in the face of the professional advice received from Thomas Eggar, solicitors, that the Board should not impose the two per cent shortfall on the leaseholders of the Old House.

i. The Applicant adduced no evidence why the Board had included Flat 9 in the proposal put before it at the meeting on the 14 June 2010. It appeared to the Tribunal that the proposal had come "out of the blue". Flats 9 and 11 had not been mentioned in the previous two proposals considered by the Board.

j. The Board's decision had no basis in the advice given by the Hurdley Atkins which advocated a tiered system of apportionment split between shared services and the specific maintenance requirements of the West Wing and the Old House.

k. The minutes of the Board Meeting on 14 June 2010 recorded that the only item on the agenda was to agree on percentages of service charges to be allocated to each property. The Board did not follow its brief, and failed to consider the apportionment of service charges as a whole.

l. The Board did not consult with the resident members of the Company and presented them with a fait accompli. The Board in so doing ignored the advice of Thomas Eggar, solicitors, about the desirability of undertaking consultation with residents.

m. The Tribunal concluded that the ongoing tensions between the residents of the West Wing and the residents of the Old House, the unwillingness of the West Wing Residents to depart from the service charge proportions in their leases, and the inbuilt majority of West Wing directors on the Board exerted undue influences on the decision reached on the 14 June 2010. This had the effect of blinkering the Board's approach to focus on the Old House rather than looking at the development as a whole when exercising its power to determine the contributions payable by the leaseholders to the service charge.

Whether the Applicant acted in accordance with the terms of the lease?

50. Clause 3(3)(a) provides:

> "To contribute and pay to the Company on demand nine per centum or such other fair proportionate part to be determined by the Company (hereinafter called the "Tenant's Proportion") of all costs charges and expenses from time to time incurred or to be incurred by the Company in carrying out the obligations and each of them under the Fourth Schedule hereto as set out in the Notice referred to in paragraph 18 of the Fourth Schedule … (hereinafter called the "service charge")…"

51. Under clause 3(3)(a) the default position for the Tenant's Proportion for Flat 9 and the other Flats in the development is the percentage specified in the leases for the individual flats. Clause 3(3)(a), however, gives the Landlord the authority to depart from the specified percentage in the lease and set a different Tenant's Proportion. The Landlord must exercise this power in accordance with the terms of clause 3(3)(a) in order to give its decision contractual legitimacy.

52. The constraint imposed on the Landlord by clause 3(3)(a) is "such other fair proportionate part". The Tribunal construes the constraint as requiring the Landlord to consider changes to the Tenant's Proportion in the context of the development as whole. It follows from the wording "fair and proportionate" that there must be a common denominator underpinning the Landlord's designated scheme of apportionment so that a comparative assessment can be made between the Tenant's Proportion of all 15 Flats to satisfy the test of fair and proportionate.

53. Thus it was not possible for the Applicant to change the Tenant's Proportion for Flat 9 on 14 June 2010 unless the change was referenced to the Tenant's Proportion for all the Flats on the Development. This reference was essential in order to assess whether the change to the Tenant's Proportion for Flat 9 was fair and proportionate.

54. The Board on the 14 June 2010 applied its power under clause 3(3)(a) to a selected number of Flats including Flat 9. The changes approved to the Tenant's Proportion of those Flats by the Board were not supported by a rationale that applied across the Tenant's Proportions of all the Flats on the development. The Tribunal is satisfied that the drivers for the Board's decision were to find a solution to the two per cent shortfall, and that the shortfall should be borne by the leaseholders of the Flats in the Old House.

55. The Tribunal concludes that the Board exercised its power under clause 3(3)(a) selectively rather than to the development as a whole. The Tribunal, therefore, finds that the Applicant's decision to increase the Tenant's Proportion to 10 per cent for Flat 9 failed to meet the threshold of "fair and proportionate" and was not in accordance with the requirements of clause 3(3)(a).

56. The Tribunal's construction of clause 3(3)(a) is supported by the previous actions of the Applicant. In 1985 the Applicant introduced a development wide apportionment scheme which was based on rateable value and the size of the individual flats. In 2007 following a vote of its members the Applicant abandoned the development-wide scheme and reverted to the Tenant's Proportions as specified in the individual leases. This is how clause 3(3)(a) should operate either a development wide apportionment scheme with a common denominator or the default position of applying the percentages for the Tenant's proportion in the leases. In this case the apportionment scheme approved by the Board on the 14 June 2010 was a mishmash of Tenant's Proportions as specified in the lease and a range of arbitrary Tenant's Proportions with no common denominator except for their location in the Old House.

57. The Tribunal takes comfort from the professionals advising the Board on apportionment. The solicitors and the chartered surveyor advocated development wide schemes. The solicitors suggested one based upon the common denominator of floor areas of the individual Flats. The chartered surveyor proposed a more sophisticate scheme but one which had a clear rationale.

Whether the Applicant's Decision to Increase by One percent the Tenant's Proportion for Flat 9 was reasonable?

58. The Tribunal's enquiry focusses on the reasonableness of the Board's decision on the 14 June 2010 to increase the Tenant's proportion for Flat 9 by one per cent. Mr Dalton on behalf of the Applicant asserted that the Board had acted more than reasonably, and responsibly, in trying to resolve an issue that had affected this development since about 1985. The Tribunal finds otherwise.

59. The Tribunal found that the Board ignored the advice of Thomas Eggar, solicitors, that it should not impose the two per cent shortfall on the leaseholders of the Old House. Next the Board paid no heed to the advice given by Hurdley Atkins which advocated a tiered system of apportionment split between shared services and the specific maintenance requirements of the West Wing and the Old House. Further the Board's proposal to increase the Tenant's Proportion by one per cent for Flat 9 came "out of the blue" and had not been included in the previous two proposals of the Board The Tribunal concluded that the Board was intent on finding its own solution to the problem of the two per cent shortfall and was unduly influenced by the ongoing tensions between the residents of the West Wing and the Old House. This had the effect of blinkering the Board's approach to focus on the Old House rather than looking at the development as a whole when exercising its power to determine the contributions payable by the leaseholders to the service charge. Finally the Board did not consult with the residents at Walberton Park about its proposal which again was contrary to the advice given by its solicitors.

60. Counsel for the Applicant stated that if the measurements of the internal floor area for Flat 9 were compared with the total internal floor area of the Flats as set out in the Hurdley Atkins report it produced a percentage of the whole of 9.93 per cent. Counsel argued that this demonstrated that a Tenant's Proportion of 10 per cent for Flat 9 was a fair proportion. The problem with Counsel's submission is that the Tribunal found on the evidence that the Board disregarded the Hurdley Atkins report. Although the Board Minutes of 14 June 2022 recorded Ms Stopforth as saying the Board should stick to the advice of the surveyor, the decision of the Board had no connection whatsoever with the recommendations of the Hurdley Atkins report. In fact the figure of 9.93 per cent did not feature at all in the report.

61. The Tribunal levels the same concerns with Counsel's reliance on other factors that Counsel says the Board would have been entitled to have regard to when making its decision. These included "the fact" that the Old House had historically been more costly to maintain and that there was no reason why the service charges should necessarily be equally split between the Old House and the West Wing. In support of the latter Counsel relied on the original split service charges under the leases of 44 per cent (West Wing) and 54 per cent (Old House). The Tribunal observes that there is no evidence that the Board had regard to these factors when reaching its decision on 14 June 2023. Interestingly Mr McDermott did not accept Counsel's suggestion that the Old House was more costly to maintain than the West Wing.

62. The Tribunal is obliged to make its decision on reasonableness on the evidence of what took place at the Board meeting on 14 June 2010 and at the preceding events. It is not open to the Applicant to rely on ex post facto evidence to justify its decision.

63. The Tribunal notes that the current arrangements for the apportionment of service charges between the 15 Flats have been in place for almost thirteen years. The Applicant did not rely on this fact in support of its case.

64. The Tribunal returns to its findings on the decision making process of the Board in determining the Tenant's Proportion for Flat 9. The Tribunal found that the Board did not have regard to the professional advice received, failed to consult the residents and took account of irrelevant factors. The Tribunal is satisfied that the Board's decision was irrational. The outcome of the Board's decision was that Tenant's Proportion for Flat 9 could not be justified by comparison with the Tenant's Proportions for the other Flats on the development, and did not meet the test of fair and proportionate. The Tribunal decides that the Tenant's Proportion of 10 per cent for Flat 9 is not reasonable.

Summary of the Tribunal's Decision on the Tenant's Proportion for Flat 9

65. The Tribunal decides that

    a) The Applicant's decision to increase the Tenant's Proportion to 10 per cent for Flat 9 failed to meet the threshold of "fair and proportionate" and was not in accordance with the requirements of clause 3(3)(a).

    b) The Tenant's Proportion of 10 per cent for Flat 9 was not reasonable.

66. The effect of the Tribunal's decision is that the Tenant's Proportion for Flat 9 reverts to the Tenant's Proportion specified in the lease of nine per cent.

Administration Charges

67. The Tribunal finds that the Respondents had not paid the service charge demand for the contribution to the West Wing reserve fund in the sum of £2,666 dated 20 September 2021 by the due date of 11 October 2021. The Tribunal is satisfied that the Applicant was entitled to incur administration charges for the issue of a final reminder letter and a referral to a solicitor to collect the service charge arrears. The Tribunal holds that the charges of £50 plus VAT and £100 plus VAT imposed on 19 November 2021 and 26 November 2021 are reasonable.

68. The Tribunal determines that the administration charges of £60 dated 19 November 2021, and £120 dated 26 November 2021 are reasonable and payable by the Respondents.

69. The Tribunal was not convinced the £250 referral fee for the instruction of a professional debt collection agency, namely, Property Debt Collection Limited was reasonable. The Tribunal found that the Managing Agent had referred the collection of arrears to a firm of Solicitors. Further it appeared that the actions of Property Debt Collection were duplicating the actions that the firm of solicitors would take. Also the Applicant did not exhibit a demand for the referral fee with a summary of Tenant's Rights and Obligations. The Tribunal determines that the administration charge of £250 for referral to Property Debt Collection Limited is not reasonable and not payable by the Respondent.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.