Case Reference	**:**	CHI/24UP/LSC/2022/0105
Property	**:**	Flats 1-9, St Thomas Church, Southgate Street, Winchester, Hampshire, SO23 9EF
Applicant	**:**	St Thomas Church (Winchester) Management Ltd
Representative	**:**	Stephen Perkins (Director)
Respondents	**:**	Frank & Hilary Horsford (Flats 1 and 2) The executors of Mr A Mediratta (decd) Stephen Perkins (Flat 4) Jonathan Molyneux (Flat 5) Jonathan Nott (Flats 6 and 8) Ian Dunn (Flat 7) Jane Kennerley (Flat 9)
Representative	**:**	Mr Perkins, for the Applicant Nicholas Faulkner FRICS, for Ms Kennerley Mr Molyneux, Mr Dunn and Mr Horsford, in person
Type of Application	**:**	Landlord and Tenant Act 1985 s.27A (service charges)
Tribunal Members	**:**	Judge Mark Loveday Ms T Wong
Date and venue of hearing	**:**	17 May 2023, Havant Justice Centre
Date of Decision	**:**	20 June 2023

DETERMINATION

Introduction

1. By an application dated 5 September 2022, the applicant sought a determination of liability to pay service charges under s.27A Landlord and Tenant Act 1985 ("the 1985 Act") in relation to a development at Flats 1-9, St Thomas Church, Southgate Street, Winchester, Hampshire, SO23 9EF. The applicant is the lessee-owned freehold company, and the respondents are the lessees of the nine flats.

2. Notwithstanding the form of the application, in reality this dispute involves a proposed re-apportionment of service charges, a proposal broadly supported by the applicant and most of the lessees. It is opposed (in various respects) by a minority. It is a matter of some regret that the Tribunal concludes that none of the options advanced by the various parties for a re-apportionment is permissible under the leases of the flats.

Background

3. Saint Thomas Church is a 200-year-old Grade 2 listed former church in central Winchester. Some 7-8 years ago it was converted by a private developer into 9 prestigious flats and let on 125-year leases. But it is an important feature of the development that externally the building has always continued to resemble a Gothic-revival church, with complex multi valley steeped pitched roofs, stone buttresses, mullioned stained-glass windows, and an imposing 52m high steeple. Compared to other developments, a very high proportion of the premises was unsuitable for conversion into residential accommodation, contributing instead to the unique and prestigious character of the scheme. But the cost of maintaining the steeple, roofs and other communal parts has of course to be shared between just nine lessees. One feature of the building is the internal hallway, which originally formed part of the church atrium, and which gives access to seven flats. There is a lift from the hallway which serves three flats, with each having a private dedicated internal lift access.

4. The nine flats can be summarised in the following table[1]:

Flat	Floor	GIA	Lessee	Hallway access?	Lift access?	Lease date
1	GF/1/2	127.9m^3	Horsford	yes		28.08.18
2	GF/1/2	197.9m^3	Horsford	yes		28.08.18
3	GF/1/2	119m^3	Mediratta (decd)	yes		27.06.18
4	GF/1/2	134m^3	Perkins	yes	yes	24.07.20
5	GF/1/2	129.1m^3	Molyneux	yes	yes	02.07.18
6	GF/1/2	191.6m^3	Nott			10.07.17
7	GF/1	129.2m^3	Dunn	yes	yes	10.02.17
8	2/3/4	88.04m^3	Nott	yes		06.04.17
9	GF/1	82.6m^3	Kennerley			10.02.17

[1] This is largely based on the "Chronology of Flat Purchases" in the Applicant's Statement of Case.

5. The applicant is a resident-owned company, which acquired the freehold from the developer in September 2020, shortly before it went into liquidation. The managing agents are Belgarum Property Management Limited.

The leases

6. To understand the dispute, it is first necessary to deal with the material provisions of the various leases of the flats. Copies of all nine leases were provided, and (save in one instance) they are in similar form.

7. The primary obligation to pay a service charge is in clause 4.2 of the lease. By clause 4.2, the lessee agreed:

> "4.2 To pay the Service Charge and the Development Charge in the manner set out in the [sic] Schedule 5 …"

These terms were defined by clause 1 of the lease as follows:

> "1.13 The Service Charge: A fair and reasonable proportion of the Expenditure on Services (as defined in Schedule 5[2]) in respect of the Building
> 1.14 The Development Charge: 1/9th of Expenditure on Services (as defined in Schedule 5) in respect of the Development (excluding the Building)"

Under para 1.1 of Schedule 5, "Expenditure on Services" means "what the Landlord spends in complying with his obligations set out in the Schedule 7 including interest paid on any money borrowed for that purpose". Schedule 7 then lists the "Landlord's Obligations Subject to Reimbursement". That list identifies various covenants by the landlord, some of which relate to the "the Building", some of which relate to the "the Development", and some of which relate to both. For example, para 14 deals with insurance of both parts:

> "14 To keep the Building and any other buildings on the Development insured at all times to the full cost of reinstatement under a policy which complies with the terms of this paragraph …"

The "Building" and "Development" are in turn defined by clause 1:

> "1.3 The Development St Thomas, 20 Southgate Street. Winchester shown edged green on Plan 1
> 1.4 The Building: The building within the Development of which the Apartment forms part"

For the sake of completeness, Sch.5 contains provisions for payment of interim and balancing service charges, the latter to be paid within 21 days of service on

[2] The leases of Flats 3-9 say "Schedule 7", but this is an obvious typo.

the lessee of a service charge statement prepared by an independent chartered accountant.

8. The one material difference was that clause 7.15 of the lease of Flat 8 contained an specific provision which the Tribunal was told had been individually negotiated by the lessee's solicitors when the property was purchased:

> "7.15 For the avoidance of doubt, there is no obligation on the part of the Tenant of the property to contribute towards any cost in respect to the lift(s) serving the Building and which does not serve the Property.

That provision did not appear in any of the eight later leases.

The 2017-21 service charge years

9. It was common ground that the expenses in Sch.7 to the Lease which related to the "Development" largely comprised the maintenance of the grounds, car park, bin store, bike store etc. In the past, these had been apportioned according to clause 1.14 to arrive at the Development Charge. In other words, each flat, no matter large or small, and no matter what facilities it enjoyed, contributed 1/9th of the overall costs.

10. There was less clarity about the Service Charge proper (i.e., the relevant costs of managing, insuring and maintaining the Building). The bundle and bundle addendum extended to over 300 pages. But there were no copies of any service charge statements or demands. Neither was there any evidence from the managing agents about how the charges operate at present or how they have operated in the past.

11. The Tribunal was told there was some uncertainty about the service charge development history prior to the applicant's acquisition of the freehold. For the purchase of the first four flats in 2017, the original landlord instituted a service charge scheme, but this apparently changed in 2018 before the remaining flats were sold off. According to a letter in the hearing bundle dated 16 January 2022, by March 2021, the approach adopted by Belgarum was to divide the relevant costs between 3 categories, namely:
    - The Development Charge: All nine flats contribute 1/9th share.
    - A Service Charge for the "internal areas": The seven flats with access to the communal lobby (Flats 1-5 and 7-8) contributed to these costs based on flat area (sq m).
    - A Service Charge for the Lift: All three flats which have lift service (Flats 4-5 and 7) contributed to these costs based on flat area (sq m).

    The three categories are described in the application itself as "Schedule 1", "Schedule 2" and "Schedule 3" costs.

The applicant's case

12. At the hearing, the applicant was represented by one of its Directors, Mr Stephen Perkins. Mr Perkins explained that six of the nine lessees broadly supported the applicant's proposals.

13. Mr Perkins stressed the unique nature of the building, and that the Directors took the management of it very seriously. He explained that major works were required to the tower and roof as a result of water ingress, and that notices under s.20 of the 1985 Act were given at some stage in 2021. The Applicant and the lessees discussed the apportionment of the major works costs and reached an agreement ("without setting a precedent") to share them equally on a 1/9th basis. It also seems the insurance costs were shared equally in the same way.

14. The parties continued to discuss the apportionments, and various views were expressed about whether they were consistent with the flat leases. In March 2021, the applicant was introduced to Alexander Faulkner Partnership, which offered to provide an independent third-party opinion in relation to the roof works. Eventually, in March 2022, the Directors agreed to continue, broadly speaking, with the current scheme. This was the original apportionment proposed in the application to the Tribunal.

15. The Applicant's current proposal is a further refinement of that original scheme and is set out in the applicant's Statement of Case dated April 2023 (described as a "Bundle Addendum"). It can be summarised as follows:
    a. Buildings insurance. This would continue to be assigned to the Development Charge. Each lessee would pay 1/9th.
    b. Internal Communal Area. This would be apportioned between the relevant seven flats according to the gross percentage area (including restricted height areas). The Tribunal assumes this means an apportionment based on Gross Internal Area (or "GIA"). The revised measurements are set out in the table above.
    c. Structural Repairs/Capital Works to external parts of the building. This would be divided equally on a 1/9th basis.
    d. Structural Repairs/Capital Works to internal parts of the building. This would be apportioned between the same seven flats as (b), but apportioned equally. In other words, the costs would be divided equally between the seven flats on a 1/7th basis.
    e. Structural Repairs to the Lift. This was to be allocated to the three flats with access to the hallway on an equal 1/3rd basis.

16. Mr Perkins was asked to explain the applicant's position about the terms of the Lease. He candidly (and quite fairly) acknowledged the lessees disagreed about the meaning of their leases, and the Directors had not made a judgment about that. In effect, the applicant was seeking the Tribunal's determination on the point. But essentially, it contended the proposed apportionment was a "fair and reasonable" one under clause 1.13 of the Lease.

17. It was submitted that each of the proposed apportionments was rational:
    a. The insurance premiums covered both insurance of the Building and the Development. It was hard to allocate the two elements of the premiums differently between the Development Charge and the Service Charge and then apply different apportionments. It was felt the most appropriate answer was therefore to apportion the entirety of the insurance premiums using the Development Charge allocation of 1/9th. The insurance also benefitted everyone equally.
    b. An apportionment of the costs of the internal common areas between the relevant seven flats according to GIA reflected the benefit each flat received from these areas. The previous landlord had not provided the applicant with verifiable floor areas, but there had since been a survey of floor areas. The apportionments proposed were based on the measured areas of each flat.
    c. The equal 1/9th division of the costs of the external structural works reflected the fact that all flats benefitted equally from the superb and unique Grade II listing, irrespective of flat size. Although the non-binding agreement had allocated the costs of the major works on this basis, it was now necessary to have a more permanent arrangement going forwards. It was reasonable and rational to have a different apportionment to the other costs because the benefit given by the spire and roof did not reflect the relative "usage" of these parts by the occupiers of each flat. They benefitted all equally.
    d. The equal 1/7th division of the costs of works to internal parts of the building again reflected the fact that all seven flats enjoyed equal access to these communal parts, including the stairs, landings and the main hallway.
    e. The lift was accessed by only three properties, each of which had private lift entrances within their respective flat. Two of these flats had the same GIA, and one was only slightly larger. The costs were therefore shared equally by the flats which used the lift.

18. Apart from the main issue of apportionments going forward, the applicant sought to "backdate" the new scheme. It asked the Tribunal to determine the service charge contributions from the first full year of invoices following the transfer of the freehold to the applicant, namely the 2021 service charge year. In essence, the argument was that the re-apportionment should be applied to that year.

Mr Dunn (Flat 7)

19. Many of the representations which were made in relation to the applicant's reapportionment related to earlier iterations of the scheme. However, Mr Dunn submitted a statement on 12 February 2022 and also addressed the Tribunal hearing.

20. In his email of 12 February 2022, Mr Dunn opposed a straight 1/9th division of costs. It was anomalous for larger flats to pay a lot less psm than smaller ones. This equal 1/9th split was not specified in clause 1.13 of the Lease. It was not a

'normal' apportionment in most shared developments. At the hearing, Mr Dunn did not oppose the applicant's 'sub-apportionment' approach. But he developed the argument in relation to the lifts. The lifts were not dealt with separately in the leases of the three flats concerned. The costs of the lifts simply fell within Sch.7 to the leases, which was common to all the flats. Moreover, the lifts benefitted everyone, even if they were only accessible from three flats. The lifts were simply another 'spectacular' feature of the development.

Ms Kennerley (Flat 9)

21. In an email dated 24 January 2022, Ms Kennerley suggested she did not access the lift or the "common parts" and therefore "clearly should not contribute". Those with the greatest investment in their properties or the greatest usage of the internal areas and the lift should bear the greatest proportion of costs.

22. Mr Faulkner appeared for Ms Kennerley at the hearing. He submitted this was a "very difficult lease". In this respect, he referred to the lease of Flat 8, which contained the additional provision at clause 7.15.

23. Mr Faulkner accepted the use of GIA-based apportionments was "completely normal and rational". The Lease was clear that expenditure on the structural parts of the Building were to be apportioned in the same way under clause 1.13. Capital works benefitted those most whose investment values were highest. By contrast, anything spent on the Development (such as the car park surface) was to be apportioned equally, because it benefitted all lessees equally.

24. He did not agree with apportioning the internal communal parts 1/9th. Of all the options, that was the one which was not permissible under the leases. Ms Kennerley's ideal answer would be for the internal common parts to be split 7 ways, and the lift split 3 ways.

The Law

25. None of the parties is legally represented, and it is unclear whether any of them has had the benefit of legal advice. Perhaps inevitably, the arguments focussed on the merits of the reapportionment exercise, rather than the legal framework within which the application was made.

26. The Application sought two determinations under s.27A of the 1985 Act. In relation to the proposed apportionment going forward, the application is made under s.27A(3) and the issue is whether if costs were incurred for services etc. in 2023 and future years, "a service charge would be payable for the costs". In relation to the proposed "backdating" from 2018-22, the application is made under s.27A(1) and the issue is whether the service charges for those years are "payable".

27. A Tribunal's power to consider an apportionment of relevant costs sits slightly uneasily within these two jurisdictions. In many (if not most) cases, an

apportionment is fixed by the terms of the relevant leases of flats within a building – either as a stated percentage or a fraction. In such cases, the Tribunal has no general jurisdiction under s.27A to interfere with the bargains between the parties by amending those apportionments – although there are of course powers to vary the apportionments under s.35-39 of the Landlord and Tenant Act 1987 ("the 1987 Act") in clearly defined circumstances. But where the leases provide a landlord, management company or third party with a discretion about the apportionment of costs (as in this case), it is now well settled that the Tribunal does indeed have jurisdiction to consider the chosen apportionment under s.27A of the 1985 Act.

28. The precise scope of this power has been matter of some debate in recent years, but is now largely settled by the very recent decision of the Supreme Court in *Aviva Investors Ground Rent GP Ltd and another* [2023] UKSC 6; [2023] 2 WLR 484. The focus of the decision in *Aviva* was the effect of s.27A(6) of the 1985 Act, but it also restated the general approach to a tribunal's jurisdiction under s.27A of the 1985 Act in re-apportionment cases. The judgment of the court was given by Lord Briggs, who at [16] said:

> "16. On an application under section 27A(3) in relation to a prospective service charge the FtT might well be invited to exercise its jurisdiction before the landlord made the relevant discretionary management decisions, but the jurisdiction would not thereby be enlarged from that described above merely because of the timing. Ignoring section 27A(6) for the moment, the FtT would still be limited to ruling upon the contractual and statutory legitimacy of the landlord's proposal, coupled with a *Braganza* rationality review if necessary, which is really an aspect of the testing of contractual legitimacy. And the landlord would have to furnish the FtT with a sufficiently detailed plan of its proposals (including the relevant discretionary management decisions) to enable the FtT to rule prospectively upon the lawfulness of the service charge demand if the proposed works were carried out: see *Royal Borough of Kensington and Chelsea v Lessees of 1-124 Pond House* [2015] UKUT 395 (LC); [2016] L&TR 10 at paras 66-67."

29. *Aviva* represented an important sea-change from the previous approach in apportionment cases encapsulated in the earlier decision of the Court of Appeal in *Sheffield City Council* [2017] EWCA Civ 225; [2017] 1 WLR 4473. Judgment in *Aviva* was delivered after the issue of the application in this case, so in a sense the legal background to the present matter has changed markedly during the course of proceedings. Since the parties in this case were not legally represented, the Tribunal summarised the *Aviva* decision at the start of the hearing. None of them had any specific observations to make.

30. Turning to the two provisions of the Lease in this case, there is no issue at all about the apportionment used to arrive at the Development Charge in clause 1.14 of the Lease. This specifies a fixed percentage of 1/9th of relevant costs for each flat. That particular percentage is not challenged, and the Tribunal in any event has no jurisdiction to intervene under s.27A of the 1985 Act (see above).

31. However, the relevant costs which are used to calculate the Development Charge are a different matter. Insofar as the Applicant proposes to include any "Expenditure on Services … in respect of the Building" within the Developoment Charge, that is simply not permissible under the terms of the Lease because clause 1.14 specifically excludes services provided to "the Building" from the Development Charge. The Applicant cannot therefore use clause 1.14 as a contractual route to apportion the relevant costs of (i) insuring the Building or (ii) the external structural works. It is not a shortcut to arriving at an equal apportionment of 1/9th for any of the Building costs, and if these costs are to be apportioned on a 1/9th basis, this will have to be done under clause 1.13.

32. Turning therefore to clause 1.13, the formula used is a "fair and reasonable proportion of the Expenditure on Services … in respect of the Building". This evidently gives the landlord a discretion, and that discretion is to be tested by reference to *Braganza* rationality. It is for this reason that the Tribunal invited the parties to concentrate primarily on whether the Applicant's various proposals were "rational", rather than whether they were "reasonable".

33. The Tribunal concludes that, if taken separately, each of the separate apportionments proposed by the Applicant meets the test of *Braganza* rationality. The Applicant has taken independent advice about the apportionment matrix, it has discussed the proposals with the lessees affected and taken their views into account. It's revised proposals base some elements on the GIA area of each flat (which have been professionally measured) and other elements are assessed on a 'per unit' basis. Each element of the scheme can be justified as producing an objectively fair outcome – reflecting 'benefit' either by way of a fixed 1/9th apportionment, a 1/7th apportionment of those having access to the internal common parts, a 1/3rd apportionment of those having access to the lifts, or a GIA based apportionment for other costs. GIA based apportionments, 'per unit' apportionments, and weightings are all commonly used for service charge apportionments.

34. In short, the GIA-based apportionments and the per capita apportionments used by the applicant for the various elements of their proposed scheme are all rational. Insofar as it is necessary to decide it, the five different apportionment methods used in the revised scheme also produce outcomes which fall within the range of what can be said to be "just and reasonable".

35. However, that is not the end of matters. The real difficulty for the applicant's revised apportionment scheme is the use of five different apportionments within clause 1.13. The Tribunal considers this is simply not permitted under the terms of the Lease. Clause 1.13 specifies the service charge to be "A fair and reasonable proportion" of Expenditure on the Building, not several proportions. It is of course possible that the singular "A" includes the plural, but that would also mean adding the words "or reasonable proportions" to the

covenant. As a process of interpretation, the Tribunal sees no justification for adding these words to give effect to the intention of the parties. The ordinary and natural meaning of clause 1.13 is that there is to a single apportionment of all service charge costs. Moreover, the fact the Lease provides two different apportionment methods for the Development Charge and the Service Charge at clauses 1.13 and 1.14 suggests it was not intended to further sub-divide the clause 1.13 apportionment (something which was described as 'sub-apportionment'). There is also no suggestion in Sch.5 that the process of certifying and accounting for service charges involves the assessment of further subcategories of cost to which a different apportionment can be applied. Mr Faulkner perhaps came closest to saying this in his submissions.

36. A further similar objection can be made to the suggestion that a different apportionment can be applied to three or seven flats for certain costs. As Mr Dunn observed in relation to the lift costs, that is simply not permissible. If the lift maintenance and capital costs fall within Sch.7, contractually they fall to be apportioned nine ways – irrespective of the benefit any lessee may or may not receive from the lift.

37. It was suggested this is a "very difficult lease". The Tribunal does not entirely agree. The advantage of the apportionment regime in clause 1.13 of the Lease is that it is simple and relatively straightforward. All the Building expenditure must be apportioned in the same way – but the Applicant has a choice of methods of apportionment. It may properly pick any rational scheme, such as a GIA floor-area based approach, or one of the recognised other methods used in the market to allocate the costs to the various lessees. What makes things "difficult" are the attempts by the applicant (and the respondents) to introduce additional layers of complexity to deal with perceived injustices. Those well-meaning efforts are sadly not something which the Lease permits.

38. It follows that the Tribunal considers that either (i) an apportionment of 1/9th, or (ii) an apportionment by reference to GIAs are permissible under clause 1.13 of the Lease. Indeed, there may be other rational methods of apportionment based on Net Internal Areas, floor levels, rental values etc. But it is not permissible to mix these methods under clause 1.13 of the Lease. Still less is it permissible to apply separate apportionments to only some flats (as in the case of the proposals for the lift costs and the 'internal' costs).

39. The consequence is that the applicant effectively has two options going forward. It may either introduce a uniform scheme which complies with the Lease (using a single scheme of apportionment for clause 1.13 expenditure). Or it may attempt to vary the leases to introduce more nuanced apportionment scheme, either by agreement with all the parties or by way of an application under the Tribunal's above-mentioned powers in the 1987 Act.

40. The Tribunal is well aware of the practical problems that may arise in applying a single apportionment to all the Building 'internal' expenditure. In particular,

it may seem artificial to have the insurance premiums for the external part of the Development split nine ways, whilst the premiums for the Building may be divided in another way. But that is what the Lease says might well be done. In any event, the allocation of insurance premiums between premises or parts of premises is something commonly done in service charge calculations. A reasonably competent managing agent or insurance broker should have no difficulty identifying the elements of the insurance premium that relate to the 'internal' and 'external' parts of the development.

41. The other problem applying a uniform apportionment to all the internal costs is that clause 7.15 of the Lease of Flat 8 carves out a special exception for lift costs. The Tribunal recognises that the result of its decision is that this anomaly will mean there will be a permanent deficit in the scheme of service charges, since in any one year the landlord will only be able to recover 8/9ths of the costs of maintaining the lift. But that is the consequence of a rather unwise decision made by the landlord in 2107. Again, it may be possible to agree a suitable variation to the leases, or to apply to the Tribunal to vary under the 1987 Act. But the Tribunal sees no reason to interpret the other leases in such a way so as to 'fit' with the lease of Flat 8. But the existence of this anomaly is not a reason to interpret all the leases differently. There is no evidence the original lessees of the other eight flats knew about the Flat 8 'carve out' when they negotiated their own leases.

42. The Tribunal therefore concludes that service charges based on the applicant's proposed scheme would not be payable under s.27A(3) of the 1985 Act.

43. In relation to the application under s.27A(1) of the 1985 Act, the Tribunal indicated it was not in a position to make a determination about the charges payable for 2018-22 service charge years without seeing the demands for payment or evidence of the costs which were incurred in those years. Moreover, it is hard to see how an apportionment determined for future years under s.27(3) of the 1985 Act can be used to "backdate" service charges in past years. But in any event, having rejected the applicant's proposed scheme for 2023 onwards, it follows that any claim for backdating based on the new scheme must necessarily fail as well.

Conclusions

44. The Tribunal determines under s.27A(3) of the 1985 Act that any service charges based on the applicant's proposed apportionment scheme would not be payable in future years. The proposed scheme is inconsistent with the terms of the leases of the flats.

45. It is nevertheless open to the applicant to adopt any rational apportionment scheme which complies with the Lease. This will require it to apply a single apportionment for each flat in respect of all Building expenditure under clause 1.13 of the Lease.

46. The application to ‘backdate’ the new apportionments to previous service charge years under s.27A(1) of the 1985 Act also fails.

Judge Mark Loveday

20 June 2023

Appeals

1 A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application 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.