FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CA/HNA/2022/0060**
Property	**:**	**Apartment 5, Barkfield Mansions, 6A Wicks Lane, Formby, Liverpool L37 3JE**
Applicants	**:**	**Leonard Eric Ryan & Kathleen Mary Ryan**
Representative	**:**	**Ms Denise Ryan**
Respondent	**:**	**Barkfield Mansions Management Limited**
Representative	**:**	**Mr Brian Whitfield) Mr Derek McShane) (Directors) Mr Paul Rice)**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s27A Landlord and Tenant Act 1985 – s20C Commonhold and Leasehold Reform Act 2002 – Schedule 11 para 5A**
Tribunal Members	**:**	**Tribunal Judge L. F. McLean Tribunal Member J. Faulkner FRICS**
Date of hearing	**:**	**21st April 2023**
Date of decision	**:**	**28th July 2023**

DECISION

Decisions of the Tribunal

(1) The following amounts are payable by the Applicants to the Respondent, pursuant to the demands for payment made to date by way of service charge for the service charge financial years detailed below:

a) 1st January-31st December 2016 £1914.35
b) 1st January-31st December 2017 £1664.58
c) 1st January-31st December 2018 £1664.55
d) 1st January-31st December 2019 £1715.73
e) 1st January-31st December 2020 £2727.00
f) 1st January-31st December 2021 £1974.00
g) 1st January-31st December 2022 £2412.00

(2) The Applicants' application under Section 20C Landlord and Tenant Act 1985 is refused.

(3) Under the Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A, any liability of the Applicants to pay any administration charges is extinguished in respect of litigation costs relating to these proceedings.

The application

1. The Applicants have sought a determination pursuant to s.27A Landlord and Tenant Act 1985 as to whether they are required to pay to the Respondent certain sums by way of service charge for the service charge financial years 2016 to 2022 inclusive.

2. The Applicants seek an order under Section 20C Landlord and Tenant Act 1985 that all or any of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings before the First-tier Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

3. The Applicants seek an order pursuant to Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A, reducing or extinguishing the Applicants' liability to pay administration charges in respect of litigation costs.

Background

4. The Respondent is the leasehold management company under a tripartite lease arrangement concerning a purpose-built residential development at Barkfield Mansions, 6A Wicks Lane, Formby, Liverpool L37 3JE ("the Estate").

5. The premises which are the subject of this application are located in the block of 11 apartments known as Barkfield Mansions ("the Building").

6. The Applicants are the tenants of Apartment 5 Barkfield Mansions ("Apartment 5"), which is a 2-bedroom flat within the Building, as the current registered proprietors of a lease granted on 23rd April 2014 for a term of 999 years commencing from 16th September 2006 ("the Lease"). The Lease was granted by Richard George Crompton and Nigel Nattress (of Colliers International UK plc) as Receivers of Mr Kerry Tomlinson. Mr Tomlinson was the original freehold owner of the Estate. The Tribunal were informed that, due to Mr Tomlinson's insolvency, title to the freehold reversionary interest in the Estate had escheated to the Duchy of Lancaster and the Respondent had been carrying out all of the functions of a landlord for several years, in the absence of any other suitable person willing or able to do so.

7. The Lease provides for the Respondent to provide certain services, set out at Section 2 of the Fourth Schedule. The Lease also provides for the Applicant to pay a service charge in relation to the Respondent's costs so incurred, and the method of calculation of the same is the only issue in dispute in this matter.

8. The final hearing took place remotely on 21st April 2023 via the HMCTS Video Hearings Service. The First Applicant appeared in person and was assisted by his daughter, Ms Denise Ryan as a McKenzie Friend. The Respondent was represented by its directors Brian Whitfield, Derek McShane and Paul Rice.

9. The members of the Tribunal considered the parties' oral and written submissions and evidence and documents filed in accordance with the Tribunal's directions.

10. At the conclusion of the hearing, it was agreed that the Tribunal should conduct a post-hearing inspection of the Building, which took place on 28th June 2023. On 6th July 2023, the Tribunal issued an inspection report to the parties and requested any comments on the same to be received by no later than 20th July 2023.

Grounds of the main application

11. The Applicants did not dispute the reasonableness of the overall costs incurred by the Respondent in providing the contracted services under the Lease, nor did they contend that any amounts were not payable due to any failure to comply with statutory formalities or notice requirements, etc.

12. The only ground on which the Applicants disputed the amounts they were due to pay to the Respondent was on the basis that the figures had been calculated incorrectly, inasmuch as the Applicants asserted that the sums demanded were a higher proportion of the total than was their obligation to contribute under the terms of the Lease. This was set out in their application dated 22nd June 2022. The Applicants' case was that the wording of the Lease meant that they were only required to pay towards the Respondent's costs incurred in relation to providing the services for the Estate in the proportion that the square footage of Apartment 5 bore to the combined square footage of all of the Apartments in the Building. The application particularly turned upon Paragraph 1.1 of the Fourth Schedule to the Lease which defined the "Tenant's Proportion" of the service charge.

13. The Applicants also applied for orders under Section 20C of the Landlord and Tenant 1985 and Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A.

14. The Respondent summarised its position in an email dated 2nd January 2023 to the Tribunal, which set out its grounds for opposing the application in the following terms:-

    1. *All eleven flats, apart from the largest (Flat 7) include the proportional clause which Mr Ryan is seeking to invoke.*
    2. *Flat 7 has an equal split (one eleventh) clause, which renders all historical overpayment claims submitted by Mr Ryan inaccurate. This clause must also be factored into any potential revised service charge calculations going forward.*
    3. *Previous minutes from all recent Annual General Meetings of the residents confirm and document an equal split of service fees, based on the fact that no individual flat receives any extra benefits from the combined service fees.*

15. Mr Ryan responded to the above email on 30th January 2023, asserting that the above matters put forward by the Respondent in fact supported his own case, in that the Respondent and their property management agents had agreed to comply with the service charge apportionment set out for Apartment 7 but had ignored the provisions of each of the leases of the remaining ten apartments, including his.

Issues

16. The issues which the Tribunal had to decide were:-
    a. Were the sums demanded for the years in dispute correctly calculated in accordance with the terms of the Lease, particularly following the definition of the "Tenant's Proportion" as defined in the Fourth Schedule thereto, or are different amounts payable?
    b. Is it just and equitable to preclude the Respondent from recovering its legal costs of the application through the service charge?
    c. Should the Tribunal reduce or extinguish any administration charges sought from the Applicants by the Respondent?

Relevant Law

17. The relevant sections of the Landlord and Tenant Act 1985 read as follows:-

18 Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent —

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

20C Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

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

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

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

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or
(b) on particular evidence, of any question which may be the subject of an application under subsection (1) or (3).

18. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides as follows:-

Limitation of administration charges: costs of proceedings
5A(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—
(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings

Documentary Evidence

19. Documents put in evidence before the Tribunal by the parties included:-
    a. The Lease
    b. The lease for Apartment 7
    c. Sample leases for other apartments in the Building, specifically for Apartments 2, 6 and 8
    d. An undated letter from HLM to the tenants of the Building
    e. A letter dated 18th November 2022 from HLM to Mr Ryan
    f. A letter dated 20th December 2022 from the Respondent to the tenants of the Building, with appendices
    g. Service charge accounts for the Estate between 2016 and 2022
    h. Demand for payment of service charges for Apartment 5 dated 24th June 2022
    i. Minutes of various of the Respondent's members' meetings:-
        i. AGM 6th October 2015
        ii. AGM 25th August 2016
        iii. AGM 20th July 2017
        iv. AGM 5th July 2018
        v. AGM 30th April 2019
        vi. AGM 27th April 2021
        vii. AGM 2nd August 2022

20. Pursuant to clause 3.1 of the Lease, the Applicant is obliged "*To pay the Rents during the Term on the days and in the manner provided by this Lease…"*.

21. "The Rents" is defined at clause 1.23 of the Lease to mean "*the Rent and the Insurance Rent and the Service Charge*".

22. "The Service Charge" is defined at clause 1.25 of the Lease to mean "*the Tenant's Proportion of the Expenses*".

23. "The Expenses" is defined at clause 1.9 of the Lease to mean "*all costs expenses and outgoings (including any Value Added Tax thereon) properly incurred by the Management Company during each Financial Year in or incidental to providing all or any of the Services*".

24. In the Fourth Schedule, the Services, in summary and so far as is relevant, include:-

    a. Repair, decoration, maintenance, renewal replacement, cleaning and upkeep of the Common Parts
    b. Cleaning, lighting and maintenance of the Common Parts
    c. Cleaning the exterior of all windows

25. The Fourth Schedule of the Lease sets out the definition of the "Tenant's Proportion" in these terms:

> ***1 Definition of "Tenant's Proportion"***
>
> *1.1 In this Schedule the expression "Tenant's Proportion" means in relation to the Service Charge such proportion as the Landlord's Surveyor acting reasonably determines such proportion (if appropriate) to be calculated by reference to the ratio which the gross internal floor area of the Apartment bears in relation to the aggregate gross internal floor area of the apartments within the Building and where the Particulars refer to Parking Space then in respect of the Parking Space to be by reference to the ratio which the gross floor area of the Parking Space bears in relation to the aggregate gross areas of the parking spaces within the Car Park.*
>
> *1.2 The Landlord may acting reasonably:*
>
> *1.2.1 increase or alter the Tenant's Proportion as is fair and reasonable in the circumstances Provided that the Landlord shall as soon as practicable serve notice in writing thereof upon the Tenant;*
>
> *1.2.2 in the exercise of the discretion, if it is proper to do so attribute the whole of an item of expenditure to the Apartment.*

26. The terms of each lease granted in respect of each of the 11 flats in the Building are identical, except for the description and the address of the individual flat and with the sole exception of Apartment 7. The corresponding text at paragraph 1 of the Fourth Schedule to the lease of Apartment 7 reads as follows:-

> ***1 Definition of "Tenant's Proportion"***
>
> *1.1 In this Schedule the expression "Tenant's Proportion" means in relation to the Service Charge 1/11th of the total of the Service Charge.*
>
> *1.2 The Landlord may acting reasonably:*

1.2.1 increase or alter the Tenant's Proportion as is fair and reasonable in the circumstances Provided that the Landlord shall as soon as practicable serve notice in writing thereof upon the Tenant;

1.2.2 in the exercise of the discretion, if it is proper to do so attribute the whole of an item of expenditure to the Apartment.

Oral Evidence, Submissions and Discussion

27. At the final hearing, the parties supplemented their written statements of case with oral evidence and submissions, which are summarised below.

Applicants

28. The Applicants' primary case was that they have been paying a higher service charge than they are meant to. They asserted that all apartments are currently contributing an equal 1/11th share – even though the lease terms for ten of the apartments provide for apportionment of costs payable by way of service charge based on the square footage ratio of each apartment to the others. Mr Ryan is particularly aggrieved that Apartment 7 pays 1/11th of the costs even though it is a much larger dwelling.

29. The Applicants put forward that in 2016 and 2017, the service charge costs apportionments were not equal but were based on the square footage ratio of each apartment to the others. It was said that in 2016, Mr McShane, the tenant of Apartment 7, paid £660 per month, which was 37% higher than the other tenants who each paid £540 per month. However, it appeared that this was only for a period of around six months.

30. Reference was made to a meeting of the tenants of the Building which took place in May 2017. At this meeting, a verbal agreement was reached to change the service charge cost contributions so that all tenants would pay an equal share. However, this decision was not communicated in writing, which the Applicants had assumed would follow, and the Applicants considered that there had been no consultation around this decision. It was submitted for the Applicants that this decision was therefore not binding. This concern was then raised with HLM in November 2021, who said that the proportions could not be changed unless the express terms of the leases were varied, which had not occurred.

31. The Applicants' position was also that a higher proportion of the costs should be borne by the tenant of Apartment 7 because that property benefits from more extensive amenities than the other apartments. In particular, the Applicants asserted that Apartment 7 is the only apartment which is served by both of the lifts, it has exclusive use of an additional external landing at the top of the stairwell, and due to the more extensive roofline it is also served by more extensive guttering which has to be maintained by the Respondent, and more windows which need to be cleaned by the Respondent.

32. It was also mentioned that the current dispute had been prompted by a planning application to extend Apartment 7, together with significant increases in the service charges in recent years which led the Applicants to examine the terms of the Lease more closely. In particular, Mr Ryan asserted that the impact of the equalisation of contributions had been that his service charge increased from £85pcm to £95pcm whereas Mr McShane's had decreased from £110pcm. Mr Ryan said that when the proposal to equalise the contributions was put forward, he had been led to believe by Mr McShane that he was only paying a small amount more than the other tenants. Mr Ryan said that a proposal of this magnitude should have been on the agenda for the meeting in May 2017, but it was only raised at the meeting itself as a "suggestion".

Respondent

33. Firstly, in reply to the Applicants, the Respondent observed that most of the amenities of the Estate (including the communal grounds surrounding the Building) were maintained for the benefit of all tenants, but there would be some components to which all tenants would have to contribute irrespective of whether their particular property actually directly benefited or not – for example, the tenants on the ground floor did not practically benefit from either of the lifts at all. More importantly, the Respondent asserted that only one of the lifts provides exclusive access to Apartment 7 and the other does not. The Respondent averred that the additional landing which does serve Apartment 7 is integral to the Building in any event, that the additional ventilation and lighting are provided through vents which cost nothing to maintain, the rainwater guttering is for the overall benefit of the entire Building, and also disputed that Apartment 7 had more windows than the other apartments. The Respondent suggested that the additional amenities referred to appear not to be as significant as the Applicants made out.

34. The Respondent's most substantial part of its case, though, was in relation to the interpretation and application of the provisions of the Lease itself. The Respondent's directors highlighted that Paragraph 1.2 of the Fourth Schedule to the Lease enabled the landlord to make his own determination of the apportionment. They explained that the original apportionment of the charges had in fact been in equal shares since the completion of the development in 2006, with the only exception to that being the six-month period when Mr McShane had paid a higher proportion, but this was done voluntarily and was not imposed upon him by the Respondent. The Respondent asserted that when contributions had been equal, both before and after this period, no tenants had objected to the apportionment until the current application was made to the Tribunal.

35. Mr McShane went on to explain that he had offered a voluntary higher contribution towards the service charge budget at a residents' meeting because some of the older residents were upset at increases in costs overall, so he offered to pay more to "get [the budget] over the line". However, he said that the offer was not minuted and he could not recall which meeting it was made at, except that it was some time in around 2016. Mr McShane recalled that the Respondent had suffered a cash flow problem and owed money to

window cleaners and gardeners, which was causing some contractors to require payment up front. Ms Ryan questioned why other tenants did not seem to be aware of Mr McShane's higher contribution having been voluntary. Mr McShane said he was not a director of the Respondent at the time and that his predecessor took the minutes until April 2019. Mr Ryan also said he had no recollection of any such discussion taking place. In response, Mr McShane pointed out that the terms of the lease for Apartment 7 state that his contribution is only 1/11th by default, so any payment above that must, by definition, be voluntary.

36. It therefore became clear that the Respondent's position was that Paragraph 1.2 of the Fourth Schedule to the Lease was not activated at the meeting in May 2017, but that the contribution had been fixed at 1/11th per apartment since 2006 under the provision of Paragraph 1.1 which states "*the expression "Tenant's Proportion" means in relation to the Service Charge such proportion as the Landlord's Surveyor acting reasonably determines*". Mr Whitfield concurred that the contributions had always been equal from 2006 onwards and the Respondent had never considered if a surveyor should be instructed to provide detailed measurements of each apartment's floor area.

37. Equally, Mr Whitfield conceded that he had never actually seen any communications from a surveyor appointed by the original landlord to determine that all tenants should pay an equal share, nor had he ever received a written notice from landlord that any tenant's share should be altered or increased?

38. However, in this regard it emerged that there was a complex and difficult history to the ownership of the Estate and the early management of the development of the same. The Estate was developed by Mr Tomlinson, who sold off the individual apartments under long leases. Mr Whitfield stated that Mr Tomlinson had originally allowed his mother to reside in one of the apartments without holding a lease and she managed the Building. Indeed, it appeared that Mr Tomlinson only managed to grant leases in respect of seven of the apartments to begin with, and the others were left vacant. When Mr Tomlinson encountered financial difficulties, his mother was evicted by Mr Tomlinson's receivers. It was only at that point that the residents took control of the Respondent company to restore orderly management. Meanwhile, Mr Tomlinson's receivers granted leases on the remaining four apartments, including that of the Applicants, in order to raise funds to pay Mr Tomlinson's creditors. These additional four leases, including the Lease, were all backdated to 2006 to ensure consistency.

39. In that rather unusual context, it is instructive to note that the lease for Apartment 7 was granted by Mr Tomlinson prior to his bankruptcy and at a time when he took a personal interest in how the development was managed.

40. It was also discussed during the course of the hearing that the Respondent had attempted to obtain the freehold of the Estate from the Duchy of Lancaster, but there had been administrative difficulties in doing so. There was also discussion regarding statutory mechanisms for the variation of

leases, but that the Tribunal was not in a position to engage these during the course of the current application.

Inspection

41. The property is a purpose-built apartment block which is part three-storey and part two-storey with communal gardens and car parking. It was constructed in 2006 of cavity brick walls under pitched slate-covered roofs with uPVC double-glazed windows and comprises 11 self-contained apartments numbered 1 to 11.

42. There are two communal entrances, one fronting Wicks Lane and one opposite Barkfield Avenue to the left-hand side. The Wicks Lane entrance gives access to the apartments numbered 1 to 7 and the Barkfield Avenue entrance is for the apartments numbered 8 to 11 plus a secondary access to Apartment 7. All apartments except for no. 7 and no.10 are located on the ground and first floors with no. 7 being on the second floor and no. 10 being a "duplex" apartment on the first and second floors with access from the first floor.

43. Each entrance leads to a lift giving access to the first floor but the lift in the Wicks Lane entrance also extends to the second floor with a key-operated access for the exclusive use of Apartment 7. Both entrances have stairs to the first and second floors. Both stairs between the first and second floors are for the use of apartment no. 7. The Respondent contends that these stairwells are also used for maintenance access to the roof space and for servicing the lifts – the Applicants assert that this is only occurs very rarely although the Respondent contends that access has been required on numerous occasions in recent years.

44. It is understood that most of the apartments benefit from 2 bedrooms with the exception of Apartments 3 and 7 which all have 3 bedrooms, although in some instances this is due to internal re-configurations over the years.

45. Each apartment is allocated one car parking space in the communal car park, with the exception of Apartment 3 which has two car parking spaces.

46. The roof to Apartment 7 consists of a lower roofline and an upper roofline.

47. The windows of each apartment which have cleaning included in the service charge are:

No.	Floor	Windows	Additional Comments
1	Ground	10	
2	Ground	5	
3	Ground	9	
4	First	10	
5	First	3	Patio doors to balcony not included in service charge

6	First	6	Patio doors to balcony not included in service charge
7	Second	9	Roof lights not included in service charge
8	Ground	9	
9	Ground	7	
10	First & Second	6	Roof lights and patio doors to balcony not included in service charge
11	First	4	Patio doors to balcony not included in service charge

Determination

Were the sums demanded for the years in dispute correctly calculated in accordance with the terms of the Lease, particularly following the definition of the "Tenant's Proportion" as defined in the Fourth Schedule thereto, or are different amounts payable?

48. During the course of the hearing, the Respondent's directors commented that the solicitor who drafted the leases for the Estate in 2006, which set the template followed in the Lease itself, "was not the finest draftsman." The wording of Paragraph 1.1 of the Fourth Schedule to the Lease is indeed very badly drafted. When defining the "Tenant's Proportion", it says this means "*such proportion as the Landlord's Surveyor acting reasonably determines*" and that "*such proportion (if appropriate)* [is] *to be calculated by reference to the ratio which the gross internal floor area of the Apartment bears in relation to the aggregate gross internal floor area of the apartments within the Building*". At first glance, these two concepts might appear to be entirely independent of each other and, to at least some extent, contradictory in approach. One affords a broad discretion to the landlord, fettered only by a general requirement of reasonableness; whereas the other seeks to narrow, or even potentially eliminate, that discretion and connect it to a proportional calculation of the apartments' respective floor spaces. Indeed, the clause would make more sense if either limb were to be struck out, leaving the other standing alone. It almost seems as if two different forms of words from different precedent documents were amalgamated without proper forethought. The waters are further muddied, in respect of the second limb, by the absence of any precision in the words "*…to be calculated* ***by reference to*** *the ratio…*" and the strange inclusion of the conditional wording "*…such proportion (****if appropriate****) to be calculated by reference to the ratio…*"

49. Where a lease purports to grant the landlord a power to vary the proportion of the costs to which the tenant must contribute by way of service charge, the leading case authority is *Aviva Investors Ground Rent GP Ltd & anor v Williams & Ors* [2023] UKSC 6. In this case, their Lordships determined that where the landlord has reserved a contractual power to vary the apportionment of costs between tenants, section 27A(6) of the Landlord and Tenant Act 1985 does not render that provision of the lease invalid. The role of the Tribunal in such cases is to decide whether the contractual conditions of the apportionment (or re-apportionment, as the case may be) were followed correctly, including whether the landlord "acted reasonably" where this is a

stipulation. In contrast, section 27A(6) only invalidates clauses, or parts of clauses, which provide for the landlord's determination to be final and binding, etc.

50. The Tribunal is also required to interpret the provisions of the Lease and reach a conclusion on how the Applicants' proportion of the costs etc. is thereby calculated. The leading case authority on the interpretation of contracts, including leases, is *Arnold v Britton* [2015] UKSC 36.

51. At paragraph 15 of *Arnold v Britton*, Lord Neuberger said:

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".
>
> [...]
>
> And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of [:]
>
> (i) the natural and ordinary meaning of the clause,
> (ii) any other relevant provisions of the lease,
> (iii) the overall purpose of the clause and the lease,
> (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
> (v) commercial common sense, but
> (vi) disregarding subjective evidence of any party's intentions.

52. The following further key points were made at paragraphs 19 to 22 of the judgment:

> "Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made." (paragraph 19).
>
> "Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a

contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

"When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties." (paragraph 21)

"… in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SCLR 114, where the court concluded that 'any . . . approach' other than that which was adopted 'would defeat the parties' clear objectives', but the conclusion was based on what the parties 'had in mind when they entered into' the contract …" (paragraph 22)

53. Applying the principles set out above, the Tribunal identified two essential competing interpretations of the relevant provisions of the Lease.

54. The first potential interpretation is that the two "limbs" of Paragraph 1.1 are indeed independent of each other and are capable of being mutually contradictory. Given that no party to a 999-year lease would ever deliberately reach a rational decision to create a patently unclear lease arrangement, the most sensible interpretation of this view would be that the "Tenant's Proportion", is defined as "*such proportion as the Landlord's Surveyor acting reasonably determines*", with the remainder of Paragraph 1.1 being relegated to the status of a non-binding commentary on how such a broad discretion could be exercised.

55. The alternative interpretation is that the second limb is a qualification on the first limb, inasmuch as that the starting presumption is that the amount of the service charges will be apportioned exactly in accordance with the respective floor area ratios of the apartments, but the landlord's surveyor can make reasonable adjustments to those apportionments (for example, if the respective floor areas are very similar and any differences are *de minimis*, then the landlord's surveyor can reasonably even these out to some extent).

56. The Tribunal therefore identified the following specific questions to address:-
    - Does "acting reasonably" mean starting with the respective ratios and only departing from that to the extent that it is reasonable to do so, or does the landlord's surveyor have an unfettered discretion?
    - Has the landlord's surveyor determined the proportions?
    - If so, is or was it reasonable (on either interpretation) for the landlord's surveyor to have determined an equal 1/11th apportionment? In particular, would this be a reasonable thing to do bearing in mind the limitation placed by the specified 1/11th contribution under the lease for Apartment 7?
    - In all the circumstances, have the service charges been demanded in accordance with the contractual mechanism as per above?

57. In considering the above issues, the Tribunal firstly observes, and finds, that the Respondent cannot itself exercise the power set out in either Paragraph 1.1 or 1.2 because it is not itself the landlord of the Estate, even if it is carrying out the practical functions of the landlord out of necessity.

Does "acting reasonably" mean starting with the respective ratios and only departing from that apportionment to the extent that it is reasonable to do so, or does the landlord's surveyor have an unfettered discretion?

58. Applying the principles set out in *Arnold v Britton*, the Tribunal concludes that the most plausible interpretation of Paragraph 1.1 of the Fourth Schedule to the Lease is the second interpretation, i.e. that the starting presumption is that the amount of the service charges will be apportioned exactly in accordance with the respective floor area ratios of the apartments, but the landlord's surveyor can make reasonable adjustments to those apportionments (for example, if the respective floor areas are very similar and any differences are *de minimis*, then the landlord's surveyor can reasonably even these out to some extent).

59. In reaching this conclusion, the Tribunal considers it particularly relevant that the wording used is highly ambiguous, both grammatically and in terms of the discernible "ordinary meaning" of the wording. In that context, although there was limited evidence available regarding the parties' subjective intentions at the time of the Lease being executed, the Tribunal can take into account the circumstances which undoubtedly will have applied. The reality is that residential leases are rarely individually negotiated: typically, the lease is drafted by the grantor's solicitors, and the tenant's solicitors are unlikely to provide extensive (or indeed any) advice to the purchaser regarding its terms unless this is specifically requested. With that in mind, it is nonetheless to be presumed that the parties would intend that all of the wording used in a valuable residential lease agreement, prepared by a solicitor, would be relevant, meaningful and operationally effective. This makes it unlikely that the caveat set out in the "second limb" of Paragraph 1.1 would be intended to be of no contractual effect at all, even if the calibre of the drafting left much to be desired.

Has the landlord's surveyor determined the proportions?

60. There is regrettably no conclusive evidence of the original landlord ever having appointed a surveyor to determine the proportions payable in respect of each apartment. However, the Tribunal notes the evidence of the Respondent, particularly led by Mr Whitfield, that the proportions charged to each apartment had been equal at the outset of the development. The Applicants, having only been tenants since 2014, are not in a position to disprove that assertion. Mr Whitfield appeared to be an honest and reliable witness, so the Tribunal has no substantial reason to doubt his testimony.

61. It is also intriguing to note that the only anomalous lease is for Apartment 7, which expressly sets a default position of a 1/11th share as a starting point. No explanation has been advanced by either party for this. The Tribunal nonetheless concludes this is likely to have been individually negotiated with the first tenant of Apartment 7, a certain Mr Barry Kenneth Woods, as an exception to the usual rule described earlier. In reaching this conclusion, the Tribunal takes note of the evidence that Mr Tomlinson appears to have had a proclivity to engage in shrewd business techniques, that he struggled to sell some of the leases for the Building, and that the first purchaser of Apartment 7 might have been understandably concerned about his level of financial exposure to service charges; such that it is reasonable to assume that Mr Tomlinson might have been willing to reach a pragmatic compromise with Mr Woods and cap his contribution at 1/11th.

62. The Tribunal therefore finds, on balance of probabilities, that the landlord determined the proportions payable in respect of each apartment at the outset of the development of the Estate in 2006 as each paying an equal 1/11th share. Whilst there was again no conclusive evidence of the original landlord having specifically appointed a surveyor to make this determination, the Respondent and the various tenants of the Estate appear to have operated on the assumption that the proportions were so determined, as evidenced by their having paid the service charges without objection over many years.

<u>If so, is or was it reasonable (on either interpretation) for the landlord's surveyor to have determined an equal 1/11th apportionment? In particular, would this be a reasonable thing to do bearing in mind the limitation placed by the specified 1/11th contribution under the lease for Apartment 7?</u>

63. The main argument in favour of the proposition that it is reasonable to determine an equal 1/11th apportionment is due to the "Tenant's Proportion" under the lease for Apartment 7 being pre-determined at 1/11th unless the landlord utilises the power set out at Paragraph 1.2 of the Fourth Schedule to the same. Unless the proportion for Apartment 7 was also varied at the same time as with the other leases, there would be an inevitable shortfall in receipt of service charge funds, because the contributions of the other ten apartments would add up to less than 10/11ths. This would therefore lead to the risk of insolvency, and no competent surveyor, acting reasonably, would ever put their client in that position. Exercising the power under Paragraph 1.1 of the Fourth Schedule of the Lease to any proportion other than a 1/11th share for Apartment 5 would thus require a simultaneous and corresponding alteration of the proportion for Apartment 7 to something other than the default 1/11th share, and this raises the issue as to whether it would have been deemed to be "acting reasonably" to do so immediately after granting the lease for Apartment 7 when the first tenant of Apartment 7 would have assumed his contribution had been limited through individual negotiation. This also therefore brings into question whether it would be "appropriate", as per the caveat set out in Paragraph 1.1 of the Fourth Schedule, to calculate the apportionment by reference to the ratio of the floor area of Apartment 5 to the others.

64. A further argument in favour is also that there is no evidence that the voting rights of the members of the Respondent company are allocated according to the size of their respective apartments and/or their contribution to the service charge funds. Where there is equal control, this may be indicative of equal responsibility.

65. The main argument against the proposition that it is reasonable to determine an equal 1/11th apportionment is that Apartment 7 does benefit more extensively from certain amenities, the costs of which form part of the service charge. The Tribunal is aware that for such reasons it is conventional for a larger property in a development to pay a greater share of the service charge.

66. Apartment 7 benefits from a much more extensive share of the roofline and guttering than the other apartments. The Respondent observes that the roof and guttering are nonetheless communal assets for the structural benefit of all of the tenants, including those on the ground floor.

67. Apartment 7 benefits from a high number of external windows which are cleaned through the service charge budget. However, it is common ground that there are other apartments with a similar number of external windows, with Apartments 1 and 4 having the most even though they would currently pay the same share of service charge costs as Apartment 5, the disparity being largely down to coincidence regarding the design as between external bay windows compared to balcony windows.

68. During the course of proceedings, it became common ground that Apartment 7 does in fact only benefit from lift access from one of the two lifts, not from both of them. The importance of this cost is also diminished given that the ground floor apartments derive little functional benefit from either lift anyway, but there is no suggestion that they should pay less towards the service charge costs as a result.

69. The Tribunal notes that the difference in apportionment in respect of the Applicants is between approximately 7.45% as against 9.09%, which is around only one-fifth more.

70. Alongside this, there are other substantial costs which are fed into the service charge calculation and in respect of which there is little or no substantial difference in benefit as between the various apartments, such as gardening and landscaping, maintenance of the car park (except for Apartment 3 which has a second space), communal lighting, security and fire alarms / equipment, entrance buzzers / doorbells, cleaning of internal corridors, maintenance of service media, etc.

71. In all the circumstances, the Tribunal is persuaded that it was reasonable to determine an equal 1/11th apportionment of the service charge costs for each of the apartments, including Apartment 5. The individual negotiation with the first tenant of Apartment 7 had the practical effect of tying the hands of both the landlord and the Respondent. Also, although it is to some extent counter-intuitive that a larger premises to pay an equal share, the argument that all of the service charge costs should be apportioned solely by reference to the ratio

of the apartments' floor areas, irrespective of actual benefit to each apartment, does not bear scrutiny when the actual rationale for incurring the costs is considered in depth.

In all the circumstances, have the service charges been demanded in accordance with the contractual mechanism as per above?

72. In the absence of any other substantive challenge by the Applicants, it naturally follows that the service charges have been demanded in accordance with the determined proportions and are payable.

73. If the Tribunal had not been persuaded to find that it was reasonable to determine an equal 1/11th apportionment of the service charge costs for each of the apartments, the issue would have arisen, in the alternative, that no reasonable determination would ever been provided by the landlord's surveyor. Had that been the case, all of the service charge demands for all of the apartments on the Estate (except, ironically, for Apartment 7) would have failed to comply with the terms of the respective leases from 2006 onwards, and would have thus been void and not payable to any extent, leading in all probability to the Respondent owing these sums back in full to all of leaseholders (except for Apartment 7). Given the current problematic circumstances following Mr Tomlinson's insolvency, it is difficult to envisage how that situation could have been rectified within the provisions of the various leases, since the power under Paragraphs 1.1 and 1.2 may only be exercised by the landlord's surveyor and not by the Respondent.

Is it just and equitable to preclude the Respondent from recovering its legal costs of the application through the service charge?

74. Subject to any particular considerations of an individual case, the Tribunal will usually hold that it is just and equitable to grant a tenant's application under Section 20C Landlord and Tenant Act 1985 if the tenant is substantially successful in their main application.

75. Given that the Applicants have not successfully challenged the service charges in dispute, the Tribunal exercises its discretion to refuse the application under Section 20C.

Should the Tribunal reduce or extinguish any administration charges sought from the Applicant by the Respondent?

76. Likewise, subject to any particular considerations of an individual case, the Tribunal will usually hold that it is just and equitable to grant a tenant's application under Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A if the tenant is substantially successful in their main application.

77. In this instance, the Tribunal nonetheless had great sympathy for the Applicants' desire for clarity on the terms of the Lease, which (it has already been noted) are highly ambiguous in relation to the issues in dispute. Accordingly, the Tribunal considers that the Applicants ought not to be penalised directly for any failure to pay service charges as and when falling due, and so the Tribunal exceptionally exercises its discretion to order that the Applicants should not have to bear any of the costs of litigation or penalties for failure to pay service charges.

Name: **Date: 28th July 2023**
Tribunal Judge L. F. McLean
Tribunal Member J. Faulkner FRICS

Rights of appeal

1. By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

2. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

3. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

4. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

5. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

6. If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).