FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00EU/LSC/2022/0052**
Property	**:**	**18, Archers Green Road, Warrington WA5 7XS**
Applicant	**:**	**Mr Shea Devine**
Respondent	**:**	**The Butts Green (Kingswood) Management Company Limited**
Type of Application	**:**	**Section 27A Landlord and Tenant Act 1985** **Section 20C, Landlord and Tenant Act 1985** **Paragraph 5A, Schedule 11, Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Tribunal Judge C.Wood** **Tribunal Member J Gallagher MRICS**
Date of Decision	**:**	**5 July 2023**

DECISION

Order

1. The Tribunal orders as follows:

   (1) directors' and officers' liability insurance: the premium costs incurred or budgeted in the service charge years 2016-2022 (inclusive) are not reasonably incurred and the Applicant is not liable to pay them;

   (2) sinking fund: the establishment of a de facto sinking fund is in breach of the terms of the Applicant's lease and the re-distribution of surplus funds has not been effected proportionately to leaseholders' contributions and is unreasonable accordingly;

   (3) 2022 service charge budget: the re-allocation of the management fee as between the leaseholders of the apartments and the leaseholders of the houses is reasonable and the Applicant is liable to pay a "reasonable proportion" thereof;

   (4) "non-contributing" houses: a "reasonable proportion" of the Estate service charge payable by the Applicant is 1/149th;

   (5) 2022 service charge budget: the budgeted amounts for waste collection and general maintenance insofar as it relates to pest control are reasonable and the Applicant is liable to pay a "reasonable proportion" thereof and

   (6) the actual and budgeted management fees for the service charge years 2016-2022 (inclusive) have not been reasonably incurred and are reduced by 40%.

2. The Tribunal further orders as follows:

   (1) s20C of the Landlord and Tenant Act 1985

   It is just and equitable to grant the Applicant's application under s20C of the 1985 Act preventing the Respondent from charging any of its costs incurred in the proceedings before the tribunal as service charge.

   (2) paragraph 5A of Commonhold and Leasehold Reform Act 2002

   It is just and equitable to grant the Applicant's application extinguishing any liability of the Applicant to pay administration charges in respect of the Respondent's litigation costs incurred in respect of the proceedings before the tribunal.

Background

3. By an application dated 14 May 2022, the Applicant sought determinations as to reasonableness and/or payability in respect of various items of service charge expenditure in the service charge years 2016 – 2022 (inclusive), ("the Application").

4. In response to directions dated 22 July 2022 both parties made written submissions to the Tribunal.

5. A video hearing was scheduled for 21 April 2023 at which the Applicant attended in person and the Respondent was represented as follows:

Respondent: Mr J Quirk

Counsel: Mr R Weatherley

Revolution Property Management Limited ("Revolution"): Mr L Burkitt

Butts Green (Kingswood) Management Company Limited: Mr A Lee

Law

6. Section 27A(1) of the Landlord and Tenant Act 1985, ("the 1985 Act"), provides:

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.

7. The Tribunal is "the appropriate tribunal" for this purpose, and it has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

8. The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It 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.

9. In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

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.

10. "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

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.

11. There is no presumption for or against the reasonableness of the standard of works or services, or of the reasonableness of the amount of costs as regards service charges. If a tenant argues that the standard or the costs of the service are unreasonable, he will need to specify the item complained of and the general nature of his case. However, the tenant need only put forward sufficient evidence to show that the question of reasonableness is arguable. Then it is for the landlord to meet the tenant's case with evidence of its own. The Tribunal then decides on the basis of the evidence put before it.

12. Section 20C of the 1985 Act permits the Tribunal to order that the costs incurred by the landlord in connection with these 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 by any other person specified in the application for the order. The Tribunal may make such order as it considers just and equitable in the circumstances.

13. Paragraph 5A(1) of Schedule 11 permits the Tribunal to reduce or extinguish a tenant's liability to pay a particular administration charge in respect of litigation costs. "Litigation costs" is defined in paragraph 5A(3) of Schedule 11. The Tribunal may make such order as it considers just and equitable in the circumstances.

Hearing

14. The written evidence submitted to the Tribunal included the following:

14.1 a copy of the Applicant's lease dated 27 July 2004 and made between Bellway Homes Limited ("Bellway") (1) Commission for the New Towns ("the Lessor") (2) Butts Green (Kingswood) Management Company Limited ("the Management Company") (3) and the Applicant ("the Lessee") (4), ("the Lease");

14.2 where appropriate, terms defined in the Lease shall bear the same meanings where used in this Decision;

14.3 a copy of a previous decision of the Tribunal relating to 95, Butts Green, Kingswood, Warrington WA5 7XT, which is a property on the same estate as the Applicant's Property, (the 2014 Decision").

15. The parties' oral submissions at the hearing are summarised as follows:

15.1 **Alteration of the service charge**

(1) The Applicant's claim related to the alteration of the service charge in 2015 into three separate categories, namely, the Inward Apartment charge, the All Apartment charge and the Estate charge.

(2) At the hearing, the Applicant conceded that the alteration was reasonable.

15.2 **Directors' and officers' liability insurance**

Applicant

(1) The Lease is the primary document which governs what the Respondent is able to charge as service charge;

(2) there is no provision in the Lease which allows the Respondent to charge directors' and officers' liability insurance as service charge;

(3) in the 2014 Decision, the Respondent conceded that the charge was unreasonable.

Respondent

(4) The Tribunal did not make any determination on this issue in the 2014 decision as it was conceded by the Respondent;

(5) the charging provisions and the method of calculation of the amount payable as a "reasonable proportion" of total service charge expenditure are set out in the Fifth Schedule to the Lease;

(6) it is acknowledged that there is no express provision relating to charging of the insurance premium but the provisions set out in paragraphs 1 and 2 of the Eighth Schedule must be construed within the overall context/background to the Lease;

(7) it is relevant that the Respondent is a specially incorporated company whose directors/officers are leaseholders;

(8) it is in the interests of the Applicant and for the Estate as a whole that the Respondent's directors/officers are local people;

(9) reference is made to the witness statement of Mr Andrew Lee, one of the Respondent's directors, that he would resign if such insurance was not in place;

(10) the Tribunal can take into account circumstances at the signing of the Lease which includes that a leaseholder would have known that there would be a management company owned by leaseholders.

15.3 **Sinking fund/management fees**

Applicant

(1) Again, the Lease is the relevant document and it was determined in the 2014 Decision that there is no provision in the Lease for the establishment of a sinking fund;

(2) the Applicant notes that, in the 2014 Decision, Mr Burkitt argued this point for the Applicants in that case;

(3) this issue is also a management issue;

(4) reference was made to the RICS Code and, in particular:

  (i) to the need for transparency in all dealings and communications with the leaseholders. The Applicant claims that there have been no newsletters/bulletins regarding the management of the Estate, no routine surgeries held, no forecasts and limited consultation;

  (ii) the two meetings which were held in 2020 were held because of the considerable disquiet felt by leaseholders about the proposed increased expenditure in the 2020 budget, and, in particular, the increased expenditure on garden maintenance, which is a demonstration of the lack of consultation;

  (ii) where there is no provision in a lease for the establishment of a sinking fund, to the desirability of discussions with leaseholders about the possible options of either making leaseholders aware of their need to make provision for future expenditure or the possibility of a lease variation to permit a sinking fund;

  (iii) the need for communication with leaseholders, outside of any required statutory consultation, for planned/cyclical works;

(5) the Applicant considers that the Respondent should have applied for a variation of the leases to provide for the establishment of a sinking fund, having regard to the age of the Estate and the works that it can be expected will be required in the future;

(6) the doubling of the service charge in the 2020 budget and the subsequent adjustment due to the reduction in the garden maintenance budget from £39000 to £20000, and again in the 2022 service charge budget is evidence of the need for there to have been much greater prior consultation with leaseholders by the Respondent;

(7) the failures of management should give rise to a reduction of the service charges paid in respect of the management fees.

Respondent

(8) There appears to be a contradiction in the Applicant's argument in that he both criticises the Respondent for charging a sinking fund as service charge and for not varying the lease to allow for one;

(9) it is clear that the Lease does not provide for a sinking fund;

(10) the Respondent has been collecting service charges on an annual basis for cyclical maintenance/repairs with the intention that all monies should be spent within the service charge year;

(11) reference is made to the note to the annual budget which explains how and why cyclical maintenance is dealt with in this way in view of the 2014 Decision;

(12) the Respondent acknowledges that, over a number of years, amounts not spent had been rolled-over to the following year with the result that as at the end of the 2020 service charge year, there was a surplus of £6022;

(13) the Respondent has now refunded this surplus to leaseholders;

(14) the Respondent requests the Tribunal to record the Respondent's concession that the Lease does not permit charging for a sinking fund, and to endorse the steps taken by the Respondent to refund the surplus to the leaseholders;

(15) garden maintenance costs were responsible for much of the increase as "exceptional works" were needed and reflect the problem of not having a sinking fund;

(16) the Respondent had considered a lease variation but were mindful that the costs of variation would have to be borne by the leaseholders.

Applicant

(17) The Applicant challenged the claim that such increases were the result of "exceptional circumstances";

(18) the Respondent should have given greater consideration to spreading the costs of the garden maintenance programme over several years as the works were not urgent like, for example, a leaking roof;

(19) in support of this claim, the Applicant referred to the decision in Garside & Anson v RFYC, BR Maunder Taylor [2011] UKUT 367.

Respondent

(20) The Applicant's claims merely highlight the issue for the Respondent of the absence of a sinking fund;

(21) the Respondent responded to the leaseholders' concerns by reducing the 2020 budget amount but the works still need to be done which is why the issue recurs in the 2022 service charge budget.

15.4 **Calculation of Estate Service Charge**

Applicant

(1) The Applicant challenges the re-allocation to the Estate Charge in 2022 budget of £2000 of expenditure in respect of management fees formerly charged to the apartment leaseholders;

Respondent

(2) Mr Lee explained that, on his appointment as a director, a discussion took place about a change of managing agents. Within that process, quotes were received for an appropriate management fee for the houses and the apartments of £50 pa for the houses and £150 pa for the apartments. At the time, the houses were being charged considerably less than £50 pa and the apartments were being charged considerably more than £150 pa. It was therefore agreed that there should be a fairer apportionment as between the houses and apartments which was enacted in the 2022 budget. Following the re-apportionment, the house leaseholders are individually paying less than £50 pa.

15.5 **The non-contributing houses**

Applicant

(1) The Respondent's argument is the same as that argued in, and rejected by, the Tribunal in the 2014 Decision;

(2) the 2014 Decision determined that the 22 properties came within the definition of "Other Dwellings" and the "reasonable proportion" payable by the Applicant should be re-calculated to take account of the number of properties which should be paying service charge;

(3) the Lease is in the same terms as the lease in the 2014 Decision;

(4) the first time that the Applicant became aware of the budget matrix was in these proceedings and not when he bought the Property.

Respondent

(5) It is agreed that the Estate comprises 149 properties in total;

(6) the 2014 Decision determined as a finding of fact that the 22 "non-contributing houses" comprised "Other Dwellings";

(3) the Respondent challenges the conclusion that, whilst these properties may comprise "Other Dwellings", there is therefore an obligation on them to contribute to the service charge expenditure;

(4) the 2014 Decision referred to Bellway's covenant to impose similar covenants and obligations on the leaseholders of any "Other Dwellings" to those contained in the Applicants' lease;

(5) the comparable provision in the Lease is at clause 3 but the Respondent contends that this should be interpreted as limited to the imposition of the Lessee's Covenants defined as those set out in the Fourth Schedule of the Lease;

(6) in support of this interpretation reference is made to recital 1(4) of the Lease which contains a statement of intent on the Lessor's part to grant leases for all of the Other Dwellings which contains covenants in similar terms to those set out in the Fourth Schedule;

(7) specifically, this does not include the covenant to pay service charge which appears in the Fifth Schedule;

(8) the Respondent's claim is that the intention behind clause 3 was to achieve uniformity in respect of "behaviour" covenants and that, to the extent that the 2014 decision determined that there was an intention to establish a management scheme, was overreach;

(9) the Respondent contends that this interpretation is further supported by paragraph 6 of the Ninth Schedule;

(10) it is permissible to construe the Lease having regard to background facts. Contemporaneous evidence is available in the form of the budget matrix which supports the Respondent's position that the Lessor had no intention of charging service charge to all 149 properties forming the Estate.

Applicant

(11) The Applicant regarded this interpretation as "a bit of a stretch" and noted as follows:

(i) that it is reasonable to expect that all leaseholders benefitting from services and facilities are required to contribute to their cost;

(ii) that leave to appeal the 2014 Decision on this point was refused; and,

(iii) that the leases of these 22 properties have not been put forward by the Respondent in evidence.

15.6 **Estate budget 2022**

Applicant

(1) The Applicant claims that the increase in the budgeted Estate service charge expenditure for 2022, as compared with 2021, is attributable to poor management on the part of Revolution;

(2) there is little information provided or independent evaluation of the works proposed to be undertaken;

(3) the Applicant considers that there is an "obsession" on the Respondent's part with more and more maintenance of the green areas. This is reflected in the increase of £22500 in the budget for expenditure on estate gardening/grounds maintenance.

Respondent

(4) The Respondent confirmed that, because of the issue with the reserve fund surplus, the 2020 accounts are still in draft form and the 2021 and 2022 accounts are delayed;

(5) the service charges for the years 2016 – 2021 have been fairly static ranging from £206 - £300;

(6) the increases in the general maintenance and waste collection are attributable to the fly-tipping and vermin issues;

(7) the Respondent explained that the garden maintenance had formerly been carried out by one of the residents but it was decided that it was more appropriate for the service to be put on a more formal footing/a contractor with greater capacity to undertake the works required. A formal tendering process was undertaken after which EDR were appointed;

(8) whilst they were not the cheapest, the Respondent was satisfied that they were an appropriate selection to undertake the works required at the Estate;

(9) the increased expenditure reflected the more extensive works required in recent years but it was expected that in 2023 they would return to more of a maintenance approach.

15.7 **Waste collection/general maintenance (pest control)**

Applicant

(1) Whilst the expenditure on waste collection had increased from £300 (2021) - £2500 (2022), the amount payable by the apartment leaseholders has reduced;

(2) the Applicant considers that the problem with the bins is essentially an issue caused by the apartment leaseholders/occupants;

(3) again there is little explanation for the increase in the general maintenance costs, but to the extent that they relate to pest control, the Applicant believes that this is essentially an apartment, rather than a whole Estate, problem.

Respondent

(4) There are two main issues in respect of waste collection as follows:

(i) insufficient number of bins: this has now been resolved;

(ii) fly-tipping: this is an issue not related to just the apartment blocks but across the Estate as a whole.

(5) pest control: the issue does not relate only to an issue with rats on the Estate but also to dog-fouling on the green. The Respondent does not consider either to be exclusively apartment issues.

15.8 **LED bulbs /Electric car charging ports**

Applicant

(1) The Applicant is supportive of the introduction of LED bulbs but considers that the cost should be spread over a longer period.

(2) With regard to the electric charging ports, the Applicant believes that:

(i) works have already started on the establishment of electric charging ports at the Estate;

(ii) this constitutes an improvement and there is no provision in the Lease permitting improvements;

(iii) as such charging ports will be for the benefit of apartment owners/occupants, they should be included as an apartment charge and not an Estate charge.

Respondent

(3) No expenditure has been incurred to date on the installation of electric charging ports, and accordingly, there is no service charge expenditure, actual or proposed, for determination by the Tribunal;

(4) further, there is no intention on the part of the directors to incur such expenditure.

(5) the Lease permits improvements at paragraph 1 of Eighth Schedule where it refers to "…the fitment upgrading replacement and maintenance of….other fitments and fittings…"

Tribunal's Questions

16. The parties responded to the Tribunal's questions as follows:

16.1 **has a variation of the leases been considered?**

(1) the Respondent confirmed that when Revolution had first taken over the management of the Estate in 2015, there was a discussion about variation but they had not progressed it because of cost. It had been discussed again in 2020 and there had been initial discussions with solicitors where indicative costs were in the region of £15-20,000;

(2) the issue had not been put to leaseholders.

16.2 **what was the reason for the deterioration in the upkeep of the gardens by 2020? Was consideration given to scheduling the works/costs across a greater number of years?**

(1) the Respondent explained that, until October 2021, it had been accepted that there was a benefit in the garden maintenance contractor being one of the residents. It is now recognised that this was

inappropriate as the upkeep/maintenance of the Estate was beyond the capacity of a single gardener;

(2) as a result, hedgerows had not been cut for many years: and had been allowed to get "out of control"; four unsafe trees were identified; trees/shrubbery were overgrown encroaching on some of the communal car-parking spaces;

(3) the tree removal costs were £6000;

(4) the Respondent estimates the costs of what were termed "high impact issues" were £10000;

(5) in 2020, the Respondent had taken into account the leaseholders' views and the schedule of works had been revised accordingly with a consequential reduction in the budgeted expenditure from £39000 to £20000;

(6) the Respondent acknowledges that the works/costs could have been scheduled over a greater number of years but also considers that there has been a noticeable improvement in the amenity of the Estate to the benefit of all residents.

16.3 **when the refund was paid to the leaseholders was it apportioned to reflect the different "classes" of charge? If not, had this given rise to an element of cross-subsidy as between the leaseholders? Was the timing of the refund with the issue of these proceedings coincidental?**

(1) Mr Burkitt reiterated that any surplus on the cyclical maintenance reserve fund should have been dealt with by a balancing charge on each service charge account at the end of each year, but the failure to do this had resulted in the accrued surplus;

(2) it was considered that the quickest and easiest way to effect the refund was to refund each of the leaseholders 1/127th ie make no further apportionment between the different classes of service charge;

(3) Mr Lee stated that the Respondent had relied on Revolution to resolve this issue;

(4) with regard to the timing of the refund, it was stated that there had been no prejudice to the Applicant.

16.4 **has any preliminary work been done with regard to electric charging ports?**

(1) The Respondent has sought to contact the freeholder regarding the possibility of the installation of electric charging ports at the Estate;

(2) this is not an issue just for the apartment leaseholders as some house owners have garages in the garage blocks, and to install charging ports in these garages may require work to the electricity cabling which runs through the Estate;

(3) it is expected that individual house owners would pay for any installation but it is anticipated that it might involve the freeholder and/or Management Company.

Costs-related applications

17. **Section 20C and Paragraph 5A to Schedule 11 of CLARA**

Applicant

(1) The Lease is very poorly written, which makes it difficult for a leaseholder to understand;

(2) the Application has been brought in order to get clarity on important issues for leaseholders generally e.g. if the 22 "non-contributing houses" were required to pay, it would mean additional service charge income of £10,000 per annum, which is clearly significant; the improved amenity of the Estate has disproportionately benefitted those leaseholders who live nearest the green and, for that reason, more attention should have been paid to the financial impact on this significant expenditure on all of the leaseholders;

(3) the Applicant has tried to resolve these issues by going through the complaints' procedure without success: the response to the issues raised regarding D&O liability insurance and the sinking fund was inadequate having regard to the terms of the Lease.

Respondents

(4) It is always difficult to make submissions on these applications in the absence of the Tribunal's findings of fact but the Respondent makes the following points:

(i) two of the issues in the Application are the apportionment of service charge which was conceded by the Applicant at the hearing, and the 22 "non-contributing houses" which, for the reasons advanced, the Respondent regards as a point without substance;

(ii) in addition, the Applicant has used the hearing as an opportunity to critique management generally, raising de minimis and frivolous points eg LED lights, waste collection/pest control;

(iii) the Respondent is a leaseholder-owned management company and the words of Mr Martin Rodger in the 2013 UT decision in Conway v Jam Factory Freehold Limited should be borne in mind in that context: that it is "essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make";

(iv) In this case, if there is a shortfall on the recovery of costs, then the other leaseholders will have to pay.

Reasons

18. The Tribunal's reasons for its determinations in paragraph 1 of this Order are as follows:

Apportionment

(1) The Tribunal notes the Applicant's concession of reasonableness regarding the change in the Respondent's apportionment of the service charge expenditure as between the three categories of charge.

Directors & Officers Liability Insurance

(2) The Tribunal notes that the Respondent and Mr. Burkitt were aware from at least the date of issue of the 2014 Decision that there is no provision in the Lease permitting the charging of the D&O insurance premium as service charge;

(3) the Respondent's evidence that one of the current directors would not act in that capacity if such insurance was not available was not relevant to its determination as to the reasonableness and/or payability of service charge;

(4) the following amounts are not relevant costs for the purpose of the calculation of service charge:

2016: £214

2017: £300

2018, 2019, 2020: £392

2021: £392

2022: £500

Sinking fund/cyclical maintenance fund

(5) The Tribunal notes that the Respondent and Mr. Burkitt were aware from at least the date of issue of the 2014 Decision that there is no provision in the Lease permitting the collection of service charges for the purpose of establishment of a sinking fund;

(6) the Tribunal considers that the collection of funds for the establishment of reserve funds and the failure by the Respondent's managing agents to ensure that surplus funds were re-distributed at the end of each service charge year constituted the de facto establishment of a sinking fund in the absence of any provision in the Lease permitting it;

(7) the method of re-distribution of the surplus funds is dealt with below under the heading of "management fees".

Garden maintenance

(8) The Tribunal regards the issue of the deterioration in the standard of amenity of the Estate, which the Respondent explained was the rationale behind the decision to commit significant funds to garden maintenance in 2020, and the programming of works are management issues and are dealt with below under the heading "management fees";

(9) the Tribunal does not consider that the Application contains any challenge to the reasonableness of the amounts expended in the context of the specific works undertaken and it makes no determination accordingly.

Re-allocation of management fees as between houses and apartments - 2022

(10) The Tribunal notes that, contrary to the Respondent's evidence, the Applicant's share of the management fee as budgeted is not "less than £50" but determines that the re-allocation of the management fee as between the apartments and the houses is reasonable.

Non-contributing houses

(11) The Tribunal concurs with the finding in the 2014 Decision that the 22 non-contributing properties constitute "Other Dwellings", that is, "…dwellings forming part of the Estate and benefiting from the use of the Communal Areas";

(12) the Tribunal determines that Bellway's covenant in paragraph 4 of Part I of the Seventh Schedule of the Lease should be given its plain and ordinary meaning, that is, a covenant by Bellway, as developer, with both the Lessee and the Management Company to promote uniformity across the development by the imposition of "covenants in terms similar to those contained in the Lease".

(13) in particular, the Tribunal does not accept the Respondent's argument that Bellway's covenant should be limited to the Lessee's covenants in the Fourth Schedule by reference to the recital in clause 1(4) of the Lease which refers to the Lessor, a separate party from Bellway, or by the provision in paragraph 6 of the Ninth Schedule;

(14) in view of the lack of ambiguity on the face of the Lease, the Tribunal dismisses the Respondent's submission that it should have regard to contemporaneous evidence relating to background facts to assist its interpretation of the Lease;

(15) if, and to the extent (if at all) the Tribunal should have regard to such contemporaneous evidence, the Tribunal refers to paragraph 8.2 of the Third Schedule of the Lease where, in the context of plans showing the "plotting or general scheme of development of any part of the Estate" it provides that neither the Lessor, the Management Company nor

Bellway shall be bound in any way by such plotting or general scheme, and shall have the right to alter the same from time to time";

(16) by way of comparison, the Tribunal considers that the budget matrix contained in a document entitled "Proposals for the Provision of Facilities Management Services" should not be given any greater weight than the plans referred to in paragraph 8.2 of the Third Schedule, that is, it should be regarded as not binding on the parties and inconclusive of the Lessor/Bellway/Management Company's intention in this respect;

(17) the Tribunal also accepts the Applicant's evidence that he first became aware of the budget matrix during the course of these proceedings and not at the time of his entry into the Lease;

(18) the Tribunal therefore finds that a reasonable interpretation of the Lease is that the Estate service charge would be calculated on the assumption that Bellway had performed its covenant in paragraph 4 of the Seventh Schedule so that the leases of all of the "Other Dwellings" contained "covenants in terms similar to those contained in the Lease", including, without limitation, a covenant to pay a service charge;

(19) the Tribunal determines accordingly that the "reasonable proportion" of the Estate service charge payable by the Applicant is 1/149th of the total expenditure.

(20) The Tribunal appreciates the consequences for recoverability by the Respondent of 100% of the Estate service charge but notes as follows:

(i) the Respondent has been aware of this issue since at least the 2014 Decision and appears to have taken no action to seek to address or resolve it;

(ii) in this respect, the Tribunal notes the limitations on the Respondent's ability to impose charges on the 22 leaseholders with whom it has no contractual relationship but this does not preclude investigation of the possibility of voluntary agreements or a lease variation to make it clear that a "reasonable proportion" of the Estate charge is limited to 1/127th. In this respect, the Tribunal considers that the nature of the Management Company as a leaseholder-owned company and the effect on its ability to recover 100% of service charge are relevant issues which should have made the resolution/clarification of the issue following, at least, the issue of the 2014 Decision a priority;

(iii) if the Management Company suffers loss as a result of Bellway's breach of covenant, then it appears open to the Management Company to take action against it.

Waste removal and pest control

(21) The Tribunal does not accept the Applicant's claim that this is expenditure that should be charged exclusively to the Apartment leaseholders, and further determines that the amounts charged are reasonable.

Electric charging ports

(22) The Tribunal accepts the Respondent's submissions:

(i) that no expenditure had been incurred in respect of the installation at the Estate of electric charging ports;

(ii) that, if such ports were to be installed in the future, it would not necessarily be solely for the benefit of Apartment leaseholders;

(iii) as there is no evidence before it of either actual or proposed expenditure, there is no determination to be made by the Tribunal on the questions of reasonableness and/or payability and/or whether such works are permitted under paragraph 1 of the Eighth Schedule of the Lease.

Management Fees

(23) The Tribunal determines that there is evidence before it of repeated failings in respect of the management of the Estate which has resulted in service charges being unreasonably incurred as set out in the determinations in this Decision.

(24) In particular the Tribunal notes the following:

(i) the charging of directors' and officers' liability insurance premiums in the absence of any provision in the Lease permitting it to do so;

(ii) the establishment of a de facto sinking fund in the absence of any provision in the Lease permitting it to do so. The Tribunal notes in this respect the Respondent's concession that it has no right under the Lease to establish a sinking fund but that it had failed to take adequate measures to ensure that surplus funds were re-distributed annually;

(iii) the refund of the accumulated surplus on the reserve fund without regard to the differing proportions payable by the leaseholders resulting in a "windfall" for some leaseholders at the expense of others;

(iv) the delay in the preparation of accounts such that the 2020 accounts are still in draft form and the 2021 and 2022 accounts are yet to be issued;

(v) the failure over a number of years to establish an adequate grounds maintenance programme;

(vi) when faced with a significant increase in expenditure on garden maintenance, the failure to give adequate consideration to the

desirability of scheduling the works over a reasonable period of time and to prioritise works having regard to the interests of all leaseholders;

(vii) the failure to communicate adequately with leaseholders in respect of the deficiencies in their leases of which the Management Company had been aware of since at least the issue of the 2014 Decision, and with regard to proposals to significantly increase expenditure on garden maintenance;

(viii) breaches of the RICS Code by the Respondent's managing agents e.g. the failure to make leaseholders aware of the lack of provision in their leases for the establishment of a sinking fund and what could/should be done individually to prepare for that or collectively by way of variation of their leases.

(25) In view of all of the above, the Tribunal determines that the management fees in each of the years 2016-2022 have not been reasonably incurred and are reduced by 40 per cent for each of the years in question.

(26) **<u>20C and paragraph 5A</u>**

(1) The Tribunal notes that, during the course of the proceedings/at the hearing, the Applicant made a number of concessions regarding claims brought in the Application.

(2) Further the Tribunal accepts that some of the Applicant's claims were for relatively small amounts and/or were not upheld by the Tribunal.

(3) The Tribunal notes, however, that, in respect of what may be considered to be the more significant issues e.g. the sinking fund, the non-contributing houses, management fees, the Tribunal has made determinations in favour of the Applicant.

(4) The Tribunal also considers that there was a failure on the part of the Respondent to actively engage with the Applicant to seek a resolution of these issues, prior to the issue of the Application.

(5) For these reasons, the Tribunal considers it to be just and equitable to grant the Applicant's applications both under section 20C to prevent the Respondent charging the costs of these proceedings as service charge, and under paragraph 5A of Schedule 11 of CLARA to extinguish any right to charge any of its litigation costs incurred in the proceedings before the Tribunal as administration charges.

C Wood
Tribunal Judge
5 July 2023