**FIRST - TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | CHI/00HE/LSC/2023/0037. |
| **Property** | **:** | Flat 9, Zodiac House, The Valley, Porthcurno, Cornwall. TR19 6JX. |
| **Applicant** | **:** | Sarah Frances Molyneaux, Neil Molyneux (9) George Joseph Sependa, Josephine Sependa (13) Peter William Jackson (12) |
| **Representative** | **:** | Sarah Molyneaux and Neil Molyneaux. |
| **Respondent** | **:** | Zodiac House Management Limited,<br>Norma Gregory (Flat 2)<br>Janete Rudge (Flat 3)<br>Dr Rupert Collins (Flat 4)<br>Susan Elliot (Flat 5)<br>Mr A W Durkin and Mrs C E K Durkin (Flat 6)<br>Manis Ser Limited (E-L Shatby White)( Flat 7)<br>Andre Van Wyk & Jackie Van Wyk (Flat 8)<br>Janet Adams (Flat 10)<br>Georgina Browne and Michael Browne (Flat 11) |
| **Representative** | **:** | Nicholas Seaton-Burridge (Belmont Property Management) assisted by Michael Browne and Graham Day. |
| **Type of Application** | **:** | Sections 27A and 20C The Landlord and Tenant Act 1985 (the Act). Paragraph 5 of schedule 11 of the Commonhold and Leasehold Reform Act 2002 (CLARA). |
| **Tribunal Members** | **:** | Judge C A Rai (Chairman).<br>Mr M C Woodrow MRICS. |
| **Date type and venue of Hearing** | **:** | 29 September 2023.<br>Truro Magistrates Court, The Court House, Tremorvah Wood Lane, Mitchell Hill, Truro. TR1 1HZ. |
| **Date of Decision** | **:** | 19 October 2023. |

## DECISION

1. The Tribunal decided that the apportionment of the service charges by the Respondent is not authorised by the wording of the leases of the thirteen flats (the Units) comprising Zodiac House (the House) which provide for the service charges to be calculated "primarily……. by reference to the floor area of the Unit compared with the aggregate of the floor areas of all the Units in the House".

2. The service charge expenditure for Zodiac House incurred during 2022/2023 should be divided between the thirteen lessees, primarily on the basis of the calculation referred in the leases. Any elements of the service charges which relate only to the six flats within the Tower should be either split equally between those flats or calculated by reference to the floor areas of those flats as a percentage of the total floor area of the six flats.

3. Insofar as the lease gives the Landlord discretion to calculate contributions towards any elements of the service charge on a different basis, the Tribunal has no jurisdiction to exercise that discretion in place of the Landlord, but it can determine if the Landlord has acted rationally or reasonably in exercising its discretion.

4. The Tribunal made no orders under section 20C of the Act or paragraph 5 of Schedule 11 to CLARA.

5. The Tribunal declined to make an order reimbursing the Applicant in respect of the Application and Hearing Fees paid to the Tribunal.

6. The reasons for the Tribunal's decisions are set out below.

**Background**

7. Zodiac House, The Valley, Porthcurno, Cornwall was formerly part of a building used as a training facility for the Eastern Telegraph Company (Cable and Wireless). It was converted into thirteen residential apartments or flats (referred to in the lease as units) first sold in 1998.

8. The official copy of the Property Registers of the freehold title (CL150733) show that leases of the thirteen flats were granted between June and December of 1998 and that Zodiac House Management Limited (Zodiac) was registered as owner of the freehold of Zodiac House on 10 September 1999 [120-122].

9. Belmont Property Management (Belmont) is the current managing agent of Zodiac House.

10. The only lease disclosed to the Tribunal with the Application, a copy of which is in the Hearing Bundle, is of Flat 9 Zodiac House (the Lease) [73]. The parties present at the Hearing and Mr Seaton-Burridge of Belmont all agreed that the leases of the other flats are in a similar form and contain the same obligations and covenants. However, Mr Seaton-Burridge said that he has not seen any of the other leases. In response to an enquiry from the Tribunal he said no physical documents had been handed over to Belmont by the previous managing agent. Belmont has not obtained copies of any of the other leases of flats within Zodiac House.

11. Zodiac House is located on the road leading to Porthcurno Beach. It is a substantial L shaped building with the long side of the "L" adjacent to the road and short side at the far end at a right angle to the road. A private car park is located on the opposite side of the road. The Tribunal were told that each flat has a space, but some flats have two spaces.

12. The thirteen flats comprise four single storey apartments at each end of the building, (Flats 1, 2, 8 and 11), three two storey apartments (Flats 3, 4 and 7) and six single storey apartments on the ground, first and second floors within the part of the building referred to by the parties as "the Tower" (Flats 5, 6, 9, 10, 12 and 13). The flats in the Tower share entrance doors at the back and front of the building which are connected by a communal ground floor hallway off which the two ground floor flat entrances are located and from which the stairs lead to the upper floors. Some services are now located within a cupboard off that internal hallway and the Tribunal were told that all the leases grant the lessees rights to use the internal hallway.

13. Part of the first floor of Flat 7 overhangs a communal passageway which leads to the front garden of Flat 7. The other two storey apartments have small private garden areas at the rear of the building. The Tribunal were told that the gardens at the front of the building are communal areas, although some are only used and maintained by the leaseholders of the flats which adjoin them.

14. The yard, immediately adjacent to the rear of the building, is flat but the gardens beyond are set into a sloping bank and are steep and partly terraced.

15. An enclosed bin store is located to the right of the entrance gate leading into the yard. The access to flats 8 and 11 is at the terrace level reached by steps from the rear yard. Those steps also provide access to a large raised communal terraced area with washing lines at the end.

16. Access to the upper flats at either end of the building (Flats 2 and 11) is from two separate external metal staircases, (which Mr Seaton-Burridge told the Tribunal are common parts) maintained by Zodiac.

17. The Applicant stated that the majority of the lessees do not occupy the flats permanently. Many of the flats are used as second or holiday homes but an Applicant, Mr Jackson (Flat 12) is a permanent resident.

18. The Tribunal were told that when the leases were granted, the original landlord and tenant entered into a contemporaneous supplemental deed, by which the original landlord agreed with each lessee to form a management company and (following the grant of the lease of the last unit) to transfer the freehold of Zodiac House to that company. The tenant agreed to become a shareholder in the company.

19. The Tribunal were told that each supplemental deed referred to the proportion of the Service Charge payable by the tenant at that time, (expressed as a fixed percentage). The only supplemental deed in the Bundle relates to flat 4 and refers to a service charge contribution of 10.5% [103]. It is dated 16 July 1998 (the same date as the date of the lease of that flat) [121].

20. Clause 4 of the supplemental deed of flat 4 states "The provisions of this deed shall remain in force only until the Date of the Transfer and shall thereafter cease to have effect". (That date will have preceded the date on which Zodiac was registered as owner of the freehold at the Land Registry) (see paragraph 8 above).

21. The Applicant applied to the Tribunal for a determination under section 27A of the Act on 16 March 2023. The principal reason given for the application is the claim that the apportionment of the service charges between the lessees of the flats at Zodiac House is incorrect and not in accordance with the leases of the flats.

22. Directions issued by Judge Tildesley OBE on 9 June 2023 required the parties to attach position statements and provide the Tribunal with a copy of "the draft Matrix", referred to by the Applicant, and which he presumed explained the calculation of the service charge payable for each flat. Following a Case Management Hearing (CMH) on 23 June 2023, Judge Tildesley issued Further Directions dated 4 July 2023 (the July Directions).

23. Judge Tildesley identified that the Applicant had an "arguable case on the issue of the apportionment of the service charge" and directed that:-

    a. a hearing would be required to enable the Tribunal to decide the application. He limited the dispute to the service charge year 1 May 2022 – 30 April 2023 (2022/2023).

    b. the question to be determined is whether the method of apportionment used by the landlord is "authorised by the lease and is reasonable within the meaning of part 1 of the Act. He said that the decision in **Willams v. Aviva Ground Rent GP Limited [2023] UKSC 6** establishes that the Tribunal has jurisdiction to decide on the appropriate method of

apportionment and that any clause of the lease seeking to oust the Tribunals jurisdiction is void and of no effect" [29].

24. In Further Directions dated 25 August 2023 (the August Directions) Judge Tildesley summarised the issues which the Tribunal would consider and proposed that the Tribunal adopt the floor area calculation for each flat and the resulting net internal area as a percentage of the total floor areas for each unit set out in the annex to the Directions issued after the CMH (the July Directions) **unless** the Applicant made contrary representations within a defined time period.

25. The Applicant commented that those calculations did not represent net internal floor areas but "living areas" and suggested therefore these were not in accordance with the Lease. In response Belmont confirmed that the net internal floor measurement reflected an acceptable approach to measuring practice set out in the RICS code.

26. Judge Tildesley confirmed that the Tribunal's determination was not about measuring practice but about the construction of the Lease. He directed that the Applicant inform the Tribunal if he wished to propose an alternative method of calculation of the floor area of each flat or adopt the method used since the leases were granted. The Applicant later confirmed that it did not.

27. Therefore, Judge Tildesley confirmed that "the Tribunal will adopt the floor area calculation for each unit and the resulting net internal area as a percentage of floor area for the unit included in Mr Day's analysis" (annexed to the Directions dated 4 July 2023) [40 – 58].

28. Judge Tildesley said that the question for determination is whether a document used by the Respondent, described as **Matrix for Service Charges** [46], to calculate the service charge contribution for each flat, complies with paragraph 1(ii) of the Fourth Schedule to the Lease and produces an outcome which is reasonable within the meaning of part 1 of the Act.

29. The parties were required to provide further information; were notified that the Tribunal would inspect the Property on the day before the Hearing; and were advised of the location of the proposed hearing venue. It was directed that following receipt of appropriate information from Belmont, the Tribunal would ask each leaseholder whether they wished to join the proceedings as either an Applicant or Respondent.

30. Prior to the inspection the Tribunal received a hearing bundle from the Applicant comprising 232 pages. The references to numbers in square brackets in this decision are to the numbered pages in the bundle.

31. The Tribunal was notified which leaseholders wished to be joined to the proceedings, and in which capacity, and the information regarding the parties in the heading of this decision reflects those responses **save and except** that Graham Day notified that Tribunal at the hearing that his wife Susan Elliot (Flat 5) wished to be joined as a Respondent. (It

does not appear that until then the Tribunal had received formal notice, or if it had, that Susan Elliot was referred to as a named Respondent).

32. Whilst there was no formal request by the Respondent to appoint a representative, a written request was received from Mr Browne for the Tribunal to give permission for Mr Day to assist the Respondent during the Hearing. The Tribunal consented to this and sent both parties a copy of Rule 14 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules). Mrs Molyneaux said that she had not received the correspondence from the Tribunal, but it was established that the correspondence had been sent to Mrs Sependa (another Applicant). The Tribunal established that the Applicant did not object to Mr Day assisting the Respondent.

**The Inspection**

33. The Tribunal members met Mr Seaton-Burridge, Mr Browne and Mr and Mrs Molyneaux at the Property at noon on the day before the Hearing. They walked down from the car park across the road and through a pedestrian gate which is to the left of the larger gate through which it is possible to gain vehicular access to the yard at the side and rear of Zodiac House.

34. The Tribunal were told that a sink hole had damaged the tarmac between the road and gate. The Tribunal were shown the external metal staircase on the end of Zodiac House, which is the entrance to Flat 2, the bin enclosure located on the right of the yard, and the small garden areas at the rear of flats 1, 3 and 4. The members entered the Tower looked at the cupboard located off the ground floor hall, and ascended the stairs which lead to flats (9, 10, 12 and 13). They also walked through the hall off which flats 5 & 6 are located and through the communal front door. The Tribunal was told that the small garden areas in front of flats 3 and 4 are communal but used, and in some cases maintained, by the owners of the adjoining flats.

35. Flat 7 is located on two floors, with access via an external passageway that also leads to the garden serving the flat. The entrance to this flat is at the side of this covered passageway. The Tribunal were told that this is a communal area, although it is only used by the occupiers of Flat 7.

36. The Tribunal then ascended the stone steps at the rear of the yard. To the right of the steps in front of the remainder of the garden is a long patio area leading to the drying area.

37. The entrances to Flats 8 and 11 are from this higher level on the left of the building (when viewed from the road. Flat 11 at 2nd floor level, is accessed via external metal steps set into the end wall of the building which match those at the other end of the building.

38. The Tribunal walked along the road at the front of the building to look at the extent of the communal gardens, a narrow strip of which extends beyond the footprint of the building, alongside the road, until it reaches the access drive leading to two adjoining properties. Generally,

the grounds and the external decoration of the Zodiac House appeared both tidy and well maintained.

**The Hearing**

39. Mr and Mrs Molyneaux spoke on behalf of the Applicant. Mr Seaton-Burridge, Mr Day and Mr Browne spoke on behalf of the Respondent. Mr and Mrs Sependa and Mr and Mrs van Wyk also attended the Hearing.

40. The Judge explained to the parties that the Application had been made under sections 27A and 19 of the Act. She referred both parties to **paragraph 17** of Judge Tildesley's August Directions.

**The Applicant's Case**

41. Mrs Molyneaux said that the dispute was about the fairness of the apportionment of the service charges. She said that she had not known about the existence of the Matrix when she purchased her flat. She said that she believed that the apportionment of the service charges using that Matrix were based on a "guesstimate of the service charges" which would be incurred in the year following the grant of the lease and before the freehold was transferred to the Respondent. She said the Matrix was never altered to reflect the service charges expenditure actually incurred. She explained that the service charges allocated to the six flats within the Tower are subject to further adjustment because only those flats contributed to the electricity and internal maintenance costs. The costs are not equally divided but loaded on a floor by floor basis, with the flats on the top floor paying three times more than flats on the ground floor. The "loading" was calculated on a ratio of 3:2:1 with half the costs charged to the two second floor lessees, one third are paid by the two first floor lessees and one sixth are paid by the ground floor lessees.

42. When the Matrix was drawn up some budgeted expenses were apportioned based on floor area, but others were not. Mrs Molyneaux suggested that the cost of maintaining the internal communal areas of the Tower should not paid only by the lessees of the six flats in the Tower.

43. Mrs Molyneaux said that the deficiencies caused by the use of the Matrix have been made worse by the fact that the percentages in it were never adjusted once actual service charge costs were identified. In her reply to the Respondent's statement, she had set out her calculation of the service charge cost per square metre for each flat [227-228]. Whilst the average cost per flat is £28.59 per sqm, Flat 13 pays £56.40 and Flat 2 pays £21.76. Mrs Molyneux said that she does not believe that the disparity in service charge contributions was ever intended. Two flats which are similar in size, 10 and 13, are paying £48.82 per sqm and £56.40 per sqm. She does not understand the justification for such a wide variation in service charges.

44. When asked if the Applicant had a view as to whether it was appropriate to apportion specific service charges on an alternative basis, it was suggested that the Management Fee could be split equally

between the thirteen leaseholders as each derived an equal benefit. Similarly, the cost of repairing the sink hole could have been shared equally. The Applicant said, by way of an example, it would be very unfair to split the costs of resurfacing the car park based on the Matrix percentages as Flat 13 with one parking space would pay more than another flat with two parking spaces. If an electric charging point was installed, there would be no justification for installation costs to be split other than equally between each of the thirteen lessees.

45. There is a single meter measuring the communal electricity consumption, so it is not possible to accurately separate out the costs of the internal lights and the twelve external lights. An "ad hoc" division is made by the Respondent with the cost of the internal supply being recovered only from the six lessees in the Tower but unequally split on the "loaded" basis.

46. Mrs Molyneaux believes that the current usage is likely to be split differently from the usage when the leases were granted. The internal lights automatically cut out after 10 minutes whereas the external lights are controlled by a "dusk till dawn" sensor and so remain on during the hours of darkness. All the lessees benefit from the external lighting.

47. The Second Schedule to the Lease contains the "Appurtenant Rights". Paragraph 3 (c) includes the right "To use the hallways and staircases and any other internal parts of the House designed for use by more than one tenant for gaining access to and egress from the Unit" [89].

48. When summing up, Mrs Molyneaux said that for the Landlord to use the Matrix, which was drawn up using estimated service charge costs, cannot be reasonable. She believes that the current division of service charges is unfair. The Respondent has been unable to explain why the service charges are not calculated by reference to the floor areas of the flats. Some of the percentages in the Matrix are at odds with a division based on floor area. She believes, therefore, that some lessees are being substantially prejudiced and that the current service charges will impact on saleability of some flats, particularly those on the first and second floors of the Tower. Mrs Sependa however said that, because she had wanted to buy her flat, she had not taken much notice of the service charge percentage attributable to her flat but only looked at the annual amounts which had been payable in the preceding years.

49. Mrs Molyneaux suggested that reference to the actual usage of communal areas and those areas which are maintained by the Respondent does not directly assist with an analysis of who should contribute to the service charge costs and in what proportions. She said that electricity costs have increased substantially which has made the current division of those costs more unreasonable. Applying the percentages in the Matrix which reflects the loading in respect of the six flats in the Tower is intrinsically unfair.

50. She also said that the communal hallway is "just that" and therefore the maintenance costs should be shared equally between all the leaseholders.

**The Respondent's case.**

51. The current apportionment of the service charge has been used for roughly 25 years. Whilst Mr Seaton-Burridge acknowledged that it has only been possible to produce a copy of a single Supplemental Deed, he said it is reasonable to assume that similar deeds were entered into by the original lessees of the thirteen flats and that all the original lessees would have seen the Matrix and accepted the proposed division of service charge. The fact that this method of apportionment has been used for twenty five years has achieved continuity.

52. Mr Seaton-Burridge said that there were two fundamental issues which might influence prospective purchasers of the flats. Firstly, should the six flats in the Tower pay all the communal costs independently. If that was accepted, should those costs be weighted (against the first and second floor owners), be shared equally between all six owners or apportioned differently?

53. Mr Seaton Burridge acknowledged that the current apportionment is not perfect but stated that in his experience of managing blocks of leases it was a generally accepted practise to apportion management charges and internal services and maintenance based on floor area. He believes that the fundamental issue which might have prompted the application to the Tribunal is the weighting of the service charges between the six flats in the Tower.

54. Mr Day specifically referred the Tribunal to his detailed written analysis of the Matrix. He referred to page 46 of the Bundle which he said is a copy of the Matrix supplied to the first buyers and original lessees of the thirteen flats. He explained that his wife Susan Elliot, the current owner of Flat 5, is an original lessee and had retained most of the paperwork relating to her purchase, which was why he had been able to access the information on which he had based his analysis of how the currently used service charge percentages might have been calculated. The plans with the internal net living areas marked on them were provided to prospective buyers when the flats were marketed [115 – 118]. The floor area for each flat, referred to in his analysis, had been extracted from the measurements shown on those plans.

55. Using those measurements, he had produced the "floor area calculation" [Page 43]. As he had explained, in his analysis, he believed that there had been a typing error, but he had interpreted the information and checked the Matrix by putting together the "back calculation" [49]. From that calculation he had concluded that the figures in the Matrix increased the service charge percentages relating to five flats, 3,4,7,10 & 13. Whilst he has suggested reasons, he has no evidence why the adjustments were made.

56. The additional services which applied to the Tower flats, cleaning and internal redecoration further increased the service charge percentage of those flats and those costs were not equally divided but were "loaded" with the ground floor flats paying one sixth, the first floor flats paying one third, and the second floor flats paying one half of those costs.

57. Mr Day and Mr Seaton-Burridge both confirmed that the internal lights in the communal parts of the Tower are controlled by a timer. The lights will turn off after ten minutes. The external communal lights are triggered by the dawn till dusk timer. Mr Seaton-Burridge accepted that the division of electricity, cleaning and the internal repairs attributed to the Tower lessees and how those costs were split unequally between them could be reviewed.

58. Mr Day and Mr Seaton-Burridge confirmed that there is no communal water supply, so electricity is the only utility cost included in the service charge. The electric meter measures the communal supply to both the Tower and to the external communal lights. Some flats have additional external lights wired into the respective lessees' individual meters.

59. Mr Seaton-Burridge suggested that the external staircases, were not included in any of the leases and had therefore been "adopted as communal entities". He said that the balconies were demised.

60. In response to questioning from the Tribunal Mr Seaton-Burridge said that whilst the budget percentages are based on the estimated costs for the next year, actual service charge contributions are reconciled with the expenditure, once established. Any surplus is either "added" to the sinking fund or credited to the individual service charge accounts depending on the collective wishes of the lessees.

61. In summing up the Respondent's case, Mr Seaton-Burridge said that the Managing Agent is of the opinion that it is standard operating practice that all costs relating to the Tower should be borne exclusively by the six lessees with flats within it. He believes that the basis of the division of the service charge is fair and reasonable. There is no call for the division of the service charge to be varied from most of the lessees and it is his view that the majority accept that the current division should continue.

62. He however conceded that, there might be justification for varying the division of those service charges paid only by the lessees of the Tower because the loading applied in the Matrix might no longer be reasonable.

**The Section 20C Application**

63. It was established that the application form which referred to those lessees on whose behalf the application is made is no longer correct. Mrs Molyneaux agreed that the application was now made on behalf of Flats 9, 12 and 13 (Molyneaux, Jackson and Sependa).

64. Mrs Molyneaux believed that, had there been better communication and dialogue between the Applicant and the freeholder (and its Managing Agent), there would have been no need for her to make the application.

65. For that reason, she also wished to request that the Tribunal make an order reimbursing the application fee and hearing fee paid by the Applicant.

66. Mr Seaton-Burridge said that he believed that there had been an ongoing dialogue and that the parties had shared the available information by email. Information about the Matrix only came to light when Mr Day was able to obtain further information and a copy of the original supplemental deed for flat 4.

67. Mrs Molyneaux said that she wished to continue with the application under paragraph 5A of Schedule 11 to CLARA. When it was explained to her that this related to litigation costs and Mr Seaton-Burridge confirmed that no charge would be made to the Respondent for his participation in the proceedings, she agreed not to pursue that application.

68. Mrs Molyneaux then asked if Mr Seaton-Burridge's agreement not to make any charge was "legally binding". The judge confirmed that she would refer to what had been said during the hearing in the decision.

**The Law and the Lease**

69. The primary application is made under section 27A of the Act. That section, together with extracts from other relevant sections in the Act, are set out in full in the Appendix. The Tribunal has jurisdiction to consider if the service charges payable by the Applicants are reasonable and if these have been reasonably incurred.

70. There is no dispute about the liability of the Applicant to contribute towards the service charge. The parties dispute whether the apportionment of the service charges incurred has been calculated in accordance with the Lease.

71. In his August directions, Judge Tildesley OBE referred both parties to the decision of the Supreme Court in **Williams v Aviva Investors Ground Rent GP Limited [2023] UKSC 6** which established that the Tribunal has jurisdiction to decide on the appropriate method of apportionment and that any clause of the Lease seeking to oust the Tribunal's jurisdiction is void and of no effect.

72. Following the case management hearing on 23 June 2023, Judge Tildesley directed that the dispute would be limited to consideration of the service charges payable by the applicants for the service charge year starting on 1 May 2022 and ending on 30 April 2023 (2022/2023). He said that the issues to be determined are:-

    **a.** Is the apportionment method adopted by the Landlord authorised by the Lease?

**b.** Is the apportionment method reasonable within Part 1 of the Act?

[31].

Judge Tildesley proposed, which was agreed by both parties prior to the Hearing, that the Tribunal adopted the floor area calculation for each flat and the resulting net internal areas as the percentage of the total floor area included in Mr Day's analysis (annexed to the Direction dated 4 July 2023).

73. The Applicant sent the Tribunal a copy of the Lease of Flat 9 [73]. This is the only lease which the Managing Agent has seen. Therefore, although the parties refer to the leases as being identical in relation to the service charge obligations, and Mr Seaton-Burridge referred to whether certain areas are included in individual leases or form part of the freehold no evidence was provided to the Tribunal which verified his statements.

74. It is agreed that the Lease (of Flat 9) provides that the tenant must pay the Service Charge (Clause 2.1) [75]. Service Charge is defined in paragraph 1 of the Fourth Schedule.

75. "Service Charge" means a fair proportion to be determined by the Landlord whose decision shall be final of the Expenditure on Services such proportion being calculated primarily (but not in relation to such of the services for which such proportion would be inappropriate or inequitable) by reference to the floor area of the Unit compared to the aggregate of floor areas of all the Units in the House" [90].

76. Recital (A) of the lease states "The premises which this Lease demises form part of a block of residential units ("the House")". Clause 1 states that in exchange for the obligations undertaken by the tenant the Landlord "LETS the property first and secondly in the First Schedule (respectively "the Unit" and "the Parking Spaces" and together "the Demised Premises" " [74].

77. In the Lease, the demised premises, in the First Schedule, is described as "the residential premises forming part of and situate on the first floor (south) of the House known as Unit 9 Zodiac House aforesaid as the same is delineated and edged red on the plan numbered 2 attached. This demise INCLUDES (i) the ceiling and floors within the unit (but not supporting structures) (ii) the windows window frames and glass including all surrounding sealant and mastic in the windows and the doors and the door frames and the glass in the doors" and "EXCLUDES the roof and foundations of the House and the structural walls and other structural parts thereof and the boundary walls of the Unit whether or not external walls of the House except the internal surfaces (including plaster work of such external walls" [83].

78. The "Appurtenant Rights" granted by paragraph 3(c) of the Second Schedule of the Lease are limited, in that the right of access to the hallway staircases and other internal parts of the House is expressed to be granted for "gaining access to and egress from the Unit" [89]. Therefore, there is no general express right for any lessee who does not

need to gain access to or from a flat (within the Tower) to use those communal hallways and staircases.

**Section 27A of the Act**

79. The evidence provided by the parties established that, instead of the service charges being apportioned with regard to the floor area, the service charges are divided between the thirteen flats by applying the percentages in the Matrix. The Respondent believed that the Matrix would have been produced by the original landlord, or his surveyors or legal advisors. It is not disputed that at the date of the application no further information was available as to exactly how the Matrix was compiled and furthermore that such information would not assist in the determination of this application.

80. The Applicant has submitted that the division of the service charges should reflect the wording in the Fourth Schedule of the Lease so that the charges are apportioned by reference to the floor areas of each of the thirteen flats (as a percentage of the collective floor area of all the flats).

81. The definition of service charge set out in paragraph 1 of the Fourth Schedule to the lease (see paragraph 75 above) offers some assistance. It defines it as "a fair proportion to be determined by the Landlord whose decision shall be final of the Expenditure on Services" (which is also a defined term) calculated **primarily** by reference to the floor area of the Unit compared to the aggregate floor area of all the units in the house, **limited** by the following words in brackets – "but not in relation to such of the services for which such proportion would be inappropriate or inequitable" (Tribunal's emphasis)

82. Therefore, the Tribunal concludes that the intention of the parties was that the Landlord's surveyor would determine the fair proportion of the service charge payable by each lessee. He would initially divide the service charge expenditure incurred by reference to floor area, but he would exclude from that general division those expenses incurred in respect of any services which in his decision (which is final and binding) it would be inappropriate or inequitable to divide by applying the floor area calculation.

83. The **Aviva** case (a Supreme Court decision) established finally, reversing previous decisions, that whilst the Tribunal cannot interfere with discretionary decisions made by landlords or their advisors in accordance with the lease, the Tribunal retains a jurisdiction to determine if the application of that discretion is reasonable and/or rational within the parameters of section 19 of the Act.

**The Matrix**

84. The parties agree that, until now, the percentages contained in the Matrix have been used to apportion the Service Charge between the thirteen lessees.

85. The Applicant claimed that it was not explained that the Matrix was used to apportion the service charges and Mrs Molyneaux said that she

only became aware of its existence when she questioned the apportionment of the service charges.

86. Mr Day said that he had offered his interpretation of the Matrix because "no-one else to date has done so". He declared an interest in the determination because he is married to a current lessee. He has acted as a consultant to the Respondent throughout the proceedings [39].

87. It is not disputed that originally the division of the service charge between the thirteen flats reflected the percentage contributions in the Matrix. A copy of the Supplemental Deed for Flat 4 in the Bundle [103] refers to the same percentage contribution set out in the Matrix being due from the lessee of Flat 4. The parties agreed that it is likely that each original lessee entered into a similar supplemental deed. The deed also contained the agreement for the Landlord to transfer the freehold of Zodiac House to a company and for the original lessee to take a share in that company and also a clause which stated "The provisions of this deed shall remain in force only until the date of the Transfer and shall thereafter cease to have effect" [105].

88. The Proprietorship Register of the Land Registry title to the freehold of Zodiac House records that the Respondent was registered on 10 September 1999. Therefore, from that date the provisions in supplemental deeds ceased to have any effect and for that reason the Tribunal need take no account of the contents of the Supplemental Deed.

89. Both parties agree that the percentages in the Matrix differ from the percentages that would apply on the basis of a calculation of the floor areas of each flat as a percentage of the aggregate areas of all the flats within the House.

90. Although it was suggested that the division of the service charges might have been questioned in 2020, no changes were subsequently proposed, or made, to the division of the charges [136].

91. The Applicant stated that Mr Jackson continued to question Belmont about the fairness of the division. Belmont suggested that no changes could be made without the agreement of 50% of the owners (each of whom own one share in the Respondent).

92. The Applicant has suggested that no proof has ever been provided regarding the provenance of the Matrix. However, Mr Day said that it was impossible to obtain proof as his enquiries of Speechly Bircham, the Solicitors who had acted for the original developer and had drawn up the leases of the flats, had not elicited any meaningful response.

93. Until the application was made, Belmont divided the service charges in the same way as the preceding managing agent and the original landlord, by applying the percentages in the Matrix. Mr Seaton-Burridge told the Tribunal that this division had continued since the formation of the Respondent and the transfer of the freehold to it. It

appears, albeit it is accepted by the Respondent that its analysis of the Matrix is not entirely transparent, that the floor areas of the flats might have been taken into account to some extent when the Matrix was compiled. Thereafter it appears that the original landlord or its advisors produced an estimate of service charge expenditure based on which it allocated separate costs of internal communal electricity, cleaning, repairs, servicing and internal redecoration to the six flats in the Tower and then divided those extra costs between the six flats on an unequal basis.

94. However, additionally costs such as external communal electricity were also subdivided proportionately between all thirteen flats. Therefore, the six flats in the Tower paid a share of the costs of the external communal lights and a different share for the costs of the internal communal lighting.

95. Mr Day has concluded that the Matrix percentages may have been generated by summarising the respective estimated costs for each category of service charge expenditure as a percentage of the total service charge for Zodiac House.

96. There is no information in the bundle regarding whether the budget for the initial service charge expenditure was accurate. It is probably unreasonable to assume that anyone would have reconciled budget against expenditure in the early years. Generally, repair costs should have been minimal and other costs would presumably have reflected the services which the lessees required following the transfer of the freehold to the Respondent.

97. Although the division of service charges between the thirteen flats has not changed since 1998, it must be likely that if the Matrix calculation was undertaken again now, based on the budget for the current service charge year, it would be different.

98. Furthermore, it was suggested by the Applicant, and not disputed by the Respondent, that the consumption of electricity in 1998 and 2022/2023 may well be different from the consumption now. Costs of electricity have increased; the internal lights within the Tower are now controlled by a ten minute timer and the external lights by a dusk till dawn sensor.

99. The Tribunal has limited its jurisdiction to a determination of whether the service charges for 2022/2023 are reasonable. The expenditure for that year is set out in the service charge accounts [128]. The budget for that year is also in the bundle [59].

100. The Applicant has also suggested that all the flats should contribute towards the maintenance of the ground floor internal hallway and that the loading, until now applied to the service charges of the flats on the 1st and 2nd floors of the Tower, should be discontinued.

101. The Respondent does not agree that the other seven flats should contribute towards service charge costs which relate only to the

internal parts of the Tower. Although it is accepted that there is a right in every lease to use the hallway there is no need for other lessees to do so.

102. Neither party made extensive submissions regarding the division of the communal electricity costs, other than to agree that it is unfair to load those costs against the lessees on the first and second floors of the Tower. It was suggested that the fire alarm costs should be divided solely between the six flats in the Tower because the other flats have individual alarm systems, but precise information was not disclosed to the Tribunal.

103. All that this Tribunal can decide is whether it is a reasonable for the Respondent to continue to calculate the service charge by applying the percentages contained in the Matrix and whether it has discretion under the terms of the Lease to calculate the service charges in this way.

104. Having taken account of all the submissions made both during the hearing and within the statements of the parties within the bundle, the Tribunal has concluded that:-

a. It is not reasonable for the Respondent to continue to apply the percentages in the Matrix to calculate the service charges due from each lessee because this is not an accurate interpretation of the provisions of the Lease. There is no merit in Mr Seaton-Burridge's submission that continuing to use the Matrix has achieved certainty for the lessees. The calculation is not authorised by the Lease.

b. The Respondent must apply, in so far as it can, the provisions of the Lease and should recalculate the service charges for 2022/2023 based on the actual expenditure for that year. Those parts of the Service Charge Expenditure which relate to common expenditure such as, for example, the maintenance of the car park, external maintenance, maintenance of the gardens should be calculated on the basis of the floor area calculation referred to in the definition of "Service Charge" in the Lease.

c. The only discretion which the Respondent is entitled to exercise in the calculation of the Service Charges, applying the wording in the Lease will be in respect of any expenditure on services for which a division based on floor areas would be <u>inappropriate or inequitable.</u> In so doing the Respondent is entitled to exercise its discretion but must act in a rational way. (**Braganza v. The Riverside Group** referred to in paragraph 106 below).

d. The Respondent on its own admission, has not exercised any discretion regarding any element of the service charge expenditure (except perhaps the division of the cost of the communal electricity and the maintenance of the external staircases). It has instead continued to rely on the use of a calculation which it is unable to fully explain, and which for all

the reasons set out above, may no longer be appropriate or equitable and is not authorised by the Lease.

e. It is no longer reasonable to divide costs shared exclusively by the lessees of the Tower unequally between them, and insofar as the Respondent decides that it would be inappropriate or inequitable to divide the costs of any services by reference to floor area, presumably because these only benefit the lessees of the Tower (such as the cleaning costs), these should be split either equally between the lessees of the Tower or on the basis of the floor area of those six flats as a proportion of the collective area of the six flats. That is a calculation for the Respondent to make by exercising its discretion (preferably following consultation and with the agreement of those six lessees). For the reasons explained below this Tribunal has no jurisdiction to exercise that discretion in place of the Respondent.

f. Neither party put forward compelling arguments for dividing any of the Service Charge Expenditure equally between the thirteen flats.

g. For the Applicant, Mrs Molyneaux suggested that an equal division might be a fairer way in which to divide the managing agent's fee as lessees benefitted equally from its services. She also said that an equal division between lessees would have been a fairer way of sharing the costs of repairing the sink hole.

h. For the Respondent, Mr Seaton-Burridge said that in his experience an equal division of some service charges would not be normal; costs are usually shared on the basis of the agreed division of service charge contributions.

i. There seemed to be some agreement between the parties that if certain service charge expenditure is incurred in the future which might be deemed to equally benefit all lessees, such as the installation of electric car charging points, the Respondent could decide to share such costs equally between the lessees. Similarly, the Respondent could also decide that those lessees with two car parking spaces should be responsible for a larger share of the costs of maintaining the car park. **Aviva** decided that the First tier Tribunal should not make such discretionary decisions but that it is not prevented by section 27(6) of the Act from determining if the exercise of such discretion is reasonable, or even in certain circumstances (applying **Braganza**), rational.

105. In **Aviva** Lord Briggs said, "It is not part of the FtT's task to make those discretionary decisions itself, let alone for the first time". He went on to say that at most there might be a jurisdiction to review a landlord's contractual power under the lease for rationality relying on the decision in **Braganza v BP Shipping Ltd [2015] UKSC 17.**

106. After the decision in **Aviva** was made by the Supreme Court, the Upper Tribunal decided the case of **Braganza v The Riverside**

**Group Limited [2023] UKUT 243 (LC)**. Martin Rodger QC Deputy President of the Upper Chamber said that "it follows that, after Aviva, the FTT's only task when a leaseholder challenges a discretionary apportionment made by a landlord or its surveyor will be to consider whether the apportionment was rational in the sense that it was made in good faith and not arbitrarily or capriciously and was arrived at taking into consideration all relevant matters and disregarding irrelevant matters. Unless for one of those reasons the decision was not one which any reasonable landlord could make the FTT must apply it and may not substitute an alternative apportionment of its own".

107. For all those reasons this Tribunal determines the application as follows (referring to the expenditure headings in the 2022/2023 accounts):-

a. The expenditure on Buildings Insurance, Directors and Officers Insurance, Risk Assessment/Fire Maintenance, Landscaping, External Window Cleaning, Companies House, Postage and Property Management Fees should be shared between the thirteen lessees based on the floor area percentages.

b. The expenditure on electricity and common parts cleaning should be subdivided between the Tower and House. The cost of cleaning should be shared equally (or on any other basis the Respondent considers appropriate and equitable) between the lessees of the Tower. The Respondent must decide on an appropriate way of dividing the costs of electricity between the six lessees of the tower and the House; it could consider submetering the costs of the external supply, but it might find that not to be cost effective given the amounts involved. That is a decision for the Respondent who in exercising its discretion must act rationally.

c. The expenditure on building maintenance and Repairs has not been subdivided between the Tower and the House in the relevant service charge accounts. The Respondent will need to do this to enable it to allocate some of those costs exclusively to the lessees of the Tower. Those costs should be divided between the six lessees in the same proportions as the Respondent divides the electricity costs.

**Section 20C Application**

108. Section 20C is set out in the Appendix. The Applicant said it has been forced to make this application because there was insufficient dialogue with the Respondent to address the Applicant's concerns. Having considered those submissions and its determination, the Tribunal has decided it is not just and equitable for any costs which have or might have been incurred by the landlord to be paid by the Respondent. The Respondent is a lessee owned management company. Insofar as any costs have been incurred by the Respondent in connection with these proceedings, the Tribunal finds these are relevant costs and therefore recoverable as service charges.

109. The Applicant withdrew its application for an order under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 during the Hearing following confirmation from Mr Seaton-Burridge that Belmont would not charge the Respondent for its participation in the proceedings and his appearance at the Hearing.

**Reimbursement of the Tribunal Fees**

110. The Applicant applied to the Tribunal for an order that its fees be reimbursed by the Respondent. The application was made under Rule 13(2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

111. Submissions in support of this application were considered at the Hearing. Having heard from both parties the Tribunal remained unsure whether further dialogue might have prevented the need for the Application.

112. Having considered the application and the submissions and papers provided by both parties, and exercising its discretion, the Tribunal has decided not to make an order for reimbursement of the fees paid by the Applicant.

**Judge C A Rai**

## Appendix

## Extracts from the Landlord and Tenant Act 1985

### 27A Liability to pay service charges: jurisdiction

(1) An application may be made to [the appropriate tribunal]2 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]2 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).
(7) The jurisdiction conferred on [the appropriate tribunal]2 in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter. [...]3
]1

**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.
(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.

**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 persons or persons specified in the application
(2) ....
(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

**Schedule 11 to the Commonhold and Leasehold Reform Act 2002**
**Paragraph 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.

| ***Proceedings to which costs relate*** | ***"The relevant court or tribunal"*** |
|---|---|
| Court proceedings | The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court |
| First-tier Tribunal proceedings | The First-tier Tribunal |

| | |
|---|---|
| Upper Tribunal proceedings | The Upper Tribunal |
| Arbitration proceedings | The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court." |

**Appeals**

1. A person wishing to appeal this decision to the Upper 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. Where possible you should send your further application for permission to appeal by email to **rpsouthern@justice.gov.uk** as this will enable the First-tier Tribunal to deal with it more efficiently.

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.