FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CH/LSC/2023/0031**
Property	:	**Apartments 2,9,16,29 & 35 Ochre Mews, Raven Road, Gateshead, NE8 2FF**
The Applicant	:	**Andrew Mclaughlin**
The Respondent	:	**Dickinson Harrison (RBM) Limited**
The Respondent's representative	:	**Hunters Residential Block Management**
Type of Applications	:	**Landlord and Tenant Act 1985 – s 27A** **Landlord and Tenant Act 1985 – s 20C** **Commonhold and Leasehold Reform Act 2002-Schedule 11 Paragraph 5A**
Tribunal Members	:	**Judge J.M.Going** **J.Fraser FRICS**
Date of Hearing	:	**7 October 2024**
Date of Decision	:	**19 October 2024**

DECISION

The Decision

The Tribunal has determined (1) that the service charges demanded in respect of each of Apartments 2,9, 16,29 and 35 Ochre Mews for 2023 are all reasonable and payable, (2) not to make orders under either section 20C of the 1985 Act or paragraph 5A of Schedule 11 to the 2002 Act, and (3) that there be no order for costs under Rule 13 of its procedure rules.

The applications and procedural background

1. The applicant ("Mr Mclaughlin") applied to the Tribunal on 22 March 2023 for a determination as to whether the service charges demanded in relation to Apartments 2,9,16,29 & 35 ("the 5 apartments") at Ochre Mews, Raven Road, Gateshead ("Ochre Mews") for 2023 are payable and reasonable.

2. His primary application, made under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), also included separate applications for orders under section 20C of the same Act to prevent the costs incurred in connection with these proceedings from being recovered as part of the service charge, and under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") to reduce or extinguish an administration charge in respect of litigation costs.

3. Mr Mclaughlin listed the disputed service charges as being for "Unit 2 - £1,317.27, Unit 9 - £1,940.50, Unit 16 - £1,345.60, Unit 29 - £1,005.66, and Unit 35 - £1,246.45" and stated (inter alia) "there are 59 apartments in the building. Our opinion is that all 59 apartments should pay an equal amount of the service charge as every apartment has the use of and benefits from the communal areas and services equally".

4. He provided a copy of the lease relating to Apartment 2 as an example of the lease provisions common to each of the 5 apartments. The landlord's covenants contained within that lease include the obligation to ensure that every long-term lease of an apartment within Ochre Mews is in substantially the same form. Subsequent references to "the Lease" are to that common form of lease.

5. The Tribunal issued Directions on 18 December 2023 setting out how the parties should prepare for the hearing, and timetables for the provision of relevant documents.

6. Payment demands for 2023 issued by the landlord's managing agents, Hunters Residential Block Management ("Hunters"), included confirmation of the landlord as then being Dickinson Harrison (RBM) Ltd. Later demands referred to it as Dickinson Egerton (RBM) Ltd.

7. The additional papers submitted to Tribunal included copies of the budget, all the service charge demands and the audited accounts for 2023,

statements by the parties and responses, various emails, the leases for each of the 5 apartments, and a short extract from the Supreme Court's judgement in the case of *Aviva Investors Ground Rent GP Ltd v Williams [2023] UKSC 6, 2023 WL 0180302*.

Ochre Mews

8. Ochre Mews is located above the banks of the River Tyne, between the High Level and the Queen Elizabeth Metro Bridges linking Newcastle and Gateshead. It is a large, impressive, and far from standard, Grade 2 listed building dating back to the mid-19th century. It occupies an elevated, sloping, site separated from the river by Rabbit Banks Road and a small, wooded area. Originally it was part of the Greenesfield Railway Works site, built during the Victorian heyday of steam railway, and sometimes referred to as Ochre Yards. The original external block stone walls which curve round with, and down, Rabbit Banks Road have been retained as have various large brick vaulted arches within the structure.

9. What was once the main Boiler Shop building has very recently been converted into residential apartments, incorporating a new, architect-designed, box shaped, clad, annex at the easterly end. The conversion was completed by the autumn of 2022. Each of the 59 apartments has its own designated car parking space. Vehicular access is via the other parts of Ochre Yards which have also been largely redeveloped as a series of 3, 4, and 5 storey apartment blocks.

10. Both Tribunal members have previously visited Ochre Yards for different purposes and understand the location, scale, and general configuration of Ochre Mews. They have been able to refer to useful satellite and other images from Google maps, and the Judge recently walked its accessible boundaries. Whilst they have not formally inspected the interior, they have carefully studied the scale plans attached to each of the leases of the 5 apartments and have been further helped by the parties' oral evidence, and in particular Mr Mclaughlin's descriptions of the configurations of each of the 5 apartments.

The Lease

11. The Lease grants the apartment owner a 250-year term computed from 1 January 2021. There is provision for the payment of the initial purchase price as well as ongoing ground rents and, as one would expect, a proportion of the costs of insurance and the service charges.

12. The services listed in Part 1 of Schedule 7 are as follows: –
"1.1.1 cleaning, maintaining, decorating, repairing and replacing the Retained Parts and remedying any Inherent defect; 1.1.2 providing heating to the internal areas of the Common Parts during such periods of the year as the Landlord reasonably considers appropriate, and cleaning, maintaining, repairing and replacing the heating machinery and equipment;1.1.3 lighting the Common Parts and cleaning, maintaining, repairing and replacing lighting, machinery and equipment on the Common Parts; 1.1.4 cleaning,

maintaining, repairing and replacing the furniture, fittings and equipment in the Common Parts;1.1.5 cleaning, maintaining, repairing and replacing the lifts and lift machinery and equipment on the Common Parts;1.1.6 cleaning, maintaining, repairing, operating and replacing security machinery and equipment (including closed circuit television) on the Common Parts;1.1.7 cleaning, maintaining, repairing, operating and replacing fire prevention, detection and fighting machinery and equipment and fire alarms on the Common Parts;1.1.8 cleaning, maintaining, repairing and replacing refuse bins on the Common Parts;1.1.9 cleaning the outside of the windows of the Building;1.1.10 cleaning, maintaining, repairing and replacing signage for the Common Parts;1.1.11 maintaining any landscaped and grassed areas of the Common Parts (if any);1.1.12 cleaning, maintaining, repairing and replacing the floor coverings on the internal areas of the Common Parts;1.1.13 providing cleaning and maintenance staff for the Building;1.1.14 paying to any third party land owner any costs which are required to be paid towards the maintenance of any access roads or Service Media which serve the Building and which are located on land adjoining the Building to the extent that such access roads and Service Media are not adopted; and 1.1.15 any other service or amenity that the Landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building".

13. Part 2 of the same Schedule confirms that the Service Costs are the total of:-

"1.1.1 all of the costs reasonably and properly incurred or reasonably and properly estimated by the Landlord to be incurred of:

1.1.1.1 providing the Services; 1.1.1.2 the supply and removal of electricity, gas, water, sewage and other utilities to and from the Retained Parts;1.1.1.3 complying with the recommendations and requirements of the insurers of the Building (insofar as those recommendations and requirements relate to the Retained Parts);1.1.1.4 complying with all laws relating to the Retained Parts, their use and any works carried out at them, and relating to any materials kept at or disposed of from the Common Parts;1.1.1.5 complying with the Third Party Rights insofar as they relate to the Retained Parts;1.1.1.6 putting aside such sum as shall reasonably be considered necessary by the Landlord (whose decision shall be final as to questions of fact) to provide reserves or sinking funds for items of future expenditure to be or expected to be incurred at any time in connection with providing the Services; and1.1.1.7 taking any steps (including proceedings) that the Landlord considers necessary to prevent or remove any encroachment over the Retained Parts, or to prevent the acquisition of any right over the Retained Parts (or the Building as a whole) or to remove any obstruction to the flow of light or air to the Retained Parts (or the . Building as a whole);

1.1.2 the costs, fees and disbursements reasonably and properly incurred of:

1.1.2.1 managing agents employed by the Landlord for the carrying out and provision of the Services or, where managing agents are not employed, a management fee for the same; 1.1.2.2 accountants employed by the Landlord to prepare and audit the service charge accounts; and 1.1.2.3 - any other person retained by the Landlord to act on behalf of the landlord in connection with the Building, or the provision of Services.

1.1.3 all rates, taxes, impositions and outgoings payable in respect of the Retained Parts, their use and any works carried out on them (other than any taxes payable by the Landlord in connection with any dealing with or disposition of its reversionary interest in the Building); and
1.1.4 the supply of water to the Building where there is no separate mains supplies to each Lettable Unit.
1.1.5 any VAT payable by the Landlord in respect of any of the items mentioned above except to the extent that the Landlord is able to recover such VAT".

14. The "Common Parts" are defined as "(a) the front door, entrance hall, passages, staircases and landings of the Building; And (b) the external roads, paths, forecourts and landscaped areas (if any), and Refuse Area (if any) at the Building, that are not part of the Property or the Flats and which are intended to be used by the tenants and occupiers of the Building"
and the "Retained Parts" are defined as "all parts of the Building other than the Property or the Flats including:(a) the main structure of the Building including the roof and roof structures, the foundations, the external walls and internal load bearing walls, the structural timbers, the joists and the guttering and the structure of any balconies and terraces (including any balcony/ terrace railings or walls, if any);(b) all parts of the Building lying below the floor surfaces or above the ceilings;(c) all external decorative surfaces of: (i) the Building; (ii) external doors;(iii) external door frames; and (iv) external window frames;(d) the Common Parts;(e) the car parking spaces at the Building;(f) the Service Media at the Building which do not exclusively serve either the Property or the Flats; and(g) all boundary walls fences and railings of the Building; and(h) the storage units including, without limitation the Storage Unit, located within the Building and allocated for use by the tenants and occupiers of the Building.

15. The provision with the most significance for the present application is the definition of the "Service Charge" as "such fair and reasonable proportion of the Service Costs as is determined by the Landlord acting reasonably and having regard to the interests of good estate management".

The parties' written representations

16. Mr Mclaughlin submitted (inter alia) "All apartments are 2-bedroom duplex apartments, in the same building. All apartments have access to the same communal areas, services, professional fees, maintenance and reserves. No one apartment does or will use any more of the aforementioned services than any of the other apartments yet the difference in the cost of the service charge from unit 29 to unit 9, as an example is £934.83 which is 93% more. This is (in our opinion) far from being fair and reasonable…. Not one of these apartments will use any more of the communal services than any of the others…. Nowhere within the lease does it mention that service charges are based on the size of the apartments and nowhere within the lease does it mention that larger apartments will be subject to a higher management charge. The fact that one unit is larger than the other unit has no impact whatsoever on the amount of services used on these communal services/costs. We completed on all 5 apartments during 2022, on completion of each

apartment the amount of service charge (for the remainder of that year) was included on-the completion statements, the amounts were different as we completed on different dates throughout the year. However, we completed on units 2 and unit 16 on the same date (21 September 2022). When the completion statements were issued for these two apartments the service charge element was exactly the same figure, despite the apartments been different sizes. It is therefore quite reasonable to expect that all the service charges would be the same for all apartments as they are all 2 bedroom apartments within the same building"…. and after having quoted from an earlier email from the property manager "Your argument makes no difference whatsoever, you are presuming that a two bedroom/larger apartments have more people living there and therefore causing more damage to communal areas, this simply has no relevance whatsoever, neither does the size of the apartment have any relevance on the 'wear and tear' on communal areas. As an example, two of our 2-bedroom apartments have only one person living in them and another apartment is rented to 2 foreign students that spend 4 months of the year out of the country. If the lease states that the service charge should be fair and reasonable then it should be exactly that. Charging such a massive difference between 2 bedroom apartments within the same building is neither fair nor reasonable…As the lease states, the service charge should be fair and reasonable. As Hunters argument is that one bed apartments house less people than 2 bed apartments and therefore cause less damage to the communal areas then, although we disagree with this point, we are prepared to take into account these reasons. On that point, we are prepared to pay the average of the service charge of all 2-bedroom apartments within the whole development. So, we are suggesting that all 1-bedroom apartments pay the same service charge and all 2-bedroom apartments pay the same service charge. I realise that we would be paying a higher service charge in some apartments and a lower service charge in other apartments. This, in our opinion is a far more 'fair and reasonable' charge than is currently in place."

17. The response provided by Hunters, as agents for the freeholder stated (inter alia) "… the development is made up of one and two bedroom apartments with some of the them being duplex in nature. Some of these duplex apartments have a mezzanine level and some have enclosed upper floors…The Freeholder does reserve the right to be the one to decide the apportionment of the service charge as per the Lease, as long as the method of apportionment is fair and reasonable. If the Tribunal would feel it appropriate to consider Aviva Ground Rent v Williams where the Supreme Court clarifies service charge reapportionment rights of the Landlord. Whilst this is specifically regarding changes that the Landlord made to the service charge from previous years, the Supreme Court does make reference to the fact that if the Tribunal was to take this provision away from the Freeholder, should the Tribunal then have to decide upon all aspects of the service charge? The Lease allows for the Freeholder to decide the apportionment of the service charge, what goes in the service charge, the frequency and level of services to maintain good estate management whilst ensuring it is fair and reasonable and following the terms of the Lease. It is not for one Leaseholder to decide this for the benefit of themselves. Is the question here regarding if the Landlord acted in a breach of contract or in contravention of the statutory scheme regulating residential service charge as mentioned in… the Judgement? Has

the Freeholder acted unfairly by continuing to use the method of apportionment that was first adopted by the developer/Freeholder at the time/at point of sale and is the Applicant's suggestions any fairer? The method of calculation we have used for the 2023 service charge budget is based on the size of each apartment so the larger the apartment the higher their proportion. This is a method used throughout the industry and is very much commonplace…….the method of apportionment was one that the developers (Freeholder at the time) who sold the apartments to the Applicant adopted and passed to us when they instructed us to act as their managing agents. The developers have confirmed by copy email…that it was made clear to all purchasers including the Applicant that this was the method used. The Applicant is relying on the completion statements of two of his apartments that he purchased on the same day….This small error did not change the fact that the purchasers were made aware of the way they would be calculating service charge. I do believe the Applicant is not disputing that the apartments are of varying sizes but we will supply details of the different sizes so the Tribunal can see the range of sizes. We feel that the larger apartments have the capacity to accommodate more occupants and attract higher income than the smaller apartments although this should not be the basis to charge more service charge necessarily. As such the larger apartments have the potential to use the communal areas and facilities more, such as the lifts, the corridors, the waste/sewage facilities, the bin stores. Overall these apartments would also have more or larger windows therefore a greater proportion of the window cleaning, physically take up more of the building therefore more of the insurance value of the block. It is the choice of the owners of the two bedroom apartments if they only rent out to a single person but in reality they have the option to rent to more occupants than the smaller apartments. The Applicant in his application wanted all apartments to pay the same but as we have illustrated (referencing an attached spreadsheet) this would disadvantage a large number of owners as the size of the apartments does differ greatly from the smallest to the largest. The Applicant has now changed what he is disputing from his original application it seems and is wanting us to apportion the service charge based on number of bedrooms but we feel this would still disadvantage a large number of owners… It is our opinion that whichever of the Applicant's suggested methods we used it would not be seen as fair or reasonable as Leaseholders were sold the apartments on the understanding their service charge would be based on the size of their apartments. Some may have based their decision to purchase on the affordability of the property on this factor so it would be unfair of us to change this to suit the Applicant".

18. Mr Mclaughlin made various points in reply including "The lease purely states that the service charge will be 'a fair and reasonable proportion' and to charge 93% more on one 2 bedroom apartment compared to another 2 bedroom apartment in the same building is neither fair nor reasonable. Therefore there is a direct comparison and we are quite right to point out….To compare this dispute to a historical case which is actually completely different to this case because it was a case specifically regarding changes/ reapportionment to a service charge is quite ridiculous and is frankly clutching at straws. The lease does allow for the freeholder to decide the

apportionment but it has to be fair and reasonable….Regardless of whether the method of apportionment used by the respondent is used throughout the industry and is commonplace doesn't mean that the apportionment is fair and reasonable and in this case it certainly is not….the method of apportionment was never discussed or described to us when we purchased any of the 5 apartments. The only comments in the lease and any other documentation regarding the service charge was the comment that the service charge would be fair and reasonable. We only ever spoke to 2 people from the developer 'Mandale Homes' …. Neither …. informed us of anything to do with the service charge or indeed how it was calculated. The respondent may well have a copy of the developer's matrix that was used to calculate pro rata service charges, this is irrelevant as we have never been party to this and it has never been discussed with us. The argument….that larger apartments have the capacity to accommodate more people is quite ridiculous, all the apartments in question are 2 bedroom apartments and can accommodate the same number of people. How the respondent believes that the larger apartments use the communal areas more is beyond me and is quite a ridiculous statement. If the larger apartments attract a higher income, that has nothing whatsoever to do with the respondent and to use that as a reason to increase the service charge is quite ridiculous and is certainly neither fair nor reasonable…..We do think each 2 bedroom apartment should pay the same service charge. The service charge is for the communal areas and services. There is no proof or evidence that a 2 bedroom apartment uses more of the communal services than a 1 bedroom apartment, none whatsoever. If this disadvantages a number of owners then it is down to the respondent as they should have introduced a service charge that is fair and reasonable to every owner. We have not changed our mind in what we are disputing from the original application. We were asked in the directions from the tribunal 'the amount willing to pay' and as a compromise we suggested that all 2 bedroom apartments pay one price and all 1 bedroom apartments pay one price. The leaseholders were not sold the apartments on the understanding that their service charge would be based on the size of their apartments, nowhere in the lease does it mention this… What it does say in the lease Is that the service charge shall be fair and reasonable."

The Hearing

19. A video hearing, using CVP, the common video platform, took place on 7 October 2024. Mr Mclaughlin represented himself and Ms Naylor from Hunters represented the freeholder and landlord. Both, despite expressing differing views, were helpful, credible and straightforward, and the Tribunal is grateful for their assistance.

20. Mr Mclaughlin confirmed that each of the 5 apartments remains in family ownership, and that he and his wife were directors of each of the 3 companies whereby they were purchased and which owned them when the 2023 service charges were demanded in December 2022.

21. Ms Naylor confirmed that she is a senior property manager with Hunters, which has acted as the landlord's managing agents at all the relevant times. It was originally instructed by the developer, Mandale Homes, and has

continued to be instructed and act following the transfer of the landlord's interest firstly from Mandale to Dickinson Harrison (RBM) Ltd, the landlord when the 2023 service charge demands were issued, and subsequently to Dickinson Egerton (RBM) Ltd. She confirmed that Hunters, Dickinson Harrison and Dickinson Egerton are all connected companies.

22. Both Mr Mclaughlin and Ms Naylor expanded on their written submissions.

23. Mr Mclaughlin explained that his family first became interested in the development because of his son being a student at Newcastle University, and that number 15 was purchased in his son's name at the same time as the purchase of number 16. Their initial contact was via a selling agent in London who also introduced them to a London solicitor who dealt with the conveyancing of the initial purchases. Because of a continuing interest in the development Mr Mclaughlin then began dealing with Mandale direct before completing the purchase of further flats using a more local firm of solicitors.

24. Mr Mclaughlin confirmed that the 5 apartments had all been purchased for different sums, with £208,000 paid for Number 2, £260,000 for Number 9, £211,000 for Number 16, £196,000 for Number 29 and £250,000 for Number 35. All 5 apartments are within the older (westerly) end of the development which he considered had more character than the new easterly block. All were referred to as 2 bed duplex apartments and he described their particular locations and different characteristics.

25. Ms Naylor referred to the range of different apartments within the development and big differences between the smaller one-bedroom apartments, the larger one-bedroom apartments, two-bedroom apartments with a mezzanine, which she considered might be regarded having less privacy and the two bedroomed duplex apartments, and their differing sizes and aspects. She confirmed that the floor area figures provided by Mandale for the 5 apartments were: - for Number 2- 990 ft², Number 9-1485 ft², Number 16-1012 ft², Number 29- 753 ft² and Number 35- 861 ft². Mr Mclaughlin readily agreed that the 5 apartments were all different sizes, and did not seek to challenge or dispute the quoted figures.

26. He submitted that use made of the common parts was not proportional to a flats size and Hunter and Ms Naylor's references to Council tax bandings or potential rental returns should be regarded as irrelevant when determining what was a fair and reasonable allocation of the liability for the use of the shared facilities.

27. He re-emphasised several of his written submissions, stating that he had never been told that the apportionment was to be based on floor area by either Mandale or his 2 firms of solicitors, this was not in the marketing literature, it had never been discussed, and importantly was not what was specified in the Lease. He confirmed that if he had known that the service charge for apartment Number 9 was to be so much more than the others it would not have been purchased.

28. Ms Naylor confirmed that neither she nor Hunters had been involved with the marketing of the properties and accordingly had asked Mandale's director for confirmation on the question of whether the basis for the apportionment had been discussed or disclosed during marketing. The replies were confirmed in exhibited emails from Mandale and their solicitors. That from the solicitors stated "This is the budget which was issued with the Ochre Yard sale packs. This is clearly square footage based…". That from Mandale stated "He definitely knew as we had a conversation about it at the time…".

29. When the discussions moved to what items could be included within the service charges, and those specifically included within the 2023 budget and accounts, it became apparent that the Tribunal members had not, at that point in time, seen Hunters' final bundle. It became clear that whilst it had been sent to the tribunal office at the same time as being sent to, and safely received by, Mr Mclaughlin, all the documents had not been properly uploaded to the members' case files. The Judge apologised for the administrative error and confirmed that the decision on the applications would only be made after the members' receipt and proper consideration of all the papers. Ms Naylor was asked to resend the bundle to the tribunal office. This she kindly did, with full copies sent on to both Tribunal members the day after the hearing.

30. Mr Mclaughlin asked Ms Naylor whether she considered the service charge apportionment was fair and reasonable when one two-bedroom duplex apartment was asked to pay 93% more than another. Her answer was an unambiguous "Yes, I do". She referred to the number of properties within Ochre Mews, the common wording within all the leases, that the flat in question was 93% bigger than that being used for comparison, that because of the variety of the different flats an apportionment based on floor area was reasonable, an industry-standard, had been adopted and marketed as such by Mandale when selling the property, that if Mr Mclaughlin and his advisers had exercised due diligence that should have been clear, there had been no objection from any of the other flat owners, and that to institute a change would not be fair to those who had purchased on the basis on which all the flats been marketed, particularly those who would be asked to pay more. She confirmed that Hunters had nothing personal to gain or lose by a change to the present arrangements but that it would be unfair to others.

31. Mr Mclaughlin stressed that his challenge was about what was "fair and reasonable", and that the Lease did not specify an apportionment be based on square footage but rather that it must be fair and reasonable, and the apportionment decided by Hunters was not. He stated that just because something might be an industry-standard does not make it fair and reasonable. He understood others would be impacted by a change, but this was a matter that Hunters should have foreseen.

32. The parties were asked to include in their closing submissions any that they might wish to make in respect of the section 20C and paragraph 5 applications relating to the costs of the present proceedings. Ms Naylor confirmed that whilst she had been involved with a considerable amount of time-consuming work her initial thought was that her costs would be included

within Hunters' general management fees and she was unhappy with the thought that the other leaseholders should have to contribute to an application not of their making. Mr Mclaughlin said that if his primary application failed, he did not feel the other leaseholders should have to contribute to the costs.

The relevant legislation

33. Section 27A of the 1985 Act provides that:-
"(1) An application may be made to the appropriate Tribunal for a determination whether a service charge is payable and, if it is, as to-
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Sub-section 1 applies whether or not any payment has been made.
(3) An application may also be made to the appropriate Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to-
(a) the person by whom it 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.
(4) No application under subsection (1) or (3) may be made in respect of matter which-
(a) has been agreed or admitted by the tenant,
.....
(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)....."

34. Section 18 states that: –
"(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent –
(a) which is payable, directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
(3) For this purpose –
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to the service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or an earlier or later period."

35. Section 19 of the 1985 Act confirms that :-
"(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."

36. Section 20C states that: –
"(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… the First-tier Tribunal… are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
… (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."

37. Paragraph 5A of Schedule 11 to the 2002 Act states that: –
"(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 just and equitable."

The Tribunal's Reasons and Conclusions

38. The Tribunal began by considering whether there is a need to physically inspect the 5 apartments or further inspect the development before deciding that that is not necessary. It concluded that a further inspection would inevitably delay matters, unnecessarily increase all parties' expense, and importantly add nothing to its decision-making. It is content that it has sufficient evidence to be able to make the necessary findings of fact in respect of the matters to be decided.

39. The Tribunal's next task was to establish the extent of its jurisdiction, if any**.**

Jurisdiction

40. Most service charge cases involve disputes as to the amounts payable for specific charges, and a consideration of the statutory cap which section 19 of the 1985 Act imposes limiting relevant costs to those which have been reasonably incurred, and by reference whether services or works are of a reasonable standard.

41. However, the question raised by this application does not invoke, as a matter of principle, section 19 (or for that matter the cost limiting provisions set out in sections 20, 20A or 20B) but instead calls for an analysis of the contractual agreement relating to the apportionment of the service charges between those due to pay them. Mr Mclaughlin is not challenging the level of individual costs, but rather the decision taken by the landlord as to their allocation.

42. The Tribunal's jurisdiction in this case stems from the provisions of section 27A itself. That confirms an applicant may apply to it for a determination whether a service charge is payable. It is now well established by a long line of cases, culminating in the Supreme Court decision in *Aviva* that the jurisdiction under section 27A is not confined to the amounts payable for particular charges and can include issues of apportionment, as part of the primary and overarching question as to whether a service charge is payable at all.

43. However, section 27A itself imposes limitations on that jurisdiction in subclause (4) confirming that no application may be made under section 27A(1) or (3) in respect of a matter which has been agreed or admitted by the tenant.

44. Accordingly, the Tribunal has had to consider whether Mr Mclaughlin (or the companies which were the tenants for the time being of the 5 apartments) agreed or admitted the apportionment before making the application**.**

45. Subsection (5) makes it clear that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. In other words, nothing should be construed or implied simply because of the 2023 service charges having been paid.

46. But is the signing and completion of the Lease to be taken as an agreement or admission?

47. The Tribunal has made the following findings of facts to assist with its decision-making, and, where necessary, by applying its own expert knowledge and experience: –

- it is a standard part of the conveyancing process when selling flats in any new development for a legal pack to be provided with information and answers to standard precontract enquiries. Such enquiries inevitably include questions relating to the amounts of past and anticipated service charges;
- it cannot be safely assumed that service charges will as a matter of course be always split equally between flat owners. The parties to a long-lease have contractual freedom to specify who is to pay for what;
- if the apportionment of service charges in a lease is not fixed, it would be failure of due diligence both for a purchaser, particularly an experienced investor, and their solicitors to leave obvious questions unanswered;

- because of the number of transactions there were multiple opportunities for Mr Mclaughlin and his two separate sets of solicitors to discover how it was proposed the service charges would be apportioned;
- there is a direct conflict between what Mr Mclaughlin and Mandale say was orally confirmed between them, but which the Tribunal does not necessarily need to decide upon;
- Mandale's solicitors have confirmed that the basis of the apportionment was obvious from the budget included with its standard sale packs and there is no good reason to suppose otherwise.

It follows, if Mr Mclaughlin did not understand the basis for the allocation of the service charges before receipt of the 2023 service charge demands, that with proper advice and due diligence, he should have done.

48. Despite this, the jurisdictional question for the Tribunal to answer is not what was, or should have been, known, but rather what might have been agreed or admitted. Did Mr Mclaughlin (or more correctly the then tenants) by completing the various leases thereby agree or admit the apportionment regime which he then later challenged?

49. The Tribunal's answer is no. As Mr Mclaughlin has correctly identified, the Lease does not fix, or even explicitly reference, the apportionment to floor areas.

50. Being content that it has the necessary jurisdiction, the Tribunal next focused on the interpretation of the relevant Lease provisions. As Lord Briggs stated in *Aviva* "nothing is said expressly *(in Section 27A)* about the principles which the FtT is to apply in determining payability. The natural assumption is that the FtT would decide by reference to common law principles of contractual liability, subject to the detailed scheme for statutory control laid down in the immediately preceding provisions of the 1985 Act" .

51. In this case, the Lease definition of the service charge sets out the contractual liability. That specifies that it is for the landlord to decide on what is a "fair and reasonable proportion of the Service Costs" when "acting reasonably having regard to the interests of good estate management".

52. This leads to the next question to be addressed.

Has the landlord acted reasonably, having regard to the interests of good estate management, when deciding that an apportionment based on floor area is fair and reasonable?

53. The Tribunal found that the short answer to both elements of that question to be yes. It found both, that the landlord had been reasonable and had due regard to the needs of good estate management in making its decision, and that the outcome, judged objectively by those parameters was, and is, fair and reasonable.

54. The decision making, and Ms Naylor's descriptions, showed rationality and logic, and a consideration of all the leaseholders and all the elements to be

factored in, including the need to anticipate cyclical maintenance and long-term maintenance repair and renewals of the retained parts as well as regular day-to-day services, which are all part of the requirements of good estate management.

55. The Tribunal also found that apportionment based on relative floor areas to be fair and reasonable to all the leaseholders when considered in the round. Ms Naylor was correct to identify it as a well-worn industry standard for residential developments involving flats of varying sizes, amenity and value. It has many merits and is easily understood, workable and not expensive to implement. It is true that there are a range of possible methodologies, and many residential schemes made up of flats of the same, or very similar, dimensions and design (such as those in the modern blocks on the other side of Raven Road) often provide for service charges to be allocated equally. But that could well be explained as simply an application of the same principle, i.e. that it is fair and reasonable that flats of the same size and design pay the same. However, in Ochre Mews the landlord has had to decide what is fair and reasonable when the flats very clearly differ in terms of size, amenity and value.

56. There is also the question posed by Ms Naylor as to whether it could be considered fair and reasonable for a landlord, after it had been decided that the apportionment would be based on floor area, and all 59 apartments marketed accordingly, to change the benchmark so soon, with the inevitable consequence, acknowledged by Mr Mclaughlin, that this would disadvantage many of the other leaseholders. The spreadsheet calculations exhibited by Ms Naylor show 28 flat owners would be asked to pay more if his preference for equality were adopted. The Tribunal found that it would not be reasonable nor fair to those who, with due diligence knowingly committed to a particular methodology, to have that changed immediately without consultation or the ability to object. Good estate management requires due consideration of the interests of all the leaseholders.

57. The Tribunal understood, and was not unsympathetic to, Mr Mclaughlin's reasons for having raised the discrepancy between the service charges payable in respect of each of the 5 apartments, and particularly by reference to the 2 where that difference was most marked. Nevertheless, it did not find, as he sincerely believed, that this either establishes that the landlord has acted unreasonably in deciding what is a discretionary management decision, or that the result has to be judged as unfair and unreasonable. The Tribunal found that his submissions were on occasions unduly focused on considerations around the day-to-day use of the common parts and did not properly encompass the interests of all the other leaseholders, nor the first, and possibly most important, of the services listed in the Schedule 7 to the Lease being "the cleaning, maintaining, decorating, repairing and replacing the Retained Parts" which by definition includes the main structure of the Building, roofs, foundations, external walls, and other facilities.

58. There is inevitably a swings and roundabouts effect in relation to the payment of service charges and the benefits received. In the Tribunal's judgement "fairness" in this context is not to be decided solely in response to a

particular cost at a particular time but rather all the potential costs over a period of time, and not necessarily limited to a single year.

59. The Tribunal considered each of Mr Mclaughlin's two suggested alternative methods of apportionment to be less fair and less reasonable than that decided by the landlord.

60. There is nothing illogical, nor in the Tribunal's judgement, is it unfair or unreasonable, particularly when having regard to the interests of good estate management for a landlord to formulate a scheme whereby the owners of larger, more expensive, more valuable flats which clearly have more potential to generate greater income returns and more profit, pay more, and proportionately more, than the owners of the smaller, less valuable flats towards the ongoing protection of their respective assets and investments. The larger, more expensive, more valuable flats have more to protect and more to lose if the whole development is not properly maintained.

61. In short, the Tribunal found the apportionment and allocation of the 2023 service charges to be contractually legitimate, objectively reasonable, fair, and payable.

The section 20(c) and paragraph 5A applications and costs

62. The Tribunal went on to consider Mr Mclaughlin's separate applications, that it make orders both under section 20C of the 1985 Act so that the landlord be precluded from including within future service charges the costs incurred by it in connection with the present proceedings, and under Paragraph 5A of Schedule 11 of the 2002 Act to reduce or extinguish any contractual liability that he or the tenants might have under the Lease in respect of the landlord's costs.

63. The Tribunal, having found that it was appropriate for the landlord to oppose the application under section 27A, decided that the applications under Section 20C and Paragraph 5 should both be denied.

64. Its decision relating to the Paragraph 5 application should not be construed as a finding that the Lease allows for the imposition of an administration charge in respect of litigation costs. The Tribunal did not find it necessary to address that issue in any detail, and did not do so.

65. The Tribunal acting on its own initiative, in pursuance of its powers under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and having found that neither party had acted unreasonably in bringing, defending or conducting the proceedings, also decided that there should be no order for costs under that Rule.