FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/37UF/LSC/2018/0017**
Property	**:**	**St Crispins Court, Stockwell Gate, Mansfield, NG18 5GL**
Applicant	**:**	**E&J Ground Rents No 9 Limited**
Representative	**:**	**Mr J Boon for E&J Estates**
Respondents	**:**	**The leaseholders at the Property**
Representative	**:**	**Mr V D'Cruz for Crispin Commercial Limited**
Type of Application	**:**	**Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985 ("the Act")**
Tribunal Members	**:**	**Judge C Goodall** **Mr C Gell FRICS**
Date and venue of Hearing	**:**	**19 March 2019 at Mansfield Magistrates Court**
Date of Decision	**:**	**25 June 2019**

DECISION

Background

1. St Crispins Court ("the Building") is a substantial building with a frontage on Stockwell Gate in Mansfield containing both residential and commercial accomodation.

2. The freeholder of the Building is E&J Ground Rents No 9 Limited ("the Applicant"). They were represented by E&J Estates, which is a trading name for Eyre & Johnson Ltd.

3. The Tribunal understands that there are 88 leases of parts of the Building. Eighty six of those leases are leases of residential flats, 74 of which include the exclusive right to use a designated car parking space, and 12 of which are leases of flats alone without a car parking space. There is a single lease of all the remaining car parking spaces except those allocated to individual flats or the commercial units. Finally, there is a single lease of commercial units which includes all common areas exclusively serving those commercial units. The lessee of the commercial lease and of the car parking spaces lease is Crispin Commercial Ltd ("CCL").

4. All the leases contain provisions for the lessee to pay a service charge to the Applicant.

5. This case is essentially about apportionment of the service charge between all lessees.

The Application

6. On 21 December 2018, the Applicant applied to the Tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 of the liability to pay and reasonableness of the service charge. The application was for approval of the budget for service charges in the service charge year 1 January to 31 December 2019. The application included a budget (the "Budget") showing total proposed expenditure for that year of £144,541.00, prepared by Premier Property Management ("PPM") which had recently taken over management of the Building on behalf of the Applicant. A further accompanying document showed how the Applicant proposed to apportion that expenditure between the lessees. The proposal was to charge a percentage of that sum calculated by reference to the gross internal area of the units that were leased to the lessees.

7. The application was copied to all lessees, including CCL (who have all been regarded by the Tribunal as respondents to these proceedings). Seven residential lessees responded. Their specific points are dealt with below, but with one minor exception, they either agreed with the proposed apportionment or did not oppose it. Some residential lessees did challenge one or two items of expenditure in the Budget.

8. CCL however did oppose the apportionment proposal in a submission dated 28 February 2019.

9. The case was heard at Mansfield Magistrates Court on 19 March 2019. The Applicant was represented by Mr Boon from E&J Estates. In attendance were Mr Beamish, also from E&J Estates, and Mr Barron from PPM. Mr Littler and Mr Finegan from CCL also attended, and they were represented by Mr D'Cruz from Litigator Services Ltd. No residential lessees attended the hearing. Prior to the hearing, the Tribunal inspected the Building, details of which appear below.

10. After initially deliberating, the Tribunal was considering an outcome that accepted, at least in part, the argument presented by CCL to the effect that there should be some recognition of the differential benefits derived from the services provided under the service charge, the differential nature of the uses for which each class of contributor used their premises, and the significantly larger space taken up by communal areas (which are not included in the gross internal area measurements) used by residential lessees as against the commercial lessee. The Tribunal was minded to determine that a weighting for each category of user should be applied to the apportionment, which should otherwise be by gross internal floor area. The weighting proposed was 1 for residential flats, 0.5 for car parking areas, and 0.4 for the commercial units. The detail and explanation for this proposal appears in the section below under "Discussion and Determination".

11. The residential lessees had not participated in the proceedings in relation of the apportionment of service charge between them and the commercial lessee, no doubt relying on the Applicant's case which on this point was aligned with the residential lessee's interests. The Tribunal therefore wrote to all parties on 8 May 2019 asking whether they wished to make written representations or attend a hearing in order to put further argument to the Tribunal bearing in mind the Tribunal's proposal ("the May Consultation"). No party requested a further hearing. The further representations have been carefully considered and the points raised are considered in detail below.

The Building

12. The Building is built on three sides of a rectangular site, bounded by Stockwell Gate, Radford Street, and Dallas Street. There is an open aspect to the east and a central tarmacked courtyard accessed from Dallas Street. There is a lower ground floor car park accessed from Radford Street. The site slopes upwards from Stockwell Gate. On the Stockwell Gate and Radford Street frontage the building rises to a maximum of 7 storeys, but at the Dallas Street frontage there are 3 – 4 storeys.

13. At ground and first floor level on Stockwell Gate, commercial units have been built. They cover two floors and extend at first floor level on the Dallas Street frontage.

14. Around the central courtyard there are seven staircases to residential flats, each accessed through an access door off the courtyard, known as Blocks A – G. There are a total of 86 flats in the Building; 8 in Block A, 17 in B, 10 in C, 6 in D, 22 in E, 15 in F, and 8 in G. Blocks A, B, E and F have lifts. Residents in the other Blocks only have staircase access. Internally, the common parts of the staircases are plastered and painted, with carpet flooring, and electric lighting. They are supplied with intercom access, and appropriate fire protection and emergency lighting systems.

15. There are 32 car parking spaces in the central courtyard with access from Dallas St, with 3 more located just outside the main access gate. In the lower ground car parking area, there are 56 more car parking spaces, accessed from Radford St.

16. From the Applicant's schedule of measured areas (which no party disputed), the Tribunal was informed that the Building and car parking areas cover some 7,665.70 sqm of let area. The residential common parts are not included within these calculations. The split is as follows:

	sqm	%age
Residential flats	4,697.10	61.27424
Residential car parking areas	841.98	10.98373
Commercial car parking areas	158.67	2.06986
Commercial units	1933.45	25.22209
Unallocated car park space	34.50	0.45005
Total	**7,665.70**	**100**

The Budget in more detail

17. The Budget has been prepared with six cost centres, broken down as follows:

Maintenance costs	**£**
Communal cleaning	9,000
Window cleaning	2,000
Car park cleaning	4,500
Repairs and Maintenance general	10,000
Water pump service and maintenance	800
Lift service and maintenance	12,000
Gates service and maintenance	1,200
Door entry system service and maintenance	1,000
Man-safe system	400
Lower car park extractor fan	400
Sprinkler maintenance	1,100

Reserve Fund contribution	8,000
Utilities	
Electricity	18,000
Water	1,000
CCTV	800
Insurances	
Building and Public liability	45,800
Out of hours cover	1,032
Health and Safety	
Fire risk and H&S assessment	1,400
Fire alarms/Emergency lighting/smoke vents	3,000
Water risk assessment	200
Administration/Professional	
Accountancy and Audit fees	2,000
Bank account charges	100
Postage (incl VAT) and stationery	810
Professional fees / Services	
Management fees	16,666
VAT on management fees @20%	3,333
Total	**144,541**

The Leases

Residential leases ("Residential Leases")

18. The Tribunal has been supplied with one specimen residential lease and has worked on the basis that all others are in similar terms, save that 12 of them do not contain the exclusive right to use a car parking space.

19. Clause 3.2 contains a covenant by the lessee to pay "…the Service Charge…"

20. "Service Charge" is defined as "a sum equal to the "Tenant's Share" of the "Total Expenditure".

21. "Total Expenditure" means (in so far as is relevant) "the aggregate of the expenditure incurred … by the Landlord … in carrying out its obligations under Clause 6 of this lease …"

22. "Tenant's Share" means "such percentage as the Landlord acting reasonably shall for time to time deem to be fair and reasonable (which

may consider amongst other matters the size of the Premises in proportion to the size of the Property)".

23. The reference to "Premises" is a reference to the flat demised in the lease. The reference to "Property" is a reference to "the land and building owned by the Landlord and registered at the Land Registry with title number NT416057 and known as Stockwell Gate Mansfield which includes the Building".

24. The "Building" means "the building erected on the Property or part thereof of which the Premises form part".

25. Clause 6.1 contains a landlord's covenant to maintain, renew, replace, and/or rebuild:

    a. The main structure of the Building

    b. All pipes that are enjoyed or used the Tenant in common with the owners or Tenants of any other part of the Building

    c. The Internal and the External Common Parts. These are themselves defined as "the main entrances, passages, landing, lobby areas, staircases, entry phone system, lifts, meter room, tank room which are inside the Building and which do not form part of the flats" (Internal Common Parts) and "the boundary walls, fences, shrubbed areas, Bin Stores, Service Media, … the Accessways, Cycle Shelter, Car Parking Spaces, communal television aerial, satellite connection, (if any), and such other aerial and facilities with may from time to time be provided for the common use and enjoyment of the occupiers of the Property and their visitors …" (External Common Parts).

26. The "Service Media" are defined as the "sewers drains channels pipes watercourses gutters mains wires cable conduits aerials tanks apparatus for the supply of water electricity gas (if any) or telephone or television signals for the disposal of foul or surface water".

27. The remaining sub-clauses of clause 6 oblige or allow the Landlord to (inter alia, and summarising):

    a. Decorate externally

    b. Clean, decorate and light the Internal and External Common Parts

    c. Pay rates and electricity charges for the Internal and External Common Parts

    d. Employ trades and professionals to maintain and administer the Building

e. Employ managing agents

f. Pay interest and bank charges in respect of borrowing money for the proper management of the Building

g. Pay the costs of complying with statutory obligations

h. Maintain alter and renew a satellite system and communal aerial system

i. Do all works, installations, and acts reasonably necessary or desirable for the proper maintenance, safety, and administration of the Building in the interests of good estate management for for the benefit of the Building or occupiers or visitors to it

j. Maintain a sinking fund

Lease of the commercial units ("the Commercial Lease")

28. This lease is dated 31 December 2014 and the lessee is CCL. The Tribunal has been provided with copies of a Deed of Rectification dated 13 April 2015 and a Deed of Variation dated 9 March 2017 which affect the terms of the main lease, but not materially in relation to this case.

29. CCL agrees in clause 2.3 to pay "the Service Charge".

30. "Service Charge" means "a fair and reasonable proportion of the Service Costs".

31. There is no definition of Service Costs. There is though a definition of "Service Charge Costs" and the Tribunal considers this must be what was intended to be the "Service Costs". This was the assumption made by the Applicant's legal adviser in a written letter produced to the Tribunal and available to CCL prior to the hearing. They did not raise any issue on this point.

32. "Service Charge Costs" are "the reasonable cost to the Landlord or (sic) providing the Services in any Financial Year". There are four exclusions which are of limited relevance, though we draw attention to the fact that any costs incurred in the collection of rent or service charges from any occupier at the Development are not to be included within Service Charge Costs.

33. "Services" are defined as "the services listed in clause 7.1". At clause 7.1.1 the Services are described as "inspecting repairing maintaining replacing rebuilding renewing improving cleaning decorating (or otherwise treating) lighting draining and otherwise keeping in good and substantial repair order and condition:

a. The Main Structure and exterior of the Building …

b. The Common parts (sic) …

c. The window frames of the external windows in the Property the Flats and any other lettable parts of the Building …

d. The entrance doors of the Building including the glass in them

e. Such of the Service Media as may be enjoyed by the Building [excluding those in individually let parts of the Building]

34. In this lease, "Service Media" means "lifts and lift machinery and equipment and all media for the supply or removal of heat electricity, gas, water, sewage, air-conditioning, energy, telecommunications, date and all other services and utilities and all structures, machinery and equipment ancillary to those media".

35. The "Building" is defined as "the building (forming part of the Development) of which the Property forms part comprising flats 1-86 and 1-4 commercial units and car park".

36. The "Main Structure" is "the roof, foundations, structure, floor, load-bearing walls and columns, stanchions, beams, external walls (including any cladding), ceilings and all other structural parts of the Building …".

37. The "Development" is defined as "the Landlords development at Stockwell Gate Mansfield on which the Building is constructed …".

38. The "Common Parts" means the "Internal Common Parts and the External Common Parts". Those terms have the same meaning as is set out in the residential leases, so include the staircases, lifts and associated mechanical and electrical installations provided to the residential flats.

39. Clauses 7.1.2 to 7.1.15 set out more heads of expenditure which fall within the definition of "Services". The Applicant provided a helpful schedule in paragraph 6.4 of its submission identifying which lease clause allows the Applicant to charge CCL for each head of expenditure in the Budget, The Tribunal agrees that all of the proposed budget expenditure headings proposed are chargeable to CCL under the identified lease provisions in paragraph 6.4.

The car-parking area lease ("the Car Park Lease")

40. This lease is also dated 31 December 2014. The Tribunal was informed that it had been assigned to CCL in about 2016.

41. The pattern of this lease is similar to the leases already discussed. The same definitions of "Building", "Common Parts", "Service Charge" and

"Service Charge Costs" as is contained in the commercial lease applies to this lease. The "Services" are listed in clause 5, and they include maintenance renewal and replacement of the Main Structure and the Common Parts, and the cleaning lighting and decorating of the Common Parts. Again, the list of services can be read against the proposed heads of expenditure in the Budget as set out in paragraph 6.4 of the Applicant's Statement to show that CCL are obliged under the lease to contribute towards each item of proposed expenditure.

42. There is one curiosity, which is that there is no direct covenant or agreement on the part of CCL to pay the Service Charge, unlike the commercial and residential leases. No party has raised this question, and it seems to the Tribunal highly likely that the correct reading of the lease, and in particular clauses 5.2 and 5.6, and the application of the principles of contractual construction set out in *Arnold v Britton* [2015] UKSC 36, would result in an interpretation of the lease in favour of reading it as if it contained such a covenant. That is how this Tribunal interprets the lease for the purposes of this decision, but as the point was not raised by anyone and it has heard no argument, it would be wrong for any party to rely upon this decision as determinative of that interpretation.

Insurance

43. All three forms of lease deal with insurance in the same way. The obligation to insure is not a service identified within the definition of services in the leases. Instead, all lessees covenant to pay an "Insurance Rent" which is a fair and reasonable proportion of the premiums incurred to insure the Building against defined insured risks.

Payment of the service charge and the insurance rent

44. Clauses 7.6 in the Commercial Lease, clause 5.6 in the Car Park Lease and paragraph 1 of the Fifth Schedule in the Residential Leases provide for lessees to pay an estimated Service Charge in advance by two payments in each year. The collection mechanism for the insurance premium is that it is payable on demand in accordance with clause 8.3 in the Commercial Lease, clause 6.3 in the Car Park Lease, and clause 3.2 in the Residential Leases.

The issues

Jurisdiction and abuse of process

45. In their written submission to the Tribunal, CCL argued that the application be dismissed as an abuse of process. They also suggested that the Tribunal lacked jurisdiction to make a determination as requested, or at the least that the Tribunal was the incorrect place for the apportionment issue to be aired. Finally they complained about disclosure, or lack of it in

relation to a report by their expert, Mr Bielby, and that they had not had early sight of the Applicant's legal advice.

46. The argument on abuse of process was that the Applicant is familiar with the judicial process governing the law on service charges and was unfairly attempting to obtain a judicial decision which would be of assistance in its negotiations with CCL in the future. CCL argued that it should have been apparent to the Applicant that the Tribunal was not the appropriate forum for determination of the dispute between the Applicant and CCL on the correct apportionment of the service charge.

47. So far as jurisdiction is concerned, CCL argued that there is no jurisdiction for this Tribunal to make a determination of the correct apportionment of the service charge payable by them, as section 18 of the Landlord and Tenant Act 1985 restricts the Tribunal's jurisdiction to determinations relating to dwellings.

Apportionment

48. For the Applicant, the determination sought from the Tribunal was approval of the Budget and of the proposed apportionment of the Budget between the lessees. Their case was, having taken legal advice which they disclosed to the Tribunal from JB Leitch Solicitors, they wished to obtain approval to apportion the Budget expenditure between lessees according to the gross internal floor areas of the accommodation occupied by the lessees. They had obtained verification of the percentages set out in their apportionment schedule from an architect's firm called Jackson Design Associates who had been the original architects for the original developer. Jackson Design measured the total area of let space as 7,665.7 sqm.

49. The proposed treatment of the car parking spaces was to add the measured space for the car park space used by the 74 residential lessees to that lessee's flat accommodation and use that total square metreage as the proportion of the whole for calculation of the percentage contribution payable by that lessee.

50. The contribution payable by CCL under the Car Park Lease was calculated in the same way, by measuring the car parking space area occupied under that lease as 158.67 sqm and working out what that area was as a proportion of the whole. The calculation was 2.06987%.

51. The measured area of the commercial units (which the Tribunal surmises includes the communal entrance way to the commercial units the and passages leading to the individual units) was 1,933.45 sqm, equating to 25.22209% of the total let area.

52. Mr Boon said that the leases required that all leaseholders contribute towards the service charges expenditure on the Building. The

apportionment he was proposing was a fair and reasonable way of sharing that expenditure between the payers.

53. For CCL, Mr D'Cruz's main argument on the substantive issue of apportionment was that the obligation on the Applicant was to apportion on a fair and reasonable basis. It was unfair and unreasonable to ignore the use, availability and benefit of the services being provided when fixing that fair and reasonable proportion. It was demonstrably unfair if a lessee had to make a payment for a service from which he or it derived no benefit.

54. CCL had obtained a professional report from a Mr James Bielby of Bielby Associates who were property consultants. That report drew attention to the RICS code on Service Charges in Commercial Property. Mr Bielby used the 3rd edition of this code, applying from February 2014, but in fact there has been a new edition issued in September 2018 and coming into force on 1 April 2019. The relevant paragraphs in the new code (which are virtually identical to the wording referred to in Mr Bielby's report) are as follows:

Allocation and apportionments

4 Costs should be allocated to the relevant expenditure category. Where reasonable and appropriate, costs should be allocated to separate schedules and the costs apportioned to those who benefit from those services.

5 The basis and method of apportionment should be demonstrably fair and reasonable to ensure that individual occupiers bear an appropriate proportion of the total service charge expenditure that clearly reflects the availability, benefit and use of services.

55. Mr Bielby concludes his report with this paragraph:

"6.8 Having regard to the provisions of the lease and the RICS principles referred to at section 5 above [i.e. the Code], I am of the opinion that, given the topography of the development, a fair and reasonable apportionment of the service charges would be for Crispin Commercial Limited to contribute towards the general maintenance of the external structure of the building (not including glass) based as a percentage of the area comprised by the commercial units. An alternative practical solution would be for a variation of the lease to reflect an assumption of contractual liability by Crispin Commercial Limited to service, maintain and repair the external structure on the building within which the commercial units are contained. Additionally, Crispin Commercial Limited should be expected to contribute to the service costs of lighting, maintaining and repairing the car park(s), including the gates and service ways (for which the freeholder is responsible) based on the proportion of car parking spaces to which it is entitled."

56. Mr D'Cruz's point was that the Code requires that the service charge should reflect the availability, benefit and use of the services, and Mr Bielby's suggestion is a practical solution. There are substantial parts of the service charge for the Building from which CCL derive no benefit at all; in all fairness, they should not have to contribute towards those service charge costs.

57. In response Mr Boon pointed out that the assessment that has to be carried out is one of assessing the proportion of the total bill that has to be paid, not assessment of the fairness of the fact that the lessee has to contribute. The obligation to contribute is a given by virtue of the lease obligations. He also said that if the application of the terms of the lease resulted in disastrous consequences for CCL, that was no basis for interpreting the lease in a different way from the meaning it clearly bore.

58. CCL's argument, Mr Boon said, was an attempt after the event to make the lease more fair and reasonable in CCL's eyes. He accepted that it was possible to use a weighted apportionment system on occasions, but that was not in the lease in this case.

Insurance premium

59. Four residential lessees made written observations stating that the budgeted insurance premium of £45,800 was too high. None provided alternative quotations. Mr D'Cruz also said that his clients had the same objection. On their mobile phones, Mr Littler and Mr Finnegan said they had alternative quotes available.

60. In their application, the Applicant had explained the insurance premium budget figure by saying it was based on the previous year's premium plus 5%. At the hearing, Mr Boon explained that the insurance year end is in March, so at the point of preparing a budget an estimate has to be used. In fact, the premium quoted for 2019/20 is £43,636.22 plus £1,641.55 for sabotage and terrorism cover, so the actual cost for the year will be very close to the figure in the Budget. He said that the Applicant (or presumably the group of companies it was associated with) had a block policy for its buildings, so there was no individual quote for the Building. In 2015 they had conducted a tender exercise to select a panel of major insurers with whom to place their insurance. Their chosen insurer at the present time was Zurich Insurance.

Law

61. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain important statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the

parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

62. Under Section 27A(1) and (3) of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

    a. The person by whom it is or would be payable
    b. The person to whom it is or would be payable
    c. The amount, which is or would be payable
    d. The date at or by which it is or would be payable; and
    e. The manner in which it is or would be payable

63. Section 19(1) of the Act provides that:

    "Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

    and the amount payable shall be limited accordingly."

64. These provisions give the Tribunal jurisdiction to determine whether the proposed budgeted service charge is payable by the residential service charge payers.

65. The Tribunal has jurisdiction also to determine the apportionment methodology by which the service charge is split between the service charge payers – see Windermere Marina Village Limited v Wild [2014] UKUT 163 (LC); [2014] L&TR 30, Gater v Wellington Real Estate Limited [2015] [2014] UKUT 0561; [2015] L&TR 19) as approved by the Court of Appeal in Oliver v Sheffield City Council [2017] EWCA Civ 225; [2017] 1 WLR 4473, and Fairman v Cinnamon (Plantation Wharf) Ltd [2018] UKUT 0421(LC).

66. These cases establish that any provision in a lease which purports to exclude the Tribunal's jurisdiction to determine the apportionment is void. This principle derives from section 27A(6) of the Act which provides that "an agreement by a tenant of a dwelling … is void in so far as it purports to provide for a determination … in a particular manner … of any question which may be the subject of an application under subsection (1) or (3)." Determination of apportionment of a service charge can be the subject of an application under subsections (1) or (3) of the Act. Therefore, although leases may say that the apportionment decision is to be made by the landlord's surveyor, whose decision shall be final and binding, the

Tribunal's jurisdiction to determine whether that decision is correct, and to make an alternative determination, cannot be ousted by that wording.

67. On the question of how to approach the question of a "fair and reasonable" apportionment, in Service Charges and Management 4th edition edited by Tanfield Chambers, the position is set out in paragraph 3-08 as follows:

> "Rather than specifying any formula by reference to which the tenant's contribution is to be calculated, the lease might simply provide that the tenant is to pay a "fair", or "proper", or "due", or "reasonable" proportion of the costs incurred by the landlord. Such clauses often provide that it is for the landlord's surveyor to determine what might be such proportion. In doing so, the duty upon the landlord's surveyor is to make a reasonable determination. Provided the determination made is reasonable, it does not matter that other reasonable determinations might also have been made.
>
> The surveyor can be expected to follow the RICS Code of Practice: Service Charges in Commercial Property which considers the various ways the relevant costs may be apportioned between tenants. The surveyor is likely to take into account the number of lettable parts of the building or estate, the relative floor spaces of those lettable parts, and the relative use which those various lettable parts make of the common amenities and services."

68. A number of LVT, Upper Tribunal or Lands Tribunal cases are referred to in this section of the work cited above, and the Tribunal gratefully adopts and reproduces the summary of these cases appearing in that work:

    a. In *Rowner Estates Ltd [LRX/3/2006 Lands Tribunal unreported 2007]*, which concerned the "due proportion" to be paid by the residential tenants of the landlord's costs of maintaining a mixed-use development, the Lands Tribunal approved an apportionment which disregarded the relative floor-space of the residential and commercial parts but took into account the difficulty the estate company was having in letting commercial units.

    b. In *Scottish Mutual Assurance plc v Jardine Public Relations Ltd, (1999) E.G.C.S. 43* the court was concerned with a lease requiring the tenant to pay a "fair proportion" of the costs "reasonably and properly" incurred by the landlord in, amongst other things, repairing and maintaining the structure and exterior of the building. The roof to the building was in significant disrepair, although some patch repairs had recently been carried out. Notwithstanding that the tenant's lease had only a few months left to run, the landlord carried out expensive and long-term repairs, rather than further short-term, patch repairs. Mr Recorder David Blunt QC held that the cost of such long-term repairs was not a cost "reasonably and properly" incurred by the landlord because it was not reasonable vis-à-vis the tenant for

the landlord to carry out such substantive repair works when short-term patch repairs had only recently been carried out, and the tenant was only going to occupy the building for a few more months. He therefore found that the tenant was liable for 39.88% of the cost of only the short-term repairs. However, he commented (obiter) that if he was wrong and the long-term repairs were "reasonably and properly" incurred by the landlord vis-à-vis the tenant, then he would have held that the "fair proportion" of the cost of those long-term repairs to be paid by the tenant should be determined by reference to the fact that the tenant enjoyed the benefit of those long-term repairs for only a few months of their 25–30 year lifespan. Such an approach would have produced a very small contribution on the part of the tenant. It may therefore be that when determining the "fair", "proper", "due" or "reasonable" proportion to be paid by a tenant, the landlord's surveyor must also take into account the extent of the tenant's remaining unexpired term and the extent to which the tenant will benefit from the works.

c. In *Silver v Hackney LBC, unreported, LON/00AM/LSC/2007/0132, LVT* a tribunal upheld a borough council's formula for apportioning service charges which it applied across its whole housing stock. This applied a "living space factor" to allocate costs in individual blocks. For example, a bed-sit was given a factor of 1.5, a one-bedroom flat a factor of 3 and so on. There was no clear evidence of the reason for the figures adopted by the Council. However, the tribunal considered the Council had complied with the obligation to calculate a "due proportion" of its costs.

d. In *PAS Property Services Ltd v Hayes, [2014] UKUT 0026 (LC)*, the lease obliged the tenant to pay "a fair and proper proportion (to be determined by the Landlords Surveyors acting reasonably) of any outgoings expenses or assessments which may be imposed or assessed on the Apartment (or any part thereof) together with any part of parts of the Building and/or the Estate" and without prejudice thereto, to pay the cost of all gas used or consumed in the apartment. The estate comprised two buildings, only one of which was served by a gas-fired communal heating system which provided heat to the apartments in the building for the purposes of heating air and hot water. Each apartment in the building was fitted with a meter, recording the heat supplied to that apartment. Those meters could only be monitored by a company which would then charge for its services. In order to save costs, the landlord did not pay for the meters to be monitored. It sought to recover the cost of gas supplied to the communal heating system from the tenants in both buildings. The Upper Tribunal concluded that it could not do so. HH Judge Robinson explained as follows:

"Although identification of a fair and proper proportion of the gas used or consumed in each apartment is a matter for the Landlord's

> Surveyor, acting reasonably, as things stand at the moment there is no means of calculating such a fair and proper proportion other than by monitoring consumption through the meters. That is because there has been no attempt to date to assess how much heat each apartment uses, whether through monitoring of meters or otherwise. Simply apportioning the cost by floor area would not be a fair and proper proportion because it would not necessarily bear any relation to the amount of gas used or consumed in an individual apartment. This will relate to matters such as the number of occupants (more people use more hot water), whether an apartment is occupied all of the time and personal choice as to the level of heating required. Therefore, on the basis of the evidence before me, the only reasonable decision which the Landlord and his Surveyor could take is that a fair and proper proportion of the gas used or consumed in each apartment is the amount of heat measured by the meters. However, it is important to note that the decision under the Lease as to what is a fair and proper proportion is one for the Landlord's Surveyor, acting reasonably and not the court. Provided the decision is reasonable, it does not matter that other reasonable decisions could have been taken … The fact that, on the basis of the evidence before me, the only reasonable decision would be to charge on the basis of consumption measured by the meters does not necessarily mean that will always be the case. For example, it may be that after monitoring consumption through meters for a while, it appears that fluctuations in use even themselves out over time or can be related to other factors so that dividing the total cost by some other factor, such as per person in occupation, provides a reasonable assessment of the heat used in each apartment. It would plainly be in the interests of the lessees for a fair method of dividing the cost to be identified which does not require use of the meters because of the additional cost entailed."

69. These cases illustrate that in determining what is "fair and reasonable", a decision maker (whether that decision maker is the landlord's surveyor or the Tribunal) has a wide discretion to determine an outcome that seems to that decision maker to indeed be "fair".

Discussion and determination

A. Abuse of process and jurisdiction

70. The Tribunal rejects CCL's application for dismissal of the application on the grounds of abuse of process. The Act provides a mechanism whereby in relation to dwellings, a service charge dispute can be referred to the Tribunal, which can restrict a demand for a payment before the costs have been incurred to no greater amount than is reasonable (section 19(2)). Under section 27A, the Tribunal can determine the person who has to pay it, to whom they have to pay, by when, what the amount is, and the manner of payment. It seems to the Tribunal that the Applicant is exercising its

statutory right to apply for a determination, and there is simply no basis for denying the Applicant that right.

71. CCL have challenged the Applicant's motivation for the application, alleging it is a tactical ploy to gain some advantage in their dispute. That is simply not a matter for the Tribunal. It is faced with a valid application in relation to the residential dwellings in the Building which it has a duty to determine.

72. On the question of jurisdiction, CCL are entirely right to point out that the Tribunal has no jurisdiction to make a determination on CCL's obligation to pay their budgeted contribution towards the service charge. The Tribunal's jurisdiction is limited to determination of a service charge payable by a tenant of a dwelling. It is patently obvious that CCL's demise does not fall within that definition.

73. As the application is for a determination of the payability of demands in advance of incurring costs in relation to the 2019 service charge year by the 86 residential lessees, the calculation of the proportion that each residential lessee has to pay will be affected by the amount that is apportioned to CCL as its proportion of the total proposed expenditure. Whilst the Tribunal cannot rule on the payability of its contribution, CCL clearly has an interest in explaining to the Tribunal why the Applicant should charge it a lower rather than higher amount.

74. In *Windermere Marina Village Limited v Wild* [2014] UKUT 0163, the Deputy President of the Upper Tribunal (Lands Chamber) recognised the complexity of apportioning service charges in mixed use buildings. He suggested, at paragraph 45, that the tribunal should consider giving notice of the proceedings to any third party who wishes to make representations. In effect that is what has happened here, although in this case CCL have been made a party to the proceedings, but in circumstances whereby they cannot be bound by the determination of the Tribunal in respect of their own service charge. The Tribunal was therefore willing to hear from CCL at the hearing in order to consider the merits of their case for if it is meritorious, this would affect the Tribunal's decision on the proper apportionment of the service charge between the residential tenants, as it would affect the residual proportion of the service charge payable by them as a class. Except in so far as the Tribunal has accepted that there are jurisdictional restrictions upon it as described in this paragraph, in its view there is no further jurisdictional reason for the Tribunal not to proceed to determine the Applicant's application.

75. The Tribunal should comment on the complaint by CCL concerning disclosure as summarised above. Essentially these are not matters for the Tribunal. In any event, at the hearing all the documents which CCL said has not been previously disclosed were included in the documentation available to the Tribunal.

B. Apportionment

Insurance premium

76. Before considering the apportionment issue generally, we firstly deal with the insurance premium. In the Tribunal's experience, premiums for insurance of a mixed-use development such as the Building will be determined by insurers on the basis of the risk posed by each type of user. As identified above, the insurance premium is payable by all lessees as set out in paragraph 43 above, i.e. apportioned fairly and reasonably between them. The Tribunal considers that the fairest way of apportioning the insurance premium is likely to be to use the insurer's own apportionment of the premium between the three categories of user at the Building. In default of being able to obtain such as apportionment, the system the Tribunal determines for the service charges will need to be followed.

77. The leases strictly do not allow the Applicant to seek payment of the insurance premium as part of an advance payment of an annual budgeted figure. The benefit of clauses 7.6 in the commercial lease, clause 5.6 in the car park lease and paragraph 1 of the Fifth Schedule in the residential leases whereby a payment in advance can be sought is not available for payment of the insurance premium. The collection mechanism for the insurance premium is to demand it when the invoice is received for the premium, in accordance with clause 8.3 in the commercial lease, paragraph 6.3 in the car park lease, and 3.2 in the residential lease.

78. In consequence, the insurance element of the Budget will need to be removed from the Budget. It will need to be separately invoiced to the lessees when the invoice is received from the Insurer.

Service Charge

79. The Tribunal is satisfied that all of the proposed expenditure in the Budget, with the exception of the proposed insurance cost, falls within the definition of "Services" that must be provided by the Applicant to the Building under respectively clauses 7 of the commercial lease, clause 5 of the car parking space lease, and clause 6 of the residential leases. Stripping out the insurance premium results in a budgeted service charge for 2019 of £98,741.00.

80. Those costs are defined as the Service Costs or Service Charge Costs in the commercial lease, as Service Charge Costs in the Car Park Lease, and as Total Expenditure in the Residential Leases.

81. All lessees have covenanted to pay a contribution towards the total sum of those costs. For the residential lessees the contribution is "such percentage as the Landlord acting reasonably shall from time to time deem to be fair and reasonable", taking into account the size of the Flats;

and for the Car Park Lease and the Commercial Lease, it is a fair and reasonable proportion of those costs.

82. The question that therefore needs to be resolved is, what would be the fair and reasonable apportionment of the Budget sum between the service charge payers. Between them, the service charge payers are legally obliged to pay 100% of the proposed Budget. CCL have covenanted to pay something towards expenditure on services for which they receive no benefit. They must accept the consequences of signing a lease which did not make specific provision absolving them from having to contribute to services from which they derive no benefit.

83. However, once this point is recognised, it also must be accepted by the residential lessees that the leases are silent on what proportion of the service charge the lessees must pay except that it must be "fair and reasonable".

84. The Applicant's proposal is to apportion on the basis of floor area. Using rounded percentages, the residential flat lessees would pay c61%, the residential lessees with a car parking space c11%, and CCL as the lessees of the car parking lease would pay c2%, and as lessee of the commercial units a further c25%. The difficulties the Tribunal perceives with this are:

    a. The commercial units comprise the whole internal area of the two floors let. That means that CCL would have to pay a service charge for every square foot of internal floor area, from external wall to external wall. There is no communal area which services these units.

    b. The commercial units are a shell back to bare breeze block, with virtually no ongoing mechanical and electrical services provided.

    c. In contrast, fairly significant areas of the area used by the residential lessees (i.e. the common parts, corridors, stairwells, and landings within the residential blocks), are not included within the measurements, and therefore bear no proportion of the service charge.

    d. The residential areas are expensive to service. The common parts must be maintained, lit, and carpeted, and the mechanical and electrical services (which include door entry, emergency lighting, and fire protection systems) repaired and maintained. The lifts in Blocks A, B, E and F must also be maintained and serviced.

    e. The car parking area requires some services, but these are much reduced in comparison with the residential units. There are no lifts, except that the lift in block A also serves the lower ground floor Car Park, and limited mechanical and electrical services (though gates and entry systems are provided).

f. The cost of management of a commercial unit does not increase according to the size of the unit.

85. In essence, the three uses (residential, commercial and car park) are very different, so that one square metre of residential space cannot in reality to treated equally with one square metre of commercial, or car park space.

86. Put shortly, the Tribunal does not think that the proposal in the application is a fair and reasonable apportionment in the light of the points we have identified above.

87. In seeking to find a fair and reasonable apportionment, the Tribunal must make a reasonable determination. We believe it is reasonable to take into account the provisions of the RICS Code of Practice: Service Charges in Commercial Property which considers the various ways the relevant costs may be apportioned between tenants. In our view, it would be reasonable for us to take into account the number of lettable parts of the building or estate, the relative floor spaces of those lettable parts, and the relative use which those various lettable parts make of the common amenities and services, in accordance with the principles discussed above under the heading "Law".

88. Our view is therefore that some account of the differing nature of the residential, commercial, and car parking areas should be taken into account in the apportionment.

89. Fixing a fair and reasonable apportionment is an art, not a science. The role of the Tribunal is to reflect on the factors which it should take into account (which have been identified above) and reach a judgement, using its expert knowledge and experience, of the fairest method by which the service charge should be apportioned in this case.

90. We consider that the fairest way of apportioning the service charge in this case is to apply a weighting to the different uses. We are endeavouring to make a considered judgement of the relative value to be derived from the service charge and to reflect that in the proportion that each type of user has to pay.

91. We therefore determine that the fair and reasonable method of apportioning the service charge is to weight it in the proportions of 1 for the residential areas, 0.5 for the car park, and 0.4 for the commercial units. Using the measured areas provided to us by the Applicant (see paragraph 16 above), the percentages would be as follows:

	Floor area (sqm)	Weighting	Weighted floor area	Percentage
Flats	4697.10	1.00	4697.10	78.44%
Car park area	1035.15	0.50	517.58	8.64%

Commercial units	1933.45	0.40	773.38	12.92%

92. The next question is how the overall percentage allocated to flats and the car parking area is to be divided between the lessees of those areas.

93. We accept the Applicant's proposal regarding the apportionment between the residential lessees. It would in our view be fair and reasonable to divide the portion of the service charge attributable to these lessees on the basis of floor area as measured in the table provided by the Applicant in their application.

94. The car park area charge will need to be divided between the residential lessees who have the right to a car parking space and CCL as lessee of the residue of the car parking spaces. The car parking area measurement was provided by the Applicant, which breaks the area down as follows:

Leased under the car parking lease	158.67sqm
Allocated to the 74 lessees with car park space	841.98sqm
Unallocated	34.5sqm
Total	**1,035.15**

95. At the inspection, the Tribunal counted 91 car parks spaces, including three spaces on the frontage to Dallas Street, and we were also told there were 91 spaces. The measured area of 1,035.15 sqm is consistent with this number of car parking spaces, in that the average area of a space on the basis of there being 91 spaces is 11.37sqm, which is consistent with the average area of the spaces which have been individually measured.

96. The number of spaces leased under the car park lease is not specified in that lease. That lease grants a lease by exception; the spaces leased are the balance left contained within the "estate" that are not already allocated to residential flat owners. The Tribunal therefore assumes that the unallocated spaces are included within the car parking area lease. CCL, as the lessee, therefore, have 17 spaces, being the balance of 91 spaces after the deduction of the 74 spaces specifically allocated to residential lessees.

97. On this basis, the 8.64% of the service charge allocated to car parking areas in paragraph 90 above should be apportioned between the lessees as follows. 17/91 of that percentage would be charged to CCL as lessee of the Car Park Lease, and 74/91 would be payable by the residential lessees. That means 1.614% of the service charge budget is payable by CCL as lessee under the Car Park Lease, and 7.026% is payable by residential lessees.

98. At this point, we should say that the Tribunal's view is that it would be no less fair and reasonable to apportion the residential lessees' proportion of the car parking area charge equally between the 74 contributing

residential flat owners. If the Applicant decides it wishes to apportion on the basis of floor area, the Tribunal does not say this would not be fair and reasonable, but it seems to perhaps introduce an additional complexity that may not be needed. The Applicant therefore has the choice of apportioning residential lessees share of the car park service charge liability either equally or in accordance with floor area of the car park spaces.

99. Our conclusion on the apportionment of service charge liability for the car parking spaces is subject to two caveats. Firstly, and unfortunately, the land registry plans supplied to the Tribunal showing the car park spaces do not reconcile with this calculation, based on the Tribunal's inspection and the Applicant's measured area figures, as only 64 spaces are numbered, so indicating that they are allocated to a residential flat. The Applicant should satisfy itself that the total number of car parking spaces of 91 (which was given to the Tribunal on inspection) is correct, and that 74 are specifically allocated to residential flat owners. It would be open to the Applicant to adjust the car park space apportionment on the basis of the principles set out in this decision if the factual situation differs from that which the Tribunal has assumed is the case.

100. Secondly, it may be there is an issue as to the ownership of the three spaces located on Dallas Street. If they are not in fact included in the car parking spaces lease (the Tribunal has assumed they are as discussed above), it would seem to the Tribunal that they should still attract a liability to contribute to the service charge, but if they are not leased at all, the Applicant would be responsible for the apportioned contribution they would bear.

C. Representations following further consultation

101. Dealing with the representations made by residential lessees in the May Consultation, there were six responses from residential tenants. Their points can be summarised as:

    a. The weighting of 0.4 for the commercial units and 0.5 for the car park unit was not understood. Respondents to the consultation suggested it should be the other way round;

    b. One respondent (Mr Charles) suggested an alternative weighting scheme;

    c. The apportionment should be decided by the landlord under the lease, not the Tribunal. Some added that the landlord's legal advice should be adopted;

    d. The Tribunal should not be involved in fixing the sum payable by a commercial tenant;

e. CCL wrote their lease (which contains no reference to weighting) and created any problems arising from it themselves and they should therefore be held to its provisions as interpreted by the landlord;

f. Balcony sizes should be taken into account;

102. The Tribunal considered each of these points:

a. Weighting

103. Essentially, the car parking facility requires more services and facilities to be provided to it than the commercial premises. The tribunal has in mind the access gates, the lift from Block A, the cleaning regime, and some electrical cost. The commercial lessee has responsibility for its own cleaning obligations and all mechanical and electrical services provided to it. The Tribunal therefore considered that it should reflect the differing nature of the services in allocating a fair and reasonable apportionment.

b. Mr Charles's scheme

104. Mr Charles has proposed a system based on zoning the commercial premises and allocating a greater proportion of the service charge cost to the first 500 sqm, a lower apportionment for the next 500sqm, and a lower still allocation to the rest of the units.

105. This type of system is commonly used to fix rental levels for retail shop premises. However, for commercial office type space on the outskirts of Mansfield, the Tribunal does not accept that this is an appropriate approach. Zoning is not an accepted valuation methodology for commercial units, as opposed to retail units.

106. In any event, the Tribunal does not consider that a zoning system should be used to apportion a service charge as service charge is being paid for services, not lettable space.

c. The landlord should decide the apportionment, not the Tribunal

107. The legal cases discussed above in paragraphs 65 – 66 establish that the exclusive decision by a landlord on apportionment of services charges, at least in relation to residential leases, is subject to ultimate determination by a Tribunal.

d. The Tribunal should not be involved in deciding the commercial tenants service charge

108. The Tribunal considers this is the same point as the jurisdiction point discussed above at paragraphs 69 and following. The respondents who raised this point are correct in saying that the Tribunal cannot fix the service charge payable by CCL. The Tribunal can however determine the

reasonable service charge payable by the residential lessees, and this determination requires that it consider the split between the residential lessees and the commercial lessee.

e. CCL wrote their lease

109. The Tribunal was not provided with any evidence that this suggestion is true. We note that the original lessor, Mansfield Gate Limited, operated from the same premises as CCL, but there is no evidence of common directors or shareholders of the two companies.

110. If it is the case that the original lessor and CCL are connected, our view is that this would not change our decision. Once leases are put in place, the wording contained in them governs the legal obligations of the parties, whoever determined the wording to be used. Our decision focuses on the undeniable provision in the leases that the apportionment of the service charge has to be on a fair and reasonable basis, which is what the Tribunal has endeavoured to determine.

f. Balconies

111. This issue was raised by four lessees. The Tribunal was unable to find any balconies at its inspection. The Applicant suggested that the lessees who raised this issue may have had access to earlier plans of the intended development which did show balconies, but they believe that the "as built" Building contains no balconies, which seems to the Tribunal to be right. This point therefore no longer arises.

Additional comment

112. Some respondents challenged the amount of the insurance premium included within the budget. We have determined that there is no right in the Residential Leases for the Applicant to demand a payment of the insurance premium as part of the annual budget. If the respondents believe they are being asked to pay too much, their remedy is to seek a determination under section 27A of the Act that the insurance premium is being unreasonably incurred when they are asked to pay the insurance premium or when the service charge accounts are produced. If they do so, they would be prudent to obtain cheaper competitive quotations on the same basis as the existing insurance, and the Applicant will then need to defend its choice of insurer, and show that the premium was reasonably incurred.

Summary

113. The Tribunal approves a service charge budget (after stripping out the insurance premium) of £98,741 as a reasonable sum for the proposed expenditure on service charges for at St Crispin Court for the 2019 service charge year. This is a statutory determination under section 27A(3) of the

Act and approval only determines this issue as between the Applicant and lessees under the Residential Leases.

114. The Tribunal determines that the fair and reasonable apportionment of the Budget between the residential flat owners is:

    a. Collectively, the lessees under the Residential Leases should pay 78.44% of the budgeted sum, to be further apportioned in accordance with the measured floor areas of each individual flat.

    b. The residential lessees who have an allocated car parking space should collectively pay a further 7.026% of the budgeted sum, to be further apportioned (at the election of the Applicant) either equally, or in accordance with the measured floor area of the car park spaces allocated.

Appeal

115. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)