FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/0BN/LSC/2021/0017**
Property	**:**	**Flat 345D Stretford Road, St Georges II, Hulme, Manchester M15 4AY**
Applicant	**:**	**Lellis Francis Braganza**
Representative	**:**	**In Person**
Respondent	**:**	**The Riverside Group Limited**
Representative	**:**	**Solicitor Lyn James of Trowers and Hamlyn**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge J White** **Mr H Thomas (valuer)**
Venue	**:**	**Video (v)** **Northern Residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester, M1 4AH**
Date of determination	**:**	**14 September 2021 and 2 November 2021**
Date of decision	**:**	**3 December 2021**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the full amounts demanded, are payable by the Applicant in respect of the service charges for the years 2018/19, 2019/20 and 2020/21.

(2) The Respondent has 21 days to make any submissions in respect of costs. The Applicant has 21 days to reply. The matter will be determined by the Tribunal on the papers

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 1 April 2018-31 March 2019, 1 April 2019-31 March 2020, and 1 April 2020-31 March 2021.

2. The Applicant seeks an order under section 20C of the 1985 Act that none of the landlord's costs of the tribunal proceedings may be passed to any of the lessees through any service charge.

3. The Applicant does not seek an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). that none of the landlord's costs of the tribunal proceedings may be passed to the Applicant as an administration charge.

4. On 17 March 2021, the Tribunal issued Directions. In accordance with those directions both parties submitted documents. The Applicant's case is set out in his application dated 12 February 2021, Statement of Case dated 5 May 2021[sic], Scott Schedule and supporting documents. He submitted a further Statement of Case in response to the Respondents.

5. The Respondent sets out their response in their Statement of Case dated 26 May 2021, amended Scott Schedule, Witness Statements of Pam Bersantie and Bilal Hussain of Home Ownership Management Company.

The Law

6. Section 18 of the 1985 Act provides: (1) in the following provisions of this Act "service charge" means "an amount payable by a tenant of a dwelling as part of or in addition to the rent (a) which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and (b) the whole or part of which varies or may vary according to the relevant costs. (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable. (3) For this purpose (a) "costs" includes overheads, and (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

7. Section 19 provides: (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.

8. Section 21B (1) provides a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

9. Section 27A provides: (1) an application may be made to an 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 date at or by which it is payable, and (d) the manner in which it is payable. (2) Subsection (1) applies whether or not any payment has been made. (3) ..... (4) No application under subsection (1)...may be made in respect of a matter which – (a) has been agreed 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.

The hearing

10. The hearing took place on 8 September 2021 by video. Mr Braganza represented himself. The Respondent was represented by Ms James. Mr Hussain, Asset Services Manager and Pam Bersantie, Head of Ownership, of Home Ownership Management Company gave oral evidence.

11. Mr Braganza clarified the issues still in contention as set out below. The Tribunal heard argument and evidence in a full day's hearing. There was one issue that the parties agreed required further clarification and evidence. The matter was therefore adjourned to allow the parties to provide evidence. It was agreed that the Tribunal could then determine the matter without the parties present. The parties complied with the Directions and the Tribunal convened on 2 November 2021 to make a final determination.

The background

12. The property which is the subject of this application is Flat 345D Stretford Road, St Georges II Hulme Manchester M15 4AY ("the Property"). The Applicant purchased the Property on 10 April 2018. It is a ground floor two bedroomed property facing Stretford Road with an allocated parking spot. St Georges II Development ("the Development") has 79 units. There are 50 flats over 2-3 floors and 29 Houses; some with drives.

13. The Applicant has requested an inspection, and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute for the reasons set out below.

14. The Applicant holds a long lease (150 years from 18 December 1998) of the Property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The lease is a tripartite lease between Bellway Homes as Developer, the Respondent as Landlord, and the Leaseholder. The management company is Home Ownership Management Company .

The Lease

15. The relevant specific provisions of the lease are as follows:

Clause 3(4) provides that the leaseholder covenants "to pay the Service Charge by way of further or additional rent (whether formally demanded or not) calculated in accordance in accordance with Clause 7…"

Under clause 7 (2) The Leaseholder covenants to pay the Service charge in equal instalments on the first day of each month;

The Service Charge is defined in Clause 7 (1)(d) as: ".. the amount payable in accordance with the Specified Proportion of the Service Provision";

Specified Proportion is defined in clause 7(1)(b) as: "the proportion specified in the Particulars as amended from time to time under sub-clause 7(7)..";

Specified Proportion in the Particulars reads: "£35.68 per month (being the Service Charge) together with the deferred Service Charge referred to in clause 7(3)(a);

Service Provision is defined in clause 7(1)(c) as the sum computed in accordance with subclause 7(3) 7(4) and 7(5);

Clause 7(3)(a) provides for the payment a sum equal to 0.5% of either the sale price or the open market value of the property on its sale or other disposition of the property;

Clause 7(4) provides for "The Service Provision in respect of any Account Year shall be computed by 31 August of each Account Year and shall be computed in accordance with sub-clause 7(5);

Clause 7(5)-provides "(a) The Service Provision shall consist of a sum comprising (i) the expenditure estimated by the Surveyor as likely to be incurred in the Account Year by the Landlord… and (ii) a cyclical fund for or towards such as the matters specified in sub clause 7(6) hereof is likely to give rise to expenditure after the relevant account year being matters which are likely to arise either only once during the then unexpired term of this under lease or intervals of more than one year including (without prejudice to the generality of the foregoing) such matters as the decoration of the exterior of the building of which the premises form a part (b) That proportion of the Service Provision as referred to in subclause 7(3)(a) hereof as a Reserve Fund";

Clause 7 (6) provides that the "relevant expenditure to be included in the Service Provision shall comprise all expenditure of the of the landlord in connection with repair management maintenance and provision of services for the Development and shall include…";

Clause 7(7) provides "For each Account Year commencing after the 31st March 1998 as soon as practicable after the end of each Account Year the Surveyor shall determine (which figure is to be certified by the Landlords Auditors) and certify the amount by which the estimate referred to in sub-clause 7(5) hereof shall have exceeded or fallen short of the actual expenditure in the Account Year and shall supply the Leaseholder with a copy of the certificate and the Leaseholder shall forthwith upon receipt of the certificate (subject as provided in sub clause 7(8)(a) and (b) hereof pay the Specified Proportion of the excess if any (or the excess payment shall be allowed to him in the next Service Charge demand(s))";

Clause 7 (8) provides "(a) if in the reasonable opinion of the surveyor it shall at any time become necessary or equitable to do so he may increase or decrease the Specified Proportion (b) "The Specified Proportion increased or decreased in accordance with sub clause 7(7) hereto shall be endorsed on this underlease and shall hereafter be substituted for the Specified Proportion set out in the particulars of this under lease".

The Applicant's case

16. The Applicant's case is set out in his application dated 12 February 2021 and was slightly amended in the statement of case dated 5 May 2021[sic] [32-47] and supporting documents. It is further included in a Scot Schedule. He conceded and clarified some of the issues at the hearing. In general terms he asserted that:-

    (i) Failure to make proper service charge demands for the years ended 31st March 2019, 31st March 2020 and 31st March 2021 means that the service charges in the amount of £4381.98 were not properly due or payable.

    (ii) Alternatively, If the tribunal determines that service charges are, or might become due, then pursuant to Clause 7 (8) (b) of the lease the applicant has not been properly served notice with endorsements to the underlease concerning the Specified Proportion (or monthly service charge) and the applicants liability in respect of the service charges levied for the years ended 31st of March 2019 to 31st of March 2021 is limited to £35.68 per month together with deferred service charge referred to in clause 7(3)(a) of the lease.

    (iii) If the tribunal determines that the service charges are due and not so limited then the Specified Proportion or monthly service charges not been reasonably calculated as the reasonable opinion of the surveyor is not sufficiently detailed.

    (iv) That the Service charge payments for the cyclical fund are not reasonable.

(a) The size of the fund (together with the size of the Reserve Fund) is sufficient to cover works over a few years

(b) The calculation of the surveyor in establishing the cyclical works is not in accordance with the lease, equitable or clear

(c) The annual 5.5% uplift is not reasonable and should be 2.5%

(v) That the service charge for responsive and day to day repairs are not reasonable as they could have been taken from the Cyclical or Reserve Fund.

(vi) The Ground Rent has not been properly demanded.

(vii) Other elements of the service charge, such as management fees are not reasonable.

The Respondents' case

17. The Respondent sets out their response in their statement of case dated 26 May 2021 [83], Witness Statement and oral evidence of Pam Bersantie and Bilal Hussain and oral argument of Ms James. In general, their response is:-

(i) In regard to the demand for payment it complies with statutory requirements and has been served at the Property in accordance with the lease.

(ii) In regard to the Specified Proportion. This is increased annually in accordance with the Lease

(iii) In regard to the payablity of the service charge payments into the Cyclical and Reserve Fund this complies with the lease and is determined by the Surveyor as set out below.

(iv) In regard to the payability of responsive repairs. The terms of the lease prevents allocation to the sinking funds .

The issues

18. At the hearing the parties agreed that the relevant issues for determination were as follows:

(i) Has a proper demand for payment been made and served? Mr Braganza conceded that he has now been served and the demands are valid, subject to a decision on payablity.

(ii) What is the Specified Proportion of the service charge?

a. Is it limited to the amount in the Particulars? Mr Braganza conceded, as he now has all the documents, the service charge amount changes each year on service of a Notice of Increase.

b. Is the method of allocating the service charge in accordance with the lease? The Tribunal heard evidence from both parties

(iii) Is the method of assessing the Cyclical Fund reasonable, in terms of the planning process, items allocated, calculation and level of the fund (taking into account the presence of the separate Reserve Fund)? The Tribunal heard evidence from both parties. The parties agreed that additional evidence was required. Following the hearing the Respondent provided further evidence and reasoning. The Applicant provided a written response.

(iv) Is the Reserve Fund part of the service charge and so within the Tribunal jurisdiction? Are items allocated to the Reserve Fund reasonable in terms of type of expenditure and amount? Mr Braganza maintained that he required sight of the invoices relating to the 5-year planning process. At the hearing oral hearing the Tribunal decided it is not necessary or proportionate to order disclosure of the documentation/invoices used to make calculations for this purpose.

(v) Should items allocated for responsive repairs be paid from the Cyclical or Reserve Fund.

(vi) At the hearing Mr Braganza conceded that the management fees were reasonable and there were no other items of expenditure in contention.

(vii) The parties agreed that Ground Rent is not a service charge. Mr Braganza maintains it should not be in the Budget and demanded separately.

19. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

The Tribunal's decision

Service Charge Demands

20. The service charges for the years in dispute have been properly demanded.

Reasons

21. A service charge only become payable if properly demanded. It is properly demanded if it contains a summary of rights and obligations in accordance with S21B of the 1985 Act .

22. Each year, in advance for the beginning of the account year, the Respondents sends out to their leaseholders the budgets and on account demands. The covering letter incorporates the demand as it advises of the monthly instalments which will be due. Accompanying this is the summary of rights and obligations (under section 21B- this must be sent out with all demands), a

FAQ document and the services and the service charge budget notes (which explains each item of expenditure in the budget).

23. On 30th of January 2018, these documents were sent to the leaseholder at that time at his correspondence address. On 20 February 2018, a "Notice of increase of specified proportion of service charge" (the Notice) was sent to the then owner of the Property, pursuant to the terms of the lease. This increased the specified proportion to £99.57 together with any deferred sinking fund charge. The sum of £99.57 should have been the estimated service charge total taking out the ground rent of £4.17 per month. Ground Rent was demanded separately on 12 February 2018. The deficit demand was made on 21 September 2018.

24. During the course of preparing the statement the Respondent noticed there was a slight discrepancy as the service charge for this year is £115.04. As such there is a difference of £11.03. The value has been refunded to the Applicants account.

25. In 2019/20 the demand was sent on 7 March 2019 to the sum of £120.92 per month. The Notice was sent on 13 March 2019 to the sum of £116.75 per month, again taking out the ground rent. Ground Rent was demanded separately on 28 November 2019. The deficit demand was made on 27 September 2020.

26. In 2020/21 the demand was sent on 17 March 2020 to the sum of £122.62 per month. The Notice was sent on the same day to the sum of £118.44 per month, again taking out the ground rent. Ground Rent was demanded separately on 30 November 2020.

27. All demanded service charges are contained in ANNEX 7 of the Respondents Statement of Case. All demands are accompanied by a summary of rights and obligations and contain an address of the landlord. It is unclear why the emails state otherwise.

28. All demands were sent to the Property as that is the default address contained in the Lease at 6(4) that provides that *"any notice under this Underlease shall be in writing and a notice to the leaseholder shall be sufficiently served if left addressed to the leaseholder on the Premises or sent to him recorded delivery post there…"*.

29. It was only in an email on 23 June 2020 that the Applicant formally requested that documents be served elsewhere [274]. Since that time, they have been sent to that address. An address on the deed of covenant is not sufficient to notify the Respondent that this is the address for service. In addition, the Tribunal accepts the Respondents evidence that the 2020/21 demand was sent by email. All earlier demands were again sent by email.

30. The Applicant replies that since the email of 23 June the Respondent continued to send documents to the Property up to at least 30 November 2020 [285]. However, he conceded in oral evidence that all service charges have been properly demanded and as such are payable, in so far as they are reasonable.

31. The Applicant concedes reconciling demands have been sent in accordance with the lease. We find that Clause 7(7) obliges the Respondent to serve separate reconciling demands and they have provided evidence that they have done so.

Notification Proportion and Calculation

32. The method and calculation of the proportion are all due and fair. They have been calculated and notified on accordance with the Lease.

Reasons: Notification

33. The Applicant submitted that pursuant to Clause 7(8)(b) of the lease the Applicant has not been properly served notice with endorsements to the underlease concerning the Specified Proportion (or monthly service charge) and the Applicant's liability in respect of the service charges levied for the years ended 31st of March 2019 to 31st of March 2021 is limited to £35.68 per month together with deferred service charge referred to in clause 7(3)(a) of the lease.

34. The Respondent submits that the "Notice of increase of specified proportion of service charge" is compliant as found by a FTT in a similar Bellway Home Lease MAN/OOBN/LIS/2014/005. In that case the first decision was set aside when the Notice of Increase was supplied.

35. At the hearing, the Applicant conceded that the Notice of Increase sent each year were valid. The Tribunal agrees that this Notice complies with Clause 7(8)(b).

Applicant's case: Proportion and calculation

36. The Applicant asserts that the Specified Proportion or monthly service charges have not been reasonably calculated as the reasonable opinion of the surveyor is not sufficiently detailed. The method of apportionment is not rational, accurate or clear.

37. In oral evidence he relied on the seven factors set out by Lord Neuberger in Arnold v Britton [2015] UKSC 36. In looking at the construction of the lease it should be interpreted as a reasonable person interprets it. Factors 2,3 and 4 were particularly relevant. The Leases for the flats set out the Specified proportion as £35.68, whereas the houses state £20.05. By calculating the proportion of the service charge, he concludes the split should be 75/25% between the flats and houses. This is supported by other clauses in the lease. Common areas in the house lease include "*the main entrance halls passages, landings, staircases of Apartments which are intended to be or are capable of being enjoyed or used..by the Leaseholder in common with the lessees of the other Apartments and dwelling houses in the Development" (*Clause 1(2)(c)). Similarly, obligations in accordance with Clause 5B (3)(a) include maintaining and repairing the structure of the Apartments.

38. He further asserts that paragraph 49 and 51 of the UT decision Avon Ground Rents v Cowley 2018 establishes the principles of certainty. He contends the method of apportionment is not always accurate or clear, such as when is it equally apportioned between 79 leaseholders and when 69 properties with drives (50 flats and 19 houses).

39. He establishes an alternative method of calculation, that he says is fairer, would have been in the mind of a reasonable person, and provides certainty. He calculates his share as 1.508%. This is based on the apportionment of the relevant expenditure as given by the "Specified Proportion of Service Provision" amount. This is £20.05 per month for houses with and without drives (together with the service charge referred to in clause 7(2)(b)) and £35.68 for flats (together with the service charge referred to in clause 7(2)(a)) [106]. The monthly service charge budget when the lease was executed was in all probability £581.45 for the 29 houses (29×20.05) and £1,784 for the 50 flats (50×35.68) giving a total monthly service charge of £2,365. The apportionment of costs between the flats and houses therefore appears to be a 75/25 split (1784/2365). In percentage terms, the tenant's portion of the service charges would be 1.508% (35.68/2,365) ×100) for the flats and 0.848% for the houses (20.05/2,365) ×100).

40. In his Scott Schedule he does not dispute the reasonableness of most items in each budget year. Though he does reduce his share to 1.508%.

41. The Applicant stated that the Respondents method is not equitable as he does not need to obtain access to the communal parts as he has direct street access to his flat.

Respondent's case: Proportion and calculation

42. The Respondent submits there is not a clause that defines the percentage apportionment of expenditure in numerical terms. By adopting the current apportionment methodology, Riverside is acting both fairly and reasonably. As a landlord it would be unreasonable to charge residents of the houses a contribution towards the internal communal repairs associated with the apartments. The houses do not benefit from this service and so do not pay a contribution towards such. This principle applies when setting the service charge budget also, houses do not contribute to services that are of benefit to only the apartments, including internal communal cleaning, window cleaning and internal communal repairs.

43. The Respondent makes use of an inhouse surveyor who approves the accounts as correct.

44. The Respondent provides a table of set proportions. In oral evidence we heard that this table had been used for at least 13 years and the rationale for the table. Before the budget is signed off the inhouse surveyor assessed whether the allocation of particular expenditure correlates with the rights of access and if the allocation proportion is reasonable. The lease allows this as it includes the words "in the reasonable opinion of the surveyor." The Applicant is mistaken that this refers to a change of proportion.

45. The Leases for the flats and houses differ significantly in that paragraph 2 of the Second Schedule in the houses only have incidental rights of access to the communal parts of the flats, as opposed to right of enjoyment. In addition, the houses are responsible for maintenance of their own structure including roofs.

The findings: Proportion and calculation

46. The correct proportion or amount of Service charge payable by the Applicant is determined by the Lease. The Lease does not specify the proportion in percentage terms. The amount specified as the Specified Proportion in the particulars may change in accordance with clause 7(7). Clause 7(7) makes reference to 7(8) so that the proportion is increased in accordance with the annual accounts process and endorsed on the underlease (7(7) and 7(8)(b)). It is clear law that an endorsement can be by way of a separate document. Alternatively, if in the "reasonable opinion of the Surveyor it shall at any time become necessary or equitable to do so he may increase or decrease the Specified Proportion" (7(8)(a)). The proportion has been made in accordance with the lease and is fair.

The Law: Proportion and calculation

47. In PAS Property Services Ltd v Hayes [2014] UKAT 0026 (LC) The Upper Tribunal said at 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 …[50]. The surveyor is expected to follow the RICS code which does refer to variable use of common amenities.

48. Where leases provided for the tenants to pay "*a fair proportion to be determined from time to time by the Landlord or the Landlord's Surveyors taking into account the use made of and the benefit received from the services and expenses and each of them …",*it was held that (i) it was for the tenant to establish a prima facie case that it had been charged more than a due or fair proportion, without which the landlord was entitled to succeed, (ii) the decision given to the landlord was a subjective, not an objective, one, albeit that it had to be rational, and (iii) a "determination" could be arrived at by the landlord without being communicated to the tenants. Criterion Buildings LTD V McKinsey and Co Inc (UK) [2021] 2 WLUK 156

49. In Southwark LBC v Woelke [2013] UKUT 349 (LC) the Upper Tribunal emphasised that the service charge provisions should not be construed in a legalistic or technical way, but that a business-like approach should be adopted:

"Where a contract lays down a process giving one party the right to trigger a liability of the other party, such as the payment of a sum of money in response to a demand, it is a question of construction of the contract whether the steps in the process are essential to the creation of the liability, or whether the process may unilaterally be varied or departed from without invalidating the demand. Where issues such as those in this appeal arise, it is necessary to identify the minimum requirements laid down by the lease

before the obligation to pay the service charge will be created, and then to consider whether the circumstances of the case satisfy those minimum requirements. In considering each of those matters it is not appropriate to adopt a technical or legalistic approach. The service charge provisions of leases are practical arrangements which should be interpreted and applied in a business-like way. On the other hand, precisely because the payment of service charges is a matter of routine, a business-like approach to construction is unlikely to permit very much deviation from the relatively simple and readily understandable structure of annual accounting, regular payments on account and final balancing calculations with which residential leaseholders are very familiar. When entering into long residential leases the parties must be taken to intend that the service charge will be operated in accordance with the terms they have agreed. Leaseholders should be able to work out for themselves whether a sum is due to be paid by reading the lease and comparing the process it describes with the information provided in support of the demand by the landlord, without the involvement of lawyers or other advisers." at [40].

Reasons: Proportion and calculation

50. It is accepted that as the lease does not contain a percentage payment of the service charge, the allocation process is more complex and less predictable. However, the Lease does set out how that the proportion is to be decided by the surveyor. It is clear law, as set out by Lord Neuberger in Arnold V Britton at paragraph 17 and 18, that the starting point must be the wording of the Lease. "*17. First… The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision…. …18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning."*

51. The Lease is clear that the "Specified Proportion" means the proportion specified in the Particulars as amended from time to time under subclause 7(7) (Clause7(1)(b)). Clause 7(7) is set out above and establishes that the surveyor shall determine actual spend compared to the budget and the mechanism for adjustments. Clause 7(8)(a) is equally clear "*If in the reasonable opinion of the surveyor it shall at any time become necessary or equitable to do so he may increase or decrease the Specified Proportion*".

52. As the caselaw above demonstrates we have to assess what is a fair and proper proportion in the light of the surveyors reasoning. As long as the explanation is rational we cannot ordinarily substitute our own alternative rationale.

53. The Respondent sets out why their surveyor has not allocated service charge attributable to the common part of the flats to the houses. This explanation is reasonable, and fair. There is also a brief explanation contained in the annual Budget sent to leaseholders. We do not need to consider if there are other reasonable methods available. They have established a detailed breakdown of

22 items of expenditure and split this in accordance with the number and type of properties to arrive at 4 different potential splits (Flats only, flats and houses without drives, flats 75% Houses without drives 25%, all properties). This is a long standing method of allocation. It balances a workable simple method with clarity and a fair proportion.

54. This methodology is utilised in practice. The Respondent employs a Surveyor in house who assesses against actual budget and expenditure, to go behind the figures or sense checks them. Each set of accounts are verified by the auditors as required. Though there may be instances where one property may benefit more than another, this is the nature of a workable system of apportionment where on occasions one leaseholder will benefit more than another. The Applicant has not established a prima facia case that he has been charged more than a due and fair proportion.

Cyclical Fund

The Applicants Case

55. At para 43 of his Statement of Case the Applicant sets out the amount held in the sinking and cyclical fund for each year as follows:

	As at 30/09/2017	Year ending 31/03/2018	Year ending 31/03/2019	Year ending 31/03/2020	Year ending 31/03/2021 (minimum amount)
Sinking fund balance	57,816.43[2]	36,894.41[3]	38,691.25[4]	51,916.08[5]	51,916.08[6]
Cyclical fund balance	39,321.68	47,972.24	88,480.13	133,803.28	182,614.05
TOTAL	**97,138.11**	**84,866.65**	**127,171.38**	**185,719.36**	**234,528.13**

56. He asserts the amounts demanded for each were not reasonable. For the year ending 31st March 2019 £38,158 should be reduced to £15,931. For the year ending 31st March 2020 £40,517.88 should be reduced to £15,931. For the year ending 31st March 2021 £42,543.77 should be reduced to £15,931.

57. The Applicant considers it unreasonable and excessive to claim £338,631 for the cost of works/supplies pertaining to a non-complex development of recent construction comprising a mix of terraced flats, terraced houses, and individual houses. Apart from the parking area, there are no other grounds or facilities for communal use. Neither is it justified that contributions to the cyclical fund are increased by 5.5% annually when actual costs do not increase similarly.

58. It is not agreed that that the projected cost of £176,925 (£133,455 + £43,470) to be nominally incurred in 2023 is a reasonable estimate. In terms of individual items, he says:

(i) Decoration: The invoiced amount for external and internal decoration in 2016 was £120,774.69. There is no description of the works. Applying an uplift in costs of 2.5% per year to account for inflation and compounded over 7 years (2017 to 2013 inclusive) gives an amount of £143,563 for the works in 2023.

The Applicant purchased the leasehold of Flat 345D on 10 April 2018 at which time the Cyclical fund balance was £47,972.24. Subtracting this amount from the £143,563 nominally needed in 2023 leaves £95,590.8 to be collected or £15,931 for each of 6 years (2018 to 2023 inclusive). Even taking the Respondent's own estimate of £176,925 for the works in 2023 and subtracting the Cyclical fund balance of £47,972.24 (on 31.03.2018) leaves £128,953 to be collected or £21,492 for each of 6 years (2018 to 2023 inclusive). £42,543.77 was collected in 20/21 though no cyclical works took place.

(ii) Electrical Installation Testing: The cost should be reduced as this is a cost to be incurred every 5 years and not each year. It should be reduced from of £1350 to £270 (2018/19), £283 (2019/20) and from £1486 to £297 (2020/21).

(iii) The Cyclical carpet Replacement: The next cycle cost of £35,200 is not agreed. The invoice amount for the carpeting in 2014 is £21,764 which when compounded at 2.5% over 10 years gives a nominal amount of £27,859.7 needed in 2024. However, in his Scot Schedule, he has not reduced the contributions of £2,628 (2018/19), and £2760 (2019/20 and 2019/20).

59. The Applicant submits that given the level of both funds there is enough provision to pay for several cycles of repainting/decoration/, carpet replacement, fire risk assessments, electrical installation testing, high level access tree works. Those funds should be utilised before replenishing.

60. The Applicant requested that the Respondent disclose further information about how the cyclical funds were arrived at. At the hearing this was agreed by the Respondent and the matter was adjourned for them to provide a Schedule explaining how the costs were arrived at, giving dates and amounts for the last expenditure, how planned costs were calculated and providing invoices and any documents in support.

61. Furthermore, given the very large sum of £338,631 claimed for the cost of works/supplies over five years the Applicant requests the Tribunal carry out an inspection of the "St Georges II" development and use its own knowledge and experience to determine the extent of any reasonable works/supplies/services required and (very approximate) costs. “

The Respondents Case

62. The Cyclical Fund is used to pay for planned works that are carried out on a regular basis, for example, redecoration works and carpet replacement. The Reserve fund is used for capital or major works.

63. The Respondent explains that they plan for these works using a rolling five-year stock condition report. Calculations are based on previous costs, with an uplift of 5.5%. The exception is electrical testing as this is based on a contract price. There is a detailed calculation sheet, that they use to help them identify the funds needed and level of contribution demanded for the cyclical fund. This is to avoid excess increases in the year works are carried out. The level of the cyclical fund is revied annually to ensure there is enough to cover the planned programme of works.

64. The stock condition survey is updated regularly by the surveyor who undertakes a condition survey at the Development. They asses the list, condition, and useful economic life of each component. It is cross checked against the history of repairs. The last survey was completed in April 2021.

65. Prior to any works there will be a full review of the cost estimates, including going out to tender as appropriate. Following the works there will be an adjustment to the report and cyclical fund. They prefer a prudent approach to retain a healthy fund to allow for any unexpected costs. This avoids large demands being sent to leaseholders and provides better protection to leaseholders.

66. There are two major items of work identified for 2022/23. Decoration, new doors, and entry systems. The decoration work in 2020 did not take place due to Covid-19. They aim to be completed in 222 and will use the costs to recalculate the cyclical fund. No consultation was required as works are delayed.

Cyclical Fund Decision and Reasons

67. The amounts claimed for the cyclical fund are reasonable and payable for each year in issue.

68. There is no requirement for the Respondent in its certificates to give full details of how the contributions required for a sinking fund has been calculated. It was enough to state what the sums concerned actually were. The landlord was only obliged to state the amount that it "reasonably determines to be appropriate" to build up and maintain the relevant fund. It was not obliged to give any more reasoning than that, and in particular how it had arrived at that sum. The Respondent must, though comply with the lease terms in respect of the sinking/reserve fund (Criterion Buildings LTD v McKinsey [2021] EWHC 216).

69. Clause 7(5) of the lease requires the Respondent to have a Cyclical Fund. It sets out the Cyclical Fund is be used for matters "*likely to give rise to expenditure after the relevant account year being matters which are likely to arise either only once during the then unexpired term of this under lease or intervals of more than one year including .. such matters as the decoration of the exterior of the building.*" All items referred to above, therefore clearly come within that definition.

70. If a clause does not limit the amount held or how long it should be held for, it is subject to the test of reasonableness (see Leicester City Council v Master [2008] 12 WLUK 396 and Garrick Estate Ltd V Balchin [2014] UKUT 407 (LC))

71. The Applicant states that originally there was little explanation as to necessity, nature, and dates of works or length of cycles or nature of the uplift. However, each year the Budget sets out what the fund is used for and explanations of particular items (see for example 238/9 and 243/4). Behind

this is a clear and rational process. The Stock Condition Report, when taken with the further documents supplied and evidence of Mr Hussain consists of a cogent and reasonable explanation of how the fund is managed and consequently the cyclical fund service charge amounts. It is in line with the RICS Code of Practice.

72. The last payment is the correct starting point. This is not itself challenged. The Respondents carry out regular stock condition surveys and assess the likely lifecycle of individual items.

73. The applicant contends that the 5.5% uplift used to calculate payments into the fund is excessive, not justified and does not correspond to actual increases in costs. His figure of 2.5% is similarly unexplained. The Tribunal considers that though 5.5% may be at the higher end it is not out of line with industry practice or the unpredictable nature of these type of costs.

74. Though the level of fund is said to be on the prudent side, this in itself is not unreasonable. The Respondents contention that the fund should be significantly run down is likely to result in additional service fund payments in future years. As the Cyclical Fund is a type sinking fund , the actual future costs will not be collected direct as part of the service charge and so balances out payments in future years. In addition, the Respondent credits the account and starts a new cycle following each actual expenditure as well as having a system of annual reviews.

The Reserve Fund

Applicant's case

75. The Applicant's argument is set out above. The Reserve Fund is part of the service charge. It is interchangeable with the Cyclical Fund. The amounts allocated are not clear and the fund should be used before further Cyclical Funds are demanded.

Respondents Case

76. The Sinking Fund is collected by way of a deferred sinking fund (sinking fund on exit) when a property on the Development is sold. This is a payment of 0.5% of the sale price or open market value (on disposition) for each year of occupation (capped at the higher of 2% of the sale price or open market value). Any contribution received from a leaseholder following a sale is placed in a fund to be used for major work. However, the landlord has little control of the contributions made as these depend entirely on sales. The Sinking Fund is not, in any event, part of the service charge.

The Reserve Fund Decision and Reasons

77. The Reserve Fund is collected by way of a deferred fund where payments are made on sales in accordance with Clause 7(3)(a). Clause 7(5)(b) identifies these payments as a Reserve Fund. The Respondents have no control over payment into this fund as it only consists of 0.05% of the sale price when a leaseholder sells their property.

78. The Reserve Fund is used for major works that are planned for as part of the same stock survey and planning process. We heard evidence that the items will be reviewed again nearer to budget setting, and a competitive tender process and S20 consultation will take place as appropriate.

79. Section 27A of the Act relates to jurisdiction on future service charges. The Tribunal does not have jurisdiction to interfere with the 5-year planning process. At that stage, the items in the stock report are not yet payable. The stock planning report is there for planning purposes and at that stage has no impact on service charge payability.

80. As the Lease defines both the Reserve Fund and Cyclical fund the same way then it could be said that they are interchangeable, and the Respondents could deplete the Reserve Fund further to reduce payments into the cyclical fund. However, their names suggest their usage and the approach of the Respondent is logical and the outcome reasonable. It provides a clear and consistent approach that balances the unpredictable nature of the Fund with use for one off major capital expenditure. It thereby minimises large, unexpected service charges demands. It sensibly relies on the same survey and review process as the Cyclical Fund.

Responsive and day to day repairs

Applicant's case

81. The amounts claimed for responsive and day to day repairs are not reasonable. In 2018/19 the total allocated service charge amount for responsive and external repairs is £8,977 (£7,555+£1,422).The total eligible funding from the cyclical/reserve fund is at least £7,633.88 [39 and additional Scott Schedule] . A reasonable amount for responsive and external repairs might be £1,343 (or £8,977 - £7,633.88).

82. In 2019/20 the total allocated service charge amount for responsive and external repairs is £20,570 (£18,784+£1,786).The total eligible funding from the cyclical/reserve fund is at least £13,088 [44 and additional Scott Schedule]. A reasonable amount for responsive and external repairs might be £7,482 (or £20,570 - £13,088).

83. In 2020/21 as the actual budget was not yest known the amounts of £4680.90 plus £1412.19 have not been reduced; though we assume the same arguments apply.

84. The general argument is that there is nowhere in the lease limiting use of the cyclical funds to planned maintenance and the only eligibility is "expenditure likely to arise at intervals of more than one year" and so could be used for one off repairs.

Respondents Case

85. The works referred to by the Applicant in his annexes 15A,16A,17A are not cyclical works. They are reactive repairs and so do not fall within the definition of Cyclical Repairs.

Decision and Reasons

86. The lease is clear. Clause 7 (5) is intended *for or towards* such as the matters specified in sub clause 7(6) .."hereof is *likely to give rise to expenditure after the relevant account year being matters* which are likely to arise either only once during the then unexpired term of this under lease or intervals of more than one year ..." (our emphasis).Consequently the fund cannot be used for ad hoc unanticipated repairs. Its purpose is to build up funds for future years to provide more stability and predictability in annual service charge amounts and avoiding spikes to cover larger capital costs or planned for future maintenance and renewal.

87. As the Applicant has just submitted that the cost should be allocated elsewhere, he has not established, or asserted, that the actual amount is unreasonable. He has not established a prima facia case that the costs are unreasonable.

Inspection

88. The Applicant requests that the Tribunal carry out an inspection, due to the high amount claimed for the cost of works/supplies over five years, and use its own knowledge and experience.

89. The Deputy President of the Upper Tribunal at paragraph 28 of *Enterprise Home Developments v Adam* [2020] UKUT 151 (LC) says

...."*Much has changed since the Court of Appeal's decision in Yorkbrook v Batten but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a prima facie case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach.*"

90. It is for the Applicant to establish at least a prima facia case in relation to the payability of these costs. He cannot ask the Tribunal to stand in his shoes and to do so on his behalf. The purpose of an inspection is to enable the Tribunal to reach a determination of the issues raised by the parties. In this case we have established that an inspection is not necessary or proportionate to enable the Tribunal to reach a fair determination. The Applicant has not established a prima facia case in relation to payability of carpet replacement, fire risk assessment, electrical installation testing, high level access tree works and maintenance works. We are being asked to decide if the cyclical work budget setting process is reasonable, as opposed to costs actually incurred. The Respondent has provided adequate reasoning for us to make a fair determination as set out above.

Ground Rent

91. The Applicant could not point to where the ground rent of £50 is included in the service charge demand, though is included in the budget.

92. The ground rent is demanded separately and does not form part of the Service charge as claimed by the Applicant as set out above.

Costs and refund of fees

93. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the Respondent to refund any fees paid by the Applicant.

94. The Applicant has made an application to reduce or extinguish the lessee's liability to pay contractual costs. The Tribunal can also consider whether costs can be recovered from the Service Charges. The parties are directed:-

(i) Within 21 days, the Respondent shall submit any claim they may have for costs, including grounds for any claim and a detailed schedule of costs.

(ii) The Applicant has 21 days to submit any response to the application for costs, together with any documentary evidence in support.

(iii) Any further determination required by the Tribunal shall be by paper unless either party requests an oral hearing, or the Tribunal decides it is necessary to fairly determine any remining issues.

(iv) Delivery of documents to be by email to the other party and to the

(v) Tribunal.

J White
Tribunal Judge
3 December 2021

Rights of appeal

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

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

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

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

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

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