FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/44UF/LIS/2021/0032**
Property	**:**	**Lunn Poly House, Tavistock Street, Leamington Spa CV32 5PP**
Applicant	**:**	**Real Estate Investors PLC**
Representative	**:**	**Mr Simon Allison of Counsel instructed by Irwin Mitchell**
First Respondent	**:**	**Alburn (Leamington) Limited in creditors voluntary liquidation (Unrepresented and did not attend)**
Second Respondent	**:**	**Mr Iain McKenzie Watson (in person) and other long Leaseholders of Lunn Poly House (unrepresented)**
Third Respondent	**:**	**SPA CE Management Limited**
Representative	**:**	**Ms Cassandra Zanelli of Property Management Legal Services Limited**
Application	**:**	**Service Charges (Apportionment)**
Tribunal Members	**:**	**Judge Anthony Verduyn** **Mr David Satchwell FRICS**
Date of Hearing	**:**	**16th May 2022 by CVP**
Date of Decision	**:**	**21st July 2022**

DECISION

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1. These proceedings concern the apportionment of service charges between ground floor commercial premises and residential properties on other floors in Lunn Poly House, Tavistock Street, Leamington Spa CV32 5PP ("the Property"). Application was made to the Tribunal by Real Estate Investors PLC, as freeholder and landlord of the Property, on 19th July 2021, under Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). It is the direct landlord of 8 commercial leasehold units on the ground floor and an assignee of the benefit of a lease dated 18th January 2007 out of which 54 residential long leases have been granted ("the Headlease").

2. Alburn (Leamington) Limited is the first respondent, as Headlessee and intermediate landlord of the 54 residential units on floors 1 to 4 of the Property. It went into creditors voluntary liquidation on 10th March 2022, but the parties at the hearing agreed that this was not a material consideration or impediment to the final disposal of the application.

3. The second respondents are the long leaseholders of the individual units. Of these, Mr Iain Watson participated directly in the hearing and gave evidence. Other leaseholders attended the hearing as observers.

4. SPA CE Management Limited are the third respondents (added 10th August 2021) as management company for the residential parts of the Property. It has been represented throughout and at the hearing by Ms Cassandra Zanelli of Property Management Legal Services Limited.

5. The commercial leaseholders had opportunity to participate, but did not avail themselves of it. The Tribunal has seen a sample commercial lease.

6. The application is formally for the determination of service charges for the year ending 31st March and payable 2019/20 (final accounts), 2020/21 (budget/on account) and 2021/22 (budget/on account). The sole issue for determination is the apportionment of the cost of services to which both commercial and residential parts contributes by way of service charges. The applicant makes application for the tribunal to determine "a fair proportion" under the Headlease and initially invited the tribunal to apportion 80.54% to the residential parts based on relative floor area and the balance to the commercial parts. The application form itself indicates that a determination binding on all these holders is essential in order to resolve the underlying dispute about quantum of service charges.

7. In circumstances where the Headlease provides a mechanism of this sort for apportionment, there is no dispute between the parties that the final determination of "a fair proportion" reposes with the tribunal under Section 27A(6) of the 1985 Act, applying Aviva Investors Ground Rent GP Ltd v Williams [2021] EWCA Civ 27.

8. Various directions were given: on 29th July 2021 directions were issued ensuring those parties who wished to participate had opportunity; on 14th September 2021 directions were given for the third respondent's statement of case; on 20th October 2021 directions were given retaining the narrow focus of this application on apportionment (attempts to introduce other issues relating to service charges by the third respondent were not permitted, but without stopping this being raised in fresh proceedings) and providing for final statements of case and evidence (including expert evidence on floor area); on 21st December 2021 further directions were given as to evidence (and especially the

letter of instruction to the expert); on 11th January 2022 further directions were given for the instruction of the expert; on 7th February 2022 directions were given for Mr Watson's participation, but excluding other issues he sought to raise relating to service charges (without stopping this being raised in fresh proceedings); and, finally, on 25th April 2022 directions were issued for an addendum to the expert report.

9. The application is superficially straightforward. The applicant acquired the freehold interest in the Property on 25th March 2014 and was registered a week later. The ground floor faces the street on three sides and comprises commercial premises and car park with bin store and service yard (over parts of which is an open mezzanine). The ground floor entrance to the residential units over and the first to fourth floors of the Property (excluding structural or load bearing parts) is demised pursuant to a headlease dated 19th January 2007, since assigned to the first respondent, for a term of 999 years. Long leases were granted for each residential unit, with a tri-partite structure making the third respondent a party.

10. The Headlease defines "Service Charge" as "a fair proportion of the Service Costs", the "Service Costs" being defined in clause 18.2. By clause 18.1, the applicant covenants to keep the structural and exterior parts of the Property, the service yard and the service media to which rights are granted in good repair and condition. By clause 18.2 the Service Costs are defined as comprising a fair proportion of the following: the reasonable and proper costs incurred or estimated to be incurred by the applicant in keeping the structure and exterior of the Property, the service yard and the service media in good repair and condition, including inspecting cleaning and redecoration the exterior of the Property as often as is reasonably necessary; the creation and maintenance of a sinking fund; the payment of all taxes, rates, duties, impositions, outgoings etc. assessed or imposed in respect of the service yard; and, the valuation of the development for the purposes of insurance including the reinstatement thereof. The service charge mechanism appears at clause 18.3-8 and is in fairly conventional form, with an estimate of charges for each service charge year provided at the beginning of the year, the first respondent paying the estimated service charge by 4 equal quarterly instalments, and then provision for a balancing charge at year end upon production of a certificate showing the total service costs and service charge for the year.

11. The long leases for the residential units are similarly unexceptional: The leaseholders covenant with the first respondent and the third respondent to pay the service charge; "service charge" is defined as "a fair proportion of the service costs and a fair proportion of the sum payable by the landlord under clause 18.4 of the [Headlease]". At paragraph 5 of schedule 6, the first respondent covenants with the long leaseholder and the third respondent that it will comply with its covenants under the head lease (including to pay the service charge to the applicant).

12. A copy of a commercial lease has been provided to the tribunal. The commercial tenants covenant to pay "a fair and proper proportion" of the applicant's expenditure on the development, "or such other percentages as the landlords surveyor acting reasonably deems appropriate". The applicant retains CBGA Robson Limited as its managing agent. It splits the service charges into two schedules: one for commercial units only; and the other for shared costs to which the commercial and residential parts must contribute. Sums included in the latter are external repairs to the building fabric including in recent years render and roof repairs; electrical repairs to external common

fixtures; maintenance of drains; external cleaning of the development; pest control; Health and Safety, and risk assessments; and, management costs.

13. It is the payability of service charges under the Headlease which is in issue. The costs of the services provided under the Headlease, and to which both commercial and residential lessees contributed, was split 70.3% to commercial units and 29.7% to residential units. The applicant applied to the tribunal because it had undertaken a desktop survey of the development to establish the relative floor areas of the different parts. This calculated the residential parts occupy 80.54% of the floor area of the Property, compared to 19.46% comprised in the commercial ground floor parts. The applicant therefore made demands based upon these revised figures with effect from 1st April 2018. The first respondent has only paid based upon the historic apportionment.

14. In its statement of case the applicant insists that using floor area is "wholly appropriate" and is widely accepted as being the best, and the most common, way to fairly apportioned costs of this type, taking into account the overall nature of the services provided. Further, the Applicant asserts that the former apportionment bore no relation to the relative benefit or use of the services in question as between residential and commercial parts, and no formal basis for it was apparent. The applicant recognises that this Tribunal, only, can finally determine this point under its jurisdiction pursuant to Section 27A(1) and (3) of the 1985 Act.

15. The third respondent's statement of case explains that it is a not-for-profit vehicle for the management of the residential parts on behalf of its members, i.e. the second respondent residential leaseholders. There is no obligation on the third respondent to pay service charges, though typically the applicant has invoiced the first respondent care of the third respondent, and it is acknowledged that the second respondents pay the service costs. In respect of apportionment, the historic arrangement is noted and asserted to have continued for several years under the applicant: "the desktop survey produced by the applicant, and upon which it relies, does not, with respect, explain why the recalculation and dramatic increase is "fair"." It invites the Tribunal to continue the historic established practice.

16. The Applicant briefly responded that the third respondent had failed "to explain a principled objection to the applicant's proposed apportionment. It is not the recalculation itself that must be "fair"; the lease requirement is that first respondent pay a fair proportion of the cost incurred", and goes on to assert the recalculation.

17. Mr Watson's statement of case was accommodated after other exchanges of statements of case. It is only considered insofar as it addresses apportionment. He points out that the historic apportionment had been applied since January 2007. In addressing a "fair proportion" he states: "it is not unreasonable to presume, in the absence of any indication to the contrary, that all the parties having the interest and effected, at the time that the current service charge apportionment … was fixed more than 14 years ago … agreed and accepted that the service charge apportionment was "fair"." He observes that there is no provision in the Headlease that entitles or permits the applicant to vary or otherwise re-apportion the service charges. He suggests that the applicant's reapportionment of the service charge was to the advantage of its own commercial tenants and the detriment of the residential leaseholders, because there was a planned 5-year maintenance programme expected to cost c. £640,000 at March 2018. Allowing for professional fees, preliminaries, VAT and inflation, this may be more than £1m now.

Mr Watson then sets out a commentary on the desktop survey relied upon, contending that the approach is "rough and ready at best", and "entirely inappropriate and unfit for the purpose proposed by the applicant". He notes, rightly, that there was a subsequent direction for an expert report, which at the time he filed his Statement of Case had not been not received. More substantively, he contends that a single metric of floor area fails to recognise "essential differences in the form and function; the availability and use of the estate (e.g. commercial car park and service yard); and the relative benefits, value and opportunity acquired from the respective leases for the respective parts." He continues: "for the commercial leases: service charges are a 'cost of doing business' and acquiring the immediate benefit an opportunity of generating sales revenue and income, such that service charges are set off and fully recovered as a legitimate business expense. For the residential leases: service charges are a 'cost of living' and no such benefits or income generating opportunity is immediately acquired or obtained." In conclusion, he invites the Tribunal to reject the application to alter the historic apportionment and, failing that, to apply it respectively only, thereby mitigating hardship.

18. At the hearing, the Tribunal heard from three witnesses and was addressed on the expert evidence.

19. The jointly appointed expert was Mr Peter Folwell of Plowman Craven ("the Expert"). The Tribunal resolved issues with the letter of instructions and a report was prepared dated 28th January 2022. The Area Measurement Survey is stated to be in accordance with the guidelines as described in the Sixth Edition (September 2007) of the Code of Measuring Practice and the Globally applicable 6th edition (May 2015), published by RICS. It was prepared on the basis of a site inspection on 19th January 2022 and supplied information. Access was unavailable for two of the commercial units, individual residential flats and service cupboards and storage areas. The failure to give access to residential units was addressed in directions, where it was explained that revisiting for such access and to make a directly measured survey of the whole floor areas, would be impractical and disproportionate. The report concluded with residential areas comprising 80.25% and commercial 19.31%; the balance of 0.44% being plant room.

20. Following questions, particularly from Mr Watson, a revised report was prepared dated 23rd February 2022. Calculations were based on the "Gross External and Internal Area of individual floor plates". The RICS Property Measurement, 2nd edition, January 2018 was not used because it was unsuitable for retail (although appropriate for office and residential). Retail is measured using Net Internal Area (NIA) or Retail Area. Gross Internal Area (GIA) and Gross External Area (GEA) is also measured for certain requirements. RICS Code of Measuring Practice for residential uses advises that valuation and marketing use Net Sales Area, and for Council tax Effective Floor Area (EFA). Net Sales Area is GIA, subject to some conditions. EFA is the nearest comparable to NIA. The RICS Code of Measuring Practice recommends that "when applied to property management, specifically service charge appointment, then GIA or NIA can be used. It does not suggest GEA as a measurement of service charge apportionment." Against this background GIA was used in relation to each individual floor plate. GEA was provided for comparative purposes. CAD software was used to construct accurate area surveys. In the result, the recalculated using GIA determined that residential areas comprised 80.20% and commercial 19.36%; the balance of 0.44% being plant room. This compared to GEA for residential areas comprising 80.97% and commercial 18.50%, the balance of 0.53% being plant room.

21. Questions from Mr Watson were also answered directly, detailing why NIA was inapplicable, and GEA and GIA to be preferred: "Net Internal Area excludes features such as corridors, common circulation, stairs and lift wells. The combination and amount of this space will determine the difference in percentages between GIA and NIA. The situation at Lunn Poly house is that the residential space has a greater percentage of corridor, stairwell, common circulation space than the commercial floor, therefore if you could compare NIA with EFA, then in this scenario, it could transpire the percentage difference between commercial and residential would be different." Lack of access to residential properties did lead to assumptions having to be made about wall thickness. Differences between the results for NIA and GIA depends on build and design, hence the contrast between GIA and NIA would have an impact on areas. A further response was obtained from the expert on 5th May 2022, again rejecting the use of NIA. EFA is the closest to NIA and so this was utilised, again for comparison. Consistency was sought to be achieved. This produced residential areas comprising 73.45% and commercial 26.55%.

22. In opening, Mr Allison stated that, despite Mr Watson's concerns, no major works were in fact planned in the short or medium term, cheaper solutions having been found to the issues identified in 2018. The use of schedules differentiating service charges which were incurred for the benefit of the commercial tenants from those to the benefit of all, disposed of Mr Watson's other concerns. Agreement of apportionment proved impossible when revisited and so the Tribunal needs to resolve matters such that everyone, including the first respondent (who had not participated) is bound. He also challenged any idea of an incremental approach to the proposed apportionment, since it had been demanded in all the years concerned.

23. Mr Ian Russell Clark, Head of Asset Management for the applicant, confirmed his statement. This detailed the acquisition and how intended works had been scaled back after further investigation as to their necessity. Apportionment, he confirmed, was unconnected with major works, but to address what he considered an unfair and unreasonable arrangement (a point he maintained when pressed by Ms Zanelli). When questioned, he explained that Knight Frank were replaced as managing agents in about 2018 and recent commercial tenancies would have been informed of the proposed apportionment. He accepted that proposed major works had thrown the apportionment into focus, but insisted that this was not the motivation for change and the major works were not now going-ahead. He knew nothing of the basis for the historic apportionment and he had not been involved in the applicant's purchase of the Property.

24. Mr Robert George Charles Goodall of CBGA Robson LLP, managing agent for the applicant, confirmed his statement. CBGA replaced Knight Frank in 2017. He was involved in the planned preventative maintenance programme and the substantial scaling back of proposals. It was when the original, very high costing was received in March 2018 that the apportionment was identified and investigated. On 1st May 2018 the agent for the third respondent was requested to provide further information on the apportionment and measured plans showing square footage. Only very basic plans were received and Mr Goodall did the initial desktop survey from these. He observed it did not differ greatly from the expert assessment. Ms Zanelli questioned him in some detail on the commercial tenancies, but operating hours, staffing and footfall were outside his knowledge. Mr Watson focused his questions on "form and function", but Mr Goodall was adamant that the apportionment was the reverse of what was to be expected, and

the use of schedules reflected benefit and use of services. As to use of the car park, Mr Goodall stated that abuse of this facility was being challenged.

25. Mr Watson, long leaseholder and director of the third respondent confirmed his statement. He refers to the applicant reneging on the historical apportionment. He asserts the heavier usage of commercial properties, compared to residential units. In questioning by Mr Allison, he accepted that access to commercial units was from the pavement and not via common parts. Mr Watson accepted that the issue was benefit from services and not benefit from custom.

26. Mr Watson had provided observations and commentary on the expert's measured floor areas on 10th May 2022 and he was questioned by Mr Allison about these. Mr Watson acknowledged and accepted "without reservation, the measurement summaries contained in the expert's two reports". He accepted that NIA and EFA were effectively synonymous, but insisted that the commercial and residential areas were "buildings different in type, form or function", and that a single metric of floor area was inappropriate. He referred to the "expansive ground level external areas", with the exclusive use of the car park for commercial tenants and the much smaller bin store for residential tenants. Applying measurements from the expert's report in February 2002, this gave residential areas comprising 65.61% and commercial 34.39% (after an equal division of the plant room). Once the value of the car park in rent was factored in and credited to the service charge account in favour of the commercial units, then the service charge of the commercial units at 70.3% is almost entirely expunged and it is exceeded at any lower rate. Overall, Mr Watson was keen to emphasise the historic custom and practice, albeit of unknown foundations, was a precise calculation by people who should not be taken as incompetents and capable of identifying what was fair.

27. Mr Allison question Mr Watson on these views, pointing out that the car park and service yard were not exclusive to the commercial tenants, but crossed by residential leaseholders and afforded an emergency and rear exit. The bins were wheeled across it also. Mr Allison then asked why the potential rental value of the car park was relevant in any event: this would be factored into commercial rents. Cost of cleaning and emptying bins is in schedule for shared cost, but waste management was in the schedule for commercial tenant cost. As to resurfacing the yard, it was put that his was like roof repair, façade maintenance and management cost, properly shared, but Mr Watson observed that it would be no small cost.

28. Ms Zanelli closed by emphasising that nothing had changed to justify a change in apportionment that had existed for the first 4 years of even the Applicant's ownership. Whereas the spectre of large costs in protective prospective maintenance had fallen away, the applicant may be looking to attract new commercial tenants by reducing the service charge: commercial self-interest, rather than fairness, was a driving force. If fairness is engaged at all, the modes of occupation fall to be considered, with contrasting usage of residential and commercial parts, and the car park. There may be more than one fair approach to this, resolving interests, and square footage alone is not the right approach. It is not prescribed in the headlease for instance. The discretion should be exercised rationally and in good faith, taking account of the extent of usage of commercial premises.

29. Mr Watson added that the historic apportionment had prevailed for 14 years and was presumably agreed at the outset. Had square footage been the correct measure, it would have been used form the start. As it was, a 270% increase was simply unfair.

30. Mr Allison observed that Mr Watson appeared to accept floor area for commercial or residential, but not both together, without sufficiently explaining why. The big costs were roof and exterior, not cleaning internal corridors (which benefits residential) nor commercial services (for which there was a separate schedule). Insurance is by floor area, so why not these parts also? Of the various measurements, GIA was the most consistent for differing usages, but GEA hardly gave a different result +/- 1%. The report was properly worked out and should be accepted, so the Tribunal should follow the expert with GIA. Mr Allison contended that the applicant was neutral in its assessment, since it did not meet any of the costs, but motivation is immaterial and the residential tenants are self-interested in their arguments. Further, there was no need in this lease for a trigger event, not the prospective maintenance would be an improper consideration, and the historic approach had no apparent rationale. Furthermore, this was not a case of the applicant exercising a discretion: the applicant is not to determine the apportionment at its own discretion, but to make a fair apportionment. It simply has to levy a demand in that light.

31. Mr Allison posited the relevant factors as there being four residential floors, but only one commercial one; service charges exclusively benefitting the commercial tenants were charged to the commercial tenants; it is not known exactly how much use is made of the commercial units, but footfall is irrelevant. The costs are those of maintaining the Property, and more relating to that structure than the car park and service yard. Really internal costs and not coming in and out of the service yard. Hence, floor area is a good proxy for relevant factors. As to Mr Watson's points about the car park area, these would apply also to the mezzanine, and the expert rightly disregarded both. The commercial value of parking is a red-herring, as such rights feature in commercial rents as a proprietary benefit not service charge. There was simply no evidence for the processes that led to the original split, may be it was to make residential units more attractive, but large sums were never levied in any event. The increase may be steep, but there are three years in issue and no requirement to graduate the change

Discussion and Findings

32. The Tribunal took time to consider the evidence and submissions.

33. The Tribunal finds that there is nothing in the Headlease, arising expressly or by implication, preventing the applicant from re-considering the apportionment between commercial and residential leaseholders. The only qualification is that the service charge is a "fair proportion of the Service Costs". In particular, there is no requirement for a trigger event before any change in apportionment is made. The applicant was accordingly within its rights to reassess the passing apportionment from 2018.

34. The Tribunal finds that the motive in re-apportionment is immaterial. It finds that the prospect of major works did not directly lead to the re-apportionment, in that this did not cause the applicant to shift the greater burden from commercial to residential units. The prospect of major works did, however, bring the apportionment to the attention of the applicant and led to an assessment as to fairness. In making this finding, the

Tribunal accepts the evidence of the applicant's witnesses, which appeared to the Tribunal to be given in a straight-forward and honest fashion.

35. The Tribunal , however, does not consider motive to be material in any event. The question is not whether re-apportionment was motivated by any commercial considerations, but whether the result was a "fair proportion" within the terms of the Headlease.

36. The Tribunal also finds that case law regarding the discretionary exercise of a contractual power (after Braganza v BP Shipping Ltd [2015] UKSC 17; [2015] 1 WLR 1661) is not of assistance in this case. The operation of the apportionment is not a matter of discretion, but contractual obligation. The result of an assessment is either "a fair proportion" within the terms of the lease or it is not, and the applicant has no discretion accordingly.

37. In respect of the historic apportionment, the Tribunal rejects the submissions that this can somehow fix the apportionment thereafter. Had a fixed apportionment been the intention of the parties, then a percentage would have been included in the Headlease. Had a less flexible basis been intended, then the continuing use of a fixed percentage (nominated in the Headlease or determined at the outset) could have been stated, with a trigger for any later change, but this was not done. Apportionment was accordingly at all times at large.

38. The Tribunal has regard to the historic apportionment being fairly precise specified: 70.3% to commercial units and 29.7% to residential units. The Tribunal notes that there is simply no evidence for why these figures were arrived at in or about 2007. It may have been to make the residential units more attractive, and to the detriment of the commercial units, but that amounts to speculation. Mr Watson states that the Tribunal cannot assume that there was no reason for this apportionment or it was the product of incompetence, but the Tribunal recognises that there is no identifiable basis for those figures and so no reason (or lack of reason) can be discounted. The applicant, in effect, says that these figures are an unfair apportionment, and it is notable that the respondents have struggled to identify any rationale for them; or, at least, any rationale that would result in this degree of precision.

39. The Tribunal is accordingly satisfied that it can revisit the apportionment under the terms of the Headlease and that the historic apportionment, although relevant, is but one factor in that consideration and, absent any explanation for it, a minor factor.

40. The applicant's case is that floor area is the best metric for assessment of "a fair proportion" of the service costs. It is certainly in common and broad usage, because it can bear a relationship with the benefit of the charges levied. The desktop survey produced an apportionment of 80.54% residential to 19.46% commercial. The more precise work of the Expert produced initially 80.25% residential to 19.31% commercial and 0.44% plant room (which Mr Watson sensibly in his comments divided equally between the other two). Following further questions, the Expert adjusted the figures to 80.20% and 19.36% using GIA, and checked against GEA of 80.97% and 18.50%. For the reasons given by the Expert, the Tribunal accepts that GIA is the most appropriate measurement for service charge apportionment between residential and commercial retail units. This is primarily because it is a recognised measurement for each of these

uses and, therefore, can form a standard comparison. The equal division of the plant room appears sensible in this context, and is a relatively minor matter.

41. This approach to floor area is not, however, decisive. The respondents quite properly raised other issues that could go to the fairness of using this measure, or may qualify the result, and these need to be considered.

42. The Tribunal rejects the submissions made by the respondents in respect of the car park, service yard and bin store. The Tribunal finds that the examination of internal areas is far more important than the assessment of these spaces. It does so, because these external areas are peripheral to the interests of the respondents and the commercial tenants. The residential tenants are primarily concerned with the flats and the commercial tenants with the retail units. The flats and units are what is being served. The external areas are to some extent shared, for access and wheeling bins, visual amenity and cleanliness. Whilst the parking serves some of the commercial units, the bin store and the mezzanine serve the flats. The Tribunal considers that these complicating factors in use and benefit of peripheral areas are best treated by being disregarded as a modifier. Some expenditure in these areas will arise, but will be comparatively minor in respect of the Property as a whole. Further, the rental value of car parking is plainly irrelevant to the service charge apportionment. It simply does not arise on the facts and cannot be deployed in the very creative, and speculative, fashion adopted by Mr Watson.

43. The Tribunal also rejects the submission that re-apportionment should be rejected, in its entirety or on the basis of floor area, because it works to the potential commercial advantage of the landlord in renting street access units. Whilst a somewhat lower service charge may have an economic effect, there is no evidence that this is significant to the market for the commercial units or produces an unfairness overall in respect of the residential flats.

44. Mr Watson was keen to emphasise the different nature of commercial units from residential flats. So much is true, but that merely begs the question of a fair means of apportionment of costs between them. It does not mean that measurement is inappropriate. The use of a dedicated schedule for services unique to the commercial properties and paid by them only, removes material unfairness. Footfall and matters of that sort are also plainly irrelevant, as the commercial units are accessed directly from the streets and usage is therefore limited to the demised areas and subject to rent. It is undoubtedly true that service charges are a commercial cost, but they are also a residential cost, and the fact that one has to be paid out of commercial revenue and the other out of personal revenue, is neither here nor there.

45. The Tribunal has assessed all the evidence presented before it and the careful arguments of Mr Allison, Ms Zanelli and Mr Watson. The Tribunal finds that the use of measured floor area as to Gross Internal Area ("GIA") is fair in the circumstances of this case. Whilst a number of other factors were raised in evidence and argument, none of them warrant an adjustment of the impact of GIA, save the necessary and equal division of the plant room. This is not to determine that GIA should always be used in cases of this sort, since there may be many and varied relevant factors arising case by case, but in respect of Lunn Poly House the Tribunal is satisfied that a fair apportionment of service charge can and should reflect it. In doing this, the Tribunal considers that the historic apportionment was either not fair or not sufficiently fair by comparison and need not be

retained. The Tribunal will, nevertheless, adopt the rounding to the nearest decimal place and apportionment is determined at 80.4% to residential and 19.6% to commercial.

46. Finally, in respect of phasing in and like submissions, these are rejected by the Tribunal. The applicant made clear its intention in each of the years referred to this Tribunal and, for the reasons set out above, fairness requires the re-apportionment accordingly. There is no good reason for the Tribunal to decline this in the earlier years covered by the application.

Dr Anthony Verduyn
Tribunal Judge
21st July 2022

Notice Regarding Appeal:

A party may appeal this Order to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends its written reasons for the Decision to the party seeking permission.