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

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| **Case reference** | : | **LON/00AS/LSC/2022/0070** |
| **Property** | : | **20 Marlborough House, 37 Park Lodge Ave, West Drayton UB7 9FJ** |
| **Applicant** | : | **Laura Stephanie Lyon** |
| **Representative** | : | **In person** |
| **Respondent** | : | **Notting Hill Home Ownership Ltd (NHHO)** |
| **Representative** | : | **Ms Victoria Ostler, Counsel, instructed by Devonshires, Solicitors LLP,** |
| **Type of application** | : | **For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985** |
| **Tribunal members** | : | **Mr Charles Norman FRICS Valuer Chairman**<br>**Mr Stephen Mason FRICS**<br>**Mr Clifford Piarroux JP** |
| **Venue** | : | **10 Alfred Place, London WC1E 7LR** |
| **Date of hearing** | | **17 November 2022** |
| **Date of decision** | : | **5 March 2023** |

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**DECISION**

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## Decisions of the Tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision below. The Tribunal also appends the Scott Schedule although it did not find it appropriate to use it for findings.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") so that not more than half of the landlord's costs of the Tribunal proceedings may be passed to the lessee through any service charge. The Tribunal also orders under Para 5A of Sch 11 of the 2002 Act ("the 2002 Act") that not more than half of any administration charge in respect of litigation costs may be made against the applicant.

(3) The Tribunal directs that the name of the respondent be amended from Notting Hill Genesis to Notting Hill Home ownership Ltd

## The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of the following service charge issues:

    - the reserve funds for 2018, 2019 and 2021 2020
    - 2021 the costs in respect of following items: fire safety; dry riser; the door system; cleaners; lift; refuse removal; landscaping and reserves
    - the 2022 the service charge budget
    - whether the landscaping contract is a Qualifying Long Term Agreement ("QLTA")
    - The apportionment of landscaping charges

2. The lessee also seeks an order for the limitation of the landlord's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985 and an order to reduce or extinguish the tenant's liability to pay an administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

## Directions

3. Directions were issued, drafted on the papers without a hearing, on 26 April 2022 and subsequently amended on 19 July 2022. The landlord was directed to make disclosure of documents by 25 May 2022. The tenant was directed to serve her case on the landlord by 22 June 2022 with a Scott Schedule together with alternative quotes, legal submissions signed witness statements and any other document upon which she intended to rely. By 10 August 2022, the landlord was directed to serve its case on the tenant comprising its Scott schedule responses, copy

invoices relating to disputed issues, a statement of case, any witness statements, and any other documents to be relied upon. The tenant was permitted to serve a reply by 31 August 2022.

## The hearing

4. The Applicant appeared in person. The Respondent was represented by Ms Victoria Ostler, counsel. The respondent called Mr Mohammed Islam as a witness, who had provided a signed witness statement.

5. Prior to the hearing counsel provided a skeleton argument for which the Tribunal is grateful. Immediately prior to the start of the hearing the Tribunal provided the applicant with copies of brief emails, which members of the Tribunal had sent direct to the respondents solicitors shortly before the hearing date, making urgent requests for the hearing bundle which had not been provided in an accessible format.

## The background

6. The property which is the subject of this application is a modern two bedroom flat in Marlborough House, a purpose built block of affordable housing. The building dates from around 2007 and is divided into two adjoining separate blocks known as M1 and M2. The building is situated on a much larger estate which comprises 593 units. These are mainly flats but include 12 freehold terraced houses. The land comprising the estate was owned by St George West London Ltd, who have subsequently sold off parcels of the land for development, whilst retaining the estate common parts. Estate costs are then recouped via a rentcharge on the disposed land.

7. Neither party requested an inspection, and the Tribunal did not consider that one was necessary.

## The Lease

8. The property is held under a lease dated 2 November 2007 which granted a term of 125 years from 12 October 2007. The lease is a part-ownership lease with staircasing provisions. The percentage owned by the applicant is 100%.

9. At clause 1.3, the Building is defined as "the property known as flats 1-28 Marlborough House 37 Park Lodge Avenue…comprised in title number AGL172801… By clause 1.4 the Premises are defined as "plot number 566 on the first floor of the building which is shown edged in red on the plan…" At clause 1.12 the Specified Proportion is 7.507%.

10. By clause 2.2:3 the common parts are defined as "the entrance landing storerooms bin stores cycle stores always lift staircases in other parts if any of the building which are intended to be… enjoyed… by the leaseholder in common with other occupiers of the flats in the building"

11. By clause 2.2:4 the "estate" is defined as "the land now or formerly comprised in title number AGL129897 forming the estate as referred to in the transfer".

12. By clause 2.2.5 the "estate common parts" means all private accessways footpaths hard and soft landscaping any water features open parking spaces curbs and verges…intended for the communal use of the residents of the dwellings or as may be varied or amended from time to time together with all fences or walls bounding the estate and all lighting installations and equipment which serve and/or light the estate and which are not publicly maintainable…"

13. By clause 2.2.6 the "Estate Owner" means the owner from time to time of the Estate Common Parts registered under the title number AGL 129897 currently being St George West London Ltd.

14. By clause 2.2.8 the "Rent Charges" means the rent charge as defined in the Transfer. By clause 2.2.10 the "Transfer" means the transfer dated 17 July 2007 between St George West London Ltd and Notting Hill Home Ownership Ltd.

15. By clause 3 the landlord demises the Premises "together with the easements rights and privileges mentioned in the second schedule…" The second schedule grants rights to use the common parts.

16. By clause 4.4.2 the lessee covenants to pay the service charge in accordance with clause 8. By clause 4.2.3 the lessee covenants "to pay the proportion of Rent Charge which relates to the premises as determined by the landlord".

17. By clause 6.3 the landlord covenants to repair the common parts and by clause 6.4, light and clean common parts.

18. By clause 8, the lessee covenants to pay the Service Charge. This is defined as the Specified Proportion of the Service Provision. The Specified Proportion means the proportion specified in the particulars [being 7.507%], and the "Service Provision" means the sum computed in accordance with clauses 8.3, 8.4, 8.5 and 8.6.

19. Clause 8.4.2 provides as follows "[the Service Provision shall include] an appropriate amount as a reserve for or towards such of the matters specified in clause 8.5 as are likely to give rise to expenditure after such account year being matters which are likely to arise either only once

during the then unexpired term of this lease or at 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 (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the service provision shall not fluctuate unduly from year to year) but reduced by any unexpended reserves already made pursuant to clause 8.4.2 in respect of any such expenditure as aforesaid."

20. By clause 8.5 the relevant expenditure to be included in the service provision is defined to include the costs of and incidental performance of the landlord's covenants contained in clauses 6.2, 6.3 and 6.4.

21. By clause 8.5.19 the relevant expenditure includes "the proper service charge or other payments made by the landlord under the transfer".

22. Clause 8.8 provides "for the avoidance of doubt it is hereby agreed declared that the provisions of sections 18 to 13 the landlord and tenant act 1985 (as amended) shall apply to this clause 8."

**The Transfer**

23. As set out by Miss Ostler in her skeleton argument, St George was the developer and original freehold title owner of the estate, the freehold title being registered under title number AGL 129897. This included several residential purpose-built blocks.

24. By a transfer dated 17 July 2007, St George transferred to NHHO the freehold title to several blocks including Marlborough House. Marlborough House, although a single structure, is internally divided into two blocks M1 and M2. M1 comprises flats 1-14 and M2 flats 15-28. These blocks do not interconnect.

25. By the Fifth Schedule to the transfer, the transferor St George is obliged to maintain the estate. The Estate is defined under the transfer at clause 1.5 as "the land now or formerly comprised in the above title number AGL 129897 forming the transferors estate together with any adjoining or neighbouring land which may be added thereto within the perpetuity period and includes without limitation: 1.5.1 all private accessways foot paths hard and soft landscaping any water features open parking spaces curbs and verges (including all installations and constructions ancillary thereto) intended for the communal use of the residents of the dwellings or as may be varied or amended from time to time together with all fences or walls bounding the estate and 1.5.2 or lighting installations and equipment (including cables wires lamps and operating equipment which serve and/or like the estate and which are not publicly maintainable by any relevant authority"

26. St Georges' obligations in relation to the estate are set out in Part A of the Fifth Schedule. Under Part A clause 1 St George covenanted as follows "keeping the roads and foot paths (so long as the same are not adopted at public expense) together with the gardens and grounds forming part of the Estate generally in a neat and tidy condition and tending and renewing any lawns flowerbed shrubs and trees forming part thereof as necessary and maintaining repairing and where necessary reinstating redecorating the boundary walls hedges or fences (if any) on or relating to the Estate including any benches seats garden ornaments shed structure or the like"

27. Under Clause 2 St George covenanted as follows: "keeping the landscaping areas of the Estate including any water features roads accessways and open parking spaces in good repair and clean and tidy and clearing snow from the same when and where necessary". Under Clause 3 St George covenanted to maintain Estate conduits.

28. Under Part B of the Fifth Schedule the respondent is obliged to pay St George a "Due Proportion" of the "costs applicable to any or all of the previous parts to the schedule." "Due proportion" is defined at Clause 1.7.1 of the Transfer as follows: ""the Due Proportion" means a fair proportion of the expenses reasonably and properly incurred by the transferor in accordance with the matters referred to in Part A of the [Fifth[1]] Schedule and any relevant matters referred to in Part B of the [Fifth] Schedule".

29. "Due Proportion" is defined at Clause 1.7.1 of the Transfer as "a fair proportion of the expenses reasonably and properly incurred by the Transferor on 31 December in each year as certified by the Transferor in accordance with matters referred to in Part A of the [Fifth] Schedule and any relevant matters referred to in Part B of the [Fifth] Schedule."

30. The Due Proportion is payable as a variable rent charge as defined in clause 6 of the transfer as a "perpetual yearly estate rent charge" "to be calculated and paid under the terms of the fourth schedule". The rent charge is registered.

31. Part B to Schedule Five sets out the matters to which the due proportion relates which are as follows:

"1. Paying all reasonable and proper costs in connection with the matters detailed in part A of this Schedule"...

3. "Providing and paying such persons as may be necessary in connection with the upkeep of the estate"...

[1] There is a typographical error in the transfer and Sch 1-5 but no sixth schedule

7. "Generally managing and administering the estate and protecting the amenities of the same and for the purpose if necessary employing a firm of managing agents… and the payment of all costs and expenses incurred by the transferor:

7.1 "in the running and management of the estate and the collection of the rentcharges and service charge issuing from the estate and in the enforcement of the covenants and conditions regulations contained in the transfers and leases of the dwellings and any estate regulations"

7.2 "in making such applications representations and taking such action as the Transferor shall think reasonably necessary in respect of any notices or order or proposal for a notice or order served under any statute orders regulations or bye law on the transferee or lessee of any dwellings or on the transferor in respect of the estate …

11. "The provisions maintenance renewal of any other equipment and provision of any other service or facility which in the reasonable opinion of the Transferor it is reasonable to provide and from which the Dwellings derives a direct benefit".

12. "Such sums as shall reasonably be considered necessary by the transferor… To provide a reserve fund or funds item of future expenditure to be or expected to be incurred at any time in connection with the estate".

13. "All other reasonable and proper expenses… incurred by the Transferor in and about the maintenance of proper and convenient management and running of the estate".

**The Applicant's Case**

32. From the application form Scott schedule and supplemental response, the applicant's case may be summarised as follows. The landscaping contract was a qualifying long term agreement for which no consultation had been carried out under section 20. This was because the landscaping services had been provided by the same company for more than 12 months. From G*hosh v Hanover Gate Mansions Limited* [2019] UKUT 290 (LC), the contract was deemed to be for the length of service and was therefore a qualifying long term agreement. Accordingly the leaseholders' liability should be limited to £100 per annum.

33. The apportionment of landscaping costs was also unfair. Save for the podium gardens accessible to specific private blocks, and the area to the front of Arlington which was controlled with a fob access all landscaping on the remainder of the site is accessible by all residents on the estate. Therefore the landscaping for these parts should fall within the estate

costs rather than block costs and should be equally split. It was unfair to charge Marlborough House more for landscaping areas that are equally available to the use and enjoyment of other residents across the estate. The applicant was not informed until 2021 that access to the padlocked area to the rear Marlborough House would be available to her via the concierge.

34. The reserve fund for the disputed years was excessive. The respondent had the right to charge for unforeseen expenses in any event. The "Parkwest – Asset Management Plan and Reserve Modelling" demonstrated that if the Reserve Sum annual collection remained constant there would be a surplus of £66,000 for Block S2 after cyclical works had been completed. The applicant produced a worked example which was said to demonstrate that the amounts demanded were excessive. However the applicant was not contesting the type of planned work itself. First board currently holding £1.77 million in reserve funds across the estate which was hugely disproportionate. The reserve amount for the largest proportion of service charge which was primarily inflating annual service charge making the service charge unaffordable the leaseholders in the designated "affordable housing" block.

35. Further, in relation to 2021, the cost of day-to-day services provided at the block was also challenged as being excessive. Notwithstanding that they are consequent from a rentcharge between the respondent and St George, both disputed Bock and Estate costs fall within the definition of service charge under section 18 of the Act. The Respondent is the correct respondent. The Respondent has had from the 4 August 2020 to raise the disputed matters with the rentcharge owner and was in a position to challenge its costs under the rent charge directly with the rent charge owner. The apportionment of the applicant's case is particularised in the attached Scott Schedule.

## The Respondent's case

36. The respondent's statement of case dated 9 August 2022 was prepared by Karima Collymore, property management officer of the respondent and verified by statement of truth. This may be summarised as follows, except where already addressed above.

37. The estate comprises several blocks of which eight including Marlborough Court are owned by the respondent.

38. The applicant had incorrectly named Notting Hill Genesis as the respondent instead of Notting Hill Home Ownership Ltd which was the landlord of the property. Neither Notting Hill Genesis nor Notting Hill House Ownership took issue with this substitution.

39. As the estate services are provided by St George, it should be added as an additional respondent because otherwise the respondent would be unable to address the issues raised by the applicant which should instead be addressed by St George as they provide the services.[2] St George engaged First Port Property Services as agent who had similarly been appointed by the respondent as its agent.

40. In relation to landscaping charges there was no duty to consult under section 20, because the costs were incurred by St George who were not acting as landlord but as a rent charge owner. Landscaping to the front of the building was carried out by JPS Ltd which was contracted to deal with all landscaping on the estate. The Respondent understood from First Port that the costs of landscaping to the front of block M was based on the size the landscaping from which the block benefits. Gardens to the front of block M operate on gate entry system controlled by the concierge and access was available.

41. In relation to reserve funds there is an estate fund created for maintenance of the estate within the scope of the rent charge. There is separately a block reserve fund payable by leaseholders the respondent under clause 8.4 of the lease. It was the block fund which was being challenged. The respondent relied on the Parkwest Asset Management Plan, which estimated the future cost of works for which the respondent was obliged to carry out. The reserve fund contributions were reviewed each year and may change and be reduced in the future. These show planned cyclical works relating to access roof repair drainage main façade balconies internal communal areas and services due to take place in 2023 and thereafter every five years. The lease contains a specified proportion of block costs of 7.507% of the total costs relating to flats 15-28.

42. In her skeleton and oral arguments Ms Ostler developed these points. However, the respondent no longer contended that St George should be a party. Rather, the respondent's position was that the Tribunal lacked jurisdiction to deal with the rentcharge payments. In relation to the reserve fund Ms Ostler submitted that estimates anticipated expenditure will be based on contractors' quotations.

43. In relation to landscaping, as landscaping services are provided under contract between St George and JPF, the respondent could not consult on a contract to which it is not a party. Secondly, for the purpose of section 18(2) the costs are not incurred on behalf of the landlord or a superior landlord, because St George was neither the landlord of the applicant or the respondent. Thirdly, the costs were not incurred under the lease and the costs could not therefore comprise a relevant

[2] This was not made as an interim application to the Tribunal but was stated at Para 12 of the statement of case. It was not therefore addressed by the Tribunal. It is incumbent on parties to ensure that such interim applications are made explicitly and using the correct form "Applications and requests for case management or other interim orders" which is available from the Tribunal website. This is particularly expected where parties are professionally represented by solicitors.

contribution for the purpose of section 20 of the act, as it is not a sum required to be paid under the terms of the lease but instead under the transfer. Thirdly, the costs were not incurred under the lease and could not therefore constitute a relevant contribution for the purposes of section 20 of the act, being a sum required to be paid under the terms of the transfer rather than under the terms of a lease.

44. In the alternative, the respondent submitted that the contract did not comprise a QLTA. This was because a qualifying long term agreement means an agreement entered into by or on behalf of the landlord or a superior landlord for a term of more than 12 months under section 20 ZA(2) of the act. Here the JPS agreement was not for a fixed period of 12 months but a rolling yearly contract. Miss Ostler relied on *Paddington Walk Management Limited and The Peabody Trust* [2011] L & TR6 in which it was held that a year to year contract subject to a right to terminate on three months' notice at any time entailed only of commitment of 12 months and was not a QLTA. Miss Ostler relied also on *Corvan (Properties) Ltd v Abdel Mahmoud* [2018] EWCA CIV 1102 as further considered by the Upper Tribunal in *Bracken Hill Court at Ackworth Management Company Limited v Dobson* [2018] UKUT 333 (LC). The Upper Tribunal following *Corvan* held that the deciding factor was whether the minimum length of the commitment under the contract must exceed 12 months. The JPS agreement did not exceed 12 months as the minimum commitment was one week.

45. In relation to apportionment of landscaping costs, Miss Ostler submitted that the lessee's contribution was split between that in relation to communal areas where lessees are charged an equal estate charge together with areas benefiting a particular block being subject to a separate apportionment, based on the time spent on that particular landscaped area. There are two main gardens from which all leaseholders benefit which consumed 231 hours of contractor time and comprise 33% of the landscaping costs (from Mr Islam's witness statement). These form an estate charge apportioned equally throughout the estate. The areas surrounding individual blocks are subject to a charging system devised by First Port where leaseholders who benefited most from those areas would pay a further landscaping service charge relating to that block, assessed as a separate percentage of those landscaping costs. A ground maintenance contractor had visited the estate and had estimated the amount of time it would take to landscape the areas around each block. The hours were translated to a percentage for each block. In relation to Marlborough House M2, the leaseholders pay 4.5% of the overall landscaping costs of the estate. The applicant's objection to this, based on other blocks paying less, does not reflect the additional time needed in relation to Marlborough House. The applicant's solution is for landscaping costs be charged entirely as an estate charge so that each leaseholder pays equally towards landscaping costs of the entire state regardless of benefit they derive. The respondent contended that this would be unfair to leaseholders who do not benefit from landscaped areas immediately surrounding their block where such

areas are less time-consuming than those benefiting other blocks. The respondent rejected the suggestion that the applicant had no access to an area of garden to the back of Marlborough House as the concierge is able to provide the applicant access.

46. As to charges payable for block costs [day to day expenditure for each block] there was a specified proportion under the lease of 7.507% of the total cost pertaining to the expenditure for flats 15 to 28 of Marlborough House. The applicant did not dispute this liability in principle. Rather, the applicant complained that another, block Larchwood House paid less in respect of certain items of expenditure. However any change would be inconsistent with the specified proportion in the applicant's lease.

47. In terms of the block reserve fund, the respondent denied that this was excessive. The initial contribution was set too low. Reserves are based on the Parkwest Planned Maintenance Programme produced by an external surveyor, reviewed by First Port and also on the Reserve Model. This contains a description of the planned works and the estimated costs. These documents are reviewed annually, and contributions amended as appropriate. The fund also needs to cover emergency works, contingencies, preliminaries, professional fees, tender price inflation, and VAT.

The Respondent's Witness

48. Miss Ostler called Mr Mohammed Islam, an employee of First Port Property Services Limited who had provided a witness statement verified by a statement of truth dated 20 October 2022. Mr Islam had been employed as development manager since July 2016. First Port had been instructed by the respondent in relation to management of Marlborough House and also by St George's West London Ltd in relation to management of the estate. Mr Islam's role was to oversee management of 26 blocks including Marlborough House and the wider estate. He was responsible for overseeing the management team, arranging tenders, liaising with leaseholders, setting an annual budget estimate, reviewing the service charge accounts, and issuing demands to the respondent. He was authorised by the respondent to make this statement. His witness statement included exhibits.

49. In relation to the estate charge, Mr Islam stated his understanding that when the budget was set for the estate several years ago, a grounds maintenance contractor visited the estate to ascertain the length of time it would take to maintain the landscaping around each block on the estate. The hours were then converted into a percentage with each block being charged the landscaping based on that percentage. He exhibited a spreadsheet showing this breakdown. In addition, 33% of the estate landscaping costs are charged equally to all residents.

50. As to block charges, flats 15 to 28 contribute towards schedule two as those flats are in effect a separate building. The applicants proportion is stated as 7.5066% of the total expenditure in relation to services carried out in relation to the block and landscaping costs associated with the block.

51. In relation to the block reserve there is a reserve fund for both the estate and for the block. It is the latter which the applicant is disputing. The contribution from flat 20 was £525 in 2018 rising to £1126 in 2021. Initial reserve fund contribution was set to low. Cyclical works are due to be carried out in 2023. Reserves are based on the Parkwest Planned Maintenance Programme And Reserve Model. Mr Islam attached the latest version. This was produced by an external surveyor and utilised by First Port to create a reserve model to set reasonable reserve collections. PMP only deals with planned works and does not take into account emergency works. The applicant in disputing the reserve amounts is not taking into account contingencies, preliminaries professional fees tender price inflation and VAT. The actual amount of total block reserves the flats 15 to 28 which have been collected are as follows 2018: £7000, 2019: £11,000, 2020: £13,000, 2021: £15,000, and 2022: £15,000.

## Findings

## Jurisdiction In Relation To Estate Costs in the Lease

52. The Tribunal is unable to accept counsel's submissions in relation jurisdiction for the following reasons. Firstly, as stated above, by virtue of clause 8.5.19 of the lease, the relevant expenditure to be included in the service charge provision includes the proper service charge or other payments made by the landlord under the transfer. This is an express covenant in the lease between the applicant and respondent. St George is not a party to the lease. Secondly, although Schedule 2 of the lease (easements rights and privileges included) does not expressly confer rights to use Estate Common Parts, Para 5 of the First Schedule (mutual covenants) clearly envisages the use of Estate Common Parts by the lessee ("not to obstruct at any time the accessways or Estate Common Parts"). Thirdly, as the respondent's freehold title is confined to the footprint of the building itself, a failure to provide access, egress and use of Estate Common Parts would in the Tribunal's judgment amount to a breach of the covenant for Quiet Enjoyment or a derogation of grant. Therefore, the Tribunal finds that the relevant rentcharge costs are incurred on behalf of NHHO because the services would otherwise have to be provided by NHHO. Fourthly, the lease provides at clause 4.2.3 that the amount referable to the rentcharge "is to be determined by the landlord." Fifthly, as also referred to above, clause 8.8 provides that sections 18 to 33 of the Landlord and Tenant Act 1985 shall apply to clause 8. Although the parties cannot by covenant confer jurisdiction on the Tribunal which it otherwise lacks, the Tribunal places weight on this covenant as part of its interpretation of the lease.

53. Conversely, there is no direct relationship between the covenants in the transfer and the applicant lessee.

54. The Tribunal therefore accepts the applicant's submissions that the amounts payable by the tenant to the landlord fall within the definition of service charge under section 18 of the 1985 act, notwithstanding that they arise indirectly from a separate legal relationship between the landlord and the transferor. The Tribunal therefore finds that it does have jurisdiction to consider the entirety of the applicant's case.

55. The Tribunal does not consider that St George are a proper respondent as there is no landlord and tenant relationship between it and the applicant.

**Was the respondent under a duty to consult in respect of the landscaping contract?**

56. The Tribunal accepts the respondent's submission that the landscaping contract between St George's and the landscape contractor JPF, was a rolling yearly contract. There is no evidence to support a contention that the contract length would inevitably exceed a duration of 12 months. It therefore follows from *Corvan (Properties) Ltd v Abdel-Mahmoud,* which the Tribunal accepts as binding authority, that the contract is not a QLTA. The Tribunal does not accept the applicant's submission that the facts are similar to *Ghosh v Hanover Gate Mansions Limited*. In that case the Upper Tribunal held that the minimum contractual term was 12 months.

57. It is therefore unnecessary for the Tribunal to consider to what extent a section 20 consultation would be required on the facts of this case.

**Apportionment of landscaping costs**

58. Clause 4.2.3 of the lease provides that the proportion of rentcharge which relates to the premises is to be determined by the landlord. It was not disputed that the Tribunal had jurisdiction to determine the relevant apportionments where the lease provided this to occur at the discretion of the lessor. This was the effect of section 27A(6) of the Act, as held in *Windermere Marina v Wild, Oliver v Sheffield [2017] EWCA Civ 225. and Gater v Wellington Real Estate Ltd [2014] UKUT 561 (LC).*

59. Subsequent to the hearing, on 8 February 2023, the Supreme Court promulgated its judgment in *Aviva Investors Ground Rent GP Ltd and another (Respondents) v Williams and others* [2023] UKSC 6 . The Supreme Court held that the earlier line of cases (above) were wrongly decided. It held that management decisions made by landlords pursuant to leases were not void under s 27A(6). The issue was one of whether the landlord's decision fell within its contractual powers under the lease. If

so, and if the costs were reasonably incurred and work carried out to a reasonable standard, at most the Tribunal had a jurisdiction to review the landlord's decision for rationality.

60. The Tribunal notes that the lease refers only to "estate common parts" which does not distinguish between areas closely associated with particular blocks and those areas of more general benefit to each block.

61. However, the Tribunal does not consider that this is determinative of an apportionment method. The Tribunal finds that any reasonable apportionment basis adopted by the landlord would be acceptable. The Tribunal expressed some concern that the block based apportionment schedule exhibited to Mr Islam's witness statement did not have a clear provenance. Nevertheless, the Tribunal accepted his evidence that this had been prepared by a gardening contractor and reflected the likely time expenditure in relation to block gardening costs. The Tribunal was not persuaded by the applicant's submissions that the block element overstated the time reasonably required to maintain the areas around Marlborough Court, as compared to other blocks, as the landscaping varied across the estate. The Tribunal also rejected the applicant's submission that she had been denied access to part of the gardens. It accepted the landlords case that access could have been granted via the concierge.

62. Prior to *Aviva Investors*, the Tribunal was minded to find that the apportionment was reasonable, the costs reasonable incurred and the work carried out to a reasonable standard. Following *Aviva Investors*, the Tribunal finds that the landlord's apportionment falls within its discretionary powers under the lease and is not irrational. *Aviva Investors* cannot assist the applicant and has not therefore affected the outcome of the Tribunal's decision.

**Block Costs**

63. During the course of the hearing the applicant conceded that these were payable.

**Reserve Funds**

64. The Tribunal found Mr Islam to be a reliable witness doing his best to assist the Tribunal, although he did not have first-hand knowledge of how the landscaping apportionment had been compiled. Nor did the Tribunal have expert evidence in relation to the planned maintenance.

65. From Mr Islam's evidence, reserves to Marlborough House block S2 flats 15 to 28 stood at £57,932.62 as at 2021. The planned maintenance programme and reserve modelling shows anticipated future expenditure of £34,066 in 2023. This arises from base costs totalling £19,916,

together with contingency, preliminaries, professional fees, tender price inflation and VAT. From a document described as "PMP budget estimate" [838], the main works proposed comprise redecoration of external windows and doors, for which full scaffolding is required. The scaffolding base budget is £9,450 which covers both full scaffolding to elevations without direct road access and mixed access provision using mobile elevated working platforms.

66. The planned maintenance programme and reserve modelling also anticipates expenditure of £108,454 in 2028, £96,613 in 2033, £175,610 in 2038 with subsequent cyclical expenditure in 2043, 2048 and 2053.

67. The difficulty with the budget is that it treats possible works as a certainty when this is not the case. For example, the building which dates from 2007, has a pitched roof which is therefore unlikely to need significant maintenance (if any) for many years. The same applies to rainwater goods. The Tribunal therefore finds that the approach adopted is likely to result in reserve fund contributions being too high. In practice nearer the time of cyclical works the Tribunal would expect a survey to be carried out to identify which if any of the works were actually required. A specification would then be drawn up and subject to a section 20 consultation process. However as at the date of the hearing no detailed specification was available for the works proposed in 2023 and no consultation process had been started.

68. The Tribunal considers that the reserve fund for scaffolding need not require both fixed and elevated working platform facilities. It also considers that pitched roof repairs, above ground drainage and building services may not in practice be required to any significant extent, or at all. It accepts that renewal of the UPS battery may be required. For these reasons the Tribunal finds that the budget estimate for 2023 is too high. It finds a reasonable basis for the budget estimate is as follows. Two-thirds of the access costs are allowed, or £10,669. Works to the main façade are allowed of £11,333. Replacement of the UPS battery is also allowed at an estimated cost of £2000. These items aggregate to £24,002. Allowing a further £1000 for sundry items gives a budget estimate after rounding of £25,000.

69. The Tribunal finds that the consequential expected unexpended reserve balance of £62,999 is too high. It finds that the £7000 demanded in 2018 was reasonable. Thereafter, for the years in dispute, and in the absence of expert evidence, it finds that £10,000 per annum is a reasonable reserve sum. This would leave an expected reserve balance of approximately £42,000. Having regards to the future cyclical expenditure, the Tribunal finds this balance to be reasonable.

| | | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|---|---|---|---|---|---|---|
| **Reserves** | **B/F** | £ 9,837 | £ 16,933 | £ 27,933 | £ 42,933 | £ 57,933 | £ 72,933 |
| **Sums demanded** | | £ 7,000 | £ 11,000 | £ 15,000 | £ 15,000 | £ 15,000 | £ 15,000 |
| | | £16,837 | £ 27,933 | £ 42,933 | £ 57,933 | £ 72,933 | £ 87,933 |
| | | Tribunal finding of expected cost | | | | | £ 25,000 |
| | | Expected reserve balance | | | | | £ 62,933 |

| | | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|---|---|---|---|---|---|---|
| **Reserves** | **B/F** | £ 9,837 | £ 16,837 | £ 26,837 | £ 36,837 | £ 46,837 | £ 56,837 |
| **Sums found reasonable by Tribunal** | | £ 7,000 | £ 10,000 | £ 10,000 | £ 10,000 | £ 10,000 | £ 10,000 |
| | | £16,837 | £ 26,837 | £ 36,837 | £ 46,837 | £ 56,837 | £ 66,837 |
| | | Tribunal finding of expected cost | | | | | £ 25,000 |
| | | Expected reserve balance | | | | | £ 41,837 |

70. For the avoidance of doubt, the Tribunal makes no findings as to the reasonableness of reserves in subsequent years, which may be significantly different. These years were not expressly stated on the application form as being in dispute and the Tribunal would in any event decline jurisdiction to determine reserve fund expenditure lying many years in the future, particularly given the absence of expert evidence.

## Applications under s.20C and Para 5A Sch 11

71. In the application form the Applicant applied for orders under section 20C of the 1985 Act and Para 5A Sch of the 2002 Act . Having heard the submissions from the parties and taking into account the determinations above, where each party was partially successful, the Tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass more than 50% of its costs incurred in connection with the proceedings before the Tribunal through the service charge. For similar reasons, the Tribunal also orders under Para 5A of Sch 11 of the 2002 Act that not more than half of any administration charge in respect of litigation costs may be made against the applicant.

**Name:** Mr Charles Norman FRICS **Date:** 5 March 2023

## 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).