10910

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/OOBP/LSC/2014/0117**
Property	:	**Various at Rimmon Close, Greenfield, Oldham**
Applicant	:	**Sidney Woodhouse & others**
Represented by		**Mr Woodhouse**
Respondent	:	**(1) Millbank (Greenfield) Management Company Limited** **(2) Ms Knox; Mr & Mrs Etchells; Mr Thomas; Lisa-Jane Samuels**
Represented by		**(1) Nigel Gaskell; Tim Bloodwell; Andrew Dunkley** **(2) In person, save for Lisa-Jane Samuels, represented by Darren Samuels**
Type of Application	:	**Service charge – Landlord & Tenant Act 1985 s27 and s20C**
Tribunal Members	:	**Ms S O Greenan** **Mr W Tudor M Roberts FRICS**
Date of Decision	:	**20.7.15**

DECISION

The application

1. On 3rd November 2014 Mr Woodhouse, the owner of 4 Rimmon Close, Greenfield, Oldham, made an application to the First Tier Tribunal Property Chambers ("the Tribunal") for a determination as to the payability of service charges for the years 2010 to 2014, and for 2015.
2. Mr Woodhouse made the application in his own right and as the representative of the owners of nos 1, 2, 3, 4, 5, 18, 19, 20, 21, 23, 68, 30, 31, 32, 33, 34 and 35 Rimmon Close. This group, including Mr Woodhouse, are referred to as "the houseowners".
3. The primary complaint made by the houseowners related to the division of the service charges between the houseowners and the owners of apartments (referred to as "the flatowners") on the same development.
4. In addition Mr Woodhouse raised concerns regarding the level of communication by the landlord's agents, Mainstay.
5. The application was listed for hearing on 11.12.14. The Tribunal visited the development and carried out an inspection. A hearing then took place the Tribunal's premises in Manchester. It became clear to the Tribunal at the outset of that hearing that the effect of the houseowners case would be, if successful, to increase the sums payable by the flatowners by way of service charge. The flatowners had not been served with any proper notice of the proceedings, although there had been mention of it at a meeting attended by some, but not all flatowners, a few days before the hearing.

6. The Tribunal took the view that it would not be in the interests of justice to proceed without proper notice of the proceedings being given to the flatowners and they being given an opportunity, if they wished to join in the proceedings.
7. Directions to facilitate that process were given and subsequently four flatowners, as listed at the beginning of this decision, sought to be joined as respondents, and they were accordingly joined in to the proceedings.
8. The matter was listed for a further hearing on 11th May 2015, in Manchester.

The properties

9. Rimmon Close is a small estate of 18 apartments and 16 houses built on the site of a former mill building on the edge of Greenfield, a small town on the outskirts of Oldham. All the properties are new-build.

10. The Tribunal inspected the estate on 11.12.14. The members were able to view the common parts of one of the apartment blocks. They walked round the whole of the estate and also inspected the area of woodland which forms part of the communal area of the estate. Those parts of the estate which are the landlord's responsibility appeared to be maintained to a good standard.

11. The apartments were in three blocks of six apartments each, with two on each floor. Each had a communal staircase, carpeted and provided with lighting, including emergency lighting, entry system, and fire protection. There were small areas of communal garden for each block, together with parking areas and a bin store.

The lease

12. The Tribunal was provided with a copy of the standard lease terms used for all the houses on Rimmon Close. The service charge is defined in clause 1.22 as "a reasonable proportion attributable to the Property of the total costs charges

and expenses incurred by the Management Company in performing the obligations set out in the Seventh Schedule...". The management company covenants by clause 8 to "observe and perform the obligations contained in the Seventh Schedule hereto". The Seventh Schedule provides for maintenance of the Communal Areas, defined as "the areas of open space within the estate", and the Reserved Property, defined as "the boundary walls fences hedges ... and pathways forming part of the estate...". The Seventh Schedule provides that the management company covenants by paragraph 1 to "keep the Reserved Property ... in a good and tenantable state of repair decoration and condition...". Paragraph 2 requires the management company to "maintain those parts of the Reserved Property as are laid out as amenity areas or landscaping or Visitor Parking Spaces" and to "maintain the boundary walls pathways and/or fences and/or hedges" and to "undertake grass cutting".

13. The Tribunal was not provided with a copy of a lease for any of the flats on the estate. It was however agreed by all those who attended the hearing that the terms of the flat leases, as regards service charges, were identical to the house leases. The flat leases made provision for services provided solely to the flats to be paid for by the flatowners, and for separate management fees to be charged solely to the flatowners in relation to those services. The costs of those fees was divided between the flats in proportion to the floor area of each flat.

The law

12. Section 19 of the Landlord and Tenant Act 1985 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.

13. Section 27A of the Act provides:

1)An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a)the person by whom it is payable,

(b)the person to whom it is payable,

(c)the amount which is payable,

(d)the date at or by which it is payable, and

(e)the manner in which it is payable.

(2)Subsection (1) applies whether or not any payment has been made.

(3)An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a)the person by whom it would be payable,

(b)the person to whom it would be payable,

(c)the amount which would be payable,

(d)the date at or by which it would be payable, and

(e)the manner in which it would be payable.

14. Section 20C of the Act provides:

(1)A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the First-Tier Tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

The Applicant's case

15. The houseowners had indicated in their application that they regarded it as unsatisfactory that the flats and houses were both part of the same management scheme. They accepted however that this was the position, but sought to change the apportionment of the portion of the service charge relating to the management of the estate. Historically and up to the date of the hearing that part of the service charge had been divided equally between all 34 dwellings on the estate, with each dwelling paying 2.9412%.

16. Mr Woodhouse in thorough and detailed written documents had set out the basis of the houseowners case. It was their view that the majority of services provided by or on behalf of the management company were of no benefit to the houseowners but related solely to services required by the flatowners. These included cleaning of the common parts of the apartment blocks, including windows, carpets, bins stores; gutter maintenance; gardening the gardens of the apartment blocks; electricity; day to day maintenance and out of hours fees relating solely to services provided to the apartment blocks; maintenance of door entry systems and TV aerials; fire risk assessment and fire alarm provision; emergency lighting; car park costs; buildings insurance; and the sinking fund.

17. By contrast, Mr Woodhouse pointed out, the houseowners had the benefit only of three services shared with the flatowners: general maintenance; woodland maintenance; and public liability insurance.

18. Mr Woodhouse had analysed the cost of the services and concluded that the houseowners received services which (taking a five year average) cost only 5.8% of the total cost of the services provided to the estate. It was the houseowners' case that this modest amount should be reflected in the proportion of the management charges payable by the homeowners. They were however paying 31.2% of the total management charges.

19. Mr Woodhouse noted that in relation to the shared services, the cost was divided equally between the houseowners and the flatowners, so that 50% of the cost was divided between the 16 homeowners, and 50% between the 18 flatowners.

20. The houseowners sought to reduce the proportion of the management charges payable by them to 5.8% of the total cost management charges. That sum they contended should then be divided between the houseowners in proportion to the floor area of each house.

21. In relation to the shared services, they accepted that the houses and their gardens occupied about 70% of the total area of the estate. They proposed that the cost of those services should be shared in proportion to the area occupied by the properties, so that 70% of the costs of the shared services should be divided between the 16 houseowners, and 30% between the 18 flatowners. Again the houseowners suggested that their proportion should be divided between them on the basis of the floor area of each house.

22. Mr Woodhouse had helpfully provided a detailed table setting out the figures relied on, and the effect of the approach to charging which the homeowners sought to introduce.

The management company's case

23. The management company had provided a detailed statement of case and a bundle of supporting documents. It argued that the approach of equal division for each dwelling was correct. It pointed out that general maintenance related the whole of the estate; that the woodland area which was maintained was shared by all the dwellings as an amenity; and that the public liability insurance provided cover for the whole estate.

24. The management fee for each dwelling was £51.23 plus VAT. This covered the cost of the property manager visiting regularly and carrying out a full site inspection, together with the provision of services from Mainstay's head office in Worcester. Those services included dealing with leaseholder queries, sales and purchases, and paying and dealing with invoices. A separate management fee was charged to the flats for inspections relating to the flats alone.

25. Bank charges were incurred on a quarterly basis for holding the monies in the client account, and did not depend on expenditure or on which services were provided. The costs of providing company secretarial services depended on the number of dwellings, and was not proportional to expenditure.

26. The management company had accepted that accountancy fees and external accounts fees were based on expenditure and transactions and that the contributions being made by the householders through the management charges was disproportionate. It had adjusted the amount of the accountancy/audit fees charged to the houseowners for the years 2010 to 2012 so that the houseowners' share reflected the amount of the expenditure on the estate (excluding the services provided only to the flats) as a proportion of the total expenditure (including the services provided only to flats). From 2013 onwards this method of charging for accountancy and audit fees had been used for each new demand.

27. An issue had previously been raised by the homeowners in relation to the charge for public indemnity insurance. A charge had been made for that in 2010 when in fact no policy had been in place. A credit had been returned to the accounts for 2011 to reflect this. A policy had been in place from 2012 onwards.

28. The management company's case was that the approach of equal division of the management and estate costs between each dwelling was fair and reasonable in the circumstances of this particular estate. When the budget for

the estate charges was first considered, the management company's new business team had analysed the service charge provision and tried to determine what would be a fair proportion and had determined that equal division was the fairest approach.

The flatowners' case

29. A statement of case had been filed on behalf of the flatowners who had been joined as parties.

30. Their case was that the management costs should be split between the dwellings in proportion to the floor area of each dwelling. As some of the flats were significantly smaller than the houses, this would have the effect of reducing the charges payable by some of the flatowners. They pointed out however that the houses varied in size, and some houses were smaller than certain flats. Mr Woodhouse's house was one such, so he would benefit from this approach. The principle of charging in proportion to floor area was used for the division of the flatowners' service charges and management charges, and they contended that it would be rational to extend that the estate charges.

31. The flatowners pointed out that some of the houseowners regularly made use of facilities for which the flatowners bore all of the costs. These included the bin stores and the communal gardens provided to the apartments. Expense had been incurred by the management company, including legal costs, in dealing with a dispute with one of the houseowners in relation to his having damaged the visitor's parking space, preventing it from being used: costs such as that should not be borne predominantly by the flatowners.

32. The flatowners secondary position, if the Tribunal was not minded to agree with the suggestion of charging based on floor area, was that the method of charging currently being used should be retained.

The hearing

33. The parties' respective cases at the hearing were consistent with their written submission as summarised above. The Tribunal was assisted by the fact that all three parties (management company; houseowners; flatowners) had prepared helpful written submissions. In particular Mr Woodhouse had prepared the schedules referred to above showing the effect of the apportionment which the houseowners were seeking. He had done everything which could be done to explain what the homeowners asking for.

The decision

34. The Tribunal considered the decisions of the Upper Tribunal in the cases of *Barney v Eastern Green Ltd* [2013] UKUT 331 (LC), *Shersby v Grenehurst Park Residents Co Ltd* LRX/142/2007, and *Windermere Marina Village v Wild* [2014] UKUT 163 (LC).

35. In *Barney v Eastern Green* HH Judge Huskinson considered a lease in which the basis of apportionment of service charge between a number of business and residential units was floor area, but with a proviso that the landlord could vary the apportionment "if in the opinion of the Management Company it should at any time become necessary or equitable to do so the Management Company shall recalculate the Lessee's Proportion and the proportions of the Building Service Charge and Residential Service Charge applicable to the residential units in such manner as the Management Company shall consider to be equitable". Considering the approach which the Tribunal should take to a challenge to the landlord's variation of the lessee's proportion, he commented:

> "24. A question therefore arises as to the extent of the LVT's power to examine the method of apportionment which the management company has concluded to be equitable. The LVT's power arises not from section 19 of the Landlord and Tenant Act 1985 as amended because a decision as to the method of apportionment to adopt under the Proviso is not a decision as to whether relevant costs have been reasonably incurred. However the LVT has jurisdiction under Section 27A to determine whether a service charge (which includes a charge in respect of insurance) is payable and, if so, the

amount which is payable. This enables the LVT to consider whether the Insurance Rent demanded by the respondent (calculated on the basis of the method of apportionment adopted under the Proviso) is properly payable. This therefore enables the LVT to decide whether the method of apportionment adopted by the respondent (through the management company's decision) is a method of apportionment which the respondent is entitled to adopt. 25. However the test to be applied by the LVT in reaching a decision on this point is not for the LVT to make the management company's decision for it and to decide what it (the LVT) considers to be the equitable method of apportionment in all the circumstances. Instead the test to be applied is in my judgment the test which the LVT correctly applied in the present case (see paragraph 44.16 of its decision) namely whether the method of apportionment chosen is reasonable."

36. In *Shersby v Grenehurst Park* the Upper Tribunal (again HH Judge Huskinson) considered the question of apportionment under a lease which contained a formula for apportionment, but which also permitted a variation of that proportion if "in the opinion of the Manager it should at any time become necessary or equitable so to do the Manager shall recalculate on an equitable basis the percentage proportions appropriate to the properties on the Estate and notify the owners thereof accordingly."

37. A variation had been put in place under this provision and was challenged by a leaseholder. Considering the correct approach to such challenges, Judge Huskinson observed:

"36. The question of the variation of the percentage proportions turns upon whether the Respondent properly exercised its powers of variation under Part III of the Fourth Schedule. The trigger which engages the operation of this provision is "if in the opinion of the Manager ....". The relevant question is whether the Respondent (as the Manager) reached a genuine and bona fide opinion that it had become equitable (the word "necessary" is not relied on) to recalculate the percentage proportions. It is not for this Tribunal to conclude whether it has become equitable to do this. This Tribunal's only function is to conclude whether the Respondent reached a lawful decision on the point, being a decision which was within the range of reasonable decisions (as opposed to being a perverse decision) and whether the Respondent took into consideration relevant matters and did not take into consideration irrelevant matters. Once the power is triggered it becomes for the Respondent to recalculate the percentage proportions on an equitable basis. Once again the question is not whether the Tribunal considers that some other equitable basis should have been adopted or would have been more equitable. The question is whether this was a bona fide decision being one within the range of reasonable decisions and being reached taking into account relevant and ignoring irrelevant matters."

38. In *Windermere Marina Village* the leaseholder was required by the lease: "To pay a fair proportion (to be determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding)". The surveyor determined a fair proportion; a leaseholder challenged that determination;

and the FTT substituted a different apportionment as being fair and reasonable after hearing evidence from surveyors on both sides.

39. The Upper Tribunal (Martin Rodger QC) took the view that the effect of the term in the lease providing for a third party to determine a fair proportion was an attempt to contract out of section 27A and was therefore caught by the anti-avoidance provisions of section 27A(6). The Tribunal was therefore entitled to substitute its own view as to what was fair and reasonable

40. It was not entirely clear to the Tribunal whether this decision would also apply to cases in which the lease permitted a fair proportion to be determined by the landlord itself. In paragraph 27 of his decision, Mr Rodger QC comments:

> "27. The issue of principle is concerned only with cases where the parties have *not* agreed the apportionment of liability at the commencement of their lease, but have left the question of apportionment to be determined by a third party at a later date. The issue is also likely to be relevant to leases under which more than one method of apportioning charges is identified, but where the choice of which method is to be adopted, either generally or in relation to particular categories of expenditure, is left to the landlord or to a third party. Arrangements of that type are quite commonly encountered (often in local authority leases). An example can be found in a relatively recent decision of the Tribunal (Her Honour Judge Walden-Smith) in *Levitt v London Borough of Camden* [2011] UKUT 336 (LC)."

41. In this case the parties did not agree the apportionment, but nor did they leave it to a third party.
42. It was the view of the Tribunal that the correct legal approach was for the Tribunal to consider whether the method of apportionment chose by the landlord was reasonable.
43. The Tribunal found that the method was reasonable:
    a. The management fee of £51.23 plus VAT per block was charged in relation to management of the entire estate. A separate management fee was charged to the flatowners in relation to services supplied solely to them.
    b. The management fee included a significant volume of general services provided by the management company, including services necessary

for properties to be bought and sold, which were unrelated to levels of expenditure.

c. The bank charges arose purely because of the existence of a bank account. The company secretarial fees were charged on the basis of the number of dwellings and did not vary with expenditure.

d. The shared services (maintenance, woodland maintenance, and public liability insurance) benefited each dwelling equally.

44. The Tribunal was of the view that shifting a further slice of the management charges onto the flatowners would be inequitable and would not reflect adequately the benefit to the homeowners from the services provided.

45. The Tribunal did not see any merit in the approach of division on the basis of floor area suggested by the flatowners. There was no reason why the cost of services related for example to the sale and purchase of properties should not be borne equally by each dwelling, as the ability to buy and sell was an equal benefit to each dwelling.

46. The Tribunal considered, in the light of the uncertainty left by the decision in *Windermere Marine Village*, whether it would, if it were in a position to substitute its own assessment of what was fair and reasonable, alter the current arrangements. The Tribunal had not heard any independent evidence as to what was fair and reasonable but had heard evidence and submissions from all the parties.

47. The Tribunal concluded that, if it were in a position to substitute its own decision as to what was fair and reasonable, it would not have changed the current arrangements, which were in the view of the Tribunal fair in the context of this particular estate.

48. Accordingly the Tribunal determined that the service charges for the years 2010 to date are payable in full.

49. The Tribunal considered the houseowners application under section 20C. As the application had been determined in favour of the management company, the Tribunal saw no basis on which to exercise its discretion to prevent the management company recovering the costs of these proceedings via the service charge.