FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LLE/2021/0001 V:CVP**
Properties	**:**	**The leasehold and freehold properties which are listed in the application relating to Green Street Garden, Mayfair, London W1K**
Applicants	**:**	**(1) The Grosvenor Estate Mayfair** **(2) The Trustees of the Second Duke of Westminster Will Trust**
Representative	**:**	**Trowers and Hamlin LLP** **Ranjit Bhose QC**
Respondents	**:**	**(1) The leaseholders listed in Annex B to the application** **(2) The freeholders listed in Annex B to the application**
Type of application	**:**	**A determination as to the payability of expenditure in respect of garden maintenance works to Green Street Garden, Mayfair, London, W1K**
Tribunal member	**:**	**Judge Sheftel** **Ms M Krisko FRICS**
Date	**:**	**24 August 2021**

DECISION

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Applicants have provided a Bundle of Documents for the hearing and Ms Gregson (one of the Respondents) has provided an additional bundle. The order made is described at the end of these reasons at paragraphs 41-43.

Background

1. Green Street Garden (the "Garden") is a private garden situated in Mayfair surrounded by a mix of leasehold and freehold properties that contribute towards its upkeep.

2. The Garden is situated between Dunraven Street, Green Street, Park Street and Woods Mews. It is bounded by a total of 24 residential buildings/properties (the "Properties"), the leaseholder or freeholder of which is each required to make a contribution to the to the costs of maintaining the Garden. There are 15 freehold Properties and 9 leasehold Properties.

3. The First Applicant is the freehold owner of various properties around the Garden (91, 97-99, 103A Park Street, 3, 4, 6 Dunraven Street, and 39, 43, 45, 48 Green Street). The First Respondents are lessees of such properties. In addition, the First Applicant was the freehold owner of various properties surrounding the Garden which are now vested in the Second Respondents (93, 95, 101, 103 Park Street, 5 Dunraven Street, 1-1A ,3-5Woods Mews, 37, 38, 40, 41, 42, 44, 46, 47 Green Street).

4. The Second Applicants are Trustees of the Grosvenor Mayfair Estate Management Scheme as referred to below.

5. Some of the Properties, both freehold and leasehold, are subject to underleases, to which neither Applicant is a party. Access into the Garden from each Property is said to be available only from doors within the rear elevations to each property. This means that in some cases where a property is subject to underleases but the door from that property is within an individual (ground and/or lower ground floor) apartment within that property, only those occupying that particular apartment have access to the Garden. However, so far as the tribunal is concerned, the charges which we are asked to consider are levied only to each Property (building) and not to individual flats which may exist within any particular building.

6. While a suggestion was made at the hearing that others use the Garden but do not pay a charge, we were told in reply that the locks had been changed and no one else could gain entry.

The issue in dispute

7. The application in respect of the leasehold properties is made under section 27A of the Landlord and Tenant Act 1985 and the application in relation to the freehold properties is made under section 159 of the Commonhold and Leasehold Reform Act 2002. As such,the First Applicant seeks a determination under section 27A(3) of the 1985 Act and the Second Applicant a determination under section 159(6) of the 2002 Act, in relation to the apportionment of the charges incurred in the management and maintenance of the Garden.

8. The years in question are 2017-2020. The total costs for the garden were as follows:

   - 2017 - £35,826.06
   - 2018 – £35,008.65
   - 2019 - £27,045.55

9. The issue has arisen as a result of the fact that since 2016, the Applicants have applied a points-based system to apportion the costs between the Properties. Prior to the, apportionment of the costs was carried out having regard to the rateable value of each Property.

10. Several of the residents are in disagreement with the amended apportionment method. Accordingly, the Applicants seek a determination of the payability of the charges in light of the objections.

The hearing

11. The hearing of this application took place on 13 July 2021.

12. The Applicants were represented by Ranjit Bhose QC. The tribunal also heard from Gareth Rowe, the property manager.

13. In advance of the hearing, the tribunal received notification of opposition to the application from: Sanjit and Neeta Vohra of 38 Green Street, Diamantis Lemos of 39 Green Street, Sarah Gregson on behalf of 40 Green Street Ltd and Mark Vali of 37 Green Street. The hearing was attended by Sara Gregson (and her partner Kenneth Young), Sanjit Vohra and Diamantis Lemos. Submissions were made principally by Ms Gregson and Mr Vohra.

The obligations to pay

The freehold properties

14. For the freehold Properties the obligation to contribute to the costs of the Garden arises as a result of their being subject to the Grosvenor Mayfair Estate Management Scheme, which was approved by the High Court on 5 December 1973, pursuant to section 19 Leasehold Reform Act 1967 (the "Scheme").

15. Paragraph 17 of the Scheme provides that the provisions in the Schedule thereto shall apply in respect of every enfranchised property "which has appurtenant thereto the liberty and privilege in common with the Landlord and other persons entitled to the like right of walking in and enjoying the gardens … being Green Street Garden … whether or not such liberty and privilege shall have been granted by the Original Transfer".

16. Paragraph 2 of the Schedule provides that:

> "The Owner shall on receipt of the Landlord's written demand forthwith pay and contribute to the Landlord a fair proportion of the reasonable costs and expenses of maintaining repairing improving and keeping in good order and condition the Gardens and the walks lawns and shrubberies thereof and the iron railings or other fencing enclosing the same and any other embellishments improvements or things from time to time belonging thereto such proportion (if in dispute) to be determined by the Surveyor)."

17. So far as the present application is concerned, the key element is that the owner of each freehold property is required to pay "a fair proportion of the charge".

The leasehold properties

18. As regards liability for, and apportionment of, the costs in relation to the leasehold properties, according to the Applicants there are leases in a number of different forms. Although not included in the bundle, they were set out in the Applicants' statement of case and contained the common feature of the use of the words 'a fair proportion' as follows:

19. Specific instances referred to in the Applicants' statement of case were as follows (with emphasis added in each case):

    (1) Leases in respect of 91, 97-99 Park Street, 4 Dunraven Street:

"The leaseholders are required to pay by way of service charge a fair proportion of the costs of … Maintaining repairing improving and keeping in good order and condition the Communal Garden and the iron railings and other fences and gates and closing it (including the plinth's to which they are fixed) and the walk lawns and shrubberies and any other embellishments improvements or things now or from time to time belonging to the Communal Garden."

(2) Leases in respect of 103a Park Street and 48 Green Street:

"The rights in common with others authorised by the Company and subject to such rules and regulations for the use and maintenance of the same as may be prescribed from time to time by the Company of use of the garden known as Green Street Garden at the rear of the building for recreational purposes together with the right of way in common with all others entitled over and along the iron causeway giving access to Green Street Garden subject to the contribution by the tenant to the company of a fair proportion of the costs incurred in the improvement and maintenance of said garden."

(3) Lease in respect of 3 Dunraven Street:

"To pay a fair proportion … of the expenses payable in respect of constructing repairing rebuilding and cleansing all party walls sewers drains gutters pipes and other things the use of which is common to the demised premises and other premises and a fair proportion of any other payment which the Lessor is called upon to pay the Superior Lessor including the expense of maintaining improving and keeping in good order and condition said garden at the rear of the building."

(4) Lease in respect of 39 and 45 Green Street:

"The Lessee will on receipt of the landlords' written demand forthwith pay and contribute to the Landlords a fair proportion with other lessees interested therein of the expenses of making good repairing scouring all party and other walls gutters sewers and drains belonging or which shall belong to the demised premises or any adjoining or neighbouring hereditaments And also a fair proportion of the expenses of maintaining repairing cleansing and keeping in good order and condition the garden to the rear of the demised premises known as Green Street Gardens the Walks lawns and garden shrubberies thereof and the iron railings or other fencing enclosing the same and any other embellishments improvements or other things now or hereafter from time to time belonging thereto or such proportion … ."

20. Although it is trite that provisions of any contract must be construed on its own terms, there was no suggestion that 'fair proportion' should be construed differently from one lease to another or indeed differently from the wording of the Scheme. It was also submitted on behalf of the Applicants that all of the various obligations must work together.

The legal framework

21. Section 159(6) of the 2002 Act provides as follows:

(6) An application may be made to the appropriate tribunal for a determination whether an estate charge is payable by a person 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.

(f) Section 159(7) provides that subsection (6) applies whether or not any payment has been made.

22. Similarly, section 27A(1) of the Landlord and Tenant Act 1985 provides that:

An application may be made to 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.

23. A point was raised by Ms Gregson as to whether the tribunal had jurisdiction given that paragraph 2 to the Schedule to the Scheme provides for the proportion (if in dispute) to be determined by "the Surveyor". However, and in accordance with the submissions on behalf of the Applicants, by virtue of section 159(11) of the 2002 Act, such provision is of no effect. Subsection (11) provides that:

"An agreement (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under subsection (6)."

24. An equivalent provision is contained in section 27A(6) of the 1985 Act.

25. In the circumstances, we are satisfied that we have jurisdiction to determine the application.

The Applicants' method of apportionment

26. As set out above, apportionment of the charges for the Garden had previously been carried out having regard to the 1973 rateable values of the Properties. According to the Applicants this was not an up to date basis to calculate the charge. The rateable values had not been updated since 1973 and did not reflect the accurate current value of each Property. Under the previous apportionment method, just a few properties covered a large proportion of the overall charge, which, according to the Applicants, did not reflect usage of the Garden or the size of other Properties. According to the Applicants' statement of case, two of the properties were covering almost half of the charge. However, as pointed out by Ms Gregson and is apparent from the table below, it was in fact approximately 30%.

27. In any event, according to the Applicants' statement of case the revised apportionment is a points-based system "referenced by length of property frontages onto the garden and the number of direct access points into the garden". Each property with more than one access point or that is double fronted is designated with an extra point. Under the scheme, the majority of properties are scored one point and there are no more than two points. However, as pointed out by Ms Gregson, the Applicants have not provided a detailed methodology as to precisely how and why points were allocated in each instance.

28. The impact of the revised apportionment on the Properties is as follows:

Property	**Points**	**New %**	**Previous %**
3 Dunraven Street	1	3.57	1.36
Warburton House, 4 Dunraven St	2	7.14	8.31
5 Dunraven Street	1	3.57	2.22
6 Dunraven Street	1	3.57	1.94
37 Green Street	1	3.57	2.47
38 Green Street	1	3.57	1.84

39 Green Street	1	3.57	1.69
40 Green Street	1	3.57	1.72
41 Green Street	1	3.57	1.18
42 Green Street	1	3.57	2.45
43 Green Street	1	3.57	2.64
44 Green Street	1	3.57	2.71
45 Green Street	1	3.57	3.56
46 Green Street	1	3.57	10.20
47 Green Street	1	3.57	1.71
48 Green Street & 103A Park Street	2	7.14	2.23
91 Park Street	1	3.57	8.79
93 Park Street	1	3.57	9.77
95 Park Street	1	3.57	1.90
Bostock House, 97/99 Park Street	2	7.14	18.70
101 Park Street	1	3.57	2.38
103 Park Street	1	3.57	5.00
3/5 Woods Mews	2	7.14	3.78
1 Woods Mews	1	3.57	1.42
Total	**28**	**100%**	**100%**

29. As is apparent, the allocation under the revised method has resulted in a total of 28 points, meaning that a Property allocated 1 point, is required to pay 3.57% of the total costs. This means that for the 2019 charge a property with one point would be liable to pay £1,323.05 for the year.

Objections to the apportionment method

30. Although there was brief reference to the standard of maintenance – in particular the fact that furniture belonging to certain residents had been left out untouched for long periods – the key issue was the Applicants' method of apportioning the charges. In this regard Ms Gregson and Mr Vohra raised a number of objections. While readily accepting that the

sums in question were relatively modest compared to the substantial values of the Properties in question, they nevertheless objected to the way in which the apportionment had been calculated and imposed by the Applicants.

31. The principal objection was that the apportionment method was overly simplistic and produced unfair results. According to Ms Gregson, the revised methodology appeared to be chosen on a somewhat random basis and took no account of the actual relative lengths/sizes of the frontages of the buildings or indeed the number of residences of the buildings which can access the Garden directly.

32. In relation to linear frontage in particular, a number of examples of the overly simplistic nature of the calculation were given including: Warburton House which has a frontage 3.75 times the length of each of the buildings at 37 to 40 Green Street; and 3-5 Woods Mews which has a frontage the same length as the total of 5 buildings across from it (39-43 Green Street). However, Warburton House and 3-5 Woods Mews each have 2 points under the revised system. She also highlighted the disparity between buildings relating to access to and therefore use of the Garden. For example, in Warburton House, all flats have access to the Garden via a common exit whereas in 40 Green Street, only the ground floor flat does. Ms Gregson further noted that Grosvenor owns Warburton House, Dunraven Street and 97/99 Park Street with the result that when the new apportionment was introduced, Grosvenor saved 12% on the Garden charges.

33. Ultimately, Ms Gregson submitted at the hearing that an apportionment based on measured linear frontage should not be difficult to calculate.

34. Mr Vohra agreed that the chosen methodology was too simplistic and agreed that one based on the relative linear frontages would be better. While he commented that the combined value of flats in a building were likely to be greater than the value of an equivalent building which was a single house and that views over the Garden (which differed amongst buildings) would have a value, he accepted that taking into account all such factors could make the apportionment calculation extremely

complicated. He agreed that an apportionment based on linear frontage would be fairer than the current system.

35. In response, it was conceded on behalf of the Applicants that the system was not perfect but maintained that it nevertheless resulted in the Properties paying a 'fair proportion'. This was so notwithstanding that the Applicants did not dispute the assertions of Ms Gregson and Mr Vohra regarding the different sizes of the frontages of different buildings. The current system has the benefit of simplicity and is cost effective – having regard to the total amount of the charges in question. However, to the extent that the tribunal disagreed, it was accepted that we could tweak the allocation as necessary.

36. Further, it was submitted that there was no easy and straightforward answer. If allocations were to be measured solely by reference to linear frontage, this would produce anomalies insofar as, for example, the garden frontage for 3 Dunraven Street is just half the width of the property and 6 Dunraven Street would barely contribute if at all. Similarly, 48 Green Street/103a Park Street is a substantial building but has little if any linear frontage to the Garden.

Discussion and decision

37. The requirement is to pay a 'fair proportion' but there is no further guidance in the Scheme or the leases as to how this should be calculated.

38. The tribunal agrees that the system is not perfect. We also agree, however, that there is no obvious and straightforward way to introduce a system that could not give rise to an objection on some ground or other.

39. In particular, the tribunal accepts Mr Bhose's argument that a system solely based linear frontage would throw up its own anomalies and produce unfair results. We also agree that adding in more variables such as: the number of access points or residents in particular building able to use the Garden; whether a building is a single dwelling or divided into flats; the number of flats per building; the extent of views over the Garden, could make any calculation extremely complicated. The tribunal

is also conscious of the modest level of charges relative to the value of the Properties in question.

40. In our view, the fact that an approach is simple does not itself preclude a finding that the charges arising from it amount to a 'fair proportion'. Accordingly, we do not find that the notion of a points-based system as created by the Applicants is objectionable per se. We also do not find evidence of any improper motive on the part of the Applicants in establishing the revised system, notwithstanding any saving by Grosvenor under the revised system.

41. While arguments could be validly made that the method of apportionment should be more precise in a number of instances, we find that the points-based system can broadly result in a 'fair proportion' of costs. However, in our view, there are two instances where the points allocated are much harder to justify:

    (1) 46 Green Street: at present this has only 1 point but would appear from the plan to have a significantly larger frontage than the properties at 38-45 and 47 Green Street – according to Ms Gregson, it was 3.5 times the length. In the tribunal's view, this should have been allocated an additional point;

    (2) 3-5 Woods Mews: at present this has 2 points. However, this is a substantial property and as pointed out by Ms Gregson the frontage of this property is the same as the frontage of 39,40,41,42 and 43 Green Street, as the whole length of it is directly opposite these 5 houses – although it is also noted that it has fewer stories than those properties. Mr Vohra commented that in his estimation, 38Green Street had an approximate floor area of 6,000 sq ft whereas for 3-5 Woods Mews, it was in the region of 20,000 sq ft – albeit this was not based on any evidence presented to the tribunal. In the tribunal's view, the considerable extra frontage for 3-5Woods Mews would justify an additional point on the Applicants' scale.

    By making the above two changes, although this does not produce a perfect result and undoubtedly anomalies remain as highlighted by the

Respondents, in our determination, the revised allocation nevertheless results in parties paying a 'fair proportion' of the charges.

42. We are conscious that neither the owners of 3-5 Woods Mews, nor 46 Green Street attended the hearing – although all Respondents were served with the application and so had the opportunity to make representations.

43. In light of our findings that: (i) 46 Green Street should be allocated 2 points and; (ii) 3-5 Woods Mews should be allocated 3 points, this would bring the total number of points under scheme up from 28 to 30. This would mean that a property with 1 point would now be paying 3.33% of the charges for the Garden rather than 3.57% and therefore when determining payability under the 1985 Act and the 2002 Act for the years in question, the sums demanded would need to be adjusted accordingly.

Name: Judge Sheftel **Date:** 24 August 2021

Rights of appeal

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

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

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

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case

number), state the grounds of appeal and state the result the party making the application is seeking.

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