FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/138UD/LSC/2021/0023**
HMCTS	**:**	**CVP**
Property	**:**	**Flats 1-8 & 10, 45 Highbridge Street, Waltham Abbey EN9 1BQ**
Applicants (Sub Lessees)	**:**	**Wendy Paul, Flat 1** **Rosie O'Neill & Leanne Smith, Flat 5** **Tudor Rosca, Flat 8** **Paul Hoadley, Flat 10**
(Lessees)		**Peter Regis, Flat 3** **Amanda Beggs, Flat 4** **Rosemary Kelly Flat 7** **& Samuel Staal, Flat 6**
Representative	**:**	**Danielle Cheese, Flat 2**
Respondent 1 (Head Lessor & Freeholder)	**:**	**Abacus Land 4 Limited**
Representatives (Managing Agent)	**:**	**Residential Management Group**
Respondent 2 (Head Lessee)	**:**	**London & Quadrant Housing Trust**
Type of Application	**:**	**To determine the reasonableness and payability of Service Charges (Section 27A Landlord and Tenant Act 1985) and Administration Charges (Schedule 11 Commonhold and Leasehold Reform Act 2002)** **2) For an Order to limit the service charges arising from the landlord's costs of proceedings (Section 20C Landlord and Tenant Act 1985)** **3) For an Order to reduce or extinguish the Tenant's liability to pay an administration charge in respect of litigation costs (paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002)**

Tribunal	**:**	**Judge JR Morris** **Mr G Smith MRICS FAAV REV**
Date of Application	**:**	**16th March 2021**
Date of Directions	**:**	**8th June 2021**
Date of Hearing	**:**	**9th September 2021**
Date of Decision	**:**	**15th October 2021**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing together with the papers submitted by the parties which has been consented to by the parties. The form of remote hearing was Video. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Decision

1. The Tribunal determines that the Respondent's Apportionment of the Service Charge for the years in issue is reasonable.

2. The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that the Landlord's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Tenants.

3. The Tribunal makes an Order extinguishing the Tenants' liability to pay an administration charge in respect of litigation costs under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Reasons

Application

4. The Application dated 16th March 2021 is for:
   1) A determination of the reasonableness and payability of Service Charges in relation to a lift, incurred for the years ending 31st May 2019 and 2020 ("the years in issue") and the estimated costs to be incurred for the year ending 31st May 2021 (Section 27A Landlord and Tenant Act 1985);
   2) An Order to limit the service charges arising from the landlord's costs of proceedings (Section 20C Landlord and Tenant Act 1985);
   3) An Order to reduce or extinguish the Tenant's liability to pay an administration charge in respect of litigation costs (paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002).

5. Directions were issued on 8th June 2021.

The Law

6. A statement of the relevant law is attached to the end of these reasons.

Description of the Property

7. The Tribunal did not make an inspection of the Development, Buildings or Blocks in which the Properties are situated but the following description was derived from the Lease, the Statements of Case and the Internet and confirmed by the parties.

8. The Properties are situated in the larger building of a Development of two four storey buildings referred to in the Lease as the "Building" or "Buildings". The larger Building is the subject of these proceedings. There are Commercial premises on the ground floor of both Buildings, referred to in the Lease as the "Commercial Block" and residential premises on the floors above of one- and two-bedroom flats. The larger Building is in four parts as follows. Part one is the Commercial Block on the ground floor, part two is the residential flats or

maisonettes, which have their own entrances and parts three and four which are residential flats which share common parts.

9. The issues which are the subject of these proceedings relate to the parts three and four which are residential flats which share common parts. These two parts each have their own entrances giving access via door entry system. Each entrance has a common hallway and stairs to the upper floors and landings off which are the dwellings. These two parts are separated by a wall that rises from the foundations to the roof and there is no means of internal access from one part of the Building to the other. Each part has its own address. The part in which the properties are situated is 1-11 45 Highbridge Street EN9 1BQ ("the Highbridge Street Flats") and the address of the other is 6-21 Winchester Close EN9 1BB – EN9 1BD ("the Winchester Close Flats). The part in which the properties are situated does not have a lift whereas the other part does have a lift. In essence the dispute so far as the correlation between the description of the Building and the Lease is concerned is that the Applicants submit that the two parts of the Building each of which has its own common parts are, in the terminology of the Lease, two separate "Blocks". One of the Blocks benefits from a lift and it is submitted that its Lessees should meet the costs related to that facility, whereas the other does not and its Lessees should not have to contribute to that cost.

10. Externally the front and side of the Building has brick elevations to its central portion with timber cladding to the side portions and the rear elevations are brick. The residential storeys have upvc windows with double glazed units. The Building has a street frontage. The entrance to the Highbridge Street flats is on Highbridge Street and the entrance to the Winchester Close flats is to the side of the Building off Highbridge Street down a pedestrian lane towards the car park at the rear and Winchester Close.

11. The area at the rear of the Building is a car park gated with designated spaces for each Dwelling as well as additional parking spaces for the commercial premises. Around the car park there are shrubs and trees.

The Lease

12. Flats 3, 4 and 6 are subject to long Leases between Respondent 1 and the Applicant Lessees. Flats 1, 5, 8 and 10 are subject to Head Leases between Respondent 1, the Freeholder and Head Lessor, and Respondent 2, the Head Lessee. Each Property is subject to a Shared Ownership Sub-Lease between the Head Lessee and each of the Applicant Sub Lessees. The Managing Agent manages all Flats.

13. A copy of the Lease for Flat 2, 45 Highbridge Street Waltham Abbey was provided. This was said to be the same as the Head Leases for Flats 1, 5, 8 and 10 and the Leases for Flats 3, 4 and 6, 45 Highbridge Street, Waltham Abbey referred to hereinafter as "Highbridge Street Lease". The Highbridge Street Leases are for a term of 125 years from 1st January 2004.

14. A copy of the Shared Ownership Sub-Leases was provided. These also are for 125 years (less 3 days) from 1st January 2004. For the purposes of these

proceedings only the Head Lease needs to be considered because the Service Charge provisions of the Head Lease are incorporated into the Shared Ownership Sub-Leases by Clause 7 of that Lease.

15. A copy of the Lease for Flat 9 Winchester Close, Waltham Abbey was provided. This was said to be the same as the other Leases at 6-21 Winchester Close referred to hereinafter as the "Winchester Close Leases". The Winchester Close Leases are also for a term of 125 years from 1st January 2004.

16. It is common ground that all the Clauses and Schedule paragraphs of these Leases are the same except that in the Highbridge Street Leases the Internal Common Areas are defined as "the common entrance porches corridors hallways (including common service ducts fire screens and doors therein) and staircases within the Block and or the Building…". However, in the Winchester Close Leases, the Internal Common Areas definition also includes the words "Lift (if any") as follows "the common entrance porches corridors hallways (including common service ducts fire screens and doors therein) Lift (if any) and staircases within the Block and or the Building…"

Hearing

17. A hearing was held on 9th September 2021 which was attended by Ms Danielle Cheese for the Applicants and Mr M Amodeo, Property Manager, Ms Debbie Cook, Head of Property for Respondent 1, Ms Sue Corby Regional Manager for Respondent 1 and Mr Tom Smith, Service Charge Co-ordinator for Respondent 2.

Preliminary Issue

18. The Applicants raised a preliminary issue by asking that the Tribunal consider the validity of the service charge demands. Companies House shows that Abacus 4 Land Limited dissolved on 5th January 2019 yet service charge demands are still issued in this name.

19. The Tribunal noted that if the demands were in the wrong name section 47 of the Landlord and Tenant Act 1947 provides a remedy in that the demands are not payable until they are re-issued in right name.

20. The Respondent's Representatives confirmed that Abacus 4 Land Limited was not dissolved and was still registered at Companies House. This was accepted by the Applicants.

21. The Tribunal found that Abacus 4 Land Limited was the Freeholder and Head Landlord.

Issues

22. The overall issue is whether under the Lease the Service Charge costs incurred and to be incurred for the lift are payable by the Applicants.

23. Based on the Statements of Case the questions for the Tribunal to determine are:
    a) Whether the Building comprises two separate Blocks or is a single Block; and
    b) Whether or not the Lease requires all the Lessees in the Building to contribute to the lift or only those where the lift is specifically mentioned in the Lease.
    c) Whether, if it is determined that the Service Charge is payable by the Applicants under the Lease, they should be liable for the lift costs of all the years in issue or only the costs to be incurred for the year ending 31st May 2021. The Applicants submit that Respondent 1 should be estopped from charging the earlier costs on the basis of convention.

Evidence and Submissions on Payability

Applicant's Case

24. The Applicant provided a Statement of Case in which it was said that the Respondent is incorrect in its statement that flats 1-11 have access to a single lift. The external fabric of the building comprises of two separate blocks; 1-11, 45 Highbridge Street, EN9 1BQ and 6-21 Winchester Close, EN9 1BB – EN9 1BD, respectively. These blocks share a roof. A copy of the plan and photographs of these separate entrances is included.

25. Under the Definitions of the Lease for 1-11, 45 Highbridge Street, the Internal Common Areas is defined as "means the common entrance porches corridors hallways (including common service ducts fire screens and doors therein) and staircases within the Block and or the Building…"

26. Under the Definitions of the Lease for 6-21 Winchester Close, the Internal Common Areas are defined as "the common entrance porches corridors hallways (including common service ducts fire screens and doors therein) Lift (if any) and staircases within the Block and or the Building…"

27. The Applicant therefore believes that the Leases for the two blocks are clear that one block benefits from a lift whilst the other, does not. A copy of both leases were provided.

28. Historically, the Respondent's Representatives had charged out the budget on the basis of 6 schedules; Social Housing, Private Flat, Flat without Lift, Flat private Entrance, Estate and Commercial. In 2017 a decision was made by RMG to change this to two schedules and this was communicated to residents on 13th September 2017.

29. Following this change, one of the Applicants instructed solicitors to contact the Respondent's Representatives on 9th August 2017. The Respondent's representatives responded on 23rd August 2017 in which they confirmed that "although the residential schedule would include items which you do not have access to (e.g. a lift), the service charge has been apportioned on a per unit basis…leaseholders will be paying different percentages based on the services they receive." The correspondence also confirms; "…you will not be

contributing towards services which you do not have access to." A copy of this correspondence has been included within this bundle.

30. Following receipt of the service charge invoice, another of the Applicants who had recently purchased a flat in the block, contacted Respondent 1's Representative on 27th July 2018 to query why payment for a lift appeared on the statement for 1-11. Respondent 1's Representative responded on 3rd August 2018 to confirm that whilst the costs appeared on the service charge statement, 1-11 do not pay for this lift. A copy of this correspondence was provided.

31. On 19th September 2018, Respondent 1's Representative sent a meeting invitation to all residents in relation to the lift works in which it was expressly stated that this meeting was for residents who had a lift in their block.

32. The meeting was held on 4th October 2018 at Waltham Abbey Town Hall. The Property Manager attending on behalf of the Respondent 1's Representative, confirmed that 1-11 would not be contributing towards any lift costs.

33. The first half-yearly service charge demand for 2019/20 was sent on 12th June 2019. A service charge breakdown was requested by the Applicants and received on 3rd July 2019. It was noted here that 1-11 appeared to be contributing towards the lift. A copy of this correspondence was provided.

34. On 18th July 2019, the Applicants contacted Respondent 1's Representative again to query why the lift charge was again appearing on the service charge. Following escalation, Respondent 1's Representative responded on 7th August 2019 to advise that the lift charges were deemed payable. A copy of this correspondence was provided.

35. On 8th August 2019, Respondent 1's Representative deemed this complaint as closed. A copy of this correspondence was provided.

36. Based on the above and the evidence submitted, the Applicants were of the opinion that they are not responsible for a lift in a different and inaccessible block and therefore, should not be charged for any costs associated with operating that lift.

37. Supplementary to the case the Applicants said that should the Tribunal deem the lift costs payable, they would ask that the principles of estoppel are considered for the period when it was deemed that the lift costs were not payable.

Respondent 2's Case

38. Respondent 2's Representative said that London & Quadrant Housing Trust is a Registered Provider of Social Housing and a non-profit making organisation. Respondent 2 is the Head Lessee of four separate flats at 45 Highbridge Street: Flats 1, 5, 8 and 10. The Head Leases were originally let to East Choice Limited, part of the former East Thames Housing Group. This organisation

was merged into Respondent 2 in April 2018. The four flats listed above are underlet by Respondent 2 on Shared Ownership Sub-leases.

39. As Head Lessee, Respondent 2 is obliged to pay the service charge ("Maintenance Expenses") to the Head Lessor (Respondent 1) in respect of their obligations carried out under the Sixth Schedule of the Head Lease. In turn, the Shared Ownership Sub-Leases enable Respondent 2 to recover the costs incurred under Clause 7 – Service Charge Provisions of the Shared Ownership Sub-Leases which incorporates the Head Lease Service Charge Provisions into the Shared Ownership Sub-Leases. Respondent 2 passes the Service Charge on to the Shared Ownership Lessees as a service charge payable alongside their specified rent.

40. In accordance with the terms of the Shared Ownership Sub-Leases, Respondent 2 sets an on-account charge payable by the Shared Ownership Sub-Lessees each month based on the Estimated Service Charge as referred to in the Head Leases and reconcile this at year-end in accordance with actual expenditure which is the Final Service Charge also as referred to in the Head Leases. This includes all invoices levied by the Head Lessor (Respondent 1) or its Managing Agents. Respondent 1 sets Estimated Service Charges for Shared Ownership Lessees in line with the most up to date budgetary information available from Respondent 1's Managing Agents. Respondent 2 produces Final Service Charge statements to the Shared Ownership Lessees when Respondent 2 reconciles actual expenditure at the end of each financial year. Expenditure includes any payments that they have made to the Respondent 1's Managing Agents during the year in accordance with their head leases.

41. Respondent 2 makes payments to the Respondent 1's Managing Agents when demanded, taking the view that they are fair and reasonable in line with the terms of the duties carried out under the Sixth Schedule of the head leases.

42. However, in its role as an intermediary between the Shared Ownership Lessees and Head Lessor, Respondent 2 is willing to raise issues with Respondent 1's Managing Agents if there are concerns raised to Shared Ownership Lessees that the maintenance expenses have not been billed reasonably.

43. The Sixth Schedule of the Head Lease does not explicitly mention access to a communal lift, so it is not clear whether it is a facility Respondent 2 should reasonably be expected to contribute towards. Respondent 2 noted that the Shared Ownership Lessees together with the other Applicants had agreed to pay £1,230.00 in full and final settlement as stated in the solicitor's letter dated 4th March 2021.

Respondent 1's Case

44. Respondent 1 provided a Statement of Case prepared by its Representatives, the Managing Agents, in which it confirmed that the financial year runs from 1st June to 31st May, so the years in issue are the years ending 31st May 2019 and 2020 for which the accounts have been produced. The charges for these years are therefore the actual costs incurred. The accounts for the actual costs

for the year 2021 have still to be finalised and produced and therefore the Service Charge provided is the estimated costs for that year.

45. Flats 1-11, 45 Highbridge Street form part of a mixed-use development. The communal entrance to Flats 1-11 is situated on the front elevation between two of the commercial properties. A single lift is present within the building comprising Flats 1-11, which is accessed via a separate communal entrance, by those with such granted access.

46. Four of the eleven flats are owned by a Housing Association, who hold a Headlease for each individual property. Shared ownership sub-leases have then been issued out of the four individual Headleases to Sub-Leaseholders. The remaining seven flats are owned by individual Leaseholders.

47. Across all properties, the original Leases were registered with the Landlord, George Wimpey North London Limited. The freehold interest in the development now resides with the Respondent, Abacus Land 4 Limited.

48. It was stated that the basis for the payment of lift costs was that the Respondent is of the view that the Lease only allows for one Service Charge schedule to be utilised for all residential properties across the Development.

49. Within the one schedule, the concept of 'fair and reasonable' is then used to allocate the proportions to each property based on the benefit of the services provided. Further detail and explanation of this view is shown below.

50. In Paragraph 1 of the Seventh Schedule, it is stated that the 'Lessees Proportion' means:
1(a) - "The Part A Proportion of the amount attributable to the Block being the matters mentioned in Part "A" of the Sixth Schedule hereto and of whatever of the matters referred to in Part "C" of the said Schedule are expenses properly incurred by the Lessor which are relative to the matters mentioned in Part "A" of the said Schedule";

1(b) - "The Part B Proportion of the amount attributable to the Commercial Block in connection with the matters mentioned in Part "B" of the Sixth Schedule hereto and of whatever of the matters referred to in Part "C" of the said Schedule are expenses properly incurred by the Lessor which are relative to the matters mentioned in Part "B" of the said Schedule".

51. The Part B Proportion, as shown in the Particulars, relates to the Commercial properties only and does not relate to any of the Residential properties, therefore, any references to this can be disregarded.

52. The Part A Proportion, as shown in the Particulars, is shown as 'Private Flat Block Costs' and refers to being a fair and reasonable proportion of the Maintenance Expenses, of which is defined as being:
"The moneys actually expended or reserved for periodical expenditure by or on behalf of the Lessor at all times during the Term in carrying out the obligations specified in the Sixth Schedule."

53. Taking Paragraph 1(a) above into consideration, the word 'Block' is stated and this is defined as:
"That part of the Building containing several flats and the Demised Premises BUT NOT any part or parts of the Commercial Block".

54. The Respondent's view is that the "Block" includes all flats within the Building, as opposed to just Flats 1-11, 45 Highbridge Street.

55. Taking Clause 1(a) above into consideration again, this provides reference to all matters in Parts "A" and "C" of the Sixth Schedule. Part "A" is referred to as 'Residential Block Costs' as a whole and is interpreted as being all costs in relation to the residential properties. Therefore, it is considered that all costs are to be included in one Service Charge schedule, of which all residential properties pay a proportion.

56. In determining the Service Charge proportions, the concept of 'fair and reasonable' has been used to assign a proportion based on the benefit of the services provided. This, therefore, means that the Applicants' proportions have taken into account the fact that there is no benefit of using the lift.

57. The services provided in relation to lift costs are allowed within the lease at Parts "A" and "C" of the Sixth Schedule, as follows:

Lift Maintenance:
Paragraph 4 (Part "A") – "Inspecting, rebuilding, repairing, re-pointing, renewing, cleaning or otherwise treating as reasonably necessary and keeping the Block and every part thereof (and the Service Installations ancillary thereto) in good and substantial repair, order and condition and renewing and replacing all worn or damaged parts thereof."

Lift Telephone:
Clause 3 (Part "C") – "Paying all rates, taxes, duties, charges, assessments and outgoings whatsoever (whether parliamentary, parochial, local or of any other description) assessed, charged or imposed upon or payable in respect of the Maintained Property or any part thereof."

Engineering & Lift Insurance:
Paragraph 1 (Part "C") – "Insuring any risks for which the Lessor may be liable as an employer of persons working or engaged in business on the Maintained Property or as the owner of the Maintained Property or any part thereof in such amount as the Lessor shall reasonably think fit."

58. In addition to Paragraph 4.7, there are allowances for the Landlord to provide additional services and recover additional expenses if there is a reasonable requirement to do so. This is shown within the Lease as follows:

Paragraph 11 (Part "C") - "Providing, inspecting, maintaining, repairing, reinstating and renewing any other equipment and providing any other service or facility which in the opinion of the Lessor it is reasonable to provide."

59. Paragraph 15 (Part "C") – "All other reasonable and proper expenses (if any) incurred by the Lessor "
Paragraph 15(a) – "in and about the maintenance and proper and convenient management and running of the Development"

60. The Application refers to disputed costs for the year 2019/20 of:
Lift Control Board - £9,276 (incl. VAT)
Additional Lift Works - £3,810 (incl. VAT),
Upon further investigation, these costs were found not to be incurred during 2019/20 but they were actually incurred in 2020/21.

Discussion

61. At the Hearing the Tribunal expressed the view based upon the submissions made by the parties in written representations that the issue as to whether or not the Applicants as Leaseholders of the Highbridge Street Flats were required to pay a contribution towards the maintenance of the lift depended on the definition of "Block" in the Lease.

62. The Respondent's Representatives said there are just two Service Charges: one for the Residential Block and one for the Commercial Block. They say Residential Block means all the flats on the Development and Commercial Block means all the businesses premises on the Development. Each Block should have the same Service Charge Heads of Expenditure in the Schedule of service costs and the only differentiation is between flats within the Building or Buildings by way of the apportionment.

63. In reply the Applicants' Representative stated that the definition of "Block" as "that part of the Building containing several flats and the Demised Premises but not any part or parts of the Commercial Block" was not as clear as the Respondent's Representative suggested and did not exclude the Applicant's interpretation which was that "Block" related to the residential flats in that part of the Building not all the flats. If the distinction was between Commercial Block and Residential Block then there would be a definition of Residential Block.

64. The Respondent's Representative conceded that it would have been helpful if the Lease had set out a clear definition of Residential Block as being all the Residential Flats or similar. However, it was submitted that the definition of "Block" was in effect the definition of Residential Block. In support of this reference was made to the Particulars which defined only two Proportions as Part A Proportion (Private Flat Block Costs) and Part B Proportion (Commercial Block Costs).

65. In response to the Tribunal's questions the Respondent's Representative referred the Tribunal to the definition of "the Properties" which were defined as "all the flats and the Commercial Block shown uncoloured on the Plan other than the Demised Premises" and the definition of "the Dwellings" as "the Properties and the Demised Premises forming the Buildings or the Block or the Development (as the context permits) and a Dwelling means any one of them".

66. It was submitted that if "the Properties" meant all the units other than the Demised Premises and "the Dwellings" meant all the units including the Demised Premises then there was no individual definition of the residential units of flats other than "the Block". "The Block" was the only definition which included the residential units or flats but excluded the commercial units.

67. Following the above submissions, the Tribunal then asked the parties to address the issue of apportionment.

68. The Applicants' Representative submitted that the costs for the lifts should be removed from the Service Charge and the Applicants should just pay for the services relating to the Highbridge Street Flats.

69. The Respondent's Representatives said that prior to the year ending 31st May 2019 the Service Charge was calculated on the basis of 6 schedules; Social Housing, Private Flat, Flat without Lift, Flat private Entrance, Estate and Commercial. In 2017 Respondent 2 was of the opinion that this was not in accordance with the Lease and that this should be changed to two schedules of "Commercial Block" and Residential "Block". The Service Charge was therefore reviewed during the year ending 31st May 2018 and was communicated to residents on 13th September 2017.

70. By way of further explanation reference was made to a letter dated 23rd August 2017 to Mr Staal of Flat 6 which had been referred to by both parties. This stated as follows:
"The Re-formatting of the Service Charge: earlier this year there was a full lease review undertaken as per the request of the Freeholder, as there was uncertainty over the structure of the service charge. As a result of this. It was identified that the service charge should be comprised of two schedules only: residential and commercial. Now within the two aforementioned schedules, the service charge was apportioned on a per unit basis to ensure that every leaseholder was paying a "fair and reasonable" proportion of the costs incurred by the development. Therefore, although the residential schedule would include items which you would not have access top (e.g., a lift), the service charge has been apportioned on a per unit basis and leaseholders will be paying different percentages based on the services they receive. As you have mentioned in correspondence, there have been multiple contentious issues surrounding the structure of the service charge in the past and historically been calculated incorrectly. In light of the lease review, all leaseholders will now be charged the correct level of service charge as per the terms of their lease. Once again, I would like to re-iterate that whilst there are now two schedules in the service charge, the residential costs have been apportioned on a per unit basis and you will not be contributing towards services which you do not have access to."

71. The Applicants' Representatives referred the Tribunal to the last sentence and the Service Charge Schedule which referred to the lift. The Respondent acknowledged that this might appear anomalous but referred the Tribunal to the passage in the letter which stated:

"However, although the residential schedule would include items which you would not have access to (e.g., a lift), the service charge has been apportioned on a per unit basis and leaseholders will be paying different percentages based on the services they receive."

72. In response to the Tribunal's questions the Respondent's Representatives said that there were four types of flat in the Residential Block corresponding with the parts of the Building or Buildings of the Development in which they were situated and hence the services to which they had access. The Respondent's Representatives submitted that a fair and reasonable proportion was achieved by charging each of the flats within each part the following percentages:

1. The smaller four storey Building has 13 apartments. It has no lift but does have Internal Common Areas. Their proportion of all the costs attributed to the Residential Block (including the lift costs) is 1.98% for each apartment.
2. There are 5 flats or maisonettes with their own entrances in the larger Building, have no access to a lift and do not have Internal Common Areas. Their proportion of all the costs attributed to the Residential Block (including the lift costs) is 1.09% for each maisonette.
3. The 11 flats in the larger Building referred to here as the Highbridge Street Flats, which are the subject of these proceedings, have no access to a lift but all the flats have Internal Common Areas. Their proportion of all the costs attributed to the Residential Block (including the lift costs) is 2.35% for each flat.
4. The 16 flats in the larger Building referred to here as the Winchester Close Flats, have access to a lift and all the flats have Internal Common Areas. Their proportion of all the costs attributed to the Residential Block (including the lift costs) is 2.68% for each flat.

73. The Respondent's Representatives said the apportionments are taken to 3 percentage points which makes the 100%. The percentage apportionments are based on the previous calculations. Overall, it was submitted that the apportionments are fair and reasonable and reflect the services each flat receives.

74. The Applicants' Representative referred the Tribunal to the costs to be incurred for repairs to the lift which will now appear in the service charge for the year ending 31st May 2021. She submitted that it was not fair and reasonable to have to contribute to such high costs.

75. The Tribunal appreciated the point made but said that in considering whether the apportionments were fair and reasonable it would need to take into account potential repairs for the whole Building. For example, it noted that a part of the Highbridge Street Flats had a flat roof which in the knowledge and experience of the Tribunal members was likely to require repair works sooner than the pitch roof on the rest of the Building. In addition, the larger Building was clad at both the Highbridge Street Flats and the Winchester Close Flats ends. This too was likely to require maintenance sooner than the area with brick elevations such as the smaller Building, the elevations of which were all brick with no cladding. Therefore, whereas costs might be incurred in one year in maintaining one part of the Development, in another year another part of the Development would require maintenance thus incurring additional costs.

It may therefore over time be advantageous to all residents to have the costs spread provided there is sufficient allowance for the services received.

Decision

76. The Tribunal found that both parties presented their cases clearly both in writing and orally, for which it was most grateful.

77. Firstly, the Tribunal considered the interpretation of the Lease by each party. It would have been helpful if the drafting had been clearer with regard to the definition of the Blocks in that "Commercial Block" was defined as all the Commercial premises. The Tribunal found that "Block" alone was ambiguous in that it referred to "the Building containing several flats" not all the flats or the Buildings containing all the flats. The Tribunal also could not see why the Lease having identified and defined the "Commercial Block" did not then identify and define the "Residential Block" rather than just refer to "Block".

78. Notwithstanding this confusion the Tribunal found that, whereas there might possibly be another interpretation, that adopted by Respondent 1 was reasonable and in keeping with the wording of the Lease. The Tribunal was particularly persuaded of this by the Particulars which defined only two Proportions as Part A Proportion (Private Flat Block Costs) and Part B Proportion (Commercial Block Costs). The Tribunal found that the meanings given to other words such as "Dwelling" and "Properties" which it thought might have elucidated matters more were neither helpful nor contradictory of Respondent 1's interpretation.

79. Secondly, the Tribunal considered the method of apportionment. In doing so the Tribunal had regard to the cases of *Fairman v Cinnamon (Plantation Wharf) Limited* [2018] UKUT 421 (LC) Apportionment *Williams v Aviva Investors Ground Rent* [2020] UKUT 111 (LC) in which *Gater and others v Wellington Real Estate Limited* [2019] UKUT 561 (LC) and *Windermere Marina Village Limited v Wild and Barton* [2014] UKUT 163 (LC). It found that the cases establish that section 27A (6) of the Landlord and Tenant Act 1985 renders void any provision of a lease that purports to enable the re-calculation of a specified service charge apportionment. However, a provision, such as the definition of "Part A Proportion (Private Flat Block Costs)" which enables the variation of an apportionment to ensure it is "fair and reasonable" enables a tribunal to make such recalculation.

80. The Tribunal appreciated the Applicants' concerns that it appeared that they were paying for a service which they were not receiving i.e., the lift. However, because, on the basis of the Respondent's interpretation of the Lease, all the flats contributed to all the costs, the Respondent's Managing Agent had identified that specific parts of the Development were receiving a different level of services. To take account of this the Respondent's Managing Agent had made a percentage apportionment for each flat in each Building or part of a Building dependent on the service received.

81. Having accepted the Respondent's interpretation of the Lease the Tribunal considered whether a percentage adjustment dependent on the services

received was "fair and reasonable". The Tribunal noted the differentiation made between flats with no internal common areas and no lift, flats with internal common areas and a lift and flats with internal common areas and no lift with an additional distinction in this category between the two Buildings. There was no evidence to show that the differentiation was unreasonable. Most particularly it took account of the main contention of the Applicants that they were paying for a lift to which they did not have access.

82. The Tribunal therefore found the method of apportionment fair and reasonable.

83. Thirdly, the Tribunal considered whether the amount of the apportionment was fair and reasonable. In doing so the Tribunal made some calculations of its own to check whether Respondent 1's percentage apportionments would mean the Applicants would be disadvantaged and paying proportionally more than those Leaseholders who had the benefit of services such as the lift. In doing so it took account of the costs of repairs to the lifts to be charged in year ending 31st May 2021.

84. The Tribunal was satisfied that the percentage apportionment was fair and reasonable in amount.

85. The Tribunal therefore determined that the apportionment for the costs incurred for the years ending 31st May 2019 and 2020 and the costs to be incurred for the year ending 31st May 2021 was reasonable.

86. The Applicants had submitted that Respondent 1 should not be able to re-claim the Service Charge for the lift for the years ending 31st May 2019 and 2020 by reason of an estoppel of convention.

87. The Tribunal considered the law on estoppel by convention as set out in *Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396 (TCC)*, by Akenhead J at paragraph 49:

> *49. From the cases, one can conclude that the relevant law on estoppel by convention is:*
>
> *(a) An estoppel by convention can arise when parties to a contract act on an assumed state of facts or law. A concluded agreement is not required but a concluded agreement can be a "convention".*
>
> *(b) The assumption must be shared by them or at least it must be an assumption made by one party and acquiesced in by the other. The assumption must be communicated between the parties in question.*
>
> *(c) At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably be the case that both parties will have relied upon it. There is nothing prescriptive in the use of "reliance" in this context: acting upon or being influenced by would do equally well.*
>
> *(d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am*

not convinced that "detrimental reliance" represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention; in that context, Goff J at first instance in the Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] 1 QB 84 case described that this is what is needed and Lord Denning talks in these terms.

(e) Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed.

(f) The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.

88. In applying the statement of the law to the facts of the case the Tribunal finds that there may have been a common assumption as to the law prior to the year ending 31st May 2019. However, as from 23rd August 2017 the Respondent had adopted a different interpretation which the Tribunal found was reasonable and not contrary to the wording. Therefore, for the years in issue there was no common assumption as required by a), b) and c) above. In addition, the Tribunal found the method and amount of apportionment to be fair and reasonable therefore there was no unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position, as required by d).

89. The Tribunal found that estoppel by convention did not apply.

Submissions Re Section 20C & Paragraph 5A of Schedule 11

90. The Applicants applied for an order under section 20C of the Landlord and Tenant Act 1985 that the landlord's costs arising from the proceedings should be limited in relation to the service charge and for an order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 to reduce or extinguish the Tenant's liability to pay an administration charge in respect of litigation costs.

91. The Applicant stated that as an executrix she was obliged to pursue the matter and as she had no resources herself any costs would have to come out of the estate.

92. The Respondent's Representatives stated that Respondent 1 did not intend to charge for these proceedings.

Decision re Section 20C & Paragraph 5A of Schedule 11

93. Leases may contain provisions enabling a landlord to obtain the costs incurred in proceedings before a tribunal or court either through the service charge or directly from a tenant. Where the lease contains these provisions, the costs of the proceedings could be claimed by a landlord under either lease provision but not both. The difference between the two was referred to in the *Freeholders of 69 Marina St Leonards on Sea v Oram & Ghoorun* [2011] EWCA Civ 1258.

94. The provision enabling a landlord to claim its costs through the service charge might be seen as collective, in that a tenant is only liable to pay a contribution to these costs along with the other tenants as part of the service charge. Under section 20C of the Landlord and Tenant Act 1985 a tribunal may, if it is satisfied it is just and equitable, make an order that a landlord's costs, either in part or whole, cannot be re-claimed through a service charge.

95. The provision enabling a landlord to claim its costs directly from a tenant might be seen as an individual liability, whereby a tenant alone bears the landlord's costs of the proceedings. Under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 a tribunal may, if it is satisfied it is just and equitable, make an order that a landlord's costs, either in part or whole, cannot be re-claimed directly from a tenant.

96. Taking into account that the Respondent Landlord had no intention of recouping its costs through the Service Charge the Tribunal considered whether in any event it was just and equitable to make an order under section 20C of the Landlord and Tenant Act 1985 or paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

97. The Tribunal found that in the circumstances of changing the way in which the service charge was to be apportioned and collected following a review of the Lease either party might have brought these proceedings; the Applicants to request whether the Respondent was correct and the Respondent to have its interpretation confirmed or otherwise. It was advantageous to both to have the matter settled and both parties produced clear cases.

98. The Tribunal therefore finds the Respondent right not to include its costs of these proceedings in the service charge.

99. Therefore, in concurrence:

    1) The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that the Landlrod's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Tenants.

2) The Tribunal makes an Order extinguishing the Tenants' liability to pay an administration charge in respect of litigation costs under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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.

2. 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.

3. 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.

4. 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.

APPENDIX 2 – THE LAW

The Law

1. The relevant law is contained in the Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.

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

3. Section 19 Landlord and Tenant Act 1985
   (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.

4. Section 21A Withholding of service charges
   (1) A tenant may withhold payment of a service charge if—
      (a) the landlord has not provided him with information or a report—
         (i) at the time at which, or
         (ii) (as the case may be) by the time by which,
         he is required to provide it by virtue of section 21, or
      (b) the form or content of information or a report which the landlord has provided him with by virtue of that section (at any time) does not conform exactly or substantially with the requirements prescribed by regulations under that section.

(2) The maximum amount which the tenant may withhold is an amount equal to the aggregate of—
  (a) the service charges paid by him in the period to which the information or report concerned would or does relate, and
  (b) amounts standing to the tenant's credit in relation to the service charges at the beginning of that period.

(3) An amount may not be withheld under this section—
  (a) in a case within paragraph (a) of subsection (1), after the information or report concerned has been provided to the tenant by the landlord, or
  (b) in a case within paragraph (b) of that subsection, after information or a report conforming exactly or substantially with requirements prescribed by regulations under section 21 has been provided to the tenant by the landlord by way of replacement of that previously provided.

(4) If, on an application made by the landlord to the appropriate tribunal, the tribunal determines that the landlord has a reasonable excuse for a failure giving rise to the right of a tenant to withhold an amount under this section, the tenant may not withhold the amount after the determination is made.

(5) Where a tenant withholds a service charge under this section, any provisions of the tenancy relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

5. Section 27A Landlord and Tenant Act 1985

(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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which –
  (a) has been agreed or admitted by the tenant,
  (b) has been or is to be referred to arbitration pursuant to a post arbitration agreement to which the tenant was a party
  (c) has been the subject of a determination by a court

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

6. 20C Landlord and Tenant Act 1985
Limitation of service charges: costs of proceedings.

(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.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

7. Schedule 11 of the Commonhold and Leasehold Reform Act 2002
5A Limitation of administration charges: costs of proceedings

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.