FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BK/LLE/2021/0002** **LON/00BK/LLE/2021/0003** **LON/00BK/LSE/2021/0211**
HMCTS Code	**:**	**V: CVPREMOTE**
Property	**:**	**Gloucester Square Garden, London, W2**
First Applicant	**:**	**Chelwood House Freehold Company Limited**
Representative	**:**	**Joshua Dubin (Counsel) instructed by Bower Bailey LLP**
Second Applicant/ Lead Applicant	**:**	**The Church Commissioners for England**
Representative	**:**	**Tim Hammond (Counsel) instructed by Charles Russell Speechlys LLP**
Interested Party	**:**	**The Garden Committee**
Representative	**:**	**Interests represented by the Second Applicant**
Active Respondents	**:**	**13/14 Gloucester Square Freehold Limited;** **26/28 Gloucester Square Limited;** **44-46 Gloucester Square Freehold Ltd;** **Susan Dale and Julian Gleek (Freeholders of 47 Gloucester Square);** **48-49 Gloucester Square Limited;** **21 Hyde Park Square Freehold Limited**
Representative	**:**	**Piers Harrison (instructed under the Direct Access Scheme)**

Interested Parties	**:**	**The nine leaseholders of the Active Respondents specified at page 22 of the Bundle of Documents**
Passive Respondents	**:**	**The 18 Freeholders at Gloucester Square specified at page 20 of the application bundle;** **The six Leaseholders at Gloucester Square specified at page 21 of the Bundle.**
Type of application	**:**	**Apportionment of Estate Charges and Service Charges**
Tribunal	**:**	**Judge Robert Latham** **Evelyn Flint FRICS** **Owen Miller**
Dates and Venue of Hearing	**:**	**18 and 19 January 2022 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**21 February 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The parties have provided a Bundle of Documents (954 pages) and a Bundle of Authorities (114 pages) to which reference is made in this decision.

Decisions of the Tribunal

(1) The Tribunal determines that the Points Based method proposed by the Active Respondent should be used to apportion the Garden Rate between the Garden Ratepayers.

(2) The Tribunal further determines that this method of apportionment should be backdated to 1 January 2021, and that any estate/service charges payable for any period after this date should be apportioned in this manner.

The Applications

1. The Tribunal is required to determine three applications relating to the apportionment of the charges payable (“**the Garden Rate**”) in respect of Gloucester Square Garden (“**the Garden**”) which is enjoyed by residents of Gloucester Square, London, W2 (“**the Estate**”).

2. The Church Commissioners for England (“**the Commissioners**”) are the freehold owner of Gloucester Square which is one of six garden squares within the Commissioners’ broader Hyde Park Estate. The Square contains a total of 28 properties all of which were originally held under leases. There are now 22 enfranchised properties and six properties that remain unenfranchised. Some of the enfranchised properties have in turn been sub-divided and leased as individual units. The enfranchised properties are governed by the terms of an Estate Management Scheme (“**the EMS**”) approved by the then Leasehold Valuation Tribunal (“**LVT**”) on 8 September 1998. The unenfranchised properties are governed by the terms of their leases. The Garden is managed by **the Garden Committee**, to which powers have been transferred by the Commissioners. The Garden Committee is an unincorporated body consisting of volunteer owners/occupiers at Gloucester Square, who are themselves elected by the owners/occupiers of the properties at Gloucester Square. The Garden Committee has been in existence (in some form) for many years. The Commissioners have represented the interests of the Garden Committee in these proceedings.

3. The three applications are:

   (i) LON/00BK/LLE/2021/0002: On 29 March 2021, Chelwood House Freehold Company Limited **(“Chelwood”)** applied for a determination of its liability to pay and the reasonableness of the estate management charge, namely the Garden Rate, pursuant to section 159(6) of the Commonhold and Leasehold Reform Act 2002 (“**the 2002 Act**”). Chelwood is currently required to pay 47.043% which it contends is no longer a fair proportion of the outgoings. It contends that its charge should rather be 28.712% based on gross external area. This should be apportioned on the basis of building footprint multiplied by the number of floors of each relevant building as outlined in the report of its expert Mr Dean Ferdinandi MRICS (“**the GEA method**”). Chelwood ask for this to be backdated to 1 January 2016, namely to the service charge demand made on 31 December 2015. Chelwood named the Commissioners as respondent and the Garden Committee as an interested party.

   (ii) LON/00BK/LLE/2021/0003: On 11 June 2021, the Commissioners applied for a determination as to a fair and reasonable prospective apportionment of the Garden Rate pursuant to section 159(6) of the 2002 Act. Traditionally, the Garden Rate has been apportioned on the basis of rateable values. The Commissioners accept that the Garden Rate needs to be reviewed. They propose that it should be apportioned on the basis of “**the Unit Charge method**” devised by their expert,

Mr Charles Seifert FRICS, so that each of the 116 contributing units pays 0.862%, with CHFC bearing 33.261% altogether. The Respondents to this application are the **22 Freeholders** of the enfranchised properties. The Commissioners ask for any change to take effect from 1 January 2022, namely the start of the current service charge year.

(iii) LON/00BK/LSC/2021/0211: On 11 June 2021, the Commissioners applied concurrently for a determination as to a fair and reasonable prospective apportionment of the Garden Rate pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**"). The Respondents to this application are the **six Leaseholders** of the properties at Gloucester Square which have not been enfranchised. Again, the change should take effect from 1 January 2022.

4. On 25 June 2021, the Tribunal held a Case Management Hearing ("**CMH**") at which Directions were given. Pursuant to these Directions, on 9 July, the Commissioners served the following on the Respondents: (i) a copy of the Directions (at p.4) and (ii) Statements of Cases prepared by both Chelwood (p.79) and the Commissioners (p.86) setting out details of their proposed schemes.

5. On 4 August, the Garden Committee organised a meeting at which these options were discussed (at p.222). Mr William Cortazzi, the then Chairman of the Garden Committee, opened the meeting by stating that the Garden Committee was not legally represented in these proceedings and was neutral as to which means of apportionment was adopted. Its role had rather been to facilitate a speedy resolution. Questions were raised as to why an application to this Tribunal had been necessary and why this could not have been resolved within the Garden Committee.

6. The Directions required the Respondents to complete a questionnaire specifying (i) whether they wished to take an active part in these proceedings; (ii) which scheme they preferred; (iii) whether they wished to propose any alternative scheme or any modification to the proposed schemes; and (iv) whether they considered that the variation should be backdated. The Commissioners received 20 Reply Forms (see p.239). 13 Responses stated that they did not wish to take an active part in these proceedings. 12 Responses supported the Unit Charge method proposed by the Commissioners. All the Responses (save for one where the relevant box was not completed) opposed the backdating of any variation. The responses to the questionnaire are at p.276-295.

7. On 13 August 2021 (at p.242), Mr Tom McErlain, a director of 13/14 Gloucester Square Freehold Limited, proposed a third scheme, namely "**the Points Based method**" with points assigned to a property depending upon whether it is a House (+2) or a Flat (+1) and whether it has direct accesses onto the Garden (+1) or not (+0).

8. The Points Based method is now supported by five further freeholders, namely (i) 26/28 Gloucester Square Limited; (ii) 44-46 Gloucester Square Freehold Ltd; (iii) Susan Dale and Julian Gleek (freeholders of 47

Gloucester Square); (iv) 48-49 Gloucester Square Limited; and (v) 21 Hyde Park Square Freehold Limited. We refer to the 5 freeholders who support the Points Based method as "**the Active Respondents**".

9. Fifteen of the freeholders and the six leaseholders have not participated in these proceedings. These are "**the Passive Respondents**".

10. Eight leaseholders of 44-46 Gloucester Square Freehold Ltd and one leaseholder of 47 Gloucester Square have applied to be interested parties (their names are listed at p.22). They all support the Points Based method and oppose any backdating.

11. 21 Hyde Park Square Freehold Limited is the freehold owner of the following properties: (i) 43 Gloucester Square; (ii) 3 Southwick Place (now 43a Gloucester Square); and (iii) 20 & 21 Hyde Park Square. The leaseholders of these three properties have access to the Garden at Gloucester Square and the garden at Hyde Park Square. It is accepted that 21 Hyde Park Square Freehold Limited is obliged to contribute to the garden rates for both gardens.

12. Over the subsequent weeks, a number of leaseholders have stated that they now prefer the Points Based method to the Unit Charge method proposed by the Commissioners (see p.296-304). On 12 September 2021, Dr Malcolm Finlay, a Consultant Cardiologist & Electrophysiologist, wrote to the Tribunal in these terms:

    > "I have now been in contact with the Fair Points Model Representatives and have had an opportunity to further digest the options and the implications being put to the Tribunal. It was remarkable how little I had understood of the implications of either system proposed, both of which seem either unworkable or grossly unfair particularly to those in flats on the square without direct access to the Garden. I wish to change my representation to support the proposal of the FPMR: i.e. a points based system that appears workable, fair and provides reasonable apportionment of the costs of the garden square. As such I will be participating in proceedings through this group rather than being an independent active participant. May I highlight that I am sure that some other residents may have not fully understood this model or implications of the other models proposed. It appears that some of the explanations provided were obscure to us non-experts and the importance of these legal proceedings not made clear to me certainly."

13. Pursuant to the Directions, the parties have filed the material upon which they seek to rely:

    (i) Chelwood: (a) Supplemental Statement of Case (at p.91-105); (b) Expert Report of Mr Ferdinandi (p.324-348); (c) Witness Statement of Mr Michael Clasper (p.305-319); and (d) a Reply (p.705).

(ii) The Commissioners: (a) Statement of Case (at p.106-116); (b) Expert Report of Mr Seifert (p.349-675); and (c) Witness Statement of Mr Neville Bass (p.320-323).

(iii) The Active Respondents: (a) Summary Statement of Case (at p.233-237); (b) Statement of Case (p.117-232). The Statement of Case has been prepared by Mr McErlain who gave evidence on behalf of the Active Respondents.

14. Pursuant to the Directions, on 7 December, the experts met. Mr McErlain represented the Active Respondents. Their Statement of Agreed Facts and associated Appendices are at p.712-719. The following facts are apparent:

(i) The Estate consists of 25 houses and 7 blocks. There are 91 flats in the blocks. Chelwood House is a purpose-built block of 38 flats. 53 additional flats have been created from conversions within the original Victorian properties. The freeholds of five of the houses have been enfranchised by Gloucester Square Management Company Limited.

(ii) The 7 enfranchised blocks include the Garden Rate as part of their block service charge. This will therefore be apportioned to their 91 lessees in accordance with the terms of their leases. It seems that this tends to be apportioned on the basis of the GIA (gross internal area) of the individual flats.

(iii) Any lessee of a house or of a block has a right of access to the Garden. They are also entitled to attend the Annual General Meeting of the Garden Committee and to be members of the Executive Committee which is responsible for the day-to-day management of the Garden.

(iv) The Garden Committee have appointed managing agents to manage the Garden, namely Principia Estate and Asset Management ("**Principia**") who previously traded under the name of Farrar Property Management ("**Farrar**"). They have played no part in these proceedings.

(v) Knight Frank manages the Estate on behalf of the Commissioners. They have played no part in these proceedings.

(vi) 13 of the houses have direct access onto the Garden. None of the flats have such access. Mr McErlain considers that direct access onto the Garden is a significant benefit. Neither Mr Seifert or Mr Ferdinandi accept this.

(vii) The houses are significantly larger than the flats. Mr Seifert accepts that he made a number of errors in his table at p.570. Most significantly, he had included details for "3 Gloucester Square" as a house; this rather related to "Flat 3, 13-14 Gloucester Square". It is now accepted that the houses are substantially larger than the flats.

(viii) None of the houses have taken an active role in these proceedings.

(ix) There are three caretakers' flats at Chelwood House, 26-28 Gloucester Square and 21 Hyde Park. The caretakers have no access to the Garden, and it is agreed that they should be excluded from the Unit Charge and the Points Based methods. These flats will be included in the GEA method, but the impact is modest.

(x) 50 Gloucester House does not currently have access to the Garden. Any apportionment would need to be adjusted, were this house to be included.

The Hearing

15. Mr Joshua Dubin (Counsel) appeared on behalf of Chelwood. He was accompanied by Mr James Hulme, from his Solicitors, Bower Bailey LLP ("**Bower Bailey**"). He adduced evidence from Mr Michael Clasper who is the lessee of 36 Chelwood House and from his expert, Mr Dean Ferdinandi, MRICS.

16. Mr Clasper has been on the Chelwood board since 2011, initially as the Deputy Chairman and, since August 2018, as the Chairman. He states that throughout his period on the board, there has been disquiet about the disproportionate share of the Garden Rate borne by Chelwood House. However, matters were only brought to a head in 2016, when the Commissioners proposed to reinstate the metal railings which had been removed during the Second World War at a cost in excess of £400k. The Commissioners have contributed £40k to the cost. At this time, the late Sir Alan Greengross was the chairman of Chelwood. His primary concern was whether the railings were an improvement to which Chelwood should not be required to contribute. Apportionment seemed to be a secondary concern. Mr Clasper conceded that Chelwood had not liaised with the Garden Committee before issuing its application. The Tribunal notes that two Chelwood House lessees have been members of the Garden Committee, namely Baroness Sally Greengross and Mr Avinash Vazirani (the Treasurer). Neither were called to give evidence.

17. Mr Ferdinandi is a quantity surveyor, rather than a general practice surveyor. He has not given evidence to a court or tribunal on valuation matters, albeit that he has prepared reports. His first report is dated 24 June 2020 (at p.916). He notes that in the RICS Code of Measuring Practice (6th Edition) Gross Internal Area ("**GIA**") is an appropriate means for the apportionment of service charges. However, this is not practical for the Estate as there is no record of the GIAs of the 25 houses and 91 flats and it would be disproportionate to measure these. He therefore proposes the GEA method based on Gross External Area **("the GEA method**"). He proposes that this is computed by taking the footprint of each block and multiplying this by the number of floors. He notes that the Hyde Park Square Garden Committee adopted this method at Hyde Park Square. However, Gloucester Square is not uniform. Both Mr Seifert and Mr McErlain made a number of criticisms as to the manner in which Mr Ferdinandi had computed GEA. In his initial report, dated 24 June 2020, Mr Ferdinandi had suggested that Chelwood House should pay 28.862% and 13/14 Gloucester Square 6.216% (p.335). In his report dated 14

October 2021, he revised these apportionments to 28.712% for Chelwood House and 5.497% for 13/14 Gloucester Square (at p.344). After the experts met, agreement was reached of 27.946% for Chelwood House and 6.282% for 13/14 Gloucester Square ("**GEA Plot**" at p.719). However, Mr Seifert and Mr McErlain argue that this method adversely affects the traditional Victorian properties due to the "tapering effect" (see below). If adjustments are made for this, the apportionment would be 28.135% for Chelwood House and 5.360% for 13/14 Gloucester Square ("**GEA Adjusted**" at p.720). This demonstrates the lack of certainty in any system of apportionment based on GEA.

18. Mr Tim Hammond (Counsel) appeared on behalf of the Commissioners. He was accompanied by Ms Lauren Fraser from his Solicitors, Charles Russell Speechlys LLP ("**CRS**"). He adduced evidence from Mr Neville Bass who is the lessee of 39 Gloucester Square and a member of the Garden Committee, and from his expert, Mr Charles Seifert FRICS.

19. Mr Bass is a retired orthodontist. He lives at 39 Gloucester Square which is one of the town houses which were constructed in 1938 and which has direct access onto the Garden. He bought the house in 1998. Mr Bass occupies the house with his son, daughter-in-law and grandchildren. He is a member of Gloucester Square Management Limited, the vehicle established to enfranchise the leasehold interest in Nos. 38 to 41 Gloucester Square. This is one of the Passive Respondents in these proceedings. Mr Bass has been involved with the Garden Committee since 1998. He has been both the Treasurer and the Chairman. He currently directs the gardeners employed to manage the Garden. The Garden Committee has no view on the preferred means of apportionment, but opposes any backdating. He stressed that he was giving evidence in a personal capacity. He stated that the Garden Committee had had misgivings about the railings project which was proposed by the Commissioners. The Commissioners had threatened to sell keys to the Garden to other local residents if there was any financial shortfall in the railings project. He suggested that the same would apply were there to be any deficit arising from any decision to backdate the new apportionment.

20. Mr Seifert is a general practice chartered surveyor with considerable experience in Leasehold Reform, rent reviews and service charge disputes. He was instructed by the Commissioners in response to Chelwood's application to this tribunal. He has considered eight different apportionment methods, but his preferred methods are the three options which this tribunal is asked to consider. He prefers **the Unit Charge method** as in his opinion all residents are potentially able to derive the same benefit and use from the Garden with the costs being split equally. He notes that the GEA method has been adopted at Hyde Park Square. However, he does not provide any evidence as to how this has worked in practice. He rejects the Points Based method as being arbitrary and not reflecting core RICS service charge provisions. He notes that the Grosvenor Estate has adopted a points based system at three of its garden squares, namely Eaton Square, Belgrave Square and Chester Square. The points reflect whether it is a flat or a house and whether the house has

mews access. He does not explain the rationale for the difference between the flats and house (1:6 at Eaton Square; 1:5 at Belgrave Square). However, this may reflect the number of floors, with each floor having been converted to self-contained flats. He initially rejected Mr McErlain's evidence that houses are substantially larger than the flats. However, when the experts met, he agreed that he had made a number of errors in his Table at p.570. On the basis of his revised figures based on four houses and six flats, the average size of a house is 5,164 sq ft and a flat 1,482 sq ft (see 724-5).

21. Mr Piers Harrison (Counsel) appeared on behalf of the Active Respondents.
He is instructed under the Bar's Direct Access Scheme. He was accompanied by Mr McErlain who has authority to act on behalf of the Active Respondents. He adduced evidence from Mr McErlain.

22. Mr McErlain is a Financial Services Consultant and is the lessee of Flat 2, 13-14 Gloucester Square. Mr McErlain has extensive data analysis skills which he has demonstrated in his extensive report (at p. 117-232). He stated that he had spent some 100-200 hours in preparing this. He made a number of unfortunate references to the "manipulation" of data. The Tribunal is satisfied that both Mr Ferdinandi and Mr Seifert have sought to assist the Tribunal, and are aware of their responsibilities as independent experts. **The Points Based method** which he advocates assigns points to a property depending upon whether it is a House (+2) or a Flat (+1) and whether it has direct accesses onto the Garden (+1) or not (+0). He suggests that the points should be tripled should there be any commercial or embassy use of any property. The Tribunal does not consider it necessary to consider any such additional refinement. These properties have been let for residential occupation. If there is any change of use, this is a matter for the Garden Committee. The Tribunal is satisfied that a supplement would be justified for any commercial user if this was reflected by greater use of the Garden. This is a matter for the discretion of the Garden Committee, as are such matters as to whether residents can erect marquees in the Garden for weddings or use the Garden for social functions.

23. All Counsel provided Skeleton Arguments. They also agreed a List of Essential Reading, a Timetable and a marked Bundle of Authorities. Mr Hammond took the lead on this. We are grateful for the assistance provided by all Counsel.

Issues in Dispute

24. All Counsel agree that all Garden Ratepayers (whether the 22 freeholders or the 6 leaseholders) are required to pay a reasonable and fair proportion towards the costs of maintaining the Garden and that this Tribunal has jurisdiction to determine this proportion. Further, there should be a common means of apportionment for both freeholders and leaseholders. All Counsel agree that the current means of apportionment needs to be adjusted having regard to the change of circumstances since the current

Garden Rate was fixed. The current system of apportionment based on individual rateable values was in use prior to 1964, and the apportionment amended when Chelwood House was constructed. There was no evidence that the rateable Values used in 1964 were those in the 1963 Valuation List. There were revaluations in later years, but no evidence was adduced to indicate that the apportionment was amended as and when houses were converted into flats or following the later revaluations. In 1990, rates were replaced by the council charge.

25. The first issue for the Tribunal to determine is how the Garden Rate should be apportioned between the houses and the flats. Three schemes are proposed for the future apportionment of the Garden Rate:

    (a) **The Unit Charge method** proposed by the Commissioners;

    (b) **The GEA method** proposed by Chelwood; and

    (c) **The Points Based method** proposed by Mr McErlain and the Active Respondents.

26. The second issue is the date from which the new system of apportionment should apply:

    (a) Chelwood asks the Tribunal to back-date any variation to 1 January 2015.

    (b) The Commissioners and the Active Respondents are proposing that any variation should take effect from 1 January 2022.

27. The Garden Committee was not separately represented in these proceedings. The Commissioners have represented their interests. Under the six leases, the Garden Committee is responsible for the management of the Garden. In about September 1999, the Commissioners transferred its responsibility under the EMS in respect of the Garden to the Garden Committee. The Tribunal notes that Chelwood dispute the inferences that should be drawn from the unsigned letter dated 9 September 2019 which the Commissioners produced at the hearing. The Commissioners and their managing agent, Knight Frank, took the initiative to reinstate the railings in place of the old chain link fencing. The Tribunal was told that the Commissioners did this as agents for the Garden Committee. The cost of the railings has been passed on to the Garden Ratepayers through the Garden Rate. The Tribunal has not been asked to determine any issue in respect of the payability or reasonableness in respect of the sums charged in respect of the railings.

28. The Garden Committee is not a legal entity and no step has been taken to identify the members who would bear the legal responsibility for its actions. The Garden Committee has declined to express any view on the manner in which the Garden Rate is apportioned, albeit that it is the body to review and determine the Garden Rate. The Tribunal was not impressed by Mr Bass's comment that he was a mere volunteer on the Garden

Committee who focused on the management of the garden staff. The members of the Executive Committee are all trustees in respect of the management and finances of the Garden. The legal liability of members of the Garden Committee is not a matter which this Tribunal is required to determine.

The Estate, the Leases and the Estate Management Scheme

29. The Estate dates back to the 1830s. However, between 1928 and 1940, a number of houses on the Estate were redeveloped, having neared or reached the end of their original leases. Other buildings have been combined and converted to create flats.

30. In 1938, 18 town houses were constructed at either end of the Garden and are now Nos. 1-9 and 31-39 Gloucester Square. The architect was T.P.Bennett who was renowned for designs that maximised the views of gardens. Thirteen of the houses have direct access on the Garden. These are the most desirable (and valuable) properties on the Estate. The Tribunal was provided with the sales particulars for 6 Gloucester Square which recently sold for £10.05m (at p.726). The freehold interest has been enfranchised. The house has been newly refurbished with a patio which leads directly onto the Garden. The GIS is over 5,500 sq ft, which seems to be slightly larger than the average house on the Estate. It has five bedrooms over six floors with a lift. A basement has been added with a gym, sauna and wet room.

31. Six of these houses remain unenfranchised and are governed by the terms of their leases. The leases held by the leaseholders are in one of two forms:

    (i) "Form 1" (being the form of the leases for 5 Gloucester Square - a term of 93.75 years from 24 June 1938 at p.796-811; 7 Gloucester Square - a term of 86 years from 25 March 1946 at p.814-836; 9 Gloucester Square - a term of 85.5 years from 29 September 1946 at p.840-862; 29 Gloucester Square - a term of 96.5 years from 24 June 1938 at p. 865-882; and 33 Gloucester Square - a term of 85.5 years from 29 September 1946 at p.885-892); and

    (ii) "Form 2" (being the form of the lease for 36 Gloucester Square - a term of 90.5 years from 29 September 1969 at p.894-911).

32. Chelwood House was constructed between 1962 and 1964 on what was previously Nos.15-25 Gloucester Square. It is a luxury block on nine floors with a caretaker's flat, 24-hour porterage and two lifts. There are 38 flats. Mr Seifert's Table (at p.570) gives the GIAs for three of the flats: Flat 12A: 2,309; Flat 10: 1,024, and Flat 30: 1,110 sq ft. They are thus substantially smaller than the houses. It is necessary to cross a road in order to access the Garden.

33. Nos.13 and 14 Gloucester Square are original Victorian six storey properties which have been combined to create eight flats. In September 2020, a fifth floor was added (see p.185-189). Any such addition would

affect the apportionment under any of the three schemes. Mr Seifert has included Flat 3 in his Table at p.570, the size of which is 1,267 sq ft. These flats have no direct access onto the Garden.

34. All the enfranchised properties are governed by the terms of the EMS (p.769-792) which was approved by an LVT (p.760-768) on 8 September 1998. All Counsel are agreed that:

    (i) All Garden Ratepayers (whether the 22 freeholders or the 6 leaseholders) are required to pay a reasonable and fair proportion towards the costs of maintaining the Garden;

    (ii) This Tribunal has jurisdiction to determine this proportion (see *Windermere Marina Village Ltd v Wild* [2014] UKUT 163 (LC) and *Gater v Wellington Real Estate Ltd* [2014] UKUT 561 (LC); [2015] L. &. T.R. 19;

    (iii) There should be a common means of apportionment for both freeholders and leaseholders; and

    (iv) Any of the three schemes which the Tribunal is asked to consider would provide a lawful means of apportionment.

It is therefore unnecessary to consider the details of either the leases or the EMS which Mr Seifert analyses at Section 6 of his report (at p.358-363).

<u>The Background</u>

35. The starting point of the current dispute is a letter dated 19 April 2016 (at p.315) sent by Sir Alan Greengross, Chairman of Chelwood, to the Commissioners. The Chelwood Board was concerned about the Commissioner's proposal to reinstate the metal railings around the Garden at a cost of some £400k. The Board, having taken legal advice, considered these to be "improvements" which would fall outside the scope of the EMS. Were the Commissioners to proceed with the proposal, Chelwood would consider a legal challenge, whether by arbitration or an application to this tribunal. Sir Alan added that Chelwood reserved their right to challenge the percentage of the costs that it would be required to pay.

36. This is the first time that Chelwood had challenged the percentage which it was required to contribute to the Garden Rate. Chelwood had been paying 47.043% for many years. This figure is specified in a Schedule, dated December 2011 (at p.346). It seems that it was the proportion payable in 1998 when the EMS was approved, and probably in 1964 when Chelwood House was completed. The Tribunal was told that this percentage had been based on rateable values. However, if so, it would seem unduly high compared to the other properties. The Tribunal suspects that the error may have arisen in that Chelwood House's contribution was based on the 1963 Rates Revaluation whereas no adjustment was made for the other properties. In 2011, the Garden expenditure was some £55k and Chelwood does not seem to have objected to their annual bill of some £26k.

37. The Tribunal has not been provided with copies of the subsequent correspondence. The next item of correspondence to which the Tribunal was referred was an email, dated 14 October 2017 (at p.317) sent by Mr Cortazzi, the then Chairman of the Garden Committee, to Mr Vazirani, the Treasurer. It was copied to the other members of the Garden Committee, namely Mr Peter Shasha (the Secretary), Mr Neville Bass, Mr Mark Keatley, and Baroness Sally Greengross. The header read: "Re: Railings/Church – Hyde Park Square". The email read:

    "No point in moving forward if Chelwood are opposed and I am not prepared to go down the path of changing the allocations. We agreed at the AGM that you and Peter should have a meeting with Alan/Chelwood to try and find a way forward. I am not going to waste my time unless they are on board in principle".

38. On 15 October 2017, Baroness Greengross forwarded a copy of the email to Sir Alan. Both Baroness Greengross and Mr Vazirani were lessees at Chelwood House. The Tribunal has not been provided with a copy of the Minutes of the AGM of the Garden Ratepayers. It would have been open to any Garden Ratepayer (or indeed any of the lessees who are treated as members of the unincorporated association) to propose that the method of allocation should be reviewed.

39. On 18 January 2018 (at p.914), Principia invoiced Chelwood £33,177 for their 47.043% share of the garden expenditure of £70,524 which was budgeted for 2018. The charge was payable on 1 January 2018. The budget did not include any expenditure in respect of the railings. Chelwood paid the sum demanded.

40. On 12 December 2018, Knight Frank, on behalf of the Commissioners, served a Stage 1 Notice of Intention in respect of their proposal to reinstate the railings. On 10 June 2019, Knight Frank served the Stage 2 Notice of Estimates, having obtained two estimates in the sums of £464k and £551k. We were told that the Commissioners were acting as agents for the Garden Committee. The Tribunal has not been provided with copies of the consultation documentation. The proposal to reinstate the railings was not merely aesthetic. We were told that there had been problems of prostitution, drug taking and rough sleeping as the chain fencing around the Garden was not secure.

41. On 19 July 2019 (at p.920), Bower Bailey (Chelwood's Solicitors) wrote to CRS (the Commissioners' Solicitors). They had previously been in communication with Knight Frank. They repeated the proposed railings were "improvements". However, Chelwood might be willing to pay if (i) there is a repayment plan; and (ii) the apportionment is modified. They stated that Chelwood is currently liable for a "disproportionately large part of the works at 47.043%". They could not see "any ordinary basis for calculation could justify this percentage". They proposed discussions about "a more appropriate means of distributing the liability for the maintenance of the garden and the associated costs".

42. On 7 August 2019 (at p.922), CRS responded. Addressing the issue of apportionment. They stated:

> "Any suggestion of varying the percentage of those contributing via the Estate Management Scheme (if this is what is suggested) is not something our client can consider".

43. Thereafter, Chelwood paved their way for their application to this Tribunal:

    (i) On 28 January 2020 (at p.935), Bower Bailey wrote to Knight Frank requesting details of the current method of apportionment.

    (ii) On 2 March 2020 (at p.924), CRS provided a spread sheet of the current percentages. They stated: "we understand that the apportionment attributable to Chelwood House has been applied since as long ago as 1964 and the Garden Rate has been demanded and paid for by the residents for a period of nearly 50 years".

    (iii) On 24 June 2020 (at p.916), Chelwood obtained a report from Mr Ferdinandi. He noted that Hyde Park Square had adopted an apportionment based on building footprint x number of floors. He suggested that a similar model be adopted for Gloucester Square Garden.

    (iv) On 13 July 2020 (p.928), Bower Bailey served Mr Ferdinandi's report on CRS. They pointed out that any method of apportionment should be regularly reviewed. Given that it was no longer practical to use rateable values as the means of apportionment, the Commissioners were asked to adopt the Ferdinandi apportionment method. If the Commissioners were unwilling to recalculate the method of apportionment, Chelwood would need to apply to this tribunal to determine what should be a fair proportion for the relevant Estate Charge year.

    (v) On 31 July 2020 (p.937), Chelwood settled in full a demand of £14,936, dated 7 July 2020. This was the first of 16 quarterly demands issued by Knight Frank in respect of the railings.

    (vi) On 13 August 2020 (p.932), CRS responded to Bower Bailey. They stated that the Commissioners were acting as agent for the Garden Committee in respect of the railings project only. All powers in respect of the Garden, including the apportionment of the Garden Rate, had been delegated by the Commissioners to the Garden Committee. Chelwood would need to take this up with the Garden Committee.

    (vii) On 31 October 2020, Knight Frank issued the second quarterly demand of £14,936 for the railings.

(viii) On 23 December 2020 (p.937), Bower Bailey wrote to Frank Knight stating that Chelwood were only willing to pay 27.415% of the sum demanded, representing Mr Ferdinandi's assessment of a reasonable charge. They further sought a refund of £6,232 in respect of the sum paid in July.

(ix) On 8 January 2021 (at p.933), CRS wrote to Bower Bailey in response to the letter sent to Knight Frank. They pointed out that under the EMS, Chelwood had covenanted to pay "a fair proportion from time to time determined by the Estate Owner or Surveyor … such proportion (if in dispute) to be determined by the Surveyor". It was therefore not open to Chelwood to unilaterally determine its contribution. If Chelwood intended to pay this proportion, it would need to make an application to this tribunal. The Commissioners were not willing to reimburse any alleged overpayment.

(x) On 9 February 2021 (at p.953), Principia sent a draft budget for 2021 in the sum of £66,826. This did not include any charge in respect of the railings.

(xi) On 29 March 2021 (p.23), Chelwood issued their current application to this Tribunal. The Commissioners are named as the respondent; the Garden Committee as an interested party. Chelwood ask this tribunal to determine the "fair proportion" of the Garden Rate which it is required to pay. Chelwood do not challenge their liability to contribute towards the cost of the railings.

Issue 1: Apportionment of the Garden Rate

44. The Tribunal is required to determine how the Garden Rate should be apportioned between the houses and the flats. Three schemes are proposed:

(a) The **Unit Charge method** proposed by the Commissioners;

(b) The **GEA method** proposed by Chelwood; and

(c) The **Points Based method** proposed by Mr McErlain and the Active Respondents.

45. Before considering the method of apportionment, it is constructive to consider how each will impact upon the different properties within the Estate. No. 1 Gloucester Square is a house with no direct access onto the Garden.

Table: Methods of Apportionment					
	Current Scheme (p.573)	**GEA (Plot)** (p.719)	**GEA (Adjusted)** (p.720)	**Unit Charge** (p.715)	**Points** (p.716)
1 Gloucester	1.123%	1.552%	1.620%	0.862%	1.299%

Square					
6 Gloucester Square	1.004	1.910	1.798	0.862	1.961
13-14 Gloucester Square	5.638	6.282	5.260	7.759	5.844
Chelwood House (Nos. 15-25)	47.043	27.496	28.135	32.759	24.675

46. It is to be noted that under all the three methods, Chelwood will pay less. Indeed, they would pay least under the Points Based method (a 48% reduction). Whilst the current system is said to be based on rateable values, Chelwood's contribution would seem to be unduly high compared with the other properties. This error would not have been identified, but for the Commissioners' decision to restore the railings, the cost of which caused Chelwood to question their historic apportionment.

47. All Counsel are agreed that our starting point should be the RICS Code of Practice – Service Charge Residential Management Code and Additional Advice to Landlords, Leaseholders and Agents and highlight the following passage in the Foreword (at p.411) (emphasis added):

> "Depending on the terms of the lease, the basis and method of apportionment, where possible, should be demonstrably fair and reasonable to ensure that individual occupiers bear an appropriate proportion of the total service charge expenditure that reflects the availability, benefit and use of services."

48. In considering the three options, the Tribunal also considers the following factors to be relevant:

    (i) Simplicity of operation: All Counsel agree that it is not proportionate to obtain the GIAs for all the flats and houses on the Estate. It is for this reason that Mr Ferdinandi relies on GEAs.

    (ii) Transparency: The method of apportionment and the manner in which it is implemented should be understood by the Garden Ratepayers. This should avoid future challenges.

    (iii) Ease of amending the apportionments in the light of changing circumstances: It is accepted that any method of apportionment needs to be kept under review. The more complex the method of apportionment, the greater the difficulty in refining the apportionment if extra flats or additional floors are added.

49. The Tribunal is satisfied that the Points Based method best meets these criteria. It now seems that this is the preferred method of a majority of the Garden Ratepayers.

Direct Access onto the Garden

50. The Points Based method is the only one which adds a premium if a property has direct access onto the Garden. Both the Unit Charge and the GEA methods could be adapted to take this into account, but neither Mr Seifert or Mr Ferdinandi were willing to indicate what weighting should be given to this. Mr Ferdinandi is a quantity surveyor and this may have been outside his expertise. Mr Seifert rather sought to suggest that direct access to the Garden adds value to the capital value and that it would be wrong to double count this by an addition to the service charge. We disagree. A purchaser is willing to pay more for a house with direct access to the Garden because its location is more desirable. This reflects the "availability, benefit and use" of the Garden, attributes which should also be reflected in the service charge. We consider this to be a very substantial benefit. The houses have patios which lead directly onto the Garden. They are likely to make more use of it with their families and friends. A property which is directly adjacent to a garden, is more desirable than one which is adjacent to the road. It is much safer for young children. The Points Based method gives a 50% uplift. We accept that this is appropriate.

The GEA Method

51. Chelwood argue that their GEA method is the fairest and reflects professional guidance. The RICS Code of Measuring Practice (6th edition) advises surveyors to use gross internal floor area or net internal floor area. This is impractical in the case of Gloucester Square. Mr Ferdinandi selects the GEA method as the 'pragmatic alternative'. The GEA best matches the need to reflect the availability, benefit and use of the Garden. This is the only option that calculates apportionment with any reference to floor area (or its equivalent) and therefore to the potential use that the Owner or occupier of any accommodation unit might make of the Garden. The GEA is a practical solution which has been refined to reflect the current situation. It can be adapted to reflect any future changes, as any external extension must be notified to the Commissioners as it will require planning consent. The GEA method is consistent with that adopted on the Hyde Park Square estate. This demonstrates that the method is practicable and presents no insuperable difficulties in calculation or management. The leases speak of, for instance, proportions based on relative frontages, so that GEA therefore marries well with that principle in the leases. It is also arguable that this method is closest to the original apportionment based on rateable values.

52. The major disadvantage of the GEA method is its complexity. Mr Hammond and Mr Harrison argue that this makes the model wholly impractical. Mr Ferdinandi's original formulation was to take the building footprint multiplied by the number of floors ("**GEA Plot**"). However, the storey height at the front of the buildings (used as the indicator of number of floors) does not necessarily reflect storey height at the rear. Further, the "footprint" has been taken from the Ordnance Survey map which has been shown to be inaccurate. It is also assessed at ground floor level, and would not reflect any basement extension which may be larger. Further, it will be difficult to ascertain from external inspection alone if roof spaces have been converted/are habitable. The proposed method (unless amended)

does not address the effect upon size of tapering in some of the older properties at the Square. This method therefore favours a modern block such as Chelwood House which is uniform and makes maximum use of the available space.

53. Whilst Chelwood has proposed an alternative methodology ("**GEA Adjusted**") to address this (at p.720), this merely adds to the complexity of the scheme. Further GEA is not an accurate indicator of the GIA of the houses/flats as it includes (i) both internal and external walls; (ii) communal areas with the flats and (iii) any caretaker's flat. The Tribunal suggested that this was a "tapestry" to which ever more refinements could be added. If a roof terrace is added, should this be taken into account? If so, why not balconies? If not, what is the rationale for including a basement with a swimming pool, gym and sauna? Mr McErlain explored the extensive refinements which could be made in his extensive report.

54. Mr Harrison further argues that this method is unfair. Take the example of a five storey house. Were it to be converted into five self-contained flats, there would be no increase in the GEA of the property. However, there would be four additional households enjoying the Garden.

55. As a result of the difficulty of obtaining the necessary measurements, it would fall at the further hurdles of transparency and ease of adjustment. It was argued that there is always scope for dispute as to what should, or should not, be included in computing GEA, albeit that the RICS provide Chartered Surveyors with detailed guidance on what should be included. Further, the apportionment would need to be adjusted whenever there is any change to the GEA of any property. Many of these changes, such as the size of a basement or a roof top addition would not be apparent from a visual inspection.

The Unit Charge Method

56. At the opposite end of the spectrum, the Unit Charge method has the great merit of simplicity. Mr Seifert refers to the core principles set out in the RICS Service Charge Residential Management Code (3rd edition) and argues that this represents best practice. This requires that individual payers, where possible, should bear an appropriate proportion of the total expenditure that reflects the availability, benefit and use of services. The Unit Charge method fairly reflects this: it is based upon the premise that each unit has the potential to derive the same (unlimited) benefit and use from the Garden (with each Garden Ratepayer paying a percentage that corresponds to the number of units within its property). The Unit Charge method provides a straightforward apportionment methodology, which is simple to understand and implement; especially for a volunteer committee like the Garden Committee. The scheme is also easy to amend/update should any other properties subsequently be granted the right of access/use of the Garden

57. Mr Dubin and Mr Harrison argue that the Unit Charge method is unfair and wholly inappropriate for a development such as Gloucester Square

because the buildings are of such different ages and construction. The properties that have access to the Garden are not uniform, or even roughly approximate, in size. It is inequitable for the lessee of a flat to pay the same sum as the owner of a house when the 25 houses are on average some 108% larger than the flats (the average adjusted GEA for houses is 481 sq m, compared with 231 sq m for the flats – see Figure 4-2 at p.751). The larger the property, the greater the number of people who will benefit from and use the Garden. They note that it is the houses which benefit from this scheme and pay less than under the current scheme.

58. Mr Harrison argues that the fact that some properties have direct access and that some do not voids the foundational assumption of this scheme. Should an adjustment need to be made for this, the Unit Charge method becomes a Points Based method.

59. Both Counsel argue that this method departs from the RICS Codes and assumes that all Garden Ratepayers have the potential to derive the same benefit and use from the Garden. Manifestly, they do not.

The Points Based Method

60. The Points Based method is a compromise between these two extremes. Mr McErlain argues that this method is simple and avoids the complexities of the GEA method. It is also more equitable in that it addresses the two main shortcomings of the Unit Charge method: (i) the fact that houses are substantially larger than the flats and (ii) the houses with direct access to the Garden benefit more and have greater use of the Garden. He notes that this method has widespread support from Garden Ratepayers. No Garden Ratepayer outside Chelwood House supports the GEA method. A number of those who had supported the Unit Charge method, now consider this method to be fairer. This method is also adaptable to future changes. It is easy to monitor the number of flats and houses on the Estate and identify those which have direct access to the Garden.

61. Mr Hammond and Mr Dubin argue that the Points Based method is subjective and arbitrary. Mr Seifert argues that different weightings between flats and houses have been adopted at Eaton Square and Belgrave Square (see [20] above). However, he has not investigated the reason for this, which may merely reflect how many floors the houses have.

62. Mr Seifert argues that other factors could be included in the assessment of points, such as (i) the number of windows facing the garden; (ii) obstructed and unobstructed view; and/or (iii) the number of metres from the gate into the Garden. The Tribunal is not impressed by this argument. The more factors which are taken into account, the more complex a Points Based method becomes. Whilst Mr Seifert considered a points system as one of his three preferred methods of apportionment in his original report, he has not sought to suggest how he would construct such a scheme.

63. The Tribunal is satisfied that the Points Based method is premised on two highly relevant factors:

(i) The houses are substantially larger than the flats, on average they are 108% larger (see [57] above). The larger the property, the greater the number of people who are likely to benefit from and use the garden. Two points are therefore allocated to a house and one to a flat. Whilst the flats in a block may vary in size, this will be reflected in the manner in which the block passes down the charge to its lessees. The Tribunal understands that this is based on the GIAs of the flats within the block. Thus, Chelwood House Freehold Company Limited will pass its charge on to its 38 lessees and 13/14 Gloucester Square Freehold Limited will pass it on to its 9 lessees. At [129] of his report, Mr Seifert sought to challenge Mr McErlain's assessment of the respective size of the houses and flats. When the experts met, he agreed that his Table (at p.570) was wrong.

(ii) A house with direct access onto the Garden is likely to benefit more and make greater use of the Garden than a house/flat with no such access. Three points will be allocated to a house with such access, rather than 2 to a house with no such access. We reject Mr Seifert's opinion that this should solely be reflected in the capital value of the house, rather than in the service charge that should be payable.

64. The Tribunal recognises that the Points Based method will increase the proportion of the service charge borne by the houses. On the other hand, Chelwood House will face a 48% reduction. This reflects the fact that historically it has been overcharged. 13-14 Gloucester Square will face a 4% increase, whilst it would pay less under the GEA (Adjusted Scheme). These Garden Ratepayers accept that this method is fair. No. 1 Gloucester Square (a house with no direct access) will face a 16% increase, whilst No.6 (a house with direct access) will face a 96% increase. The Tribunal is satisfied that this reflects both the greater benefit that these properties derive from the Garden and the greater use that they make of it.

<u>Issue 2: Backdating</u>

65. The Tribunal is required to determine the date from which the new system of apportionment should apply:

(a) Chelwood asks the Tribunal to back-date any variation to 1 January 2015.

(b) The Commissioners and the Active Respondents are proposing that any variation should take effect from 1 January 2022.

66. Mr Dubin argues that there is no bar to the Tribunal's jurisdiction to backdate the variation under either the 1985 or the 2002 Acts. The application is for the reasonableness and payability of the service/estate charge and not a claim to recover these charges or for restitution (see *Cain v Islington LBC* [2015] UKUT 542(LC); [2016] L&TR 181, per HHJ Nigel Gerald at [34]). He also argues that the Garden Committee is in manifest breach of its duty to periodically review the fairness of the apportionment.

This is not a once-and-for-all-time exercise (see *Moorcroft Estates v Doxford* (1980) 254 EG 871). Dillon J was considering apportionment based on rateable values in a building where there had been additions and subdivisions and the addition of a penthouse flat. However, Mr Dubin restricted his claim to 1 January 2015, namely the six year limitation period.

67. Mr Hammond and Mr Harrison argue that this position is wholly impractical. Any apportionment determined by the Tribunal only reflects the current situation. For example, in 2020, there was one less flat on the Estate (see p.716). Further, if there was any over or underpayment, this would be a liability between the membership of the Garden Committee and the Garden Ratepayer at the time of the under/over payment. Section 20B of the 1985 Act may prevent the Garden Committee from recovering any underpayment of service charges from a leaseholder after 18 months. This may also impact on any enfranchised freeholder seeking to recover an underpayment of a service charge from a lessee of a flat. Mr Hammond suggests that confronted by these difficulties, the Executive Committee of the Garden Committee would resign. It has been suggested that the Commissioners might seek to meet any shortfall by selling keys to the Garden to other local residents. Mr Dubin suggested that any adjustment could be achieved by credits and debits to future bills. The Tribunal does not accept that this is how any backdating would work (see *Gateway Holdings (NWB) Ltd v McKenzie* [2018] UKUT 371 (LC)). It would rather be necessary to reopen the accounts for each relevant year.

68. In the closing submissions, Mr Hammond took the lead in opposing any backdating, his submissions being adopted by Mr Harrison. Mr Hammond noted that only one Garden Ratepayer, Chelwood, supported backdating. In 2016, Chelwood had only raised its concerns about apportionment obliquely, when it had complained about the cost of the railings.

69. Mr Hammond argues that Chelwood is estopped from contending that the apportionment should be backdated, relying on estoppel by convention. He relies on *Republic of India v India Steamship Co Ltd* [1998] AC 878 and the speech of Lord Steyn at 913E:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption… It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

Mr Hammond argues that since at least 1998, both the Garden Committee and Chelwood have acted on the assumption that Chelwood's contribution to the Garden Rate is 47.043%.

70. Mr Hammond contends that Chelwood only challenged "in earnest" the system of apportionment on 13 July 2020 (at p.928) when it served a copy of Mr Ferdinandi's report on the Commissioners. He refers the Tribunal to the judgment of Hildyard J set out in *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023); [2017] Ch 389 (CA) at [73]:

    "If and when the common assumption is revealed to be mistaken the parties may nevertheless be estopped from departing from it for the purposes of regulating their rights inter se for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so."

    Mr Hammond argues that, having received Mr Ferdinandi's report, the Garden Committee needed a reasonable time to devise and implement a new method of apportionment. A new scheme could not reasonably have been put in place before 1 January 2022.

71. Mr Hammond also relies on section 159(9)(a) of the 2002 which provides that no application may be made to the tribunal for a determination as to whether an estate charge is payable in respect of a matter which "has been agreed or admitted by the person concerned". Section 159(10) qualifies this by adding: "But the person is not to be taken to have to have agreed or admitted any matter by reason only of having made any payment". These provisions are mirrored in section 27A (4) and (5) of the 1985 Act.

72. Mr Hammond referred the Tribunal to the following passages of the judgement of HHJ Nigel Gerald in *Cain v Islington LBC*:

    "[15] Absent subsection (5) [of the 1985 Act] and depending upon the facts and circumstances, it would be open to the F-tT to imply or infer from the fact of a single payment of a specific sum demanded that the tenant had agreed or admitted that the amount claimed and paid was the amount properly payable, a fortiori where there is a series of payments made without challenge or protest. Part of the reason for this is that people generally do not pay money without protest unless they accept that that which is demanded is properly due and owing, and certainly not regularly over a period of time. Whilst it would generally be inappropriate to make such an implication or inference from a single payment because it could not be said that the conduct of the tenant was sufficiently clear, where there have been repeated payments over a period of time of sums demanded, there may come a time when such an implication or inference is irresistible."

    "[18] Looking at the reasoning behind this provision, no doubt the reason why the making of a single payment on its own, or without more, would never suffice is that such will often be insufficiently clear but also, in the peculiar area of landlord and tenant, it is common enough for tenants to pay (even expressly disputed) service charges so as to avoid the risk of forfeiture and preserve their home and the value of their lease. But the reason why a series of unqualified payments may, depending on the circumstances, suffice is because the natural

implication or inference from a series of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded. Putting it another way, it would offend common sense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest. Self-evidently, the longer the period over which payments have been made the more readily the court or tribunal will be to hold that the tenant has agreed or admitted that which has been demanded and paid. It is the absence of protest or qualification which provides the additional evidence from which agreement or admission can be implied or inferred."

73. Mr Dubin responds that there has been no common assumption that 47.043% was a fair contribution for Chelwood to pay towards the Garden Charge. There was no sufficient evidence that Chelwood had agreed to the apportionment. He referred the Tribunal to *Marlborough Park Services Ltd v Leitner* [2018] UKUT 230 (LC); [2019] HLR 10; *Admiralty Park Management Company Ltd v Oju* [2016] UKUT 421 (LC) and *Bucklitsch v Merchant Exchange Management Company Ltd* [2016] UKUT 527 (LC). In the latter case, HHJ Huskinson approved the following passage from the judgement of Briggs J in *Stena Line v Merchant Navy Ratings Pension Fund Trustees* [2010] EWHC 1805 (Ch) at [134]:

"(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be [expressly] shared between them. The crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred.

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

74. Mr Dubin asserts that Chelwood have been challenging the fairness of the apportionment since April 2016. Further, there has been no "unconscionability" in Chelwood's conduct. The Garden Committee has been under a duty to keep the fairness of the apportionment under review. It has been in manifest breach of its duty to do so. At no time has it carried out such a review. Rather, it has refused to do so. The need for Chelwood to issue their application only arose because the Garden Committee and the Commissioners could not agree whose responsibility it was to review the apportionment. The issue which brought this to a head was the Commissioners' decision to restore the railings at a cost in excess of £400k which was to be passed on to the Garden Ratepayers through an apportionment which was manifestly unreasonable.

75. The Tribunal notes that it is not the various additions, subdivisions, basements and penthouses on the Estate that have primarily caused the current system of apportionment to be unfair. The unfairness rather dates back to at least 1998 (when the EMS was approved) or 1964 (when Chelwood House was completed). This unfairness, which is now readily accepted by all parties, only became apparent when the spreadsheet of the current percentages was shared in March 2020.

76. The Tribunal is not impressed by the position adopted by either the Garden Committee or the Commissioners. The Garden Committee are not mere volunteers; they are trustees with responsibility for the management and finances of the Garden. We note the email from the then Chairman of the Garden Committee, dated 14 October 2017 (see [37] above) when he stated that he was not prepared to revisit the apportionment of the Garden Charge. We are satisfied that the Garden Committee should have taken a more proactive role in revisiting the apportionment when it became apparent that the current system was unfair.

77. Despite taking the initiative to reinstate the railings, the Commissioners have sought to hide behind the Garden Committee. On 7 August 2019 (see [42] above), the Commissioners stated that they were unwilling to consider the issue of apportionment. This issue only arose because of their desire to reinstate the railings. Mr Bass stated that the Garden Committee had misgivings about this proposal. He stated that the Commissioners had threatened to sell keys to other residents in the area if there is any shortfall in the Garden Fund. The Commissioners cannot have it both ways. If they wish to delegate responsibility for the Garden to the Garden Committee, they must give them the freedom to determine how it is managed and who is permitted to have access to it. They must also make clear to the Garden Committee the legal responsibilities that this entails.

78. Having regard to the evidence and the submissions that have been made to us, we are satisfied that the new apportionment should be backdated to 1 January 2021, and that any estate/service charges payable for any period after this date should be apportioned in this manner. The Tribunal reach this decision for the following reasons:

(i) Chelwood have been paying their contribution of 47.043% for many years without complaint. The only proper conclusion is that Chelwood had admitted that this was a fair proportion towards the Garden Rate (see section 159(9)(a) of the 2002 Act).

(ii) Alternatively, Chelwood are estopped from denying that this was a fair contribution towards the Garden Charge. There was a shared assumption between Chelwood, the Garden Committee and the Commissioners that 47.043% was the appropriate apportionment. The Garden Committee and the Commissioners have acted on the basis of this shared assumption for many years. It would be unjust and unconscionable for Chelwood to be allowed to resile from this position as a result of which the Garden Committee would need to re-compute all the estate/service charge contributions dating back to January 2015 and to seek to recover additional sums from many of the Garden Ratepayers.

(iii) Chelwood paid the 47.043% Garden Rate contribution up to July 2020. This included the first instalment towards the railings.

(iv) Whilst Sir Alan Greengross had raised the issue of apportionment in his email of 19 April 2016, this was only a subsidiary point raised in respect of the railings. His primary argument was that the railings were an improvement to which Chelwood should make no contribution. There was no suggestion that Chelwood was challenging its 47.043% contribution towards the maintenance of the Garden.

(v) Two Chelwood members served on the Executive of the Garden Committee. There is no evidence that they advocated that the apportionment should be reviewed. It may be that they felt conflicted.

(vi) On 2 March 2020, the Commissioners provided a copy of the spread sheet of the current percentages. At this stage, the Garden Committee and the Commissioners should have been put on notice of the urgent need to review the manner in which the Garden Charge was apportioned. It should have been apparent that Chelwood was paying an unduly high contribution towards the Garden.

(vii) On 13 July 2020, Chelwood served Mr Ferdinandi's report on the Commissioners. On 23 December 2020, Chelwood withheld part payment of the Garden Rate.

(viii) The Tribunal accepts that it would take time for a new system of apportionment to be devised. Whilst Mr Ferdinandi's GEA method could have provided an acceptable means of apportionment as at the local Hyde Park Square Estate, it has not proved practical for this Garden.

(ix) The Tribunal accepts that it would take some six months to devise a new scheme. If more time was required, an interim scheme could have been put in place to protect Chelwood from the disproportionate burden that it was being required to bear. The Tribunal is satisfied that a new scheme could, and should, have been put in place by 1 January 2021.

79. The Tribunal does not consider that there are any undue difficulties in backdating it for one year. The Tribunal notes from the Table at p.716 that the apportionment would be the same in 2021 as in 2022. The accounts of the individual Garden Ratepayers will need to be adjusted. Both the Garden Committee and the Commissioners must accept some responsibility for not acting more promptly.

80. The Tribunal is satisfied that the Points Based method is one that it is easy for the Garden Committee and its managing agent to administer. If any new flats are added, keys to the Garden will be required and the percentages can be adjusted for the following year. Every year, when the Garden Rate is fixed, the Garden Committee will need to consider whether any additional units should be added. The Garden Committee should periodically review, perhaps every five years or when there is any significant change to the Estate, whether this Points Based method remains the appropriate means for apportioning the Garden Rate. The Garden Committee should consider whether it should establish itself as a separate legal entity with limited liability.

81. The Tribunal has not considered what charge would be appropriate were any property to be used for business or embassy purposes. This is a matter for the Garden Committee. It is also for the Garden Committee to determine how the Garden should be managed, how Garden Ratepayers should be able to use the Garden and who should have access to the Garden. The only matters which are within the jurisdiction of this Tribunal are the manner in which the relevant estate/service charge is apportioned and the date from which the Points Based method of apportionment should take effect.

<u>Service of this Decision</u>

82. The Tribunal will serve a copy of this decision on the three sets of lawyers who have appeared before us. They are responsible for notifying their clients of this determination. The Tribunal has appointed the Commissioners as Lead Applicant and they are directed to serve this decision on the Passive Respondents.

Judge Robert Latham
21 February 2022

<u>Rights of appeal</u>

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 **by e-mail**

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).