FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/26UG/LSC/2021/0075**
HMCTS code (audio, video, paper)	**:**	**F2F**
Property	**:**	**1-12 Heritage Close, High Street St. Albans, Hertfordshire AL3 4EB**
Applicant	**:**	**Hawk Investment Properties Limited**
Representative	**:**	**Mr Mark Loveday, instructed by Darlington Hardcastles Solicitors**
Respondents	**:**	**Diana Eames and the other residential leaseholders listed in the table below**
Representative	**:**	**Mr Nicholas Grundy QC, instructed by SA Law**
Type of application	**:**	**Liability to pay service charges**
Tribunal members	**:**	**Judge David Wyatt** **Mrs M Hardman FRICS IRRV (Hons)**
Date of decision	**:**	**19 July 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a face-to-face hearing. The documents we were referred to are those described in paragraphs four and five below. We have noted the contents.

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Decisions of the tribunal

(1) The tribunal determines that 50% of the sums in the last column below are payable (pursuant to the demands dated 28 March 2022), and the remaining 50% of those sums would if duly demanded be payable, by the following Respondents under clause 3(7) of their leases as the estimated "*Service Cost*" for the service charge year from 31 March 2022 to 30 March 2023 based on the budget of £422,100 including the estimated costs of the proposed major works.

These proportions and sums do not include any amounts which may be payable as service charges for the cost of insurance under clause 3(2) of the leases.

Unit	**Estimated "Service Cost" for 2022/23**		
	Respondent(s)	**Proportion (%)**	**Potentially payable (£)**
1	Diana Eames and Christopher Paul Stuart Eames	0.8	3,376.80
2	Erik Mielke & Karen Marie Richardson	0.8	3,376.80
3	Timothy Adrian Robert Clark and Penelope Jane Cooper	0.8	3,376.80
4	Richard John Latham	0.76	3,207.96
5	Mark Comiskey	0.91	3,841.11
6	Harsha Ranil Perera	0.69	2,912.49
7	John William Biswell and Jennifer Biswell	0.83	3,503.43
8	Anne Valentine	0.83	3,503.43
9	Diane Harrison	0.83	3,503.43
10	Nicholas Charles Howes and Susan Jean Howes	0.83	3,503.43
11	Nancy Jackson	0.83	3,503.43
12	Elizabeth Anne Blossom and Jonathan Hinkins	0.83	3,503.43
Total		9.74	41,112.54

(2) The tribunal orders that the costs incurred by the Applicant in connection with these 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 Respondents.

Reasons

Application

1. The Applicant freeholder sought a determination under section 27A of the Landlord and Tenant Act 1985 (the "**1985 Act**") of the service charge proportions payable by the Respondent leaseholders. The Applicant then estimated and demanded the relevant costs for 31 March 2022 to 30 March 2023. The Respondents have residential leases of upper floor areas at Heritage Close, which is a mixed-use development. The Applicant sought new apportionments of service charges, which had been apportioned by reference to rateable values. The application relied on the grounds, and proposed the floor-area or value-based apportionments, set out in the first expert report of Mr Peter Alan Forrester FRICS.

Procedural history

2. On 24 February 2022, the judge gave case management directions requiring service of the application documents and directions on the Respondents. These gave the Applicant permission to rely on the expert evidence of Mr Forrester in his report dated 16 December 2021. The Respondents were directed to produce case documents in response (including a schedule of any service charges said not to be reasonable or payable at all, aside from the issue of the proportion payable). In their first statement of case in response to the application, the Respondents made submissions and protested that a formal statement of case had not yet been provided by the Applicant. They also applied for an order under section 20C of the 1985 Act, to limit any recovery of the Respondent's costs of the proceedings through the service charge.

3. Following correspondence between the parties, short extensions of time were given and the Respondents were given permission to produce a statement of case in response to any further case documents from the Applicant, with any other documents relied upon by the Respondents. An interim telephone case management hearing was arranged for 28 April 2022, when the judge gave further extended directions. The Applicant's first formal statement of case, pleaded as a reply, confirmed that the Applicant was relying on paragraph 1(b) of the Fourth Schedule to the lease (not paragraph 1(a) of that Schedule, which had been referred to by Mr Forrester but deals with certain types of provisional apportionment). As directed, the Applicant also produced details of the rateable values on which the current apportionments were based and

details of the rents payable by the current occupiers of the commercial units. The Applicant also produced a supplemental report from Mr Forrester. The Respondents then produced their more detailed statement of case in response.

4. A hard copy bundle was produced by the Applicant for the hearing, including copies of the documents exchanged by the parties pursuant to the directions. On 7 June 2022, the Applicant produced a skeleton argument and bundle of authorities from Mr Mark Loveday of Counsel. On 8 June 2022, the Respondents produced a skeleton argument from Mr Nicholas Grundy QC, together with a bundle of supplemental correspondence.

5. The hearing on 9 June 2022 at St. Albans Magistrates Court followed an inspection of the property that morning. With the helpful assistance of Mr Ashman, the Applicant's site manager, we inspected the basement area and external areas of and around Heritage Close. We also inspected the interior of Unit 10, one of the flats which had been extended into the loft above the original demise (explained below). At the hearing, the Applicant was represented by Mr Loveday. David Norman gave factual evidence and Mr Forrester gave expert evidence. The Respondents were represented by Mr Grundy. We are grateful to Counsel for their assistance.

6. Richard Latham had given a witness statement but was unable, for good reasons, to attend the hearing. At the hearing, a short witness statement from Nicholas Charles Howes (one of the leaseholders of Unit 10) was produced referring to the contents of Mr Latham's statement and adopting them as his own. The Applicant produced copy floor plans from MK Surveys showing their measurements of the residential units. The Respondents produced a photograph of a sign in the basement area reading: "*No motor vehicles including motorbikes should be parked without a licence.*" Mr Loveday confirmed he did not seek to cross-examine Mr Howes. We admitted the late evidence from each side and gave permission to rely on the expert evidence of Mr Forrester in his supplemental report.

Planning consent and leases

7. On 15 September 1971, planning consent was given for redevelopment of the site: "*with 18 shops, 12 Maisonettes, 1 flat and car parking*". This included a condition requiring parking provision to be: "*…kept available solely for use in connection with the development on the basis of 12 car spaces for the shops and restaurant and 15 car spaces for the residents of and visitors to the flats and maisonettes.*"

8. The sample residential lease of 1 Heritage Close was made in 1977. It was granted for a term of 99 years from 1 January 1975. The lease indicated the Landlord was: "*…carrying out a development scheme of shops and*

maisonettes and ancillary accommodation…", described as the "*Centre*". The lease plans show each ground floor unit labelled "*SHOP*", with numbers up to 18. The 12 residential units were on the first and second floors above. The lease defines:

"*Other Lettable Unit*" as: "*…a part of the Centre (other than the common areas (as hereinafter defined) and the Demised Unit) which is let or designed to be let to a Tenant*"; and

"*Common Areas*" as: "*…those parts of the Centre designated by the Landlord and being footways and pedestrian areas vehicular service roads basement garage communal stairways caretakers stores refuse stores and plant room and such other parts of the Centre as shall be allocated by the Landlord from time to time for the common use and/or benefit of the tenants of premises within the Centre and persons using or visiting the Centre.*"

9. Clause 6(5) confirms that: "*Where the context so requires or admits … the singular includes the plural*".

10. Clause 3(2) is a tenant covenant to pay on demand a fair proportion applicable to the Demised Unit of the insurance costs specified in that clause.

11. Clause 3(7) is a tenant covenant to pay to the Landlord for the services set out in the Third Schedule an amount calculated and payable in accordance with the provisions of the Fourth Schedule. The Third Schedule sets out a range of services for the Common Areas and the Centre (with no reference to insurance). The Fourth Schedule provides:

"(1) *To pay to the Landlord from time to time in manner hereafter provided the proportion properly attributable to the Demised Unit (meaning thereby that proportion which the rateable value of the Demised Unit bears to the aggregate Rateable Value of the Demised Unit and the other Lettable Units in the Centre) of the total outgoings and expenditure (the aggregate amount of which … is … referred to as "the Service Cost") incurred …. by the Landlord in … providing the services amenities and facilities specified in the Third Schedule … the amount of the Service Cost and the proportion thereof aforesaid to be determined and notified in writing in manner hereinafter provided by the Landlord's Surveyor PROVIDED NEVERTHELESS :- …*

(a) That if at any time there shall not in respect of the Demised Unit or in respect of the other Lettable Units in the Centre be in force any determination of rateable value by the relevant rating authority then either

(i) the yearly gross rent (not being merely a nominal or concessionary rent) for the time being payable to the Landlord

in respect of the Demised Unit or the other Lettable Units respectively or

(ii) in the case of any other Lettable Unit in respect of which no yearly gross rent or only a nominal or concessionary yearly gross rent is payable to the Landlord such yearly sum as in the opinion of the Landlord's Surveyor represents the then current market rent of that other Lettable Unit shall for the purpose of provisional apportionment be treated as the rateable value thereof until the actual rateable value thereof has been determined and assessed when any necessary adjustment or correction shall be made

(b) That if the system or method of rating buildings and premises in operation at the commencement of the term hereby granted shall hereafter be changed or abrogated so as to render the apportionment of and contribution to the Service Cost according to rateable value inoperable or manifestly inequitable then such apportionment and the proportion of the Service Cost to be attributed to and paid in respect of the Demised Unit shall be calculated by some other just and equitable method ~~to be conclusively determined by the Landlord's Surveyor~~"

12. It was agreed that, on the current law as confirmed in Aviva Investors Ground Rent GP Ltd v Williams [2021] EWCA Civ 27, by s.27A(6) of the 1985 Act, the words struck out in the above extract from paragraph (1)(b) are void, so if the condition has been satisfied but the parties are unable to agree a method it is to be determined by the tribunal as part of its determination under section 27A(3).

13. Paragraph (2) of the Fourth Schedule goes on to set out the arrangements for assessment and payment of the relevant proportion. Paragraph (2)(a) provides for (on 1 December or another date) notification of an estimate of expenditure during the 12-month or shorter period ending on the following 31 December and the amount and proportion attributable to the Demised Unit, with the Tenant to pay this by two equal instalments on 25 March and 29 September. Paragraph 2(b) provides for a certified statement of the actual Service Cost and the sum payable by the Tenant as the proper proportion of the Service Cost attributable to the Demised Unit for that year, with arrangements for a balancing payment or credit.

Inspection

14. Following changes (described below), the Centre currently accommodates 11 "*retail and restaurant*" units on the ground floor and basement levels. At ground-floor level, four have frontages to the High Street and there is a central courtyard around which they and other units are arranged. There are two public accessways to the courtyard: a main entrance from the High Street and another in the far corner of the courtyard leading down steps to Waxhouse Gate (signposted towards the

Abbey). A separate gated private pedestrian entrance from the High Street leads along a path to an external staircase (above commercial bins) up to the first-floor residential area. A roadway leads from an adjoining vehicular entrance gate, runs beside the pedestrian pathway and then slopes down into the large basement car parking/service area. That area has parking spaces in the centre, access space around the parking spaces and loading bays, bin storage areas and doors opening directly from the commercial units for loading. An internal staircase also leads up from the car park area to the first-floor residential area.

15. The residential flats are in smaller pitched structures arranged around a large open paved first-floor "deck" area, itself surrounding a large central opening above the courtyard. There is a separate external fire escape staircase. We inspected the interior of Flat 10, said to be an example of the largest loft extension. The first and second floors are reasonably proportioned. The loft area of Flat 10 was being used as a home office; it is constrained by the top of the pitched roof, with a steeper pitch on one side giving reasonable height and a shallower pitch on the other (into which Velux windows had been fitted) with a cross-member, giving restricted height. Apart from the position above the commercial areas, this is a relatively appealing location for residential leaseholders, near the Cathedral and Abbey Church of St Alban (described locally as the Abbey) area.

Background

16. It was said all the residential leases were originally granted in about 1977/78, with the same term commencement date. Although rating revaluations were meant to occur every five years, after the end of the second World War there had only been three (in 1956, 1963 and 1973). The last valuation of all the flats for rateable value purposes was in 1973. The total 1973 rateable values recorded for the flats (3,620) represented about 10.85% of the combined rateable values recorded for the flats (3,620), the commercial units (29,093) and the car park (638), or about 11.07% if the car park is excluded. In paragraph 9 of his witness statement, Mr Norman treated the rateable value of the car park as part of the commercial premises, confirming he had calculated that the residential units represented 10.85% of the total rateable values in 1973.

17. On 31 March 1989, the (then) managing agents wrote to the (then) leaseholder of Unit 5, saying that the "service charge" was recovered using an apportionment based on rateable value, insurance would be demanded separately (not as a "service charge" item) and: "*The proportion (based on rateable value) of the expenditure attributable to the car park, has been borne by the landlord, as the car park licence fees paid for the above period were inclusive of service charge.*"

18. The last records for rateable values of the residential flats are for (or to) 1990, (when, as noted above, there had been no overall revaluation since

1973). The rateable values recorded for 1990 for all the flats were the same as those in 1973 except for Unit 6, which reduced from 290 to 254 (probably because of an individual re-rating request). Unsurprisingly, the rateable values of many of the commercial units had changed from those in 1973. No record was produced of the rateable value of the car park area in 1990. The total rateable values recorded in 1990 for the flats (3,584) were calculated at the time as representing 9.74% (although the exact proportion appears to be 9.77%) of the total rateable values recorded for the flats (3,584) and the commercial units (33,098).

19. The system of domestic rates was abolished with effect from 31 March 1990, but rating valuations for commercial premises continued. Since then, all landlords had used the same 1990 calculations as the proportions of the "*Service Cost*" payable by each residential leaseholder. Residential leaseholders contributed a total of 9.74% of the relevant costs each year for more than 30 years after domestic rates were abolished, from 1991 to March 2022.

20. In 2000, commercial units 14-16 were combined and extended, outside towards Waxhouse Gate (additions with roof glazing) and inside into the basement garage area (taking away space used for three car parking spaces), to create a restaurant (Lussmans) which is still trading from this enlarged unit. Mr Forrester's notes indicate the current lease of these combined commercial units was granted in 2001 and expires in 2026.

21. In 2002 and 2003, the internal ground-floor entrance foyer and staircase for residential leaseholders was removed. It appears the residential leaseholders complained about this to the local authority, but did not take action under the terms of their leases to attempt to prevent it. These areas were combined with commercial units 23, 27 and 29 to create a large new retail unit.

22. In 2005, a Leasehold Valuation Tribunal made a decision in proceedings between some leaseholders and Lanchester Investments Limited, a predecessor in title to the Applicant. The case number was CAM/26UG/LSC/2004/0046. A residents' association had objected to new apportionments of service charges proposed by that landlord for a service charge year from 1 October 2004, and applied to the LVT. The LVT had been given the impression that, while the layout of commercial areas had changed, there had been no great change in the ratio of commercial to residential floor area. Initially, floor-area apportionment had been proposed by that landlord, saying this would indicate that the residential leaseholders should be paying a total of 34.86%. However, the decision records that the (then) landlord had conceded on the advice of their surveyor, Mr E F Shapiro FRICS IRRV FCIArb, that: "*…floor area apportionment was inappropriate*" [para. 13]. Instead, Mr Shapiro proposed alternative methods. The LVT in 2005 appears to have been informed, or understood, that the Landlord's surveyor had from 1991 onwards calculated proportions by some other just and

equitable method by applying the 1990 proportions and/or that this had been agreed with the residential leaseholders. The LVT asked itself whether that apportionment arrangement had itself become inoperable or manifestly inequitable and decided it had not, so there was no basis to alter the established apportionment. We accept Mr Loveday's submission that, with great respect to the relevant tribunal, that was not quite the right question (considered below). In the 2005 proceedings, the relevant parties had not been legally represented and the LVT was dealing with the cases and limited information which those unrepresented parties had provided. However, the decision to retain the same 1990 proportions was made and there was no further attempt to change this until the current application was made in 2022.

23. From 2006 onwards, all the residential leases were extended to 189 years, expiring 31 December 2163 (so now have about 141 years left to run). Between 2005 and 2017, the leases of several of the residential units were extended into the loft space of the pitched roofs for payments of between £10,000 and £25,000, and a conservatory was added to one. The Respondents said a total of 50 sq. m. had been added to the residential areas.

24. On 1 September 2014, the freehold title to the Centre had been purchased by Merritts Properties Limited for a declared price of £4.6m from Nationwide Building Society (apparently selling through receivers it had appointed as fixed charge holder). Mr Norman had been Managing Director of Merritts. He said he could not recall what information had been provided in advance about service charge arrangements, observing that limited information would have been available. He did not deny that Merritts had taken any risk on this. He said he could not recall whether he had been aware of the LVT decision from 2005.

25. In 2017 and 2018, the shop fronts of units 22 (courtyard), 23 (high street and courtyard), 27 and 29 (high street) were extended, with new glazed exteriors beyond the exterior brick walls/pillars. In 2017, the commercial unit occupied by the "*Mad Squirrel*" public house was extended into the basement garage area. Mr Norman said that, in 2018, the roof(s) above the residential units had been replaced. He said, in effect, that it was unfair that the residential units had contributed so little to the cost of this work, although it appears no alternative proportions were proposed at that time.

26. In 2020, the external garden area was changed into a patio dining area beside Waxhouse Gate, looking towards the Abbey, for the commercial unit now occupied by "*Mad Squirrel*". In the same year, the Applicant acquired the freehold title from Merritts. Mr Norman explained this was part of a corporate reconstruction ("*demerger*"). In simple terms, Merritts and the Applicant had the same shareholders, with the asset being transferred to the Applicant for no financial payment. Mr Norman

had been Managing Director of Merritts and was Managing Director of the Applicant.

27. The Applicant permits parking in the basement car park (which currently has 30 spaces) only by licence. The Respondents said licences had been granted for each space and the Applicant charged residential leaseholders £360 per quarter and others £540 per quarter. At the hearing, the Applicant said the residential leaseholders were free to keep motorbikes and bicycles in the garage area. The Respondents then produced their photograph (noted above) of the sign in the garage area saying that motorbikes cannot be parked without a licence. The Applicant said this sign had been put up by a previous landlord.

28. On 17 March 2022, the Applicant produced a service charge budget for 2022/23 for a total of £422,100 (including £330,000 for the estimated cost of proposed major works). On 28 March 2022, they sent a half-year service charge demand for the 1990-calculated proportions of this estimated cost. The Respondents also received a consultation notice for roof works, which they understood to be the major works referred to in the estimate. The Applicant said these works were needed because the first floor "deck" area was leaking into the commercial units below. They intend to arrange for the slabs to be lifted and material removed, a new hot seal product applied and then smaller slabs laid. They said that, together, the hot seal and smaller slabs should have a longer lifespan.

29. The Respondents had argued that they could not assess the estimated major works costs until the consultation requirements were complied with. They were warned at the case management hearing that the limit in the consultation requirements may not apply to estimated costs and they would need to identify any charges which they said were unreasonable or not payable under the lease. They did not do so. Accordingly, it was not disputed that the costs in the budget are reasonable and payable as relevant costs under the lease, subject to the question of apportionment.

30. The current details produced by the Applicant show that only one of the commercial units (25 High Street) is vacant and declare that the rents payable by the occupiers of the other commercial units total £324,500pa.

Expert evidence

31. Mr Forrester is a sole practitioner trading as Peter Forrester SCCS Ltd, regulated by RICS. He has over 40 years' experience in managing commercial property. Amongst other things, he is chair of an RICS Professional Group and author of the RICS Professional Statement: *Service charges in commercial property*.

32. Copies of the commercial leases were not provided. Mr Forrester said the lease of units 14-16 had a similar service charge provision to that in the residential units, but the leases of the other commercial units provided for the tenants to pay a fair and reasonable proportion of "*Service Costs*".

33. Mr Forrester annexed to his first report an assessment by KDS Real Estate Ltd of the annual market rent of the residential units as at 1 April 2015 (the valuation date for the 2017 rating list, which sets out the current rateable values of the commercial units). These market rents are summarised in his report, ranging from £16,800 for unit 6 to £22,800 for unit 5. Mr Forrester acknowledged he was not a rating expert, but understood rateable values were equivalent to Net Annual Value ("NAV"): "*…being the rent at which a property might reasonably be expected to let on a year to year basis on the assumption that the leaseholder is responsible for repairs and insurance and any other expenses necessary to maintain the property in a state to command the rent*". Accordingly, Mr Forrester adjusted those market rent figures by deducting his calculations of average service costs (based on actual costs for 2014-2017 to, he said: "*be contemporary with Date of Valuation*") as if the proportions payable were based on his estimated updated rateable values (between £2,350 and £3,190 per unit) and buildings insurance costs (between £345 and £488 per unit). On this basis, he produced his estimated updated rateable values of between £14,105 and £19,122 for the residential units as at 1 April 2015. He said these totalled £193,800 (33.90%), compared to the rateable values for the commercial units of £368,000 (64.52%) and the car park of £9,000 (1.58%).

34. Service charge accounts were not produced, but Mr Forrester gave a summary of service charge expenditure since 31 March 2014. Similar details of insurance costs were not provided, but Mr Forrester gave the total other costs as £94,354.78 in 2014/15, £89,923.25 in 2015/16, £101,110.51 in 2016/17, £105,929.37 in 2017/18, £196,079.33 in 2018/19, £95,026.09 in 2019/20 and £78,869.96 in 2020/21. These charges include site management resources (over £35,000 in each of the last two years), which appears to be or include the costs of the manager who is on site six days per week. It appears the works to the roofs of the residential units (with associated management fees) were the main cause of the higher charges in and/or around 2018/19, with charges for "*fabric repairs and maintenance*" of £103,968.41, compared to £43,708.98 in 2017/18, £32,594.69 in 2018/19 and £21,177.29 in 2020/21.

35. Mr Forrester observed that the RICS professional statement for commercial property stated rateable values were no longer recommended for calculation of service charge apportionments (para.4.2.6) and suggests "*…various bases of apportionment…*". He said that professional statement for commercial property and the RICS Code of Practice: *Service charge residential management code* advised the basis and method of apportionment should be: "*…demonstrably fair and reasonable to ensure that individual occupiers bear an appropriate*

proportion of the total service charge expenditure that clearly reflects the availability, benefit and use of services." He acknowledged this might involve allocating different types of costs to separate schedules and then apportioning them to those who benefit from those services based on floor area. He said that was considered a fair and reasonable basis well-established in the UK for service charge apportionment in mixed-use schemes.

36. Mr Forrester said floor-area apportionment was the most common and generally considered the simplest method. He said this also provided greater certainty and stability for occupiers, because it was not subject to fluctuations in market values. At the time of his first report, it was said the Respondents had "*declined*" to give permission for measurement of their flats. Floor areas had, he said, been taken from plans and marketing particulars and used with the results of a measured survey of the commercial units to calculate floor area apportionments which would total 37.68% (13,152) for the residential units and 60.32% for the commercial units (21,282). The balance of 2% was his assessment of the proportion which should be attributed to the car park, based on the recorded rateable value compared to his updated estimated residential rateable values. He had taken this approach because it was: "*not practicable or appropriate to calculate the service charge in respect of the basement car parking based on floor area*".

37. In his supplemental report, Mr Forrester refined his first report. He explained most of the residential leaseholders had since arranged access to their flats for measurement. He said some of the commercial rateable values had also changed following appeals, the shop front of one of the commercial units had been altered to increase the floor area and he had revised his assessment to take into account two other leases (of an electricity substation and a basement lavatory and store) of which he had previously been unaware. Taking these into account, he produced his estimated rateable values of the residential units totalling £193,357 (34.04%), compared to the rateable values for the commercial units of £365,750 (64.38%) and the car park of £9,000 (1.58%). He confirmed the two other leases were not included in this because they did not appear to have rateable values. He said their lease terms contained service charge provisions (while acknowledging the tenant of the basement lavatory and store would be unlikely to benefit from certain services so their contribution would be assessed on a user basis). However, he said that since the areas leased were accessible externally, they did not benefit from the provision of general services. He acknowledged that they did benefit from the maintenance and repair of the main structure, so ought to bear a proportion of the proposed roof/deck replacement works.

38. Mr Forrester then produced a revised floor-area apportionment schedule as appendix 7 to his report which he said would for normal service charges total 34.71% (11,754) for the residential units and 63.293% (21,434) for the commercial units. Again, he attributed 2% to the car park. For service charges for repairs to the structure, he said the

electricity substation and basement lavatory and store covered a total of 1.38% of the floor area, so the proportions for the residential units should be reduced slightly to total 34.22%.

39. In his second report, Mr Forrester also discussed potential insurance service charges, payable (in addition to the "*Service Cost*") under the separate lease clause 3(2) which provides for payment of a fair proportion of the insurance costs. He said this had been charged (by the Applicant, at least) in the same proportions as the Service Cost (9.74% residential and 90.26% commercial), but the Applicant would in future seek to charge insurance costs in proportions based on gross internal floor area. His calculations proposed proportions for the residential units which appear to total 31.73%. That seems surprising, but it appears the difference relates to adjustments made by Mr Forrester so that leaseholders do not contribute towards the cost of insurance cover for loss of rent for the commercial units. We do not make any findings or determination about this, because the service charges payable for insurance costs were not the subject of the application made to the tribunal.

The main issues

40. Returning to the wording of paragraph 1(b) of the Fourth Schedule to the lease, it is obvious and the parties agreed that "*the system or method of rating buildings and premises in operation at the commencement of the term*" under the leases (i.e. in the latter half of the 1970s) had from 1990 been changed or abrogated. The main questions were (in simple terms) as follows, and we examine them in turn below:

    (i) whether that was: "*…so as to render the apportionment of and contribution to the Service Cost according to rateable value inoperable or manifestly inequitable…*";

    (ii) if so, whether more than one "*other just and equitable method*" could be calculated from time to time (the Respondents argued only one bite of the cherry was possible, and that was taken in 1990 or at some point thereafter when the historical 1990 proportions continued to be applied despite changes in values); and

    (iii) if so, whether the 1990 apportionments or the apportionment proposed by Mr Forrester is the just and equitable method for calculation of the proportion of the Service Cost to be paid by the residential leaseholders.

41. Mr Loveday referred to the well-known principles for interpretation of leases, summarised by Lord Neuberger in Arnold v Britton [2015] EWSC 36 at [15]. We keep those principles in mind.

Inoperable or manifestly inequitable

42. On the evidence produced, we are not satisfied that apportionment according to rateable value has been rendered inoperable or manifestly inequitable.

43. Mr Loveday submitted that (until 1990) the rateable value apportionment mechanism was dynamic. It actively and automatically changed all the apportionments every time there was a change in domestic or non-domestic rates. He observed that, since rateable values broadly follow letting values, the historic use of rateable values enabled a constant adjustment to reflect the relative values of flats and commercial premises. If there was a mid-term adjustment for a particular property because it had been changed, for example, that automatically resulted in a re-apportionment. We do not accept his submission at the hearing that losing "dynamism" was unfair in itself. Mr Loveday said freezing the rateable values at 1990 levels could never be a substitute for a dynamic system. But the question is whether the apportionment has been rendered "*inoperable or manifestly inequitable*". In assessing whether it has, we bear in mind Mr Loveday's submissions about the starting point under the lease of a dynamic value-based apportionment (while the rating system could be used to achieve that without the additional costs and time of separate periodic valuations).

44. We take into account the argument by the Respondents themselves that, at some point from 1990, apportionment according to rateable value "*must*" have been rendered inoperable or manifestly inequitable, but that appears to have been part of their "one bite of the cherry" argument (considered below) and their alternative case appeared to argue that it had not been. We also give significant weight to Mr Forrester's opinion that it had been, particularly in view of his estimates of what the rateable values would now be. These estimates are perhaps artificial, not least because they are comparing recorded commercial rateable values with his own calculations of what residential rateable values might have been recorded if domestic rating had been continued. For example, as noted below, it is obvious that the rateable value recorded for the car park has been mistakenly assessed and is far too low, and general domestic revaluations were infrequent.

45. In our assessment, Mr Forrester's estimates of the residential rateable values are probably too high, but not much higher than the residential rateable values might have been if valuations for domestic rating had continued. As he fairly acknowledged, he is not a rating expert. His service charge deductions took into account only "ordinary" service charges, but should probably also have taken into account the costs of the major works in 2018/19. His average took into account ordinary service charges after the valuation date in 2015 and the valuers based their market values on much more recent comparable transactions with

adjustments. Similarly, as Mr Grundy submitted (referring to the repairing obligations under section 11 of the 1985 Act for short leases), Mr Forrester should have allowed for the costs of internal maintenance, not merely service charges and insurance, when seeking to adjust an estimated market rent to attempt to estimate what the rateable value might have been. We do not agree with Mr Forrester's suggestion that his deductions had if anything already been "*over-generous*", but accept his evidence at the hearing that the additional service charges and internal repairing liability would not have made a very significant difference. His estimates are not much higher than the residential rateable values might have been. They are consistent with the uncontroversial comments in his report that values of residential property are now substantially higher, relative to values of commercial property, than they were in the 1970s or the 1990s. As Mr Loveday said, the original contractual scheme under the lease would have increased the proportions payable by the residential leaseholders if valuations for domestic rating had continued.

46. However, there is nothing to show and it seems unlikely that suddenly, in one year, abolition of domestic rating in 1990 rendered apportionment according to rateable value inoperable or manifestly inequitable. When we asked, the parties could not explain when they said that point was reached, only that it was at some time after 1990 when values would have changed or the commercial areas would have been revalued for rating purposes. The difficulty with that is:

(i) apportionment according to rateable value does not appear to have become "*inoperable*". Mr Loveday submitted that from 1990 such apportionment became impossible. However, it seems to us that the apportionment each year from 1990 followed the wording of paragraph (1), using the rateable values for the year they were last produced for all units in the Centre. The expression "rateable value" is not defined in the lease. As Mr Loveday pointed out, paragraph 1(a) allows provisional apportionment while a determination of rateable values is not "*in force*" in respect of a unit. However, it only does so for the Demised Unit if the rent payable to the Landlord is not a nominal or concessionary rent (under these long residential leases it obviously would be). Since there is no prescription for provisional apportionment in that situation, the wording in paragraph (1) obviously contemplates that the rating system might be changed or abrogated but nonetheless apportionment according to rateable value might still be operable. The fact that for some 30 years the residential service charges have been apportioned according to the 1990 rateable values seems to support this; it has not been "inoperable". This is not a situation where, for example (as in the Bedford Court case mentioned below) new residential units have been created since abolition of domestic rating; and

(ii) perhaps depending on when relative values changed, the significant changes to the Centre and the conduct of the parties over the last 30 years (particularly the matters highlighted in paragraphs 54 and 55 below) are likely to have offset such changes and made it less likely that apportionment according to rateable value had become "*manifestly inequitable*". We have no evidence to indicate when/how much relative values had changed in the years between 1990 and 2015.

More than one method?

47. If we are wrong about that first question, at some point since 1990 the apportionment according to rateable value was rendered inoperable or manifestly inequitable and the apportionments based on the 1990 rateable values were the calculation of "*some other just and equitable method*" under paragraph (1)(b). The Respondents argued only a single change of apportionment was permitted and additional words would have to be added to the lease to allow a landlord to "*serially*" implement new methods from time to time. However, Mr Grundy (rightly, it seems to us) explained at the hearing that he was not pursuing this argument with any real vigour.

48. We accept Mr Loveday's submissions that it follows from the natural and ordinary meaning of the words in the lease (such as "*calculated*" in paragraph (1)(b), before the default 12-monthly service charge periods anticipated in paragraph (2) and the confirmation in clause 6(5) that "*the singular includes the plural*", consistent with the interpretation under section 61(c) of the Law of Property Act 1925) that if the condition is satisfied (apportionment according to rateable value has been rendered inoperable or manifestly inequitable) more than one apportionment method can be used over time. The starting provision for rateable value apportionment expected changes over time (although as Mr Grundy submitted in the 1970s there had been few revaluations since the war, more like every 10-15 years than every year). Any "*other method*" adopted might no longer be just and equitable decades later, depending on the circumstances. Words would need to be inserted to limit this to one other method and there is no justification for implying any such words. Mr Grundy rightly pointed out that in the 1970s there was no equivalent of Section 27A(6) of the 1985 Act, so leaseholders would have only very limited scope to challenge new apportionment methods determined by the landlord's surveyor. However, it seems to us that the risks in this of a single method which must be followed for the rest of the term of the lease are worse than the risks of more than one method. Again, something which is just and equitable when first adopted can of course become inequitable over decades as circumstances change.

49. Mr Loveday also referred to the decision in Bedford Court Mansions Ltd v Ribiere and Others [2017] UKUT 202 (LC), which involved a comparable provision, acknowledging that the Heritage Close leases

(which were originally granted for shorter terms than those in Bedford Court) cannot be interpreted based on findings in other cases about different leases. In Bedford Court, the lease provided for apportionment by dividing expenditure for any year by the "*aggregate of the rateable values in force at the end of such year*" for all the flats and then multiplying the result by the "*rateable value in force at the same date of the Flat*". If that became "*impractical or impossible*", expenditure was to be apportioned "*…on such alternative basis as shall be fair and equitable.*" It had obviously become impractical or impossible because the wording required examination of rateable values in force each year and there were none. In response to a similar "one bite of the cherry" argument, HHJ Huskinson said at [71]: "*…Nor is there anything in the language to indicate that a single alternative basis must be adopted once the triggering event has occurred and that this … must be adhered to throughout the remainder of the 999-year leases. It would be remarkable if such a single alternative basis must be adopted and adhered to…*"

Just and equitable method

50. In case we are wrong about the first question, and since the parties might agree or in a new application for a future year produce evidence showing that at a particular point in time apportionment according to rateable value was rendered inoperable or manifestly inequitable, we consider below the alternative methods proposed by the parties. As Mr Loveday pointed out, when considering whether a method is just and equitable we need to keep in mind the position of the landlord as well as that of the leaseholders.

51. For the same reasons (particularly those summarised in paragraphs 54 and 55 below) that we were not satisfied the 1990 apportionments based on rateable values were manifestly inequitable, we consider those apportionments to be just and equitable (although of course the threshold is not the same). However, we can see that in view of the various factors relied upon by the Applicant (particularly the change in relative values) they are at one extreme of the potential range of just and equitable methods. In our assessment, Mr Forrester's proposed method based on floor areas (which Mr Loveday confirmed was the only method now being sought by the Applicant) goes beyond the other extreme and is not just and equitable in the circumstances of this case.

52. Mr Forrester accepted there was no single or precise formula for apportionment of service charges, which had an element of professional subjectivity. He accepted this involved an approximation of the use made of services (in the sense of the right to use services, whether or not someone actually used them). He was taken to the relevant paragraphs of the RICS guidance note on managing mixed-use developments which states (at 4.7): "*There can be a difference between benefit and use … A discounted charge may be appropriate in some circumstances, with the*

costs being weighted towards each occupancy and use type." When he was asked why he had not referred to the mixed-use guidance in his reports, he said that was an omission. He said discounted floor areas were used where, for example, the full proportion was paid for the shop area and a discounted charge was paid for ancillary and staff space. He was also taken to the RICS real estate management guidance which states (at 4.7.5, consistent with the comments made in his first report as summarised above) that: "*...apportionment should ensure that individual occupiers bear an appropriate proportion of the total service charge expenditure, reflecting the availability, benefit and use of services.*"

53. We give significant weight to Mr Forrester's evidence. He is clearly an expert, particularly in relation to commercial service charges and with knowledge and experience of mixed-use developments. The Respondents did not produce any expert evidence to counter what Mr Forrester had said. However, there are two sets of problems with Mr Forrester's proposed floor-area approach, which we summarise in turn below.

54. The first set of problems relate to the failure to take into account the historical matters and conduct which in this case (together with the matters summarised in paragraph 55 below) make just and equitable the approach of continuing the apportionments from 1990. Mr Forrester was doing the job he had been asked to do, which was to advise based on what he could see on the ground today. He had been asked to take into account the changes in relative values and the fact there had been extensions. He had not been told about some of the main adverse changes over the last 20-30 years and did not feel able to comment on them, beyond saying (in effect) that changes justified starting afresh with a new method of apportionment. However, the following factors offset or at least substantially mitigate the matters the Applicant relied upon:

(i) for about 45 years (since the grant of the residential leases), the various landlords have demanded from residential leaseholders service charges for "Service Costs" which represent about 10% of the total costs each year;

(ii) as Mr Grundy said, the proposed change to about 34% would be a huge increase. For example, it would take the service charges for Unit 1 for 2022/23:

(a) from £3,376.80 (0.80% of structure repairs (about £2,640) and ordinary costs (about £736.80)), plus whatever service charge is made for insurance costs (Mr Forrester's second report appears to indicate this would have been £383.12 if it were based on last year's premium);

(b) to about £12,488.79 (2.95% of structure repairs (about £9,735) and 2.99% of ordinary costs (about £2,753.79)), plus whatever service charge is made for insurance costs;

(iii) despite the abolition of domestic rating in 1990, the current apportionments from 1990 have been charged ever since, for more than 30 years. As Mr Grundy pointed out, it appears the apportionments in 1990 slightly favoured the landlord (or the commercial areas), because they do not appear to have taken into account any rateable value for the car park/service area;

(iv) the effect of the LVT decision in 2005 was to confirm the current apportionments (albeit for different reasons and the then landlord having conceded, rightly or wrongly, on expert advice that floor-area apportionment would be inappropriate);

(v) following that 2005 decision, the landlords continued to charge the same 1990 apportionments for everything (in the case of the current landlord apparently even for insurance, when the lease allowed different proportions to be charged for insurance costs);

(vi) it appears there was no further attempt to change the apportionments until 2022, 17 years later, despite the extensions from 2006 onwards of the terms of the leases and, in particular, extensions of the demises into the lofts. The landlords could then have asked leaseholders who wanted to extend their demises to pay greater service charge proportions. Instead, it appears they negotiated payments for the extensions with no suggestion that the proportion might be changed;

(vii) over the last 20 years, there have been substantial adverse changes for residential leaseholders. Removal of the private ground floor access area/lobby and internal staircase was a significant adverse change, even if (as Mr Forrester suggested when asked about this) residential leaseholders might in a new system be expected to bear the costs of maintaining that area. A private internal ground floor pedestrian access and staircase was a substantial feature taken away from residential leaseholders when they might reasonably have expected it to be preserved for them under the terms of their leases;

(viii) Further, there have been significant extensions of the commercial premises (the unchallenged evidence was that they had been extended by over 200 sq. m, plus a further 46 sq. m of external space for the public house, compared to extensions of the residential areas by some 50 sq. m). The commercial areas now include two large licensed premises which inevitably operate much later hours than shop units and probably create more noise/nuisance; and

(ix) there is no evidence to suggest that commercial tenants are being deterred by the current service charge arrangements. We were given little evidence about the commercial lettings, but there is only one vacant commercial unit. The others are generating substantial rents (£324,500pa, as noted above) in addition to the income for the Applicant from the car park licence fees it charges.

55. The second set of problems relate to the Applicant's failure to take a more nuanced and co-operative approach, making reasonable allowances for the background and the nature of this mixed-use development, as Mr Grundy submitted. We accept Mr Forrester's evidence that it would not be appropriate to attempt intricately to measure footfall or individual use and benefit of each service and each part of this Centre. However, we do not accept that because the Centre is relatively simple and routine service charges are only about £100,000pa, some more balanced consideration of benefits or use is "not worth it", as was suggested. As Mr Grundy pointed out, Mr Forrester had sought to depart from floor area or make allowances in relation to the car park/service area and the lease of the lavatory and store, but at least in relation to the car park/service area his allowance was inadequate. A more balanced assessment should have been made, perhaps (for example) giving appropriate weighting to take into account key features of this mixed-use Centre. In particular:

(i) it is likely that the site manager (who works on site six days per week) and the resources he uses (which as noted above appears to be a large part, more than a third, of the ordinary service cost) spends substantially more time and resources managing and clearing up after visitors to the commercial areas (and maintaining and supervising operation of the car park/service area) than simple floor-area apportionment would suggest. That is particularly so given the nature of this site, with the covered space open to the public, the route through the site from the High Street towards the Abbey and a relatively high proportion of licensed premises. We accept it is not practical to assess what the site manager does in great detail, but reasonable professional allowance should be made;

(ii) it is likely that the car park/service area also benefits the commercial areas substantially more than has been allowed for. Mr Forrester said he had considered for some time what to do about the car park. His proposed allocation of only 2% to this area is inadequate and is based on a mistake. Mr Forrester had arrived at 2% by reference to the recorded rateable value for the car park, which is plainly wrong because that is only £9,000. He did not dispute (and fairly acknowledged that he was surprised when it was put to him) that the recorded rateable value had been calculated as 12 spaces at £750 each, not the 30 spaces in the car park. We do not accept Mr Forrester's evidence that the additional benefit of the garage/service areas for the commercial areas/landlord is accounted for by their greater floor area in his apportionments together with his additional 2%;

(iii) as was pointed out, the residential areas benefit from the garage/car parking area. Amongst other things, it is part of the structure, fire protection measures protect the whole building, they have an internal staircase from the basement car park area, bicycle storage may be possible and the service area keeps commercial loading and unloading and some of the commercial bins out of sight. However, in our assessment the commercial areas benefit substantially more than simple floor areas would suggest, opening directly onto the basement area and with service areas for their benefit, in addition to the additional revenue for the Applicant from car parking licence fees;

(iv) further, the Applicant refused to allow the Respondents to measure the basement garage/service area. We understand they might have been concerned about late evidence, since the request from the Respondents was made only on 26 May. However, refusing access was obstructive and we would have liked to decide for ourselves whether to consider any such evidence, particularly when each of the opposing parties gave us additional documents about other matters on the day of the hearing;

(v) we are dubious about some of the measurement information which has been provided, at least in relation to the residential areas. As was pointed out at the hearing, the space in the loft we inspected appeared to be substantially smaller than the dimensions shown in the measurement drawing produced on the day of the hearing when we asked to see it. Mr Forrester had accompanied us on the inspection, but said he could not comment on any of this (beyond reminding us that he had excluded balcony areas from the floor areas used in his report); understandably, he had simply used the areas calculated by the measurement company used by the Applicant; and

(vi) we were provided with only basic information about the proposed major works to the first floor “deck” area, although we note they were said to be needed to prevent water ingress into the commercial units and the structure. These works, with estimated costs of £330,000, would cause the service charge for 2022/23 to be several times higher than normal. We have no information about how the procurement process under the consultation requirements is progressing. We bear in mind the smaller major works in 2018/19. However, a method which suddenly moves to a much higher service charge proportion just when these larger major works are planned does not, together with the other factors mentioned, appear just or equitable.

Conclusion

56. Accordingly, we are satisfied that the service charges which are or would be payable based on the budget and demands provided (for the estimated Service Cost for the current service charge year, apart from any additional service charge for insurance) are as set out at the start of this decision, following the 1990 apportionments.

57. However, this does not preclude an application in future which is prepared more carefully and co-operatively, gives better evidence about what is said to have happened when, produces the underlying documents relied upon (rather than simply stating in an expert report what parts of them said) and proposes a more balanced method of apportionment. That might show the condition has been met and a more nuanced method would be more appropriate than the current method.

Section 20C

58. As we said at the hearing, we are not sure that the Applicant could recover its legal costs of these proceedings under paragraphs 11 (fees and disbursements paid to managing agents) or 12 (other services) of the Third Schedule to the lease. However, even if the Applicant can seek to recover its costs of these proceedings under the terms of the leases, so (as Mr Loveday submitted) the starting point is that we are being asked to relieve the Respondents of their contractual obligation, we are satisfied that it is just and equitable for us to do so. In these proceedings, the opposing parties took an unhelpful approach to each other without preparing their cases and evidence as carefully as they might have done. Ultimately, although the Respondents could themselves have been more co-operative, the Applicant appears not to have engaged constructively with leaseholders before making the application, did not do enough to co-operate with the residential leaseholders and has been unsuccessful in these proceedings.

Name:	Judge David Wyatt	**Date:**	19 July 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 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).