FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AA/LVL/2021/0005**
HMCTS	**:**	**Hybrid: In Person/V: CVPREMOTE**
Property	**:**	**39 and 41 Crutched Friars, London EC3N 2NA**
Lead Applicant	**:**	**Michael Will (Flats 2 & 3, 41 Crutched Friars)**
Representative	**:**	**Gary Cowen KC (Counsel) instructed by Elliott Matthew Property Solicitors**
Second Applicant	**:**	**David Gillott (Flat 3, 39 Crutched Friars)**
Representative	**:**	**Henry Webb (Counsel) instructed by Raymond Saul & Co LLP**
Third Applicant	**:**	**Different Houses Limited (freeholder of 39 and 41 Crutched Friars)**
Representative	**:**	**Piers Harrison (Counsel)**
Additional Respondents	**:**	**<u>39 Crutched Friars</u>:** **Philip Dutton (Flat 1)** **Ben & Jessica Wong (Flat 2)** **Thomas Travers (Flat 4)** **<u>41 Crutched Friars</u>:** **Hiu Ping (Lynia) Lau (Flat 1)**
Representatives:	**:**	**Daniel Dovar (Counsel) appeared for Mr Travers** **Mr Dutton, Mr & Mrs Wong and Dr Lau appeared in person.**
Interested Party	**:**	**David Lonsdale (former lessee of Flat 1, No.41 Crutched Friars) who appeared in person**

Type of applications	**:**	**Variation of leases pursuant to Part IV Landlord and Tenant Act 1987 Applications for orders under section 20C Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge Robert Latham Helen Bowers MRICS Stephen Mason FRICS**
Date and venue of hearing	**:**	**12, 13 and 14 December 2022**
Date of decision	**:**	**31 January 2023**

DECISION

Covid-19 pandemic: description of hearing

This has been a hybrid hearing. The Tribunal listed this case as a face-to-face hearing. However, Mr Dutton and Dr Lau applied to join remotely and joined by CVPREMOTE. The parties have prepared the following bundles to which the Tribunal will refer in its decision:

Bundle A (257 pages): Pleadings (referred to as "A.____")
Bundle B (253 pages): Title & Deeds ("B.____")
Bundle C (220 pages): Witness Statements ("C.____")
Bundle D (924 pages): Disclosure Documents ("D.____")
Bundle of Authorities (153 pages): ("Auth.__")

Decision

1. The basis of the service charges for Nos. 39 and 41 Crutched Friars should be on a separate building basis, each building being treated separately.

2. The leases for Flats 2 and 4 No.39 have been granted on a separate building basis. There is therefore no need to vary their leases. Their service charge contributions remain at 24% and 10% respectively, namely the sums specified in their leases.

3. The five other leases are varied to be on a separate, rather than a unified building basis.

4. It is necessary to vary the service charges payable under these leases in order to ensure 100% recoverability:

(a) The percentages payable for the flats at No.39 are varied to 33% for both Flats 1 and 3.

(b) The percentages payable for the flats at No.41 are varied to 26.5% for Flat 1 and to 36.75% for both Flats 2 and 3.

5. The Tribunal approves the attached Order, drafted by Counsel, giving effect to these variations.

6. The Tribunal makes orders under section 20C of the Landlord and Tenant Act 1985 so that the landlord shall not pass on any of its costs relating to these proceedings through the service charge. This order applies to all lessees, save for Mr Dutton who did not seek such an order.

Summary

1. The Tribunal is required to determine three applications which relate to the manner in which the service charges are apportioned between the seven lessees at 39 and 41 Crutched Friars, London EC3N 2AE ("**Crutched Friars**"). There is a single freehold interest in Nos. 39 and 41 which is currently held by Different Houses Limited ("**DHL**"). No.41 was constructed in the 1860s and is Grade II listed. No.39 was built in the 1950s to replace a building destroyed during WW2. There are commercial premises on the ground and the basement floors, which are occupied by the Crutched Friar Public House. The leaseholder of the commercial premises is Stonegate Pub Company Limited. There are four residential flats at No.39 ("**1/39, 2/39, 3/39, 4/39**") and three at No.41 ("**1/41, 2/412, 3/41**").

2. The residential accommodation was refurbished in 1996/7 by Capitalstart Limited ("**Capitalstart**"). Over the subsequent seven years, Capitalstart granted leases in respect of the seven residential flats. Six of the leases were granted in 1996 and 1997. The final lease was granted in 2002, apparently because it had been occupied by an employee of the landlord. The leases were drafted by Kosky Seal and Co, Solicitors. The approach which was adopted can only be described as incoherent. The extent to which this is due to error by the solicitors or the design of the landlord is not clear. However, this is irrelevant to the issues which this Tribunal is required to determine. The Tribunal observed at the commencement of the hearing that a special place in hell should be reserved for those who signed off these leases. However, because of the delays that have occurred, it is no longer possible to hold the devil's draftsmen to account for their actions before our temporal courts.

3. It is rather for this Tribunal to devise a practical solution to the problems that have arisen. The Upper Tribunal has held that it is not for this Tribunal to devise what we consider to be a fair method of apportionment. We must rather have regard to the contractual intentions of the parties and seek to do the least damage to the contractual arrangements that have been agreed.

4. In devising a rational service charge regime for these seven flats, the drafter was required to consider two issues:

(i) Whether to treat the two buildings as a unified unit (the "**unified**" building) or as separate buildings (the "**separate**" buildings). The drafter granted five of the leases on a unified and two on a separate building basis. In seeking to address the problems that have arisen, DHL have failed to recognise that these can only be addressed by putting all the leases on either a unified or a separate basis.

(ii) The service charge contributions from the seven flats should add up to 100%. It is for a landlord who grants any leasehold interest to decide the basis on which the percentages are to be computed. Normally, this would reflect the size or the letting value of the various flats. It is open to a landlord to require each lessee to pay an equal proportion. It is also open to a landlord to grant a lower "preferential" contribution for some flats. The minimum requirement is that the approach adopted should be coherent and result in the total service charges adding up to 100%. In this case the percentages totalled some 156%, the extent of the excess depending on whether the expenditure is attributed to No.39 or No.41.

5. The approach adopted by Capitalstart and its solicitor, the drafters of the leases, has been incoherent. The problem has been aggravated by the failure of those acquiring the leasehold interests to read them and inform themselves of the terms of the legal relationship that they were entering.

(i) On 11 September 1996, the first lease to be granted was in respect of 3/39 at a premium of £150k. The lease was granted on a unified building basis with a service charge contribution of 24%. A prudent purchaser of a leasehold interest of 999 years might have been expected to inquire why should they pay a service charge contribution of 24% in a building with seven flats? On 7 January 2000, Dr David Gillott acquired the leasehold interest.

(ii) On 16 January 1997, the lease granted was in respect of 1/41 at a premium of £172k. Again, the lease was granted on a unified building basis with a service charge contribution of 24%. A prudent purchaser of the leasehold interest might again have been expected to inquire why should they pay a service charge contribution of 24% in a building with seven flats? The lease was granted to Mr David Lonsdale, a barrister. He did not read his lease, rather relying on his professional advisors. On 13 July 2020, Dr Hiu Ping Lau acquired the leasehold interest for £840k. She was alerted to the problems that had arisen.

(iii) On 28 February 1997, the lease granted was in respect of 2/39 at a premium of £200k. On this occasion, the lease was granted on a separate buildings basis with a service charge contribution of 24%. The reason why the drafter adopted a different approach has not been explained. The prudent purchaser of the leasehold interest would have had no reason to question the terms of the lease. There were four flats in No.39, and a 24% contribution was just 1% less than an equal share. The lease was granted to Mr and Mrs Wong.

(iv) On 7 March 1997, the lease granted was in respect of 3/41 at a premium of £150k. Again, the lease was granted on a unified building basis, but the service charge contribution was 33%. This percentage would have been understandable had the lease been granted on a separate basis as there are three flats in No.41. However, a prudent purchaser of the leasehold interest might have been expected to inquire why the service charge contribution extended to both Nos. 39 and 41. The lease was granted to Mr Michael Will. He is a lawyer. He did not read his lease, rather relying on his professional advisors. Mr Will states at [4.2] of his witness statement (at C.195) that he did not have access to his lease until 2017, after he had redeemed his mortgage.

(v) On 14 March 1997, the lease granted was in respect of 1/39 at a premium of £118k. The lease was granted on a unified building basis with a service charge contribution of 24%. A prudent purchaser of the leasehold interest might have been expected to inquire why should they pay a service charge contribution of 24% in a building with seven flats? On 27 September 2013, Mr Philip Dutton acquired the leasehold interest for £725k. He did not read the lease, rather relying on his professional advisors.

(vi) On 21 March 1997, the lease granted was in respect of 2/41 at a premium of £180k. The lease was granted on a unified building basis with a service charge contribution of 33%. A prudent purchaser of the leasehold interest might have been expected to inquire why the service charge contribution extended to both Nos. 39 and 41. On 31 October 2000, Mr Will acquired the leasehold interest for £285k.

(vii) On 4 February 2002, the lease granted was in respect of 4/39 at a premium of £495k. The lease was granted on a separate building basis with a service charge contribution of 10%. This lease was granted five years later than the other leases. It was clearly granted at a discretionary percentage. There was some suggestion that the original leaseholder had some link with Capitalstart. The leaseholder had no reason to complain. On 23 August 2013, Mr Thomas Travers acquired the leasehold interest for £900k. He is a lawyer. He read his lease. He recognised that he was acquiring a lease under which the leaseholder was only required to contribute 10% in respect of a building with four flats. It is probable that his purchase price reflected this.

Different premiums were paid on different dates. There is no sufficient evidence before the Tribunal to enable us to determine whether this reflected the service charge provision in the lease, the layout of the flat (Flats 4/39 and 3/41 being significantly different from the other flats) or the market conditions at the date of the transaction.

6. For the next 10 years, no one recognised the true character of the beast that had been created. The lessees would only have had access to their own leases, and would have had no knowledge of the service charge contributions that their neighbours were paying. For a number of years, the buildings were self-managed by the lessees. They spent little on maintaining the buildings.

There had been a lift in each building. When these broke down, the lessees decided not to incur the cost of installing new lifts. From 2011, a number of managing agents were appointed. They ignored the leases and operated separate service charge accounts for each building. The situation changed in March 2017, when Shaftesbury West End Limited ("Shaftesbury") acquired the freehold and their managing agent, CBRE, operated on a unified buildings basis

7. On 28 November 2018, DHL acquired the freehold interest for £2.7m. The company is owned and controlled by Mr Dutton. Having acquired the leasehold interest in 1/39 in September 2013, Mr Dutton was aware of the contractual difficulties with the leases.

8. Matters came to a head in 2019, with DHL proposing major works to the roof at a cost of £207k. On 27 February 2020, Mr Travers issued an application under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in LON/00AA/LSC/2020/0087. On 24 February 2020, DHL issued a separate application in respect of the other leases in LON/00AA/LSC/2020/0160. An unsuccessful attempt was made to mediate. There was a three-day hearing in July 2021 which was heard by an experienced tribunal chaired by Judge Andrew Dutton, sitting with Mr Jagger MRICS and Mr Piarroux. On 5 August 2021, the Tribunal issued a careful and reasoned decision identifying the respective service charge liabilities of each lessee (see [84] – [88] below). The Tribunal found that a balance of £79,314.10 was payable by the lessees in respect of the major works. However, the landlord was entitled to collect a total of £122,937 pursuant to the terms of the leases. There was thus an overpayment of £46,622. The Tribunal made no finding as to how the landlord should treat this surplus. No party has sought to appeal this decision.

9. The service charges which the lessees were found liable to pay are analysed in Table 2 at [87] below. Were expenditure to be split equally between both buildings, there would be an overpayment of 56%. However, the leases create a web of cross-subsidies between the two buildings. Thus, were the expenditure to relate only to No.39, there would be a surplus of 73%; whilst were the expenditure to relate only to No.41, there would be a surplus of 39%. This highlights the fact that the drafting flaws could only be cured by amending all the leases both (i) adopting a coherent approach of either a "unified" or a "separate" building basis and (ii) ensuring that the service charge contributions total 100% for each building.

10. Rather than seek to address the problem created by its predecessor-in-title, DHL spotted the opportunity to profit from the situation that had arisen, through what Mr Dovar, Counsel for Mr Travers, described as a "cynical manoeuvre". On 27 August 2021, Mr Will had issued his application to vary his leases. DHL's response was to grant two deeds of variation (the "**2021 Deeds of Variation**") purporting to rely on the Upper Tribunal decision in *Morgan v Fletcher* [2019] UKUT 186 (LC); [2010] 1 P&CR 17:

    (i) On 11 October 2021, DHL granted a deed of variation in respect of 1/39. This converted the lease from a unified to a separate building basis

(thus reducing the liability by some 50%), and reduced the percentage from 24% to 1%. This lease is held by Mr Dutton who controls DHL. The paperwork relating to this transaction is far from satisfactory. Mr Dutton paid DHL £11,500 in respect of this concession.

(ii) On 18 November 2021, DHL granted a deed of variation in respect of 1/41, a lease held by Dr Lau. This also converted her lease from a unified to a separate building basis and reduced her percentage from 24% to 1%. Dr Lau again paid £11,500 for this concession. As a result of probing by the other lessees, it has become apparent that there was a side agreement whereby DHL agreed to refund this sum if the deed is found to be "invalid, ineffective and unenforceable".

11. DHL's primary submission to the Tribunal is that these deeds of variation are valid and that these have resolved the defects in the leases. Whilst it is conceded that there is still an overpayment of 8% (when the expenditure is split equally between the two buildings), it is said that this is modest and does not require any further variation. The Tribunal analyses the current position in Table 3 at [112] below. We are satisfied that this position is untenable:

    (i) Even an overpayment of 8% is excessive. DHL has not provided any explanation as to how DHL, as statutory trustee, would account for this surplus to the lessees who made the overpayments.

    (ii) Because of the cross-subsidies between the two buildings, the position is starker in respect of any expenditure attributable to just one building. Were the lift at No.39 to be replaced at a cost of £100k, the landlord would be entitled to collect £125.6k. Two lessees in No.41 would be required to contribute £66,700 for works from which they would not benefit. The landlord would hold the surplus of £25.6k in a statutory trust.

    (iii) Were the landlord to be required to replace the lift at No.41, the situation would be quite different. The landlord would only be able to collect £91.6k from the lessees and would be required to meet the shortfall of £8.4k from its own resources.

    (iv) The service charge account would be unworkable. For each item of expenditure, the landlord would need to attribute it to each of the buildings. On the No.41 account, there would be a shortfall which the landlord would need to fund; on the No.39 account, there would be a surplus which would need to be transferred to the statutory trusts.

12. If the leases are to be varied, all the parties are agreed that service charges should be apportioned on a separate building basis. The Tribunal notes this might not have been the outcome had the Tribunal merely had regard to the terms of the leases: (i) the first lease was granted on a unified building basis; (ii) five of the seven leases were granted on this basis. However, the Tribunal is satisfied that there are cogent practical reasons to treat the buildings separately. Further, the Tribunal should adopt a problem resolving approach and endorse the very practical approach proposed by the parties.

13. Five of the seven leaseholders ("**the majority lessees**") argued that in determining the percentages to be paid by each of the lessees, the Tribunal should not have regard to the two deeds of variation. We accept their submission (see [128] to [142] below). Mr Dutton and Dr Lau ("**the minority lessees**"), the two lessees who benefit from these deeds, argued to the contrary.

14. In considering what percentage to allocate to each lease under a separate building basis, the Tribunal is required to consider a number of options:

Table 1: Final Positions adopted by the Parties

	Leases	DHL	Will	Travers	Gillott	Tribunal
39 Crutched Friars						
Flat 1	24% - u	1%	25%	29.3%	25%	33%
Flat 2	24% - s	29%	25%	29.3%	25%	24%
Flat 3	24% - u	57%	25%	29.3%	25%	33%
Flat 4	10% - s	13%	25%	12%	25%	10%
41 Crutched Friars						
Flat 1	24% - u	1%	33.3%	-	-	26.5%
Flat 2	33.3% - u	48.5%	33.3%	-	-	36.75%
Flat 3	33.3% - u	48.5%	33.3%	-	-	36.75%

Key: "u" - unified building; "s" – separate buildings

15. Before the parties started their closing submissions, the Tribunal invited them to consider a formulation under which there were "winners", but no "losers". Our approach was premised on doing the least damage to the leases as originally granted. The leases for 2/39 and 4/39 were both granted on a separate buildings basis. Although their percentages are lower than that paid by the other lessees in No.39, we suggested that there was no reason why they should be required to pay more, in a situation where the problem is not one of under, but over payment. The Tribunal increased the percentages of all the other lessees pro rata. However, where they were paying on a unified basis and will now pay only in respect of their building. Flats 1/39 and 3/39 will now pay 33% (s), rather than 24% (u). Thus, were £100 to be paid on both No.39 and 41, they will now only pay £33 in respect of their own building, rather than £48 in respect of the two buildings.

16. Counsel were sympathetic to this approach. Mr Travers welcomed it as he will pay less than he was willing to concede. Mr and Mrs Wong welcomed it as it preserves their current position. The other parties sought to maintain their positions, albeit that they were sympathetic to the Tribunal's formulation, were their own formulations to be rejected.

17. Mr Will is the lead applicant. He seeks a variation so that all lessees pay an equal contribution. This has the merit of equity. However, we must have regard to the guidance of the Upper Tribunal that we should not vary leases on the basis that they impose unequal burdens. It is not the role of this

Tribunal to interfere with or improve contractual arrangements freely made. We should therefore have due regard to the percentages specified in the leases when we convert five leases from the "unified" to the "separate buildings" basis.

18. Dr Gillott argued that all the lessees at No.39, should pay the same, namely 25%. However, we are satisfied that we should not interfere with the leases in respect Flats 2 and 4. There therefore needs to be a pro rata increase in the percentages paid by Flats 1 and 3. Both these leases had been granted on a unified basis and will therefore be winners in that their service charges are now assessed on a separate buildings basis.

19. Finally, we address the formulation proposed by DHL and endorsed by Mr Dutton and Dr Lau. We are satisfied that this is perverse for the reasons discussed at [148] to [151] below. DHL's predecessor-in-title granted leases in respect of 2/39 and 4/39 on a separate building basis with percentages of 24% and 10% respectively. The landlord is now proposing that their percentages be increased to 29% and 13% without any compensation being paid by the landlord. DHL rather suggests that they should be compensated by Mr Will. The only lessees for whom the percentage is not increased, are those for 1/39 and 1/41. Each of these retain their preferential 1% which they have been granted through the 2021 Deeds of Variation. Mr Will holds the leases of 2/41 and 3/41. He is expected to pay 99% of the service charges in respect of No.41 (48.5% for each flat). DHL further suggest that Mr Will is a "winner" and should pay compensation to other lessees.

20. The Tribunal is satisfied that DHL's formulation reflects the antagonism between Mr Dutton and Mr Will which was only too apparent in the papers in the bundle. Such antagonism does not lend itself to a rational solution to the problem that has arisen. Mr Dutton seemed to adopt the approach that the problem was not one for DHL, as landlord, to resolve, but was rather for the lessees. The Tribunal does not accept this. The problem was created by the landlord's predecessor in title. The landlord should have taken a proactive approach to remedy that problem. This problem could only be addressed by the landlord devising a scheme that was agreeable to all the lessees or through the intervention of this tribunal.

21. The Tribunal is satisfied that our formulation provides an acceptable solution for all the parties (see [143]- [155] below). All benefit in that there will be a rational service charge mechanism for the seven flats at Crutched Friars. The present leases would discourage prudent and well-informed purchasers. Our proposed variation will remove this detriment. Our scheme has additional advantages. We are satisfied that the variations should be backdated so that it extends to the service charges determined by Judge Andrew Dutton (see [156] – [159] below). Some lessees will be entitled to a refund; no lessee will be required to pay more. Since there are no losers, no question of compensation arises (see [160] – [163] below).

The Applications

22. The Tribunal is required to determine five applications which relate to 39 and 41 Crutched Friars, London EC3N 2AE. All these cases have been issued under a single Case Number.

    (i) On 27 August 2021, Mr Michael Will ("the Lead Applicant") applied to vary the leases of Flats 2/41 and 3/41 under Section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act"). He issued a linked application under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act").

    (ii) On 14 February 2022, Dr David Gillott applied to vary the lease of 3/39 under Section 35 of the 1987 Act. He seeks similar variations to those sought by the Lead Applicant. He also issued a linked application under section 20C of the 1985 Act.

    (iii) On 9 June 2022, Different Houses Limited ("DHL") the freeholder and landlord applied to vary all the seven residential leases at 39 and 41 Crutched Friars under Section 36 of the 1987 Act. The purpose of this application is to secure the requisite variations to all seven leases, should the Tribunal decide to make any order pursuant to section 35.

23. The following are parties to these applications:

    (i) DHL, the freeholder and landlord of Crutched Friars. DHL is the Respondent to the applications issued by the Lead Applicant and by Dr Gillott. It is the Applicant in its own application.

    (ii) Mr Michael Will, the Lead Applicant, who is the lessee of 2/41 and 3/41. He is also a Respondent to the application brought by DHL.

    (iii) Dr David Gillott, the Second Applicant, who is the lessee of 3/39. He is also a Respondent to the application brought by DHL. He applied to be a Respondent to the lead application.

    (iv) Mr Philip Dutton who is the lessee of 1/39. He is also the sole director of DHL. He is a Respondent to the application brought by DHL. He applied to be a Respondent to the lead application.

    (v) Mr Thomas Travers who is the lessee of 4/39. He is a Respondent to the application brought by DHL. He applied to be a Respondent to the application brought by the Lead Applicant.

    (vi) Mr Ben and Ms Jessica Wong who are the lessees of 2/39. They are Respondents to the application brought by DHL and interested parties to the applications brought by Mr Will and Dr Gillott.

    (vii) Dr Hiu Ping (Lynia) Lau, who has been the lessee of 1/41 since 13 July 2020. She is a Respondent to the application brought by DHL. She also applied to be a Respondent to the lead application.

(viii) Mr David Lonsdale had been the lessee of 1/41 prior to July 2020. He is joined as an interested party to all these applications.

24. The lease of the commercial units on the ground and basement floors of Crutched Friars is held by the Stonegate Pub Company Limited ("Stonegate"). The lessee pays 33.3% of the cost of insuring Nos. 39 and 41 Crutched Friars and to a limited number of additional service charges. Apparently, these relate to the party walls, fences, sewers, drains, pipes, wires, flues, and gutters. The proceedings have been served on Stonegate. It has not applied to be joined to be a party to these proceedings. The following have also been served with the application made by the Lead Applicant: (i) Santander UK PLC (Mr Will's lender); (ii) Octopus Co-Lend Limited (DHL's Lender); and (iii) Skipton Building Society (Mr Dutton's Lender). They have also been served with the application made by DHL. None have applied to be made parties.

25. The Tribunal gave Directions on 3 September 2021 and 21 June 2022, pursuant to which the parties have filed their Statements of Case, Replies and Witness Statements.

26. The Tribunal directed DHL, Mr Lonsdale, Mr Dutton and Dr Lau to disclose any documents in their possession or control concerning the negotiation and entering into of the two deeds of variation. Neither DHL nor Ms Lau initially disclosed the side agreement relating to the 2021 Deed of Variation. DHL disclosed this in response to an application for specific disclosure.

27. Mr Dutton applied, and was granted permission to give evidence from the USA. Dr Lau applied to join the hearing from Hong Kong. She did not apply to give evidence from Hong Kong. This would not be possible as the UK has no arrangement with the Chinese authorities for such evidence to be given.

The Hearing

28. The Tribunal conducted a hybrid hearing. The hearing was held in person. Mr Dutton joined the hearing from Honolulu. Dr Lau and Ms Shania To who has been assisting her, joined from Hong Kong. All the parties attended the hearing.

29. Mr Will (the Lead Applicant) is the lessee of 2/41 and 3/41. He was represented by Mr Gary Cowen KC who is instructed by Mr Richard Webber of Elliott Matthew Property Solicitors. His application is at A.3-14 and his Statement of Case at 32-51. Mr Will proposes a formulation which he has said to be fair, namely an equal apportionment between the lessees in each building, the four lessees in No.39 paying 25% whilst the three lessees in No.41 pay 33.3%. Mr Will gave evidence. His witness statement is at C.192-220. He is the CEO of a software firm based in USA. He has qualified as a solicitor and trained with Clifford Chance. He has acted as a regulatory prosecutor for Lloyds. The Tribunal is satisfied that Mr Will only made his application because DHL had failed to take any adequate steps to rectify the problem that had arisen. Mr Will has had the most to benefit as each of his two leases currently require him to pay 33.3% of the service charges and

insurance in respect of both buildings. Thus if £100 were to be spent on both buildings, he would be required to pay a total of £133 in respect of his two flats. It was apparent that the antagonism between Mr Will and Mr Dutton has been mutual.

30. Dr Gillott (the Second Applicant) is the lessee of 3/39. He was represented by Mr Henry Webb (Counsel) who is instructed by Raymond Saul & Co LLP. His application is at A.83-93 and his Statement of Case at A.75-82. He currently pays 24% of the service charges in respect of both buildings. He argues that he should only pay 25% in respect of No.39, each lessee paying an equal proportion. Mr Webb largely adopted the arguments developed by Mr Cowen, but there were some significant differences. Dr Gillott gave evidence. His witness statement is at C.125-144. The Tribunal has no hesitation in accepting his evidence.

31. DHL (the Third Applicant) is the freeholder and lessor. DHL was represented by Mr Piers Harrison (Counsel) under the direct access scheme. DHL's application is at A.136-138 and its Statements of Case at A.55-71 and 178-180. Mr Harrison adduced evidence from Mr Dutton who gave evidence remotely from Honolulu. He is the sole director and shareholder of DHL. His witness statement is at C.2-113. He is currently the CEO of a software company. There was a 10-hour time difference and Mr Dutton gave evidence between 00.00 and 04.30 local time. The Tribunal must take this into account, but notes that it was Mr Dutton who chose to give evidence from abroad.

32. DHL's primary argument is that the Tribunal is bound by the two deeds of variation regarding the service charges and that Mr Dutton and Dr Lau should benefit from a service charge of 1% assessed on a separate building basis. DHL plead (at A.180): "the case of *Morgan v Fletcher* [2009] UKUT 186 binds the Tribunal as a result of the Upper Tribunal's findings that the landlord was entitled to reduce to zero the service charges recoverable on the lease of its two flats within a building."

33. The Tribunal did not find Mr Dutton to be a satisfactory witness. We are critical of the manner in which he responded to the Tribunal decision of Judge Dutton and his approach to the variation of the leases. The two deeds of variation seek to reduce the liability of the two lessees from 24% on a unified basis to 1% on a separate building basis. Thus, were £100 to be spent on each of the two properties, they would have had to pay £48; they are now only required to pay £1. Mr Dutton sought to argue that the £11,500 paid by each lessee for this concession was a commercial one. We are satisfied that this scheme was a cynical manoeuvre so that DHL could profit from the problems that had been created by its predecessor-in-title.

34. DHL did not accept any responsibility, as landlord, to resolve the problem that had arisen. Mr Dutton's approach was rather that this was a problem for the lessees and one which the lessees needed to resolve. If any compensation was to be paid as a consequence of the manner in which the original lessor had granted the leases, this should be paid by the lessees. We found this argument unattractive. DHL's primary argument was that the

overpayment of service charges had largely been addressed by the 2021 Deeds of Variation. Whilst there was a modest overpayment of some 8%, it could use this to service any arrears or to establish a sinking fund. Mr Dutton did not recognise that because of the element of cross-subsidies between the two buildings, there was a potential overpayment of 25.6% in respect of No.39 and an underpayment of 8.6% on No.41 (see Table 3 at [112] below). He would not have contemplated funding the underpayment that DHL had created. DHL's application only comes into play if the Tribunal is satisfied that the leases need to be varied.

35. Mr Travers is the lessee of 4/39. He was represented by Mr Daniel Dovar (Counsel) under the direct access scheme. His Statements of Case are at A.104-11 and A.191-200. This flat is on two floors and is much larger than the other flats. It has four bedrooms, whereas the others have two bedrooms. This was the last lease to be granted and seems to have been granted on concessionary terms. Under his lease, Mr Travers is only required to pay 10% in respect of the service charges for No.39; there are four flats in this building. Mr Travers gave evidence. His witness statement is at C.145-185. He had acquired the leasehold interest on 23 August 2013 and paid £900k. He emphasised that he had read his lease. He recognised that he was acquiring a lease under which the leaseholder was only required to contribute 10% in respect of a building with four flats. The Tribunal has no hesitation in accepting this evidence.

36. Mr and Mrs Wong are the lessees of 2/39. They appeared in person. Their Statement of Case is at A.184-185. Under their lease, they pay 24% in respect of No.24. They were the original lessees. Mr Wong gave evidence. His witness statement is at C.114-115. He objects to DHL's attempt to increase this to 29%. This is only necessary because of the deed of variation which DHL has granted to Mr Dutton, whereby his percentage is reduced from 24% to 1%. Mr and Mrs Wong have always paid their service charges. As a result of the decision of Judge Andrew Dutton, they should have received a refund of £6,600.23. They only received a refund of £3,828.10. DHL seem to have used the deed of variation as a device to circumvent the decision of the Tribunal. We have no hesitation in accepting their evidence. Their position is closely aligned to the position adopted by Mr Travers. They adopted the submissions made by Mr Dovar.

37. Mr Dutton, as lessee of 1/39, appeared in person. His Statement of Case is at A.181-183. He supported the position taken by DHL. He seeks to rely on the deed of variation whereby his service charge was reduced from 24% on a unified basis to 1% on a separate building basis. At A.183, he uses the same language as DHL: "the case of *Morgan v Fletcher* [2009] UKUT 186 binds the Tribunal as a result of the Upper Tribunal's findings that the landlord was entitled to reduce to zero the service charges recoverable on the lease of its two flats within a building".

38. Mr Harrison adduced evidence from Mr Dutton and there was no apparent difference between the approach that Mr Dutton took as director of DHL to his own position as lessee. At the end of the hearing, Mr Harrison reminded the Tribunal that he was only instructed on behalf of DHL. Mr Dutton did

not attend the third day to make closing submissions. The Tribunal was mindful that he should have the opportunity to comment on the formulation that we had postulated. The Tribunal therefore afforded Mr Dutton the opportunity to make written representations.

39. On 16 December, Mr Dutton provided these. He now suggests that the Tribunal should favour a unified building approach, with the flats paying the following percentages: 1/39: 0.5%; 2/39: 11%; 3/39: 22%; 4/39: 5%; 1/41: 0.5%; 2/41: 30.5%; and 3/41: 30.5%. This is not an option that any party advocated at the hearing. He complains that he might be required to contribute 33% to the cost of repairing the lift at No.39. His flat is on the ground floor and does not benefit from the lift. This liability for repairing the lift does not arise from these variation applications. He suggests that he is entitled to compensation should the Tribunal look behind the deed of variation. He also complains that he was not afforded the opportunity to put questions to witnesses. At no stage during the hearing did either Mr Harrison or Mr Dutton suggest that Mr Dutton had any distinct interest from DHL when it came to the cross-examination of witnesses.

40. Dr Lau, the lessee of 1/41 appeared in person. She is also a lawyer. She joined the hearing remotely from Hong Kong. She was also joined by Ms Shania To. Dr Lau's Statement of Case is at A.204-206. She has provided a witness statement at C.114-124. Because of the absence of any agreement between the UK and the Chinese authorities, she was not able to give any evidence from Hong Kong.

41. Dr Lau adopts the position adopted by DHL and Mr Dutton. At A.205, she pleads: "the case of *Morgan v Fletcher* [2009] UKUT 186 binds the Tribunal as a result of the Upper Tribunal's findings that the landlord was entitled to reduce to zero the service charges recoverable on the lease of its two flats within a building". In her closing submissions, Dr Lau argued that were the Tribunal to look behind the deed of variation, she would be entitled to substantial damages for loss of bargain which would far exceed the sum of £11,500 specified in her side agreement. This applies were the agreement to be found "invalid, ineffective and unenforceable".

42. Mr Lonsdale attended the hearing as an interested party. He is a friend of Mr Dutton. He is a barrister and has contributed to a text on leasehold enfranchisement. His Statements of Case are at A.72-73 and A.201-203. He gave evidence and his witness statement is at C.186-188. He was the original lessee of 1/41. He admitted that he had not read the lease, rather relying on his professional advisors. He stated that his sole interest in these proceedings was whether any variation should be backdated. However, his case went somewhat further than this. His Statements of Case make reference to *Morgan v Fletcher*. He emphasised that he did not instigate the deeds of variation. He felt it appropriate to add (at A.73) that he does not hold Mr Will in high regard "because of his belligerency, his unneighbourly behaviour, his false claims, his persistent deprecating of other people over many years". Mr Lonsdale did not attend to make closing submissions.

43. All Counsel provided Skeleton Arguments. We are grateful to the assistance that they provided.

The Inspection

44. On 9 December 2022, the Tribunal inspected the buildings at 39 and 41 Crutched Friars. Mr Lee Gardner, the managing agent for the freeholder, was present to afford the Tribunal access. Ms Jinan Linley, the managing agent for Mr Will, afforded access to 2/41 and 3/41. Dr Lau's assistant afforded access to 1/41. The Tribunal inspected all the flats. Mr and Mrs Wong and Mr Gillott were present when we inspected their flats.

45. The Crutched Friars Public House is on the ground and basement floors. We were told that the property had been a brewery. No.41 is a late Victorian Grade II listed property. The staircase seemed to be the feature which merited the listing. There is a rear projection to this property. There are three flats on the first, second and third floors. The property has wooden sash windows. The property has a centre valley roof and parapet gutters. We observed a walkway in the valley area that gave access from a fire door that was located in flat 4 in 39 Crutched Friars.

46. No.39 has a quite different layout. The original property was bombed during WW2, and the current building was constructed in the 1950s. There are four flats on the first, second, third and fourth/fifth floors. The ceilings are lower. Thus, the top of the third floor, is at the same height as the top of the second floor at No. 41. The staircase is more compact. There is no rear extension. The roof structure is quite different being a slate mansard roof, most likely with a concrete sub-frame, rather than timber. The windows are double glazed aluminium with a powder coating.

47. The widths for No.39 and No.41 are essentially the same. A parapet wall divides the roofs of the two properties. There is a fire exit from the top floor of Flat 4, No.39 leading onto the roof of No.41. Both properties have dormer windows at the front on the upper floors with dormer windows also to the fourth floor of No.39. There are also dormer windows at the rear, on the third floor at No.41, but on both the fourth and fifth floors at No.39. The physical layout and construction of the dormer windows is different on the two properties.

48. Six of the flats have large spacious living rooms at the front. There is no such feature at Flat 4, No.39, where there are two bedrooms at the front on the lower floor. A chimney stack straddles the two properties. The stack only serves the flats at No.41. There are lifts in both properties which seem to have been installed in about 1950. Both are currently redundant. At No.39, the entrance to the lift on the ground floor has been boarded over.

49. The Tribunal first inspected No.41:

    (i) 1/41 is on the first and first floor mezzanine levels. It has two bedrooms.

(ii) 2/41 2 is on the second floor. It has two bedrooms. This is also a split level flat. The flat is currently a building site. We were told that there had been serious problems of water penetration.

(iii) 3/41 is on the third floor. It has one bedroom. There is a separate store room in the rear extension at a lower level which has access to a roof terrace. There is a ladder in the hallway which gives access to the roof.

50. The Tribunal then inspected No.39:

(i) 1/39 is on the first floor. It has two bedrooms.

(ii) 2/39 is on the second floor. It has two bedrooms and a similar design.

(iii) 3/39 is on the third floor. It also has two bedrooms and a similar design.

(iv) 4/39 is on fourth and fifth floors. It has four bedrooms on fourth floor. There is a large living space on the fifth floor. There is access from the fifth floor living room onto a balcony/patio to the front of the property. In the living room we observed a fire door with an emergency push bar and this was consistent with the one-way fire door we observed on the roof of 41. A small kitchen is on the lower floor. The dormer windows are set back and the depth of the fourth floor is less than in the lower flats; the depth of the fifth floor is even smaller. The layout of this flat is quite different from any of the other flats. Being on two floors, the floor space is significantly greater.

51. Our inspection confirmed that there are cogent reasons for treating Nos. 39 and 41 as two separate buildings. This was the option for which all parties contended at the hearing. They are physically separated from each other. They are quite different in design. The sash windows in the Grade 2 Victorian Building are quite different from the double-glazed aluminium windows in No.39. The roof structures are different. It also enables different choices to be made for each building. The lessees at No.39 may agitate for their lift to be repaired, whilst those at No.41 may be content to use their Victorian staircase.

Issues in Dispute

52. At the Case Management Hearing on 21 June 2022, the parties agreed that the following issues need to be determined:

(i) Issue 1: Should the leases be varied? In particular:

(a) Should the leases of 2/41, 3/41 and 3/39 be varied?

Mr Cowen relied on sections 35(2)(b), (e) and (f) of the 1987 Act. Mr Webb rather put the emphasis on section 35(2)(f). Mr Harrison, on behalf of DHL, accepted that whilst the Tribunal did have jurisdiction under section 35(2)(f), we should not exercise our jurisdiction to vary any of these leases because the lessees were seeking to alter the fairness of the leases which was outside the statutory purpose.

(b) If so, should the other leases also be varied?

All the parties agreed that if the Tribunal is minded to vary these three leases under section 35, then all the leases should be varied under section 36.

(ii) Issue 2: If any of the leases should be varied, in respect of those leases, how should they be varied? In particular:

(a) What is the effect of the two 2021 Deeds of Variation?

Mr Harrison argued that DHL was entitled to vary the leases at 1/39 and 1/41 relying upon *Morgan v Fletcher*. The Tribunal must consider the scope of what was decided by the Upper Tribunal. DHL accept that despite the deeds of variation, the landlord is still entitled to collect service charges in excess of 100%. Thus, it retains the jurisdiction under the 1987 Act to vary the leases.

The majority tenants (Mr Will, Dr Gillott, Mr Travers, and Mr & Mrs Wong) argue that the Tribunal should have no regard to the 2021 Deeds of Variation. First, they are unlawful as DHL has acted in breach of Clause 3 of their leases, under which the landlord covenants that all leases should be on similar terms. Secondly, the Tribunal has a wide discretion as how it should vary the leases. In exercising its discretion, it should consider the conduct of DHL. If satisfied that these were a cynical manoeuvre to manipulate the leases for its own gain, the Tribunal should rather have regard to the intention of the parties when the leases were originally granted.

(b) Should they be varied on a "unified" or "separate" building basis?

All the parties accepted that all the leases must be on the same basis. Indeed, it is apparent that it would be impossible to operate a service charge account for these buildings with some flats being on a unified basis, whist others are on a separate building basis. All the parties favoured a separate building basis, albeit that the first lease was granted on a uniform basis, and five out of the seven leases were granted on this basis. The Tribunal agrees that there are cogent practical reasons to treat the buildings separately. Further, the Tribunal should adopt a problem resolving approach and endorse the very practical approach proposed by the parties.

(c) In the light of the answer to 2(b) above, what percentages of the service charge should each leaseholder pay?

There are three different formulations proposed by the parties. The Tribunal postulated a fourth formulation which is the one which we have concluded that we should accept.

(iii) Issue 3: Should any variation be backdated?

Mr Will and Dr Gillott argued that that any variation should be backdated to 1 June 2019 so that it governs the apportionment of the service charges which Judge Andrew Dutton found to be payable. The Tribunal had found that there was an overpayment of 56%. This will enable DHL to identify to whom any repayment should be made.

Mr Travers and DHL argued that there should be no backdating. Mr Harrison was not clear as to how DHL would account for these overpayments, namely £43,622.73 in respect of the major works and £3,403.01 in respect of the service charges payable for 2019.20. He also identified the practical problems created by section 20B of the 1985 Act, were the Tribunal to find that there were any "losers" who would have to pay further sums in respect of these service charges.

(iv) Issue 4: In the light of the answers to Issues 1 2, and 3, is any compensation payable under section 38 of the 1987 Act? If so, (a) to whom (b) by whom and (c) on what principles should the compensation be calculated? If compensation is to be paid, how much should be paid?

Mr Will and Dr Gillott opposed the payment of any compensation. Mr and Mrs Wong were silent on this issue. The other parties argued that any "winner" should pay compensation to the "losers". On DHL's formulation, Mr Will would be a winner and should pay compensation to Mr and Mrs Wong, Dr Gillott and Mr Travers.

One of the attractions of the Tribunal's formulation is that whilst there are "winners", there are no "losers". This should normally be the situation where there is over recovery of service charges. The issue is who should pay less. Were the Tribunal's formulation to be adopted, the parties accepted that no compensation would be payable. Indeed, all parties would benefit in that they would acquire leases with a service charge mechanism that is coherent and which would be attractive to any prospective purchaser.

(v) Issue 5: Both Mr Will and Dr Gillott have issued separate applications under section 20C of the 1985 Act seeking an order restricting DHL from passing on its costs in connection with these applications through the service charge account. Mr Travers, Mr & Mrs Wong and Dr Lau confirmed that they also wished to make similar applications. Mr Dutton does not make such an application. In his written closing submissions, he argues that it would be wrong for such an application to be made.

The Law

53. Both Mr Will and Dr Gillott apply for their leases to be varied pursuant to section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act"). This section makes provision for a party to apply to vary their lease. The relevant parts provide (with emphasis added):

> "(1) Any party to a long lease of a flat may make an application to the appropriate tribunal for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

(a) the repair or maintenance of—

(i) the flat in question, or

(ii) the building containing the flat, or

(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease;

(g) such other matters as may be prescribed by regulations made by the Secretary of State. 2

(3) .....

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

54. Mr Will applies for his lease to be varied relying on section 35 (2) (b), (e) and (f). DHL oppose any variation. However, if the Tribunal is to vary the leases, Mr Harrison seemed to accept that the threshold in section 35 (2) (f) is met. This is the position adopted by the majority leaseholders. If the section 35(2)(f) threshold is met, it is of less importance whether subparagraphs (b) and (e) are also met.

55. Should the Tribunal decide to vary the leases held by Mr Will and Dr Gillott, we need to consider whether to vary the other leases. DHL relies on section 36 of the Act which provides (emphasis added):

"(1) Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the tribunal asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.

(2) Any lease so specified—

(a) must be a long lease of a flat under which the landlord is the same person as the landlord under the lease specified in the original application; but

(b) need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.

(3) The grounds on which an application may be made under this section are—

(a) that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application;

(b) that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons

who are parties to the leases specified in that application, to have all of the leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect."

56. Section 38 makes further provision in respect of orders varying leases. The relevant parts of the section provide (with emphasis added):

> (1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.
>
> (2) If—
>
> > (a) an application under section 36 was made in connection with that application, and
> >
> > (b) the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application under section 36, the tribunal may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.
>
> (3) .....
>
> (4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.
>
> (5) If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.
>
> (6) A tribunal shall not make an order under this section effecting any variation of a lease if it appears to the tribunal —
>
> > (a) that the variation would be likely substantially to prejudice—
> >
> > > (i) any respondent to the application, or
> > >
> > > (ii) any person who is not a party to the application, and that an award under subsection (10) would not afford him adequate compensation, or
> >
> > (b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

(7) A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—

(a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or

(b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or

(c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(8) A tribunal may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.

(9) A tribunal may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.

(10) Where a tribunal makes an order under this section varying a lease the tribunal may, <u>if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation</u>.

57. An issue arose as to how DHL should deal with the excess service charges which are recovered from the lessees. Section 42 of the 1987 Act provides for any overpayment to be held under a statutory trust for the benefit of any lessee who has made an overpayment:

(1) This section applies where the tenants of two or more dwellings may be required under the terms of their leases to contribute to the same costs, or the tenant of a dwelling may be required under the terms of his lease to contribute to costs to which no other tenant of a dwelling may be required to contribute, by the payment of service charges; and in this section

"the contributing tenants" means those tenants and "the sole contributing tenant" means that tenant;

"the payee" means the landlord or other person to whom any such charges are payable by those tenants, or that tenant, under the terms of their leases, or his lease;

"relevant service charges" means any such charges;

"service charge" has the meaning given by section 18(1) of the 1985 Act, except that it does not include a service charge payable by the tenant of a dwelling the rent of which is registered under Part IV of the Rent Act 1977, unless the amount registered is, in pursuance of section 71(4) of that Act, entered as a variable amount;

"tenant" does not include a tenant of an exempt landlord; and

"trust fund" means the fund, or (as the case may be) any of the funds, mentioned in subsection (2) below.

(2) Any sums paid to the payee by the contributing tenants, or the sole contributing tenant, by way of relevant service charges, and any investments representing those sums, shall (together with any income accruing thereon) be held by the payee either as a single fund or, if he thinks fit, in two or more separate funds.

(3) The payee shall hold any trust fund—

(a) on trust to defray costs incurred in connection with the matters for which the relevant service charges were payable (whether incurred by himself or by any other person), and

(b) subject to that, on trust for the persons who are the contributing tenants for the time being, or the person who is the sole contributing tenant for the time being.

(4) Subject to subsections (6) to (8), the contributing tenants shall be treated as entitled by virtue of subsection (3)(b) to such shares in the residue of any such fund as are proportionate to their respective liabilities to pay relevant service charges or the sole contributing tenant shall be treated as so entitled to the residue of any such fund.

58. An issue also arose as to the practical difficulties that might arise were the Tribunal to increase the service charge that any lessee is obliged to pay and backdate the effect of the variation. Section 20B of the 1985 Act provides:

"(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

59. The majority lessees are seeking an Order under Section 20C of the 1985 Act which provides:

> "(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a ..... the First-tier Tribunal .... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
>
> (2) .....
>
> (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

The Leases

60. Bundle C includes the lease for all the flats at Nos. 39 and 41 Crutched Friars. Mr Will analyses these leases at [16] to [34] of his Statement of Case (at A.36-41). DHL largely agrees with this analysis (see [10] to [23] at A.56-59).

61. In each lease, "the Estate" is defined by reference to the First Schedule. Five of the leases define "the Estate" as meaning "All that land together with the building thereon and known as 39/41 Crutched Friars ..... all of which land (together with other land) is shown for the purpose of identification only edged black on Plan "A" annexed hereto and registered at HM Land Registry under Title number NGL654348". The exceptions are (i) 2/39 which refers to the land and building known as 39 Crutched Friars which is said "to form part of the land" registered at the Land Registry and (ii) 4/39 which refers to the land and building known as 39 Crutched Friars shown edged black on Plan A and registered at HM Land Registry. Plan A to this particular lease appears to show the land edged in black as only comprising part of 39 itself, that being the footprint of 4/39. This is different to all of the other lease plans.

62. All of the leases have a defined term for "the building" being the building constructed on "the Estate" and therefore defined by reference to the definition of "the Estate". So, the inconsistencies referred to above are carried through to the definition of "the building". Confusingly, six of the seven leases also include a definition of "the Building". 4/39 does not include "the Building" as a defined term at all. Each of the flats in 41 has a definition of "the Building" limited to 41. Flats 1/39 and 2/39 have definitions limited to 39. However, 3/39 defines "the Building" as 39/41. That is important because, as drafted, the lease of 3/39 also included a specific obligation upon the lessee of that flat to repair the roof of "the Building", meaning, therefore, the roof of 39/41.

63. The Tribunal does not need to analyse the leases in any greater detail as Judge Andrew Dutton has construed the leases and has identified the service charge apportionments for each lease. The commercial premises are required to contribute 33.3% of the insurance. The remaining 66.7% is to be

apportioned to the lessees on the same basis. No party has sought to appeal this decision. There is some ambiguity as to the insurance contribution that 4/39 is required to make. We address this at [155] below.

64. As drafted, the lease for 3/39 required the lessee to repair, at his own expense, the roof of Nos. 39 and 41. This defect was spotted by Dr Gillott's solicitor when he was negotiating to acquire the lease. By a deed of variation dated 20 October 1999 and made between Capitalstart and Jacobus Van Goolen ("the 3/39 Deed"), the lessee's obligation to repair the roof was removed and the roof was included within the "Retained Premises". Unfortunately, the solicitor did not register the 3/39 Deed when Dr Gillott's assignment was registered with the Land Registry on 7 January 2000. On 28 November 2018, DHL acquired the freehold interest in Crutched Friars. It disputed the validity of the 3/39 Deed. After a financial settlement was reached, DHL conceded the validity of the Deed of Variation. On 9 March 2021, the FTT (Land Registration) proceedings relating to validity of the Deed of Variation were compromised on terms providing for the Deed to be registered and a Consent Order was made to this effect

65. The 3/39 Deed is relevant as DHL has sought to argue that if Capitalstart was entitled to grant this deed of variation, it was equally entitled to grant the two deeds of variation in 2021. We must consider this argument in due course.

66. The Lead Applicant relies on Clause 3 which was included in each of six leases granted in 1996 and 1997 (the covenants were repeated in a slightly different form in the lease for 4/39 which was granted in 2002). The Landlord covenanted with the Tenant (emphasis added):

> "(ii) that any Leases previously granted of any of the Flats have been on the similar terms as are contained in this Lease (mutatis mutandis)
>
> (iii) It is intended that the grant of any further leases of any of the Flats comprised in the building will be on the same terms as are contained in this Lease (mutatis mutandis) and in particular that the Landlord will require every person to whom it shall hereafter grant a lease of any flat comprised in the building to covenant to observe the restrictions and stipulations set forth in the Fourth and Sixth Schedules hereto and that while any flat or part of the building remains undemised the Landlord will observe covenants and conditions similar to those covenants and conditions contained in this lease as if any flat or part of the building was demised on long lease including a covenant to pay its proper proportion of service charge of any undemised flat or part of the building.
>
> .....
>
> (v) That (if so required by the Tenant) it will enforce the covenants on the part of the tenant of any other flat or other premises or other premises comprised in the building upon the Tenant indemnifying the Landlord against all costs and expenses in respect of such enforcement and providing such security in respect of costs and expenses as the Landlord may reasonable require."

67. Mr Cowen argues that the purpose of these provisions is not difficult to understand. Provided that the landlord complies with its obligations, the provisions "provide a practical way of ensuring that all lessees know the principles and rules upon which the building will be operated and occupied" (quoting the speech of Lord Kitchin at [41] in *Duval v 11-13 Randolph Crescent Limited* ("*Duval*") [2020] UKSC 18; [2020] AC 845).

68. Mr Cowen and Mr Webb argue that the 2021 Deeds of Variation breached the terms of these covenants and were thereby unlawful. We must consider this argument in due course.

The Background

69. On 11 September 1996, the first lease was granted and was in respect of 3/39 on a unified building basis with a service charge contribution of 24%. On 16 January 1997, the second lease was granted and was in respect of 1/41, again on a unified building basis with a service charge contribution of 24%. No explanation has been offered as to why the landlord should have thought it appropriate to require two lessees in a building with seven flats to contribute 48% towards the service charges. Whether this was due to error by the solicitors or the design of the landlord is not clear.

70. On 28 February 1997, the third lease was granted and was in respect of 2/39. On this occasion, the lease was granted on a separate building basis with a service charge contribution of 24%. The reason why the drafter adopted a different approach has not been explained. There were four flats at No.39. Considered in isolation, there is nothing to suggest to the tenant that the approach adopted by the landlord was incoherent.

71. The fundamental problem is that it is impossible to operate a service charge regime on a rational basis if some leases are granted on a unified basis, with others on a separate building basis. The Tribunal is satisfied that at this point, Capitalstart was in breach of its covenant in Clause 3(iii) that any further leases in the building would be on the "same terms". We accept Mr Cowen's formulation that with this Clause it was intended that all future leases would be granted on a "coherent" basis.

72. On 7 March 1997, the fourth lease was granted and was in respect of 3/41 on a unified building basis, but at a service charge contribution of 33.3%. This lease was granted to Mr Will. A service charge of 33.3% would have been understandable, had the lease been on a separate building basis as there are three flats at No.41. However, had Mr Will read his lease, it would have been apparent that it had not been granted on this basis. The four flats were now contributing 81.3% to any expenditure in respect of No.39 and 105.3% in respect of No.41. By this stage, the landlord was creating a greater and greater problem for itself.

73. On 14 March 1997, the fifth lease was granted in respect of 1/39 on a unified basis with a service charge contribution of 24%. On 21 March 1997, the sixth lease was granted in respect of 2/41 on a unified basis with a service charge

contribution was 33.3%. The six flats were now contributing 129% to any expenditure in respect of No.39 and 153% in respect of No.41.

74. On 4 February 2002, the seventh lease was granted, was in respect of 4/39 and was granted on a separate basis with a service charge contribution of 10%. This lease was granted five years later than the other leases. It would have been clear to the lessee that the percentage had been granted on a concessionary basis. The lessee had no reason to complain. A contract is a contract.

75. By 2002, the service charge mechanism was incoherent. All the lessees would have had reason to complain that the structure of the seven leases did not reflect the covenants made by the landlord in Clause 3 of their leases. Five of the leases were on a unified basis and two on a separate building basis. The landlord was entitled to collect 138.6% to any expenditure in respect of No.39 and 172.63% in respect of No.41. It should have been apparent that the only way to resolve the situation was to put all the leases on a "unified" or a "separate building" basis and ensuring that the service charges totalled 100%. This could only be achieved with the agreement of all the parties or by an application to this tribunal.

76. The Tribunal was told that the problem only became apparent to the lessees at No.39 (Mr Dutton, Mr and Mrs Wong, Dr Gillott and Mr Travers) in 2015 and the lessees in No.41 (Mr Lonsdale and Mr Will) in 2018. For a number of years, the buildings were self-managed by the lessees. They spent little on maintaining the buildings. There had been a lift in each building. When these broke down, the lessees decided not to incur the cost of installing new lifts. In 2011, O'Sullivan & Co were appointed to manage the building. In 2014, they were succeeded by Rendall and Rittner.

77. In 2015, Dr Gillott and Mr Dutton exchanged emails with Emma Utting, from Rendall and Rittner. The leaseholders at No.39 were being charged 82% in respect of their building (Mr Dutton: 24%; Mr and Mrs Wong: 24%; Dr Gillott: 24% and Mr Travers: 10%). There was an apparent shortfall of 18%. Mr Dutton was concerned that their contributions were being rounded up to 100%. On 19 March (at C.136), Mr Dutton suggested that the freeholder should make up the shortfall. On 12 April 2018 (at D.360), Mr Travers proposed that each of the lessees at No.39 should pay 25% of the service charges for the building.

78. In June 2016, Capitalstart transferred the freehold interest to Soho Thai Limited, a subsidiary. In March 2017, the freehold was sold to Shaftesbury who appointed CBRE to manage Crutched Friars. CBRE adopted a unified building basis.

79. In August 2017, Mr Will redeemed his mortgage and obtained a copy of his lease for 3/41. In October 2018, Mr Dutton shared a full set of the leases with Mr Will. On 28 February 2018, Shaftesbury issued a Section 20 Consultation Notice for the installation of an entry phone at No.41. This was also served on Mr Will in respect of 3/41 relating to the service charge account.

80. On 17 May 2018 (see D.367), there was a meeting to discuss the situation. Deeds of Variation were discussed. Shaftesbury stated that they had acquired Crutched Friars as part of a portfolio of properties. Shaftesbury was focussed on the West End and had no interest in retaining its interest. It expected the lessees to pay for any deeds of variation.

81. On 29 August 2018, Mr Dutton incorporated DHL which acquired the freehold on 28 November 2018 for £2.7m. DHL, through its director, acquired the freehold with knowledge of the problems relating to the service charge account. Crutched Friars was in a state of disrepair reflecting the years of neglect. This is reflected in the Condition Reports, dated August 2018 at C.14-56. On 29 October, Mr Dutton wrote to the lessees proposing that the service charges should be apportioned on a unified basis with the 1/39 paying 15%; 2/39: 15%; 3/39: 15%; 4/39: 10%; 1/41: 15%; 2/41: 15% and 3/41: 15%. The parties were unable to agree to this.

82. Matters came to a head in 2019, when DHL was proposing major works to the roof at a cost of £207k. On 27 February 2020, Mr Travers issued an application under section 27A of the 1985 Act seeking a determination of his liability to pay the sum sought (LON/00AA/LSC/2020/0087). On 24 February 2020, DHL issued a separate application in respect of the other lessees (LON/00AA/LSC/2020/0160). An unsuccessful attempt was made to mediate.

83. On 13 July 2020, Mr Lonsdale assigned his leasehold interest in 1/41 to Dr Lau for £840k. She was alerted to the problems relating to the service charge account. On 9 March 2021, the FTT (Land Registry) approved a Consent Order giving effect to the 3/39 Deed of Variation.

84. There was a hearing on 5, 6 and 7 July 2021, before an experienced Tribunal chaired by Judge Andrew Dutton. On 5 August 2021 (at A.299), the Tribunal issued their decision identifying the service charge liabilities of each lessee. No party has sought to appeal this decision.

85. The Tribunal determined the contributions payable in respect of the major works (at A.254). It found that the cost of these should be attributed equally between the two buildings. Both Shaftesbury and the commercial premises contributed a total of £100,834 towards the cost of the works. There was a further £22,862 contribution from monies held on account. The Tribunal made a reduction in the management charges of £4,000. The Tribunal found that a balance of £79,314.10 was payable by the lessees. However, the landlord was entitled to collect a total of £122,936.83 pursuant to the terms of the leases. There was thus an overpayment of £43,622.73 (55%). The Tribunal made no finding as to how the landlord should treat this surplus. The Tribunal also made findings in respect of the service charges for 2019/20 (at A.255) and the interim service charges for 2020/21 (at A.256).

86. No party had made an application to vary the leases. However, the Tribunal made some suggestions as to the way forward to deal with the over recovery on the service charge account of 55%:

"116. If it is thought appropriate to consider other potential divisions of allocations in relation to service charges then we would suggest that [DHL] retains the services of an independent surveyor and reaches some agreement with the leaseholders as to how it may be best to deal with the division both as to whether or not it is dealt with as one building which may be difficult given that 41 is Listed, or whether they deal with it on a square footage basis. What is clear is that the confusion caused by the leases needs to be resolved for the benefit of all parties".

"121. Although this application was not in connection with the variation of the leases, it may be of some assistance if we indicated that in our view perhaps the way forward would be to deal with the leases on the basis that the properties were split between 41 and 39. The apportionments could perhaps be dealt with on a quarter share for 39 and a third share for 41, subject to contributions from the pub for insurance and general service charges in so far as the pub is liable. Maybe that if there were to be variations of the leases some form of compensation might be payable certainly to Mr Travers but he may be amenable to accepting a higher service charge figure on the basis that it will at least lead to agreement between all concerned".

87. The Tribunal determined that the relevant expenditure should be split equally between the two buildings. However, as Table 2 illustrates, the position is more marked if the expenditure relates to either No.39 (a 73% over recovery) or No.41 (a 39% over recovery) because of the extent to which the lessees at No.41 subsidise any expenditure at No.39. In practice, it would be necessary for the landlord to apportion any item of expenditure between the two buildings and identify the extent of any over recovery, which would then need to be held on trust for the individual lessees. As the Tribunal recognised, the problem of over recovery could only be resolved by putting all the leases on a unified or separate building basis. The Tribunal suggested a separate building basis.

Table 2: The Effect of the Tribunal Decision

		£50 spent on each property	£100 on No.39	£100 on No.41
39 Crutched Friars				
Flat 1 – Mr Dutton	Unified 24%	£24	£24	£24
Flat 2 – Mr/Mrs Wong	Separate – 24%	£12	£24	-
Flat 3 – Dr Gillott	Unified - 24%	£24	£24	£24
Flat 4 – Mr Travers	Separate – 10%	£5	£10	-
41 Crutched Friars				
Flat 1 – Dr Lau	Unified - 24%	£24	£24	£24
Flat 2 – Mr Will	Unified – 33.3%	£33.3	£33.3	£33.3
Flat 3 – Mr Will	Unified – 33.3%	£33.3	£33.3	£33.3
Total:		£155.6	£172.6	£138.6
Excess:		56%	73%	39%

88. The Tribunal did not offer any guidance as to how DHL should deal with any over recovery. Any overpayment paid by a lessee on any service charge item paid by a lessee would be held by the landlord under a statutory trust on behalf of the individual lessees pursuant to section 42 of the 1987 Act. Mr Dutton suggested that he was entitled to retain any over recovery to meet any shortfall on the service charge account or to establish a sinking fund. The Tribunal is satisfied that under the statutory trusts, the landlord is not entitled to use trust funds to subsidise the arrears of other parties.

89. The parties did not come together to seek to identify an agreed way forward. Rather, DHL took an entrenched position. Part of the problem seems to have been that Mr Will and Dr Gillott were withholding their service charges and insurance charges pending the resolution of this issue. Mr Dutton was concerned that the Tribunal had reduced DHL's management fee by £4,000. He was also concerned about the cost of the proceedings. He considered that the apportionment problem was one for the lessees to resolve. He did not accept DHL's responsibilities as landlord. It was DHL's predecessor in title which had created the problem. The landlord had covenanted to provide the services. It needed an effective service charge mechanism in order to do so.

90. On 6 August (D.799), Mr Dutton emailed the lessees:

> "Hello All,
>
> Could you please all confirm by email that you have received, read, understood and accept the decision from the FTT.
>
> Once received DHL will instruct its accountants to perform the necessary recalculations and will be sending final demands according to Schedule A provide by the FTT.
>
> Thanks & Regards
> Philip Dutton
> Different Houses Limited."

91. On 7 Aug (D.799), Dr Gillott emailed Mr Dutton:

> "I think it would be useful for everyone if you could confirm how you intend to apportion the £39,657 for each building between the lessees for 39 and 41."

92. On 8 August (D.797), Mr Lonsdale emailed Mr Dutton:

> "I do not see any reason why you cannot alter your own lease by deed between you and DHL to reduce the amount of service charge that you have to pay. That is what after all happened with Gillott and on his case his predecessor.
>
> But why not before doing it ask another member of the Bar if this is permissible and then publish his opinion assuming this is positive?

This will leave Will paying 33% plus 33% of everything and Gillott and Lin paying 24% of everything. You could then embark on raising money for the lifts in the knowledge that you will not be paying or not substantially paying for them.

It is self interested but the law does not stop you being self interested.

The FTT's decision leaves so many issues unresolved and the reasoning is very poor but I doubt any of them will appeal it."

93. On 11 August (D.798) Mr Dutton emailed Dr Gillott:

"Hello David,

Apportionment will be as per the percentages stipulated in the FTT ruling.

Thanks & Regards
Philip Dutton
Different Houses Limited"

94. On 13 August (D.798), Mr Will emailed Mr Dutton:

"Dear Philip.

Just so we are all clear you are proposing contributions for the major works and 2020/2021 service charge that exceed the amount spent. For example with regard to the major works the over recovery totals £43,622.73?

Best
Mike"

95. On 14 August (D.255), Mr Lonsdale emailed Mr Dutton suggesting how he might like to draft an email to the lessees:

"Dear Philip,

Something like this.

'I propose to charge the full amount permitted by the tribunal decision.

I am aware that service charges are held on trust and if payment of demands produce a surplus then so be it. No person is entitled to a reduction on that account.

As the tribunal has made clear what each lessee must pay, any failure to pay the sum demanded will result in forfeiture proceedings.'

But do take advice from someone other than me as to whether you can reduce your own liability to pay service charges in the light of the (ludicrous) decision.

David"

96. 15 August 2021 (D.798), Mr Dutton responded to Mr Will:

"Hello Michael,

Different Houses Limited (DHL) proposes to charge the full amount permitted by the tribunal decision.

DHL is aware that service charges are held on trust and if payment of demands produce a surplus then so be it. No leaseholder is entitled to any reduction on that account.

As the tribunal has made clear what each lessee must pay, any failure to pay the sum demanded will result in forfeiture proceedings.

DHL is appointing a managing agent to manage the building going forward and they will enforce the leases to the letter of the law.

Thanks & Regards
Philip Dutton
Different Houses Limited"

97. Mr Will noted in his evidence that this was the first time that either DHL or its predecessors in title had sought to collect 156% of the service charge expenditure. There was a threat of forfeiture if the lessees did not pay 56% more than the budgeted expenditure. There was no explanation as to how DHL would operate the trust fund. Neither did Mr Dutton recognise that DHL would need to apportion each item of expenditure between Nos. 39 and 41, there being an excess of 73% on No.39, but 39% on No.41.

98. On 27 August 2021, Mr Will issued his application to this tribunal seeking a variation of his two leases in respect of Flats 2/41 and 3/41 pursuant to section 35 of the 1987 Act. He sought to vary his leases so that the 33.3% contribution that he paid in respect of each of his two flats should be on a "separate" rather than a "unified" building basis. This application is in line with what Judge Andrew Dutton had contemplated. If the parties were unable to agree a variation, a further application to the tribunal would be required. On 3 December, Judge Pittaway held a Case Management Hearing at which she gave Directions.

99. DHL's response to this application was to grant the 2021 Deeds of Variation:

(i) On 11 October 2021 (at B.72-75), DHL granted a deed of variation in respect of 1/39. This converted the lease from a unified to a separate building basis (thus reducing the liability by some 50%), and reduced the

percentage from 24% to 1%. The variation takes effect from the date of the deed. This lease is held by Mr Dutton, who controls DHL.

(ii) On 18 November 2021 (at B.194-197), DHL granted a deed of variation in respect of 1/41, a lease held by Dr Lau. This also converted her lease from a unified to a separate building basis and reduced her percentage from 24% to 1%. Dr Lau paid £11,500 for this concession (D.28). There is a side agreement, also dated 18 November 2021 (at D.858-861) whereby DHL agree to refund this sum if the deed is found to be "invalid, ineffective and unenforceable". No explanation was offered as to why this needed to be in a side agreement, rather than in the deed of variation. Neither DHL nor Dr Lau disclosed this agreement pursuant to the Direction for disclosure made by Judge Latham on 28 June 2022.

100. The paperwork in connection with these deeds is not entirely satisfactory. Mr Dutton told the Tribunal that he had been alerted to the Upper Tribunal decision in *Morgan v Fletcher* by DHL's Legal Counsel. The deeds were drafted by DHL's Solicitor, Mr Anthony Shalet, at Rooks Rider. It is unclear whether Mr Dutton instructed separate solicitors.

101. On 18 October (D.258), Mr Dutton sent the following email to Mr Shalet:

"Hello Anthony,

Lynia Lau (Hiu Ping Lau) - Owner Flat 1, 41 Crutched Friars has asked me to put you in contact with her regarding the deed of variation.

Please let me know when you have some documentation for me to review.

Thanks & Regards
Philip Dutton"

It is not entirely clear what further documentation was required as on Mr Dutton's account, he had signed his Deed of Variation on 11 October.

102. On 22 October (D.260), Mr Shalet responded to Mr Dutton and Dr Lau:

"Thanks All

I am reviewing the lease to prepare the drafting

Kind rgds
Anthony Shalet
Partner
Head of Real Estate"

103. DHL have disclosed two invoices dated 15 November 2021:

(i) DHL issued an invoice (at D849) to Mr Dutton in the sum of £11,500 in respect of the Deed of Variation. This is assessed as £500 for each 1%

reduction in the service charge contribution. It is to be noted that the variation was substantially greater than this as the deeds purport to change the charge from a unified to a separate building basis. The sum demanded was to be paid by 15 November 2022. However, the invoice recorded that the sum had been paid. On 29 July 2022 (at D.872), Mr Dutton paid this sum to DHL. Mr Dutton stated that the invoice had been printed out after this date. The invoice did not record the date of payment. The Tribunal notes that this sum was paid shortly after Judge Latham had given Directions on 21 June 2022.

(ii) DHL issued an invoice (at D.850) to Dr Lau in the sum of £11,500. This also recorded that the sum had been paid. No explanation was provided as to why this invoice was issued before Dr Lau's Deed of Variation had been agreed or executed. On 22 and 23 November 2021 (at D.871), Dr Lau paid three sums totalling £11,500.

104. On 16 November (at D.262), Dr Lau sent the following email to Mr Shalet:

"Hi Anthony

May I know where are you for the draft and if you haven't started yet please out that in hold as Philip hasn't decided how to proceed with the variation.

Please confirm if there's any conflict of interest if you are acting both for Philip as the landlord and myself as the tenant. If so I may need to engage another firm in case we can't agree on the variation of the lease.

Regards
Lynia"

105. On 17 November 2021, Dr Lau emailed Mr Dutton and Mr Shalet:

"Thanks Philip.

Hi Anthony

I'm in HK so you need to send me the deed to execute and then the documents can only arrive London in several days. This deed of variation needs to be registered and get confirmed ASAP without any delay and keep highly confidential otherwise it may get injunction by other tenants.

Philip has been asked to provided a copy of all leases by the tribunal already.

Regards
Lynia"

106. On the same day (at D.264), Mr Dutton emailed Mr Shalet:

"Hello Anthony,

I have tried to reach you this morning on mobile and direct line. It is critical and urgent that I speak to you. I need to complete the deed of variation for Flat 1, 41 Crutched Friars today. This has been dragging for weeks for what should be a very simple one day max drafting. Lynia who is also a lawyer, provided a draft drafting and is equally vexed by why this is taking so long. I would like to have the deed of variation back to both Lynia and I for signing today.

Thanks & Regards
Philip Dutton"

107. On 18 November, Dr Lau executed her Deed of Variation. On 26 November, Mr Dutton sent the following email to the majority lessees:

"Hello All,

Following the First Tier Tribunal's decision, Different Houses Limited (DHL) has entered into deeds of variation with myself and Lynia Lau in respect of the leases of our respective flats. The effect of those deeds is to reduce the percentage that each of us have to pay in respect of individual building service charges to 1%.

This is entirely permissible following the decision of *Morgan v Fletcher* [2009] UKUT 186 and the positive application of *Morgan v Fletcher* in *Pratt v Bretby Hall* 2019.

"I calculate therefore that the position now is that:

- Michael Will is responsible for 33.3 % x 2 = 66.6% of the total spent on 39 and 41.
- David Gillott is responsible for 24% of the total spent on 39 and 41.
- Ben and Jessica Wong are responsible for 24 % of the total spent on 39 or 12% of the total spent on 39 and 41
- Tom Travers is responsible for 10% of the total spent on 39 or 5% of the total spent on 39 and 41.
- I am responsible for 1% of the total spent on 39 or .5% of the total spent on 39 and 41.
- Lynia Lau is responsible for 1 % of the total spent on 41 or .5% of the total spent on 39 and 41.

This means that the service charges raise 108.6% of what is required. There does therefore still remain limited scope to reduce the percentages. DHL is prepared to consider commercial offers from any lessee other than Lynia or myself for a deed reducing percentages so that the total comes to 100%. If this can be agreed then there will be no need for a hearing at the tribunal, the tribunal can also not reduce the percentage to below 100% and so Michael's application to

reduce his to 33.3% of 41 cannot be upheld.

Thanks & Regards
Philip Dutton on behalf of Different Houses Limited"

108. By return, Mr Will emailed Mr Dutton (at D.863) requesting copies of the deeds of variation. On 26 November 2021 (D.862), Mr Lonsdale sent the following email to Mr Will:

"Greetings Michael!

Just exquisite news.

The deeds of variation are all fine. Did your great solicitor not warn you about the marvellous case of *Morgan v Fletcher*?

Condign punishment for all that badmouthing and generally dismal behaviour and attitude.

Have a lovely (but I guess rather frugal) Christmas.

David"

The Tribunal notes that on this date, Mr Lonsdale had no interest in Crutched Friars. On 13 July 2020, he had assigned his leasehold interest in 1/41 to Dr Lau.

109. On 1 December 2021 (at D.866), Mr Dutton provided copies of the deeds of variation to the majority lessees:

"Hello All,

As requested by Richard I enclose the 3 deeds of variation.

(i) DHL and David Gillott; (Including Registration Notification)
(ii) DHL and Philip Dutton
(iii) DHL and Lynia Lau.

The case law to which I have referred makes it clear that DHL was free to enter into a variation of these three leases the effect of which is to reduce the liability of David Gillot, Lynia Lau and myself to pay service charges.

The percentage of overall recovery is now around 108%. I say "around" 108% because Tom Travers and Jessica Wong and Ben Wong were found liable only to contribute to 39 whereas the other lessees were found liable to contribute to both buildings.

I agree that because there is still some "over recovery" the FTT retains jurisdiction under section 35 of the Landlord and Tenant Act 1987. But what it cannot do is to make an order reducing recovery substantially

below 100%. Accordingly, in the light of the deeds of variation, it has no jurisdiction to make the order sought by Michael Will.

Moreover, I do not accept that the FTT has any jurisdiction to vary Michael Will's lease with retrospective effect.

DHL, David Lonsdale and I (and possibly Lynia Lau) wish to apply for this claim to be stuck out and any directions ought to afford us an opportunity of doing this. David Lonsdale, Tom Travers, Lynia Lau and I also wish to removed (sic) as Respondents.

DHL remains ready to vary leases to reduce the percentage to 100% and I suggest that we have some form of settlement meeting to discuss how that may be achieved.

Thanks & Regards
Philip Dutton
Different Houses Limited"

110. On the same day (at D.867), Mr Lonsdale wrote to the majority tenants adding his own gloss:

"Dear All,

The case of *Morgan v Fletcher* shows that it is permissible for a landlord to agree a reduction of the percentages of service charge payable by certain individual lessees. In that case the reduction occurred after the application for variation under section 35 of the 1987 Act had been made by 6 out of 8 lessees. As a result, there was a 100% service charge recovery at the time of the hearing and the Upper Tribunal decided that the First Tier Tribunal had no jurisdiction to order the variation the 6 sought.

This shows that the Tribunal must take into account events that occur after an application has been made when it comes to consider whether it has jurisdiction and what orders it may make.

The case of *Birchfield Properties v Paul Botten* was one where a block of flats had been transferred and the freeholder sought to change the percentages so that they added up to 100% on the remaining blocks. The Upper Tribunal found that the application could have retrospective effect. But of course, in that case nothing of any significance had happened since the transfer of the one block.

If Michael Will's application were granted in its present form, it would result in a substantial shortfall for the entire building. I think that is what makes it now unsustainable and it should be struck out. It may be if he were to modify it so as to seek a variation so that the percentages added up to 100% it could be acceptable.

But there is nothing to stop others agreeing terms in advance with DHL.

I do not want to be a party having sold my lease eighteen months ago. There is no reason for anyone who does not seek a variation of his lease to be a party.

I have drafted rough directions that Philip and I will seek at the hearing.

Yours
David Lonsdale"

111. Dr Lau sought to argue that DHL had offered all the lessees the same concession as had been offered to Mr Dutton and herself. We reject this. Mr Dutton rather stated that he was willing to enter a deed of variation with those who had been most amenable to discussion. He stated that DHL were being forced to foot the cost of a leasehold dispute about apportionment. He did not consider that there was any need to be transparent with the other lessees about what was being proposed. As a lessee at 1/39, he did not wish to contribute to the cost of repairing the lift. There is no evidence to support this suggestion. Mr Dutton suggested that the consideration paid of £11,500 was a commercial payment. The Tribunal does not accept this. Mr Dutton did not seek any advice from a valuer. To the contrary, he argued that the sums paid should not be treated as a guide for any compensation under the 1987 Act arising from any variation that the Tribunal might make.

112. Neither Mr Dutton nor Mr Lonsdale recognised that the 2021 Deeds of Variation did not achieve their stated purpose and provide for 100% recovery of service charge expenditure. Such an object could only be achieved if all the flats are put on either a "separate" or a "unified" building basis. The 2021 Deeds of Variations reduced the over recovery from 56% to 8.6% provided that the expenditure is split equally between the two buildings. However, if the expenditure relates to one building (for example the repair of a lift), there is an over recovery of 25.6% for No.39, whilst there is an under recovery of 8.4% on No.41. This is inevitable given the problem of cross subsidies which arises when not all the leases are granted on the same uniform basis.

Table 3: Leases as Varied by DHL				
		£50 spent on each property	£100 on No.39	£100 on No.41
39 Crutched Friars				
Flat 1 – Mr Dutton	*Separate 1%*	*50p*	*£1*	-
Flat 2 – Mr/Mrs Wong	Separate – 24%	£12	£24	-
Flat 3 – Dr Gillott	Unified - 24%	£24	£24	£24
Flat 4 – Mr Travers	Separate – 10%	£5	£10	-
41 Crutched Friars				
Flat 1 – Dr Lau	*Separate 1%*	*50p*	-	*£1*
Flat 2 – Mr Will	Unified – 33.3%	£33.3	£33.3	£33.3
Flat 3 – Mr Will	Unified – 33.3%	£33.3	£33.3	£33.3
Total:		£108.6	£125.6	£91.6
Excess/(Shortfall):		8.6%	25.6%	(-8.4%)

113. There is a separate liability in respect of the insurance. The commercial premises are required to contribute 33.3% of the cost of insurance and a limited number of additional service charges. The residue is apportioned to the lessees. This must be split between the two buildings as four lessees now only pay any service charge attributable to their building. Mr Dutton has therefore engineered a situation whereby not only is there a shortfall in any service charge attributable to No.41, there is also a shortfall to the insurance for No.41. If the Deeds of Variation are to stand, these shortfalls would need to be met by DHL.

Issue 1: Should the Leases be Varied

114. The Tribunal must first consider the decision of HHJ Jarman QC in *Morgan v Fletcher* [2009] UKUT 186 (LC); [2010] 1 P&CR 17. That application related to a building which had been converted into eight leasehold flats. The landlord also owned one lease; a second lease was held by N. The six other lessees applied under section 35(2)(f) of the 1987 Act to vary their leases at a time when the proportion of the service charges payable added up to 116% of the landlord's expenditure. Between the dates of the application and the hearing, the landlord reduced the service charges payable by itself to 1/96th and N by 3/96th. The effect of this was to reduce the total payable to 100%. The landlord argued that the Tribunal no longer had any jurisdiction to vary the six leases as the reduction which it made meant that the service charge provision was satisfactory. The Tribunal held that the leases were unsatisfactory as some of the lessees were paying 16 times more than the landlord and N.

115. The Judge held, allowing the appeal, that section 35(4) of the 1987 Act must be construed as if the word "if" read "only if". There was an ambiguity in section 35 and the Judge therefore had regard to the debate in the House of Lords. The Judge recorded (at [9]) that the authors of the report and the promoters of the bill had in mind two situations which it was intended to avoid. The first was that the aggregate of service charges payable in respect of a block of flats amounted to more than 100 per cent of expenditure, giving the lessor a surplus over monies expended. The second was where the aggregate was less than 100 per cent, producing a shortfall and so failing to promote the proper maintenance of the block. The Judge noted (at [18]) that the avoidance of a situation where contributions were unfairly disproportionate was a mischief of a different nature to that contemplated by the report and the promoters of the statutory provisions and whether such intervention could be justified was a major policy decision.

116. The Judge allowed the appeal on the single point as to how section 35(4) should be construed. He concluded (at [22]):

> "Although I have some sympathy for the respondents, in my judgment I must allow this appeal on this point and set aside the determination of the LVT as to the proportions in which the service charge is payable so that those proportions remain as provided for by the leases in question."

117. Counsel for the majority lessees in our case distinguish this decision on a number of grounds:

(i) HHJ Jarman's decision related solely to the jurisdiction of the Tribunal. The Tribunal only had jurisdiction to vary the leases under section 35(2)(f) if the aggregate of the service charges either exceeded 100% or where there was a shortfall. We agree with this analysis.

(ii) In the current case, all counsel concede that the service charges exceed 100% regardless of whether one considers (a) the leases as at the time of the issue of the application (156% if the expenditure is split equally between the two buildings); or (b) the leases, as varied, by the date of the hearing (8.6%).

(iii) In the current cases, the majority tenants argue that the two deeds of variation were granted in breach of the landlord's covenants in Clause 3 of the leases (see [66] above) and are therefore unlawful. This was not an issue which was considered by either the Tribunal or HHJ Jarman.

(iv) The Tribunal queried with Counsel whether it was open to a landlord to usurp the statutory jurisdiction of this Tribunal to vary leases under the 1987 Act, by unilaterally varying the leases between the date of issue and the date of the hearing of the application. This was not an argument which was raised before HHJ Jarman. None of the parties felt it necessary to argue this point.

118. Mr Cowen KC, for Mr Will, and Mr Webb, for Dr Gillott, rely on section 35(2)(f) as the "gateway jurisdiction" for their applications to vary their leases. Mr Will issued his application on 27 August 2021 before the 2021 Deeds of Variation were granted. Dr Gillott issued his application on 14 February 2022, after they were granted. Their primary argument is that we should have regard to the leases as originally granted. As is illustrated in Table 2 (at [87] above), on that date there an excess of 156% (if the expenditure is split equally between the two buildings), but the excess is 73% if the expenditure relates solely to No.39 or 39% if it relates solely to No.41.

119. Even were the Tribunal to have regard to the two deeds of variation, as Table 3 (at [112] above illustrates), there is an excess of 8.6% (if the expenditure is split equally between the two buildings), but the excess is 25.6% if the expenditure relates solely to No.39. If the expenditure relates solely to No.41, there is a shortfall of 8.4%. This situation is equally unsatisfactory having regard to the statutory criteria. The landlord has to make up the shortfall. The risk for the tenants is that the landlord fails to do so and becomes insolvent.

120. The Tribunal therefore has no hesitation in concluding that we have jurisdiction under section 35(2)(f) to vary the leases of Mr Will and Dr Gillott. Having reached this conclusion, the Tribunal has the jurisdiction to vary the other leases under section 36.

121. Mr Cowen KC also seeks to argue that we have gateway jurisdiction to vary the leases under section 35(2) (b) and (e). He argues that the leases fail to make satisfactory provision for (b) the insurance of the building and (e) the recovery by one party to the lease from another party to it of expenditure

incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party. He argues that Nos. 39 and 41 are very different buildings; No. 39 was constructed in the 1950's whereas No. 41 is a Grade II Listed Building. He argues that it is inherently unsatisfactory for a lessee to be required to pay for services in another property in respect of which he has no connection and derives no benefit.

122. The Tribunal is satisfied that it was open to the landlord to grant the leases on a unified building basis. Indeed, this seems to have been the apportionment which the landlord contemplated when the first two leases were granted. The commercial premises occupy the ground and basement floors of both buildings and contribute to 33% of the insurance. There is therefore logic in treating Nos. 39 and 41 as a unified building.

123. However, the Tribunal is satisfied that it is unsatisfactory for some leases to be granted on a unified basis whilst others are granted as separate buildings. It is difficult to envisage how a rational service charge account could be operated on this basis. The Tribunal finds that we would also have gateway jurisdiction under section 35(2)(e) to vary the leases. Further, as a result of the two deeds of variation, there is now a shortfall of 8.4% in respect of the insurance of No.41, the building in which Mr Will's two flats are situated. This would now afford jurisdiction under section 35(2)(b). We deal with these arguments briefly, as we are satisfied that our gateway jurisdiction to vary these leases is primarily provided by section 35(2)(f).

124. Mr Harrison asks the Tribunal to take as its starting point the leases as varied. He suggests that the over recovery of 8.6% is now modest and can be resolved by a pro-rata reduction. He suggests that the leases are no longer unsatisfactory. We disagree for the reasons stated above.

125. Mr Harrison also argued that Mr Will and Dr Gillott are seeking to vary their leases for an improper purpose, namely to alter the fairness of how the individual lessees contribute to the service charge. Mr Will is proposing that each of the three lessees at No.41 should pay 33.3%, whilst Dr Gillott is arguing that each of the four lessees at No.39 should pay 25% towards the costs of their respective buildings. Mr Harrison refers us to the decision of Judge Elizabeth Cooke on *Camden LBC v Morath* [2019] UKUT 193 (LC); [2020] L&TR 4 and the following passage:

> "16. What I take from those decisions is that the Tribunal will consider whether the wording of the lease as it stands is clear, and whether the term sought to be varied is workable. If it is clear and workable then it is not unsatisfactory. Obviously the question whether the bargain as it stands works in practice has to be considered on the basis of the evidence in each case. But section 35 does not enable the Tribunal to vary a lease on the basis that it imposes unequal burdens, or is expensive or inconvenient. It would be very strange if it did, in view of the law's general resistance to the temptation to interfere in or improve contractual arrangements freely made."

126. In the current case, we are satisfied that the leases are not workable. However, when we come to consider what variations should be made, we accept that we should not seek to interfere in or improve the contractual arrangements freely made when the leases were originally granted.

127. Mr Harrison also referred the Tribunal to the Supreme Court decision on res judicata and issue estoppel in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 and the speech of Lord Sumption at [18] and [24]. These principles have been established to support the good administration of justice in the interests of the public and the parties by preventing abusive and disruptive litigation. Mr Harrison suggests that Mr Will should have applied to vary his lease when he made his Section 27A application. We disagree. He was entitled to await a determination by the Tribunal as to how the leases should be interpreted, before making his application for variation. All the parties seem to have been taken by surprise by Judge Andrew Dutton's decision. No landlord had sought to operate the service charge account as the leases demanded.

Issue 2: How should the leases be varied?

The 2021 Deeds of Variation

128. We must first determine what weight should be afforded to the 2021 Deeds of Variation in respect of Flats 1/39 and 1/41. We need to consider the following contentions:

(i) Mr Harrison argues that the Deeds of Variation are lawful. DHL was entitled to rely on *Morgan v Fletcher* to remedy the overpayment on the service charge account by reducing the service charges payable by two lessees. The fact that one of those leases was held by Mr Dutton who controls DHL is irrelevant. Even if DHL were in breach of its covenants under Clause 3 of the leases, this would not affect the validity of the deeds of variation.

(ii) Mr Cowen and Mr Webb argue that the Deeds of Variation were unlawful as they were granted in breach of Clause 3. Mr Cowen places his argument on Clauses 3 (ii) and (iii). Mr Webb also relies on Clause 3 (v). They are therefore invalid, ineffective and unenforceable.

(iii) The majority lessees argue that having decided that we have the gateway jurisdiction under section 35 (2) (f) to vary the leases, the Tribunal has a wide discretion under section 38(1) and 38(4) to vary the leases "in such manner" as we consider appropriate. The 2021 Deeds of Variation have not resolved the problem of overpayment; they have rather created a new problem of underpayment in respect of No.41. We should therefore have regard to the contractual intention of the parties when the original leases were granted.

(iv) If necessary, the Tribunal should have regard to the conduct of the parties. The 2021 Deeds of Variation were granted after Mr Will had issued his application to this Tribunal. Mr Dovar characterised this as a cynical manoeuvre. These were not commercial transactions entered into in good faith. Mr Dutton and Dr Lau recognised that they were open to challenge on

grounds of being "invalid, ineffective and unenforceable". Dr Lau protected her position accordingly.

129. Mr Cowen's starting point is the Supreme Court decision in *Duval v 11-13 Randolph Crescent Limited ("Duval")* [2020] UKSC 18; [2020] AC 845. Each flat in the block was let on a long lease in substantially the same form. Each lease contained, at clause 2.7, an absolute covenant by the lessee not to cut, maim or injure any wall within or enclosing the demised premises. By clause 3.19, the landlord covenanted to enforce any covenant entered into by another lessee in the block of a similar nature to the covenant contained in clause 2.7, if the tenant so requested and provided security for the landlord's costs. The lessee of one of the flats asked the landlord for permission to carry out improvement works to her flat which, since they included the removal of part of a load-bearing wall, would amount to a breach of the covenant in clause 2.7. The landlord was willing to grant consent to the works, but the claimant, a lessee of another flat, sought a declaration that to do so would be in breach of clause 3.19. The deputy district judge granted a declaration that the landlord had no power to waive covenants without the consent of the other lessees in the block, but the judge allowed the landlords appeal. The Court of Appeal allowed the claimant's appeal and granted the declaration sought by her, holding that it was implicit in the covenant contained in clause 3.19 that the landlord would not put it out of its power to comply with it. This would be the consequence, were the landlord to licence another lessee to do an act which would otherwise be a breach of the covenant contained in clause 2.7.

130. The Supreme Court dismissed the landlord's appeal. Lord Kitchin held that it was not a rigid rule of the law of contract that a party who had undertaken a contingent contractual obligation was bound not to prevent the contingency from occurring or bound not to put it out of his power to comply with the obligation if and when the contingency arose. Rather, such a proposition was more properly regarded as a term which, depending upon the circumstances, might be implied into a contract following an application of the usual approach to implying contractual terms. On a true construction of the leases, in view of the purpose of the covenants in clauses 2 and 3.19, namely to provide protection to all the lessees, and the enforcement obligations on the landlord in clause 3.19, a term had to be implied into the claimants lease to the effect that the landlord had promised not to put it out of its power to enforce clause 2.7 in the leases of other lessees by licensing what would otherwise be a breach of it. It was entirely reasonable to suppose that the kind of work which fell within clause 2.7 should not be carried out without the consent of all of the other lessees, since clause 2.7 was directed to more fundamental works than routine repairs, renovations and alterations (which, by clause 2.6 of the lease, a lessee could carry out with the consent of the landlord) and included works which were intrinsically such that they might be damaging to or destructive of the building. Accordingly, clause 3.19 of the lease prevented the landlord from licensing work which, absent a licence from the landlord, would amount to a breach of clause 2.7

131. Mr Cowen highlighted the following passages of the speech of Lord Kitchin:

> "Further, Dr Duval continues, the inclusion of clause 3.19 in each lease provides a practical way of ensuring that all lessees know the principles and rules upon which the building will be operated and occupied" (at [41]);
>
> "In my opinion Dr Duval is right to say that, in the first part of clause 3.19, the landlord made a promise that every lease of a residential unit in the building granted by the landlord at a premium would contain covenants similar to those in clauses 2 and 3" (at [42]).

132. Mr Cowen argued that Clauses 3(ii) and (iii) of the current leases, led lessees to believe that their leases were in the same or similar form to each of the other lessees. It turns out that that was not the case. In breach of covenant, the leases were drafted so that some of the lessees were granted on a unified building whilst other were granted on a separate buildings basis. By the phrase "on the similar terms as are contained in this lease", Mr Cowen argued that the landlord was covenanting to grant all the leases on a "coherent basis". However, the approach adopted by the landlord was incoherent. In Mr Will's leases for Flats 2/41 and 3/41, the service charges were apportioned on a unified building basis. The leases for Flats 1/39 and 1/41 had also been granted on this basis. The deeds of variation changed the apportionment to a separate buildings basis. Whilst Mr Cowen accepted that the service charge contributions did not need to be the same, they did need to be apportioned on a consistent basis. Whilst Flats 1/39 and 1/41 had paid 24%, these were reduced to 1% which was nominal. These deeds of variation also created a shortfall of 8.4% in respect of any expenditure on No.41. The consequence of this breach of covenant was that the deeds were unlawful and of no effect.

133. Mr Webb also seeks to rely on Clause 3(v). Relying on *Duval*, he argues that a term should be implied that the landlord would not put it out of its power to enforce the existing covenants in the leases for Flats 1/39 and 1/41. In their original leases, the lessees of these flats covenanted to contribute to the service charge costs of the buildings. In respect of the 2021 Deeds of Variation, the lessee would no longer be able to require the landlord to compel Flat 1/39 to contribute to the service charge costs for No.41, and of the lessee of 1/41 to contribute to the costs of No.39.

134. Mr Harrison rejected these arguments. He argues that Clause 3 (ii) is no more than a statement of intention. There was no covenant that all leases would be granted on (i) either a unified or separate building basis; or (ii) at the same percentage contribution. Mr Will's lease in respect of Flat 3/41 was the fourth lease to be granted. By this date, two lease had been granted on a unified basis and Flat 2/39 on a separate building basis. A different percentage had been specified for Flat 3/41. There could therefore be no expectation that all leases would be at the same percentage. There is no justification for implying any term that the landlord would not put it out of his power to enforce the covenants in Clause 3(v). Even had the 2021 Deeds

of Variation amounted to a breach of covenant, they would nevertheless remain effective. As a general principle, a disposition remains effective notwithstanding it is entered into in breach of contract. Thus, an assignment in breach of covenant remains effective, as does the grant of an underlease in breach of covenant. Mr Will's remedy for an alleged breach of covenant would have been to sue in a court of competent jurisdiction for damages, but as the 2021 Deeds of Variation had no effect on the amount he had to pay under his leases or the value of the same, there would be no loss.

135. The Tribunal reaches the following conclusions. First, the Tribunal is satisfied that the 2021 Deeds of Variation were granted in breach of covenant and were therefore unlawful. We should therefore not take them into account in determining what variations should be made to the other leases. If we are wrong on this, we should consider the circumstances in which they were granted, in determining what weight to give to them in deciding what variations are required to the leases.

136. The effect of Clauses 3(ii) and 3(iii) is that the landlord covenanted that all previous leases and all past and future leases would be granted on "similar" or the "same" terms. The landlord was thereby covenanting that there would be a consistent and coherent framework for the funding of the service charges for the services that the landlord covenanted to provide. Such a consistent and coherent framework required the landlord (i) to adopt either unified or separate building approach; and (ii) ensure that the service charges collected amounted to 100% of the sums expended. The Tribunal accepts that until all the leases were granted, there would not need to be 100% collection. The landlord would be expected to contribute to the service charges in respect of any flat which it retained.

137. As our analysis at [5] above demonstrates, the landlord ceased to grant the leases on a consistent and coherent basis when it granted the lease for Flat 2/39 on a separate buildings basis. Further, it is difficult to discern any rational approach to the manner in which the service charge contributions were apportioned to the seven leases. However, no one has sought to argue that any of these leases were void.

138. The Tribunal must rather have regard to the situation when the 2021 Deeds of Variation were granted. Judge Andrew Dutton had identified the problem that needed to be addressed and had proffered practical advice as to how this could be addressed. DHL had the option of devising a consistent and coherent basis on which all lessees would pay their service charge contributions. Mr Philip Dutton decided not to do so.

139. The two applications to vary under section 35 have been brought by Mr Will and Dr Gillott. By Clause 3(ii), DHL covenanted that the grant of any further lease should be on "the same terms" as their leases. Their three leases (2/41, 3/41 and 3/39) had all been granted on a unified building basis. The leases for Flats 1/39 and 1/41 had also been granted on a unified building basis. By varying the leases for Flats 1/39 and 1/41 to a separate buildings basis, they were being granted on fundamentally different terms. Further, the reduction of the service charge contributions from 24% to 1%

fundamentally changed the basis on which the service charge contributions were to be collected.

140. Further, we accept Mr Webb's argument that DHL were also in breach of Clause 3(v). Under their leases, Flat 1/39 had covenanted to contribute to the service charge expenses of No.41; and Flat 1/41 had covenanted to contribute to the service charge expenses of No.39. Mr Will and Dr Gillott were entitled to expect DHL to enforce the covenants of these lessees to contribute to this expenditure. A term had to be implied into the leases of Mr Will and Dr Gillott that the landlord that the landlord had promised not to put it out of its power to enforce these contributions.

141. Even were we to be wrong in our conclusion that the 2021 Deeds of Variation are invalid, ineffective and unenforceable, we are satisfied that section 38(1) and (4) gives us a wide discretion as to the variations that we should order. We should have regard to the common contractual intent that all the leases should be on similar terms. We should seek to do the least damage to the leases as originally granted. These were the leases that applied when Mr Will issued his application. The 2021 Deeds of Variation do not remedy the problem of overpayment; they rather create a new problem of underpayment in respect of No.41. We would not be prejudicing Dr Lau as her side agreement makes provision were the Tribunal to adopt this approach.

142. If necessary, the Tribunal has no hesitation in finding that the 2021 Deeds of Variation were a cynical manoeuvre to usurp the jurisdiction of this Tribunal and prevent us from seeking a solution which we consider will do justice between all the parties. We are satisfied that DHL/Mr Dutton were not acting in good faith. Both Dr Lau and Mr Dutton knew that the Tribunal might find these deeds to be "invalid, ineffective and unenforceable" and made provision should this situation arise. These were not commercial transactions. £11,500 was not a "market price" for the substantial concessions that were granted. There was no transparency. There was no attempt to seek a solution with all the lessees. The deeds did not address the problem of overpayment, but rather created a new problem as highlighted in [112] above. The Tribunal is satisfied that DHL knew, or ought to have known, that the problem could only be resolved by putting all the leases on either a unified or a separate building basis. This could only be achieved with the agreement of all the parties or through an application to this tribunal.

What Variation should be made?

143. If the leases are to be varied, all the parties were agreed that service charges should be apportioned on a separate buildings basis. It was only in his written submission of 16 December, that Mr Dutton sought to argue that the service charges should be apportioned on a unified building basis. He had, of course, agreed to the 2021 Deed of Variation whereby his lease for 1/39 had been converted from a unified to a separate buildings basis.

144. In considering what percentage to allocate to each lease under a separate buildings basis, the Tribunal is required to consider a number of options:

Table 1: Final Positions adopted by the Parties						
	Leases	**DHL**	**Will**	**Travers**	**Gillott**	**Tribunal**
39 Crutched Friars (1950s)						
Flat 1	24% - u	1%	25%	29.3%	25%	33%
Flat 2	24% - s	29%	25%	29.3%	25%	24%
Flat 3	24% - u	57%	25%	29.3%	25%	33%
Flat 4	10% - s	13%	25%	12%	25%	10%
41 Crutched Friars (1860s)						
Flat 1	24% - u	1%	33.3%	-	-	26.5%
Flat 2	33.3% - u	48.5%	33.3%	-	-	36.75%
Flat 3	33.3% - u	48.5%	33.3%	-	-	36.75%
Key: "u" - unified building; "s" – separate buildings						

145. Before the parties started their closing submissions, the Tribunal asked them to consider a formulation which we had devised under which there were "winners", but no "losers". Our approach was premised on doing the least damage to the leases as originally granted:

(i) The leases for 2/39 and 4/39 were both granted on a separate buildings basis. Although their percentages are lower than that paid by the other lessees in No.39, we can see no reason why they should be required to pay more, in a situation where the problem is not one of under, but rather over payment. The original lessees would have had no reason to question the terms of the lease that they were granted. We were impressed by the evidence of Mr Travers. He read his lease. He recognised that he was acquiring a lease whereby he was only required to contribute 10% to the service charge expenditure of No.39. It is probable that the price that he paid for the lease reflected this.

(ii) The Tribunal increases the percentages of all the other lessees pro rata. However, they were all paying on a unified basis and will now pay only in respect of their building. Thus Flats 1 and 3 will now pay 33%, rather than 24%. However, were £100 to be paid on both No.39 and 41, they will now only pay £33 in respect of their own building, rather than £48 in respect of the two buildings.

(iii) Since there are no losers, no question of compensation arises. The assessment of compensation when leases are varied is complex (see *Triple Rose Ltd v Stride* [2019] UKUT (LC); [2020] HLR 9). It is a complexity which we should seek to avoid.

(iv) Whilst Dr Lau will no longer be able to benefit from the 2021 Deed of Variation, she entered the contract knowing that it might be found to be "invalid, ineffective and unenforceable". The side agreement entitles her to a refund of the £11,500 which she paid. Mr Dutton was also aware of this. He is the author of his own misfortunes. Mr Dutton controls DHL.

146. Counsel were sympathetic to this approach. Mr Travers welcomed it as he will pay less than he was willing to concede. Mr and Mrs Wong welcomed it as it preserves their current position. The other parties sought to maintain their positions, albeit that they were sympathetic to the Tribunal's formulation, should their own formulations to be rejected.

147. Mr Will is the lead applicant. He seeks a variation so that all lessees pay an equal contribution. This has the great merit of equity. However, we must have regard to the guidance of the Upper Tribunal which reminds us that we should not vary leases on the basis that they impose unequal burdens. It is not the role of this Tribunal to interfere with or improve contractual arrangements freely made. We should therefore have due regard to the percentages specified in the leases when we convert five leases from the "unified" to the "separate buildings" basis.

148. Dr Gillott also argued that all the lessees at No.39, should pay the same, namely 25%. However, we are satisfied that we should not interfere with the leases in respect Flats 2 and 4. There therefore needs to be a pro rata increase in the percentages paid by Flats 1 and 3. Both these leases had been granted on a unified basis and will therefore be winners in that they now occupy under a separate buildings basis.

149. Finally, we must address the formulation proposed by DHL and endorsed by Mr Dutton and Dr Lau. DHL accept that the service charges should be apportioned on a separate building basis. At the Case Management Hearing on 21 June 2021, DHL's formulation was that the apportionment should be as follows:

(i) 39 Crutched Friars: 1/39: 2%; 2/39: 41%; 3/39: 41%; 4/39: 17%;

(2) 41 Crutched Friars: 1/41: 1.5%; 2/41: 49.25%; 3/39: 49.25%.

It is to be noted that under this formulation, it would have been necessary to vary the 2021 Deeds of Variation in respect of 1/39 and 1/41.

150. When Mr Harrison made his closing submissions, he proposed an alternative formulation on behalf of DHL:

(i) 39 Crutched Friars: 1/39: 1%; 2/39: 29%; 3/39: 57%; 4/39: 13%;

(2) 41 Crutched Friars: 1/41: 1%; 2/41: 49.5%; 3/39: 49.5%.

151. Mr Harrison provided a spread sheet explaining how DHL had computed their revised formulation:

(i) The starting point is the respective contributions taking into account the 2021 Deeds of Variation. Thus, the starting point is 1/39: 1% (s); 2/39: 24% (s); 3/39: 24% (u); 4/39: 10% (s); 1/41: 1% (s); 2/41: 33.3% (u); 3/41: 33.3% u).

(ii) DHL then assume that any expenditure is split 50:50 between the two buildings. The Tribunal notes that this is a false assumption. On this

basis, any lessee who pays on a separate building basis only pays 50%. Thus, the adjusted percentages are: 1/39: 0.5%; 2/39: 12%; 3/39: 24%; 4/39: 10%; 1/41: 0.5%; 2/41: 33.3%; 3/41: 33.3%. These percentages add up to 108.6%.

(iii) DHL then pro rate this down from 108.6% to 100%, as a result of which the contributions are as follows: 1/39: 0.5%; 2/39: 11%; 3/39: 22%; 4/39: 5%; 1/41: 0.5%; 2/41: 30.5%; 3/41: 30.5%.

(iv) Each building is then treated separately.

(a) The percentage for No.39 now total: 38.5%. This therefore increased pro rata to 100% and the following contributions are proposed: 1/39: 1%; 2/39: 29%; 3/39: 57% and 4/39: 13%.

(b) The percentage for No.41 now total: 61.5%. This therefore increased pro rata to 100% and the following contributions are proposed: 1/41: 1%; 2/41: 49.5%; 3/41: 49.5%.

(v) DHL then suggest that Flats 2/41 and 3/41 are the winners by 34%, whilst the losers are Flats 2/39 (4.57%); 3/39: (9.14%); and 4/39 (2.98%). DHL propose that Mr Will should pay compensation to Mr & Mrs Wong, Dr Gillott and Mr Travers.

152. The Tribunal finds this formulation to be perverse.

(i) DHL's predecessor-in-title granted leases in respect of 2/39 and 4/39 on a separate building basis with percentages of 24% and 10% respectively. The landlord is now proposing that their percentages be increased to 29% and 13% respectively without any compensation being paid by the landlord. DHL rather suggests that they should be compensated by Mr Will.

(ii) The only lessees for whom the percentage is not increased, are those for 1/39 and 1/41. Each of these retain their preferential 1% which they have been granted through the 2021 Deeds of Variation. The Tribunal is satisfied that these deeds were correctly characterised as a "cynical manoeuvre". Both these leases had been granted on a unified building basis with a service charge contribution of 24%.

(iii) Mr Will holds the leases of 2/41 and 3/41. He is expected to pay 99% of the service charges in respect of No.41 (49.5% for each flat). It is difficult to contemplate how a lessee who had been granted a lease specifying a 33.3% contribution could have contemplated that they would have to contribute 49.5%. The mischief in this case is one of overpayment, and not underpayment.

(iv) DHL further suggest that Mr Will is a "winner"; whilst Mr & Mrs Wong, Dr Gillott and Mr Travers are "losers". DHL expects Mr Will to pay them compensation, albeit that the mischief was created by DHL's predecessor in title. The Tribunal finds it difficult to understand why there should be any "losers", where the problem is one of overpayment.

The Tribunal merely needs to identify who has been paying too much and to reduce their contribution.

(v) The only reason that DHL need to increase the contributions for Flats 2/41 and 3/41 to 49.5% is their decision to reduce the service charge payable by 1/39 to 1% on a separate, as opposed to a unified, building basis. This has created a shortfall of 8.4% in respect of any expenditure on No.41 (see Table 3). It is remarkable that DHL expect Mr Will to pay compensation arising from its cynical manoeuvre to grant the 2021 Deeds of Variation.

153. Mr Travers, and Mr & Mrs Wong do not take issue with the Tribunal's formulation. Flats 2/39 and 4/39 pay the same percentage on a separate build basis as is specified in the leases. Whilst these flats pay less than their neighbours, this was the basis of the contract which was originally agreed between landlord and lessee. Mr Dovar, Counsel for Mr Travers, reminds us of the guidance provided by George Bartlett QC, the Chamber President, in *Cleary v Lakeside Developments* [2011] UKUT (LC) at [27]. The purpose of the legislation is to remedy the deficiencies in the leases. It is not to enable the parties to make their contractual positions stronger.

154. The Tribunal is satisfied that our formulation provides an acceptable solution for all the parties. There are winners and no losers. All parties benefit from a rational and workable mechanism for the collection of service charges.

155. There is a separate issue with regard to the insurance. The commercial premises are required to contribute 33.3% of the cost of the insurance. The remaining 66.7% is to be apportioned to the lessees on the same basis. The Tribunal is asked to address a potential ambiguity in the lease for 4/39 in this regard. Both DHL and Mr Will in their Statements of Case (at A.150 and A.45 respectively) suggest that 4/39 is required to contribute 10% of the insurance of the whole of No.39 (including the commercial premises). Thus, this lessee does not benefit from the 33.3% contribution that the commercial premises are required to make. The issue is how one construes the paragraph 2 of the Fourth Schedule of this lease (at B.149). This issue was not determined by Judge Andrew Dutton. The Tribunal is satisfied that the seven leases must be construed as a whole. It only makes commercial sense for the lease for 4/39 to be construed in the same manner as the other leases, namely that the 10% contribution relates to the insurance of residential part of No.39. Thus 4/39 also benefits from the 33.3% contribution made by the commercial premises. Were we to be wrong on this, we would have no hesitation in varying the lease to this effect in order to secure 100% collection of the insurance relating to No.39.

Issue 3: Should any Variation be Backdated?

156. The parties accept that this Tribunal has jurisdiction to backdate any variations to the date upon which the unsatisfactory working of the leases commenced (see *Brickfield Properties v Botten* [2013] UKUT 133 (LC)). The Tribunal is satisfied that the variations should be backdated to 1 June 2019

so that it extends to the service charges determined by Judge Andrew Dutton.

157. Judge Andrew Dutton made findings as to the payability and reasonableness of the following service charges:

(i) Schedule A – the Major Works: The Tribunal found that there would be an overpayment of £46,623. Our determination provides the framework for the landlord to apply in determining who is entitled to a credit. Those lessees who have yet to make any payment, will know the smaller sum that they are now required to pay.

(ii) Schedule B – Service Charges payable for 2019/2020. The Tribunal found that £6,120.55 was payable and that this should be split equally between the two buildings. Again, there was an overpayment. Our determination provides the framework for the landlord to apply in determining who is entitled to a credit

(iii) Schedule C – Estimated Service Charges for 2020/21. The final accounts should now be available. It is now for DHL to apportion these charges according to the percentages which we have determined.

158. The Tribunal was concerned to note that DHL had sought to "correct" the figures which the Tribunal had found to be payable (see D.831). DHL made no request to the Tribunal to review its decision and make any such corrections. It is not open to a landlord to do this unilaterally. The Tribunal also noted that DHL has added additional accountancy fees to the 2019/20 service charges which the Tribunal had found to be payable. It was not open to DHL to do so. DHL must accept its responsibility, as landlord, for failing to operate a rational service charge account. It should have taken steps to vary the leases as soon as the overpayments became apparent. A successful outcome could only be achieved with the agreement of all the parties or through an application to this Tribunal. It would not be reasonable for the landlord to seek to pass on any additional accountancy costs arising from the need to recompute the sums payable by the lessees.

159. Under our formulation, there are winners, but no losers. Thus, no lessee is required to pay any additional sum. We accept Mr Harrison's argument that were such losers to be required to pay additional sums in respect of past service charges, section 20B of the 1985 Act could prevent the landlord from recovering these sums.

Issue 4: Is any Compensation Payable?

160. Under the Tribunal's formulation, no question of compensation arises. There are no losers. All the parties benefit in that there is now a rational service charge mechanism for the seven flats at Crutched Friars.

161. Mr Dutton and Dr Lau are no longer able to benefit from the 2021 Deeds of Variation. For Dr Lau, her remedy is to be found in the side agreement. She was alerted to the consequences should the deed be found to "invalid, ineffective and unenforceable". In such circumstances, she is entitled to a

refund of the sum of £11,500 which she paid. In her closing submissions, Dr Lau sought to argue that she was entitled to more substantial compensation under the 1987 Act. We do not accept this.

162. Mr Dutton controls DHL. There is no evidence that DHL granted him a similar side agreement. However, this is a matter for Mr Dutton to determine whether DHL should refund to him the sum of £11,500 which he has paid.

163. As a matter of principle, the Tribunal does not see why any compensation should be payable where the mischief to be addressed is one of overpayment. The solution is to reduce the burden imposed on those who are paying too much. There should be no need to require any lessees to pay more. Our remit is not to devise a fair method of apportionment. It is rather to seek to do the least damage to the contractual arrangements which have been agreed.

Issue 5: Section 20C of the 1985 Act

164. Both Mr Will and Dr Gillott have issued separate applications under section 20C of the 1985 Act seeking an order restricting DHL from passing on its costs in connection with these applications through the service charge account. Mr Travers, Mr & Mrs Wong and Dr Lau confirmed that they also wished to make similar applications. Mr Dutton does not make such an application. In his written closing submissions, he argues that it would be wrong for such an application to be made.

165. Section 20C permits this Tribunal to make such order on these applications as it considers just and equitable in the circumstances. We are satisfied that it is appropriate to make such an order in respect of the lessees, save for Mr Dutton. The problem has been created by DHL's predecessor in title. DHL, as landlord, has covenanted to insure the building and to provide services. It has been under an obligation to ensure that there was a rational mechanism for collecting service charges. We have not been impressed by the response that DHL has adopted in response to (i) the Tribunal Decision of Judge Andrew Dutton, and (ii) Mr Will's application for a variation. It would not be just to require the lessees to pay DHL's costs in connection with these applications.

The Next Steps

166. On 12 January 2023, the Tribunal circulated a draft decision to the parties. The Tribunal indicated to the parties that they may consider it appropriate to agree new modern leases for each of these seven flats. This could avoid future disputes. It could also clarify the ambiguity which the Tribunal has addressed in respect of the lease for 4/39 (see [155] above). In the absence of such agreement, the Tribunal directed the parties to submit a draft order to give effect to the variations required by this decision.

167. We understand that whilst there is consensus amongst the parties that they would wish to seek to modernise their leases, there was no unanimity

in favour of doing so as part of these applications within the three month time limit specified in our decision.

168. Mr Cowen has submitted a draft Order which has been agreed by counsel and the other parties. The Tribunal approves this Order. The lead applicant is directed to add the appendix to specify the relevant reversionary title number to the residential leases at 39 and 41 Crutched Friars, together with each leaseholder's name, flat number and title number. The lead applicant is directed by 3 March 2023 to file a copy of this Order, together with a copy of our decision, with HM Land Registry and confirm to the tribunal that it has done so.

169. The Tribunal is satisfied that each party should bear their own costs in connection with giving effect to this determination. It would not be reasonable for DHL to pass on its costs through the service charge account.

Judge Robert Latham
31 January 2023

Rights of appeal

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

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

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

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

LON/00AV/LVT/2021/0005

IN THE MATTER OF PART IV, SECTION 37 OF THE LANDLORD AND TENANT ACT 1987

AND IN THE MATTER OF 39 AND 41 CRUTCHED FRIARS, LONDON EC3N 2NA

BETWEEN:

DIFFERENT HOUSES LIMITED

Freeholder/Lessor

- and-

PHILIP DUTTON
BEN and JESSICA WONG
DAVID GILLOTT
THOMAS TRAVERS

Lessees of 39 Crutched Friars

- and-

HIU PING LAU
MICHAEL WILL

Lessees of 41 Crutched Friars

ORDER

UPON considering the applications made by Michael Will (dated 27 August 2021), David Gillott (dated 14 February 2021) and Different Houses Limited (dated 7 June 2022);

AND UPON an Appendix being attached to this Order, which specifies the relevant reversionary title number to the residential leases at 39 and 41 Crutched Friars, together with each leaseholder's name, flat number and title number

IT IS ORDERED, pursuant to sections 35 and 36 of the Landlord and Tenant Act 1987, that each of the residential leases in respect of 39 and 41 Crutched Friars referred to below are amended as follows:

1. The Lease of Flat 3, 39 Crutched Friars dated 11 September 1996 made between (1) Capitalstart Limited and (2) Jacobus Teunis Johannes Van Goolen, and which was varied by a Deed of Variation dated 20 October 1999 also

between (1) Capitalstart Limited and (2) Jacobus Teunis Johannes Van Goolen, be further varied as follows:

(a) The definition of "the Retained Premises" at sub-paragraph (f) of the First Recital be amended to replace the word "on" in Line 2 with "or"

(b) The First Schedule be amended to read:

"ALL THAT land together with the building erected thereon and known as 39 Crutched Friars, London EC3N 2AE"

(c) Plan "A" annexed to the Lease be removed

(d) The Second Schedule be amended to read:

". . . SECONDLY ALL THOSE the main structural parts of the building including the roof, the foundations, the external and load bearing walls and the joists upon which the floors are laid and external parts of the building (but not the glass in the windows of the Flats nor the plaster on the ceilings and walls or the screed on the floors of the Flats) and all cisterns tanks sewers gutters drains pipes wires cables radiators ducts conduits or other media aerials and installations and any sanitary water gas electrical heating or ventilation apparatus not used solely for the purpose of one flat or which are incorporated in any one of the Flats from time to time unlet PROVIDED THAT there shall be excluded from the said Premises First and Second described any premises which the Landlord has specifically demised or intends specifically to demise."

(e) Paragraph 2 of the Fourth Schedule be amended so that each reference to 24% (twenty-four percent) is replaced with a reference to 33% (thirty-three percent).

2. The Lease of Flat 2, 41 Crutched Friars dated 21 March 1997 made between (1) Capitalstart Limited and (2) Simon Hill & Victoria Alma Wearing be varied as follows:

(a) The definition of "The Flats" at sub-paragraph (e) of the First Recital be amended to remove the words "and the maisonette"

(b) The definition of "The Retained Premises" at sub-paragraph (f) of the First Recital be amended to replace the word "on" in Line 2 with "or"

(c) The First Schedule be amended to read:
"ALL THAT land together with the building erected thereon and known as 41 Crutched
Friars, London EC3N 2AE"

(d) Plan "A" annexed to the lease be removed

(e) The Second Schedule be amended to read:

". . . SECONDLY ALL THOSE the main structural parts of the building including the roof the foundations, the external and load bearing walls and the joists upon which the floors are laid and external parts of the building (but not the glass in the windows of the Flats nor the plaster on the ceilings and walls or the screed on the floors of the Flats) and all cisterns tanks sewers gutters drains pipes wires cables radiators ducts conduits or other media aerials and installations and any sanitary water gas electrical heating or ventilation apparatus not used solely for the purpose of one flat or which are incorporated in any one of the Flats from time to time unlet PROVIDED THAT there shall be excluded from the said Premises First and Second described any (24.1.23premises which the Landlord has specifically demised or intends specifically to demise."

(f) Paragraph 2 of the Fourth Schedule be amended so that each reference to 33.3% (thirty-three point three percent) is replaced with a reference to 36.75% (thirty-six point seventy-five per cent)

3. The Lease of Flat 3, 41 Crutched Friars dated 7 March 1997 made between (1) Capitalstart Limited and (2) Michael Will be varied as follows:

(a) The definition of "The Flats" at sub-paragraph (e) of the First Recital be amended to remove the words "and the maisonette"

(b) The First Schedule be amended to read:
"ALL THAT land together with the building erected thereon and known as 41 Crutched Friars, London EC3N 2AE"

(c) Plan "A" annexed to the lease be removed

(d) The Second Schedule be amended to read:

". . . (but excluding the roof terrace forming part of the premises), foundations, the external and load bearing walls and the joists upon which the floors are laid and external parts of the building (but not the glass in the windows of the Flats nor the plaster on the ceilings and walls or the screed on the floors of the Flats) and all cisterns tanks sewers gutters drains pipes wires cables radiators ducts conduits or other media aerials and installations and any sanitary water gas electrical heating or ventilation apparatus not used solely for the purpose of one flat or which are incorporated in any one of the Flats from time to time unlet".

(e) Paragraph 2 of the Fourth Schedule be amended so that each reference to 33.3% (thirty-three point three percent) is replaced with a reference to 36.75% (thirty-six point seventy-five per cent)

4. The Lease of Flat 1, 39 Crutched Friars dated 14 March 1997 made between (1) Capitalstart Limited and (2) Chira Suksthaporn and Duanjai Suksathaporn which was varied by a deed dated 11 October 2021 made between (1) Different Houses Limited and (2) Philip Denis Decourcy Dutton, be further varied as follows:

a) All variations made by the deed of variation dated 11th October 2021 be reversed and the variations stipulated below to be made to the terms of the original lease.

b) The definition of "The Flats" at sub-paragraph (e) of the First Recital be amended to remove the words "and the maisonette".

c) The definition of "the Retained Premises" at sub-paragraph (f) of the First Recital be amended to replace the word "on" in Line 2 to "or".

d) The First Schedule be amended to read: "ALL THAT land together with the building erected thereon and known as 39 Crutched Friars, London EC3N 2AE".

e) Plan "A" annexed to the lease be removed.

f) The Second Schedule be amended to read:

". . . SECONDLY ALL THOSE the main structural parts of the building including the roof, the foundations, the external and load bearing walls and the joists upon which the floors are laid and external parts of the building (but not the glass in the windows of the Flats nor the plaster on the ceilings and walls or the screed on the floors of the Flats) and all cisterns tanks sewers gutters drains pipes wires cables radiators ducts conduits or other media aerials and installations and any sanitary water gas electrical heating or ventilation apparatus not used solely for the purpose of one flat or which are incorporated in any one of the Flats from time to time unlet".

g) Paragraph 2 of the Fourth Schedule be amended so that each reference to 24% (twenty-four percent) is replaced with a reference to 33% (thirty-three percent).

5. The Lease of Flat 1, 41 Crutched Friars dated 16 January 1997 made between (1) Capitalstart Limited and (2) David Lonsdale which was varied by a deed dated 18 November 2021 made between (1) Different Houses Limited and (2) Hiu Ping Lau, be further varied as follows:

a) All variations made by the deed of variation dated 18th November 2021 be reversed and the variations stipulated below be made to the terms of the original lease.

b) The definition of "The Flats" at sub-paragraph (e) of the First Recital be amended to remove the words "and the maisonette".

c) The definition of "The Retained Premises" at sub-paragraph (f) of the First Recital be amended to replace the word "on" in Line 2 to "or".

d) The First Schedule be amended to read: "ALL THAT land together with the building erected thereon and known as 41 Crutched Friars, London EC3N 2AE".

e) Plan "A" annexed to the lease be removed.

f) The Second Schedule be amended to read:
". . . SECONDLY ALL THOSE the main structural parts of the building including the roof, the foundations, the external and load bearing walls and the joists upon which the floors are laid and external parts of the building (but not the glass in the windows of the Flats nor the plaster on the ceilings and walls or the screed on the floors of the Flats) and all cisterns tanks sewers gutters drains pipes wires cables radiators ducts conduits or other media aerials and installations and any sanitary water gas electrical heating or ventilation apparatus not used solely for the purpose of one flat or which are incorporated in any one of the Flats from time to time unlet PROVIDED THAT there shall be excluded from the said Premises First and Secondly described any premises which the Landlord has specifically demised or intends specifically to demise".

g) Paragraph 2 of the Fourth Schedule be amended so that each reference to 24% (twenty-four percent) is replaced with a reference to 26.5% (twenty-six and a half).

IT IS FURTHER ORDERED that each of the variations referred to above are to take effect and bind each of the parties to the leases with effect from and including 1 June 2019 save for (i) variation 4(a), which is to take effect and bind each of the parties from 11 October 2021 and (ii) variation 5(a), which is to take effect and bind each of the parties from 18 November 2021

The Tribunal **directs** the solicitor for Michael Will no later than **3 March 2023**:

(i) file a copy of this Order together with a copy of the Tribunal's decision, at HM Land Registry.

(ii) confirm to the Tribunal that it has done so.

The Tribunal **directs** HM Land Registry to enter a note in the register of each of the leasehold titles of the residential leases in respect of 39 and 41 Crutched Friars (as set out in the Appendix) which are varied by this order and in the register of the relevant reversionary freehold title, confirming that the terms of the registered lease has been varied by this Order, dated 1 February 2023 and to file a copy of this Order under each affected title.

Judge Robert Latham
31 January 2023