FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2019/0388**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE AND IN PERSON**
Property	**:**	**Flats 1, 2, 3, 5 and 8 Iris Court, 39a Brayards Road, Peckham SE15 3RD**
Applicant	**:**	**(1) Sasha Fraser (Flat 1)** **(2) Esther McIntosh (Flat 2)** **(3) Isiama Ajunam (Flat 3)** **(4) Sean Trotman (Flat 5)** **(5) Winsome Bennett (Flat 8)**
Representative	**:**	**Mrs Bennett as Lead Applicant**
Respondent	**:**	**London & Quadrant Housing Trust**
Representative	**:**	**Mr Stephen Evans of Counsel**
Type of application	**:**	**Section 27A of the Landlord and Tenant Act 1985; ancillary costs orders.**
Tribunal members	**:**	**Mr Charles Norman FRICS** **Valuer Chairman** **Ms Fiona Macleod MCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR** **8 August, 25 and 26 October, remote;** **12 November 2021, in person.**
Date of decision	**:**	**2 April 2022**

DECISION

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Covid-19 pandemic: description of hearing

This has been in part a remote video hearing (3 days) which has been consented to by the parties and in part a face to face hearing (1 day). The form of remote hearing was V: CVPREMOTE. A face-to-face hearing for the first three days was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that the Tribunal were referred to are in multiple bundles comprising approximately 2000 pages, together with two lengthy Scott Schedules, the contents of which the Tribunal has noted. The first Scott Schedule was superseded by an Additional Scott Schedule. This is referred to below as the Scott Schedule.

Decisions of the Tribunal

(1) The Tribunal sets out below its findings below and in the attached Scott Schedule.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 ("the Act") so that not more than half of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge.

(3) The Tribunal makes an order under Para 5A of Sch 11 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") so that not more than half of the landlord's costs of the Tribunal proceedings may be passed to the lessees as an administration charge.

The application

1. The Applicants seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") and as to the amount of service charges payable by the Applicants in respect of the service charge years 2008/9, 2009/10, 2010/11, 2011/12, 2012/13, 2013/14, 2014/15, 2015/16, 2016/17, 2017/18, 2018/19, 2019/20.

2. Directions were issued by Tribunal Judge Mohabir on 12 November 2019 which identified the following matters for determination:

    (i) whether the applicant service charge liability been correctly apportioned in accordance with their leases for the years 2008/2009 to 2019/20 inclusive. The applicants asserted that the correct contractual apportionment was 3.25% per flat.

(ii) In the alternative, whether the items of service charge expenditure set out in the schedule annexed to the application were reasonable. Given the number of years being considered and the numerous items being challenged the Tribunal limited the items of service charge expenditure to any item in excess of £50 per lessee as set out in the schedule.

(iii) Whether an order under section 20C of the Act should be made. Whether an order for reimbursement of application hearing fee should be made.

3. The Tribunal records that an application under section 5A of Sch. 11 of the Commonhold and Leasehold Act 2002 ("the 2002 Act") was also before it.

4. By an order of Deputy Regional Judge Vance dated 19 December 2019 the directions were varied so that the amount of £10 was substituted for that of £50. As service charge apportionment was in issue, the Tribunal reads the reference to the £10 threshold as being against the 7.14% (1/14th), per leaseholder, the position prior to the determination in these proceedings. The effect of this is that items above £140 for the block are outside the scope of these proceedings, and this was accepted by all parties at the hearing. The landlord conceded during the hearing that amounts for similar types of expenditure during a service charge year can be aggregated when determining whether the £10 threshold had been met. Costs outside the scope of these proceedings cannot now be challenged and are payable.

The hearing

5. The hearing took place by remote video conferencing on 9 August, 25 and 26 October and in person at 10 Alfred Place on 12 November 2021. The Applicant appeared in person by Mrs Bennett, as lead applicant, being the wife of Mr Bennett, the lessee of flat 8. The Respondent was represented by Mr Stephen Evans of Counsel.

6. At day 1 of the hearing, it emerged that the respondent's bundle had not been agreed with the applicant who had instead submitted a supplemental bundle dated 16 April 2021, having been given limited permission to adduce such material. The directions in the case provided that the respondent be responsible for provision of the trial bundle. No provision was made for each party to submit its own bundle in the event of disagreement as to the contents. The directions did not provide that the dispute be reduced to a Scott Schedule. Mr Evans did not raise strong objection to the inclusion of the applicant's supplemental bundle which to a large extent replicated the respondent's bundle.

7. Late in day 3 of the hearing during the cross examination of Ms Hughes (see below) it emerged that the applicant wished to refer to documents which were not in the bundles before the Tribunal. These were described as appendices 10 and 11 (also described as appendices 1 and 4) and were forms of lengthy excel Scott Schedule, in one case with tabs. The issue of missing documents was not raised by the applicants during day 1 when the status of the applicants' supplemental bundle was discussed. The parties were asked to confirm that the correct bundles were before it at the start of the day 2 on 25 October. The applicants did not refer to the missing documents when making their case. The Respondents' counsel was not aware of the missing documents on day 3. The Tribunal adjourned the case to consider this procedural issue. Subsequently, the Tribunal received lengthy correspondence from the parties. This indicated that other substantial documents were not included in the respondents' bundle.

8. However, the correspondence demonstrated that these additional documents were sent to the Respondent on 17 February 2020. The Respondents' in-house solicitor subsequently explained that these had been omitted from the respondents bundle, by oversight.

9. In these circumstances, the Tribunal allowed the missing documents into the proceedings. It also allowed in the applicants' appendices 10 and 11. It provided for the respondent to call additional witnesses to address this material or recall its witnesses who had already given evidence. In the event the landlord addressed this by serving a second witness statement from Ms Hughes.

10. As the matter of apportionment was in issue and as the flats were of obvious unequal size, (see below) the Tribunal directed that the respondent provide expert evidence as to an apportionment based on floor areas. This was provided (see below).

The background

11. The Applicants each hold a long, shared ownership lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

12. From the applicants' statement of case the subject property is a purpose-built block of ten two-bedroom and four one-bedroom flats under a flat roof dating from approximately 2003. The development site was owned by Presentation Housing Association Ltd which transferred it to Tower Homes Ltd on 26 February 2002 for a substantial consideration. As part of the TP1 transfer, ("the TP1 transfer") Tower Homes covenanted to meet various costs of maintenance in relation to the shared accessway (see below).

Subsequently, Presentation Housing acquired a further development site immediately to the west of Iris court. This was developed into Dayak Court, comprising 54 units of social housing. Access to Dayak court was to be solely via the shared accessway. During August 2006, a meeting was held between the applicants, the Respondents and Presentation Housing Association to discuss the effect of Dayak Court on Iris Court. Subsequently, Presentation Housing Association installed an electric gate to regulate access and egress to the shared accessway. Some additional parking was also provided to Iris Court residents. These arrangements were not formalised in writing.

13. In 2008, London & Quadrant ("L & Q") acquired the property as part of a block transfer from Tower Homes. Subsequently, Notting Hill Genesis became successors in title to Presentation Homes.

14. Photographs of the building were provided in the hearing bundle. Neither party requested an inspection, and the Tribunal did not consider that one was necessary.

The issues

15. During the hearing, the Tribunal identified relevant issues for determination as follows:

(i) The payability and/or reasonableness of service charges for years 2008/09 to 2019/20 and in particular

i. the reserve fund contributions

ii. liabilities in relation to bulk refuse collection from the bin store

iii. payments in relation to a water standpipe adjacent to the bin store

(ii) Whether the applicants were estopped by convention from challenging the service charge apportionment of 7.14%. If so, until what date, and thereafter the correct basis of apportionment.

(iii) The effect of the TP1 covenants relating to site expenditure between the adjoining owner Notting Hill Genesis and the respondent and the extent to which these costs are recoverable from the applicants as service charges.

(iv) As raised by the Tribunal, whether costs relating to the electric gate on the shared accessway are recoverable as service charges.

(v) Applications for orders providing cost protection to the applicants under section 20C of the Act and paragraph 5A Schedule 11, of the 2002 Act.

The Law

16. Relevant legislation is set out at Appendix 2 below.

The Leases

17. A sample lease of flat 8 was provided. This was dated 25 July 2003 made between Tower Homes Ltd and Peter Bennett. The lease was granted for a term of 99 years from 25 December 2002. It is described as a shared ownership lease. The initial ownership percentage was 50% and a rent was provided for. The block specified proportion was 3.25%. By clause 3(2)(a) the tenant is to pay the service charge in accordance with clause 7. By clause 7(2) the leaseholder further covenants to pay the landlord the service charge by equal monthly payments in advance including a sum for reserves. Clause 7(4)(b) provides for reserves towards matters specified in clause 7 (5) as are likely to give rise to expenditure after such account year, being matters which are likely to be either once only during the then unexpired term of the lease or at intervals of more than one year including decoration.

18. Clause 7(5) provides that expenditure to be included in the service provision includes all expenditure reasonably incurred by the landlord in connection with repair management maintenance and provision of services for the building and common parts including insurance excesses reasonable fees charges and expenses payable to the landlord surveyor any solicitor or accountant valuer architect other person whom the landlord may from time to time reasonably employ in connection with the management or maintenance of the building including the computation and collection of rent.

19. By clause 1(2)(a) the Common Parts include "any communal …bin store garden fences …gates…pedestrian ways footpaths …accessways on the Estate and/or appurtenant to it which are intended to be or are capable of being enjoyed or used by the Leaseholder …"

20. Clause 7(9) provides that if in the reasonable opinion of the landlord it shall at any time become necessary or equitable to do so the landlord may increase or vary the specified proportion. Clause 7(9)(b) provides that "the specified proportion increased or decreased in accordance with clause 7(9)(a) shall be endorsed on this lease and shall throughout

the remainder of the term be substituted for the specified proportion set out in the particulars of this lease."

21. The Fifth Schedule provides "staircasing provisions" by which the lessee can increase his/her percentage ownership but makes no reference to the service charge apportionments being altered in consequence to this.

The TP1 Transfer

22. By the TP1 transfer dated 26 February 2002, the site of Iris Court was transferred by Presentation Housing Association Ltd to Tower Homes Ltd for £623,000. The transferee covenanted within 23 months to construct Iris Court. The property was transferred with the right of access to and egress from the property along the accessway shown yellow on the plan attached to the transfer subject to the transferee and its successors in title contributing a fair and reasonable proportion (initially being 75%) of the cost of repairing maintaining and where necessary renewing the accessway. In the event of any dispute regarding the calculation of a fair and reasonable proportion the dispute should be referred to an independent surveyor to be appointed upon application by the party by the President of the RICS.

The Applicants' Case

23. The applicants' case may be summarised as follows:

(i) the respondents have overcharged the applicants as they have levied charges in excess of the 3.25% apportionments stated in the applicants' leases for a period exceeding 11 years

(ii) the respondent has charged for services which have not been provided

(iii) the applicants have been charged for services provided to residents of the adjacent properties owned by Notting Hill Genesis who do not live at Iris Court.

(iv) the respondents have relied upon the TP1 transfer to assess part of the applicants' liability, notwithstanding that the applicants are not a party to that deed.

(v) Further specific matters as raised in the statement of case which are included in the Scott Schedule.

24. The above matters were expanded in a skeleton argument prepared by Ms Esther McIntosh, which may be summarised as follows. There is an implied covenant in all contracts that all parties act in good faith and [with] fair dealing which cannot be waived. The respondents had not acted in good faith as they did not notify the applicants of the need or intention to vary the block proportion, specified in the lease at 3.25%. Clause 7(9)(b) of the lease implies that the respondents owed the applicants a duty of care to notify them in writing during a reasonable time and have the varied block proportion endorsed on the lease. The respondent should have applied to vary the lease under section 35 of the Landlord and Tenant Act 1987 because it did not make satisfactory provision in respect of the calculation of service charges due, as the respondents believe that the block proportion specified was less than the total expenditure. The respondent's solicitor who drew up the lease had a duty to get the specified block proportion right in the first instance. Further by virtue of section 27A(5) the leaseholders' agreement is not to be implied simply because she/he pays the sum claimed by the landlord.

25. The applicants also relied on section 27A(6) of the Act which precludes the landlord from itself deciding the question of reasonableness, including a method of apportionment of costs, which fall within the jurisdiction of the Tribunal, as held in *Windermere Marina village Ltd v Wilde* [2014] UK UT163 (LC).

26. In relation to the respondent's case for estoppel by convention, the applicants relied on *Jetha v Basildon Court Residents Co Ltd* [2017] UKUT 58 (LC). In that case, the leaseholders had acquired their leases between 2003 and 2011. The landlord issued demands for on account payments in advance which were not paid until 2014. In 2015 and 2016 the leaseholders disputed their obligation to pay. The FTT held that the leaseholders were estopped from disputing a method of demands due to their previous conduct. On appeal, the Upper Tribunal, in allowing the appeal, referred to *Blindley Heath investments Limited v Bass* [2015] EWCA CIV 1023 which set out five conditions that must be met for estoppel by convention: the parties must have expressly agreed a common assumption upon which any estoppel is based by express agreement, conduct or silence; the party who is now seeking to go back on the agreement must have conveyed to the other party that he expected them to rely on it; the person who is alleging estoppel must have relied on the assumption; that reliance must have occurred within dealings between the parties; and any the person who is alleging estoppel must have suffered a detriment so as to make it unjust or unconscionable to the other party to go back on the agreement.

27. The applicants did not agree to a variation of the lease by written or oral agreement, conduct or silence. They were not made aware of this [re-apportionment] in writing at any time prior to sight of the respondents' statement of case [in these proceedings] that the block proportion was 7.14% and the electric gate maintenance was apportioned at 5.35%. [1]Secondly, the applicants are not seeking to go back on the agreement as the applicants have not agreed to pay the 7.14% block proportion or the 5.35% proportion for electric gate maintenance. The Respondent has not suffered a detriment as the respondent has been collecting service charges based on a block proportion percentage which was not varied equitably over 12 years and also charged the applicants 100% for services they did not receive and services on land shared with third party residents.

28. The applicants unfairly charged 100% for services shared with Notting Hill Genesis residents between 2008 and 2020. Notting Hill Genesis residents paid nothing and benefited 100% from bulk refuse removal, grounds maintenance, communal standpipe, maintenance of the electric gate and communal lighting.

29. The respondents unfairly charged the applicants for services they did not receive. This was developed in the [Scott Schedule] (see below). It could be argued that under section [20 of the Act] the respondent was required to consult on carrying out work which will cost more than £250 for any individual leaseholder. The applicants feel that a written consultation and notification to vary the lease would have been in line with those obligations.

30. The applicants "are fully aware that their service charges were apportioned at 1/14th as there are only 14 Properties Iris Court so this is obvious. However, it was not obvious that 7.14% was being charged as the respondents notified the applicants as service charges increased each year in line with the retail price index, the respondents added new service charge items almost every year between 2008 and 2020 and there was no indication of the 7.14% levy stated anywhere on the lease by letter or on the service charge estimates or actuals or otherwise. The applicants are not accountants."[2]

31. Miss McIntosh also sought to distinguish *Cane v Islington* [2015] UKUT 542(LC) in which it was held by the Upper Tribunal, that depending on the circumstances, a series of unqualified payments may suffice to amount to agreement, because "the natural implication or inference of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded". Miss

[1] [Being 75% of 7.14%, 75% arising from the TP1 transfer, accessway liability, see below]

[2] Para 7f applicants skeleton argument

McIntosh submitted that the applicants should not have had cause to qualify or protest a variation to the proportion because this had been clearly expressed on their lease agreements at 3.25%.

32. The applicants were not notified that the respondent had no management agreement in place to provide communal services on land shared with Notting Hill Genesis until 2016 when they received a letter from the respondent. The applicants were also unaware that the respondents were relying on the TP1 made with Presentation Housing in February 2002 to inform part of their service charge demands. The majority of applicants did not have sight of the TP1. The applicants were not party to the TP1 nor is this referred to in the leases. The applicants could only protest about what was glaringly obvious on their service charge estimates and actuals, as well as disrepair, poor workmanship or services not received. Therefore, the applicants have not made a series of unqualified payments towards the service charges.

33. In relation to the section 20C application Miss McIntosh referred to the *Tenants of Langford court v Doran Ltd* LRX/37/2000, which refers to what is just and equitable in all the circumstances.

The Applicants' Witnesses

34. Ms McIntosh gave evidence having submitted a witness statement. Her evidence may be summarised as follows. She had been a leaseholder since 11 July 2003. Ms McIntosh made express reference to the block specified proportion of service charge being 3.25%. When she received her first service charge statement in 2004, no service charge block proportion was stated. During a residents' meeting in 2006 between Iris Court leaseholders, representatives of Presentation Housing Association, and Tower Homes Limited and others, Mrs Bennett negotiated the following on behalf of leaseholders Iris Court: an electric access gate operated by fobs to access the forecourt and deter unauthorised parking which Presentation Housing Association agreed to install and maintain; five unallocated parking bays, one visitors' bay, and one contractors' bay would be for the sole use of the applicants, all as free gifts and goodwill gestures at no cost to Iris Court leaseholders. Tower Homes Ltd asked for two additional parking bays for Iris Court. For this to be feasible, Presentation said that they would need to move the Iris Court communal bin store and relocate it to the new development. That was on condition that the new communal bin store would be shared between the applicants and the residents of the new developments, flats 1-13 Dayak Court, 51 to 69 Consort Rd, and 26 flats at Sarawak Court.

35. Ms McIntosh instructed a solicitor to advise her in relation to her property purchase and he did not raise any concerns about the specified

block proportion of 3.25% or mention any other block proportion percentages to her.

36. She first complained to the respondent regarding service charges on 4 September 2008 by email regarding communal TV aerial communal doors and communal signage. This resulted in a meeting with then neighbourhood services manager. She also complained about excess charges for bulk refuse removal and a water charge where there was no water supply at Iris Court, during 2010. She queried service charges for the year 2013/2014 by 'phone during June/July 2014 regarding the water charge for what she described as a non-existent standpipe which was removed in 2007, excessive costs for light fittings and grounds maintenance carried out only once or twice a year on a tiny piece of land.

37. During March 2015 she complained about service charges for the electric access gate which had been damaged beyond repair by Southwark Council and remained out of service. During August 2015 she called to request invoices for the year 2013/14. During September 2015 she complained about scaffolding for which she was being charged in her private garden and which had been in situ for over two years. This eventually resulted in a residents' meeting with the respondents. L & Q informed her that there was no management agreement in place with adjoining owners and the L & Q would therefore be proposing a new management agreement concerning shared facilities and services throughout the site.

38. The first time she was made aware of any different block proportion was when this was first mentioned by Robert Hutson, regional manager of the respondent in a meeting of 23 October 2018. In the respondent's statement of case of February 2020, the respondent also gave block proportions of 7.14% and 5.35%[3].

39. Ms McIntosh also referred to the Home and Communities Agency shared ownership joint guidance for England 2016. Guidelines 35 and 36 required the Housing Corporation to give consent for deeds varying the terms of the leases. This included changing service charge apportionments. Ms McIntosh stated that she was not aware that any such application had been made by the respondent.

40. In cross-examination, Mr Evans referred to the reactive repairs item on the final service charge statement for 2012/2013. The total was £280.01 of which the leaseholder was charged £20. Mr Evans asked whether Ms McIntosh could see that the leaseholders' proportion was much greater than 3.25%. Ms McIntosh said that she did not know as her maths was

[3] [in respect of shared accessway]

not a strong point. Mr Evans pointed out that none of the applicants had made payments under protest. Mr Evans referred to minutes of a meeting between Iris Court residents and the respondents of 23 October 2018 and whether the proposed 25% refund in relation to accessway costs was reasonable. Miss McIntosh said that the minutes were not written by her, and she was not happy with the 25% reduction.

41. Mr Evans also pointed out that the bin store was always outside the respondents' land, with reference to the TP1. Ms McIntosh confirmed that there were no objections the bin store being moved. The witness said that bulk refuse collection should be split 50/50 as the shed was not on L & Q land. Ms McIntosh accepted that she did not know who had been dumping rubbish at the bin shed but she had lived at the property for 18 years. However, she did not think that she should pay anything towards this cost. Counsel pointed out that the increase in the reserve fund from £300-£525 per year predated L & Q's ownership. Mr Evans also referred to several open offers made to settle the matter on 8 February 2019, 13th of May 2019 16th of August 2019 by Mr Hutson and asked why no responses had been made. Ms McIntosh said that they were not acceptable, and also that the Housing Ombudsman to whom a reference had been made, held that he did not have jurisdiction.

42. Ms Fraser's evidence may be summarised as follows. She had lived in the property since June 2003. She first complained about service charges to L & Q in 2008 by telephone. This related to questions of value for money and the fairness and reasonableness of charges for non-essential work. She also complained about service charges on 26 September 2010 when she emailed L & Q in relation to bulk refuse removal. On 11 November 2015 she made a further complaint about service charges in relation to pest control and lack of fairness, equality, consistency, and transparency. A meeting with L & Q took place on 24 February 2016 which she was unable to attend owing to her inability to gain entry to the building. The minutes were sent on 8 July 2016. On 21 November 2018 she queried charges in relation to cyclical decoration. A further meeting took place with L & Q on 16 August 2018. On 13 September 2018 she made a further complaint in relation to signage changes following the takeover by L & Q. She attended a meeting with Mr Robert Hutson with other residents on 23 October 2018. Discussions included the lack of any management agreement between L & Q and Notting Hill Genesis, the percentage of service charges, the shared bin store, cyclical redecorations, and a refund of service charges Mr Hutson stated that L & Q "owe you a lot of money" and agreed that he would work on providing a refund which he stated would be around "£25,000".

43. Ms Fraser emailed Mr Hutson on 23 January 2019 seeking clarity, summarising her complaints and asking when the refund would be

provided. Her complaints were that the residents were paying more than 3.25% block proportion which they had been unable to calculate because the service charge statements did not contain individual items broken down per leaseholder only the total costs; L & Q had never notified leaseholders of the intention to change the block specify proportion nor had this been endorsed on the leases. Leaseholders discovered this themselves through calculating what they were paying through their service charge statements. This was an unfair practice which lacked transparency.

44. Further, the lack of a management agreement between L & Q and Notting Hill Genesis has resulted in unfair costs being passed to L & Q residents who were paying for 75% of service charges when they occupied only a small proportion of properties on the shared land, being 14 flats in one building compared to Notting Hill Genesis' development of 60 properties of flats and houses. She also raised the issue of responsibility for the upkeep of the electronic gate installed by presentation in 2008 as a goodwill gesture to Iris Court leaseholders following the development of Dayak court and the remainder of the Notting Hill Genesis development. Further, the bin store was outside the property boundary and therefore outside the remit of the TP1 document. Therefore, the residents should not have been paying for bulk refuse collection for 10 years and should have had their original bin store reinstated as documented in their leases. Miss Fraser then dealt with correspondence relating to open offers made by L & Q to settle this matter.

45. In cross-examination, Ms Fraser said that her solicitors had not pointed out the 3.25% proportion and she had sought legal advice in this matter. She felt intimidated by Mr Hutson. She was not aware that she had been charged at 7.14%. She did not accept that this could have been worked out from previous invoices. She had not paid under protest but had raised previous complaints. As there are only 14 flats in Iris Court and 56 properties owned by Notting Hill Genesis the latter should pay 75 to 80% of the costs in relation to the accessway. The TP1 was not available to her. There was nothing in writing from Notting Hill Genesis in relation to any agreement. She had not responded to Mr Hutson's offers because matters had not been addressed thoroughly. There was a suggestion that a RICS surveyor be appointed to consider re-apportionment under the TP1, but Mr Hutson still referred to the 75%.

46. Mr Trotman in a short witness statement stated that he had lived at flat 5 Iris Court since July 2003. He attended meetings held between the leaseholders and L & Q in 2008, 2016 and 2018. He agreed with Mrs Bennett's statements in full. During cross examination, he confirmed that he had instructed solicitors in relation to his purchase. He was not aware that the 3.25% for each flat did not give rise to a 100% recovery of service charges. He had not sought legal advice in relation to the

proceedings. He had since been made aware by another resident. He did not complain about any of the items because L & Q did not take notice. Service charges were unfair and too high, and the process very stressful. In relation to the bin store be considered that the cost should be divided 56/14. He had not responded to offer letters because the offers were not good.

47. Mr Peter Bennett in a short witness statement stated that he had been living at flat 8 Iris Court with his wife Mrs Winsome Bennett since July 2003. The problem occurred when L & Q took over the management of freehold from Tower Homes Limited in 2008. He had complained between 15 April 2014 to 2 July 2014 in relation to not receiving value for money, slow repairs, and a problem with a communal entry door. He should only be paying 3.25% of the service charges. In cross-examination Mr Bennett confirmed that he had instructed solicitors in the purchase and relied on his wife to deal with formalities. He had complained about service charge statements. A fair proportion was 3.25% as per the lease.

48. Ms Isioa Ajunam in a short witness statement stated that she had been leaseholder of flat 3 since July 2003. Since the time when L & Q took over in 2008, she had made several complaints via phone calls regarding service charges. These included the electric access gate fee and the costs of cutting down trees and water consumption. These should not be part of her invoices as the land on which these items sit belongs to the Notting Hill Group. On 23 October 2018, a meeting took place at L & Q's offices with Robert Hutson, and he made it known to the residents that all such charges would be removed but nothing was done. She was disappointed, cheated and let down. During cross examination Miss Ajunam said that she had used a solicitor and understood the service charge to be 3.25%. She was not good at mathematics. Service charges should be shared fairly for the accessway. There was previously no gate at the property.

49. Mrs Bennett stated that she had been living at Iris Court with her husband Mr Peter Bennett since July 2003. In February 2002 Tower Homes Limited purchased a plot of land from Presentation Housing Association for £623,000. This was developed into Iris Court. The property comprises 14 flats over four floors and there is no lift. At that time the property included a communal external bike storage area inside the building, refuse bin storage room, a water standpipe and eight allocated parking bays. Mr Bennett used solicitors in connection with the purchase. It is a shared ownership lease. In July 2003 the forecourt was divided between Tower Homes Limited and Presentation Housing Association. The portion owned and managed by Presentation Housing Association comprised five unallocated parking bays, one visitor's parking bay and one contractors parking bay. The unallocated parking bays owned by Presentation Housing Association were shared

between Iris Court residents who did not have allocated parking bays with their properties, and Presentation Housing Association residents who lived in houses immediately outside Iris Court, on Brayards Road. The total allowable service charges should be 45.5% based on 3.25% per property. Charges for the accessway should not be 75% for Iris Court.

50. In 2005, Presentation purchased land adjacent to Iris Court. There was a meeting between Iris Court residents and Presentation Housing Association to discuss the impact of those properties being built adjacent to Iris Court and how the forecourt should be shared. Presentation stated that the only way the residents of the new development would be able to gain entry to their properties would be to use the Iris Court's accessway, with which the leaseholders were unhappy. The new development was completed in early 2008.

51. Mrs Bennett first complained about service charges in 2008. On 25 September 2008 there was a residents' meeting with L & Q where Mrs Bennett complained about the charge for standpipe water when there was no standpipe, and also about the TV aerial. On 24 February 2016 a residents meeting took place with L & Q where their representative Mr Dakin stated that there was no management agreement in place between Presentation Housing Association (now known as Notting Hill Genesis) [and L & Q]. On 5 February 2018 Mrs Bennett made a further complaint. In reply, L & Q advised that the leaseholders have to pay for cutting of trees, although there are no trees on their land. Mrs Bennett attended a meeting with Mr Hutson on 23 October 2018. Mr Hutson promised that he would put things right, but the leaseholders continue to be disappointed with the management of L & Q.

52. In cross-examination Mrs Bennett first confirmed that any reference to Carol Bennett was also a reference to her. Mrs Bennett confirmed that solicitors were appointed by her but the percentage of 3.25% was not drawn to her attention. Reference to the service charge liability 45% was not surprising as this was a shared ownership purchase. Mr Evans made the point that the service charge percentage does not vary in relation to equity changes in the staircasing provisions. Mr Evans referred to the freehold title and the TP1, but Mrs Bennett said that she was not made aware of this by her solicitor and only became aware of this in 2018. She pointed out that the TP1 existed before Iris Court was built and the TP1 is not referred to in the lease.

53. She did take legal advice in relation to the current case in 2018. With reference to the service charge 2012/13, and to which Mr Evans had made previous reference in cross-examination, Mrs Bennett said that she did not pay attention to the figures which is why she did not challenge it at the time. She did not make payments under protest. With reference to a letter apparently signed by Mrs Bennett dated 29 October 2018, she said that she was unable to confirm whether the

signature was hers. She was unable to comment as to whether the 75% cost of maintaining the accessway was a fair proportion and she was not a surveyor. She agreed that the bin store could be moved. Before the move it was not shared and there were 14 flats at the subject property against 56 properties at Dayak court. Mr Evans pointed out that the applicants had not put alternative figures into the Scott schedule which they were required to do. Mrs Bennett did not accept that various items including the door entry charge were reactive costs and can be charged in addition to the reserve fund. Mrs Bennett did not accept that a mobile caretaker was needed. She had not responded to Mr Hutson's offers in relation to the water tap. There were no minutes of the meeting of 2006. Mr Evans asked why Mrs Bennett had not previously challenged the charges. With reference to the landlords' measured survey carried out by of Aston Rose (see below), Mrs Bennett challenged the reports because the apportionment attributed to the measured flats kept going up.

The respondents' case

54. In his skeleton argument Mr Evans submitted that in accordance with paragraph 10 of its statement of case the respondent was entitled to contractually increase or vary the proportion of service charge. The fact that this had not been endorsed on the lease was not an impediment because clause 7(9) of the lease was not a condition precedent to the respondent's ability to make that variation. In closing, Mr Evans stated that he was no longer pursuing the argument that the respondent was entitled to vary the percentage but that this was a matter for the Tribunal, in light of *Marina Village*.

55. Mr Evans also submitted that up until 23 October 2018, by the doctrine of estoppel by convention, the applicants were estopped from disputing the then apportionment of 7.14%. He first referred to the *Republic of India v India Steam Ship Company Limited* [1998] AC 878 where Lord Steyn described the legal principle as follows:

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

56. Mr Evans then relied on *Admiralty Park Management Company v Ojo* in which the Upper Tribunal (Mr Martin Rodger QC, Deputy President) said:

> "42.... It would in my judgment have been clear to anyone who considered the Maintenance Charge statements that the expenditure on buildings maintenance was not being divided amongst 16 flats in a single building but was being apportioned amongst a much greater number. I accept that it might not have been clear how the proportions for building and estate expenditure had been arrived, although I was informed that the proportions are different because buildings expenditure does not include at cost in respect of the three buildings owned London & Quadrant, which undertakes its own building maintenance. **It would nevertheless have been obvious to Mr Ojo, had he considered the statements, that he was being asked to pay a much smaller percentage of expenditure on the building than he would have been if only the leaseholders in his building had been required to contribute.**
>
> 43. Mr Ojo acquiesced in that manner of calculating the Maintenance Charge (which may have been more or less favourable to him than the method strictly required by the lease). He may not have fully appreciated the requirements of the lease (as indeed the appellant and its managing agent appear not to have done) but he had the opportunity to read his lease and understand how service charges were supposed to be accounted for.
>
> 44. Taking his prolonged acquiescence into account, and having regard additionally to the fact that in 2011 Mr Ojo did not dispute liability in principle for charges computed in the same way, it seems to me that a conventional mode of dealing existed between the appellant and Mr Ojo under which it was understood the Maintenance Charges were to be apportioned on the basis that each leaseholder was obliged to contribute towards expenditure on all nine leasehold buildings." (emphasis added by the Tribunal)

57. The respondent relied on Mr Hutson's evidence. It would be unfair to the respondent because it would allow the applicants to go back on the parties' dealings during the last 12 years; the respondent had no recourse to its own funds to make up the difference between 100% and the 45.5% of recoverable costs, the respondent is a charity and the applicants have had the benefit of generous payment options. It was

clear that the lease fails to make satisfactory provision for the computation of 100% of the service charge such that the FTT would be likely to grant a variation to the leases if such an application were brought. The fact that 7.14% was being levied whilst not expressly stated to the applicants was obvious from the first service charge final statements.

58. Alternatively, in accordance with *Cane v Islington* [2015] UKUT 0117 (LC), the defendants were taken to have agreed the service charges including the percentage increase. Although the applicants had made complaints, they had never made express protest about paying the sums demanded. The first complaint in relation to the percentage charge being levied was made in 2018 and again in 2019. It was only Ms McIntosh and Ms Fraser who did so.

59. In relation to section 20C, Counsel having referred to *Tenants of Langford Court v Doren Ltd* LRX/37/2000 submitted that much would depend on the outcome and that the respondent had made earlier reasonable offers of credit to the service charge accounts, to which detailed reference was made in the bundle.

The Respondents' Witnesses

60. Mr Tim Richards FRICS was called as an expert surveyor in connection with apportionment based on floor areas within Iris Court. Mr Richards is a Director of Aston Rose (West End) Ltd having qualified as a chartered surveyor in 1989. He has 35 years' experience of advising clients of service charge budgets and apportionments. His instructions were to calculate the apportionments of flats at the property for service charge purposes, based on floor areas, using the RICS Code of Measuring Practice. He was not provided with any scale plans but had sight of low-quality drawings, not to scale. He physically inspected and measured flats 1,2,3,5,8 and 13 on 25 August 2021. He used a Disto laser measuring device. He used gross internal area. Of those flats to which access was not given he made assumptions based on measurements taken on similarly shaped flats on upper or lower floors. This was made clear on his schedule of apportionments. Subsequently he amended his report having identified some additional plans following a search. These were created by BMP architects and dated April 2002. On 19 October 2021 and in response to a letter from Mrs Bennett dated 15 October 2021, Mr Richards identified an error in one of his dimensions which he corrected. Mr Richards recommended a service charge percentage schedule which was wholly based on scaling. This was to avoid a schedule based on a mixture of some physically measured flats and some flats measured from scale plans which he opined would be inconsistent.

61. Mr Hutson was called and confirmed the truth of his witness statement. He has been employed as Regional Manager for the respondent the last two years. He confirmed that the respondents' statement of case dated 13 January 2020 was true. Appendix 1 to the respondent's case is a Scott schedule. (The Scott Schedule annexed to the statement of case has now been superseded by the Additional Scott Schedule produced by the applicants and the amended respondents' position is therefore shown on that Schedule).

62. Mr Hutson repeated some of the legal submissions of the respondent which it is unnecessary to repeat. In relation to 2008/2009, the consent of the HCA was unnecessary to increase the service charge percentage nor was it necessary in subsequent years. The RICS Service Charge Management Code did not apply because the respondent is not a managing agent. The apportionment increase was apparent from the service charge statements as a matter of pure mathematics. The applicants never challenge the increase until 2018. There is no letter of complaint in relation to ground maintenance. However, the then Head of Leasehold Services sent a letter dated 11 March 2008 to Mr and Mrs Bennett and a Ms King of flat 7, in response to an email of 26 February 2008. That letter stated that the works were done fortnightly and the lessees of flats 7 and 8 were the only complainants. The reserve fund contributions levied by Tower Homes of £300 per annum rising to £525 per annum were appropriate given the number of leaseholders. The respondent is not required to refund reserve fund contributions which are not used over the years.

63. In relation to 2009/2010, Mr Hutson referred to an email dated 5 August 2010 when Sam Dowdle of the respondent wrote to Mr Bennett and others to state that the respondent did invoice NHG a proportion of the costs for removal of dumped items as they shared the same bin store. On 16 December 2009, Mr Dowdle again wrote to Mr Bennett and others by email asserting that there was a water supply pipe to the left-hand side of the bin store. On 7 December 2010 Mrs Bennett emailed the respondent to complain that the pipe had burst. The purpose of the pipe was to clean the bin store. The respondent did not have an agreement with NHG to share the cost.

64. In relation to 2010/2011, there is a fire alarm and safety equipment in the block including emergency lighting and automatic opening vents. These are serviced annually and the AOV every six months.

65. For Service charge year 2011/2012 an invoice was provided for routine maintenance of fire alarm and emergency lighting for various sites including the subject property for £22,112.58. The total cost Iris Court was £1002.26.

66. For Service charge 2012/2013 the cost of the accessway maintenance pursuant to the TP1 requires the respondent to pay 75% of the initial cost. A provision enabled Tower Homes (and latterly the respondent) to instruct an RICS surveyor to reconsider the apportionment. Neither Tower Homes nor the respondent have disputed the apportionment. The applicants did not have the right to challenge the 75% apportionment except in so far as the lease allows. Inadvertently the applicants may have been charged 100% of the cost of maintenance of the gate by the respondents rather than 75%, and a refund of 25% has been offered since February 2019. There is no evidence that the applicant successfully negotiated that the gate would be maintained by NHG or anyone else at no cost, after its erection in December 2007.

67. For service charge year 2015/2016, only two handsets of the door entry system required replacement and therefore the reserve fund was not utilised. This was correct.

68. As regards service charge year 2016/2017, mobile caretaking was provided. The advantage is that individual callouts for smaller jobs which would be individually charged were unnecessary. The charge was calculated from the mobile caretaker salary plus associated costs divided by the number of units that derived a benefit from the service.

69. In relation to service charge year 2018/2019, on 23 October 2018 a meeting took place between the residents and the respondent at Iris Court. The TP1 was discussed. On 8 February 2019, Mr Hutson wrote to Mrs Bennett advising her that the communal vehicle gate is on land forming part of the accessway. He accepted that at certain times Iris Court residents may have paid 100% for the maintenance of this gate and that the respondent would refund 25% of the following from service charge year 2012/2013:

(i) 25% of grounds maintenance £526.61 per flat
(ii) 25% of bulk refuge collection £270.56 per flat
(iii) 25% of water consumption 52.72 per flat
(iv) 25% of communal gate maintenance £314.75 per flat

70. This averaged as an offer of £291.16 per flat which the applicants did not accept. A further goodwill gesture offer of £320 was also made increasing the total credit offered to £611.16, which the applicants rejected.

71. For the service charge year 2019/2020, the amounts sought were estimated amounts. The applicants will be able to challenge final amounts when published.

72. On 13 May 2019 Mr Hutson wrote to Mrs Bennett stating that he did not have information going back 12 years but that the respondent had decided to give credit for 12 years back to 2007. Mr Hutson proposed to double the figure in his February 2019 letter as referred to above. No charges had been made for tree works. The cost of bulk refuse collection would be refunded in full without admission as to any liability. Mr Hutson indicated two options regarding the water tap, either not using it or continuing with a 75% charge as per the TP1. Mr Hutson confirmed the bins would be restored to their previous position. The Respondent would work with Notting Hill Genesis in relation to parking bays and a new RICS surveyor's assessment of the apportionment as per the TP1 would be required, which NHG had not yet progressed. A further revised credit of £1380.61 to all residents would be offered. This was not accepted and instead a complaint made to the Ombudsman who held that it was out with their jurisdiction.

73. In cross-examination Mr Hutson agreed that 7.14% charged had not been included as an express statement in demands. However, the fact that 1/14 was charged was very clearly set out. He was not aware of consent needed from Housing Corporation to vary the percentage in the leases. The 7.14% had been charged from the outset and had not been challenged. The respondent wanted to receive 100% of the block costs. He accepted that the leases had not been endorsed with the 7.14%. Mr Hutson said that a reasonable proportion of the costs of providing services at the bin store should be recovered.

74. Ms Hughes provided first and second witness statements. In her first statement she confirmed her employment as a Service Charge Team Manager at the respondent. She confirmed the veracity of appendix 2 to the respondent statement of case being the schedule of invoices. Her evidence was that she was not involved in the day-to-day management of Iris court and in so far as Mr Hutson's witness statement concerned figures in dispute as opposed to the supply and standard of services, she could speak to the contents of his statement.

75. In her second witness statement Ms Hughes confirmed that she had completed the respondent's responses in the Additional Scott Schedule and collated the invoices at pages 1 to 59 of the statement in support of those responses. Ms Hughes pointed out that many of the items challenged were outside the scope of proceedings as directed being less than £10 per lessee in accordance with the amended directions. Ms Hughes was cross examined by Mrs Bennett.

Findings

Witnesses

76. The Tribunal found Ms Hughes evidence to be a highly credible witness and accepts her evidence . The Tribunal found Mr Hutson to be an honest witness doing his best to assist the Tribunal, but he did not have significant personal knowledge of the property over much of the relevant time period.

77. The Tribunal accepts the applicants' evidence insofar as it demonstrates a protracted dispute with the landlord covering a wide range of issues. The Tribunal is unable to accept the applicants' evidence to the effect that Presentation Housing Association agreed to meet shared access costs and in particular electric gate maintenance in a way which departed from the TP1. This is because this was not embodied in a written agreement. If the Tribunal is wrong about that, it finds that any such verbal agreement was too vague to be enforceable and does not modify the effect of the TP1.

78. As to the landlords' argument of estoppel by convention (see Para 50 onwards above), the Tribunal finds that each of the applicants could have established that they were each being charged 1/14th of the total costs, had they made enquiries (see *Admiralty Park* , Para 56 above, in bold) . This is also consistent with Ms McIntosh's submissions. It is therefore unnecessary for the Tribunal to make individual findings as to whether the witnesses each had personal knowledge of the actual proportion charged.

79. The Tribunal rejects the applicants' submission that there are implied terms that all parties act in good faith and fair dealing, which was unsupported by authorities. It also rejects submission that a duty lay on the landlord to apply for a lease variation under the 1987 Act.

80. The Tribunal accepts and indeed it was ultimately common ground, that the Tribunal has jurisdiction to determine the relevant apportionments where the lease provided this to occur at the discretion of the lessor, and that any re-apportionment by the landlord is void. This is the effect of Section 27A(6) of the Act, as held in *Windermere Marina v Wild* to which both parties referred. Mr Evans also referred to *Oliver v Sheffield* [2017] EWCA Civ 225 which further supports this proposition.

81. The Tribunal rejects the respondents' submission that the applicants had agreed service charges, applying *Cain v Islington*. The factual matrix was one of a lengthy dispute, covering a wide range of matters from different lessees and over many years. Although payments had not been formally made under protest, the Tribunal had particular regard to s. 27A(5) of the Act and found that the threshold in *Cain* was not reached and accordingly agreement could not be inferred.

82. As to restrictions on changing service charge proportions by the HCA, the Tribunal finds that if this existed all, it was an administrative issue between the HCA and respondent. It was not a restriction or condition imposed in the lease or shown on the respondents' title. Therefore, it does not operate to prevent the service charge apportionment being amended. Further, any such change is not a lease variation but implementation of a lease provision that already existed.

83. In relation to estoppel by convention, in *Blindley Heath v Bass* upon which the applicants rely, the Court of Appeal said

> 75. The judge reminded herself that the parties must have conducted themselves on the basis of the shared assumption and that the shared assumption must have been communicated between them. It is not sufficient for one or (even) both parties to have acted on the assumption if there is no communication of that assumption, but she pointed out at para 131, on the authority of The Vistafjord [1988] 2 Lloyd's Rep 343 , 351, that the necessary communication may be effected by the conduct of one party which is known to the other, provided that such conduct is **"very clear conduct crossing the line … of which the other party was fully cognisant".** She might well have added that such communication could, a fortiori, be effected when both parties conduct themselves towards each other on the basis of the assumption. She further reminded herself that the estoppel could **only operate if it was unconscionable for one or other party to seek to rely on the true position contrary to the parties' assumption.**" […]
>
> The question whether the parties manifested assent to the assumption by something said or some conduct which clearly crossed the line is largely a question of fact." (emphasis added)

84. Although the Tribunal accepts that each of the applicants could have calculated the apportionment had they obtained relevant advice it does not find that this amounted to "very clear conduct crossing the line… of which the other party was fully cognisant" as set out in Para 75 of *Blindley Heath* above.

85. The Tribunal distinguishes *Admiralty Park v Ojo* on the ground that there, apportionment percentages for both estate and block

expenditure had been stated on the Maintenance Charge Statements given to Mr Ojo[4]. Conversely, in the present case that did not occur.

86. Further, the Tribunal finds that the failure by the respondent to endorse the leases with the revised apportionment, contrary to clause 7(9) is a continuing breach of covenant by the landlord which makes it inequitable for the respondent to rely on an estoppel. In the Tribunal's judgment it would not be unconscionable for the applicants to seek to rely on the true position. The Tribunal recognises that following *Windermere Marina v Wild* such endorsement required a prior application to the Tribunal, but none was made by the respondent.

87. The Tribunal therefore finds that estoppel by convention is not made out by the respondent. The apportionment of 7.14% is void, having been made by the landlord, and the Tribunal has jurisdiction to determine the apportionment for each of the years in dispute before it.

88. The Tribunal finds that as the flats are a mixture of one and two bedrooms the most appropriate basis of apportionment is by floor area. The Tribunal accepts the factual contents of Mr Richard's evidence. However, it disagrees with his opinion that all measurements should be based on scaled plans because some of the flats were inaccessible, to ensure a consistent basis of measurement. The Tribunal's judgment is that the best evidence now available should be used, being a combination of actual measurements where access was available and scaling from plans otherwise. The apportionments found are set out at Appendix 1 below. Although it is convenient to set out the apportionments of all the flats, only those apportionments which relate to the flats of the applicants are binding, as this decision does not bind non-parties. These apportionments apply to each of the disputed years including the reserve fund.

89. In relation to the reserve fund, such amounts are only recoverable by the landlord to the extent that they are reasonable by virtue of section 27A (1) of the Act. However, the reserve fund is separate to costs for reactive repairs and should not be used for that purpose. The applicants were initially charged £300 per annum, which was increased to £525 per annum after the respondent acquired the block. The main evidence supporting these charges was a table as follows:

No of homes	item	Cost/£	years	months	S/F monthly /£	S/F yearly/£

[4] Para 39

14	Entryphone /doors	15,000	10	120	8.93	107.16
14	render	7735	20	240	2.30	27.72
14	roof	38575	30	360	7.65	91.92
14	decs	5000	10	120	2.98	35.76
14	carpets	4372	10	120	2.60	31.32
						293.88
					rounded	300.00
[Totals]		70,682				[Based on the apportion-ment of 7.14% this aggregates to £4200 per annum for the block .]

90. In addition, there was photographic evidence showing that the building roof was flat and would therefore require renewal approximately every 30 years. Neither of the respondent's witnesses gave evidence about the reserve fund quantum. The table equates to a total cost of £70,682 or £4,200 per annum. The respondent submitted that the reserve balance as of 31 March 2019 was £89,266.02 and £21,055.14 was expended in 2009/10.

91. The Tribunal finds that there is no evidence to justify the £7,350 per annum (equivalent to £525 per flat) now being charged. From the limited evidence available, which is now historic, the Tribunal agrees that £4,200 per annum is a reasonable reserve fund contribution, provided that the balance does not significantly exceed the total cost of works for which there is evidence of £70,682. As of 31 March 2017 this stood at £74,041.92. Therefore, the Tribunal finds that reserve fund charges in the subsequent years 2017/18, 2018/19 and later to be unjustified. It assesses the reserve funds payable in those years at nil. The Tribunal is not able to make allowances for price inflation as it

received no relevant evidence. These findings do not preclude the landlord from obtaining updated costings and potential changes to the reserve fund amounts in the future.

92. Neither the transferor nor transferee has instigated a process for reapportionment of the 75%. The Tribunal finds that as the TP1 preceded the construction of Iris Court and in particular at the date of grant of leases, its existence was ascertainable by the applicants, who were represented by solicitors in their purchases. Therefore, they ought to have had notice of it. The Tribunal finds that neither the transferor nor the transferee was obliged to instigate a process for reapportionment, the outcome of which is uncertain.

93. As the shared accessway falls within the definition of "Common Parts" under clause 1(2)(a), (which does not require such land to be owned by the respondent), and as the transferee is under a continuing obligation to pay 75% of the shared accessway costs, such costs fall within the scope of the service charge provisions and are in principle recoverable from the applicants.

94. The Tribunal raised the issue of whether the scope of the TP1 and the service charge covenants extended to the maintenance of the new electric gate which was not installed until several years after the leases had been completed. This is because the lease must generally be interpreted in the circumstances that applied when it was entered into. However, the Tribunal notes that the definition of common parts in the lease at 1(2) expressly includes "gates" and, as gating arrangements might change from time to time during the term of a long lease, it finds that the electric gate maintenance costs do fall within the service charge provisions.

95. As part of the informal arrangements between the applicants and Notting Hill Genesis, the bin store was moved to a location between Iris Court and Dayak Court. It has now been moved back to its original location. However, the movement of this bin store was part of the overall discussions with Notting Hill Genesis at which the respondent was represented. The bin store could not have been moved without the agreement of the respondent. Further, the bin store, whatever its location, falls within the definition of Common Parts (see above).

96. Photographs show large quantities of bulk rubbish being deposited adjacent to the bin store. The Tribunal accepts that a some of this bulk waste was more likely than not to have been deposited by residents at Dayak Court which comprise 56 dwellings. However there was no evidence as to the origin of waste. The Tribunal notes that in the

original Scott Schedule of July 2021[5] the applicants considered that the charges for bulk waste removal should be divided equally between Notting Hill Genesis and Iris Court. The Tribunal agrees that it is unreasonable for the residents of Iris court to pay more than 50% of the bulk waste costs in the years when the bin store was situated in the location described above. For other years, the Tribunal finds that the whole amount of bulk refuse removal should be paid for by Iris Court.

97. The evidence in relation to the standpipe in the bin store was unsatisfactory, which Mr Evans accepted. The applicants were adamant that despite water supply invoices, it had been disconnected. Neither of the respondents' witnesses were able to give first hand evidence about it. In all the circumstances the Tribunal is not satisfied that this service was provided.

[5] At Row 20

Applications under section 20C and Para 5A Sch 11

98. Neither party has been entirely successful. The applicants have failed to establish payability of 3.25% and have lost on most of the Scott Schedule items but have been partially successful on the reserve fund point. The respondent lost in relation to estoppel by convention but succeeded on most of the Scott Schedule items and in part on the reserve fund. The Tribunal has also considered the open offers made by the respondent. It is concerned that despite considerable efforts by the respondent to settle this litigation the applicants chose not to respond.

99. Having regard to these factors, the Tribunal orders that not more than half of the litigation costs in the proceedings may be recovered from the applicants via the service charge. For similar reasons, the Tribunal also orders that that not more than half of administration charge in respect of litigation costs may be made against the applicants.

Name Mr Charles Norman FRICS **Date:** 2 April 2022

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).

Appendix 1
Service Charge Apportionments

	Number of Bedrooms	Measured or scaled	GIA in sq. M	Percentage
Flat 1	2	Measured	68.5	7.95%
Flat 2	2	Measured	68.42	7.94%
Flat 3	2	Measured	69.33	8.05%
Flat 4	2	Scaled from plan	72.85	8.45%
Flat 5	2	Measured	74.76	8.68%
Flat 6	2	Scaled from plan	70.77	8.21%
Flat 7	2	Scaled from plan	66.02	7.66%
Flat 8	1	Measured	43.39	5.04%
Flat 9	1	Scaled from plan	42.91	4.98%
Flat 10	2	Scaled from plan	65.59	7.61%
Flat 11	2	Scaled from plan	66.02	7.66%
Flat 12	1	Scaled from plan	44.02	5.11%
Flat 13	1	Measured	43.53	5.05%
Flat 14	2	Scaled from plan	65.59	7.61%
			861.7	100.00%

Appendix 2

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate Tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

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

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate Tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  (a) an amount prescribed by, or determined in accordance with, the regulations, and
  (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(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.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property Tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property Tribunal, to that Tribunal;
- (b) in the case of proceedings before a residential property Tribunal, to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property Tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the Tribunal;
- (d) in the case of arbitration proceedings, to the arbitral Tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate Tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

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

(d) has been the subject of determination by an arbitral Tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).