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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2015/0362 and LON/00BK/LVL//0001**
Property	:	**Flat 3, 51 Gloucester Street, Pimlico, London SW1V 4DY**
Applicant	:	**Ms Katharine Birtwistle (Flat 3)**
Representative	:	**Mr Rodney Birtwistle**
Respondents	:	**51 Gloucester Street Limited** **Mr Frederick Raikes (Flat 1)** **Ms Victoria Larard (Flat 2)** **Mr Richard Steele (Flat 4)**
Representative	:	**Ms Lina Mattsson (Counsel) for Mr Steele**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985** **Section 37 Landlord and Tenant Act 1987**
Tribunal Members	:	**Mr Jeremy Donegan (Tribunal Judge)** **Mr Stephen Mason FRICS (Professional Member)**
Date and venue of Hearing	:	**03 March 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16 April 2016**

DECISION

Decisions of the tribunal

(1) The application to vary the leases of Flat 3 and 4, 51 Gloucester Street, Pimlico, London SW1V 4DY, made under section 37 of the Landlord and Tenant Act 1987 ('the 1987 Act'), is dismissed.

(2) The tribunal determines that the service charge proportion payable by the Applicant for Flat 3, 51 Gloucester Street, Pimlico, London SW1V ('Flat 3) for the service charge years 2011 to 2016 is 20%.

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 ('the 1985 Act') so that none of the Respondent's costs of these tribunal proceedings may be passed to the Applicant through any service charge.

The applications

1. On 20 August 2015 the tribunal received two applications; one seeking a determination of service charges under section 27A of the 1985 Act and one seeking the appointment of a manager under section 24 of the 1987 Act. The section 27A Application relates to Flat 3 and the section 24 application relates to 51 Gloucester Street, Pimlico, London SW1V 4DY ('the Building'), as a whole.

2. Directions were issued at a case management hearing on 10 September 2015 and the section 24 application was stayed pending the outcome of the section 27A application. Further directions were issued at a subsequent case management hearing on 07 December 2015.

3. On 25 January 2016 the leaseholder Flat 4 at the Building ('Flat 4'), Mr Steele, submitted an application to the tribunal, seeking lease variations pursuant to section 37 of the 1987 Act. The specific variations sought were alterations to the service charge proportions for Flats 3 and 4. Directions were issued on 08 February 2016, which included provision for the section 37 application to be heard at the same time as the section 27A application.

4. This decision deals with both the section 27A and section 37 applications. For the sake of convenience, the tribunal refers to Ms Birtwistle as the Applicant throughout, even though she was named as a Respondent to the section 37 Application. Mr Steele is referred to by his surname throughout.

5. The relevant legal provisions are set out in the Appendix to this decision.

The background

6. The Building is a converted Victorian house containing four leasehold flats. The Applicant is the current leaseholder of Flat 3, which she purchased in in October 2011. Mr Steele is the current leaseholder of Flat 4, which he purchased in early 1988. In her skeleton argument, Ms Mattsson stated that his purchase took place on 19 April 1988. The Land Registry entries show that he was registered as the proprietor of the flat on this date, which suggests that his purchase was a little earlier.

7. All four leaseholders at the Building are members of the freehold company, 51 Gloucester Street Limited ('51GSL'), which is a company limited by guarantee. The current directors of 51GSL are the Applicant, Mr Frederick Raikes, the leaseholder of Flat 1 and Ms Victoria Larard, the leaseholder of Flat 2.

8. The Applicant holds a long lease of Flat 3 and Mr Steele holds a long lease of Flat 4. Both leases require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the leases are referred to below, where appropriate.

9. Neither party requested an inspection of the Building and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The leases

10. The original lease of Flat 3 was granted by Camray Construction Limited (1) to Christopher Philip King and Evelyn Rose Elizabeth King (2) on 03 November 1978, for a term of 99 years from 25 March 1978. Paragraph 7 of the particulars reads:

    "7. TENANT'S SHARE OF TOTAL EXPENDITURE One fifth"

11. The tenant's covenants are to be found at clauses 3 and 4 and include an obligation to:

    "4(4) Pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such Charges to be recoverable in default as rent in arrears"

12. The detailed service charge provisions are set out in the fifth schedule. Paragraph 1 sets out various definitions, including:

"1(2) "the Service Charge" means such percentage of Total Expenditure as is specified in paragraph 7 of the Particulars or (in respect of the Accounting Period during which this Lease is executed) such proportion of such percentage as is attributable to the period from the date of this Lease to the Thirty First date of December next following"

13. The original lease of Flat 4 was granted by Camray Construction Limited (1) to Bloodstock & Stud Investment Company Limited (2) on 17 August 1978, for a term of 99 years from 25 March 1978. This is largely in the same form as the original lease of Flat 3. One notable difference is paragraph 7 of the particulars, which reads:

"7. TENANT'S SHARE OF TOTAL EXPENDITURE Two fifths"

14. The lease of Flat 3 was extended by 75 years, pursuant to a deed of surrender and re-grant dated 04 October 2011. The deed was granted by 51 Gloucester Street Limited to the Applicant's predecessor, Jane Power. The extended lease term is 141 years from 25 March 2011. Clause 2 of the deed varied the insuring obligations in the original lease. Clause 3 of the deed reads:

"3. Subject to the above, the Landlord and the Tenant further agree and covenant with each other that, during the said period of extension, they will observe and perform the obligations on their respective parts and abide by the provisions and stipulations contained in the Lease as through the Term (as above defined) had always included the said period of extension"

15. There has been no lease extension for Flat 4.

The hearing

16. The full hearing of the applications took place on 03 March 2016. The Applicant was represented by her father, Mr Rodney Birtwhistle. She lives overseas and Mr Birtwistle is one of her joint attorneys.

17. Mr Steele was represented by Ms Mattsson of counsel, who was accompanied by her instructing solicitor (Mr Lewis Addison of Nelsons).

18. The tribunal were supplied with three hearing bundles, containing documents relating to both applications. These included copies of general powers of attorney dated 24 October 2014 and 28 September 2015, in which the Applicant appointed Mr Birtwistle and Susan Mary Birtwistle as her joint attorneys.

19. On 02 March 2016, the tribunal sent an email to Mr Addison querying if 51GSL had passed a resolution consenting to the section 37 application. He responded later the same day, stating there was no resolution.

20. Immediately before the hearing the tribunal was supplied with a helpful skeleton argument and bundle of authorities from Ms Mattson. It was also supplied with copies of a letter from Mr Robert Larard of Winkworth & Pemberton Solicitors to Mr Steele dated 23 September 1988 and an insurance policy schedule for the Building, for the year ended 12 April 1989. The start of the hearing was delayed while the tribunal considered these additional documents. Mr Birtwistle consented to the late production of the copy letter and schedule. In the letter, Mr Larard requested a payment of £331.26 from Mr Steele. This represented 30% of the insurance premium and expenses relating to the purchase of the freehold by 51GSL. The letter was typed on Winkworth & Pemberton's headed notepaper.

Section 37 application - preliminary issue

21. In the section 37 application, Mr Steele sought an increase in the service charge proportion for Flat 3 from 20 to 30% and a reduction in the proportion for Flat 4 from 40 to 30%. The tribunal was informed that the proportions for Flats 1 and 2 are each 20% but were not supplied with copies of these leases.

22. In order to satisfy the requirements of section 37(5)(a) of the 1987 Act, Mr Steele needs to establish that all, or all but one, of the parties concerned consented to the proposed variations at the time the section 37 application was made. The parties are 51GSL and each of the leaseholders. The Applicant opposes the variations. It follows that the application can only proceed if 51GSL and the leaseholders of Flats 1-3 all consented to it (at the time the application was made).

23. The original application form was accompanied by copy emails from Mr Raikes and Ms Larard to Mr Addison dated 15 and 20 January 2016, respectively. Mr Steele relies on these emails as evidence of their consent to the application, both as leaseholders and directors of 51GSL.

24. At the start of the hearing the tribunal explained that it would deal with 51GSL' position, as a preliminary issue. This issue had been raised in the Applicant's response to the application and in the tribunal's email of 02 March 2016. It was also foreshadowed in the directions dated 08 February 2016, which identified one of the issues to be determined as *"Is there a sufficient majority for an application under section 37 of the 1987 Act?"*

25. Mr Birtwistle's position was that 51GSL had not consented to the application. He relied on paragraph 3(C) of the Memorandum of Association. Paragraph 3 sets out the objects of the company, which include:

"(C) Having acquired the said freehold, to vary (by agreement with the tenants thereunder) the terms of the existing leases of the flats upon such terms as the Company shall determine."

26. Mr Birtwistle pointed out that Mr Steele did not consult the board of 51GSL before making the section 37 application and the application had not been considered at any board meeting.

27. The Articles of Association for 51GSL enable the members to pass resolutions at general meetings or in writing. Article 22 reads:

"Subject to the provisions of the Act a resolution in writing signed by all the members for the time being entitled to receive notice of and to attend and vote at general meetings shall be as valid as effective as if the same had been passed at a general meeting of the Company duly convened and held. Any such resolution may consist of several documents in the like form each signed by one or more members of their agents duly authorised in writing."

28. The Articles also provide that the business of the company shall be conducted by a "*Committee of Management*". Article 31 reads:

"The business of the Company shall be managed by the Committee who may exercise all such powers of the Company as are not, by the Act or by these Articles, required to be exercised by the Company in general meeting, subject nevertheless to the provisions of the Act or those Articles and to such regulations, being not inconsistent with the aforesaid provisions, as may be prescribed by the Company in general meeting but no regulation made by the Company in general meeting shall invalidate any prior act of the Committee which would have been valid if that regulation had not been made"

29. Article 34 requires the Committee to keep minutes:

"....

(c) of all resolutions and proceedings at all meetings of the Company and of the Committee and of sub-committees of the Committee."

30. Article 45 provides:

"A resolution in writing signed by all the members for the time being of the Committee or of any sub-committee set up by the Committee who are duly entitled to receive notice of a meeting of the Committee or of such sub-committee shall be valid and effectual as if it had been passed at a meeting of the Committee or of such sub-committee respectively duly convened and constituted. Any such resolution may consist of several documents in the like form each signed by one or more members of the Committee or any such sub-committee or their agents duly authorised in writing."

31. Ms Mattsson accepted that all but one of the parties concerned had to consented to the section 37 application. She relied on the emails from Mr Raikes and Ms Larard, referred to at paragraph 22. These were sent in response to an email from Mr Addison dated 15 January 2016, which read:

"Dear Ms Larard and Mr Raikes

I write further to the issues before the First Tier Tribunal regarding the service charges to be paid in respect of the flats at 51 Gloucester Street. I understand that you are a leaseholder of one of the flats and a director of the (sic) 51 Gloucester Street Limited. As you know Mr Steele is the leaseholder of flat 4.

It is my understanding that since at least 1989 until the purchase of flat 3 by Ms Birtwistle, there was an arrangement in place agreed between the various leaseholders and the Landlord that flats 1 and 2 would pay 20%, with flats 3 and 4 to pay 30%. This was considered to be a fairer split than was set out in the leases given the size of the respective flats. I understand you were aware of and abided by this arrangement throughout your ownership until the present dispute was raised by Ms Birtwistle's father shortly after the purchase of flat 3 by his daughter.

Subsequent to Ms Birwistle's purchase negotiations took place to try and resolve the matter and it was agreed that the service charges would be based on the square footage of each flat. As you will be aware from the application by Mr Birtwistle, that agreement has been reneged on.

In light of the above I understand that you would be willing to consent, on your own behalf and as a director of 51 Gloucester Street Limited, to an application to vary the lease, under section 37 of the Landlord and Tenant Act 1987 to record the service charge proportions of each of the leases as 20% for flats 1 and 2, and 30% for flats 3 and 4.

The section 37 application will be heard in advance of the application by Mr Birtwistle as part of our application to strike out of (sic) Mr Birtwistle's application. Provided that we are successful, which I think we shall be, there will be no need for a lengthy, expensive and contentious trial on 3 March this year.

I would be most grateful if you could email me confirmation of your agreement to the section 37 application as soon as possible.

I look forward to hearing from you.

Yours sincerely"

32. Mr Raikes responded later that day. The third paragraph of his email read:

"I consent, as a leaseholder of Flat 1 and as a director of 51 Gloucester Street Limited, to an application to vary the leases, under section 37 of the Landlord and Tenant Act 1987 to record the service charge proportions of each of the leases as 20% for Flats 1 and 2, and 30% for Flats 3 and 4 (noting that this would only require a variation of the leases of Flats 3 and 4). I believe this to be the fair approach as it represents the arrangements that have lasted for 20+ years and to which the leaseholder of Flat 3 should (or even could) have been aware of at the point he acquired the lease in 2011 after all Mr Power, from whom Mr Birtwistle acquired the lease stated that "in response to the request from Birtwistle's (sic) during contract negotiation, I had passed on to my solicitors the common expense incurred" and what was Flat 3's share, which was 30%"."

33. Ms Larard responded on 20 January 2016. Her email simply read:

"I consent, as a leaseholder of Flat 2 and as a director of 51 Gloucester Street Limited, to an application to vary the leases, under section 37 of the Landlord and Tenant Act 1987 to record the service charge proportions of each of the leases as 20% for Flats 1 and 2, and 30% for Flats 3 and 4 (noting that this would only require a variation of the leases of Flats 3 and 4)."

34. Ms Mattsson submitted that these emails bound 51GSL. She relied on the Court of Appeal's decision in ***Freeman & Lockyer v Buckhurst Park Properties (Mangal) Limited [1964] 2 QB 480***, which concerned a company's liability for architect's fees, where the architect had been instructed by a single director. Mr Raikes and Ms Larard had consented to the application, both as leaseholders and as directors of the company. Ms Mattsson argued that Mr Raikes and Ms Larard had apparent (if not actual) authority to bind the company and referred to two examples where company documents had not been signed by all

directors. Firstly the company provided retrospective consent for alterations to Flat 3 in a letter dated 16 November 2001 that was signed solely by a Mrs Angela Larard, who was a director at the time. Secondly the deed of surrender and re-grant for this flat was signed by two officers of the company, rather than all three directors.

35. Ms Mattsson acknowledged that 51GSL had not passed formal resolutions consenting to the application, in accordance with its Articles. However she contended that the company was bound by the emails from Mr Raikes and Ms Larard and submitted that the issue of consent should be determined in line with the law of agency.

36. In response, Mr Birtwistle referred to Mr Steele "*picking off individual directors*" by email. He maintained that the application should have been considered at a formal board meeting. Had there been a meeting he would have pointed out that:

    (i) the application was contrary to his daughter's minority interest in 51GSL; and

    (ii) one director had a financial interest in consenting to the application. Flat 1 has recently been extended and Mr Raikes had agreed (at least in principle) to an increase in his service charge contribution. He would benefit if the application is granted, as his contribution would remain at 20%.

37. Ms Mattsson suggested that Mr Raikes had no financial interest in the outcome of the application, notwithstanding the clear benefit for Flat 1.

38. In response to a question from the tribunal, Ms Mattson acknowledged that Mr Addison's email of 15 January 2016 made no mention of seeking independent legal advice. However she pointed out that Mr Raikes and Ms Larard could have sought advice of their own accord.

The tribunal's decision

39. The section 37 application is dismissed. The tribunal informed the parties of this decision at the hearing.

Reasons for the tribunal's decision

40. It is for Mr Steele to satisfy the tribunal that the grounds in section 37(5)(a) were made out at the time the section 37 application was made. Clearly he consented to the proposed alteration to the service charge proportions, which would benefit Flat 3. Equally clearly the Applicant opposed the alteration, which would prejudice Flat 4.

41. The tribunal is satisfied that Mr Raikes and Ms Larard also consented to the lease variations, as borne out by their emails of 15 and 20 January 2016. However there was no consent from 51GSL. Consent could have been given in the form of a members' resolution, either made at a company general meeting or in writing. Consent could also have been given by way of a committee resolution, again made at a meeting or in writing. There were no such resolutions.

42. The question of whether 51GSL consented to the variations is a straightforward factual issue and is should not be determined by the law of agency. This is not a contractual dispute between the company and a third party. Rather it is a dispute between the company members/directors, over whether consent was given. The issue to be decided by the tribunal is whether the company actually consented to the variations; not whether two directors had apparent authority to bind the company. For this reason, the tribunal derived no assistance from the decision in ***Freeman***.

43. Ms Mattsson relied on the emails from Mr Raikes and Ms Mattsson, in which they consented to the section 37 application, both as leaseholders and in their capacity as directors of 51GSL. The tribunal considered whether the company could give consent informally, without a resolution by the members or committee and concluded this is not possible. The proposed lease variations are far reaching and would prejudice the Applicant, who is both a member and a director of the company. Clearly she was entitled to be involved in the decision making process and to make representations to her fellow members/directors. Had she been given this opportunity then she could have raised the points on her minority interest and Mr Raikes' financial interest, as highlighted by Mr Birtwistle. The Applicant was denied this opportunity, by 51GSL's failure to follow its Articles.

44. The tribunal's view was reinforced by the contents of Mr Addison's email dated 15 January 2016. He is Mr Steele's solicitor and does not represent 51GSL. There were two notable omissions in his email. Firstly he did not suggest that the recipients seek independent legal advice. Secondly he made no mention of a possible award of compensation under section 38(6). Had he raised either of these points then Mr Raikes and Ms Larard might have responded differently.

45. The existence of earlier company documents signed by less than three directors does not alter the position. It may be the company gave them delegated authority to sign. Even if this was not the case, previous failures to follow its Articles would not set a binding precedent. The company cannot ignore its constitution, simply because it has not been followed in the past.

46. The emails from Mr Raikes and Ms Larard did not, on their own, amount to consent for the company. Ms Mattsson acknowledged that

there was no company resolution. It follows that only three of the concerned parties (Mr Steele, Mr Raikes and Ms Larard) consented to the variations. Two did not (the Applicant and 51GSL) and the requirements of section 37(5)(a) have not been made out. Accordingly, the section 37 application is dismissed.

Remaining issues

47. Notwithstanding the representation in Mr Addison's email of 15 January 2016, there was no application to strike out the section 27A application as a preliminary issue. Rather there was a full hearing of this application.

48. The issue to be decided by the tribunal is the service charge proportion payable for Flat 3. The Applicant contends this is 20%, as set out in her original lease. Mr Steele opposes the application and argues for a higher proportion. There was no formal response to the application from 51GSL but the tribunal did receive a letter from Mr Raikes dated 02 December 2015, sent in his capacity as a director of the company and the leaseholder of Flat 1. Ms Larard did not respond to the application xx

49. In the application form, the Applicant sought a determination of her liability to contribute to pay services charges for the years 2011-2015 and 2016 until the expiry of the lease. At the hearing, the tribunal suggested that the period of the application should be restricted to the years 2011-2016, which Mr Birtwistle consented to.

50. Mr Birtwistle and Ms Mattsson confirmed that the tribunal was only required to determine the percentage contribution due from the Applicant for each of the years in question, as opposed to the amount payable for each year. The tribunal was not asked to determine whether the service charge expenditure was reasonably incurred or payable and was not provided with any service charge accounts for these years.

Service charge proportion for 2011-2016

Introduction

51. The starting point is the leases. The proportion specified in the original lease of Flat 3 is one fifth (20%) and that specified in the lease of Flat 4 is two fifths (40%). In her opening submissions, Ms Mattsson explained that Mr Steele had actually paid 30% since buying Flat 3 in 1988. This was evidenced by the letter from Mr Larard dated 23 September 1988.

52. Ms Mattsson contended that the service charge proportion for Flat 3 had been increased from 20% to 30% in one of the following ways:

(a) There was a binding agreement ('the First Agreement') to increase the proportion to 30% by the time Mr Steele purchased Flat 4 in early 1988. This predated the introduction of section 2 of the Law Reform (Miscellaneous) Provisions Act 1989 ('the 1989 Act') on 27 September 1989. Accordingly the old regime for dispositions of land applied, as set out in section 40 of the Law of Property Act 1925 ('the 1925 Act').

(b) The Agreement has contractual force and is binding on the parties, as it was evidenced in writing. Alternatively it is binding under the doctrine of part performance.

(c) Alternatively, if the First Agreement did not have contractual force then the Applicant is prevented from negating the agreement, as there has been a waiver/estoppel by representation.

(d) Alternatively there was an informal agreement to vary the service charge proportions in all four leases in 2013 ('the 2013 Agreement') and the Applicant is prevented from negating on this agreement, as there has been an estoppel by representation.

(e) Alternatively the Applicant is prevented from pursuing the section 27A application, as she had agreed the service charge proportion for Flat 3 as part of the 2013 Agreement (section 27A(4)).

The evidence

53. The tribunal heard oral evidence from Mr Steele and Mr Birtwistle. In addition, Mr Steele relied on a witness statement from Mr Andrew Power dated 14 January 2016. Both parties relied on a letter from Mr Raikes to the tribunal dated 02 December 2015.

54. The hearing bundles contained three witness statements from Mr Steele dated 02 December 2015, 25 January and 15 February 2016, respectively. These gave details of the Agreement and the 2013 Agreement.

55. The 2013 Agreement arose from various communications regarding the service charge proportions, which culminated in a property marketing company (CP Creative) being instructed to measure the flats. Measurements were also undertaken by Chestertons, at least for some of the flats. Ms Mattson contends that the leaseholders/members

agreed the following revised proportions, based on the floor areas of the flats:

Flat 1 – 26.1%

Flat 2 – 18%

Flat 3 – 24.3%

Flat 4 – 31.6%

However these new proportions were not implemented in deeds of variation, as the Applicant refused to pay the increased percentage for her flat.

56. In his oral evidence, Mr Steele verified the contents of his statements and stated that throughout his period of ownership the service charge proportion demanded for Flat 4 had been 30% (save for a demand issued by Mr Birtwistle). The proportions demanded from the other flats were 20% each for Flats 1 and 2 and 30% for Flat 3. This was corroborated, for the period 1990 to 2007, by a letter from Mr Robert Larard to Mr Addison dated 10 November 2015.

57. Mr Steele alleged that the Applicant was aware that Flat 3 was paying 30%, when she purchased this flat. He was aware the proportion specified in his lease was 40%, when he purchased Flat 4. He tried to negotiate a reduction in the purchase price, which was rejected by the seller who relied on the lower service charge proportion actually charged.

58. Mr Steele recalled a heated conversation with the seller, when they discussed the service charge for Flat 4. He was comfortable with the seller's reassurance that proportion was 30% and took this on trust. Mr Steele believed that that he had contacted the other leaseholders who confirmed the percentage. However he candidly admitted that his memory of these events was "*hazy*". Now, with the benefit of hindsight, he believes he paid too much for the flat.

59. Mr Steele was unable to provide detailed information about the First Agreement, as this predated his purchase of Flat 4. He had no documents that gave details of the agreement and could not identify the parties, save they were the freeholder and leaseholders at the time. His recollection was that the leaseholders/members discussed "*rewriting the leases*", following his purchase of the flat. However this was not pursued.

60. The Land Registry entries for the freehold title show that 51GSL was registered as the freehold proprietor on 25 May 1988, shortly after Mr Steele purchased Flat 4. Mr Steele could remember little about the freehold purchase, save that it was dealt with by Mr Robert Larard. He believed the variation to the service charge proportions to be permanent; otherwise he would not have accepted "*25% of the freehold*".

61. Mr Steele no longer has any documents relating to his purchase of Flat 4. He has contacted the conveyancing solicitors that acted on the purchase but they have been unable to locate the purchase file.

62. Mr Steele stated he had no involvement in the in 2011 deed of surrender and re-grant for Flat 3 and was unaware the lease had been extended. He had "*no idea*" why the deed did not vary the service charge proportion but pointed out that it had been signed by Mr and Mrs Power, on behalf of 51GSL.

63. The statement from Mr Power was very brief. He stated that he was the leaseholder of Flat 3 between 2007 and 2011 and was appointed to manage the Property by 51GSL. The tribunal notes that the 2011 deed of surrender and re-grant was between 51GSL and Jane Marian Power, which suggests that the latter was the leaseholder and not Mr Power. This is borne out by old Land Registry entries for Flat 3 and the leasehold and property information forms in the bundles. The former showed Mrs Power as the registered proprietor and the latter, supplied to the Applicant's solicitors as part of the conveyancing process, named Mrs Power as the seller.

64. Mr Power corroborated Mr Steele's evidence that Flats 1 and 2 each paid 20% of the service charges and Flats 3 and 4 each paid 30%. He referred to "*an agreement reached by past leaseholders with the company to produce a fairer split of service charges*", which he was aware of when he purchased Flat 3. However he did not provide any details of how or when this agreement was reached.

65. The final paragraph of Mr Power's statement reads:

> "*During the sale of Flat 3 to the Applicant I passed on to my solicitors the details of the service charges and the 30% split that I had been paying and understand this information was sent on to the Applicant's solicitors prior to exchange and completion of the transfer of the flat.*"

66. The statement was of limited evidential value, as Mr Power did not attend the final hearing and give oral evidence. This meant there was no opportunity for Mr Birtwistle or the tribunal to test this evidence. Ms Mattsson acknowledged that it was for the tribunal to decide what weight to attach to the statement.

67. There were no witness statements from the Applicant. Rather Mr Birtwistle relied on two documents headed "*THE APPLICANT'S CASE*" and "*Rebuttal of Application to disallow the Section 27A Application*", which he verified in his oral evidence. These addressed the Applicant's purchase of Flat 3 and the information provided by the seller, during the conveyancing process. They also addressed Mr Birtwistle's subsequent dealings with Mr Steele and the 2013 Agreement.

68. Mr Birtwistle was cross-examined at some length, regarding the purchase of Flat 3. He was referred to Mr Power's statement but was adamant that he was not informed of the 30% contribution paid by Flat 3. This could not be deduced from the service charge documents disclosed in the conveyancing process and was not included in the estate agents' sales particulars.

69. It appears that Mr Birtwistle instructed solicitors (Stephen Gallico) to act on the purchase of Flat 3, rather than the Applicant. The solicitors forwarded rudimentary service charge accounts for the periods ended 17 October 2010 and 11 June 2011. These showed the total expenditure in each period and gave figures for 20 and 30% of this expenditure. However they did not specify the proportion payable by each flat.

70. Mr Birtwistle was also supplied with a copy email from Mr Power to Mr Steele dated 10 June 2011. This detailed the unbilled service charge expenditure for the Property, which totalled £2,042 and stated that Mr Steele's share was £612.60 (30%). However it did not specify the proportions payable by the other flats.

71. The bundles also included a letter from Stephen Gallicao to the seller's solicitors, LSG, dated 23 August 2011. The third paragraph read:

"To our mind the service charge situation is somewhat unorthodox. Accordingly we require £1,400 to be retained by you on completion to cover any service charges and excess service charges that relate to your client's period of ownership but come through the system after completion."

72. Mr Birtwistle queried the service charge proportion in an email to Maurice Moore of Stephen Gallico dated 03 September 2011. Mr Moore responded in a letter dated 05 September 2011, stating that the proportion was 20%. In cross-examination, Mr Birtwistle stated that this information was provided in the week that contracts were exchanged and his daughter was under pressure to exchange. The £1,400 retention was suggested, as there was a possible underpayment of service charges for Flat 3.

73. Mr Birtwistle was cross-examined regarding his failure to disclose the complete conveyancing file relating to the flat purchase. His

explanation, which was not entirely satisfactory, was that he had only been asked for the file (by Mr Raikes) very late in the day and had already provided a "*wealth of information*". The file contained privileged information regarding the mortgage and the family finances, which he did not wish to disclose. To the best of his knowledge, he had disclosed all service charge information that had been provided at the date of purchase. He also stated that Mr Moore had now retired and that Stephen Gallico had merged with another firm.

74. The bundles included copies of various emails exchanged between Mr Birtwistle and Mr Moore, following completion. In an email dated 01 October 2012, Mr Moore stated:

"By this Email I confirm that Mr @ (sic) Mrs Powell did not disclose the service charge percentage was 30%"

75. The bundles also leasehold and property information forms relating to the sale of Flat 3. These did not mention any change in the service charge proportion. Mrs Power responded negatively to question 7.1 in the former, which read:

"Is the seller aware of any changes in the terms of the lease or of the landlord giving any consents under the lease? If Yes, please supply a copy or, if not in writing, please give details"

76. Mr Birtwistle was also cross-examined regarding the service charge accounts for 2005, copies of which were included in the bundles. These showed that Flats 3 and 4 were each required to pay 30% of the total expenditure. Mr Birtwistle stated that these accounts had not been disclosed prior to the flat purchase.

77. Mr Birtwistle accepted that he had agreed to a variation to the service charge proportions "*in principle*" in an email to Mr Steele and Mr Raikes dated 04 April 2013. This referred to adjusted proportions of 22.5% each for Flats 1, 2 and 3 and 32.5% for Flat 4, for the period from October 2011 to the end of the end of the 2013/14 service charge year. For 2014/15 onwards the proportions would be based on the floor area of each flat, excluding "*terraces and garden/garden terraces*". The final sentence in the third paragraph of that email read:

"However any subsequent extensions, incorporation of vaults etc would involve a recalculation of the affected flat sq ft and in consequence the % shares. Could I have confirmation please that this is the agreed proposal."

78. The four leaseholders/members subsequently attended a meeting of the board of directors and management committee of 51GSL in December 2013, with Mr Steele acting as company secretary. Ms Mattsson relied

on minutes of that meeting, which appear to have been prepared by Mr Raikes. The minutes were initialled and signed by Mr Birtwistle, Mr Raikes and Ms Larard but not Mr Steele. They did not specify the precise date of the meeting.

79. The minutes detailed a proposed extension to Flat 1 and the officers of the company gave formal consent to this alteration and approved a draft licence for alterations and deed of variation produced by Mr Raikes ('the Deed'). The minutes also record that the officers were authorised to execute the Deed. It appears from the Land Registry entries for the freehold title that the Deed was completed on 25 February 2014. The tribunal was not supplied with a copy

80. The minutes also detailed the proposed recalculation of the service charge proportions for all four flats. In brief the proposal was that 51GSL would instruct a local firm of surveyors to measure the floor areas of all of the flats and the increased floor area of Flat 1, following the extension. From 05 April 2014, the service charge proportions would be the internal floor area of each flat divided by the aggregate floor areas for all four flats. The proportions would then vary following substantial completion of the Flat 1 extension, to reflect the increased floor area of that flat.

81. The minutes also provided that 51 GSL and each of the leaseholders would submit an application to the Land Registry to register a memorandum of the floor areas against each title, by 05 April 2014.

82. Mr Birtwistle subsequently sent an email to Mr Raikes, dated 21 February 2014, seeking Mr Steele's agreement to the minutes and Deed but this was not forthcoming.

83. The tribunal was not supplied with the measurements prepared by CP Creative or Chestertons. It appears these were undertaken in the spring of 2014. There was then an issue over which measurements should be used to recalculate the service charge proportions. The measurements from CP Creative resulted in the following apportionment:

Flat 1 – 26.1%

Flat 2 – 17.3%

Flat 3 – 24.3%

Flat 4 – 32.3%

The measurements from Chestertons resulted in the following split:

Flat 1 – 25.9%

Flat 2 – 17.3%

Flat 3 – 25.6%

Flat 4 – 31.2%

Mr Birtwistle preferred the former and Mr Steele preferred the latter.

84. On 13 August 2014 Ms Larard sent an email to all leaseholders suggesting a compromise, whereby her flat would pay an additional 1%. She then put forward the following revised proposal in an email dated 14 August 2014:

Flat 1 – 26%

Flat 2 – 18%

Flat 3 – 25%

Flat 4 – 31%

It is clear that these offers were made on a commercial and pragmatic basis, in order to break the deadlock between Mr Birtwistle and Mr Steele. Mr Birtwistle was unhappy with these proposals, as he considered that Mr Steele was taking advantage of Ms Larard.

85. It appears there were further negotiations. In an email to the parties dated 16 September 2014, Ms Larard wrote:

"We all accept the proposed % splits below. For the record this is per CP Creative for Fred and Howard. For myself and Richard this is also per CP Creative with a 0.7% offsetting adjustment between us.

Basement	*26.1%*
Flat 2	*18%*
Flat 3	*24.3%*
Flat 4	*31.6%*
TOTAL	*100%*

However before we engage solicitors and get the leases amended, I think we need to be clear and in agreement about the split of expenses between the temporary % splits and these proposed ones."

86. A further meeting of 51 GSL took place on 09 October 2014. The minutes were prepared by Ms Chloe Straker who works for a business associated with Mr Steele, Knox D'Arcy.

87. Paragraph 3 of the minutes record that the company would instruct Nelsons solicitors to deal with the lease variations. Paragraph 4 records that the leaseholders/members would pay a total sum of £300 per calendar month into the company account by standing order, to cover routine expenditure. The final sentence reads:

"This would be split according to the service charge percentages from April 2014."

This paragraph also set out the proportions detailed in Ms Larard's email of 16 September 2014.

88. The minutes covered various other matters (including repairs to the Building) and were circulated by Ms Straker, by email, on 21 October 2014. Mr Birtwistle responded in an email dated 22 October, which largely addressed the repairs. He did not dispute paragraphs 3 or 4 of the minutes, either in this email or a subsequent email dated 31 October. Ms Larard responded to Ms Straker in an email dated 31 October, which said of the minutes *"I think they represent an accurate view of the discussions"*. She then went on to raise one exception, relating to a refund for balcony repairs to Flat 3.

89. Further email correspondence ensued and service charges were demanded on the basis of the revised proportions set out in Ms Larard's email of 16 September 2014. In an email dated 02 November 2014, Mr Birtwistle wrote:

"Whilst I have no objection to using Nelsons (subject to a competitive quote) I am not willing to proceed on deeds of variation until all these matters which relate to the long awaited repair of the building have been sorted out satisfactorily."

90. Mr Birtwistle was unwilling to pay the service charges for Flat 3 based on the adjusted proportions and the leases have not been varied. He claims that his agreement to vary the proportions was conditional upon the Building being properly managed and repairs being undertaken to the terrace of Flat 4, to prevent further water ingress to Flat 3. These conditions have not been met. In his oral evidence, Mr Birtwistle acknowledged that these conditions were not stipulated in any of the documents.

91. Mr Birtwistle's primary position is that his willingness to vary the service charge proportions was only an "*agreement in principle*" and was conditional. His secondary position is that any agreement was induced by economic duress. This took the form of a threat by Mr Steele to pursue High Court proceedings to challenge the service charge percentages in his leases. He claimed to have after the event insurance that would cover the cost of the proceedings and stated that the cost of defending the case would be £50,000. The threat of proceedings, combined with the need for major works at the Building and Mr Steele's failure to pay his service charge contributions, put Mr Birtwistle under considerable pressure. He was not used to litigation and was concerned by the cost and length of proceedings, which would delay the major works. Further there would be insufficient funds to proceed with the works until Mr Steele paid his service charges. Mr Birtwistle suggested it was the combination of these factors that prompted him to concede.

92. The letter from Mr Raikes largely corroborated Mr Steele's evidence. In particular it stated that 20/20/30/30 service charge split had "*existed for over 30 years*". It also referred to his requests for "*the background on the legal work and standard enquiries that Applicant (sic) performed during their acquisition of Flat 3*".

93. Paragraph 8) of the letter gave some support for the Applicant's case, as Mr Raikes expressed the opinion that the agreement to vary the service charge proportions would not be finalised until the deeds of variation were agreed and signed. He also stated:

"I do not agree with Mr Steele's conclusion that the current arrangements are estopped by way of the expenditure and believe that if this is not properly documented following the tribunal's judgement (sic) then further issues may arise."

94. This letter, like Mr Power's statement, was of limited evidential value, as Mr Raikes did not attend the hearing.

Closing submissions

95. Ms Mattsson's starting point was that the First Agreement was a binding contract that varied the service charge proportion for Flat 4. This was in place before Mr Steele's purchase of Flat 4 in early 1988 and he relied on this representation when purchasing the flat. He was only ever required to pay 30% and it is highly likely that the leaseholder of Flat 3 had agreed a corresponding increase for this flat (to 30%).

96. Ms Mattsson submitted that the Applicant knew, or ought to have known, of the First Agreement at the time Flat 3 was purchased. She relied on Mr Power's statement and the 2005 service charge accounts together with the Applicant's failure to disclose her conveyancing file.

97. Ms Mattsson contended that the First Agreement satisfied the requirements of section 40(1) of the 1925 Act. The letter from Mr Larard, dated 23 September 1988 was a memorandum/note signed by the party to be charged. Ms Mattsson invited the tribunal to find this was one of many documents, evidencing service charge demands at 30%.

98. Ms Mattsson acknowledged that the documentary evidence of the First Agreement was "*not perfect*" but suggested this was unsurprising, given the passage of time. The lack of documentary evidence does not prevent the tribunal from finding that a binding contract had been formed.

99. Ms Mattson's secondary position was that if the First Agreement did not meet the requirements of section 40(1) then it was still a binding contract under the doctrine of part performance. She relied on the service charge demands issued to, and paid by, Mr Steele between his purchase of Flat 4 and the Applicant's purchase of Flat 3, including Mr Larard's letter of 23 September 1998. At the very least there was an oral agreement that these flats would each pay 30%. The demands and payments amounted to part performance of this agreement. Mr Steele had relied on the agreement and had acted to his detriment by accepting a 25% interest in the freehold company, rather than seeking a larger stake.

100. Ms Mattsson also relied on the House of Lords' decision in ***Steadman v Steadman [1974] AC 536***, which concerned the settlement of matrimonial proceedings between Mr and Mrs Steadman, following the dissolution of their marriage. Mrs Steadman agreed to surrender her interest in the former matrimonial home upon payment of a sum of £1,500. She also agreed to maintenance arrears being remitted, save for a sum of £100. The settlement was negotiated at the door of the magistrates' court and was notified to the magistrates. Mr Steadman duly paid the £100 and his solicitors prepared a transfer deed, which Mrs Steadman refused to sign. At first instance, the registrar held that there had been part performance of an oral agreement concerning land and the agreement was enforceable under section 40. Mrs Steadman successfully appealed to a county court judge but this decision was reversed by the Court of Appeal, which held that the payment of £100 was an act of part performance of the contract for the purposes of section 40(2). Mrs Steadman's subsequent appeal to the House or Lords was dismissed.

101. Ms Mattsson referred to the following passage in the judgment of Viscount Dilhorne, at pages 552 and 553:

"In my opinion, the res gestae to which I have referred show exclusively the existence of a contract between the appellant and the respondent. If there had been no contract, there would have been no

announcement to the magistrates with the clearly implied request that they should act in accordance with it, there would not have been the undertaking to pay and the payment of the £100, and no transfer would have been sent for execution by the appellant. One does not send to a person a document for execution which transfers title to property unless there has been some prior agreement with regard thereto. While an oral statement made by a party or his solicitor will not ordinarily be an act of part performance, in this case the making of the statement to the magistrates was an essential part of the performance of the contract. Without it, and the magistrates' cooperation, the agreement could not have been implemented."

102. On questioning from the tribunal, Ms Mattsson submitted that it must have been a term of the First Agreement that Flat 3 would pay 30%. She was unable to say what the other terms might have been, who the parties were or when the First Agreement was formed. She was also unable to say whether there was any consideration and could only speculate that the leaseholder of Flat 3 agreed an increased service charge proportion as it was fairer, given the size of this flat.

103. Ms Mattsson also submitted that the Applicant was estopped from negating on the First Agreement. She referred to paragraphs 4-086/095 of Chitty on Contracts (32nd edition). Waiver/estoppel by representation requires;

(a) a representation that the strict terms of the leases will not be enforced;

(b) Detrimental reliance on this representation; and

(c) It must be inequitable for the promisor to go back on the promise.

Again, Ms Mattsson relied on the service charge demands issued to and paid by Mr Steele. These amounted to a representation that 51GSL would not enforce the 40% service charge in the lease of Flat 4. Mr Steele relied on this representation when purchasing this flat and continued to pay the same proportion as his predecessors. If there was an agreement that he pay 30% then, on the balance of probabilities, there must also have been an agreement that Flat 3 would pay 30%.

104. Ms Mattsson also relied on the statement from Mr Power, as evidence that Flat 3 had always paid 30%. The Applicant must have known of this when she purchased the flat and it would be inequitable for her to negate on the Agreement. If the Applicant's predecessors were bound by the Agreement then she is too.

105. Ms Mattsson also referred to the Court of Appeal's decision in ***Hopgood v Brown [1955] 1 WLR 213***, which concerned a boundary dispute, arising from conveyances of adjoining plots of land in 1932. In 1951 the Defendant built a property on the southern plot so that the wall of his garage formed an apparent boundary with the northern plot, which belonged to a company in which he was a director. The actual construction work was undertaken by the company, which received a payment of £2,200 from the Defendant. The northern plot was subsequently conveyed to a third party and then sold to the Plaintiff, who issued proceedings in the County Court claiming that part of the garage encroached on his land. There was also a claim for nuisance, relating to a manhole and drain installed on the Plaintiff's land by the Defendant. The trespass claim was dismissed and nominal damages were awarded on the nuisance claim.

106. The Plaintiff appealed the first instance decision and the Defendant cross-appealed. The Court of Appeal dismissed the appeal but allowed the cross-appeal. Ms Mattsson referred to pages 224-225 of the judgment, in which it was held that the construction of the garage by the company amounted to a representation that the flank wall was on the boundary line. The Defendant relied on this representation and acted to his detriment by paying the company. It followed that the company was bound by this representation, as was the Plaintiff (as a successor in title).

107. The judgment also referred to the decision in ***Taylor v Needham [1810] 2 Taunt. 278***, which concerned an estoppel between lessor and lessee. In that case, Mansfield CJ said:

"Then the question comes whether the assignee of the lease may be allowed to controvert the title of the lessor, when the lessee, under whom he derives, could not controvert the title of the lessor; so that the assignee should have a better right than he from whom he derives it. Exclusive of all the dicta, it would be a very odd thing in the law of any country, if A could take, by any form of conveyance, a greater or better right than he had who conveys it to him; it would be contrary to all principle; for if you look into all the books upon estoppel, you find it laid down, that parties and privies are estopped, and he who takes an estate under a deed, is privy in estate, and therefore never can be in a better situation than he from whom he takes it."

The language in this passage is particularly dense but the meaning is clear. The rights of an assignee can be no better than those enjoyed by the assignor.

108. Turning now to the 2013 Agreement; Ms Mattsson accepts this was not a binding contract as it post-dates the introduction of section 2 the 1989 Act. Rather she relies solely on estoppel, submitting that all four leaseholders and 51GSL agreed to vary the service charge proportions at

the board/management committee meeting in December 2013. There were two elements to this agreement. Initially the service charge expenditure would be split 22.5/22.5/22.5/32.5%. From 04 April 2014 onwards, the service charge proportions would be based on the measured floor areas. Acting in reliance upon this agreement, a surveyor was instructed and the flats were measured before the percentages were finally agreed at the meeting on 09 October 2014. In addition, the parties agreed to proceed with the major works.

109. Ms Mattsson submitted that Mr Steele had agreed to the lease variations at the December 2013 meeting, even though he had not signed the minutes. This was borne out by the subsequent instruction of surveyors to measure the flats.

110. There was detriment in that surveyors' fees were incurred and the major works were billed using the interim proportions. As a result some leaseholders paid more towards these works. Ms Mattsson submitted that there was an estoppel by representation and the Applicant was bound pay the interim proportion of 22.5% until April 2014 and then 24.4%.

111. Ms Mattsson relied on the minutes for the meetings in December 2013 and October 2014 together with the email correspondence between the parties. She submitted there was clear evidence that Mr Birtwistle had agreed the variations. She also dismissed the notion that any agreement had been induced by economic duress. This was not borne out by the documents. Some external works were undertaken by 51GSL prior to the meeting on 09 October 2014, when the revised service charge proportions were finally agreed, as evidenced by the minutes.

112. Ms Mattsson did not specifically address the tribunal on the section 27A(4) argument, in her closing submissions.

113. In response, Mr Birtwistle disputed the First Agreement had contractual force. There were no corporate documents on the part of 51GSL, establishing any agreement to vary the service charge proportions. Also there was no evidence of the terms of the alleged agreement. Based on the floor area measurements taken by CP Creative, the proportion in the original lease of Flat 3 is "*a little kind*" but the proportions for the other flats do not precisely reflect their floor areas. The leases express the proportions in fractions, rather than percentages and have not been calculated precisely. Mr Birtwistle said he could not understand why the previous leaseholder of Flat 3 would agree to pay a higher service charge proportion than that specified in the lease.

114. Mr Birtwistle also made the point that Mr Steele had owned Flat since early 1988. If there was a binding agreement to vary the service charge proportions then the leases should have been formally varied in the

intervening decades. This did not happen. To the contrary, the 2011 deed of surrender and re-grant for Flat 3 made it clear that the original lease provisions will continue for the extended term.

115. Mr Birtwistle rejected the estoppel argument on the First Agreement and the submission that Mr Steele had acted to his detriment in accepting a 25% share in the freehold company. In his experience, leaseholders who buy their freehold normally hold it in equal shares and not based on the service charge proportions.

116. Mr Birtwistle also rejected the estoppel argument for the 2013 Agreement. He relied on an email from Mr Raikes to Ms Straker, dated 03 September 2014 that stated he could not accept the service charge accounts "*or the % split until the deed of variation of each of the leases is signed by each party and filed with the land registry*". This suggested that the any agreement to vary the proportions was conditional upon the parties agreeing and completing deeds of variation.

117. Mr Birtwistle argued that no final agreement was reached at the December 2013 meeting, as the minutes had not been signed by Mr Steele. In his email to Mr Raikes, dated 21 February 2014, he made it clear that Mr Steele needed to agree the minutes (and the Deed for Flat 1), as all four leaseholders needed to agree the lease variations.

118. Mr Birtwistle also argued there was no final agreement at the October 2014 meeting, as evidenced by his email of 02 November 2014. He described this meeting as a "*gathering of leaseholders*", rather than a formal company meeting and the minutes as "*jottings of leaseholders' discussions*".

119. Mr Birtwistle's alternative submission was that any agreement to vary the proportions had been induced by economic duress on the part of Mr Steele. When the Applicant purchased her flat there was a problem with water leaks from the terraces. This resulted in five ceilings coming down in Flat 3. Mr Birtwistle arranged the relining of the Flat 3 terrace but similar work was required to the other terraces. Other, substantial works were also required to the exterior of the Building.

120. Mr Birtwistle was eager to undertake all of the external works, to prevent further damage to Flat 3. He was concerned by the threat of High Court litigation and Mr Steele's failure to pay his service charges, as this would delay the works. This induced his agreement to vary the service charge proportions in the leases. This agreement was conditional upon the flats being measured and the floor areas being agreed. As it was, the floor areas were not agreed and Mr Steele did not agree the new proportions.

121. Mr Birtwistle felt "*conned*" into the 2013 Agreement. He submitted there had been economic duress on the part of Mr Steele and relied on a paper headed "KEY DEVELOPMENTS IN CONTRACT LAW; ECONOMIC DURESS", prepared by Mr Dov Ohrenstein of Radcliffe Chambers. An extract from this paper was included in the bundles. This identified the necessary ingredients for a successful economic duress claim as:

(a) pressure which is illegitimate;

(b) that the pressure is a significant cause including the claimant to enter into the contract; and

(c) that the practical effect of the pressure is that there is a compulsion on, or a lack of practical choice for the victim.

Mr Birtwistle's denied there was any agreement to vary the service charge proportions in 2013 or 2014 but if there was then it was induced by economic duress.

The tribunal's decision

122. The tribunal determines that the service charge proportion payable for Flat 3 for the years 2011-2016 is 20%, as stated in the original lease.

Reasons for the tribunal's decision

123. The section 27A application was unusual in that it was made by a leaseholder but was not contested by the freeholder, 51GSL. Rather it was contested by another leaseholder, Mr Steele.

124. The application was also unusual for the limited evidence on the key issues. There was no information regarding the parties or the date of the First Agreement and Mr Steele had no knowledge as to the circumstances or terms. He was informed by the seller that Flat 4 only paid 30% but had no additional information. Crucially there was no evidence that any previous leaseholder of Flat 3 had explicitly agreed an increase to 30%. Logically there is no reason why a leaseholder would agree such an increased liability.

125. The conveyancing files were not disclosed. It is likely that the file for Flat 4 has been destroyed, given that purchase was 28 years ago. However the purchase file for Flat 3 should still exist, given that the transaction took place in 2011. This should have been obtained and disclosed by Mr Birtwistle, with any sensitive information redacted. The likelihood is that his solicitors raised management enquiries

regarding the service charges at the Building and the replies would have assisted the tribunal in determining the issues.

126. The tribunal was not supplied with the measurements from CP Creative or Chestertons, or the instructions to either firm. Again these would have assisted the tribunal in determining the issues. As would the leases for Flats 1 and 2. The Land Registry entries for the freehold title reveal that a new lease was granted for Flat 1 on 25 February 2014. Presumably this was effected by the Deed agreed at the December 2013 meeting. The tribunal were not provided with any evidence, or even information, as to the service charge proportion in the new lease

127. The only oral evidence was from Mr Birtwistle and Mr Steele. Mr Raikes and Ms Larard did not attend the hearing and did not provide any witness statements, even though they were both added as Respondents to the application. The tribunal does not know the reasons for this. It may be that Mr Raikes and Ms Larard were reluctant to become embroiled in this dispute, which is essentially between Mr Birtwistle and Mr Steele. However the outcome of the application directly affects their flats and their lack of involvement is surprising.

128. In the absence of oral evidence from Mr Raikes, his letter of 02 December 2015 was of limited evidential value and the tribunal attached little weight to it. The same is true of Mr Power's statement.

129. The onus was on Mr Steele to establish, on the balance of probabilities that the service charge proportion for Flat 3 had been varied.

130. The tribunal rejects the submission that the First Agreement amounted to a binding contract. The requirements of section 40(1) of the 1925 Act have not been made out. No written agreement, signed by the party to be charged, was produced to the tribunal. Ms Mattsson sought to argue that Mr Larard's letter of 23 September 1988 was a memorandum/notice, signed by the party to be charged. However this related to Flat 3 rather than Flat 4 and was simply a demand for payment of service charge and company expenses. It did not set out the terms of the alleged contract or the parties and was on Winckworth & Pemberton's headed notepaper. It did not mention 51GSL by name and was signed by Mr Larard personally. There was no evidence that he was an officer of 51GSL at the time or was able to bind this company.

131. The tribunal was not supplied with any signed memorandum/note, increasing the service charge proportion for Flat 3. To be enforceable, such a document would have to have been signed by the then leaseholder of Flat 3, or some other person authorised by him/her. It was the leaseholder of this flat that was the party to be charged.

132. Similarly, Mr Steele has not established that the First Agreement was a binding contract under the doctrine of part performance. The alleged acts of part performance were the service charge demands and payments for Flat 4. These do not prove a contract to increase the service charge proportion for Flat 3. Rather they simply establish lower demands for Flat 4. Mr Steele could not comment on the reasons for this. It may be the demands were issued in error or his predecessor negotiated a concession. This case is very different to ***Steadman***, where the terms of the oral agreement were clearly identified and the Plaintiff and Defendant were both parties to that agreement. In this case, Mr Steele is trying establish an agreement that he was not a party to and has no knowledge of. He has failed to do so.

133. The tribunal's conclusion that the First Agreement was not a binding contract was reinforced by the terms of the deed of surrender and re-grant for Flat 3. This was granted in October 2011. Had there been an enforceable agreement to increase the service charge proportion then this should have been included in the deed. It was not and the deed made it clear that the terms of the original lease would continue to apply.

134. The tribunal also rejects the submission that the First Agreement gave rise to an estoppel. In order to succeed on this argument, Mr Steele would need to establish a representation by one of the previous leaseholders of Flat 3 and a detrimental reliance on that representation by 51GSL or a previous freeholder. It is not enough that he relied on service charge demands for his flat. It is debateable if these demands amounted to representations. Even if they did, they were made by 51GSL and the previous freeholder and were made to Mr Steele. There was no evidence of any representations made by a leaseholder of Flat 3 to the freeholder at the time.

135. The estoppel argument for the First Agreement does not get off the ground. This means it is unnecessary for the tribunal to consider the application of ***Hopgood*** or the detriment alleged by Mr Steele. However it is worth pointing out that the detriment was allegedly suffered by Mr Steele and not the freeholder. Further the tribunal's experience, gained from hearing similar cases and the members' professional practices, matches that of Mr Birtwistle. Leaseholders who buy their freehold normally hold it in equal shares, whether they purchase in their names or via a nominee company.

136. The position in relation to the 2013 Agreement is less clear cut. The tribunal is satisfied that all four leaseholders/members agreed a mechanism to vary the service charge proportions at the meeting in December 2013. The fact that Mr Steele did not sign the minutes is immaterial. The agreement was reached orally at the meeting and CP Creative were instructed to measure the flats, pursuant to that agreement. However Mr Steele did not accept the revised proportion

for Flat 4 based on these measurements and negotiated a reduction. Clearly he did not consider himself bound by any agreement. The same is true of Mr Raikes, as evidenced by his email to Ms Straker of 03 September 2014 and his letter to the tribunal of 02 December 2015. At the time of the December 2013 meeting, no-one knew what the precise measurements would be or how these would translate into service charge proportions. All that was agreed was a mechanism to vary the proportions in the future.

137. The measurements triggered further negotiations between the parties. It is clear from Ms Larard's email of 16 September 2014 and the minutes for the October 2014 meeting that revised service charge proportions were agreed, at least in principle. It may be that the meeting was not a formal company meeting but it was attended by all four leaseholders, who unanimously agreed the new proportions. The tribunal does not accept that Mr Birtwistle's agreement was conditional, as this was not mentioned in his emails of 22 and 31 October 2014.

138. The tribunal rejects the submission that Mr Birtwistle's agreement was induced by economic duress. There was simply no evidence to support this. Duress was not mentioned in Mr Birtwistle's emails of 22 and 31 October 2014 or in any of his subsequent emails in the bundles. No doubt he was worried by the threat of High Court litigation and Mr Steele's failure to pay his service charge. However this did not amount to illegitimate pressure and it cannot be said that Mr Birtwistle had no practical choice but to agree the new service charge proportions.

139. The agreement reached at the October 2014 meeting was a negotiated settlement, reached after a certain amount of 'horse-trading' by the parties. It appears that having agreed the new service charge proportions, Mr Birtwistle had a change of heart. The issue is whether he was able to withdraw from the settlement or estopped from doing so.

140. It is clear from the meeting minutes that the leases were to be formally varied. Mr Birtwistle, Ms Larard and Mr Steele agreed that Nelsons would be instructed to deal with these variations. This makes it clear that the variations would not take effect immediately. Rather they would only take effect once the appropriate deeds had been approved and completed. The tribunal is satisfied that all four leaseholders intended to vary their leases. However this was only an agreement in principle. Section 2 of the 1989 Act had to be complied with for the agreement to be enforceable and the parties specifically agreed there should be formal variations.

141. By agreeing the new service charge proportions, in principle, all four leaseholders made representations that the strict terms of their leases would not be enforced. This satisfied the first requirement of the three-part estoppel test referred to by Ms Mattsson.

142. The second requirement is detrimental reliance on that representation by 51GSL. Did Mr Birtwistle's promise influence the company's conduct and induce it to act differently? There was no evidence of this or that Mr Birtwistle created or encouraged an expectation that he would not withdraw from the transaction. Ms Mattsson relied on the instructions to the surveyors (to measure the flats) and the billing of the major works. However these steps were taken shortly after the December 2013 meeting, whereas the promise by Mr Birtwistle (and the other leaseholders) was made at the October 2014 meeting. There was no evidence of any detrimental reliance on this promise, following the second meeting. Such reliance would have to be by 51GSL, as the other party to the Applicant's lease.

143. Given there was no detrimental reliance the second limb of the estoppel test is not satisfied. This means that it was unnecessary to go on and consider whether it was inequitable for Mr Birtwistle to go back on his promise. However the tribunal did consider whether the October 2014 agreement precluded the Applicant from making the section 27A application. The effect of section 27A(4)(a) is that no application can be made for matters that are agreed or admitted. In this case the agreement was not an enforceable contract. Rather it was an agreement in principle that was not concluded. Mr Birwistle was not estopped from withdrawing from the settlement and did withdraw. It follows there was no agreement for the purposes of section 27A(4)(a) and the Applicant was not precluded from making this application.

144. The tribunal has found that the First Agreement was not an enforceable contract, no estoppel arises for the First Agreement or the 2013 Agreement and the Applicant was not precluded from making the application under section 27(4)(a). This means that the service charge proportion in the original Flat 3 lease continues to apply and the she is liable to pay 20% of the total service charge expenditure.

Application under s.20C and refund of fees

145. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. This was repeated by Mr Birtwistle at the end of the hearing. A section 20C order would only apply to any costs incurred by 51GSL, as opposed to Mr Steele. However it is difficult to see how the latter could try and recover any of his costs from the Applicant. Furthermore, 51GSL has not played an active role in these proceedings and probably has not incurred any costs. Even so, it is necessary to decide the section 20C application.

146. Ms Mattsson consented to a section 20C order, on behalf of Mr Steele but was not in a position to bind 51GSL. Given the outcome of the two substantive applications it is just and equitable for such an order to be made, so that 51GSL may not pass any of its costs of these proceedings through the Applicant's service charge. The Applicant has been entirely

successful in that the section 37 application has been dismissed and the section 27A application has been decided in her favour. It would be inequitable for her to pay any part of 51GSL's costs, if such costs have been incurred.

147. At the end of the hearing, the tribunal queried if the Applicant was seeking a refund of the fees paid for application/hearing[1]. Mr Birtwistle stated that she was not seeking a refund. Accordingly it is unnecessary for the tribunal to make any decision on these fees.

The next steps

148. The tribunal has determined that the service charge proportion payable for Flat 3 is 20%, as set out in the original lease. However that is not the end of the matter, as Mr Steele has only ever paid 30% for Flat 3. Potentially this leaves a shortfall in the service charge fund. There is also the matter of the recent extension to Flat 1 and whether this should trigger an adjustment in the proportions.

149. The tribunal has not determined the proportions payable for Flats 1, 2 and 4. It had no jurisdiction to do so, as there were no applications for these flats. Unfortunately there is spectre of further tribunal proceedings for one or more of these flats, unless the parties can now agree a compromise that is contractually enforceable. There is also the stayed application for the appointment of a Manager under the 1987 Act, which will need to be resolved.

150. Clearly it is in everyone's interests to try and resolve the outstanding issues rather than continue the litigation and become increasingly entrenched. The Applicant, Ms Larard, Mr Raikes and Mr Steele are leaseholders at the Building and members of 51GSL. They have a vested interest in ensuring that Building is properly managed and maintained and should make every effort to resolve their differences. The parties might wish to consider mediation or other forms of alternative dispute resolution.

Name: Tribunal Judge Donegan **Date:** 16 April 2016

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

RIGHTS OF APPEAL

1. 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.

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

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

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

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 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.

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.

Landlord and Tenant Act 1987 (as amended)

Section 37

(1) Subject to the following provisions of this section, an application may be made to the appropriate tribunal in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.

(2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, no leases which are drafted in identical terms.

(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.

(5) Any such application shall only be made if –

(a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or
(b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent of the total number of the parties concerned and at least 75 per cent of that number consent to it.

(6) For the purposes of subsection (5) –

(a) In the case of each lease in respect of which the application is made, the tenant under lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and
(b) the landlord shall also constitute one of the parties concerned.

Section 38

(1) If, on an application under section 356, the ground 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 that 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) If, on an application under section 37, 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, the tribunal may (subject to subsections (6) AND (7)) make an order varying each of those leases in such manner as is specified in the order.

(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 to substantially 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 (1) 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 to 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 and 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 section varying a lease the tribunal may, 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.

The Law of Property Act 1925

Section 40

(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, in in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized.

(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court.

The Law Reform (Miscellaneous Provisions) Act 1989

Section 40

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

(5) This section does not apply in relation to—

(a) a contract to grant such a lease as is mentioned in section 54(2) of the Law of Property Act 1925 (short leases);

(b) a contract made in the course of a public auction; or

and nothing in this section affects the creation or operation of resulting, implied or constructive trusts.

(6) In this section—

"disposition" has the same meaning as in the Law of Property Act 1925;

"interest in land" means any estate, interest or charge in or over land.

(7) Nothing in this section shall apply in relation to contracts made before this section comes into force.

(8) Section 40 of the Law of Property Act 1925 (which is superseded by this section) shall cease to have effect.