FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00MG/LIS/2020/0003**
Property	:	**13 Hinsley Walk, Milton Keynes, MK3 6FE (also known as Plot Number 150)**
First Applicant	**:**	**Stonewater Limited (Head Lessee & Landlord of Under Lessee)**
Representative	**:**	**Shakespeare Martineau LLP**
Second Applicant	**:**	**Ms Jordan Barrows (Under Lessee, known as Shared Ownership Lease)**
Respondent	**:**	**Trinity (Estates) Property Management Limited (Head Landlord)**
Date of Application	**:**	**17th January 2020**
Type of Application	**:**	**to determine the reasonableness and payability of the Service Charges (section 27A Landlord and tenant Act 1985) and Administration Charges (Schedule 11 Commonhold & Leasehold Reform Act 2002)** **to determine whether the landlord's costs arising from the of proceedings should be limited in relation to the service charge (section 20C of the Landlord and Tenant Act 1985)**
Tribunal	**:**	**Judge J R Morris**
Date of Decision	**:**	**28th July 2020**

DECISION

Decision

1. The Tribunal determines that the Internal Block Charge is not payable by the First or Second Applicants for the years in issue in respect of the Property.

2. As the Tribunal determined that the Internal Block Charge is not payable then the application in respect of reasonableness is unnecessary.

3. The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that the Respondent's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicant.

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4. The Tribunal, following this decision, will make a decision regarding the stay on the Respondent's Application Number CAM/00MG/LVL/2020/0001 under section 35 of the Landlord and Tenant Act 1987 and issue Directions.

Reasons

Application CAM/00MG/LIS/2020/0003

5. The Applicants seek a determination under secton 27A of the Landlord and Tenant act 1985 as to whether service charges are payable and reasonable.

6. The Applicants state in their Application as follows;

   a) The Property is demised as plot 150 pursuant to a Head Lease between (1) Bryant Homes Central Limited (2) Trinity (Estates) Property Management limited and (3) Jephson Homes Housing Association Limited dated 3rd December 2007 ("the Head Lease").

   b) Jephson Homes Housing Association Limited is now Stonewater (2) Limited, the First Applicant.

   c) The First Applicant is charging a Service Charge by the Respondent in accordance with Schedule 7 of the Head Lease.

   d) The Service Charge Percentage as it relates to the interior of the Block is defined in the Head Lease as *"… 5.5556% per Unit excluding units 105, 106, 128, 143, 2144 and 150 in relation to the interior of the Block*". Despite this the Respondent has charged the First Applicant in respect of unit 150 for services relating to the interior of the Block.

   e) The service charges incurred by the First Applicant are passed on to the Second Applicant, who occupies the Property pursuant to a Shared Ownership Lease dated 11th November 2009.

   f) The Applicants seek a determination as to the payability of these service charges and, if they are payable, as to their reasonableness.

7. Determinations are sought in respect of the service charge years 2016/17, 2017/18, 2018/19 and 2019/20 and the estimated value of the dispute is £2,740.68.

8. The Second Applicant also seeks an order for the limitation of the Respondent's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985. She does not seek an order to reduce or extinguish the tenant's liability to pay an administration charge in respect of the litigation costs under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

9. Directions were issued in respect of this Application on 19th February 2020.

Application CAM/00MG/LVL/2020/0001

10. In March 2020 the Respondent made an Application to vary the Head Lease under section 35 of the Landlord and Tenant Act 1987 so as to make it an express term that the First Applicant is required to contribute 5.556% towards the Internal Block Charge. In effect to delete the Property, referred to as Unit 150, from the Service Charge Percentage definition in Schedule 7 which states "*5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in relation to the interior of the Block*". Thereby making Unit 150 liable for the 5.5556% contribution to the service charge for the interior of the Block.

11. The Tribunal wrote to the parties asking whether the Lease Variation Application was in effect conceding that the relevant service charges were not payable under the current terms of the Lease.

12. On 4th May 2020 it was confirmed that no such concession was made and that:
    a) The Respondent's position was that paragraph 4 of Schedule 7 of the Head Lease confers on the Respondent the discretion or ability to vary or recalculate the relevant proportion; and
    b) The Lease Variation Application had been made in the alternative to that position.

13. On 7th May 2020 the Procedural Judge issued Directions noting that the Lease Variation Application would require substantial Directions, preparation and third-party involvement. Accordingly, it was appropriate to stay the Lease Variation Application and examine the question of payability as a preliminary issue:
    a) if under the current terms of the Head Lease a service charge is payable in respect of the Property for the interior of the Block, the Lease Variation Application will be redundant and the Tribunal can make a determination as to the reasonableness of the relevant charges.
    b) if no such service charge is payable, the Tribunal is likely to arrange a case management conference to consider the directions referred to above in respect of the Lease Variation Application.

This Decision

14. This Decision relates to Application CAM/00MG/LIS/2020/0003 to determine under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable and reasonable i.e. if under the current terms of the Head Lease a service charge is payable in respect of the Property for the interior of the Block, the Lease Variation Application will be redundant and the Tribunal can make a determination as to the reasonableness of the relevant charges

The Leases

15. By a lease referred to here as the "Head Lease" dated 3rd December 2007 between (1) Bryant Homes Central Limited, (2) the Respondent (referred to in the Head Lease as the "Company") and (3) Jephson Homes Housing Association plot numbers 105-110 (Inclusive), 128, 130-132 (inclusive), 139-141 (inclusive), 143, 144 and 150 were let for a term of 150 years from 1st January 2001. A copy of the Head Lease was provided. The Head Lease is registered under title number BM332339 and a copy of the entry at HM Land Registry was provided.

16. It is understood that the Head Lease was assigned to the First Applicant, Stonewater (2) Limited, in 2014 (following a merger between Raglan Housing Association and Jephson Housing Association).

17. Jephson Homes Housing Association now Stonewater (2) Limited, the First Applicant, granted subleases to the individual plots on a shared ownership basis, one of which was granted in respect of plot 150 otherwise known by its postal address of 13 Hinsley Walk ("the Property"). A copy of this under-lease, referred to here as the "Shared Ownership Lease", was provided. The Shared Ownership Lease dated 11th November 2009 between (1) Jephson Homes Housing Association and (2) Kerry Gregory was let on a shared ownership basis for a term of 99 years from 28th November 2007 and is registered under the title number BM349198 and a copy of the entry at HM Land registry was provided.

18. The Shared Ownership Lease was assigned to Ms Jordan Barrows, the Second Applicant, in March 2017.

The Head Lease

19. The following provisions of the Head Lease are relevant to the case:

20. Under paragraph 2 of Schedule 4, the First Applicant covenants "*To pay the Service Charge in the manner specified in Schedule 7*"

21. Under paragraph 11 of Schedule 7, the First Respondent is to pay "*…on account of the Service Charge on each 1st January and 1st July (or such other half yearly dates as shall be notified in writing to the tenant) on half of the Provision Service Charge…*"

22. Under paragraph 12 of Schedule 7:

"If the Service Charge for any Service Year shall:

12.1 exceed the Provisional Service Charge payment made on account the excess shall be paid by the Tenant to the Company within ten working days after written demand or at the option of the Company on the next day for payment by the Tenant

12.2 be less than such payments on account the overpayment shall be allowed by the Company to the tenant as a credit against payments to become due or (in the Service Year ending on or after the expiry of the Term) shall be repaid by the Company to the Tenant"

23. The "Provisional Service Charge" is defined in paragraph 1 of Schedule 7 as: "*the amount which in the opinion of the Company shall from time represent a fair and reasonable estimate of the Service Charge for the Service Year in question Provided that should it appear necessary or appropriate to adjust the Provisional Service Charge during the Service Year the provision Service Charge may be increased or decreased (as the case may be) by the Company at any time*."

24. The "Service Charge" is defined in paragraph 1 of Schedule 7 as: "*the service charge Percentage of the Annual Expenditure*"

25. The "Annual Expenditure" is defined in paragraph 1 of Schedule 7 as: "*the aggregate expenditure incurred or to be incurred by the Company during a Service Year in or incidentally to providing or in respect of all or any of the Services (after giving credit for any Insurance money received under any policy*)"

26. The Service Charge Percentage is defined in Clause 1 of the Lease as:
"3.0303% per Unit in relation to the exterior of the Block
5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in relation to the interior of the Block (referred to in this Decision as the "Internal Block Charge")
6.6667% in relation to the Garage, Unit 150 only
3.7037% per Unit excluding Unit 150 in relation to the Parking Spaces
2.8571% per Unit in relation to the Estate".

27. Paragraph 4 of Schedule 7 states:
"*If at any time during the Term the property comprising the Block and/or the Estate and/or the Common Parts is increased or decreased on a permanent basis or the benefit of any of the heads of Services is extended on a like basis to any adjoining or neighbouring property or if as a result of the final measuring of the Demised Premises or other units in or the numbers of the Demised Premises or other units in the Block and/or the Estate or if some other event occurs a result of which is that any of the service charge percentages are no longer appropriate to the Demised Premises the relevant service charge shall be varied by the Company in a fair and reasonable manner in the light of the event in question with effect form the date of service of written notice by the Company to the Tenant of such event and specifying the variation and all references to the relevant service charge percentage shall be construed as so varied*"

28. Paragraph 17 of Part 2 of Schedule 7 states:
Employing or retaining any solicitor accountant auditor surveyor valuer architect engineer managing agent or management company or other professional consultant or adviser in connection with the management administration repair and maintenance of the Maintained Property including the preparation and auditing of any accounts certificates and statements relating to Annual Expenditure and the collection of the Service Charge

29. Paragraph 18.2 of Schedule 4 states:
On the occasion of every transfer of the Demised Premises or of a Unit for the unexpired portion of the Term and in every under-lease which may be granted to insert a covenant by the assignee, transferee or under lessee (as the case may be) directly with the Company to observe and perform the covenants conditions and obligations on the part of the Tenant appearing in the Lease…

Shared Ownership Lease (Underlease)

30. The following provision of the Shared Ownership Lease (Underlease) are relevant to the case:

31. Clause 2 of the Underlease states:

…PAYING…. a sum equal to that expended by the Landlord in complying with its covenants in the Superior Lease to pay the Yearly Rent and Service Charge and other monies reserved under the Superior Lease which may from time to time be due from the Landlord to the Superior Landlord pursuant to the terms of the Superior Lease

32. Clause 3 states:
3.1.3 To pay as additional rent without any deduction or set off on demand the Yearly Rent and Service Charge and other monies reserved under the Superior Lease which may from time to time be due from the Landlord to the Superior Landlord pursuant to the terms of the Superior Lease PROVDED THAT where such monies shall not be immediately ascertainable by the Landlord payment by the Leaseholder shall be based on reasonable estimates provided by the Landlord with subsequent adjustment to accord with actual payments made by or due from the Landlord to the Superior Landlord pursuant to the terms of the Superior Lease
3.1.4 To pay as rent and by way of indemnity to the Landlord all monies due pursuant to Clause 3.1.3 hereof where the Leaseholder shall have failed to make payment to the Superior Landlord or the Superior Landlord shall have demanded the same from the Landlord

Description

33. No inspection was made but from the parties' Statements of Case the Property is part of a purpose-built residential development known as 'Phase 2 Bletchley Park' ("the Development") and compromises 9 houses and 33 flats in 11 Blocks. There are 18 flats which share internal communal areas.

34. The Property is a first floor flat built over a garage and is accessed via a communal area comprising a staircase and an external entrance door on the ground floor which it shares with the neighbouring Plot 149, the postal address of which is flat number 11 Hinsley Walk.

35. The 18 flats that are accessed via a communal external entrance door are by plot number: 107, 108, 109, 110, 130, 131, 132, 133, 138, 139, 140, 141, 145, 146, 147, 148, 149 and 150.

36. There are 5 flats that are accessed via their own external doors which are by plot number: 105, 106, 128, 143 and 144.

Contribution to the Service Charges

37. It is noted from the Head Lease that plot numbers: 107, 108, 109, 110, 130, 131, 132, 138, 139, 140 and 141, which are accessed via a communal external entrance door, are required to contribute to the Internal Block Charge.

38. It is also noted from the relevant passages of the respective leases referred to in the Respondent's Statement of Case that plot numbers: 133, 145, 146, 147, 148 and 149, which are accessed via a communal external entrance door, are required to contribute to the Internal Block Charge (Copies provided on pages 204 to 210 of the Bundle).

39. It is further noted from the Head Lease that plot numbers: 105, 106, 128, 143 and 144 which are accessed via their own external entrance door, and not a communal external entrance door, are not required to contribute to the Internal Block Charge.

40. Finally, it is noted from the Head Lease that plot 150 (13 Hinsley Walk) is not required to contribute to the Internal Block Charge. This is notwithstanding that it is accessed via a communal area comprising a staircase and an external entrance door on the ground floor, which it shares with the neighbouring flat, plot number 149/postal address 11 Hinsley Walk. Plot number 149/flat 11 Hinsley Walk does pay a 5.5556% contribution to the Internal Block Charge.

The Issues

41. The Applicants identify two issues:

    1. The Property (Plot 150, postal address 13 Hinsley Walk) is demised to the First Applicant under the Head Lease and is charged a service charge in accordance with Schedule 7 of the Lease. The Service Charge Percentage as it relates to the interior of the Block (referred to hereafter as "the Internal Block Charge") is defined in Clause 1 of the Lease as "*5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in*

relation to the interior of the Block". Despite this the Respondent has charged the First Applicant for services in relation to Unit 150 in respect of the interior of the Block. The Internal Block Charge is passed on to the Second Applicant who occupies the Property pursuant to the Shared Ownership Lease dated 11th November 2009 which is a long lease with variable Service Charge. The First and Second Applicants seeks a determination as to whether or not the Internal Block Charge is payable.

2. If the Tribunal determines that it is payable then a further determination is sought as to the reasonableness of the Internal Block Charge.

42. The Respondent replies to the two issues stating that:

1. The Property (Plot 150, postal address 13 Hinsley Walk) as a first-floor flat that is accessed via a communal external entrance door, should be required to contribute to the Internal Block Charge;

2. The Internal Block Charge is reasonable.

43. The Tribunal considered and made a Decision in respect of the First Issue before considering the Second Issue as depending on that Decision a determination may or may not be required regarding the Second Issue. However, in considering the First Issue the whole of the Statements of Case regarding both issues were read as matters relevant to the First Issue may have been included in the Second Issue submissions.

Applicant's Case – Issue 1

44. The First Applicant prepared a Statement of Case which, it was stated, the Second Applicant fully supports and endorses.

45. The First Applicant submitted that the terms of the Head Lease were accepted on the basis that the Property is excluded from paying the Internal Block Charge.

46. The First Applicant noted that the Respondent had submitted that a failure by the Property to pay the Internal Block Charge meant that there was a shortfall in the Service Charge. The First Applicant stated that any shortfall was solely in the knowledge of the Respondent and neither the First Applicant nor the Second Applicant (via payments of the service charge pursuant to the Shared Ownership Lease) should be penalised for any shortfall created by the apparent error of the Respondent. The First Applicant said that it had acted in good faith when it became a leaseholder and acted on the assumption that the lease terms were accurate.

47. The First Applicant said it had made numerous complaints in relation to the Internal Block Charge and submitted that there is no basis for the Respondent to assert that the Applicants are estopped from making the Application as to payability of the Internal Block Charge.

48. The First Applicant stated that the Respondent had agreed to reduce the Property's contribution to the Internal Block Charge to 2.9412%. The First Applicant rejected this offer and submitted that it is evidence that the Respondent is in a position to cover the shortfall.

49. The Respondent had also, in open correspondence by an email dated 24th June 2019 (Copy provided on page 216 of the Bundle) accepted that a refund was due. Instead of providing a refund, by a letter dated 30th July 2019, (Copy provided on page 217 & 218 of the Bundle) the Respondent purported to vary the percentage payable towards the Internal Block Charge under Clause 4 of the Seventh Schedule of the Head Lease.

50. The First Applicant submits that the Respondent should be estopped from failing to honour the representations that it would pay a refund which was accepted in good faith.

51. With regard to the purported variation of the percentage payable the First Applicant avers that paragraph 4 of the Seventh Schedule of the Head Lease does not give the Respondent the power to create a new charge which is what the Respondent is purporting to do by charging the First Applicant for the Internal Block Charge. The paragraph only enables the Respondent to vary the percentage for those Units liable to pay the charge.

52. The First Applicant also suggested that the Respondent's Application to vary the Head Lease under section 35 of the Landlord and Tenant Act 1985 indicated that the Respondent agreed with the First Applicant that the Interior Block Charge is not currently payable under the Head Lease.

Respondent's Case – Issue 1

53. The reasons why the Property should contribute to the Internal Block Charge submitted by the Respondent were stated as follows.

54. The Internal Block Charge represents the Respondent's costs of carrying out a number of services including cleaning and maintenance of the internal common areas and stairs at the Development, the provision of fire and emergency lighting maintenance in these areas as well as a contribution towards the redecoration fund. The Property benefits from these items as a flat to which the entrance is through the communal area. All other flats which have an entrance through the communal area contribute. Only those which have a separate external entrance do not.

55. The communal area is shared by 18 flats and, under the Head Lease, 17 flats contribute 5.5556% towards the Internal Block Charge which is a total percentage contribution of 94.446% of the Internal Block Charge. Only the Property does not contribute which leaves a shortfall equivalent to a contribution paid by one of the 17 flats. This potentially impacts on the Respondent's ability to perform its covenants under the Head Lease.

56. The Respondent submits that the Head Lease wrongly excluded the Property from contributing towards the Internal Block Charge and that this is an obvious drafting error. On the basis of this being an error, the Respondent has at least for the years in issue apportioned the Internal Block Charge equally between the 18 flats.

57. The Respondent referred to the Internal Block Charge for the Property. It stated that the Applicants were claiming repayment of the estimated charge whereas they should only claim for the actual charge which was less. The estimated and actual charges for the years in issue are as follows:

Estimated	
2016/17	£698.99
2017/18	£685.17
2018/19	£705.76
2019/20	£664.61
Actual	
2016/17	£551.21
2017/18	£580.34
2018/19	£613.15
2019/20	£709.83

58. The Respondent stated that on 21st May 2019, the First Applicant raised, for the first time, the point that the terms of the Head Lease expressly excluded the Property from a liability to contribute to the Internal Block Charge.

59. Notwithstanding the express exclusion of the Property from contributing to the Internal Block Charge the Respondent submitted that paragraph 4 of the Seventh Schedule of the Head Lease confers on the Respondent a discretion to vary or re-calculate the proportion payable by the First Applicant to the Internal Block Charge. The pre-condition for recalculating the contribution is the obvious drafting error in the Head Lease in that it cannot have been the original Landlord's intention that it could not recover 100% of the costs of the Internal Block Charge.

60. In respect of the Applicant's submission that: "*The First Applicant accepted the terms of the Head Lease and this was on the basis that the Property is excluded from paying the service charge relating to the interior block*" the Respondent stated that the First Applicant had, since circa 2007, 13 years ago, been charged a contribution to the Internal Block Charge.

61. The Respondent referred to the Service Charge Budget for the service charge years ending 30th November 2008, 2009, 2010 and 2011. It was said that these were sent to the First Applicant ahead of the start of the relevant service charge period together with a copy of the 'matrix' which gave individual charges to the Units. Copies of the Budgets and Matrices were provided on pages 230 to 234 of the Bundle. To show that this procedure continued up until 2010 the Respondent referred to and provided copies of the Service Charge Budgets and Matrices for the years ending 30th November 2016, 2017, 2018, 2019 and 2020 on pages 174 to 185 and 235 to 238 of the Bundle. The Service Charge Accounts for the actual costs were also provided for the years ending 30th November 2016, 2017, 2018 and 2019 on pages 153 to 172.

62. In its first Statement of Case the Respondent said that the Matrices were for the Respondent's own internal use. However, in its second Statement of Case it stated that they were sent to the First Applicant with the Budgets.

63. The Respondent stated that the First Applicant had paid these charges promptly and in full. The Respondent added that with regard to the position of the Second Applicant the Respondent was not privy to the details of the amount of the service charge, if any, which the First Applicant passes on to the Second Applicant.

64. The Respondent said that for all these years the First Applicant seemingly accepted a liability to pay towards the Internal Block Charge in respect of the Property as it benefits from the services provided. The Respondent therefore submitted that the First Applicant was estopped by convention from seeking to challenge its liability to pay towards the Internal Block Charge or in the alternative has waived the right to do so.

65. In support of its submission the Respondent referred to the case of *Admiralty Park Management Company Limited v Mr Olufemi Ojo* [2016] UKUT 4121 (LC). The Respondent quoted the following passages form Martin Roger QC as follows:

> *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…*
>
> *43. Mr Ojo acquiesced in that manner of calculating the Maintenance Charge …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.*
>
> *45. It would be unfair for Mr Ojo now to be allowed to dispute his liability in those circumstances on grounds which he had chosen not to raise for many years. For him to be permitted to do so would require the appellant to recalculate the service charges back at least to 2009 in order to ascertain Mr Ojo's correct contribution … In all of those circumstances I accept the appellant's case that Mr Ojo's liability should be ascertained on the assumption that the lease allowed the*

appellant to apportion liability for costs incurred in relation to the estate as a whole…

First Applicant's Reply to Respondent's Case – Issue 1

66. The First Applicant replied to the Respondent's Statement of Case by a further Statement supported by a witness statement by Abigail Harries the First Applicant's Home Ownership Service Charge Manager.

67. In respect of the statement that the Respondent "*was not privy to the details of the amount of the service charge, if any which the First Applicant passes on to the Second Applicant*". It stated that, in accordance with paragraph 18.2 of Schedule 4 and of the Head Lease and clause 3.1.3 Shared Ownership Lease, the Respondent knew that on granting the Shared Ownership Lease the First Applicant was obliged to transfer its obligation to pay the Service Charge to the Second Applicant and that the First Applicant was in turn obliged to pay the charge directly to the Respondent.

68. The First Applicant referred to the case of *Admiralty Park Management Company Limited v Mr Olufemi Ojo* [2016] UKUT 4121 (LC) stating that it was distinguishable for the following reasons:
    (i) Mr Ojo had been the Leaseholder since 2004 and he had a direct contractual relationship with the Landlord. In the present case the Second Applicant is an under-lessee and she has only held the under lease since March 2017. The Second Applicant disputed the payability of the Internal Block Charge almost immediately the Lease was assigned to her.
    (ii) On a number of occasions in the judgement it was stated that Mr Ojo may not have been prejudiced by the incorrect interpretation of the service charge clauses in the lease. Indeed, because the service charge was being shared by more buildings there was the distinct possibility that he was actually paying less due to the managing agent's error. There is no question that in this case the Second Applicant is paying more than the service charge clause in the Lease stipulates.
    (iii) The Second Applicant is the ultimate payer of the Internal Block Charge and is in a different position to Mr Ojo as she has disputed the payment of the Internal Block Charge within a short space of time and is wholly prejudiced by paying the Charge.
    (iv) In contrast to the *Admiralty Park Case* the Tribunal is only being asked to determine the payability since 2017 not 2007.

69. The First Applicant also stated that it had only been the Tenant since 2014.

Second Applicant's Reply to Respondent's Case – Issue 1

70. The Second Applicant also made a response in the form of a witness statement.

71. She said that she understood the Service Charge is passed on to her by the First Applicant who is the Head Leaseholder of the Property in accordance with paragraph 2 of Schedule 4 of the Head Lease and that she pays this

Service Charge directly to the First Applicant under Clause 3.1.3 of the Shared Ownership Lease.

72. She said that when she completed the assignment to her of the Property the information regarding the Service Charge was outlined in her contract which she relied upon as being correct. She noted that according to this information she was liable to pay the Internal Block Charge. She said she had complained about this to both the First Applicant and the Respondent since 2017 when she found that she was not liable to pay the Internal Block Charge.

Decision - Issue 1

73. The issue is whether the Internal Block Charge of the Service Charge is payable for the years ending 30th November 2017, 2018, 2019 and 2010 by the Applicants.

74. It is common ground between the parties that the Service Charge Percentage as defined in Clause 1 of the Head Lease requires all units to pay "*5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in relation to the interior of the Block"*. This means that under the Head Lease the First Applicant has no liability to pay this charge in respect of the Property (Unit 150). As the First Applicant has no liability to pay the charge then under Clause 2 and 3 of the Shared Ownership Lease (the Underlease) the Second Applicant also has no liability to pay the charge, as the Tenant of the Property.

75. The Respondent in essence submits that this exclusion is unfair and is a clear error in the Head Lease and that the Applicants should pay the Internal Block Charge relating to the Property for the following reasons:
    a) The Property is accessed via a communal area comprising a staircase and an external entrance door on the ground floor, which it shares with the neighbouring flat. Both the Property and the neighbouring flat enjoy the benefit of the services in maintaining the common area but only the neighbouring flat pays a contribution.
    b) The Property is the only flat that has a communal area to which it does not contribute to the maintenance. There are 18 flats but due to the exclusion of the Property from making a contribution under the Head Lease only 17 contribute the fixed sum of 5.5556% giving the equivalent shortfall in the total amount recovered in respect of the service charge which cannot be what the Landlord intended when the Head Lease was drafted.
    c) Only the flats that have their own external door do not contribute to the maintenance of internal common parts because they do not have the benefit of the internal services.

76. Firstly, the Tribunal needed to consider whether or not under the Head Lease and therefore under the Shared Ownership Lease the Applicants are liable to pay this charge in respect of the Property.

77. Secondly the Tribunal needed to consider whether there is any principle or provision under which the First Applicant and therefore the Second Applicant

could be liable to pay the Internal Block Charge notwithstanding what the Head Lease states.

78. The Respondent made four submissions, three in respect of the Head and Shared Ownership Leases and one in respect of a principle, namely estoppel by convention, as to why the Applicants are liable to pay the Internal Block Charge in respect of the Property.

79. Firstly, the Respondent submitted the omission of the Property from paying the Internal Block Charge is an error on the face of the Head Lease. The Landlord cannot have intended allowing the Property to benefit but not contribute to the maintenance of a communal area which the other flats do contribute to leading to a shortfall in the Internal Block Charge which then had to be made up by the Landlord.

80. The Tribunal found that in its knowledge and experience there are leases which have terms that create liabilities which one or other party might find onerous and unfair. For example, flats which have their own external entrance doors being obliged to contribute to the cost of maintaining common parts which they do not use (in contrast to the Head Lease) and ground floor flats being required to contribute to the maintenance of lifts which they do not use. The basic principle is that a lease is to be followed and, in this instance, the Head Lease is unequivocal. In the absence of any argument by the Respondent to the contrary, in the Tribunal's view the apparent unfairness must stand.

81. So far as the effect of the Landlord having to pay the shortfall, it is a well-established principle, referred to as the *contra proferentum* rule, that a term of an agreement is interpreted strictly against the party who introduces the term. The terms of the tenancy agreement are invariably drafted by the landlord and therefore the terms are construed strictly against the landlord *Granada Theatres Ltd v Freehold Investments (Leytonstone) Ltd* [1958] 1 WLR 845 Vaisey J at page 851.

82. Secondly, it was submitted that the Lease allowed the Respondent to vary the service charge and make the Applicants liable for the internal Block Charge under Paragraph 4 of Schedule 7.

83. In this regard to Tribunal referred to the cases of *Fairman v Cinnamon (Plantation Wharf) Limited* [2018] UKUT 421 (LC) Apportionment *Williams v Aviva Investors Ground Rent* [2020] UKUT 111 (LC) in which *Gater and others v Wellington Real Estate Limited* [2019] UKUT 561 (LC) and *Windermere Marina Village Limited v Wild and Barton* [2014] UKUT 163 (LC). It found that the cases establish that section 27A (6) of the Landlord and Tenant Act 1985 renders void any provision of a lease that purports to enable the re-calculation of a specified service charge apportionment. However, a provision, such as Paragraph 4 of Schedule 7 of the Head Lease, enables the variation of an apportionment in certain specified circumstances and a tribunal may make such recalculation.

84. The Tribunal considered the extent to which the paragraph permitted any re-apportionment. It found that the apportionment could be altered in a "fair and reasonable manner" to take account of one or more of the following situations:
    1) A permanent increase or decrease in the Block Estate and/or Common Parts; The extension of any heads of Services to an adjoining or neighbouring property;
    2) If the service charge percentages are no longer appropriate to the Demised Premises:
        a) as a result of the final measuring of the Demised Premises; or
        b) if there is some change in the other units in the Block and/or the Estate; or
        c) if there is some change in the numbers of the Demised Premises or other units in the Block and/or the Estate; or
        d) if some other event occurs which results in any of the service charge percentages no longer being appropriate to the Demised Premises.

85. If a tribunal determined that a reapportionment was "fair and reasonable… in the light of the event" then it would take effect from the date of service of written notice to the Tenant specifying the variation.

86. The Tribunal finds that none of the circumstances itemised in Paragraph 4 of Schedule 7 of the Head Lease apply to removing the Property from the list of those Units excluded from paying the Internal Block Charge.

87. Thirdly, the Respondent submits that if the first two submissions do not apply then the Lease should be varied pursuant to section 35 of the Landlord and Tenant Act 1987. The Tribunal notes that an Application has already been made (CAM/00MG/LVL/2020/0001) and that depending on this Decision this may be a way forward.

88. Fourthly, the Respondent submitted that, in any event, the Applicants should not be able to re-claim the Internal Block Charge already paid by reason of an estoppel of convention. There appeared to be some indication in the Respondent's Submission that the estoppel would enable the Internal Block Charge to apply in the future negating the need for a variation. If this was the belief the Tribunal disagrees. In the statement of the law set out by Akenhead J in *Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396 (TCC)*, an estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.

89. In support of its submission the Respondent referred to the case of *Admiralty Park Management Company Limited v Mr Olufemi Ojo* [2016] UKUT 4121 (LC) in which 37 in which Lord Steyn's description of the legal principle in the *Republic of India v India Steam Ship Company Limited* [1998] AC 878 was referred to 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 acquiescing 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."

90. In addition, the Tribunal considered the statement of the law in *Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396 (TCC)*, by Akenhead J at paragraph 49:

> *49. From the cases, one can conclude that the relevant law on estoppel by convention is:*
>
> *(a) An estoppel by convention can arise when parties to a contract act on an assumed state of facts or law. A concluded agreement is not required but a concluded agreement can be a "convention".*
>
> *(b) The assumption must be shared by them or at least it must be an assumption made by one party and acquiesced in by the other. The assumption must be communicated between the parties in question.*
>
> *(c) At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably be the case that both parties will have relied upon it. There is nothing prescriptive in the use of "reliance" in this context: acting upon or being influenced by would do equally well.*
>
> *(d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that "detrimental reliance" represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention; in that context, Goff J at first instance in the Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] 1 QB 84 case described that this is what is needed and Lord Denning talks in these terms.*
>
> *(e) Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed.*

(f) The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.

91. In considering the case of *Admiralty Park Management Company Limited v Mr Olufemi Ojo* the Tribunal appreciated that it may be distinguishable from the present case for the years in issue for the following reasons:

- Mr Ojo had been the Leaseholder since 2004 and he had a direct contractual relationship with the Landlord. In this case the Second Applicant is an under-lessee and she has only held the under lease since March 2017 following an assignment.
- The Second Applicant is only saying the Internal Block Charge is not payable since 2017 when the Shared Ownership Lease was assigned to the Second Applicant, not from 2007 when the Head Lease was granted or 2014 when the First Applicant became the Tenant.
- Mr Ojo was not disputing that he was liable to pay the service charge and may not have been prejudiced by the incorrect interpretation of the service charge clauses in the lease. In this case the Second Applicant is disputing her liability to pay the Internal Block Charge at all, not just the way the it has been calculated. To require the Second Applicant to pay the Internal Block Charge when she is not required to do so according to the Lease would be prejudicial.
- In addition, it was impracticable to re-calculate Mr Ojo's contribution back to 2004. In the present case the Internal Block Charge for the years in issue is identifiable.

92. The question is to what extent do these points of difference affect the applicability of an estoppel by convention in the present case.

93. Firstly, under paragraph 18.2 of Schedule 4 of the Head Lease the First Applicant is obliged to transfer its obligation to observe and perform the covenants, conditions and obligations of the First Applicant which included the service charge together with its limitations. This requirement is given effect by clause 3.1.3 of the Shared Ownership Lease. The First Applicant is therefore an intermediary and the Second Applicant is the party required to pay the service charge. Therefore, pursuant to section 18 (2) of the Landlord and Tenant Act 1985 the Second Applicant is entitled to question the payability of the Service Charge to the Respondent who is, in effect, in the position of the superior landlord providing the services.

94. Secondly the Shared Ownership Lease was assigned to the Second Applicant in March 2017. The issue for the Tribunal in respect of the estoppel by convention is whether it applies to the Applicants for the period March 2017 to the present time.

95. The Tribunal is of the opinion that if the First Applicant held the Property without underletting it then it would be liable for the service charge. Over the years if it had been paying the Internal Block Charge without question then an estoppel by convention might arise applying the criteria set out in *Mears Ltd v Shoreline Housing Partnership Ltd.* In the event in 2007 the First Applicant

under let the Property and the under lessee became liable for the service charge. Again, over the years if the under lessee had been paying the Internal Block Charge without question then an estoppel by convention might arise, applying the same criteria. However, the Tribunal is not required to consider whether an estoppel by convention arose in those circumstances or for the period from 2007 to 2017 and it accordingly makes no finding.

96. The Tribunal is of the opinion that if it did arise over the period 2007 to 2017 then it would cease on the date of the assignment. The person liable to pay the service charge had changed. Whereas it would be unconscionable and unjust of the one party, who had acquiesced, to go behind the convention relied upon by the other, it would be equally unconscionable and unjust to impose the estoppel on a party who was new to the contract.

97. Applying the law set out in *Mears Ltd v Shoreline Housing Partnership Ltd* to the situation post March 2017:
    (a) There was an assumption by the Respondent that the Property was liable to pay the Internal Block Charge.
    (b) The Respondent's assumption was communicated to the Second Applicant in the form of a statement at the time of the assignment that the Second Applicant was to pay the Internal Block Charge. Between the assignment in March 2017 and 21st May 2019 the Second Applicant found that she was not obliged to pay the Internal Block Charge under the Head Lease. As from March 2017 the Respondent's assumption was not common to the Second Applicant. The Second Applicant did not acquiesce to the Charge and realised the error within a reasonable time of the assignment, i.e. within two service charge years.
    (c) The Respondent relied upon the assumption as it enabled it to claim the full amount of the costs of the Internal Block Charge expended. However, it was not a common assumption. The Second Applicant had been misled initially and realised the error within a reasonable time.
    (d) Notwithstanding that the Internal Block Charge had been paid by the Second Applicant's predecessor over a period of years it was not unconscionable or unjust for the Second Applicant to now insist on the strict terms of her service charge liability within a reasonable time of the assignment.
    (e) The Respondent is seeking to claim the benefit of the estoppel to defend a claim to repay the Internal Block Charge and so meets the requirement for the estoppel being used as a shield as opposed to a sword.
    (f) The Tribunal is of the opinion that any common assumption ceased on the assignment to the Second Applicant.

98. Whereas an estoppel of convention may have applied up to 2017 the Tribunal finds that it ceased to apply from when the Second Applicant was assigned the Shared Ownership Lease.

99. The Tribunal determines that the Internal Block Charge is not payable by the Applicants for the years in issue.

Issue 2

100. As the Tribunal determined that the Internal Block Charge is not payable then the application in respect of reasonableness is unnecessary.

Representations in respect of Section 20C Application

101. Neither party made any representations in respect of the application for an Order under section 20C of the Landlord and Tenant Act 1985.

Decision in respect of Section 20C Application

102. The Applicants applied for an Order under section 20C of the Landlord and Tenant Act 1985 that the Respondent's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.

103. The Tribunal found that the Respondent can claim its costs in respect of these proceedings through the Service Charge under Paragraph 17 of Part 2 of Schedule 7 to the Lease.

104. In deciding whether or not it is just and equitable in the circumstances to grant an order the Tribunal considered the conduct of the parties and the outcome of the proceedings.

105. With regard to the conduct of the parties, they complied with Directions and made appropriate submissions.

106. With regard to the outcome the Tribunal found in favour of the Applicants. In addition, the onus is primarily on the Respondent to apply the Lease and address any failings it may have so far as it is able. The Tribunal therefore makes an Order under section 20C of the Landlord and Tenant Act 1925.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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 2 – THE LAW

The Law

1. The relevant law is contained in the Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.

2. Section 18 Landlord and Tenant Act 1985
   (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, improvement 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 of which the service charge is payable.
   (3) for this purpose
      (a) costs include 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 period

3. Section 19 Landlord and Tenant Act 1985
   (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 provision 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.

4. Section 20B Limitation of Service Charges: time limit on making demands
   (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 the demand for payment of the service charge 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.

5. Section 21B Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge, which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

6. Section 27A Landlord and Tenant Act 1985

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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 arbitration agreement to which the tenant was a party

(c) has been the subject of a determination by a court

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

7. 20C Landlord and Tenant Act 1985

Limitation of service charges: costs of proceedings.

(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 leasehold valuation tribunal or the First-tier 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 the county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the 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 the 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.