FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
RESIDENTIAL PROPERTY

Case reference	**:**	**MAN/00CM/LSC/2020/0034**
Property	**:**	**Ashbrooke Mews, 1-4 Ashbrooke Terrace, Sunderland SR2 7HG**
Applicants	**:**	**The various leaseholders of the Property listed in Schedule 1**
Counsel for the Applicants	**:**	**Mr Edward Blakeney**
Respondent	**:**	**English Rose Estates Limited**
Respondent's Solicitors	**:**	**Protopapas LLP**
Counsel for the Respondent	**:**	**Mr Adam Swirsky**
Type of Application	**:**	**Landlord and Tenant Act 1985 - s 27A & s20C Commonhold and Leasehold Reform Act 2002 - Sched 11 para 5A**
Tribunal Members	**:**	**Mr S Moorhouse LLB** **Mr IR Harris BSc FRICS**
Date & Venue of Hearing	**:**	**18 January 2022 –** **remote video hearing (FVH)**
Date of Decision	**:**	**11 March 2022**

DECISION

DECISION

Buildings Insurance premiums

1. Buildings Insurance premiums for the service charge years 2014/15 to 2020/21 (inclusive) are not recoverable as service charge under the terms of the Applicants' leases.

2. Had Buildings Insurance premiums been recoverable as service charge under the terms of the Applicants' leases the amounts charged, set out in Schedule 2, would have been reasonable and payable.

Other service charges

3. The service charges set out in Schedule 2, other than Buildings Insurance premiums, are reasonable and payable subject to the following changes:-

   Management Charges - the charge of £2,896.39 in 2014/15 is reduced to £1,822.50;

   Key-holding charge - the charge of £450.00 in 2014/15 is reduced to £0.00;

   Professional Fees - the charge of £240.36 in 2019/20 is reduced to £90.36 and the charge of £2,400 in 2020/21 is reduced to £1,500; and

   Loan Interest - the charge under the heading 'General Expenses' of £334.97 in 2019/20 is reduced to £0.00.

Costs

4. The tribunal makes Orders pursuant to section 20(c) of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that any costs incurred by the Respondent in relation to these proceedings shall not be included in the amount of any service charge payable by any of the Applicants or recoverable from any of the Applicants by way of an administration charge.

REASONS

The Application

5. The Application was made on 20 February 2020 by the leaseholders listed in Schedule 1 ('the Applicants'), being all of the leaseholders of Ashbrooke Mews, 1-4 Ashbrooke Terrace, Sunderland SR2 7HG ('the Property'). The Respondent, English Rose Estates Limited, is the Applicants' landlord and the freehold proprietor of the Property.

6. Each of the apartments at the Property (A-I) is held by the relevant leaseholder (or joint leaseholders) under the terms of a lease, the leases being in a consistent form (referred to as 'the Lease'). The Lease makes provision for the payment of service charges, calculated by reference to service charge years commencing 25 March and apportioned between apartments. The

Application challenges certain service charges relating to the service charge years 2014/15 to 2020/21 inclusive. The basis of apportionment between apartments is not in issue.

7. The tribunal is required to determine, pursuant to section 27A of the Landlord and Tenant Act 1985 ('the Act'), whether the service charges in issue are payable. Extracts from the Act are included at Schedule 3.

8. The Property comprises three Victorian terraced houses, which had been substantially converted to provide 9 residential apartments. Throughout the service charge years in issue the Property has been managed by a succession of agents: Avoca to August 2014; Eagerstates to September 2015; then Kingston Property Services to 12 December 2020 at which time the leaseholders' Right To Manage company took over. Kingston Property Services provided their 'actual' figures for 2020/21 during the course of the proceedings, therefore none of the amounts in issue were estimates.

Procedural matters

9. Following submission of the Application, Directions were issued. Pursuant to Directions (and with various extensions of time and additional directions having been issued) the following submissions were made: (1) certain financial information was supplied by the Respondent; (2) the Applicant submitted a Statement of Case in the form of a Scott Schedule with accompanying documents; (3) the Respondent submitted a response opposing the Application; (4) the Applicants made a submission in reply; (5) the Respondent made an additional submission in reply; and (6) the Applicants replied to the Respondent's additional submission.

10. The hearing took place on 18 January 2022, by FVH, Mr Blakeney appearing for the Applicants and Mr Swirsky for the Respondent. Also in attendance were Applicants Karen Hopkins and Julie Chisholm and, for the Respondent, Director Ben Fugler, Solicitor David Berens and Martin Knotts of Kingston Property Services. The tribunal and parties had the benefit of a hearing bundle comprising the Application and the various submissions listed above.

11. A number of preliminary issues were identified at the outset of the hearing and in its early stages. In each case the parties were given the opportunity to make representations.

12. Mr Blakeney submitted (immediately prior to the hearing) a written document setting out his Skeleton Arguments, with copy reports of cases referred to. This included submissions on two issues not raised previously by the Applicants in their written submissions. First it was argued that the Lease made no provision for Buildings Insurance premiums to be recovered from leaseholders by way of service charge. Second, it was argued that Buildings Insurance premiums for 2016-2018 were unnecessarily inflated as a result of a claim on the policy following flooding on the estate - it was argued that the insurance claim should not have been made given that the water authority had admitted responsibility. The Respondent opposed the admission of a further submission beyond the scope of earlier Directions and the introduction at the

hearing of significant issues not previously raised. The Respondent sought an adjournment in the event that these additional issues were to be considered.

13. Mr Blakeney further asked the tribunal to allow one of his clients, Karen Hopkins to assist in the presentation of the Applicant's case in relation to the written documents she had prepared. The Respondent opposed this since it might allow the admission of witness testimony - no witness statements had been included within the Applicants' written submissions.

14. The Applicants additionally sought to increase the number of items in issue beyond those set out in the Application by introducing within their Scott Schedule an additional service charge year (2013/14) and a number of additional service charge items relating to those service charge years that had been included in the Application. The tribunal identified the discrepancies between the Application and the Scott Schedule in the course of the hearing and the Respondent opposed any amendment to the Application.

15. The Respondent's submissions included an argument that the leaseholders had 'agreed or admitted' the service charges in each of the service charge years in issue up to and including 2018/19, within the meaning of section 27A(4)(a) of the Act. If the tribunal found in favour of the Respondent on this point then the tribunal would have no jurisdiction in relation to most of the disputed service charge years and would be bound to dismiss the Application insofar as it related to these years. It was suggested for the Respondent therefore that this be taken as a preliminary matter.

16. The tribunal has an overriding objective under The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the Procedure Rules') to deal with cases fairly and justly. This includes acting proportionally having regard to the case's importance, costs and resources of the parties, and avoiding delay so far as is compatible with proper consideration of the issues.

17. Having regard to these principles, the tribunal allowed the admission of Mr Blakeney's Skeleton Arguments and accompanying case reports, and the introduction of the additional issues concerning Buildings Insurance (terms of the Lease, and relevance of the water company's alleged admission of responsibility). The tribunal took into consideration in particular the Applicants' lack of legal representation prior to appointing Counsel for the hearing on a direct access basis. The tribunal denied the Respondent's request for an adjournment, in view of the substantial delay and additional cost that would likely be incurred, and gave oral directions allowing 21 days after the date of the hearing for any written submission on these issues by the Respondent, and 14 days from receipt of this for any written reply by the Applicants.

18. The tribunal's denial of the Respondent's request for an adjournment was challenged by the Respondent within the additional written submission allowed by the tribunal. These further issues concerning procedure are addressed by the tribunal later in this decision document, alongside the issues of whether insurance premiums were payable under the Lease and/or reasonable in amount.

19. The tribunal allowed Karen Hopkins to assist Counsel in presenting the Applicants' documents, but not so as to introduce witness testimony. The tribunal refused to amend the Application so as to include an additional service charge year, 2013/14. The tribunal was prepared to consider service charge items in the service charge years listed in the Application that were included on the Scott Schedule, whether or not mentioned in the application form. In this respect the Respondent had been instructed in Directions to provide financial information for the service charge years that were the subject of the Application and, with the benefit of this information, the Applicants were instructed to identify any items in dispute. The tribunal considered it to be in the interests of fairness and justice to allow the Applicants, once they had the financial information from the Respondent for the service charge years in the Application, to dispute items not identified in the application form related to those years - the Applicants did not have all of these financial details at the time they made the Application and the Respondent had had the opportunity to include these additional items in the Respondent's written submission in response.

20. The tribunal decided not to take separate submissions and determine at the outset of the hearing the issue of whether service charges (up to and including 2018/19) had been admitted or agreed. Taking these arguments as part of Counsel's overall submissions for determination post-hearing, rather than recessing for deliberations on this single issue, helped limit the hearing to a single day, minimising cost and delay.

21. In proceeding with its deliberations the tribunal had the benefit of the parties' submissions at the hearing and the various written submissions, including additional submissions post-hearing concerning buildings insurance. The tribunal determined first whether any service charges had been admitted or agreed and went on to consider the various categories of service charge in issue. Disputed service charge items are listed at Schedule 2.

Service Charges admitted or agreed

Submissions

22. In the Respondent's written statement of case it was submitted that under section 27A(4) of the Act the Applicants were not entitled to make the Application in relation to any matter that has been agreed or admitted. Subsection (5) provides that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. It was submitted for the Respondent that the Applicants had made repeated payments of the service charge demands for the period they now seek to challenge and had not previously challenged the amounts payable (although they had challenged the quality of the services provided). It was submitted therefore that for all of the service charge years in issue up to and including 2018/19 the Applicants had agreed or admitted the service charges and that the Application should be dismissed in relation to those years.

23. The case of *Peter Cain v Mayor and Burgesses of the London Borough of Islington [2017] EWCA Civ 76* was cited for the Respondent. It was argued at

the hearing that whilst section 27A(5) precluded a single payment from being taken to infer admission or agreement, multiple payments may suffice (para 17 of *Cain* being relied upon) - it was a question of fact and degree in every case. The question (referencing para 25) was whether there were 'any facts and circumstances' from which it could be found that service charges had been agreed or admitted.

24. The Respondent referred to copy emails within the hearing bundle, arguing that the tenor of these was not to say service charges were not payable, most of the content comprised requests for further information. It was submitted that only cleaning had been complained of, and in that case the complaint related to the time spent on site, and the only other complaint of substance was that buildings insurance was too high. It was submitted that between 2015 and 2019 the Applicants were silent for 4 years with no complaints. The alleged lack of complaints was likened to the circumstances in *Cain*. It was argued that the Applicants should have brought proceedings earlier, and made it clear if they were making payments under protest. It was submitted that the Applicants accepted by and large that the services in issue had to be provided, the only dispute being as to quality and cost. If the cleaning service had been as bad as the Applicants were now saying, frequent complaints would have been expected but as it was there were 2-3 emails raising issues, one of which was the time spent at the Property. Further information on electricity charges had been sought but everyone agreed electricity had to be supplied and the meters read. The Respondent additionally submitted that it had been difficult to locate documents from so long ago.

25. The Respondent made reference to other legal proceedings in which the Respondent had reached a settlement with certain Applicants concerning money in the reserve fund for the Property. Citing *Cain* and the earlier Upper Tribunal case referenced in *Cain* of *Shersby v Greenhurst Park Residents Company Limited [2009] UKUT 241 (LC)*, the Respondent argued that the tribunal should take into consideration the failure in the earlier proceedings to raise the issues now before the tribunal.

26. The Applicants differentiated *Cain* on the basis that in *Cain* the challenge under section 27A(4) was raised as a preliminary matter prior to disclosure or statements of case, thereby avoiding costs. The Applicants submitted that the only applicable legal principle from *Cain* was that the issue of agreement or admission is fact sensitive. In the present case it was submitted for the Applicants that there had been no admission that service charges were payable and that the Respondent had admitted this to be the case. In this respect the Applicants referred to the Scott Schedule page headed 'Additional Items - Breach of Covenant'. In four places, within the column headed 'Landlord Comments', the Respondent had commented 'level of service charge always been challenged by tenants'. These comments were added in the context of allegations by the Applicants that the Respondent had failed to (1) meet commitments in the Lease to create a reserve of funds to cover the cost of major works, (2) maintain the 'high class' standard of the Property, (3) paint the interior every 5 years and, (4) repair and properly maintain the entry phone system.

27. The Applicants submitted that they had received consistent advice from a local solicitor in September 2014 and then from 'LEASE' on several occasions from 2018 onwards that they had no right to refuse to pay service charges as it would ultimately result in forfeiture. It was submitted that they had instead paid, including a statement that this was 'under protest', raising their right to dispute the charges. It was submitted that charges had been disputed frequently and consistently. Reference was made to a number of emails in the hearing bundle dating back to 2014 and it was submitted that if all of the complaints had been included in the bundle the bundle would have extended to 2000-3000 pages.

28. The Applicants disputed the Respondent's point that the issues in the present case could have been raised in the context of court proceedings concerning reserve funds, and submitted that *Cain* supported the Applicants' position on this. Failure to raise issues before an earlier first-tier tribunal had been considered to be relevant in *Shersby*, however in the present case, the earlier proceedings were not before a first-tier tribunal and were entirely different in nature.

Findings & Determination

29. The tribunal considered first the Upper Tribunal case of *Cain*, upheld subsequently by the Court of Appeal. In *Cain* His Honour Judge Nigel Gerald stated (at para 17) that the wording 'by reason only of having made any payment' in sub-paragraph (5), put another way, meant that a single payment on its own without more will never be sufficient, there must always be other circumstances from which agreement or admission can be implied or inferred - those circumstances may be a series of unqualified payments over time, which, depending on the circumstances, could be quite short, it is always a question of fact and degree in every case.

30. His Honour Judge Gerald referred to the *Shersby* case by way of illustration. In *Shersby* a section 27A application had been made on the issue of insurance premiums. The appellant in that case had done more than simply make service charge payments for the years in issue. He had waited a long time before seeking to challenge them and in the meantime had made a separate application to a leasehold valuation tribunal raising various matters regarding charges but not raising any matter as regards the insurance premiums - the earlier LVT proceedings were then withdrawn without insurance premiums being raised as an issue. The combination of the repeated payments, without complaint or reservation, coupled with the lapse of time and with the express challenging of certain matters but not the insurance matters, led the Upper Tribunal to conclude that the appellant must be taken to have agreed or admitted these matters.

31. In *Cain* (at para 25) His Honour Judge Gerald determined that the first-tier tribunal was entitled to find that service charges had been admitted or agreed based purely upon the series of payments in respect of the demanded service charge throughout a six year period, and subsequently, without reservation, qualification or other challenge or protest. Judge Gerald went on to say that the first-tier tribunal probably went too far in one respect. A disputed service charge had been the subject of proceedings in the county court and referred to

a leasehold valuation tribunal to determine reasonableness. The first-tier tribunal in *Cain* held that the matters in issue should have been raised in the earlier referral to leasehold valuation tribunal - Judge Gerald pointed out that a case referred from the county court is confined to the matters referred and the LVT would not have had the latitude to consider the matters that later came before the first-tier tribunal in *Cain* without a fresh application having been made.

32. Applying these principles to the present case, the earlier legal proceedings concerning reserve funds had been different in nature to the present proceedings and had not been before a first-tier tribunal. The fact that the service charge issues before the present tribunal were not addressed in those earlier proceedings did not imply or cause the tribunal to infer that the service charges had been agreed or admitted.

33. In determining whether the service charges (up to and including the service charge year 2018/19) had been agreed or admitted, the tribunal considered whether there were any circumstances from which such admission or agreement could be inferred or implied. The tribunal noted that the Application was made on 20 February 2020, almost six years after the commencement of the earliest of the service charge years in issue. Over this time multiple service charge payments had been made by the Applicants.

34. Copy emails within the hearing bundle dated back as far as 2014 and evidenced some degree of challenge. In an email dated 24 October 2016 from Karen Hopkins (as Chair of Ashbrooke Mews Residents Association) to Kingston Property Services the quality of cleaning services was raised. In an email from Karen Hopkins (in the same capacity) to Eagerstates dated 30 March 2015 there were queries regarding missing invoices for emergency light repair and lighting replacement and it is stated 'there has been some concern regarding the payment of service charges including the section 20 works planned to replace the windows and repaint the exterior'. A further email from the same sender addressed directly to the Respondent and dated 8 April 2015 summarised a telephone conversation and stated 'I informed you of our difficulty in determining the 'reasonableness' of the recent service charges from Eagerstates because invoices were missing and some were not sufficiently detailed to allow a fair assessment to be carried out'. Then in 2019 Karen Hopkins emailed Kingston Property Services concerning buildings insurance, stating 'Julie and I have continuing concerns about this area of charges'.

35. It was claimed by the Applicants that the hearing bundle did not contain all of the relevant correspondence between the parties over the period in question, however the tribunal could only consider the evidence before it.

36. The tribunal considered the Respondent's own statement, added to a page of the Scott Schedule, that the level of service charge had always been challenged by the tenants. The Respondent had made this same statement repeatedly in response to allegations that the Respondent had fallen short of meeting the landlord's obligations under the Lease.

37. Whilst the lapse of time prior to making the Application and multiple payments made in the meantime might imply or infer agreement or admission that the service charges were payable, the Applicants were able to give a reason for making the payments (fear of forfeiture), and there was evidence of some degree of challenge in the copy emails within the hearing bundle.

38. The tribunal considered it very significant that the Respondent had submitted in the context of alleged covenant breaches that the tenants had always challenged the levels of service charge. This lended credence to the Applicants' submission that the payments were being made under protest and had been disputed frequently and consistently. The Respondent's statements in the Scott Schedule appeared to be contrary to the Respondent's argument that the service charges (up to and including 2018/19) had been agreed or admitted.

39. Taking all of these matters into consideration, the tribunal determined that none of the service charges in issue in the present proceedings had been agreed or admitted by the Applicants within the meaning of section 27A(4) of the Act.

Buildings Insurance

Submissions

40. The Applicants disputed the Buildings Insurance premiums, charged to them as service charges, for all of the years in the Application (20145/15 to 2020/21 inclusive). The amounts are set out within Schedule 2.

41. The Applicants arguments can be summarised as follows: (1) the Lease does not permit for insurance premiums to form part of the service charge; (2) premiums for 2016-2018 were unnecessarily inflated as a result of an unnecessary claim on the policy following flooding on the estate; and (3) the premiums were in any event excessive and/or inflated with additional charges imposed by the Respondent. These arguments are taken in turn.

Lease does not permit insurance premiums to form part of the service charge

42. The Applicants submitted that their liability to pay service charges is contained in Clause 3(i) of the Lease:

'pay to the lessor such sum per annum as may be notified to the Lessee by the Lessor from time to time as representing a fair and proper proportion of the reasonable estimated amount required to cover the cost and expenses incurred or to be incurred by the Lessor in carrying out the obligations contained in the covenants set out in the First Part of the Sixth Schedule hereto (hereinafter together called "the Management Charges") such estimated sum to be payable half yearly in advance on the dates specified for the payment of rent in clause 1 hereof.

<u>AND IT IS HEREBY DECLARED</u> that the Management Charges shall include (without prejudice to the generality of the foregoing)

(a) all remuneration fees charges costs expenses and outgoings incurred in pursuance of Clause 4 hereof'

43. It was submitted that: Clause 4 of the Lease contains no reference to insurance but concerns the running of the Estate; the covenant to insure the Estate is contained in Clause 5.2, which requires the Respondent to pay the premiums on the due dates, and is not cross referred to, nor conditional upon, the covenant to pay service charges; and the First Part of Schedule 6 contains no reference to insurance. Accordingly, the Applicants submit, the insurance premiums fall outside the service charge machinery.

44. The Respondent submitted that throughout the period covered by the Application, and before, the parties have treated the insurance premiums as though they were covered by Clause 4 of the Lease and/or otherwise formed part of the service charge. The Respondent accordingly raised the following issues: whether there is an implied term of the Lease that Buildings Insurance premiums are recoverable as service charge; whether liability for premiums is covered by other provisions of the Lease; and whether the Applicants are estopped from denying that Buildings Insurance premiums are recoverable.

45. On the issue of 'implied terms' the Respondent referred to the 'business efficacy test' and the 'officious bystander test'. The cases of *Marks & Spencer Plc v BNP Paribas Securities Services [2016] AC 742* and *Swainland Builders Ltd v Freehold Properties Ltd [2002] EWCA Civ 560* were cited. *Marks & Spencer* concerned a commercial lease and in it the court made observations on the application of the 'business efficacy test'. *Swainland* was cited in relation to lease rectification - in *Swainland* the necessary conditions for a court to rectify a lease were identified.

46. The Respondent contended that whilst there was no express term in the Lease requiring the Applicants to pay the insurance premiums through the service charge, such a term is implied since the Applicants and their predecessors have paid the premiums as part of the service charge, the Applicants accepted their liability for such charges (until Skeleton Arguments were submitted), any notional reasonable person in the position of the parties considering the Lease would have pointed to the necessity for such a clause to be included, there is no business reason for the sums not to be reimbursed and the implied term is necessary to give business efficacy to the Lease. It was further contended that if such a clause could not be implied, then since the criteria for rectification would be met, the mistake would be rectified on further costly court proceedings.

47. The Applicants cited the case of *Sadd v Brown [2012] UKUT 438 (LC)* contending that whilst the decision pre-dates *Marks & Spencer*, the principles are applied in the same manner in both cases and *Sadd* should be treated as binding authority on the tribunal.

48. The Applicants argued that the Respondent's contention that there was no business reason for the premiums not to be reimbursed was irrelevant to the question of whether a term should be implied. The question was whether such a term was necessary for business efficacy and it was submitted that it was not. It was further submitted that such a term was not so obvious it goes without saying - it was more likely that the omission was intentional. The

Applicants contended, relying on *Sadd*, that even if a term had been omitted by mistake this would be insufficient to imply a term that would radically alter the express obligations set out in the Lease.

49. The Applicants referred also to the Respondent's submission concerning rectification. It was argued for the Applicants that this issue was irrelevant to the construction of the Lease and that in any event the Respondent's submissions on this issue were misplaced - *Swainland* concerned a transfer and rectification application brought between the original contracting parties, intention at the time of execution was relevant and the case was simply not relevant to the circumstances in the present case.

50. On the issue of 'other Lease provisions' the Respondent contended that Clauses (C)(i) and (ii) of the lease allowed for recovery by the Respondent of the Buildings Insurance premiums they incurred. These provisions are as follows:

'(C)*(i) The Lessee will pay discharge and perform all general and water rates main drainage rates and all other taxes rates charges duties assessments impositions outgoings and obligations whatsoever now taxed charged rate assessed or imposed or which shall at any time hereafter during the said term be taxed charged rated assessed or imposed upon the demised premises or any part thereof or upon the owner or occupier thereof*

(ii) If at any time the assessment of any of the outgoings or obligations specified herein in respect of the demised premises (whether alone or with other property) shall be made on the Lessor then the Lessee will on demand pay to the Lessor an amount equal to the said outgoings.....'

51. The Applicants relied on *Sadd*, contending that provisions almost identical to Clauses (C) (i) and (ii) were considered by the Upper Tribunal in that case and that the clauses were intended to cover matters such as local taxes or statutory charges. It was submitted that the Upper Tribunal had confirmed the First-tier Tribunal's construction of such clauses as concerning '*sums levied compulsorily upon land*' - that was particularly so when there were specific provisions in the lease dealing with the landlord's contractual obligation to insure.

52. On the issue of estoppel, the Respondent submitted that an estoppel by convention arose in the present case. *Republic of India v India Steamship Co Ltd ('The Indian Endurance and the Indian Grace') [1998] AC 878* was cited. At 913-914 Lord Steyn described estoppel by convention as follows: *'[A]n estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an 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 the assumption. It is not enough that each of the two parties acts on an assumption not communicated to the other. But....a concluded agreement is not a requirement.'*

53. It was submitted for the Respondent that estoppel by convention required mutually manifest conduct by the parties based on a common, but mistaken, assumption of law or fact. It was submitted that once the common assumption was revealed to be mistaken, the parties would be estopped from departing from it for the purposes of regulating their rights *inter se* for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so. It was submitted that it was not, however, sufficient to show only a common understanding, the party seeking to rely upon the estoppel must also establish that there was an agreement or convention by which the parties regulated their dealings and that they communicated the mistaken assumption or understanding to the party seeking to resile from the estoppel, and that the latter either shared the mistake or acquiesced in it - the communication may be by words or conduct, it was not necessary to establish a clear and unequivocal representation of the kind that would give rise to estoppel by representation. It was submitted that the party seeking to rely upon the estoppel must be able to point to some detriment that would result if the other party were free to depart from it, or some benefit that would thereby be conferred on the party seeking to resile, sufficient to make it unjust or unconscionable for the true legal or factual position to be asserted.

54. The Respondent cited *Clacy v Sanchez [2015] UKUT 0387*, a case concerning the certification of service charge and *Admiralty Park Management Co. Ltd v Ojo [2016] UKUT 421*, a case in which acquiescence by the lessee in the method of calculating service charge liability was sufficient to establish an estoppel by convention.

55. The Respondent submitted that lessees over the 20 years since the leases of the apartments at the Property were granted had acquiesced in the mistake (if there was such a mistake) by paying the premium as requested and some had further acquiesced by sending correspondence that accepted their liability to pay the premium. It was submitted that the Applicants further acquiesced through representations in the present proceedings and that two of the Applicants (Apartments C and D) had served statutory notices requiring insurance details predicated upon them being a tenant of a dwelling with a service charge 'which consists of or includes an amount payable directly or indirectly for insurance'. The Respondent submitted further that the Respondent would suffer a detriment if the Applicants were allowed to resile from the convention. It would be liable to repay premiums previously recovered through service charge (subject to all the usual defences - change of position and limitation) and, going forward, it would have to cover the premium itself.

56. The Applicants submitted that the law on estoppel by convention had recently been reviewed by the Supreme Court in *Tinkler v HMRC [2021] UKSC 39*, and that that decision confirmed the correctness of *Revenue and Customs Commrs v Benchdollar Ltd [2009] EWHC 1310 (Ch)* and *Blindley Health Investments Ltd v Bass [2015] EWCA Civ 1023*. The Applicants refuted the Respondent's submission by reference to the statement of legal principles by Mr Justice Briggs in *Benchdollar* appearing at paragraph 45 of the *Tinkler* decision, and the one amendment to this made by the Court of Appeal in *Blindley Heath*.

57. The Applicants submitted that *Clacy* did not support the Respondent's position as there was an express agreement in that case that the lease provisions need not be complied with, and the parties conducted themselves for many years in accordance with this agreement. *Admiralty Park Management* was also differentiated from the present case on the basis that the tenants had challenged the service charges in previous proceedings and had not taken issue with the service charge calculations - hence it was too late in subsequent proceedings to allege the method of calculation was not in accordance with the lease.

58. The Applicants cited *Jetha v Basildon Court Residents Co Ltd [2017] UKUT 58 (LC)* in which, it was submitted, the Upper Tribunal confirmed that non-compliance over a period of time is not, without more, sufficient to create an estoppel. It was also submitted that in *Sadd*, the fact that the parties had acted on the assumption that insurance premiums were recoverable, and the fact that solicitors and mortgagees had not picked up on the point, did not mean that the tenants could not rely upon the express terms of the lease.

P*remiums for 2016-2018 inflated due to unnecessary claim*

59. The Applicants contended that insurance premiums in the period 2016-2018 were inflated as a consequence of an insurance claim made by the Respondent in respect of flooding to the Property occurring on 25 December 2015. It was submitted that the claim was unnecessary since the water authority had admitted the flooding was their responsibility, and that it was therefore unreasonable to pass the cost onto the Applicants. The cases of *Continental Property Ventures Inc v White [2007] L&TR4* and *Avon Ground Rents Ltd v Cowley & Ors [2019] EWCA Civ 1827* were cited.

60. The Respondent confirmed that the flood had occurred, there had been a claim on the policy and, following an investigation, the insurer had made a payment. It was submitted that the damage to the common parts had been minimal, most of the work had been to Apartments D and G. The Respondent argued that the circumstances in the *Continental* case were different (failure to call on a guarantee) and that in *Avon Ground Rents* an advance payment was reduced by a Tribunal on the basis that there was a high chance of some, or all, of the money being paid by an insurance policy - the only issue considered by the Court of Appeal was the extent to which the landlord was entitled to charge for repairs in advance, pending receipt of the insurance money.

61. The Respondent argued that it had not been proven that the water company accepted responsibility, and even if this had been confirmed this did not mean the cost would be paid in full in a timely manner. It was argued that it was appropriate in any event to make a claim on the insurance, even if there was later recovery of the costs of remedial work from the water company.

Premiums excessive and/or inflated with additional charges imposed

62. The Applicants submitted that Buildings Insurance premiums were excessive, pointing to an insurance quote they obtained themselves in 2019, arranged through the existing insurer. Reference was made also to an instance in the insurance period 14 May 2017 to 13 May 2018 in which there was a £5,974.48

discrepancy between the policy schedule and invoice, which was then the subject of a credit note. This reduced the insurance premium for the period from £15,896.48 to £9,922.00. The Applicants argued that had they not challenged the inflated and increased premium, they would have been charged the inflated figure - this raised doubt over the figures for other years which might also have been inflated and increased when passed on to the Applicants if not challenged as vociferously.

63. The Respondent commented on the Applicants' alternative quote, submitting that without the documents upon which it was based it could not be assumed to be a like-for-like comparison. It was submitted that the reduction in the premium for the insurance period commencing 14 May 2017 was attributable to further engagement with the insurers following the representations received from the Applicants and that the premiums were reasonable and payable.

Procedural Unfairness

64. The Respondent additionally submitted that the tribunal's refusal in the course of the hearing to agree to an adjournment was unfair to the Respondent. The Respondent contended that the additional issues concerning Buildings Insurance raised by the Applicants (terms of the Lease and relevance of the water company's alleged admission of liability) were not limited to matters that could be dealt with by submissions: evidence was required (which was particularly the case in respect of acquiescence and detriment when considering estoppel by convention). The Respondent cited the overriding objective within the Procedure Rules and cited the cases of *Regent Management Limited v Jones [2012] UKUT 369 (LC)* and *Birmingham City Council v Keddie [2012] UKUT 323 (LC)*.

65. In relation to the latter case the Respondent drew the tribunal's attention to the following words of His Honour Judge Gerald: '*In those rare cases where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submissions and if appropriate adducing further evidence in respect of the new issue before reaching its decision'*.

66. The Respondent argued that where a new point is raised at a hearing, the tribunal must as a matter of natural justice give both parties the opportunity to adduce further evidence in respect of the new issue.

67. The Applicants submitted that both of the cases cited for the Respondent concerned circumstances where (a) the tribunal raised points of its own volition and (b) did not give the party the opportunity to respond. In response to the Respondent's contention that there must be the opportunity to adduce further evidence, it was argued for the Applicants that such mandatory language was inflexible and unrealistic - each case was fact sensitive and depended on its own circumstances.

Findings & Determination

Lease does not permit insurance premiums to form part of the service charge

68. It was common ground that there was no express term within the service charge provisions of the Lease for the recovery of Buildings Insurance premiums. On the issue of implied terms, the Supreme Court in *Marks & Spencer* made certain observations which were set out in the additional submission made on the Respondent's behalf.

69. Applying these principles the tribunal considered that it was not necessary to imply a term (for recovery of premiums) to give business efficacy to the Lease, and considered that such a term would not have been obvious to the parties (i.e. notional reasonable people in the position of the parties at the time at which they were contracting). The Lease did not lack commercial or practical coherence without such a term. It was not a question of what appears fair, or whether the parties would have agreed such a term if it had been suggested, but one of business necessity and obviousness.

70. The tribunal accepted the Applicants' contention that the *Sadd* case constituted binding authority. The circumstances in that case were similar to those in the present case, there being no express term within the service charge provisions of a lease for the recovery of insurance premiums. The Upper Tribunal found in favour of the tenants, even though until the application to the Leasehold Valuation Tribunal all parties had been proceeding on the understanding that the lease allowed recovery. Her Honour Judge Alice Robinson stated '*it does not automatically follow that if one party agrees to provide a service or pay for something the other party is obliged [to] reciprocate*', and later stated '*the fact that such a term would be reasonable or was probably omitted by mistake is not enough. The lease is not unworkable without such a term*'.

71. In the present case, notional reasonable people in the position of the parties when they were contracting would not, in the tribunal's view, have found found it 'obvious' that a term for recovery of premiums must be implied. The Lease is for a term of 125 years at a ground rent of £150 that increases at intervals during the Lease term. Whilst the Buildings Insurance benefits the leaseholders, it is also of benefit to the Respondent. A scenario in which the Respondent insures the Property at its own expense in consideration for the rent payable is, at the very least, conceivable. Such an arrangement would not, in the tribunal's view, lack business efficacy. The lease is not unworkable without an implied term for recovery of premiums. To imply such a term would be to effectively rewrite the Lease, particularly as the items covered by the service charge are set out together in the First Part of the Sixth Schedule, whilst the obligation for the landlord to insure is set out elsewhere at Clause 5.2. For these reasons the tribunal considered there to be no implied term, within the service charge provisions of the Lease, for the recovery of Buildings Insurance premiums.

72. On the issue of whether there were other provisions of the Lease allowing the recovery of Buildings Insurance premiums, the Respondent relied upon Clauses C(i) and (ii) of the Lease. The tribunal considered these clauses to be similar in nature and intent to provisions in issue in *Sadd*.

73. The relevant clause in *Sadd* read:- '*To pay and discharge and indemnify the Lessors against all rates duties charges assessments impositions and outgoings whatsoever (whether Parliamentary Parochial Local or of any other description) which are now or may at any time hereafter be assessed charged or imposed upon or payable in respect of the demised premises by the owner or occupier thereof*'.

74. In *Sadd*, the Upper Tribunal determined that the wording did not naturally extend to payment of a sum due under an insurance contract voluntarily entered into by the lessor. The Upper Tribunal agreed with the First-tier Tribunal's approach, i.e. that the wording concerned sums levied compulsorily upon land, whether as national or local taxation or statutory charges, that it was misconceived to argue that this included insurance premiums negotiated by the lessor, and that this would especially be so where there were specific provisions in the lease dealing with the lessor's contractual obligation to inure.

75. The tribunal placed reliance upon the Upper Tribunal decision in *Sadd* in concluding that Clauses C(i) and (ii) did not allow for the recovery by the Respondent of the Buildings Insurance premiums it incurred. The wording of the clauses did not cross-reference the insurance provisions of the Lease and related to taxation and statutory charges - such matters as Council Tax and utility bills.

76. Turning to the issue of estoppel, the tribunal's starting point was the statement of legal principles by Mr Justice Briggs in *Benchdollar*, included at paragraph 45 of the *Tinkler* decision. The principles were as follows:- *(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.'*

77. An additional requirement was introduced in *Blindley Heath*: in relation to the first principle set out in the above paragraph '*something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption*'.

78. The tribunal considered the meaning of Mr Justice Briggs' fifth principle. The use of the word 'thereby' (both times it appeared) indicated that the detriment or benefit referred to must have arisen as a result of the matters in the preceding principles. In the present case it is argued for the Respondent that the estoppel arises in respect of a convention that insurance premiums are rechargeable to lessees.

79. Even if it were established that a common assumption that premiums were rechargeable was expressly shared (principle (i)), that the lessees had assumed some element of responsibility for this assumption (principle (ii)), that the Respondent had relied upon the common assumption that premiums were rechargeable to a sufficient extent (principle (iii)) and that the Respondent had relied upon the assumption in its dealings with the lessees (principle (iv)), it would then need to be established that reliance upon the common assumption in its dealings with the lessees had been of detriment to the Respondent or had been of benefit to the lessees.

80. The tribunal considered that this clearly would not have been the case. The Applicants have not had a benefit conferred as a result of being charged for Buildings Insurance premiums, over many years, that under the terms of the Lease should not have been recharged. The Respondent has not suffered a detriment by recovering premiums it was not entitled to recover under the terms of the Lease. Neither party identified within any submission any detriment suffered by the Respondent or benefit enjoyed by any leaseholder as a consequence of the leaseholders being incorrectly charged for insurance premiums.

81. The Respondent contended that the party seeking to rely on the estoppel must be able to point to some detriment that would result if the other party were free to depart from it, or some benefit that would thereby be conferred on the other party. The Respondent contended that it would indeed suffer a detriment if the Applicants were allowed to resile from the alleged convention. These arguments appeared to be based upon a misinterpretation of principle (v). The test was not whether there would be detriment/benefit if the parties were to depart from the alleged convention and instead adhere to the Lease.

82. The tribunal's interpretation of principle (v) is consistent with the *Benchdollar* and *Tinkler* decisions. In *Benchdollar* HMRC had suffered detriment from reliance upon a common assumption, and the employer in that case had benefited, meaning that it was unfair or unjust for the employer to later resile from the common assumption. In *Tinkler* HMRC had suffered detriment as a consequence of relying upon an affirmed common assumption that a valid enquiry had been opened - the detriment occurred because, as a result, HMRC did not send another notice of enquiry within a 12 month time limit.

83. For the reasons given, the tribunal determined that an estoppel by convention does not arise in the present case. Since the test in principle (v) of Mr Justice Briggs' statement of principles in *Benchdollar* had not been satisfied, it was unnecessary for the tribunal to go on to consider the other principles, (i) to (iv) or the additional requirement in *Blindley Heath*.

84. Reference was made within the various submissions to the possibility that the Respondent might seek the rectification and/or variation of the Lease. These matters were beyond the remit of the tribunal, and the tribunal expressed no view on them. The tribunal did however recognise the possibility that as a consequence of future proceedings or negotiations, a determination might be required as to whether the Buildings Insurance premiums in issue would have been reasonable and payable had the Lease included a right of recovery. For this reason the tribunal went on to address the remaining issues concerning the reasonableness and payability of Buildings Insurance premiums.

Premiums for 2016-2018 inflated due to unnecessary claim

85. It was common ground between the parties that flooding had occurred on 25 December 2015. A copy letter from Northumbrian Water dated 8 January 2016 stated that the company was sorry to learn of the flooding, explained that a blockage was identified within a sewer which was cleared and that further onsite investigations were undertaken which identified remedial works were required within the apparatus. Within email correspondence in August 2018 between the Applicants and the Respondent's agent, Kingston Property Services, the Applicant queried why there had been no claim against Northumbrian Water and the agents stated that they had made contact with no response and that there were no grounds to pursue the water company further. It was mentioned in the email that a letter stating Northumbrian Water took full responsibility for the loss had been passed to the Respondent, the insurer and the loss adjustor.

86. The premiums had increased dramatically following the insurance claim, increasing from £1304.84 in 2014/15 to £4,168.97 in 2015/16, £13,718.88 in 2016/17 and £12,918.02 in 2017/18 before reducing to £2,232.74 in 2018/19.

87. The tribunal accepted the Respondent's argument that, on the evidence before the tribunal, Northumbrian Water's liability and willingness to pay for remedial works in a timely manner had not been proven. It would have been appropriate for the Respondent to make an insurance claim and to do so without undue delay. The tribunal considered that even if Northumbrian Water had funded the remedial works in a timely manner, the Respondent would have been obliged to disclose the flooding to the insurers and this would have negatively affected pricing. In these circumstances the tribunal found for the Respondents on this issue. Had Buildings Insurance premiums been recoverable as service charge under the terms of the Lease, the tribunal would have made no adjustment to the amounts payable for any impact on pricing of the insurance claim.

Premiums excessive and/or inflated with additional charges imposed

88. The tribunal considered insurance premiums to be influenced by numerous factors, including property related risks and market conditions. The alternative quote obtained by the Applicants was for £1,950.27 without terrorism cover and £2,092.27 with terrorism cover. It was unclear from the documents provided what information had been provided by the Applicants to the insurer and what factors had been taken into consideration in offering the quote.

89. The reduction of £5,974.48 in the insurance year commencing 14 May 2017 had been passed on to leaseholders at that time. The tribunal was not prepared to make any further adjustment to the premiums on the evidence before it. Accordingly, had Buildings Insurance premiums been recoverable as service charge under the terms of the lease, the amounts set out in Schedule 2 in relation to Buildings Insurance would have been reasonable and payable.

Procedural Unfairness

90. The alleged procedural unfairness related to the tribunal's refusal to adjourn the hearing after agreeing to consider two additional issues: whether Buildings Insurance premiums were recoverable as service charge under the terms of the Lease and the relevance of the water company's alleged admission of liability. Whilst the tribunal allowed for additional written submissions on these issues, the tribunal did not expressly allow for the submission of witness statements and did not agree to reconvene the hearing to permit oral testimony and cross-examination. Having received the Respondent's comments on the issue of procedural unfairness within the additional submission, and the Applicants' response to these comments, the tribunal had the opportunity, if it considered it appropriate, to issue further directions in the light of these and to reconvene the hearing, before reaching its decision.

91. On the first additional issue, recoverability of premiums under the Lease, the question of whether there was an implied term relied upon the tribunal's application of the business efficacy test and the tribunal's assessment of what would have been obvious to notional reasonable people. The question of whether other provisions of the Lease allowed recovery of premiums relied upon the interpretation of the Lease.

92. The tribunal's view on the question of estoppel by convention relied (1) upon the interpretation of the authorities, and (2) upon the application of principle (v) within the statement of principles by Mr Justice Briggs in *Benchdollar*. On this latter point, neither party had identified any benefit conferred on the leaseholders or detriment to the Respondent as a result of the Respondent recovering premiums as service charge in reliance upon the common assumption. With no such benefit or detriment being identified by the parties, the tribunal considered that there was no real prospect that further evidence would demonstrate any benefit to the Applicants in having to pay premiums that were not payable under the Lease, or any detriment to the Respondent in recovering amounts that were not recoverable under the Lease.

93. Having regard to the tribunal's overriding objective to deal with the case fairly and justly, including dealing with it in a way which is proportionate to its importance and complexity, and anticipated costs and resources, the tribunal determined that it was appropriate to proceed to reach a decision on the issue of recoverability under the Lease, including the issue of estoppel, without inviting further evidence or reconvening the hearing.

94. On the second additional issue, the water company's alleged admission of liability, there was no prejudice to the Respondent in proceeding to reach a decision in the Respondent's favour.

Other Service Charge items

95. The other service charge items in dispute are included in Schedule 2. There was a general challenge consistently raised by the Applicants in the Scott Schedule that documentation submitted by the Respondent did not adequately explain or evidence the spend, and a general point was made for the Respondent at the hearing that it had been difficult to locate all of the relevant documents given the time that had elapsed and the changes in management.

96. The tribunal found that costs incurred were not always allocated to the correct service charge category and that it was difficult to reconcile invoices submitted by the Respondent with the service charge accounts. This problem was exacerbated because some of the invoices supplied were irrelevant to the Application as the costs had not been included in the service charge - some related to an insurance claim made by the Respondent.

97. The following findings relate to specific categories of service charge.

Communal electricity charges

98. Communal electricity charges were disputed for all of the service charge years included in the Application except 2017/18. The Applicants submitted that there were 3 meters, one in each block, and that all 3 accounts had been taken over by SSE, some on fixed term contracts. The electricity charges were for the electric gate and for communal lighting in each block. The Applicants submitted that the Respondents had failed to arrange regular meter readings. The Respondent commented that the charge of £4009 in 2014/15 was obviously a mistake and had been corrected by a significant credit of over £2000 the following year. The Respondent further submitted that amounts would vary between years - 2017/18 figures were particularly low due to a refund of £390. It was submitted that even if bills were by reference to estimates of usage, the position would be rectified later by reference to meter readings.

99. The tribunal considered, on the evidence before it, that the communal electricity charges were reasonable and payable. The clearly incorrect charges in 2014/15 had been rectified the following year. There was no comparative information from the Applicants against which to assess the unit cost. The tribunal accepted that any additional costs incurred through reliance on estimated usage were offset once actual figures were obtained through meter readings.

Cleaning charges

100. Cleaning charges were in issue in relation to the service charge years 2014/15, 2015/16 and 2020/21. The Applicants submitted that cleaning took place fortnightly, with only around 30 minutes being spent on site and that the cost (in the years in issue) was too high. Neither party supplied details of the cleaning work required or undertaken. Email correspondence in 2016, referred to earlier, recorded concern that the cleaning team of 2 weren't spending sufficient time on site and that whilst the hall smelt very clean and carpets were freshly hoovered, there was still dirt in places.

101. On the information before the tribunal the cleaning costs were reasonable and payable. Whilst the duration of the visits was drawn to the tribunal's attention and there was evidence of concern over a couple of months in 2016 as to the standard achieved, it was unclear whether in general, over the years in issue, the cost was considered to be excessive for the time spent or the work considered to be sub-standard. The highest charge in issue was the charge of £1854 in 2014/15. On a fortnightly visit this came to an average of £71.30 for cleaning the communal parts of all of the blocks, including providing 2 operatives, their travel time, expenses and overhead costs such as management and administration. This did not appear to the tribunal to be excessive and this was the most expensive year - other years were considerably less.

Management fees, accountancy and key-holding

102. Management charges were disputed in relation to the service charge years 2014/15, 2016/17 and 2020/21. The Applicants' submitted that more cost-efficient management could have been arranged and referred to a lack of stewardship, evidenced for example by a failure to take regular meter readings. The Applicants further referred to the turnover of managers until they ultimately took control themselves through the Right To Manage, various alleged failures on the part of the Respondent to meet its obligations, and argued that a high quote for window replacement was indicative of how the Property was managed.

103. The Respondent submitted that the Property had to be managed and agents engaged. It was submitted that the turnover in agents was not the fault of the Respondent and that the Applicants had been difficult to deal with. It was submitted that the fee was reasonable for every single year.

104. The tribunal accepted that the Respondent had needed to engage agents and noted that the 2016/17 fee of £1620 came to an average of £180 per apartment. This did not appear to the tribunal to be excessive. The fee estimate for 2020/21 was £1724 but due to the Right To Manage a pro-rata fee was charged of £1221.96. Again, the tribunal did not consider this to be excessive.

105. In 2014/15 the fee came to £2,896.39. In this service charge year Eagerstates took over from Avoca. Avoca's estimated fee (within the estimated service charge account) had been £1485 for 2014/15. Eagerstates charged £1080 for the part year, compared to a budget figure for 2015/16 of £2160. The tribunal considered that it was unreasonable for the Respondent to incur and charge to the leaseholders a fee for 2014/15 exceeding the annual fee for either agent. Both agents should have been permitted to charge only a part-year fee on a pro-rata basis.

106. The tribunal did not have the precise date for the change in agent however given that Eagerstates had charged half their estimated annual fee, it was reasonable to calculate a reduction in the management charge for 2014/15, for service charge purposes, by including only half of Avoca's annual fee (50% of £1485 being £742.50). The adjusted management fee for 2014/15 therefore came to £1822.50 (being the Eagerstates charge of £1080 plus £742.50).

107. In 2014/15 a key-holding charge of £450 was charged through the service charge. This was challenged by the Applicants as being unreasonable. The Respondent argued that it was necessary at the time but that subsequently Kingston Property Services provided the same service at reduced cost. The tribunal considered that if the Respondent chose to engage a managing agent out of the area to manage the Property, it was unreasonable to pass on to the Applicants a significant cost of this nature. The tribunal determined that the key-holding charge was not reasonable or payable.

108. Returning to 2020/21, at the time the appointment of Kingston Property Services came to an end, a handover fee of £500 was incurred. Whilst the Applicants were concerned that this was being included within the service charge, it was confirmed by the Respondent in the hearing that this was not the case.

109. An accountancy fee of £354 was also in issue in relation to 2020/21. The Applicants submitted that this related to the final accounts from Kingston Property Services but that these had not been received. The amount itself was not challenged. The Respondent submitted that the fee was necessary as the final accounts had to be prepared.

110. The tribunal considered the accountancy fee to be reasonable and payable.

Professional fees

111. Professional fees were disputed in relation to the service charge years 2018/19, 2019/20 and 2020/21.

112. The fees of £2,742.74 in 2018/19 corresponded to 3 invoices from Lewis Surveying Associates (Yorkshire) Ltd relating to project management fees for window repairs/replacement, a window survey and work to the automatic gates. The Applicants' were not content with these costs given that the window replacement had not proceeded. However there was no compelling evidence to suggest that the invoices were unreasonable in amount having regard to the work undertaken, or that it was unreasonable for the work to be procured. It was common ground that window replacement was required. The tribunal therefore considered the Professional Fees of £2,742.74 in 2018/19 to be reasonable and payable.

113. The fees of £240.36 in 2019/20 corresponded to an invoice in the sum of £90.36 relating to the automatic gates and an invoice in the sum of £150 from law firm Womble Bond Dickinson (UK) LLP ('WBD'). The latter invoice related to advice and collection of arrears relating to one of the apartments at the Property. The Applicants' contended that WBD fees related to arrears recovery were not recoverable as service charge under the Lease. The case of *Kensquare Ltd v Boakye [2021] EWCA 1725* was cited for the Applicants.

114. The Lease terms have been explored already on the issue of Buildings Insurance premiums. The tribunal agreed with the Applicants that the Lease did not provide for legal costs for arrears recovery to be included as a service charge item and that there was similarity between the circumstances of the present case and those in *Kensquare*. Whilst Clause 3(a) expressly included within the service charge all fees incurred in pursuance of Clause 4 of the

Lease, Clause 4 made no reference to arrears litigation, dealing instead with the management of the Property and flats for the purpose of keeping them as high class residences on a high class residential estate, and referring to the landlord's obligations in the First Part of the Sixth Schedule, which in turn concerned only the running of the estate. The sum of £150 corresponding with the WBD invoice forming part of the Professional fees for 2019/20, was not therefore reasonable and payable.

115. The fees of £2,400 in 2020/21 corresponded to 4 invoices. One of these, in the sum of £1500, was from Lewis Surveying Associates (Yorkshire) Ltd and related to the refreshing of the original schedule and re-tender contracts at the Property. For reasons equivalent to those given in relation to the earlier Lewis invoices, the tribunal considered these costs to be reasonable and payable. The remaining 3 invoices were from WBD and related to arrears collection. For the reasons already given the tribunal considered that these fees (totalling £900) were not payable as service charge under the terms of the Lease.

Loan Interest

116. Loan interest of £334.97 was included as 'General Expenses' in the service charge for 2019/20. It was clarified by the Respondent that this was incurred due to the service charge being in arrear, and the invoice dated 21 October 2019 was supplied. The Respondent contended that the loan interest was chargeable under the Lease. The Applicants contended that it was unreasonable to charge interest as a consequence of the Respondent's failure to collect service charge and that it had acted in a manner that was inconsistent and prejudicial. It was submitted for the Applicants that there was no entitlement under the Lease to raise a loan or to include the interest within the service charge, that the Respondent was obliged to carry out its obligations irrespective of recovery and that the reasonable action was to pursue the relevant leaseholder(s).

117. The tribunal found for the Applicants on the issue of loan interest. Whilst the Lease expressly included within the service charge all charges, costs and expenses incurred in pursuance of Clause 4 of the Lease, as has been previously stated Clause 4 dealt with the management of the Property and flats for the purpose of keeping them as high class residences on a high class residential estate, and referred to the landlord's obligations in the First Part of the Sixth Schedule, which in turn concerned only the running of the estate. Accordingly the loan interest of £334.97 was not payable.

General Repairs and Maintenance, Emergency Lighting/Fire Alarm Testing & Repairs

118. The tribunal considered that, in relation to the remaining service charge items in dispute (general repairs and maintenance, emergency lighting and fire alarm testing & repairs), there had been no clear challenge to the reasonableness of the amounts charged. It was not contended that these items fell outside the service charge provisions of the Lease. Without a clear and persuasive argument as to why a particular charge was unreasonable, the tribunal was left to consider itself whether the charge was excessive, having regard to the evidence before it. In principle the tribunal expected to see

charges for general repairs and maintenance. It was also common to see significant spend on emergency lighting testing and repairs, and fire alarm testing and repairs in recent years, due to increased liabilities following recent events.

119. In relation to General Repairs and Maintenance (in 2015/16, 2016/17, 2019/20 and 2020/21), Emergency Lighting Testing and Repairs (2020/21) and Fire Alarm Testing and Repairs (2020/21), in the absence of any compelling evidence to the contrary, the tribunal determined the charges to be reasonable and payable.

Overall Determination regarding Other Service Charge items

120. Overall, having regard to the evidence before it, the tribunal determined that the disputed service charges, other than Buildings Insurance premiums, were reasonable and payable, with the following exceptions:

Management Charges - the charge of £2,896.39 in 2014/15 is reduced to £1,822.50;

Key-holding charge - the charge of £450.00 in 2014/15 is reduced to £0.00;

Professional Fees - the charge of £240.36 in 2019/20 is reduced to £90.36 and the charge of £2,400 in 2020/21 is reduced to £1,500; and

Loan Interest - the charge under the heading 'General Expenses' of £334.97 in 2019/20 is reduced to £0.00.

Costs

121. Section 20C of the Act enables a tenant to apply for an order that all or any of the costs incurred, or to be incurred, in connection with proceedings before a first-tier tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of service charge payable by the tenant or any other person specified in the application. By virtue of section 20(c)(3) the tribunal may then make such order as it considers just and equitable in the circumstances.

122. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 permits a tenant to apply for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs, including costs in proceedings in the first-tier tribunal. The tribunal may make whatever order on the application it considers to be just and equitable.

123. The Applicants indicated their intention to apply for orders under section 20C and paragraph 5A within their application form. Written submissions by the parties addressed the question of whether legal costs incurred by the Respondent in connection with the present proceedings were recoverable from the Applicants under the terms of the Lease. The Applicants asked that orders be made by the tribunal even though, in the Applicants' submission, the Respondent's costs were not recoverable under the Lease, so that the Applicants would be protected from any attempt by the Respondent to pass on

its costs. The Applicants further submitted that the proceedings had been necessary both to challenge sums charged by the Respondent and also to force the Respondent to provide necessary documentation that had been repeatedly requested to no avail.

124. The tribunal did not invite specific arguments on section 20C and paragraph 5A in the hearing due to shortness of time, but instead requested that the parties include any additional representations in writing along with the additional submissions to be made in connection with Buildings Insurance premiums. There were no such additional representations.

125. The tribunal considered it appropriate to make Orders in relation to the entirety of the Respondent's costs. The proceedings brought by the Applicants had been necessary to challenge service charges that the tribunal had determined were, to a very significant extent, irrecoverable under the terms of the Lease or unreasonable in amount. It was unnecessary for the tribunal to determine whether or not any such costs would otherwise have been recoverable under the terms of the Lease.

126. Accordingly, the tribunal made Orders pursuant to section 20(c) of the Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that any costs incurred by the Respondent in relation to these proceedings shall not be included in the amount of any service charge payable by any of the Applicants or recoverable from any of the Applicants by way of an administration charge.

S Moorhouse
Tribunal Judge
11 March 2022

Schedule 1

The Applicants

Apartment A	Praveen Menon and Pradeep Menon
Apartment B	Grant Pearson
Apartment C	Julie Chisholm
Apartment D	Karen Hopkins
Apartment E	Jim Bradshaw
Apartment F	Pete Razaq (on behalf of Kans and Kandy)
Apartment G	Ian Sharratt
Apartment H	Paul Willets
Apartment I	Cameron Kiggell

Schedule 2

Disputed service charge items

2014/15:	Buildings Insurance	£1,304.84
	Electricity (communal)	£4000.09
	Cleaning	£1,854.00
	Management Charges	£2,896.39
	Key-holding charge	£450.00
2015/16:	Buildings Insurance	£4,168.97
	Electricity (communal)	£2,092.53 credit
	Cleaning	£1,320.00
	General Repairs/Maintenance	£5,198.07
2016/17	Buildings Insurance	£13,718.88
	Electricity (communal)	£669.44
	Management Charges	£1,620.00
	General Repairs/Maintenance	£4,122.67
2017/18	Buildings Insurance	£12,918.02
2018/19	Buildings Insurance	£2,232.74
	Electricity (communal)	£723.92
	Professional Fees	£2,742.74
2019/20	Buildings Insurance	£5,268.44
	Electricity (communal)	£1,195.35
	Professional fees	£240.36
	General Expenses (Loan Interest)	£334.97
	General Repairs/Maintenance	£1,035.68
2020/21	Buildings Insurance	£3,507.43
	Electricity (communal)	£327.33
	Cleaning	£621.60
	Management Charges	£1,221.96
	Accountancy Fee	£354.00
	Professional Fees	£2,400
	General Repairs/Maintenance	£1,113.59
	Emergency Lighting Testing/ Repairs	£568.59
	Fire Alarm Testing/Repairs	£1,418.93

Schedule 3

Extracts from legislation

Landlord and Tenant Act 1985

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 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 adjustments shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(Subsections (1), (2), (3), (4)(a) and (5))

(1) An application may be made to a 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) .....

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