11936

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LSC/2016/0080**
Property	:	**40 – 127 Bedford Court Mansions, Bedford Avenue, London WC1B 3AA and 12-14 Adeline Place, London WC1B 3AJ ("Bedford Court")**
Applicant	:	**Bedford Court Mansions Ltd ("the Company")**
Representative	:	**Seddons, solicitors**
Respondents	:	**All the long residential leaseholders in Bedford Court ("the tenants")**
Representative of the tenants of flats 40, 54, 58B, 59, 60, 74A, 77 and 81	:	**Systech, solicitors**
Type of application	:	**Liability to pay service charges**
Tribunal members	:	**Angus Andrew** **Mrs S Redmond BSc Econ MRICS**
Date and venue of hearing	:	**19 May 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**5 July 2016**

DECISION

Decision

1. The estimated major work costs should be apportioned on the basis of the schedule of fixed percentages approved at a general meeting of the Company on 12 May 2008.

2. The Company may not recover any of the costs of these proceedings through the service charge from those respondents who objected to the application.

The application, parties, hearing and inspection

3. By an application dated 16 February 2016 the Company sought a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") of the liability of the tenants of 8 flats to pay a service charge in respect of an estimated major works cost of £685,000. Those 8 alone were named as respondents because they had declined to make the on account payment demanded on 29 September 2015. The application however stated that all the tenants should be served with the application because each of them would be significantly affected by this decision.

4. Directions were issued on 23 February 2016 and in those directions all the other tenants were joined as respondents *"to ensure that all are bound by the tribunal decision"*. The directions required those who opposed the application to send a statement in response to the applicant. Ten such statements were submitted by the tenants of flat 40, 41A, 54, 55A, 58B, 59, 60, 74A, 77, 81, and 101. In this decision we refer to these tenants as "the objecting respondents".

5. The hearing took place on 19 May 2016. The Company was represented by Paul Letman and 7 of the objecting respondents by Adrian Carr, both of whom are barristers. On behalf of the Company we heard oral evidence from John Hare and Kaori O'Connor. Mr Hare is a director of the Company and owns flat 51 whilst Dr O'Connor owns flat 118. We also heard oral evidence from 5 of the objecting respondents.

6. Following the hearing we informed the parties that we would inspect the common parts, a basement flat, a penthouse flat and a third flat on an intermediate floor on 31 May 2016. We directed that the flats should be selected by agreement between the Company and the objecting respondents. By letter of 26 May 2016 the Company informed us that flats 75A, 112 and penthouse 3 would be available for inspection. However a letter from Dr Glynn of the same date informed us that those flats had not been agreed because they were not representative and 3 other flats were proposed. When we attended Bedford Court it became apparent that the flats proposed by the objecting respondents were not available for inspection. We gave those attending the inspection two opportunities to agree a number of flats for inspection but they could not reach agreement. Consequently we inspected only the exterior and common parts of Bedford Court. During our inspection we were accompanied by Mr R Myhill from

the managing agents, Mr L Goldstein from Seddons, solicitors and two of the objecting respondents, Dr Gylnn and Dr M Larsson.

Background

7. Bedford Court is a large mansion block built in the late Victorian era and is typical of such blocks found in central London. It seems that most of the flats in the building were let on long residential leases whilst a small number on the ground floor were used as offices and 4 flats were occupied by resident porters. The original long leases provided that the service charge costs would be apportioned on the basis of relative rateable values. We were told that the original leases were granted *"in and after 1973"*.

8. Six penthouses were built on the roof of the southern section of Bedford Court in about 1974. The rating system still being in place each penthouse was allocated a rateable value by the district valuer.

9. In 1989 the then long leaseholders purchased the freehold reversion to Bedford Court in the name of the Company. All the tenants are shareholders in the Company. Having acquired the freehold reversion the Company granted new extended leases to each of the residential long leaseholders. The new leases were for terms of 999 years from 29 September 1974. With one crucial exception we were told that the extended leases were identical to the original leases that would presumably have merged in the new extended terms. The exception was the addition of clause 4(c)(iv)(b). As clause 4(c)(iv) is central to this dispute we recite it in full:

> *"(iv) (a) The annual amount of the service charge payable by the Lessee as aforesaid shall be calculated by dividing the Lessor's actual and anticipated expenditure defined in accordance with sub-paragraph (c)(i) hereof for the year to which the said certificate relates by the aggregate of the rateable values in force at the end of such year of all the flats in the said Mansions and then multiplying the resultant amount by the rateable value in force at the same date of the Flat.*
>
> *(b) in the event that it shall become impractical or impossible to apportion the Lessor's actual and anticipated expenditure between all the Flats in the said mansions on the basis of relative rateable values the same shall instead be apportioned on such alternative basis as shall be fair and equitable".*

Sub-clause (a) was to be found in the original leases whilst sub-clause (b) was added in the new extended leases granted in 1989. For the sake of brevity we refer to clause as 4(c)(iv) as clause 4 and sub-clauses 4(c)(iv)(a) and 4(c)(iv)(b) as sub-clauses (a) and (b) respectively.

10. Essentially rateable values reflect rental values. They were assessed by district valuers, were published annually and underpinned the rating system that was a form of local taxation. Domestic rates were effectively

abolished in 1990 on the introduction of the poll tax. They were subsequently replaced by a banded valuation system that underpins the council tax which, following considerable public disquiet, replaced the poll tax in 1993. Mr Hare's unchallenged evidence was that the annual tables of rateable values have not been published since 1989.

11. After the Company purchased the freehold reversion 9 new flats were created in Bedford Court. Four of these flats were created in or from units that were previously either used as offices or for storage: the other 5 flats were created either by the subdivision of existing flats or by the conversion of other areas owned by the Company such as the porters' flats, common parts and a former boardroom.

12. Leases of 8 of these flats were granted between January 1989 and October 1999. The exception is flat 100 that, we were told, is one of 3 flats still retained by the Company: one of these flats is used as a porter's lodge whilst the other two are let on a commercial basis with the rental income effectively being used to subsidise the service charge costs. As Mr Hare pointed out it is self evident that domestic rateable values were never allocated to these 9 flats by the district valuer. Consequently they do not appear in the last table of domestic rateable values published in 1989. It is nevertheless apparent that (with the possible exception of flat 100) the Company allocated a service charge percentage to each of these flats although the method by which those percentages were calculated was not explained to us. There are now 114 flats in Bedford Court including the 6 penthouses and the 9 new flats to which we have referred.

13. After the abolition of domestic rates in 1990 the Company continued to apportion the service charge costs on the basis of the last published rateable values and the service charge percentages allocated to the new flats. The Company however declined to publish a full list of the service charge percentages despite requests for disclosure from a number of leaseholders and there were two formal challenges to the system that resulted in court or in tribunal proceedings.

14. Dr O'Connor who lives at flat 118 mounted the first challenge. Her principle objection was that her service charge percentage was higher than that of the company secretary who owned a large flat that had been constructed from two smaller ones. She attempted to negotiate a reduction in her service charge percentage but without success. Eventually she issued court proceedings although the nature of those proceedings is not entirely clear to us. The Company eventually compromised the proceedings by reducing Dr O'Connor's service percentage. A letter from the Company confirms its *"agreement to apply a RV of 710 to Flat 118"*. Dr O'Connor's evidence was that the agreement resulted in a $1/7^{th}$ reduction in her service charge. Perhaps surprisingly for a lessee owned company the Company insisted that the agreement remained confidential and it seems that it was not disclosed prior to these proceedings.

15. The second challenge was mounted in August 2006 by the owners of 3 of the penthouses, including Mr Spiker who owns penthouse 3 and eventually

became and remains the chairman of the Company. On 25 August 2006 the 3 lessees applied to what was than the leasehold valuation tribunal for a determination of their liability to pay service charges under section 27A of the 1985 Act. The application came before a tribunal on 10 March 2008. The three applicants considered that their service charges were excessive when compared to those of other leaseholders. A short decision was issued by the tribunal. With the agreement of the parties the tribunal adjourned the application for 3 months to enable them to *"arrive at a formula which would be acceptable to a majority of residents within the block and would be fair and equitable to all"*.

16. On the basis of the documents included in the hearing bundle it seems that the tribunal heard no more from the parties and as far as those proceedings were concerned that appears to have been the end of the matter.

17. It is apparent that the contemplated negotiations proceeded with some speed because on 18 April 2008 the secretary to the Company gave notice of a general meeting of the company to be held on Monday 12 May 2008 at the Plough Public House in Museum Street. That notice is pivotal to our decision and we therefore recite it in full:

> "***Whereas***
>
> *Each of the Leases for the flats in the Mansions contains provisions relating to the manner in which service charges are apportioned.*
>
> *And as a consequence of legal action taken by leaseholders of some of the Penthouses, claiming those flats are liable for an unfairly high proportionate contribution towards service charge payments.*
>
> *And in circumstances where the Leasehold Valuation Tribunal has made a preliminary ruling that the Penthouses are paying an unfairly high contribution.*
>
> *The Board believes that it is now just and equitable to make alterations in each for the leases in relation to the method by which service charges are ascertained and apportioned.*
>
> *The Board has determined that its proposal should have minimal impact on the present proportion of contribution flats pay, with the exception of the Penthouses.*
>
> *The method proposed is that apportionment of service charge will no longer be ascertained by reference to Rateable Values, but that such apportionment will be ascertained by applying a fixed percentage contribution for each flat.*
>
> *The proportion of Penthouse contributions will be reduced from the present level and that the shortfall will be paid by Bedford Court Mansions Ltd from its company income.*

The example clauses set out in Schedule 1 hereto are found in substantially similar form in a leases and are usually, although not always, in clauses 4C(iv)a and 4C(iv)b.

The Board propose the following resolutions

1. That the clauses in each Lease and set out in schedule 1 hereto (in identical terms or terms that are substantially similar) which have the effect of apportioning service charge contributions amongst flats within the Mansions by reference to 'Rateable Values', be deleted upon being immediately replaced by an appropriately worded clause establishing each flat's contribution by reference to a fixed percentage as defined in Resolution 2 hereto.

2. That the fixed percentage for service charge contribution payable in respect of each flat is shown on Schedule 2 in the column entitled 'Amended Percentage to 100'.

3. That, the clause to be inserted into each lease, to give effect to Resolutions 1 and 2 above be in the same of substantially the same terms as contained in Schedule 3 hereto and that as appropriate and/or required for each lease, the numbering of the affected lease paragraphs may be amended to give effect to the amendments and maintain the structure and integrity of the leases.

4. In the event that there are structural changes to the footprint of any flat or flats, so that it or they are divided or conjoined, the Board may be simple majority, amend the percentages in Schedule 2 as appropriate to redistribute the percentages payable by that flat or flats in a fair and equitable manner. Any such redistribution will not affect service charge contributions by other flats which are not subject to the structural changes. There shall be no requirement on the Board to vary the percentages.

5. The resolutions varying the leases will take effect upon receipt of approval from the Leasehold Valuation Tribunal in case number LON/OOAG/LSC/2006/0308 or the Leasehold Valuation's approval of any future application that Bedford Court Mansions makes to that body in order to give effect to the resolutions above.

6. The percentage service charge levied against the penthouses be reduced to that stated in Schedule 2 and Bedford Court Mansions will, from company income, pay the shortfall of service charge contributions by way of additional contributions from the flats owned by Bedford Court Mansions in accordance with the sums on Schedule 2 until such time as those flats may be sold, if at all".

18. Schedule 2 to the notice gives a fixed service charge percentage for every flat in the block with the exception of flat 100. It is not clear why that flat

was omitted but as it is one of the 3 flats retained by the company its omission is for the time being at least of no practical consequence. Mr Hare's evidence was that the service charge percentages produce a deficit of 1.37%, which presumably reflects the discount given to the penthouses and Dr O'Connor's flat. This deficit is more than made good by the rental income received from the two rented flats (the third being the porter's flat). We were told that the total service charge percentage will ultimately be brought up to 100 if and when those flats are sold.

19. Perhaps surprisingly the Company was unable to locate the minutes of the meeting on 12 May 2008. Mr Leech is one of the objecting respondents and purchased his flat in 2007. His evidence was that the resolutions were passed by those attending the meeting with no objections and only one abstention. It seems that the resolutions were then confirmed by a unanimous vote at the subsequent annual general meeting on 21 October 2008. Under cross examination Mr Hare agreed with Mr Leech's evidence.

20. The resolutions were never formally *"approved"* by the leasehold valuation and the leases were never formally varied by deeds of variation. Nevertheless the fixed service charge percentages recorded in the schedule to the 2008 notice were implemented and continued to be implemented until the passing of a further resolution on 15 July 2015 to which we shall shortly refer.

21. To summarise the position between the 2008 and the 2015 resolutions the service costs were apportioned on the basis of the fixed percentages in the schedule to the 2008 resolutions. We refer to those fixed service charge percentages as the *"2008 scheme"*. Although those percentages largely reflected the rateable values of the flats as they last appeared in the rating list it is apparent that percentages had been allocated to 8 of the 9 new flats and the rateable value percentages of the penthouse flats and Dr O'Connor's flat had been reduced.

22. On 28 February 2014 Mr Spiker sent a letter to all the tenants. The letter records that the board had received representations from residents who felt that their service charges were unfair relative to other similar sized flats. The letter explained the board's intention to introduce a new system of apportionment and suggested three possible schemes. The first based on net internal areas, the second on equal shares and the third being a combination of the first two options with two thirds being based on internal areas and one third on equal shares. The board clearly favoured the third option.

23. The letter invited the tenants to make their views known to the board. In his evidence Mr Hare said that a number of tenants responded to the proposal and Mr Spiker or another member of the board met those who did respond in one to one meetings. It is apparent from the documents in the hearing bundle that at one point the board also considered apportionment on the basis of council tax bands but that proposal seems to have been dropped. The board ultimately decided to proceed with its favoured option: that is, one third of the service charge costs would be

apportioned equally between the flats with two thirds being apportioned on the basis of net internal areas. The proposal was put to an extraordinary general meeting of the company on 15 July 2015. The minutes of that meeting record that the proposal was supported by 48 members and opposed by 18.

24. Following the passing of that resolution the managing agent on the instructions of the board issued on account demands for the estimated major works cost in September 2015. As observed above the refusal of the objecting respondents to pay those demands resulted in the company's application to the tribunal.

Issues in dispute

25. Mr Letman and Mr Carr could agree only on one issue. They agreed that either the company or any tenant could invoke sub-clause (b). That apart the remaining issues between the parties at the end of the hearing are encapsulated by the following questions:

    a. Is it now *"impractical or impossible"* to apportion on the basis of relative rateable values?

    b. Was the 2008 scheme an *"alternative basis"* of apportionment within the meaning of sub-clause (b)?

    c. If so, does sub-clause (b) allow "a second bite at the cherry"?

    d. Is the method of apportionment now proposed "fair and equitable" within the meaning of sub-clause (b)?

    e. In any event, did the 2008 scheme give rise to an estoppel by convention?

    f. Should we grant an order under section 20C of the 1985 Act?

26. This case turns largely on the interpretation of clause (4) and it is perhaps surprising that neither advocate drew our attention to any relevant authorities relating to the interpretation of leases. To that extent the following reasons, which answer each of the above questions, are based largely on first principles.

Reasons for our decisions

Is it now *"impractical or impossible"* to apportion on the basis of relative rateable values?

27. Both Mr Leech and Mr McAneary said that it was still possible to apportion the service charge costs on the basis of relative rateable value. Mr McAneary is an architect and he had researched the website of the Royal Institute of Chartered Surveyors. The methodology for calculating rateable values of any residential property is still available and can be applied by a competent valuer. Thus both Mr Leech and Mr McAneary said that the rateable values of all the flats within Bedford Court could still be calculated and that the system of apportionment envisaged by clause (a) was neither impractical nor impossible. Thus sub clause (b) was simply not engaged and the original system of apportionment should continue.

28. We do not however consider that the wording of sub clause (a) supports this argument. Sub clause (a) requires the service charge costs to be apportioned on the basis of *"the rateable values in force at the end of such year"*: *"such year"* being the year in which the expenditure was incurred. The words *"in force"* clearly denote the rateable values assessed by district valuers that were published annually in accordance with the provisions of the General Rent Act 1967. In our view the words do not and cannot encompass an informal assessment of the rateable values undertaken otherwise than in accordance with the General Rent Act 1967. On the basis of Mr Hare's unchallenged evidence no rateable values were *"in force"* after 1990. Consequently we agree with Mr Letman that after 1990 it became both impossible and impractical to apportion on the basis of clause (a).

Was the 2008 scheme an *"alternative basis"* of apportionment within the meaning of sub-clause (b)?

29. In his skeleton argument Mr Letman largely ignored both the 2008 resolutions and the 2008 scheme. Having concluded that it was impractical and impossible to apportion on the basis of relative rateable values he then moved directly to consider whether the new scheme proposed by the 2015 resolution was *"fair and equitable"* within the meaning of sub-clause (b).

30. When we asked him to explain why the 2008 scheme was not an alternative basis of apportionment within the meaning of sub-clause (b) he gave three reasons. Firstly he said that the 2008 scheme was simply an ad hoc interim measure that was never intended to be permanent. Secondly, even if it was intended as alternative scheme, resolution 5 of the 2008 resolutions rendered the scheme conditional upon the approval of what was then the Leasehold Valuation Tribunal. That approval never having been obtained the 2008 resolutions was effectively redundant. Finally, if we were against him on his first two reasons, he submitted that the 2008

scheme was not *"fair and equitable"* and thus it could not be an alternative basis of the apportionment within the meaning of sub-clause (b).

31. Essentially his third reason that the 2008 scheme was not *"fair and equitable"* was based on two factors. Firstly the number of complaints about the 2008 scheme to which Mr Spyker had alluded in his letter of 28 February 2014. Secondly a number of anomalies in the 2008 scheme to which Mr Hare had drawn our attention in his evidence.

32. We deal with each of these three reasons in turn and we can deal with the first reason in fairly short order. The wording of the 2008 resolutions that led to 2008 scheme was unambiguous. The clear intention was to invoke sub-clause (b) and to substitute apportionment by fixed service charge percentages for that based on relative rateable values. The sixth paragraph of the recital to the 2008 resolutions is in the following terms and permits no other interpretation:

> *"The method proposed is that apportionment of service charge will no longer be ascertained by reference to Rateable Values, but that such apportionment will be ascertained by applying a fixed percentage contribution for each flat".*

33. Mr Letman's second argument carries more weight. The fifth resolution provides that the 2008 resolutions as a whole will only take affect when approved by the Leasehold Valuation Tribunal. It is not entirely clear what form of approval the board had in mind but we agree with Mr Letman that it was probably a subsequent application to the tribunal under section 37 of the Landlord and Tenant Act 1987 for an order varying all the leases. No such application was ever made and neither Mr Hare nor anyone else could explain why it was not made. Two obvious reasons present themselves. Firstly, that despite its best endeavour, the board could not obtain the backing of 75% of the leaseholders. In a building in which, we were told, approximately half the flats are owned as investments that would not be surprising. The second and more obvious explanation is that having reflected on the passing of the 2008 resolutions, the board appreciated that sub-clause (b) does not require a tribunal order under section 37 to bring an alternative scheme into effect.

34. If the 2008 scheme had never been implemented we might well have agreed with Mr Letman. However it was implemented over a period of 7 years between 2008 and 2015. Many tenants purchased their flats on the understanding that 2008 scheme had indeed been implemented. Furthermore the process by which the board now seeks to implement a new scheme under sub-clause (b) is the same as that used to implement the 2008 scheme. That is by a resolution of the members at a general meeting followed by a board decision. The only material difference is that in 2008 no one objected to the 2008 scheme whilst a significant number of members objected to the scheme that is now proposed. Consequently we are satisfied that the failure to apply to the tribunal for an order varying all the leases neither invalidated the 2008 scheme nor rendered it redundant.

35. Finally we turn to Mr Letman's third reason. The Company gave the impression that since 2008 the board has received a large number of complaints about the 2008 scheme that effectively required it to introduce a new scheme. However in his evidence Mr Hare very fairly accepted that there had been *"few"* objections to the 2008 scheme and in the Company's response to the objecting respondents' statement of case it accepts at paragraph 4 that *"it is correct to say that catalyst for change came from a relatively small number of leaseholder challenges"*.

36. Concrete evidence of only two such challenges or objections was offered. Those made by Maureen Stroud of flat 104 and Timothy Clelland of flat 95B. Both tenants had given witness statements although neither attended for cross examination. We have however read their statements and have taken them into account. Ms Stroud made her objection in 2009 and Mr Clelland in 2012. Both objections were based on the assumption that flats of equal size should be paying the same service charge, a point to which we shall shortly return. It is apparent that, to adopt Mr Carr's words, both these objections *"fizzled out"* and were not pursued.

37. Turning to the perceived anomalies Mr Hare referred to these in his witness statement but he only give direct evidence of one such anomaly in respect of Ms Stroud's flat. She apparently pays some 50% more then the leaseholder of a flat of equal size. Although Mr Hare referred to a document entitled *"expanded and revised information on "anomalies" in the present allocations"* it was not exhibited to his statement. In answer to our questions a 13 column table was handed in at the hearing that appears to identify a number of anomalies. No explanation of that table was offered although we assume that it is the document to which Mr Hare referred.

38. What immediately becomes apparent from the table is that the so called anomalies are identified on the assumption that service charge costs should be apportioned on the basis of net internal areas. The reasoning is circular. The desired outcome is used to identify the perceived anomalies.

39. The original system of apportionment was based largely on values and not either equal shares or areas. Some people might regard a value based system of apportionment as more *"fair and equitable"* then a system based on equal shares and areas. Indeed the objections of the objecting respondents echo many of the objections to the poll tax that replaced domestic rates.

40. We do not accept that a value based system of apportionment is inherently unfair or inequitable. As we commented at the hearing there are still mansion blocks in central London (with differently worded leases) that continue to apportion service charge costs on the basis of old rateable values and such apportionments appear to continue without any difficulty or objection.

41. If the company had identified the anomalies by reference to what was essentially a value based system we might well have taken a different view: but it did not. The 2008 scheme was approved at two general meetings

without objection and it has been used to apportion the service charge costs over a period of 7 years with *"few"* complaints. We are satisfied and find that it is a *"fair and equitable"* scheme.

If so, does sub-clause (b) allow "a second bite at the cherry"?

42. Mr Letman argued that sub-clause (b) permitted an unlimited number of variations to the system of apportionment. In support of his argument he relied on business efficacy or commercial common sense. He suggested that no one would enter into agreement for 999 years that did not include a mechanism for successive variations to the system by which the service charge costs were apportioned.

43. We have difficulty with Mr Letman's argument on a number of levels. We do not consider that it is appropriate to rely on business efficacy or commercial common sense as a means of interpreting a lease provision unless there is some ambiguity in the provision itself. There is no ambiguity in sub-clause (b). It permits a variation in the system of apportioning the service charge cost if and only if it becomes impractical or impossible to apportion on the basis of relative rateable values. Sub-clause (b) does not contemplate the substitution of a new system of apportionment under any other circumstances. It is equally apparent that that was the intention behind sub-clause (b). As Mr Letman accepted sub-clause (b) was inserted specifically to allow for the contemplated abolition of domestic rates that occurred in the following year. In all other respects the new leases were identical to the old ones.

44. We also take issue with Mr Letman's suggestion that no one would enter into a long lease unless it allows for unlimited variations in the system of apportionment. The same might be said of any other provisions in the new leases and yet there is no mechanism that allows for their variation. Although some long residential leases do include a provision allowing for a variation in the system of service charge apportionment they are in our experience in the minority. Finally Mr Letman overlooks the fact that the new leases were granted two years after the introduction of the Landlord and Tenant Act 1987 that includes in part IV a comprehensive procedure for varying long residential leases. A statutory scheme for varying the leases had been in place for two years when the new leases were granted.

45. Consequently and for each of these reasons we reject Mr Letman's argument and conclude that sub-clause (b) only permits one variation in the system of apportionment. That is upon it becoming impractical or impossible to apportion on the basis on relative rateable value.

Is the method of apportionment now proposed "fair and equitable" within the meaning of sub-clause (b)?

46. As we commented in the previous section of this decision some long leases do include a provision allowing for a change in the system of apportionment. Generally such leases provide that any new system shall be at the discretion of the lessor and/or shall be reasonable. It is unusual

to find a stipulation that requires a new system of apportionment to be *"fair and equitable"*. That sets a high threshold.

47. We fully accept Mr Letman's argument that no system of apportionment can ever be wholly fair or equitable. The example of a ground floor leaseholder who does not use the lift in a block of flats but must nevertheless contribute to its maintenance was given and is always given in cases such as this and it is a point well made.

48. In this case it is largely the owners of the basement flats who are disadvantaged by the proposed scheme. Those flats had relatively low rateable values not least because many of them have only limited natural light. Furthermore those fronting Bedford Avenue and Adeline Place have their own entrances direct to street level and do not make use of the common parts that are the subject of both the existing and proposed major works projects that, as one objecting respondent pointed out, will incur considerable costs.

49. Most of the objecting respondents are faced with very large increases in their service charges at a time when substantial expenditure is being incurred in the refurbishment of the common parts. Ms Ribiere faces an increase of 110% in her service charge. She is a retired single person on a fixed income and we have no reason to doubt her evidence that she will have to sell her flat if the proposed system of apportionment is implemented.

50. Mr Leech had calculated that the increase in his service charge would reduce the value of his flat by some £46,000. The methodology that he used to calculate that sum was not dissimilar to that used in enfranchisement cases and he described himself as having worked at senior levels in property finance since 1986. He is however not a valuer and we can only give his evidence limited weight: nevertheless his point was well made.

51. Similar evidence was given by Mr McAnery who is also the tenant of a basement flat. He describes himself as a young architect on a limited income. He had calculated that over the next 40 years he would have to earn an additional £160,000 to pay for the projected increase in the service charges. He also said that he would be *"forced"* out of his home.

52. As a number of objecting respondents pointed out they had purchased their flats after the introduction of the 2008 scheme. They had completed due diligence prior to purchase and had bought their flats in the reasonable belief that the service charge percentages allocated by the 2008 scheme were fixed. They now face large and unexpected increases in their service charges and will be substantially disadvantaged by the imposition of the proposed scheme.

53. The disadvantage to the basement tenants goes far beyond that of the hypothetical tenant of a ground floor flat who does not use the lift in a

block of flats. No account appears to have been taken of their real concerns that might in some cases result in their having to sell their homes.

54. An attempt could have been made to meet their concerns. The possibility of apportionment on the basis of council tax bands was briefly considered but was rejected although for what reasons we do not know. As a number of objecting respondents pointed out the effect of the proposed scheme could have been mitigated by exempting the tenants of the basement flats from contributing towards the common parts expenditure.

55. In considering whether a new system of apportionment is fair and equitable some regard should be had to the system that it replaced. When viewed from that perspective the move to a system that completely ignores value and is based entirely on mixture of equal shares and areas may well be considered disproportionate.

56. The company also appears to have ignored the fact that in contrast to the 2008 scheme the proposed scheme met with substantial opposition. Over 25% of those attending the general meeting on 15 July 2015 objected to it. That is in sharp contrast to the two general meetings held in 2008 when they were no objections to the 2008 scheme that remained in place until last year.

57. Consequently and for each of the above reasons we are satisfied that the proposed scheme is neither fair nor equitable.

In any event, did the 2008 scheme give rise to an estoppel by convention?

58. Estoppel by convention had not been pleaded by the objecting respondents and was only raised by Mr Carr in his skeleton argument that was submitted very late in the day. He suggested that the implementation of the 2008 scheme was a convention and that the company was estopped from resiling from it.

59. Mr Letman relied on a short extract from a well known text book and said that estoppel by convention could only operate retrospectively. He accepted that the company could not resile from the 2008 scheme in respect of service charges demanded prior to September 2015 but that even if there was an estoppel by convention it would not prevent the company from introducing a new scheme going forward.

60. When we asked Mr Carr to identify the detriment suffered by the tenants he said that it was the lost opportunity, contemplated by the 2008 resolution, to apply to this tribunal to vary the leases. However that opportunity has not been lost: an application can be made by the company at any time to vary the leases under part IV of the Landlord and Tenant Act 1987.

61. We are aware that there is considerable judicial authority relating to this topic and yet only one such authority was brought to our attention. As the issue was raised so late in the day it was not fully argued out, at least to our satisfaction. Having already found in favour of the objecting respondents we are not required to decide the estoppel argument and we decline to do so. It is therefore still at large should the matter be taken any further.

Should we grant an order under section 20C of the 1985 Act?

62. As observed, Mr Carr made an application under section 20C on behalf of the objecting respondents. This was opposed by Mr Letman who said that whatever the outcome the application had been made for the benefit of all the tenants in the hope of establishing some clarity.

63. To the extent that the costs might be recovered the right to recover them is a property right which should not be lightly disregarded. Section 20C however provides that a tribunal may *"make such order on the application as it considers just and equitable in the circumstances"*. We consider that those words permit us to take into account the conduct of the parties in deciding whether to make an order.

64. Dr O'Connor gave her evidence on behalf of the company. She described the board as having an *"autocratic management style"*. Although she was referring to the behaviour of the board prior to 2008 we are nevertheless satisfied that that style has continued.

65. The company described the process that led up to the 2015 as a consultation: if so it was not an open or transparent consultation. In answer to our questions Mr Hare accepted that tenants, who are all members of the company, were never asked to vote on the various options that were put to them. They were never offered the option of the status quo. Those who raised concerns were seen by directors in *"one to one meetings"* and no minutes of those meetings were ever taken: or if they were there were not put in evidence.

66. Information was constantly withheld from the objecting respondents. Counsel's opinion was taken on the proposed scheme but the board refused to divulge it on the basis of commercial confidentiality. That would be perfectly understandable if the company had been a third party commercial landlord: but it is not, it is controlled by the tenants. In his oral evidence Mr Hare said that he did not agree with the board's refusal to divulge counsel's opinion and he had made it available on an informal basis to some tenants who had asked to see it.

67. The objecting respondents had asked for a list showing all the service charge percentages both under the 2008 scheme and under the proposed scheme but it had been denied them. It was only after we directed the company to make such a list available to the objecting respondents that it was produced to them, during the lunch adjournment. By that time it was

too late for them to undertake a proper analysis and to rely on it when the closing submissions were made.

68. Having spent some time reading the material in the hearing bundle we are left with the overriding impression that the board was from the outset intent on introducing the proposed scheme that was the subject of the 2015 resolution and that the legitimate concerns of a significant minority of the tenants were simply brushed aside.

69. Consequently and for each of the above reasons we can consider it appropriate to make the order sought by the objecting respondents.

Conclusions

70. It follows from the above reasons that the on account payments that are the subject of this application should be apportioned on the basis of the 2008 scheme. Firstly because we have found that that scheme was introduced pursuant to sub-clause (b), which does not permit a second variation. Secondly because the proposed scheme is in any event neither fair nor equitable.

71. That is not necessarily the end of the matter. The company still has the option of seeking a variation of the leases under either section 35 or 37 of part IV of the Landlord and Tenant Act 1987. In particular it can make a unilateral application under section 35 if it transpires that the sum of the service charge percentages does not equal 100% and as Mr Letman pointed out that could prove to be the case if flat 100 is sold in the open market and a service charge percentage is allocated to that flat. Equally it could still pursue an application under section 37 if at least 75% of the tenants support the application and not more than 10% object to it. On the basis of the evidence given at the hearing it appears possible that those criteria could be met if some thought was given to the legitimate concerns of the tenants of the basement flats and the objecting respondents in particular.

Name: Angus Andrew **Date: 5 July 2016**

Rights of appeal

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

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

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

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

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

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).