12588

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AL/LSC/2017/0295**
Properties	:	**Conningham & Johnson Court, City Point, Kidbrooke Village, London SE9 6AY/ 6BS**
Applicants	:	**1. Benita Hall Yee Cheung** **2. Dan Wang** **3. Fehed Said** **4. Sue Faye Young** **5. Giorgio Cali** **6. Paul Mark Evans** **7. Lu Evans** **8. Ana Alice De Oliveira Bartolo** **9. Samuel Felix Brandt** **10. Rong Wang** **11. Dominique Devoucoux**
Representative	:	**Ms Katie Gray of counsel**
Respondent	:	**Berkeley Seventy-Seven Limited**
Representative	:	**Mr J Bates of counsel instructed by Brethertons LLP**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge L Rahman** Mr K Ridgeway MRICS
Date and venue of Hearing	:	27th November 2017 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	**21st January 2018**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the apportionment of the block or apartment expenditure on the basis of floor area only is a fair apportionment.

(2) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the applicants in respect of the service charge years 2012-2017.

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

The hearing

3. The applicants were represented by Ms Katie Young of counsel and the respondent was represented by Mr J Bates of counsel.

4. Ms Cheung and Mr B R Maunder Taylor attended and gave oral evidence on behalf of the applicants.

5. Mr Richard Daver (MD of Rendell & Rittner) and Mr Jeff Platt attended and gave oral evidence on behalf of the respondent.

6. The tribunal had before it evidence contained in 3 lever arch files and further documents handed at the hearing, namely, pages H.159-L.27, a skeleton argument and case-law relied upon by the applicants, and a "Statement of agreed facts and disputed issues".

7. The tribunal reconvened on 7/12/17 for its deliberation.

The background

8. Conningham Court and Johnson Court are two adjacent blocks of residential units built in a similar manner. Both are five-floored buildings with the highest floor being the fourth floor. Conningham Court comprises 71 units and Johnson Court comprises 72 units. Most of the units are flats approached from common entrance halls and

internal staircase/lift facilities. Nine of the units in Conningham Court and seven of the units in Johnson Court are on the ground floor and have their own external front door and are accessed directly from the street without going through the common parts of their respective blocks ("direct access" units). Each of the blocks has four common entrance halls containing one lift for each entrance hall. In the middle of each development, there is an undercroft car park at ground floor level and a podium garden at first floor level. All the applicants are leasehold owners of "direct access" properties within the development.

9. The tribunal carried out an inspection before the hearing in the presence of Ms Gray, Mr Bates, Ms Cheung, Mr Guy from Rendell & Rittner, and Mr Challon from Berkeley. The tribunal first inspected Conningham Court, then Grayston House, and finally Merlin Court. Both parties agreed it was not necessary to inspect Johnson Court as the shape and layout was exactly the same as Conningham Court.

10. The applicants hold long leases (all in like form) of their respective properties which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The service charges are apportioned on a square footage basis. This has been the basis of apportionment since the leases began to be sold in 2012.

11. The relevant terms of the leases are as follows:

By clause 2.3 the lessees are required to pay service charges;

By paragraph 4 of part 2 of the first schedule, the lessees have the right to use the common parts, which includes the lobbies, staircases, lifts and the courtyard;

By part 1 of the eighth schedule, expenditure on relevant costs is divided into Apartments Expenditure, Block Expenditure, Estate Expenditure and Car Park Expenditure;

By paragraph 1.1.13 of part 1 of the eighth schedule, the "service charge" consists of:

(i) the "apartments service charge percentage of the annual apartments expenditure";

(ii) a "fair and reasonable proportion of properly attributable to the premises (as determined from time to time by the landlord or its surveyors or managing agents or accountants whose decision shall be final) of the annual block expenditure;

(iii) a " fair and reasonable proportion of properly attributable to the premises (as determined from time to time by the landlord or its surveyors or managing agents or accountants whose decision shall be final) of the annual estate expenditure;

(iv) the "car park service charge percentage of the annual car Park expenditure";

The "apartments service charge percentage" is "a fair and reasonable proportion to be determined from time to time by the landlord all its surveyors whose decision shall be final":

The "car park service charge percentage" is "a percentage from time to time by the landlord calculated by reference to the number of parking spaces in the car park";

By parts 2, 3, and 4 of schedule eight, the lessees are obliged to contribute to the relevant costs incurred by the respondent in providing services in the common parts of the development.

The issue

12. The sole issue between the parties is the correct apportionment of the block or apartment expenditure.

13. The applicant's state they neither use nor have the benefit of many of the internal services provided within the blocks of flats. However, the entire service charge, including both internal block and external expenditure, is apportioned between the lessees on the basis of floor area only without taking account of the benefit and use of the services. The applicants claim that this is unfair and unreasonable and that the expenditure ought to be divided into two schedules (internal and external), with the direct access flats only contributing to external expenditure.

14. The respondent's position is that the direct access flats have the right to use the internal services, and therefore ought to pay for them. The respondent further states that the lessees of the direct access flats in fact have to use the internal areas and therefore ought to pay for them. For example, the communal courtyard podium garden can only be accessed from the internal communal area at ground level/level 1, the car park at ground level has no pedestrian gate and residents must pass through communal areas on the ground level, and the direct access flats continue to have the right to use all the refuse stores and the bicycle storage area and can only access these through the internal common parts.

15. Both parties agreed it was for the tribunal to determine what the fair apportionment should be.

Applicants' case

Applicants Statement of Case and Supplementary Reply

16. The material parts can be summarised as follows:

17. They all have their own entrances at ground floor level and their properties can be accessed directly from the street. The applicants therefore do not use or benefit from many of the common parts of the development. In particular, the applicants do not use or benefit from the apartment blocks and the common parts thereof, the lifts or the lift lobbies, the staircases, and access to those areas via the lift lobby. Despite this, the apportionment determined by the respondent (based on floor area) requires the applicants to contribute significantly to the costs of maintaining the facilities therein, including but not limited to: lift maintenance and repairs, lift insurance, lift telephone, lighting in the common parts, cleaning of the common parts, door entry system maintenance and telephone calls, and fire system.

18. This approach fails to take into consideration the RICS code of practice for residential service charges which provides that "*the basis and method of apportionment, where possible, should be demonstrably fair and reasonable to ensure that individual occupiers bear an appropriate proportion of the total service charge expenditure that reflects the availability, benefit and use of services*". The method of apportionment adopted by the respondent lacks any real consideration or analysis of the availability, benefit and use of the communal services by the applicants. It is therefore unfair and unreasonable. Using the respondent's methodology, a smaller apartment on the top floor of the block without street access will pay less in service charges but will benefit disproportionately from the services provided.

19. Furthermore, the method of apportionment has not been applied uniformly across the development.

20. Apportionment based upon use and benefit of services would not be significantly more complex or expensive to administer than the current system. The applicants do not suggest that a fair and reasonable proportion of the service charge payable by each lessee is determined on the basis of each lessees actual use of each facility. Rather, regard ought to be had to the objective use to which the facility is likely to be or capable of being put by lessees or a group of lessees. Once the proper apportionment has been determined, there will be no need to repeat the same exercise in every service charge year unless the estate undergoes some significant change. Having regard to the use to which a facility is

put when apportioning relevant costs is not unusual and it is specifically referred to in the RICS code of practice for residential service charges. The respondent's methodology is inflexible and does not permit of review in the event that the nature or character of the estate changes. If the original grantor intended that the service charge contributions ought to relate solely to the floor space of each dwelling, the leases could have so provided and indeed do so provide in relation to the car park service charge.

Applicants' witness statement

21. The material parts of the applicants' witness statement dated 11/11/17 can be summarised as follows:

22. Each direct access unit has a privately owned external patio on the first level enclosed by glass panels and supported by metal frames. The communal podium garden is located immediately beyond the patios. In many of the direct access units, one of the glass panels is fitted as a lockable opening door thereby making it possible to access the podium garden directly from the patio. In early April 2013, Ms Cheung's parents saw the lessee of 39 Conningham Court (another direct access unit) having a lock installed on their patio gate. When asked, they confirmed that they had keys and were permitted to access the podium garden directly from their patio. Ms Cheung wrote to the customer relations manager at Berkeley Homes asking whether she too could have the same for her patio. She received an emailed reply stating "*I can confirm that there was no provision made for access to your balcony from the podium deck area. This was not an oversight as all glass partitions that have locks are for maintenance access only and there were never any keys made available for residents use*". Ms Cheung failed to understand why the lessee of 39 Conningham Court had been permitted to install a lock and to have access to the podium garden directly but she was refused and was obliged to go through the internal common parts. She found this very unfair but did not press the issue.

23. Each car park has gated vehicle access from street level. However, the respondent's prescribed method of accessing the car park for leaseholders is via the internal communal areas. It would be far more convenient for the lessees of the direct access units to access the car park directly from the street by use of the vehicle gate to the car park. However, the applicants are not permitted to do so. Rendell & Rittner stated that the vehicle gate should only be used for vehicular access and that individuals access the car park in the correct manner via the common areas.

24. Whilst there are refuse stores located inside each of the car parks, there are 2 additional external refuse stores in Conningham Court accessed directly from the street. One is adjacent to the entrance to 55

Conningham Court and the other is adjacent to the car park. Ms Cheung uses the bin store adjacent to 55 Conningham Court as it is the closest to her property. Although she is entitled to use any of the refuse stores in the building, it does not make any sense for her to go through the internal communal areas in order to deposit her waste in the refuse stores inside the car park. Her understanding is that the lessees of the other direct access units also use the external refuse stores rather than the internal ones.

25. The leaseholders of 4 Portal Terrace, a direct access unit similar to the applicants', located in Merlin Court, have access to their podium garden at the first floor level and have to pass through the internal common parts in order to access that garden. The relevant part of their lease is similar to that of the applicants in that they are required to pay *"a fair and reasonable proportion"* of their service charges. However, they are not charged for the maintenance of the internal common parts. They have two separate schedules, namely, a block schedule and an internal schedule. The direct access units contribute towards the block schedule but not to the internal schedule (the internal schedule includes the cost of maintenance of the internal common parts) whereas the remaining units contribute towards both schedules. Despite being in a materially similar position to the direct access units in Merlin Court, the applicants have not been treated in the same manner. The respondent refuses to draw up separate schedules for block and internal expenditure as has been done for Merlin Court. This discrepancy in treatment is unfair and unreasonable.

Ms Cheung's oral evidence

26. The material parts of the evidence can be summarised as follows:

27. She accepts that the glass panel fitted on her patio does not belong to her. However, she is aware that some lessees have been given keys to access the garden from their patio's. She denies that the respondent had refused to give permission to those lessees. She went on to state that she knew that one of the flats had a key and she had therefore assumed the respondent had given permission. She had written to Berkeley Homes and asked if she could have a key. Her request was refused and she did not pursue the matter any further.

28. She should be able to use the vehicular access to enter and exit the car park.

29. She would like the respondent to look at the objective usage of facilities like with Merlin Court. The direct access flats would not use the common parts.

30. When asked whether she accepts that, if she were to win her case, ground floor flats would not pay for the lifts, she stated that was for them to decide. When asked whether she accepts that if she were to pay for things from which she directly benefits, she would have to pay 100% of the cost for the bulb outside her flat as she benefits exclusively, she stated it was a matter for the respondent to consider what was fair and reasonable objectively.

Expert Report by Mr B R Maunder Taylor (FRICS, MAE) dated 6 November 2017

31. The material parts of the report can be summarised as follows:

32. An inspection was carried out on 29 September 2017. He has been informed and assumed to be correct that Merlin Court has two separate schedules, being a block schedule and an internal schedule. The direct access units contribute towards the block schedule but not to the internal schedule, whereas the internal units contribute towards both schedules. He has also been informed and assumed to be correct that the lessee of 4 Portal Terrace, Merlin Court, has access to the communal garden at the first floor level and has to pass through the internal common parts in order to get to that communal garden. However, that unit and other direct access units are not being charged for maintenance of the internal common parts which fall within the internal schedule.

33. The apartments service charge percentage, as compared to the car park service charge percentage (which is capable of definite calculation depending on the precise number of car parking spaces at any one time), has been provided with flexibility. It is not a fixed percentage. It is a proportion that is fair and reasonable and is to be determined from time to time. The RICS Real Estate Management Professional Statement (3rd edition dated October 2016), paragraph 4.7.5 states "*Costs should be allocated to the relevant expenditure category. Where reasonable and appropriate, costs should be allocated to separate schedules and the costs apportioned to those who benefit from those services. This apportionment should ensure that individual occupiers bear an appropriate proportion of the total service charge expenditure, reflecting the availability, benefit and use of services...*"

34. It is his understanding that the applicant's case is that they have their own separate entrance door from the street and therefore they lack availability, benefit and use of the internal common parts serving those flats which are accessed from the common entrance hall staircase and lift. The applicants' argument is that these matters should be reflected in the fair and reasonable proportion they are required to pay by making an adjustment. The applicants claim they have no availability, benefit or use concerning the following items taken from the block expenditure statement in the accounts: lift maintenance and repairs, lift

insurance, lift telephone, lighting in the common parts, cleaning of the common parts, door entry system, maintenance and telephone calls, fire system, and internal general maintenance.

35. His understanding of the respondents case is that the applicants have a right of access over the ground floor entrance hall to access the car park, the bicycle store, the additional internal bin store areas, and the podium garden via the first floor, and accordingly they should pay a floor area proportion of the block charges.

36. In his opinion, first of all, it is unfair and unreasonable to refuse consent for the applicants to make a relatively small alteration to form a gate from their private patio to the rear podium, to match the other existing gates from other private patios, so that the applicants can have access to the podium garden directly from their private patio instead of having to go outside the front door, inside the front doors of the entrance halls of the block of flats, and up the staircase to the first floor access point for the podium garden and come out at precisely the same point as a gate would allow them. The natural inference, absent of any other reason, is that the respondent recognises that, if such gates were allowed and put in place, the case for floor area proportions without any variation would be substantially weakened. That, in his opinion, is not a fair and reasonable approach to the issue and does not result in a fair and reasonable proportion of liability.

37. With respect to the access to the ground floor car park area, some of the applicants have requested that they be allowed to use their fob for pedestrian entrance as well as using their fob for vehicular entrance and exit. They have been refused consent on the basis that the gates are for vehicles only, despite the fact that pedestrian gates have been provided to other car parks on the estate. The natural inference is that the relevant blocks were the earlier blocks and it was quickly realised that an additional pedestrian entrance to the car parks is desirable and avoids the need for people not living in flats off the internal common parts to have to go through their internal common parts. He does not believe it to be fair and reasonable to refuse consent for somebody to use the available external gates. Furthermore, even if a direct access lessee had to have access through the ground floor entrance halls to the car park staircase, in his opinion, that could not justify on a fair and reasonable basis having to pay a full floor area proportion of the entire expenditure for the internal common parts.

38. In his opinion, access to the bicycle store within the car park area has the same /parallel arguments made with regard to access to the car park area itself.

39. With regard to the bin store, there is no need for the applicants to go into the internal common parts at all because the nearest bin stores are the external bin stores.

40. Leases which provide for *fair and reasonable proportions* are not that common because developers are aware that they can give rise to arguments and tribunal cases. Most developers in his experience prefer fixed proportions where weightings or allowances are made for any unusual characteristics of one or more peculiar units to avoid future arguments. Mostly, this is achieved by putting expenditure into appropriate schedules enabling flats to be charged according to whether or not a particular flat has availability, benefit and use to the services in any one particular schedule.

41. In his opinion, it is sometimes the case that landlords or management companies argue that if a particular service is available to the tenant (whether or not the lessee has benefit and use), then the lessee must fairly and reasonably contribute. However, by reference to the RICS Professional Statement (referring to the availability, benefit and use of services), it is his opinion that the reasonably competent managing agent should take account of all three of those matters and not only availability (or legal entitlement).

42. In his opinion, the Block or Apartments' Service Charge Percentage should be divided into two schedules: Schedule 1 (the internal costs of the internal common parts to which only the internal flats will contribute) and Schedule 2 (the external costs or remaining expenditure to which both internal flats and direct access flats will contribute).

43. He recognises that it requires fewer resources to apply an across-the-board solution applicable to everyone, irrespective of fairness and reasonableness. On the other hand, it costs more resources to actually consider and apply a fair and reasonable solution. In his opinion, when the lease calls for the application of a fair and reasonable approach, then the reasonably competent managing agent has no option but to comply with that specified requirement.

44. The management function provides two schedules for Merlin Court in similar circumstances and it is his opinion that the same principles and practice should be applied to the subject properties.

Mr Maunder Taylor's oral evidence

45. The material parts of the evidence can be summarised as follows:

46. Although he had read the relevant lease, he was not aware that the patio area for the direct access units were not demised to their respective property. He accepts that the patio does not belong to the direct access units. However, he noted that each direct access unit enjoys exclusive access to their respective patio areas.

47. Given that each of the blocks has four entrance halls, he accepts that each entrance may need its own schedule and therefore there may be the need for four schedules. When asked whether there would be the need for a fifth schedule, because of the wooden facades above the direct access units, he stated he had not considered that.

48. He did not accept that the more schedules you have, the more difficult it was to manage. He stated that he manages 163 flats with 19 schedules. Having a number of schedules does not result in a lot of extra costs once the system is set up and any additional cost is relatively small.

Respondents case

Respondents Statement of Case

49. The material parts can be summarised as follows:

50. The direct access units still benefit from the communal services and building. For example, the communal courtyard podium garden can only be accessed from the internal communal area at ground level/level 1, the car park at ground level has no pedestrian gate and residents must pass through communal areas on the ground level, and the direct access flats continue to have the right to use all the refuse stores and the bicycle storage area and can only access these through the internal common parts.

51. The applicants claim that they do not in fact use certain parts of the building and so should not have to pay for them. However, the actual use of the leaseholder for the time being is not a relevant factor. What matters is the rights granted under the lease and the corresponding obligation to pay to ensure that those rights are efficacious. For example, the applicants claim that they do not use the communal staircases. However, whilst that may be correct, they or their subtenant's (if they ever sublet) or any future leaseholder is entitled to access the communal garden and, in order to do so, will need to use those staircases.

52. The methodology proposed by the applicants is potentially very complex and expensive to administer. It requires an examination of the actual use of the building by each leaseholder during each year. That would place an enormous burden on the managing agents to calculate each year and would add to the management costs.

Mr Richard Daver's witness statement

53. The material parts of the witness statement dated 17 November 2017 can be summarised as follows:

54. He is employed by Rendall and Rittner as managing director. He is a Chartered Surveyor and a Fellow of the Chartered Institute of Housing with some 30 years experience. He has worked across the private and public sector including within a local authority and housing association. Rendall and Rittner manages a large and growing residential property portfolio, from traditional mansion blocks to substantial mixed use developments, and are currently looking after almost 50,000 individual units. He has been involved in providing strategic advice for the development (in which the two subject blocks are located) for some seven years and has personally overseen the day-to-day management at director level since the commencement of management of the first building in 2012.

55. As part of his role, he has developed and overseen the service charge strategy for each element of the development and has set the initial service charge budget. He has overseen and approved all subsequent service charge estimates and has taken an active role in the management generally.

56. Where relevant, he has provided separate schedules for internal and external services. For example, for Campbell Court, where there was a mixture of private and affordable apartments and where the internal common parts of the latter are directly managed by the affordable housing provider.

57. In preparing the service charge structure and assessment, he was aware of the existence of direct access units. However, it was evident that the occupiers of those units would have access to and beneficial use over the common parts of their respective buildings to gain access to the car park, refuse stores, bicycle stores and podium level courtyard gardens. With respect to the podium gardens, access is gained via a door on the first floor and therefore residents would need to use the lift or the staircase and walk the length of a corridor to reach the courtyard access door. It was also evident that any resident accessing the internal common parts would have beneficial use of the door entry system, fire system, communal lighting, lift, common areas cleaning, communal electricity, etc, and therefore should contribute towards the associated costs.

58. The applicants have argued that they can access the car park via the vehicle gate. The car park does not include a separate pedestrian gate and therefore there is no safe designated route via the vehicle gate.

59. The applicants have argued that they can use an externally accessible bin store. This is correct but they also have a right to access all bin stores accessed through the car park. The lessees have been advised that the use of the external bin store may change - most likely to a holding area for full bins pending collection by the local authority.

60. To base the service charge apportionment on actual usage would be extremely complicated and difficult to administer. It may for example involve monitoring each occasion an owner or occupant of the unit accesses the internal communal areas in question and adjusting the service charge percentage in relation to the costs incurred in connection with those areas annually. This process would also set a dangerous precedent as a ground or first floor resident would then want to have the lift usage assessed. This approach would also introduce uncertainty of the level of service charge to be paid and would effectively be unmanageable.

61. The applicant's state that they do not require the proportion to be based on each lessees actual use of each facilities but suggest that regard ought to be had to the objective use to which the facility is likely to be capable of being put by a lessee. However, it is not entirely clear what the outcome of this "objective" assessment would be. It would still require a factual assessment of past usage and a speculative assessment of likely future usage, otherwise the figure would be arbitrary and potentially inaccurate.

62. If the applicants are suggesting that they should not pay for any of the costs associated with the internal communal areas, that would not be fair since it cannot be said with any degree of certainty that the applicants and their successors in title will never exercise their rights over those areas.

63. The direct access ground floor units at Graystone House are not directly comparable to the Cunningham Court or Johnson Court direct access units. The Graystone House units have direct access to the podiums via an externally accessible staircase and external access is built into the design of the car park and they also have their own refuse bins. They do not require access to the internal common parts neither are they entitled to access under their leases. Therefore, the Graystone House units do not contribute towards the costs associated with the internal common parts.

64. With respect to Merlin Court, the original design on which the service charge strategy was based, changed during the construction process in relation to access to the podium courtyard. It is intended that the contributions, as originally assessed, will be varied to reflect this.

65. The design of each phase and building has been considered in detail and the service charge arrangements reflect the right prescribed under the leases and the beneficial use of services and common parts.

Mr Daver's oral evidence

66. The material parts of the evidence can be summarised as follows:

67. With respect to the external bin store being changed to a holding area (for full bins pending collection by the local authority), a decision had not yet been made as this was not immediately under consideration. Pulling bins from the car park area is manually intensive therefore the plan is to have a holding area, where the external bin store is located, to make it easier and quicker.

68. With respect to Merlin Court, the original design was to allow the direct access units direct access to the podium garden without the need to use any of the communal parts. But the design changed. Therefore, the lessees of the direct access units in Merlin Court will now have to contribute towards the communal parts. That change is intended but has not yet been implemented. The works were completed in September 2016, the service charges for 2017 have already been sent out, therefore the correction/variation will be made in 2018. The lessees of Merlin Court have not yet been consulted and will be consulted for 2018. It is expected that the direct access flats in Merlin Court will complain regarding the proposed change but the change can be justified. He doubts that they would need a determination by the tribunal. When asked whether he had referred to this point before or had merely raised the issue in his witness statement because of this claim, he stated he was pretty sure the matter had been covered before. He confirmed that the decision to recalculate the service charge apportionment in Merlin Court concerning the direct access units was not as a result of this application that had been made to the tribunal.

69. He had conducted a review of the service charges for Conningham Court and Johnson Court. However, he concluded it was not reasonable to change the existing apportionment.

70. To his knowledge, none of the lessees have ever been given a key to allow the patio doors to be opened for access to the podium garden. Only the management have the keys to allow access for maintenance only. However, given the evidence from Ms Cheung, he accepts that he cannot contradict her evidence that one lessee has a key.

71. He accepts that in practice the car park can be entered via the vehicle gate. However, in his view it is not safe. He is also concerned that the "heavy" gates may not be suitable for pedestrian use.

72. He accepts that the direct access units have their own doorbells. When put to him that with respect to the fire safety system the direct access units have less benefit, he stated it was a communal fire system.

73. When it was put to him that the stone flooring on the ground level lobby area was easier to maintain than the carpet on the upper levels, he disagreed and stated that they needed quarterly buffing and that both of the floors needed intensive cleaning.

74. He accepts that the direct access lessees will use the common parts to get to the car park and the first floor podium garden much less than the lessees in the flats. He accepts that it was more likely that Ms Cheung would use the bin store nearest to her.

Expert Report by Mr Jeffrey Arnold Platt (BSc Est Man, FRICS, FIRPM) dated 17 November 2017

75. The material parts of the expert report can be summarised as follows:

76. The lease terms refer to "*a fair and reasonable proportion*" not "*the fair and reasonable proportion*".

77. There are potentially a number of ways to determine an apportionment, each of which may or may not be considered fair and reasonable by the tribunal.

78. In his opinion, the matrix and rationale detailed by Rendell and Rittner reflect not only the most common method but also the most appropriate method of determining a fair and reasonable proportion properly attributable to the relevant blocks.

79. Costs may be apportioned to an individual property in many different ways. Most common ones are: by floor area, by weighted floor area, a straight line proportion per unit or an adjusted unit apportionment based on number of bedrooms. The basis of apportionment is seeking to approximate the relative benefit of enjoyment and use of common areas, the structure and services to each individual property. It can be argued that each of the above-mentioned methods achieves this to a greater or lesser degree but whichever method is chosen there is inevitably an element of 'swings and roundabouts'.

80. Apportionment by floor area is a very common and accepted method; especially in commercial and mixed use developments and those like the instant development where many different buildings of varying size and design with different use types, form a phased development. It is commonly accepted as a method of reflecting the relative benefit enjoyed by an individual property.

81. The applicants claim that they do not use or benefit from all the services provided to the common parts and hence they should not contribute to those costs or should not contribute to them in the same proportion. The applicants claim that the present method of apportionment adopted by the landlord is in breach of the RICS residential management code and the leases.

82. The applicants' leases grant them rights to use all of the common parts of the relevant block which includes the lifts, the lift lobbies, the

staircases, the undercroft car park, the communal courtyard podium garden, all the refuse stores and the bicycle storage area. They therefore have the right to enjoy the benefit and use of all these areas. Each leaseholder, their tenants, family, visitors and successors in title all benefit from the contractual right to use these areas. In his opinion, the choice of an individual leaseholder, occupier etc to use or not to use them is a personal choice unrelated to their contractual rights as detailed in the lease. In determining a fair and reasonable apportionment, one should have regard to the availability and benefit contractually provided within the lease. Therefore, in his opinion, any apportionment should include the cost of maintaining and providing services to all of the common parts.

83. In his experience, the most common example of these sorts of dispute is related to leaseholders on the ground floor being expected to contribute to the maintenance of a lift and stairwell that they perceive provide no tangible benefit to them even though they have a contractual right to use them. In his experience it is very rare for leases to specify that the ground floor premises do not contribute to these areas and where landlords have the choice of apportionment, it is also not common that they choose to exclude those properties from contributing. In his opinion, this is the correct approach.

84. With respect to Conningham Court and Johnson Court, he is even more persuaded that this is the correct approach having regard to both the lease terms and the physical nature of the common parts. The definition of Apartments' Common Parts is defined as "... *the use or enjoyment of which is common to some or all of the tenants or occupiers...*" The lease therefore clearly anticipated the situation where not all leaseholders enjoyed the benefit or use of particular areas.

85. Secondly, not only do the applicants have a right to use the communal entrances, stairwells and lifts but the use of these areas is necessary to fully enjoy other common areas to which they have a contractual right e.g. the communal bin stores, the bicycle storage areas, the courtyard podium gardens and the undercroft car parks.

86. In his opinion therefore, the Apartments' Expenditure rightly includes the costs incurred in maintaining the common areas and the applicants are rightly expected to contribute a fair and reasonable proportion of those costs.

87. Apportionment by floor area seeks to reflect the pretext that costs incurred in maintaining services and in particular the structure, increase as the overall size of the property increases. It also reflects the pretext that larger properties are more likely to be occupied by larger families with more people enjoying the common parts and benefiting from common services. Apportionment by floor area is an admittedly very blunt way of reflecting the potential additional usage. However,

the alternative of measuring and recording individual usage would be totally impractical. The applicants refer to a number of areas where they perceive the benefit or enjoyment accruing to their property is less than that accruing to smaller properties within the block. That may or may not be the case, but the applicants have only referred to a small part of the apartments expenditure. There are a number of areas where larger properties inevitably gain a greater benefit and apportionment by floor area is an attempt to reflect that. For example, larger properties tend to have more windows requiring long-term maintenance and replacement. Larger properties invariably benefit from a larger surface area of building facade. He noted that the direct access units (numbers 37 to 40) in Johnson Court benefit from a wooden clad facade which will cost significantly more to maintain than the brick facade common to the apartments. He therefore concludes that whilst the applicants may or may not obtain less beneficial enjoyment from some areas of the common parts or benefit from some of the common services to a lesser degree, they are likely to benefit to a high degree from other expenditure in the long term. Therefore, from that perspective, the landlords chosen method of apportionment by floor area is a fair and reasonable apportionment.

88. The applicants appear to contend that some of the costs should be allocated to a separate schedule and apportioned on a different basis. They do not suggest what method of apportionment would better reflect their perceived or likely benefit therefore he had assumed they were suggesting a weighted or adjusted floor area apportionment to a separate schedule of these costs. (The experts agreed that floor area proportions are a fair and reasonable method of calculating proportion once (in the applicants case) the schedules have been decided).

89. This approach would increase complexity which will increase management costs. The Commercial Code of Practice anticipated the issues that could be created by stating "*Care should be taken to limit the number of specific schedules. This is because the cost of operating these often substantially outweighs the benefits received by the occupiers from such detailed cost analysis and apportionment*". In his opinion, the likely scenario at Conningham Court and Johnson Court would be that additional management costs are incurred and the tribunal may wish to consider whether those increased costs would be reasonably incurred when there is no overall benefit to the block or estate as a whole.

90. If a secondary method of apportionment is not based on actual usage then it must be based on a subjective assessment of potential usage. How far does one go? For example, the applicants appear to be suggesting that they are likely to use the lifts less frequently than occupants of the main block and that they only use the lifts to ascend one floor. That subjective argument can be extrapolated indefinitely i.e. does the first floor receive lesser benefit than the second floor which

receives lesser benefit than the third floor etc? He has never come across a lease that attempts to apportion use and benefit in this way.

91. The applicants contend that they do not need to access the car parks via the apartment common parts because they can access via the vehicle gate. Taking this statement at face value, one inevitably concludes that the applicants must use the large vehicle access gate twice as often for every vehicle or bicycle entry or exit as other residents. Are they suggesting that the costs of maintenance and replacement of the vehicle gates should also be allocated to a separate schedule to which they contribute a double apportionment?

92. Also noted on his inspection was that services cupboards are located in the car parks. These cupboards need to be accessed by servicing and maintenance personnel to the benefit of each and every property in the building. The car park also needs to be regularly accessed by cleaning staff. The service and maintenance engineers and cleaning staff will access these areas via the apartment common parts. There is therefore an element of indirect use of these areas from which the applicants benefit as well as their direct use.

93. The applicants contend that they have no reason to use the internal bin stores. It is likely that other residents would also state that they typically only use one particular bin store. Are the applicants suggesting that the costs associated with each individual bin store should be allocated to separate schedules and apportioned to the properties that are most likely to use them? In his opinion, the external bin stores; with metal doors, fitted with maglocks and requiring door entry fobs, are likely to require more maintenance than the internal ones, fitted with wooden doors not requiring fob access. This would also need to be reflected in the individual cost schedules.

94. These examples of beneficial use demonstrate that an apportionment based on a subjective assessment of potential usage would require a very detailed subjective assessment of all services, all common areas, every individual part of the structure etc. It would also require not just an assessment of the likely usage today but the likely usage over a long period of time by different types of occupiers, their families and invited guests.

95. Such an assessment would arguably require consideration of the most appropriate method of apportionment and level of weighting or adjustments to be applied to every individual head of expenditure within the service charge accounts and with many additional subheads of expenditure; to reflect individual use of vehicle access gates, bin stores etc.

96. From his personal experience and discussions with other lead authors, he is of the opinion that all the good practice guidance which refers to

"use" is typically requiring regard to the different types of user that may receive differential benefit or enjoyment. The first guidance was largely drawn up to cover apportionment within complex shopping centres. The mixed use guidance is intended to cover different "use classes" e.g. shops, offices, residential. None of the guidance makes any reference to different levels of 'actual use' by similar properties in a building within one use class. Actual use is typically restricted to apportioning via various use subclasses e.g. retail may comprise a large department store or a small kiosk; where the benefit derived per square foot of floor area is clearly different. In his opinion, the good practice guidance was never intended to suggest that service charges would be apportioned within a use class dependent upon the amount of use an individual may or may not make of specific areas to which they have a contractual right of enjoyment. Therefore, in his opinion, further allocating the apartments expenditure to a number of schedules with differing apportionments is not anticipated within the lease, is unnecessary and not cost-effective.

97. The landlord could have chosen one of the commonly used method of apportionment e.g. floor area or per unit. There are elements of swings and roundabouts with each commonly used method and he would personally not be in a hurry to suggest any one method is fundamentally unfair or unreasonable. He is of the opinion that apportionment by floor area is a fair reflection of benefit and use derived from the estate expenditure and the apartments expenditure. He is also of the opinion that adopting a range of apportionment methods for different schedules would require detailed subjective assessment which would increase costs unnecessarily. He is of the opinion that the method of apportionment used by the respondent represents "the correct, fair and reasonable" method on this development.

Mr Jeffrey Arnold Platt's oral evidence

98. The material parts of the oral evidence can be summarised as follows:

99. The lease already provides for four classes of expenditure. If the applicants suggested method is adopted, he counts 19 schedules that would be needed.

100. The starting point is to look at the terms of the lease. Then look at the physical design of the building. In this instance, the applicants have a right and the need to access common parts to get to the garden and the car park.

101. If a decision is made to split into additional schedules, there may be the need to add additional schedules to that and that can then become unworkable and costly. One applicant may state that he or she uses the refuse store next to their property. But once that argument is followed, it leads to determining how much one flat uses a particular bin store.

Other flats may claim that they don't use the outside bin stores and therefore there would be the need for a further schedule. Once many schedules are set out, it becomes complex. Once you start splitting heads into schedules, potentially different people on different floors will argue those on the upper floors use the lift more and therefore should pay more.

Findings and reasons

102. The main argument underpinning much of the applicants' case is that they do not need to use the communal parts inside the block and therefore they should not have to contribute towards their costs.

103. However, the starting point must be the lease, which governs the relationship between the applicants and the respondent. Under the terms of the lease, the applicants have the right to use the common parts, which includes the lobbies, staircases, lifts, podium garden, car park, and all the refuse stores. The applicants, their tenants, family, visitors and successors in title, all therefore have the right to enjoy the benefit and use of all these areas. In this regard, the tribunal agrees that the choice of an individual leaseholder to not use them, is a personal choice unrelated to their contractual rights. Until the lease is varied, such that the applicants no longer have the right to enjoy the benefit and use of the communal parts inside the block, it must be right in principle that they should contribute towards their costs, whether they choose to use the communal parts inside the block or not.

104. In any event, the tribunal found that the applicants in fact need to use the communal parts inside the block.

105. The applicants claim that they can have direct access to the podium garden but for the respondents unreasonable refusal to install lockable gates in their respective patios. However, under the terms of the lease, whilst the applicants have exclusive use of the patio area, the patio area is not demised to the direct access properties and therefore the applicants do not own the patio or the glass partitioning, which belongs to the respondent. Therefore, the respondent is not required to give the applicants direct access gates. The applicants are effectively asking the respondent to give them something which does not belong to them so that they may seek consent to alter the glass partitioning. The tribunal noted that a number of the direct access flats have large raised borders between the patio area and the podium garden. Therefore, they would need to access the podium garden by walking through their neighbours patio area. This would result in a breach of the terms of the lease granting each direct access property exclusive use of their own patio area. It is argued by the applicants that 39 Conningham Court has access to the podium garden directly from their patio. However, the respondent stated that this was without permission and that no permission was sought or given. This is consistent with the answer

provided to Ms Cheung when she previously queried whether she too could have the same for her patio. The tribunal has not been provided with any evidence directly from the lessee(s) of 39 Conningham Court. The tribunal further notes that Ms Cheung's evidence, that they had keys and were permitted to access the podium garden directly from their patio, is based upon what her parents were apparently told. Furthermore, Ms Cheung stated in oral evidence that she knew that one of the flats had a key and she had therefore 'assumed' the respondent had given permission. The respondent denies granting permission and the tribunal has not been provided with any persuasive evidence to the contrary.

106. The applicants claim that they can access the car park via the vehicle access gates. However, unlike the other blocks within the development, Conningham Court and Johnson Court do not have any pedestrian side gates in addition to the vehicular access gates. The tribunal is of the view that it is a matter of common sense that it would be unsafe for pedestrians to use the vehicle entry / exit route without there being in place a separate designated route for pedestrians. The tribunal therefore found it reasonable for the respondent to insist that all pedestrians enter the car park through the communal doors. The applicants are effectively asking for something that does not exist, namely, pedestrian access to the car parks.

107. In its current layout, the podium garden can only be accessed via the ground floor communal area and then up a flight of stairs or by use of the lift to the first floor and the applicants are only permitted to enter the car park through the ground floor communal area. Irrespective of the need to access either the podium garden or the car park, the applicants would also need to enter the communal area to take their electric meter readings, where the meters are located. The tribunal is therefore satisfied that the applicants do in fact need to have access to and use of the communal parts.

108. The applicants claim not to have any benefit from the communal door entry system or the communal fire system. However, although the entry phone system is not connected directly to the applicants' properties, their fob keys allow them access to the communal parts and the entry phone system would prevent unauthorised entry. This would protect all the properties, including the direct access properties, from unauthorised access to the internal communal parts, the podium garden, and the direct access properties' patio areas. The communal fire system would protect the whole building, which includes the direct access units, from the risk of fire/fire damage.

109. This undermines the applicants' justification and reasoning for having two schedules (Schedule 1 for those costs relating to services for which the internally approached flats have availability, benefit and use and

Schedule 2 for those services which both the internal flat and the direct access units have availability, benefit and use).

110. With respect to the direct access units in Merlin Court, in light of the evidence from Mr Daver, on balance, the tribunal accepts that the original design was to allow the direct access units direct access to the podium garden without the need to use any of the communal parts. But the design changed. Therefore, the lessees of the direct access units in Merlin Court will have to contribute towards the communal parts, they will be consulted in 2018, and the correction/variation will be made in 2018. In any event, if the direct access units in Merlin Court had the right to use the common parts under the terms of the lease and in fact needed to use the communal parts inside the block, similar to the applicants, the tribunal would find the present apportionment unfair.

111. The tribunal notes the applicants' fallback position, namely, that the applicants do not benefit from the use of the internal communal area to the same extent as the units which are directly accessed from the communal parts. Therefore, there should be a reduction in the service charge costs for the applicants to reflect the lesser usage of the common parts. The tribunal notes that Mr Maunder Taylor has not directly dealt with this point. His conclusion, suggesting the use of 2 schedules, was based upon his opinion that the applicants would have no need to enter or use the internal communal parts at all.

112. However, Mr Platt has usefully dealt with this point. The tribunal agrees that some of the costs would need to be allocated to a separate schedule and apportioned on a different basis. The applicants argue that such an apportionment does not have to be based upon the "actual usage" but can be based upon a "subjective assessment" of potential usage. However, the tribunal agrees with the respondent in that there would be practical difficulties that would inevitably arise when using such an approach. For example, if the applicants appear to be suggesting that they are likely to use the lifts / stairs less frequently than occupants of the main block and that they would only use the lifts / stairs to ascend one floor, that subjective argument can be extrapolated indefinitely i.e. does the first floor receive lesser benefit than the second floor which receives lesser benefit than the third floor which receives lesser benefit than the fourth floor? This could result in the need for a separate schedule for each floor. If the applicants wish to access the car parks via the vehicle gates, inevitably the applicants would use the large vehicle access gates twice as often for every vehicle entry or exit as other residents. Are they suggesting that the costs of maintenance and replacement of the vehicle gates should also be allocated to a separate schedule to which they contribute a double apportionment? The applicants contend that they have no reason to use the internal bin stores. It is likely that other residents would also state that they typically only use one particular bin store. Are the applicants suggesting that the costs associated with each individual bin store should be allocated to separate schedules and apportioned to the

properties that are most likely to use them? The external bin stores; with metal doors, fitted with maglocks and requiring door entry fobs, are likely to require more maintenance than the internal ones, fitted with wooden doors not requiring fob access. This would also need to be reflected in the individual cost schedules. The direct access units (numbers 37 to 40) in Johnson Court benefit from a wooden clad facade which will cost significantly more to maintain than the brick facade common to the apartments. Would this result in yet another schedule? These are just some examples of the way in which introducing schedules based upon usage can result in significantly more schedules. Mr Maunder Taylor accepted in oral evidence, given that each block has 4 entrance halls, there may be the need for 4 additional schedules. Mr Platt stated in oral evidence that he had counted up to 19 schedules being required if the applicants' method were to be adopted.

113. The tribunal accepts that an apportionment based on a subjective assessment of potential usage would require a very detailed subjective assessment of all services, all common areas, and every individual part of the structure. The tribunal further agrees that it would also require not just an assessment of the likely usage today but the likely usage over a long period of time by different types of occupiers, their families and invited guests. The tribunal accepts that the addition of multiple schedules would inevitably increase complexity which will unnecessarily increase management costs. For those reasons, on the facts of this case, the tribunal found it unfair and unreasonable to use a method of apportionment based upon "usage".

114. The tribunal preferred the expert evidence from Mr Platt as Mr Maunder Taylor's expert evidence was based upon his assumption that the direct access units in Merlin Court accessed their communal garden via the internal common parts but were not being charged for the maintenance of the internal common parts. It was also his opinion that the applicants could in fact access the car park and the podium garden without the need to use the internal communal area. For the reasons given, the tribunal found that the present apportionment in Merlin Court concerning the direct access units arose out of a misunderstanding and will be corrected. The tribunal also found that the applicants in fact need to use the internal communal parts to access the car park and the podium garden. The tribunal found Mr Maunder Taylor's assumption and opinion inconsistent with the findings of fact made by the tribunal. The tribunal also found that Mr Platt had correctly identified the respondents case, which included the respondents argument that the applicants in fact needed to use the internal communal areas. Mr Platt's report also provided a detailed discussion concerning the practical difficulties that would arise from any apportionment based upon "usage".

115. Taking into account the rights granted to the applicants under the terms of the lease with respect to the internal communal parts, the physical nature and layout of the communal parts in Conningham

Court and Johnson Court, the actual need for the applicants to use the internal communal parts within the blocks, the unfairness in having only 2 schedules representing internal and external costs only, the complexity and the increase in costs of managing multiple schedules, the practical difficulties of apportionment based on a subjective assessment, the acceptance by the applicants that floor area proportions are a fair and reasonable method of calculating proportion once (in the applicants case) the schedules have been decided, the tribunal found that apportionment of the block or apartment expenditure on the basis of floor area only is a fair apportionment.

116. Given the findings made by the tribunal, the tribunal did not see the need to deal with the estoppel argument relied upon by the respondent.

117. The applicants argued that all the service charge demands since March 2015 were invalid as they did not contain the correct name of the landlord and therefore no service charges were due from the applicants. However, upon Mr Bates providing the amended information at the hearing, the applicants conceded they no longer pursued that point.

Application under s.20C

118. Both parties agreed at the hearing that the tribunal should make a provisional decision but allow parties to make written representations within 14 days if they disagreed.

119. Taking into account the tribunals determination above and the respondent being successful on the main disputed issue, the tribunal decline to make an order under section 20C.

Name: Mr L Rahman **Date:** 21/1/18

ANNEX - RIGHTS OF APPEAL

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

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

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

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

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

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

Section 20C

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

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

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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