FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/00MR/LSC/2021/0013**
Property	**:**	**Flat 1, 32 Ashburton Road, Southsea, P05 3JT**
Applicant	**:**	**Edith Rogerson**
Representative	**:**	**Carter Bells LLP**
Respondent	**:**	**Grimwood (Southsea) Management Company Limited**
Representative	**:**	**Nadia Atkinson**
Type of application	**:**	**Transferred Proceedings from County Court in relation to service charges**
Tribunal member(s)	**:**	**Judge Tildesley OBE**
Hearing	**:**	**22 April 2021** **Havant Justice Centre** **Cloud Video Platform**
Date of Decision	**:**	**3 June 2021**

DECISION

Summary of the Decision

1. The Tribunal decides that in accordance with the lease the Applicant is liable to contribute 11.31 per cent in any one year of the costs, expenses, outgoings, and matters mentioned in the Fourth schedule to the Lease and to the costs of taking out and maintaining in force effective insurance for the building.

2. The Tribunal decides that the Applicant is required to pay one sixth of the service charge and is estopped from asserting that she is liable to pay a contribution of 11.31 per cent to the costs of maintaining and insuring the property. The Tribunal's decision on estoppel, however, only applies for the period of time and to the extent required by equity which the estoppel has raised and does not apply to future dealings. The Tribunal, therefore, determines that the estoppel ceases as at the date of this decision and thereafter the Applicant's liability is determined by the terms of the lease, namely to pay a contribution of 11.31 per cent to the costs of maintaining and insuring the building.

3. The Tribunal is satisfied that the Applicant had admitted liability to pay one sixth of the service charges for the period from 22 December 1993 to 4 February 2020. The Tribunal decides in the alternative that no application can be made by the Applicant to dispute liability to pay service charges for the period from 22 December 1993 to 4 February 2020 on the basis of one sixth apportionment in accordance with section 27A(4) of the 1985 Act.

4. The Tribunal's decision under section 27A(4) of the 1985 Act does not prevent the Applicant and or the Respondent from making application to determine the reasonableness of the service charges during the said period provided the Applicant's contribution of the service charge is calculated on the basis of one sixth.

5. Judge Tildesley OBE sitting as a County Court Judge exercising the jurisdiction of District Judge will reconvene the hearing on **8 July 2021 at 10.00am** at Havant Justice Centre, Elmleigh Road, Havant PO9 2AL to confirm the decision of the Tribunal and make any necessary orders including costs and declarations that follow from the Tribunal's decision. The listing shall be for 90 minutes. The parties may apply to attend the hearing by video or BTMeet Me. By **1 July 2021** the parties are required to file and serve a list of outstanding issues to be considered at the hearing on 8 July 2021.

Background

6. The Applicant seeks a declaration that the service charge which she is obliged to pay pursuant to her lease of Flat 1, 32 Ashburton Road, Southsea is 11.31% of the total costs incurred by the Respondent in the management of the building. The Respondent contends that the service charge is shared equally between the six leaseholders at the property, namely one sixth (or 16.66%) of those costs. Subject to the outcome of the declaration, the Applicant also claims restitution of the sums overpaid.

7. The original proceedings were issued in the County Court under Claim No. GO1KT723 and were transferred to the Tribunal by District Judge Armstrong by order dated 14 January 2021

8. As a result of amendments made to the County Courts Act 1984, First-tier Tribunal judges are now also Judges of the County Court. In this case, the District Judge ordered that the Tribunal Judge determine all matters arising from the claim.

9. The Tribunal's has jurisdiction to determine the amount of service charge payable by the Applicant which includes a decision on the appropriate apportionment of the service charge for which she is liable. The matters falling within the jurisdiction of the Court are repayment of service charges, interest and costs.

10. On 1 March 2021 the Tribunal ordered a hearing to take place at Havant Justice Centre on 22 April 2021. The parties were given permission to attend by video if an application was made. The Tribunal stated that the evidence filed in the Court proceedings would stand as the parties' cases. On 19 March 2021 the Tribunal issued further directions in response to applications made by the parties which allowed them to submit additional evidence, replies to that evidence and the filing of skeleton arguments.

11. The parties attended the hearing on 22 April 2021 via the Cloud Video Platform. Mr Philip Sissons of Counsel represented the Applicant. Mr Roland Pingree, the instructing solicitor, and the Applicant were also in attendance. Mrs Nadia Atkinson (Flat 5) appeared for the Respondent. Mr Matt Hopkins and Mrs Angela Hopkins (Flat 3), Mr Philipp Bostock (Flat 4), Mr Reginal Hyde (Flat6), Mr Phil Atkinson (Flat 5) and Mr Brendan Cosgrove of Cosgroves (the Managing Agent) attended to give evidence on behalf of the Respondent. Ms Ann McAllister of flat 2 supplied a witness statement.

12. The Tribunal had before it the parties' bundles of documents and skeleton arguments. Pages in the Applicant's bundle referred to in the decision are in [ ].

13. On 21 April 2021 the Respondent supplied a schedule of the service charges paid by the Applicant which covered a period of 12 years. The Tribunal did not consider the schedule at the hearing on 22 April 2021.

14. At the hearing the Tribunal restricted its consideration to the issue of apportionment. The Tribunal indicated after its determination on apportionment further directions would be issued to conclude outstanding matters.

15. The case papers revealed that the Applicant was also disputing liability to contribute to some of the costs of the common parts on the ground that Flat 1 had its own entrance and that the Applicant derived no benefit from the common parts. The Tribunal decided not to consider this dispute at the hearing on 22 April 2021, principally because the Respondent had made no application to determine the quantum of the service charges.

The Dispute

16. The Applicant argues that the provisions of the lease dealing with apportionment of service charge are clear and binding on the parties. The Applicant states that the provisions stipulate that the contribution made by an individual leaseholder to the service charge is the ratio of rateable value of the individual flat against the aggregate rateable value for the whole property. As the flats have different rateable values, the individual contributions made by each flat would also be different.

17. In contrast the Respondent relies on the fact that the leaseholders have been contributing equally to the service charges for at least 27 years which was the period of time that the Applicant had owned Flat 1. The Respondent contended that the Applicant's actions amounted to an admission of liability to pay one sixth of the service charge and that she was either estopped from denying that fact or prevented from making an application challenging liability by virtue of section 27A(4) of the 1985 Act.

The Property and Lease

18. The property, 32 Ashburton Road is a substantial brick built mid-terraced building located over five floors and situated in the centre of Southsea close to the beach and the shopping parade. Around 1972 the building was converted into six flats.

19. The Applicant acquired the leasehold of Flat 1 in 1993. Flat 1 is the basement flat for the property. The Applicant's lease is dated 4 April 1972 and made between Edward Grimwood Nash (the Lessor) of the first part, Grimwood (Southsea) Management Company Limited (the Management Company) of the second part and Costa Gazidis and Dorothea Gazidis of the third part (the Lessee). The term of the lease is 999 years from 1 January 1972.

20. Under the terms of the lease the Lessor is obliged to transfer the freehold reversion of the property to the Management Company not later than one month after the leases of the all the said flats in the property had been granted. From that date the Management Company performs the Lessor's covenants and is entitled to recover its costs from

the Lessees by means of a service charge. The Respondent is the Management Company, and each lessee holds one share in the Company. The freehold reversion of the property has been transferred to the Respondent.

21. The Habendum of the lease stated

"To hold the demised premises unto the Lessees from the First day of January One thousand nine hundred and seventy two for the term of Nine Hundred and Ninety-Nine Years yielding and paying therefor during the said term the rents following, namely:

a) A rateable proportion (as hereinafter defined) of the amount which the Lessor may expend in effecting or maintaining the insurance of the building against loss or damage by fire and such other risks including insurance of staff as the Lessor may in his discretion think fit and to be paid without any deduction within fourteen days of demand being made therefor by the Lessor or his Managing Agents.

b) By equal half-yearly instalments in advance on the First day of September and the First day of March in each year the annual service charge (as hereinafter defined) payable in respect of each year of the said term and proportionately for any period less than a year as a contribution towards the expenditure incurred or to be incurred by the Lessor incidental to the performance of the covenants on the part of the Lessor contained in clause 6 hereof Provided that the Lessee will on the signing hereof pay to the Lessors a sum of Twenty Pounds on account of the Lessee's liability for One Thousand nine hundred and seventy two and any underpayment or overpayment shall be adjusted on the delivery of the account for such period.

c) The expression "annual service charge" shall mean the rateable proportion (as hereinafter defined) of such sum as is equal to the aggregate of the sums actually expended or liabilities incurred as the case may be by the Lessor in the year preceding the demand for such service charge or in the last year of the term hereby granted in connection with the matters hereinafter mentioned and in particular (but without limited the generality of the foregoing) shall include: (*the next sub-clauses are not relevant to the issue in hand)*".

22. Clause 4 sets out the Lessee's covenants. Sub-clause 4(ii) states that the Lessee covenants to "contribute and pay a proportionate part (as hereinafter defined) of the costs expenses outgoings and matters mentioned in the Fourth Schedule hereto"

23. Clause 10 deals with the declarations. Sub-clause 10(i) declares as follows: "the expression 'proportionate part' shall mean such proportion as the rateable value of the demised premises bears to the aggregate rateable value of the whole of 32 Ashburton Road aforesaid".

24. The Applicant identified the rateable values for each of the flats in the Property from the ratings list supplied by Portsmouth Water Ltd [29]. This showed that the total rateable value of the flats in the Property was £796 and that Flat 1's rateable value was £90. According to the Applicant, the leaseholder of Flat 1 was liable to contribute 11.31 per cent (£90/£796 x 100) of the service charge in any one year.

25. The Applicant's solicitors supplied the percentage for each Flat as calculated by rateable value [27], namely:

First floor Flat 23.37 per cent
Second Floor Flat 19.35 per cent
Third Floor Flat 13.32 per cent
Basement Flat 11.31 per cent
Ground Floor Flat 12.31 per cent
Maisonette Flat 20.35 per cent

26. It was not possible to decipher the date of the ratings list exhibited in the hearing bundle. Mr Sissons stated that the Tribunal could assume that the rating list supplied by Portsmouth Water was the most current.

The Applicant's Evidence

27. The Applicant tendered in evidence two witness statements dated 20 November 2020 [16-20] and 7 April 2021 [160-163] respectively.

28. The Applicant highlighted that her flat is the second smallest out of all six flats[1]. The Applicant stated that her Flat was totally self contained with its own entrance gate, staircase and exterior front door with direct access to the street. The Applicant pointed out that Flat 2 was smaller but benefitted from the amenities of the main building, such as carpeted stairs and intercom.

29. The Applicant testified that when she bought Flat 1 in December 1993 she was in the process of going through a difficult divorce and the service charge contributions were not at the forefront of her mind.

30. The Applicant asserted that what prompted her to consider the service charges and instruct a firm of solicitors was when one of her fellow leaseholders/directors told her that she owed monies to the Respondent.

31. The Applicant in cross examination could not recall which director had told her that she owed money. The Applicant accepted that over time all directors had informed her about owing monies. The Applicant did not know the precise date she considered the service charges but accepted that it was least ten years ago.

32. In answer to why it had taken nearly 27 years to take legal action regarding her liability to pay service charges the Applicant said that

[1] The Tribunal notes that the Applicant's Flat has the lowest RV.

"She had five directors against her whose service charge she was paying and that it was difficult to prove". The Applicant said she took legal advice either six or ten years ago. She was not sure which one. The Applicant stated that she had discussions with all the directors for a long time but there was five against her and she never had a chance. The Respondent stated that the Applicant's solicitor was also her son.

33. Mrs Atkinson referred to the Minutes of the AGM on 17 November 2018 [234] and asked the Applicant why she had not circulated the legal advice about the service charges to the other leaseholders and the managing agent. The Applicant said it was not relevant, asserting that she was taking action now, there were five against her and she never had a chance.

34. The Applicant said that she completely ignored the letter dated December 2019 from the debt collection agency seeking to recover the arrears of service charge from her. The Applicant stated that she had several reasons for commencing legal action in 2020 but was not prepared to share them. The Applicant denied that she was aware of her service charge debt being slowly written off by the passage of time. As far as the Applicant was concerned she had no debt but was owed monies from the other leaseholders. The Applicant said she had been overpaying for many years, one of the other flats was a maisonette. The Applicant stated that she had been Chair of the Respondent's Board of Directors for many years and had contributed far more than any other leaseholder.

35. Mrs Atkinson asked whether the ensuing comment was fair or not fair, "as time passes the Respondent would have increasing difficulties obtaining documents about the Applicant's service charge debt in 2008 when Countrywide Properties Limited ceased to be the managing agent". The Applicant responded that the comment was not fair.

36. The Applicant stated that she did not understand Mrs Atkinson's question that if the wording in the lease about the method for calculating the apportionment was crystal clear, the service charge apportionment must have been changed between 1972 and 1993.

37. In answer to questions posed by the Tribunal, the Applicant accepted that she contributed one sixth of the service charge from 1993 when she bought Flat 1. The Applicant agreed that she was still paying one sixth and that was why she was challenging the service charge. The Applicant stated she paid one sixth of the service charge since 1993 but not willingly.

38. The Applicant said that for the first three years she was not aware that the other Flats were in the same bracket as her flat. The Applicant stated that she had no means of access to the main building and did not know that the other flats were much bigger than her flat. The Applicant accepted from 1996 that she knew the sizes of the other flats but still continued to pay one sixth of the service charge because she had to.

39. The Applicant said that she tried to change the apportionment through the managing agents. The Applicant considered irrelevant whether she involved the other leaseholders in these discussions. The Applicant said that her case was that the service charge had always been apportioned incorrectly.

40. The Applicant said she was aware that the apportionment of the service was not correct when she found out about the other flats being larger. The Applicant accepted that this must have been in 1996. The Applicant, however, denied that she knew about rateable value determining the apportionment. The Applicant made no comment in answer to the question when she first read the lease. The Applicant considered it irrelevant that she was referred to the lease in 2008 over the dispute about boundary wall. The Applicant answered that she always paid one sixth after the email from Mrs McAllister referring her to the lease on 8 October 2008 [184].

41. The Applicant informed the Tribunal that she had been Chair of the Board of Directors for the Management Company for about 10 years.

The Respondent's Evidence

42. The Respondent's case was that the leaseholders had made equal contributions to for at least the past 26 years. The Respondent stated that a copy of the lease was provided to all leaseholders on purchase of the flat and that it should have been read by the leaseholders and their solicitors. The Respondent asserted that all leaseholders were aware of the provision in the lease relating to rateable value but despite this the leaseholders and the Respondent had agreed that the service charge would be apportioned equally. The Respondent added that rateable value had not been current since 1992 and was only of historic interest. The Respondent pointed to the fact that council tax banding had replaced rateable values in 1991 and all the flats were in the same council tax banding.

43. The Respondent adduced witness testimony from the other five leaseholders who all confirmed that service charges for the property had been apportioned equally between the six flats from the dates (various from 1997 to 2017) that they purchased their flats to the present day. The leaseholders also stated that it was their understanding that service charge apportionment was agreed to be split equally at some point prior to their purchase. Mr and Mrs Hopkins said that their conveyancing solicitor had confirmed the equal apportionment of service charges. The Applicant did not challenge the other leaseholders' witness testimony.

44. Mrs Atkinson added that the Applicant had over the years disputed specific charges for which she did not want to pay, such as the intercom and other items of expenditure on the communal areas. Mrs Atkinson, however, asserted that at no time did the Applicant challenge the service charge apportionment. Counsel referred Mrs Atkinson to an

email sent by the Applicant dated 29 July 2008 [65] where the Applicant had asked for the topic of "Contributions – proportional to floor space" be included on the Agenda of the next meeting. Mrs Atkinson stated that the Applicant did not pursue this matter at the meeting. In Mrs Atkinson's view the note demonstrated the Applicant's state of knowledge about the lease, and her acceptance of the agreement to share the service charges equally.

45. Mr Atkinson's witness statement referred to various documents which he said showed that the Applicant had raised the issue of apportionment on many occasions and also showed that the Applicant knew the terms of her lease. The documents highlighted that the Applicant's concern with apportionment comprised two separate issues. The first was that the Applicant wished the Board to discuss a split of maintenance charges based on square footage[2]. The second concerned the Applicant's assertion that she was not liable for expenditure relating to the internal communal areas of the property which was based on her interpretation of the lease[3].

46. The Minutes of the Meeting on 17 November 2018 recorded that

> "Edith (the Applicant) informed the meeting she had been given legal advice on the terms of the lease which proved Flat 1 was not responsible for any contribution towards the internal communal areas of the property. Edith was asked to circulate the advice to her fellow leaseholders/freeholders and Cosgroves. Edith refused to agree to pay an equal contribution of service charge going forward and currently withholds service charge towards any expenditure relating to the internal communal areas" [234].

47. The documents evidenced on the Applicant's knowledge of lease included email exchanges regarding repairs to the boundary wall [183 & 184], and Flat 1's debt in the accounts [207].

48. Mr Atkinson asserted that the Applicant had consulted her lease, refused to pay based on her interpretation of the lease and passed it to various bodies including surveyors and managing agents but what the Applicant had not done was to make a formal challenge on the lease. Mr Atkinson stated that the Applicant's delay in bringing this challenge (on apportionment) had unduly prejudiced the Respondent's case and had caused the other leaseholders to suffer a financial burden.

49. Mr Brendan Cosgrove in his witness statement dated 19 March 2021 confirmed that since the appointment of Cosgroves as managing agent on 15 January 2012 the service charge to date had been invoiced equally (namely one sixth of the costs to each flat). Mr Cosgrove stated that the Applicant had only withheld payment for specific service charge items relating to internal communal areas until the recent request for payment for a contribution towards the fire safety works

[2] See Minutes of Meeting dated 6 September 2008 [182].
[3] See Minutes of Meeting dated 3 September 2017 [233]

when the Applicant on 25 February 2021 paid £366.44 of the £540 demanded.

50. The Respondent exhibited a "Chronology" in its Skeleton which referred back to the documents in its hearing bundle. The Applicant did not challenge the accuracy of the "Chronology". The Tribunal incorporates the Chronology as part of the Respondent's evidence.

Consideration

51. The Tribunal starts with the construction of the lease. The Tribunal is satisfied that terms of the lease dealing with apportionment of service charges between the various flats are clear. The Tribunal, however, notes that the Habendum uses the words "the rateable proportion", whereas the Lessee's covenant to pay service charges under sub-clause 4(ii) uses the words "proportionate part". The Tribunal considers that the wording used in the Habendum summarises the position as set out in the body of the lease.

52. Under sub-clause 10(i) the "proportionate part" is defined as "such proportion as the rateable value of the demised premises bears to the aggregate rateable value of the whole of 32 Ashburton Road aforesaid".

53. The Tribunal observes that the lease specifies the method for determining apportionment which must be adhered to as a matter of contract. The wording used to define the method allows no room for interpretation. Once the rateable value of the flat and the aggregate rateable value of the whole of the Property are known the contribution paid by individual leaseholders is a matter of arithmetic. The Tribunal finds that under the terms of the lease there is no facility to alter the method of apportionment.[4]

54. The Tribunal is satisfied the fact that the system for local taxation of residential properties based on rateable values changed first in 1990 to the Community Charge, and then to Council Tax in 1993 has no impact upon the construction of the lease. The Tribunal is required to consider the meaning of the lease at the time it was executed in 1973 when the words "rateable value" would have been clearly understood by the parties to the lease. The Tribunal also notes that whilst domestic rateable values have been prospectively abolished, it is incorrect to say that domestic rateable values no longer exist, and, also they have been retained for specific purposes[5].

55. The next issue is one of evidence of rateable value. The Applicant relied on the ratings list supplied by Portsmouth Water. The Tribunal finds the copy of the list in the bundle barely legible and that it had no date.

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[4] The Tribunal notes that there appears to be a missing page in the lease exhibited between [51] and [52]. The Tribunal assumes that the contents of the missing page does not alter the Tribunal's conclusion on the "lack of facility".

[5] See 21.06 in Commercial and Residential Service Charges Rosenthal et al Bloomsbury Professional 2013.

The Respondent, however, did not contest the list and supplied no alterative figures for the rateable value of Flat 1, and the aggregate rateable value.

56. The Tribunal finds that the rateable value of Flat 1 is £90, and that the aggregate rateable value is £796. Under the terms of the lease the contribution of Flat 1 to the service charge is 90/796 x 100 which equals 11.31 per cent.

57. The Tribunal, therefore, decides that in accordance with the lease the Applicant is liable to contribute 11.31 per cent in any one year of the costs, expenses, outgoings, and matters mentioned in the Fourth schedule to the Lease and to the costs of taking out and maintaining in force effective insurance for the building.

58. The Respondent advanced no alternative construction of the lease with regard to the method of apportionment. The Respondent's case was that the Applicant had for over 26 years shared the service charges equally with the other five leaseholders in the property, and as a result contributed one sixth of the total service charges in any one year.

59. The Respondent contended that (1) the Applicant was estopped from denying that the apportionment was one sixth and that it would be unjust to allow the Applicant to go back on her agreement to pay one sixth, and/or (2) the Applicant's action of paying one sixth for over 26 years amounted to an admission for the purposes of section 27A(4) of the 1987 Act and, therefore, no application could be made under section 27(1) or (3) to determine liability.

60. Mr Sissons for the Applicant submitted that the evidence showed that the payment of an equal contribution to the service charge by the leaseholders at the property was simply a long established practice, and that such a practice in itself was insufficient to establish an estoppel. Further the Applicant relied on section 27A(5) to refute the application of section 27A(4) to the facts of this case. Section 27A(5) provides that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

61. Mr Sissons advanced the Applicant's case on the basis that the facts were agreed, and that it was simply a matter of applying the relevant legal principles to those facts. The Tribunal disagrees with Mr Sissons' assessment of the factual context. In the Tribunal's view, the Applicant's witness statement did not address key issues, such as why she had taken over 26 years to bring an action challenging the apportionment of the service charges, and what her understanding of the lease particularly in relation to apportionment was for those 26 years.

62. Mr Sissons contended that it was for the Respondent to prove that the grounds existed to establish estoppel or admission for the purposes of section 27A(4). The Tribunal considers that a distinction should be made between the burden of proving the case and the evidential

burden. The Tribunal formed the view that certain matters critical to the case were only within the Applicant's knowledge, particularly her reasons for paying an equal contribution for over 26 years and her knowledge of the lease provisions. The Tribunal found that the Applicant did not give straight answers to the questions of Mrs Atkinson about these matters. The Tribunal has limited powers to intervene, and when it did the Tribunal received clear responses which suggested to the Tribunal that the Applicant was holding back on key issues of fact, which in turn had an adverse impact on the Applicant's credibility.

63. The Tribunal finds the following facts:

a) The Applicant has been the registered proprietor of Flat 1 since 22 December 1993.

b) Following the acquisition of Flat 1 in 1993 the Applicant has contributed one sixth of the service charges until 25 February 2021.

c) Throughout this period from 1993 to the present day the other five leaseholders have also contributed one sixth of the service charges. The current five leaseholders believed that there was an agreement in force to pay one sixth of the service charges which over-rode the provision in the lease regarding rateable values. All the current leaseholders had received legal advice when they purchased their flat. The arrangement to pay one sixth of the service charges endured changes of ownership of the flats and changes in managing agent.

d) On 4 February 2020 the Applicant sent a letter of Claim to the Respondent stating that the current practice of splitting the service charge between the six flats cannot be correct as it was not in accordance with the lease.

e) The Tribunal was not convinced by the Applicant's explanation for waiting over 26 years to challenge the one sixth apportionment. The Applicant stated "She had five directors against her whose service charge she was paying and that it was difficult to prove". The Tribunal observes that three leaseholders including the Applicant would benefit from an apportionment based on rateable value. Also the Tribunal notes that another leaseholder at one stage had sided with the Applicant in relation to her dispute on the communal parts [220].

f) Throughout her ownership of Flat 1 the Applicant has disputed specific items of expenditure that the Applicant considers that she is not liable to pay under the terms of the lease. Specific examples includes the boundary wall in 2008, and the intercom in 2013. The Applicant had withheld payment of service charges which she believed she should not pay. The Applicant, however, did not question the one sixth apportionment until 2020, and

did not withhold payment of one sixth of the service charge until 25 February 2021.

g) The issue of apportionment referred to in the 2017 and 2018 Annual Meetings was confined to the Applicant's ongoing dispute with the Respondent about her "equal" contribution to the cost of the internal communal areas. It was not about the one sixth apportionment applicable to the service charge as whole.

h) The Applicant has since 1996 considered that the apportionment of one sixth was unfair because her flat was smaller than the other flats in the property. The Applicant on at least two occasions in 2008 and 2010 requested the Respondent at the Annual Meetings to discuss whether the apportionment should be based on the floor space of the individual flats. Despite the Applicant's sense of unfairness and her desire to change the arrangement of equal contributions, the Applicant continued to pay one sixth service charge until 25 February 2021.

i) The Applicant's reason why she continued to pay one sixth was that "she had to".

j) The Tribunal is satisfied that the Applicant knew about the terms of her lease from when she acquired Flat 1. Further the Applicant periodically received advice on those terms during her period of ownership. The Tribunal considers that the Applicant has not given a credible explanation for why she "had to pay" one sixth which was contrary to the terms of the lease. In view of the Applicant's failure to give evidence on matters within her own knowledge, the Tribunal is entitled to infer that the Applicant agreed with the Respondent along with the other leaseholders to make equal contributions which she knew was not in accordance with the terms of the lease regarding rateable values.

k) The Applicant was also a director and for around eight years Chair of the board of directors for the Respondent. The evidence showed that as Chair the Applicant was active in setting the agenda for the annual meetings which included raising issues about apportionment on square footage. The minutes of the Annual Meetings revealed that the Applicant engaged in discussion about particular charges and the overall service charge. Finally the minutes demonstrated that the Applicant together with the other leaseholders/directors took decisions on the service charge for the property.

l) The Tribunal is satisfied that the enduring nature of the arrangement for equal division of costs coupled with the parties' belief that they were obliged to pay one sixth of the service charges demonstrated that an agreement was in place, albeit not in writing.

64. The Tribunal turns now to the question of estoppel. The leading authority on estoppel by convention is the case of *Republic of India v India Steam Ship Company Limited* [1998] AC 878, in which Lord Steyn described the principle as:

> "Estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by both of them or made by one and acquiesced in by the other. The effect of the estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on an assumption.... it is not enough that each of the two parties acts on an assumption not communicated to the other. But ... a concluded agreement is not required for an estoppel by convention."

65. Briggs J (as he then was) in *HMRC v Benchdollar Ltd* [2009] EWHC 1310 identified the following principles which had to be met to establish an estoppel by convention:

> "(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it;
>
> (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter;
>
> (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties;
>
> (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

66. Mr Sissons also relied on the Upper Tribunal decision in *Jetha v Basildon Court Residents Co Ltd* [2017] UKUT 58. In this case, the service charge obligation did not entitle the management company to demand a payment on account. However, for a period of 16 years an advance payment was in fact demanded and was paid by all the tenants without objection. One of the tenants did then object and the landlord argued he was disentitled from doing so by an estoppel by convention. HHJ Behrens rejected that argument on the basis that there was no evidence to establish a shared assumption that the landlord was entitled to demand an advance payment. The crucial factor was the absence of any communications 'crossing the line' between the parties to show that they operated on the same assumption.

67. The Respondents in contrast cited the Upper Tribunal decisions of *Clacy v Sanchez* [2015] UKUT 0387 (LC) and *Admiralty Park Management Co Ltd v Ojo* [2016] UKUT 0421 in support of its case.

68. *Clacy* concerned a block of four flats. In 1993, at a meeting between the landlords it was expressly agreed that rather than follow the service charge machinery, the landlord would manage the block and send annual demands without going through the formal certification process for which the leases provided. The block was managed in that way for 19 years without any complaint by the tenants during that time. Edward Cousins J in the Upper Tribunal considered that in those circumstances, either an estoppel by convention arose (whereby the tenants were estopped from asserting that there should be a formal certification process in accordance with the leases) or the tenants had waived any right insist upon formal certification.

69. In *Admiralty Park* the service charges demanded by the management company had been calculated other than in accordance with the lease In fact, service charge demands had been obviously calculated in that way since at least 2009, and the tenants of the building had been paying them without challenge or complaint. Further, the method of calculation had not been challenged by the tenant in previous tribunal proceedings in 2011. In those circumstances, the Deputy President considered there had arisen an estoppel by convention pursuant to which the tenant was precluded from insisting upon strict compliance with the lease.

70. The analysis of relevant case law demonstrates that the issue of estoppel by convention is fact sensitive. The critical drawing line between the cases of *Clacy and Admiralty Park* and the case of *Jetha* is that in the former cases both parties shared the same assumption on the departure from the lease requirements, and the respective leaseholders "crossed the line" by assuming some element of responsibility for the departure. In contrast in the latter case of *Jetha* the departure from lease had simply existed for some time without any acceptance of responsibility for it from the leaseholder.

71. Mr Sissons argued that all the facts in this case simply demonstrated that the practice of the leaseholders sharing equally the costs of maintaining and insuring the building had been long standing, and was bereft of a shared understanding and acceptance of that understanding by the Applicant and the other leaseholders.

72. The Tribunal considers that Mr Sissons' depiction of the arrangement to pay equal contributions as a mere long standing practice is not an accurate reflection of the nature and strength of the agreement between the leaseholders/freeholders to contribute equally to the costs of maintaining and insuring the building. This arrangement had been in existence for at least 26 years, and had continued despite changes in ownership of the leasehold and in the membership of the Respondent company and despite the involvement of conveyancing solicitors and

managing agents. From at least 1993 if not before no leaseholder had challenged the validity of the arrangements until the Applicant sent a letter of claim in February 2020.

73. Mr Sissons argued that there had been no shared common assumption that an equal division of costs was permitted by the lease. Mr Sissons supported his submission by reference to (1) the fact that the question of "apportionment" had been under discussion at various Annual Meetings and (2) the minutes of 2017 meeting revealed that the parties agreed to take and be bound by legal advice on the terms of the lease. Mr Sissons pointed out that if the parties were prepared to be bound by the proper interpretation of the lease, there could not have been a shared assumption that the lease approved the equal division of costs.

74. The Tribunal disagrees with Mr Sisson's interpretation of the facts and his legal analysis. The facts showed that the purported challenges by the Applicant to the apportionment had nothing to do with the method of apportionment. The challenges were about the Applicant's liability to pay the costs of the common parts on the ground that Flat 1 was self contained and did not derive any benefit from the use of the common parts of the main building. The minutes of the 2017 Annual Meeting dealt with the dispute on the common parts. The minutes, therefore, did not support Mr Sisson's legal proposition that there was no common assumption about the method of apportionment

75. The Tribunal accepts that the facts also showed that the Applicant had wanted discussions in 2008 and 2010 about changing the method of apportionment to one based on square footage. In the Tribunal's view the emphasis is on changing the current method of apportionment which demonstrated an acceptance by the Applicant and the other leaseholders of the current method, namely, equal division of costs. The Tribunal's view is reinforced by the Applicant's evidence that she *had to* (Tribunal italics) continue paying one sixth.

76. The Tribunal disagrees with Mr Sisson's understanding of the Respondent's case on estoppel. In the Tribunal's view Mr Sisson's assertion that the Respondent's repeated position that apportionment should be governed by the express terms of the lease referred to the dispute about common parts, and not to the one dealing with the method of apportionment. In respect of the estoppel, the Respondent's case was that the parties had agreed to equal division despite the wording in the lease about rateable value, and that they were bound by this agreement.

77. The Tribunal finds that the Applicant and the Respondent expressly shared a common assumption that they were obliged to contribute equally to the costs of maintaining and insuring the building. This finding is supported by the facts of the enduring nature of the arrangement to divide the costs equally and of the parties' belief that they were obliged to pay one sixth. The Tribunal repeats the Applicant's evidence that "she had to pay one sixth". The Tribunal also found that

the Applicant and the other leaseholders agreed with the Respondent to make equal contributions which they knew was not in accordance with the terms of the lease regarding rateable values. The Tribunal considers on the evidence that the replacement of rateable values with council tax banding is the most plausible explanation for why the Respondent and the leaseholders adopted the practice of making equal contributions towards the service charge. It is not necessary for the agreement to be in writing to establish estoppel.

78. The Tribunal holds that the Applicant assumed an element of responsibility for the common assumption by (1) her payment of one sixth of the costs for over 26 years, (2) not withholding payment during that period on the ground the contribution of one sixth was not in accordance with the lease, and (3) by taking part in the discussions and the decisions on the annual service services in her respective roles of Chair of the Board of Directors and director for the Respondent and as a leaseholder. Mr Sissons suggested that the Applicant was disadvantaged by her involvement in the Respondent's decision making on service charges because she was subject to the "tyranny" of majority and bound by majority decision. The Tribunal did not form the impression from reading the minutes that the Applicant would consent to something with which she disagreed. The Applicant had withheld payment of specific charges that she did not consider were authorised by the lease. The Applicant as Chair was in the position of influencing and setting the agenda for the meetings. The Tribunal is satisfied that the Applicant's payment of one sixth of the costs and her endorsement in her various roles for the Respondents of the service charges based on equal contributions throughout the period of over 26 years demonstrated that the Applicant had crossed the line and assumed shared responsibility for the common assumption that the leaseholders were obliged to contribute equally to the costs of maintaining and insuring the building.

79. The Tribunal is satisfied that the Respondent relied on the agreement that the leaseholders were obliged to contribute equally to the costs of maintaining and insuring the building. The Respondent by the nature of its composition shared the same view as the leaseholders regarding equal contributions.

80. The Tribunal finds that the Respondent's reliance on the common assumption was in connection with the service charges paid by the Applicant and the other leaseholders. The Respondent instructed the managing agent to invoice the service charges equally between the leaseholders.

81. The Tribunal holds that the Respondent would be required to repay the Applicant the excess service charges over the one sixth contribution if it was unable to rely on the agreement for the Applicant to make equal contributions. The Applicant claimed the sum of £6,741. As the Respondent is a non-profit making residents management company the Respondent is unlikely to have available funds to meet the repayment.

The Tribunal is, therefore, satisfied that the Respondent would suffer detriment and that it would be unconscionable having regard to the period of time it has taken for the Applicant to bring this action for the Applicant to assert the true legal position under the lease.

82. In view of the above findings the Tribunal decides that the Applicant is required to pay one sixth of the service charge and is estopped from asserting that she is liable to pay a contribution of 11.31 per cent to the costs of maintaining and insuring the property. The Tribunal's decision on estoppel, however, only applies for the period of time and to the extent required by equity which the estoppel has raised and does not apply to future dealings[6]. The Tribunal, therefore, determines that the estoppel ceases as at the date of this decision and thereafter the Applicant's liability is determined by the terms of the lease, namely to pay a contribution of 11.31 per cent to the costs of maintaining and insuring the building.

83. The Respondent's second argument was that the Applicant had admitted that she was liable to contribute one sixth of the service charges which engaged the provisions of section 27A(4)(1), namely, "no application could be made under subsection 27A(1) or 27A(3) in respect of a matter which had been agreed or admitted by the tenant". Mr Sissons relied on the provisions of section 27A(5) that "but the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment".

84. The Respondent referred to the Upper Tribunal decision in *Peter Cain v Mayor and Burgess of the London Borough of Islington* [2016] L.& T.R.13 in which HHJ Nigel Gerald stated at [14] & [15]:

> "14. Before considering the facts of this case, it is necessary to consider the meaning and effect of section 27A(5). An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the tenant – usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two.
>
> 15. Absent sub-section (5) and depending upon the facts and circumstances, it would be open to the F-tT to imply or infer from the fact of a single payment of a specific sum demanded that the tenant had agreed or admitted that the amount claimed and paid was the amount properly payable, a fortiori where there is a series of payments made without challenge or protest. Part of the reason for this is that people generally do not pay money without protest unless they accept that that which is demanded is properly due and owing, and certainly not regularly over a period of time. Whilst it would generally be inappropriate to make such an implication or inference from a single payment because it could

[6] See paragraph 43 of *HMRC v Benchdollar Ltd* [2009] EWHC 1310 for the authorities on the extent of the estoppel.

not be said that the conduct of the tenant was sufficiently clear, where there have been repeated payments over a period of time of sums demanded, there may come a time when such an implication or inference is irresistible".

85. HHJ Nigel Gerald stated at [15]: "the relevant question, therefore, is : are there any facts of circumstances from which it can properly be inferred or implied that the tenant has agreed or admitted the amount of service which is now claimed against him".

86. The Tribunal has found in this case that the Applicant (1) Following the acquisition of Flat 1 in 1993 the Applicant has contributed one sixth of the service charges until 25 February 2021 (2) The Applicant's reason why she continued to pay one sixth was that "she had to" (3) The Applicant agreed with the Respondent along with the other leaseholders to make equal contributions which she knew was not in accordance with the terms of the lease regarding rateable values (4) The arrangement to pay equal contributions had been in existence for at least 27 years, and had continued despite changes in ownership of the leasehold and in the membership of the Respondent company and despite the involvement of conveyancing solicitors and managing agents. (5) The Applicant had waited over 26 years until 4 February 2020 before challenging the validity of contributing one sixth of the service charge.

87. The Tribunal is satisfied on the above facts that the Applicant has admitted liability to pay one sixth of the service charges for the period from 22 December 1993 to 4 February 2020.

88. The Tribunal decides that no application can be made by the Applicant to dispute liability to pay service charges for the period from 22 December 1993 to 4 February 2020 on the basis of one sixth apportionment in accordance with section 27A(4) of the 1985 Act.

89. The Tribunal's decision under section 27(A) (4) does not prevent the Applicant and or the Respondent from making application to determine the reasonableness of the service charges during the said period provided the Applicant's contribution of the service charge is calculated on the basis of one sixth.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.