UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT -- service charges -- basis of apportionment of the landlord's expenses between flats in a building -- lease providing for apportionment on the basis of relative rateable values and (in the event of apportionment on this basis becoming impractical or impossible) then apportionment upon such alternative basis and shall be fair and equitable -- whether basis of apportionment in force since 2008 was fair and equitable -- whether a new basis of apportionment proposed by landlord in 2015 should be adopted

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

BEDFORD COURT MANSIONS LIMITED

Appellant

and

DR M RIBIERE
MR T WARNER AND OTHERS

Respondents

Re: Various Flats in Bedford Court Mansions and Adeline Place, London WC1B 3AA

His Honour Judge Huskinson
2-3 May 2017

Royal Courts of Justice, Strand, London WC2A 2LL

Paul Letman, instructed by Seddons for the appellant
Adrian Carr, for eight of the respondents (as listed in Appendix 1 to this Decision)

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36
London Borough of Hounslow v Waaler [2017] EWCA Civ 45
Forcelux Limited v Sweetman [2001] 2 EGLR 173
Windermere Marine Village Limited v Wilde [2014] UKUT 163 (LC)
Gater v Wellington Real Estate Limited [2014] UKUT 561 (LC)
Langford Court v Doren Limited LRX/37/2000, [2001] EWLands LRX_37_2000 at paragraphs 28-32

DECISION

Introduction

1. This is an appeal from the decision dated 5 July 2016 of the First-tier Tribunal Property Chamber (Residential Property) ("the F-tT") whereby the F-tT decided what was the proper basis for apportioning to the various lessees in Bedford Court the total expenditure upon services which was to be recovered through the service charge provisions in the relevant leases.

2. In summary the appellant, being the freeholder by which the relevant services were provided, wished to introduce with effect from 29 September 2015 a new basis upon which the total relevant service charge expenditure should be apportioned between the lessees. It was the appellant's case that it had power to introduce this new basis by operation of the relevant provisions in the leases. In order to ensure that it was acting properly the appellant decided that, rather than merely introducing the new basis of apportionment and demanding service charge payments so calculated (and if necessary suing for the same) it was appropriate first to obtain, if it could, a decision from the F-tT under s.27A of the Landlord and Tenant Act 1985 as amended that service charges for the year commencing 29 September 2015 (being payments on account) would indeed be properly payable by the lessees if they were calculated pursuant to the new basis of apportionment.

3. In summary the F-tT decided that the appellant was not entitled to introduce the new basis of apportionment (which is hereafter called "the 2015 basis") and that instead the appellant should adhere to a basis of apportionment which had been in use since 2008 ("the 2008 basis"). As will be seen below, there was disagreement between the parties as to whether the 2008 basis had ever been properly adopted, but the 2008 basis had since 2008 been acted upon.

The Facts

4. The appellant, Bedford Court Mansions Limited is a company wholly owned and run by the leaseholders. The board of the appellant manages Bedford Court Mansions (hereafter "the building") for and on behalf of its members.

5. The building is a large mansion block built in the late Victorian era and is typical of such blocks found in central London. Most of the flats in the building became let upon long residential leases, but a small number on the ground floor were used as offices. At one stage four flats were occupied by resident porters. It appears that the original long leases were granted in and after 1973. These original long leases provided that the service charge costs would be apportioned on the basis of relative rateable values.

6. In about 1974 six penthouses were built on the roof of the southern section of the building. Each such penthouse was allocated a rateable value by the district valuer.

7. In 1989 the then long leaseholders purchased the freehold reversion of the building in the name of the appellant. All the lessees are shareholders in the appellant. After the acquisition of the freehold, the appellant granted new extended leases to each of the lessees, these being leases for terms of 999 years from 29 September 1974. Apparently, subject to one exception which is crucial to the present case, the new extended leases were effectively identical in terms to the original leases (save of course for the duration of the term granted). The original leases would have terminated by merger upon the grant of the new extended leases.

8. The crucial difference between the terms of the new leases and the old leases is to be found in the provision regarding how the cost of services is to be shared between the various leaseholders in the building. The new lease makes provision for the payment of service charges by requiring each lessee to make a payment in advance and on account of the expenditure to be incurred in each relevant year of the term (the yearly on account payments apparently being required to be paid by two half-yearly instalments on 29 September and the following 25 March) and for there then after the end of each service charge year to be a calculation of the actual amount payable with any shortfall being paid or any overpayment being repaid to the lessee. The annual amount of each lessee's service charge is a proportion of the appellant's actual and anticipated relevant expenditure for the relevant year in question. The intention is of course that the appellant is able to recover from the various lessees a total of 100% of the relevant expenditure.

9. The provisions of clause 4(c)(iv) are central to the present case because this clause provides how the total relevant expenditure by the appellant is to be apportioned to the various flats in the building and to be recovered from the lessees of those flats. The clause contains two paragraphs, hereafter called paragraph (a) and paragraph (b) which read as follows:

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

The alteration as between the old leases and the new leases is that in the old leases it was only paragraph (a) of clause 4(c)(iv) which appeared. In other words there was no provision in the old leases which contemplated the possibility that it might become

no longer possible or practical to use rateable values in order to apportion the service charges between the lessees. However in 1989 it was contemplated (correctly) that in due course the domestic rating system might be changed and that it could become no longer possible to apportion expenditure by reference to the rateable values of the relevant flats "in force" at the end of the relevant service charge year. It was for this reason that paragraph (b) was added so as to make provision for the apportionment of the relevant expenditure between all the flats in the building in the event that it should become impractical or impossible to apportion that expenditure on the basis of relative rateable values.

10. The F-tT in paragraph 28 of its decision considered the argument as to whether it had become impractical or impossible to apportion the appellant's relevant expenditure between all the flats in the building on the basis of relative rateable values. The F-tT in paragraph 28 decided as follows:

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

There is no cross appeal from this decision by the F-tT. In any event I respectfully agree with the F-tT's decision upon this point. Accordingly for the years after 1990 it had become impractical and impossible to apportion the appellant's relevant expenditure between all the flats in the building on the basis of relative rateable values. In consequence the appellant could no longer apportion the relevant expenditure on the basis of paragraph (a).

11. After 1990 various changes occurred at the building. Five new flats were created at the building as described in paragraph 19 of the witness statement by John Hare which he made in the proceedings before the F-tT. In addition to these newly-created flats, a further four units which previously had been used for purely commercial purposes were converted to residential use some years after the end of the rateable value system, these new residential units being described in paragraph 20 of Mr Hare's witness statement. In order to accommodate the apportionment of the relevant expenses between all of the relevant flats, including the nine additional units just mentioned, the appellant found itself obliged to depart from the rateable value formula as provided in paragraph (a), because no rateable value was shown in any valuation list for these new nine flats. It appears that the appellant chose to allocate some form of "stand-in" value in place of the non-existent rateable value each time one of these new units came into existence. Mr Hare on behalf of the appellant recognises that each such decision was pragmatic and practical at the time, but each of

these expedient changes was necessarily ad hoc and departed (in his view) from the lease formula.

12. As a result of what the appellant did after 1990, Mr Hare makes the following comment at paragraph 25:

> "What remained after 1989 and 1990 therefore, was a fossilised table incapable of change in the manner envisaged by those who wrote the Act and published the tables. That is precisely why each Board had to manipulate the ratios themselves, because there was no official way to do so any longer."

13. A further ad hoc and practical amendment to the apportionment system was introduced by way of settlement of litigation between the appellant and Dr O'Connor regarding the proper proportion of the relevant expenses to be paid in respect of her flat. Mr Hare comments (paragraph 28) that the appellant found itself perpetuating a system of arbitrary service charge apportionments which might well have been ruled unlawful and unenforceable at any time.

14. However the service charge payments continued to be apportioned amongst the various lessees in this manner and continued to be paid by the lessees, subject to these ad hoc adjustments from time to time. The apportionment in each year appears to have been by reference to the historic rateable values for each flat (in so far as such flat did have a rateable value shown in the latest historic valuation list) and by reference to the values which may have been allocated by the appellant to any new flat or to a flat in respect of which some dispute had been settled.

15. In 2006 the lessees of the penthouse flats (or some of those lessees) raised concerns that the historic rateable values attributable to the penthouses were disproportionately large when compared with the historic rateable values (or ad hoc allocated figures) attributed to other similar sized flats in the building.

16. In August 2006 the lessees of three of the penthouses applied to the Leasehold Valuation Tribunal ("LVT") for a determination as to their liability to pay service charges in accordance with section 27A of the 1985 Act. Various directions were given. In due course on 10 March 2008 the LVT issued an interim decision and directions. The LVT decided, with the agreement of the parties, that the best course would be to adjourn the application to enable to parties to seek to arrive at a formula that would be acceptable to a majority of the residents within the block and would be fair and equitable to all. The LVT drew attention to the powers available to the Tribunal, upon a proper application, to vary leases in accordance with the provisions of the Landlord and Tenant Act 1987. The LVT recognised it would be preferable for the parties to try to agree a revised formula for assessment of service charges or for the variation of the terms of the leases rather than have a solution imposed by the Tribunal. The Tribunal noticed, but did not decide, the question of whether it had become impractical or impossible to operate paragraph (a) of the apportionment provisions in the lease. The LVT at paragraph 10 stated:

> "On a preliminary reading of the lease and being informed of the conditions prevailing within the block the Tribunal was of the opinion that the existing lease operated unfairly and that if possible it ought to be revised so that it fairly reflected the values within the block."

17. In consequence of this a notice dated 1 April 2008 was sent by the appellant to the various lessees regarding service charges (pages 283-4 of the trial bundle). This document included the following proposal:

> "The board has been considering this issue for some time and determined that any change to the basis of apportionment of service charges should be fair and equitable and consistent with the spirit of the rateable values apportionment that each of us agreed to when entering the leases.
>
> This has resulted in many different schemes being conceived and considered, however, at the hearing before the LVT on 10 March 2008, the LVT intimated that we would be able to simply substitute the reference to rateable values in our leases with the percentage apportionment that are now used, subject to a variation for penthouse flats.
>
> This has opened up a neat resolution that the relevant clause in our leases which refers to rateable values is simply amended to make reference to the existing percentage contributions from September 2008.
>
> The board therefore makes the following proposal that:
>
> - Percentages be fixed for each flat and references to calculation by rateable value be replaced.
>
> - The fixed percentages be the same as or as close as possible to the current charges (except for the penthouses), so that each flat will continue to pay the same, or almost the same, proportion of service charges as are presently paid.
>
> - The penthouse contribution will be reduced to a figure commensurate with other flats of a similar size and location in the block.
>
> - The proportion of reduction to the penthouse contribution will be financed (as far as sensibly possible) by applying service charges to the flats owned by BCM (such as the porters flat).
>
> There are other proposals which could be used, but we consider that trying to maintain a figure close to the current apportionments is best as it will result in no (or no significant) change for any flat from that which each has contributed since the long leases were granted in the late 1980s. It is also worth pointing out that to establish any other method of apportionment will result in significant additional cost."

The notice also informed the lessees that there would be an extraordinary general meeting of the appellant on 12 May 2008.

18. A formal notice convening this EGM was in due course issued. The board of the appellant proposed the following resolutions (the numbering of which was unfortunate as it omitted any paragraph 4):

> "1. That the clauses in each Lease and set out in schedule 1 hereto (in identical terms or terms that are substantially similar) which have the effect of apportioning service charge contributions amongst flats within the Mansions by reference to "Rateable Values" be deleted upon being immediately replaced by an appropriately worded clause establishing each flat's contribution by reference to a fixed percentage as defined in Resolution 2 hereto.
>
> 2. That the fixed percentage for service charge contribution payable in respect of each flat is shown on Schedule 2 in the column entitled "Amended Percentage to 100.
>
> 3. That, the clause to be inserted into each lease, to give effect to Resolutions 1 and 2 above be in the same or substantially the same terms as contained in Schedule 3 hereto and that as appropriate and/or required for each lease, the numbering of the affected lease paragraphs may be amended to give effect to the amendments and maintain the structure and integrity of the leases.
>
> 5. In the event that there are structural changes to the footprint of any flat or flats, so that it or they are divided or conjoined, the Board may by simple majority, amend the percentages in Schedule 2 as appropriate to redistribute the percentages payable by that flat or flats in a fair and equitable manner. Any such redistribution will not affect service charge contributions by other flats which are not subject to the structural changes. There shall be no requirement on the Board to vary the percentages.
>
> 6. That resolutions varying the leases will take effect upon receipt of approval from the Leasehold Valuation Tribunal in case number LON/OOAG/LSC/2006/0308 or the Leasehold Valuation's approval of any future application that Bedford Court Mansions makes to that body in order to give effect to the resolutions above.
>
> 7. The percentage service charge levied against the penthouses be reduced to that stated in Schedule 2 and Bedford Court Mansions will, from company income, pay the shortfall of service charge contributions by way of additional contributions from the flats owned by Bedford Court Mansions in accordance with the sums on Schedule 2 until such time as those flats may be sold, if at all."

This notice convening the EGM contained various recitals including a reference to the provisions of clause 4(c)(iv)(a) and (b), which were set out in a schedule to the notice. The document also contained in schedule 2 (pages 296 and following in the bundle) a document showing for each flat various columns of information including the apportionment percentage; the rateable value; the amended percentage (to obtain 100%); the old service charge costs; the new service charge costs; the old reserve fund charge; the new reserve fund charge; the old total; the new total; and the difference obtained from this method of apportionment as compared with what would previously have been payable. It is notable that in respect of most of the flats there is no difference at all (apart from a few pence). However there is a substantial difference as

regards the six penthouses, in respect of which the amount payable is reduced. This schedule gives the new percentage proposed for each of these penthouses but does not within this document disclose what the old percentage was. The old percentages for the penthouses can however be seen from a previous document (bundle page 121 and following) which sets out the percentages which previously had been used in respect of each flat including the penthouses. Thus for instance penthouse 1 was previously allocated 1.200% but under the new schedule was to be allocated 0.968%. Obviously if the percentages for the 6 penthouses were to be substantially reduced and if the percentages for practically all remaining flats were to continue unaltered there would be a shortfall in recovery of the expenses. This was met in the manner contemplated in the documents previously cited, namely by allocating a percentage contribution to three flats which were held in hand by the appellant (I understand one flat may have still been a porters' flat and the other two being let at market rents). Apparently previously no part of the relevant service charge expenses had been recoverable in respect of these flats because they had been omitted from the list of flats to which a percentage contribution had been attributed.

19. This proposal by the appellant at the EGM on 12 May 2008 was adopted by the members, although the formal minute is not available. I understand that of those who voted the voting was no one against, one abstention and everyone else voting in favour. It appears that this scheme of apportionment as approved at the EGM (i.e. the 2008 basis) was further approved at the annual general meeting of the appellant. No point is taken that there was any error in company law. It is accepted that the appellant did resolve to adopt the 2008 basis in accordance with the proposed resolutions and did thereafter charge the lessees with service charge contributions (which were paid) on this 2008 basis.

20. In 2013 further complaints arose regarding the method of apportionment. Mrs Stroud complained that her Flat 104, on the first floor overlooking Adeline Place, was next door to the flat of one of the directors of the appellant's board, Mr Judd, who had a similar size flat also overlooking Adeline Place. Mrs Stroud had for some time complained that there appeared to be an anomaly in that her service charge appeared disproportionately higher than Mr Judd's – for instance in the year 2013/14 her service charge was £5,212 in contrast to Mr Judd's contribution of £3,472, whereas Mr Judd's flat was only 2.4 square metres smaller than her flat. In due course several further such anomalies were identified and published to all leaseholders. The appellant, through its board, reached the conclusion that the present basis of apportionment, namely the 2008 basis, was not fair and equitable. The appellant decided it should use its power under clause 4(c)(iv)(b) of each lease to tackle what the appellant saw as being a system which had given unfair advantages to a small number of residents at the expense of many others. The appellant decided it should create and bring in a fresh apportionment system which was fair and equitable.

21. There was substantial consultation between the appellant and the lessees regarding the proposal to change the basis of apportionment. Various proposals were put forward by the appellant as possibilities for a new system of apportionment including an allocation based on net internal area; an allocation based on equal shares; an allocation based on two thirds by net internal area and one third by equal shares;

and an allocation based on council tax band. These were explained further in graph form in August 2014 as to how this would affect flats dependent upon their net internal area. Overlaying upon these plots on the graph was what was described as option 0, namely the current allocation on the 2008 basis.

22. The appellant gave notice of an extraordinary general meeting to be held on 15 July 2015. The notice indicated that the appellant would seek approval of the appellant's decision to introduce a new basis service charge apportionment in accordance with clause 4(c)(iv)(b) of each lease with effect from 30 September 2015. The document convening the meeting had attached to it a revised basis for service charge apportionment. This document included the following under the heading Revised Basis for Service Charge Apportionment:

> "1. The annual amount of the service charge (as defined in the Lease) payable by each Lessee in respect of the Lessor's expenditure during a year commencing on 30 September shall be apportioned between all the Flats by multiplying such expenditure by the Service Charge Percentage for that Lessee's Flat at the start of such year.
>
> 2. The Service Charge Percentage for a Lessee's Flat shall be determined by applying the following apportionments:
>
> (a) **One third** of the Lessor's expenditure shall be apportioned equally between all the Flats in the Mansions; and
>
> (b) **Two thirds** of the Lessor's expenditure shall be apportioned by the proportion that the Net Internal Area ("NIA") of each Flat bears to the aggregate total NIAs of all the Flats in the Mansions.
>
> The above apportionment basis shall first be applied to the Lessor's estimated expenditure for the year commencing on 30 September 2015, the calculations being made on the basis of (i) the number of Flats determined by the Board; and (ii) the NIA figure of each Flat determined by the Board on the basis of the surveys carried out by Sterling Surveys Limited during 2014.
>
> 3. The Schedule of Service Charge Percentages ("Schedule") resulting from the calculations in paragraph 2 shall be formally approved at a Board Meeting to be held by 31 August 2015. All Lessees will then be notified of the percentage applicable to their particular Flat from 30 September 2015. Service Charge Percentages will be rounded for all purposes to three decimal places.
>
> Thereafter, the Schedule will be periodically recalculated in accordance with procedures to be determined by the Board from time to time and thereafter notified to Lessees, e.g. in the Bedford Court Mansions Handbook. A change in these procedures will not be treated as a change in the Revised Basis of Service Charge Apportionment for the purposes of paragraph 5 below."

The document went on to set out what procedures were to apply for the purpose of recalculating the relevant apportionments, which could become necessary for instance if there had been a change in area of some flat or the construction of some new flat.

The crucial part of the decision was that the apportionments should thereafter be based as to one third upon an equal contribution from each flat and as to two thirds on the basis of net internal area. The appellant had commissioned a survey of each flat so as to have an accurate measurement of the net internal area of each flat (there is apparently unease amongst some of the lessees as to the substantial amount of money paid by the appellant in order to obtain this survey – however any dispute regarding that is not the subject matter of the present case).

23. At the EGM the appellant's decision to introduce this new basis of allocating service charge (the 2015 basis) was approved by 48 votes to 18 votes. The 2015 basis having been approved in this manner, the appellant made its application to the F-tT for a decision as to whether the apportionment of service charges between the various lessees upon the 2015 basis would result in the correct calculation of properly payable service charges or whether the relevant service charge expenses should be apportioned between the lessees upon some other and (if so what) basis.

The F-tT's decision

24. The F-tT set out in paragraph 25 the issues in dispute:

> "Mr Letman and Mr Carr could agree only on one issue. They agreed that either the company or any tenant could invoke sub-clause (b). That apart the remaining issues between the parties at the end of the hearing are encapsulated by the following questions:
>
> a. Is it now *"impractical or impossible*" to apportion on the basis of relative rateable values?
>
> b. Was the 2008 scheme an "*alternative basis*" of apportionment within the meaning of sub-clause (b)?
>
> c. If so, does sub-clause (b) allow "a second bite at the cherry"?
>
> d. Is the method of apportionment now proposed "fair and equitable" within the meaning of sub-clause (b)?
>
> e. In any event, did the 2008 scheme give rise to an estoppel by convention?
>
> f. Should we grant an order under section 20C of the 1985 Act?"

25. As regards the first issue the F-tT's decision is already set out in paragraph 10 above. The F-tT decided that after 1990 it became both impossible and impractical to apportion the relevant expenses on basis of paragraph (a).

26. As regards issue (b) as identified by the F-tT, it was argued by the appellant that the 2008 scheme was not an alternative basis of apportionment within paragraph (b) because:

(i) The 2008 basis was never unconditionally adopted by the appellant – it was only adopted on the basis that it was to take effect upon receipt of approval from the LVT (which never occurred because the matter was never resurrected before the LVT) and/or upon the formal variation of the leases (which also never occurred).

(ii) Quite apart from point (i) above, even if the 2008 basis can be said to have been properly and unconditionally adopted, the 2008 basis is not itself a fair and equitable basis of apportionment and accordingly cannot be a valid basis of apportionment within paragraph (b) of clause 4(c)(iv).

The F-tT rejected both these arguments. It concluded that paragraph (b) upon the proper construction of the lease does not require any tribunal order to bring into operation an alternative fair and equitable method of apportionment. The F-tT also noted that the 2008 basis had been implemented. As regards whether the 2008 basis constituted a fair and equitable basis of apportionment the F-tT concluded that the anomalies complained of by the appellant were anomalies which in effect only arose if one assumed that it was appropriate for flats of similar size to pay a similar level of service charge. In paragraphs 38-41 of its decision the LVT stated as follows:

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

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

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

41. If the company had identified the anomalies by reference to what was essentially a value based system we might well have taken a different view: but it did not. The 2008 scheme was approved at two general meetings without objection and it has been used to apportion the service charge costs over a period of 7 years with *"few"* complaints. We are satisfied and find that it is a *"fair and equitable"* scheme."

27. Accordingly the F-tT concluded that the 2008 basis did constitute an alternative basis which had been properly adopted pursuant to paragraph (b) of clause 4(c)(iv) of the lease and which was a fair and equitable basis of apportionment.

28. As regards whether it was possible to operate for a second time paragraph (b) of clause 4(c)(iv) the F-tT concluded that paragraph (b) only permits one variation in the system of apportionment namely a variation which is made upon it becoming impractical or impossible to apportion on the basis of relative rateable values. Such event occurs once and it is upon the single occurrence of this event that paragraph (b) can be used.

29. On the basis that paragraph (b) could only be used once and had been validly used for the purpose of introducing the 2008 basis, it followed from the F-tT's decision that the appellant would not be entitled to introduce the 2015 basis even if the 2015 basis was fair and equitable. However the F-tT considered the 2015 basis and concluded that it was not fair and equitable within paragraph (b). As regards the F-tT's analysis upon this point the following may be noted:

(i) The F-tT observed that it was unusual to find a stipulation that required that a new system of apportionment was to be "fair and equitable" and that this sets a high threshold.

(ii) The F-tT accepted that no system of apportionment can ever be wholly fair or equitable – for instance a ground floor leaseholder who does not use a lift but must nevertheless contribute to its maintenance.

(iii) The F-tT noticed that it was largely the owners of basement flats who were disadvantaged by the 2015 scheme. Those flats had relatively low rateable values not least because many of them had only limited natural light. Also certain of these flats had their own entrances direct to street level and did not make use of the common parts which were the subject of existing and proposed major works.

(iv) The F-tT noticed that most of the objecting respondents were faced with very large increases in their service charges. The F-tT noted the personal circumstances of two of the lessees who said they would effectively have to sell their flats if the new proposed system of apportionment was implemented. The F-tT also noted the calculation by one lessee of a substantial diminution in value of his flat if the 2015 basis was adopted.

(v) The F-tT noted that a number of objecting respondents had purchased their flats after the introduction of the 2008 basis and had done so in the reasonable belief that the service charge percentages allocated by the 2008 basis were fixed. They would now face a large and unexpected increase in their service charges and would be substantially disadvantaged by the imposition of the 2015 basis.

(vi) In paragraphs 53-56 of its decision the F-tT stated:

"53. The disadvantage to the basement tenants goes far beyond that of the hypothetical tenant of a ground floor flat who does not use the lift in a block of flats. No account appears to have been taken of their real concerns that might in some cases result in their having to sell their homes.

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

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

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

In consequence the F-tT decided that the 2015 scheme was neither fair nor equitable.

30. The F-tT also considered whether there was an argument regarding estoppel by convention which needed to be considered. This had not been pleaded by the objecting respondents but was raised by Mr Carr late in the day. It was suggested that the fact that the 2008 basis had been implemented constituted a convention from which the appellant was estopped from resiling. The F-tT concluded that as this issue was raised so late in the day and was not fully argued out and as the F-tT had already found in favour of the objecting respondents, the F-tT was not required to decide the estoppel argument and the F-tT declined to do so. It may be noted that in the present case there is no cross appeal by the respondents. I proceed on the basis that there is no argument based upon estoppel by convention (or any other form of estoppel) which the Upper Tribunal is required to consider. Neither party suggested I should do otherwise.

31. The F-tT also considered an application under section 20C of the Landlord and Tenant Act 1985 as amended on behalf of the eight respondents represented by Mr Carr. The F-tT made criticisms of the process of consultation leading up to the decision adopting the 2015 basis and made reference to information being (so the F-tT said) constantly withheld from objecting respondents. The F-tT stated that having

spent some time reading the material in the hearing bundle it was left with the overriding impression that the appellant, through its board, was from the outset intent on introducing the 2015 basis and that the legitimate concerns of a significant minority of the tenants were simply brushed aside. Consequently the F-tT made a section 20C order as sought by the objecting respondents.

32. The F-tT in the result found that the on account payments that were the subject of the appellant's application to the F-tT should be apportioned on the 2008 basis because the 2008 basis (which was fair and equitable) was introduced pursuant to paragraph (b); because paragraph (b) does not permit a second variation; and because the 2015 scheme was in any event neither fair nor equitable. The F-tT observed that the appellant had the ability, if so advised, to apply to the F-tT for a variation of the leases under sections 35 or 37 of the Landlord and Tenant Act 1987. As regards section 37 and the requirement that at least 75% of the tenants must support the application and not more than 10% object to it, the F-tT observed that on the basis of the evidence given at the hearing it appeared possible that those criteria could be met if some thought was given to the legitimate concerns of the tenants of the basement flats and the objecting respondents in particular.

33. The F-tT refused permission to the respondents to appeal to the Upper Tribunal. However on 1 November 2016 the Upper Tribunal granted the appellant permission to appeal. The appeal was ordered to take place by way of review of the decision of the F-tT.

Appellant's submissions

34. On behalf of the appellant Mr Letman advanced the following submissions.

35. As regards the 2008 basis he submitted that, while the appellant may have purported to bring in the 2008 basis through the operation of paragraph (b), the appellant has failed validly to do so. In summary this was for two reasons. First because having regard to what was decided at the EGM on 12 May 2008 the appellant merely made a conditional decision (where the conditions were never satisfied) to introduce a new basis of apportionment in 2008. Secondly because, even if the foregoing point is wrong, the 2008 basis was not a "fair and equitable" basis of apportionment and accordingly could not qualify as a properly adopted basis under paragraph (b).

36. As regards the first reason, Mr Letman pointed out that the document placed before the EGM on 12 May 2008 did not propose an unconditional resolution to adopt the 2008 basis. Instead the 2008 basis is referred to in the document and there is a proposed resolution that a clause be inserted into each lease to give effect to the resolutions adopting the 2008 basis. Also resolution numbered 6 was to the effect: "That resolutions varying the leases will take effect upon receipt of approval from the Leasehold Valuation Tribunal …". There was never any variation of the leases. There was never any formal approval from the LVT of the 2008 basis of

apportionment. Accordingly the appellant's documents on their face showed that there had never been a proper adoption of the 2008 basis pursuant to paragraph (b) of clause 4(c)(iv).

37. As regards the second reason, Mr Letman submitted that having regard to the anomalies inherent in the 2008 basis it was clear that the 2008 basis was not a fair and equitable basis of apportionment. The F-tT was wrong in concluding that it was a fair and equitable basis of apportionment. Mr Letman in particular drew attention to anomalies as described in Mr Hare's witness statement (especially paragraphs 29-32) and to the table constituting page 134 of the bundle which illustrated what were submitted to be clear anomalies in the apportionment of service charges on the 2008 basis. Merely by way of example attention was drawn to a comparison between two adjacent flats in the basement, namely 41a and 55c where the latter (a small flat) was paying service charge at the rate of £91.04 per square metre whereas 41a was paying at the rate of £45.09 per square metre. A further comparison was invited between flat 75a in the basement and flat 75 which is directly above it on the ground floor and slightly larger. The service charge for the smaller basement flat was £6,116 for 2013/14 whereas for the slightly larger ground floor flat 75 it was £5,770.

38. Accordingly Mr Letman submitted that the 2008 basis was never validly adopted and, even if it was adopted, it was invalid as it was not a fair and equitable basis of apportionment.

39. I reminded Mr Letman that it was common ground that paragraph (a) of clause 4(c)(iv) could no longer operate and that therefore the only valid basis for the appellant to charge service charges was pursuant to paragraph (b). I asked Mr Letman as to what the situation had been after 2008 bearing in mind that the appellant appeared to be asserting that it could no longer apportion the service charges pursuant to paragraph (a) and that it had failed validly to apportion the service charges pursuant to paragraph (b). I also asked regarding earlier years, namely the years after 1990 when it is common ground paragraph (a) became impossible and impractical to use for the purpose of apportioning the relevant expenditure. I suggested that what in fact had been happening was that the appellant had from year to year been operating paragraph (b) of clause 4 (c)(iv) by from time to time allocating notional rateable values to new flats and from time to time making what were considered to be appropriate adjustments. Mr Letman appeared to accept that the appellant may well have been purporting to operate paragraph (b) – and this was consistent with his argument (as to which see below) that paragraph (b) can be operated numerous separate times rather than only once and for all. However in so far as the appellant had been perpetuating a basis of apportionment based upon rateable value, this had not been a valid operation of paragraph (b) because such an apportionment was not fair and equitable. On the question of whether, upon his own argument, the appellant had been for many years demanding service charges which had been apportioned upon an invalid basis and which (arguably) had not been properly recoverable, Mr Letman responded that no one was seeking to challenge the past payment of these service charges.

40. On a separate point Mr Letman submitted that in any event, whether the 2008 basis had been validly introduced under paragraph (b) or not, the power to adopt an alternative basis of apportionment under paragraph (b) was a power which was not limited to being exercised once and for all. Instead such power could be exercised as and when the appellant considered it appropriate to do so once the relevant event bringing paragraph (b) into operation had occurred. This event was the arrival of circumstances which made it impractical or impossible to apportion the service charges upon a rateable value basis as contemplated in paragraph (a). It was found by the F-tT, against which finding there is no appeal, that this event occurred in 1990. Accordingly after 1990 paragraph (b) has been capable of being operated whenever appropriate.

41. Mr Letman pointed out that under the rateable value basis of apportionment under paragraph (a) of clause 4(c)(iv) there was no single fixed percentage to be apportioned to each flat. Reference needed to be made to the rateable values for each flat "in force" at the end of the relevant year. These rateable values could alter. Additional flats could be constructed. The fact that the apportionments could alter under paragraph (a) pointed towards rather than against it being possible for apportionments to alter more than once after the event had occurred which made paragraph (b) the relevant paragraph. The wording in paragraph (b) is perfectly general. There is nothing in it to indicate that only a once and for all decision must be made to fix the basis of apportionment for the remainder of the 999 year leases. It would be surprising to find such a provision. Paragraph (b) should be interpreted in accordance with the normal meaning of the words which the parties had chosen to use, see *Arnold v Britton* [2015] UKSC 36 especially at paragraphs 14-23.

42. Mr Letman submitted that it followed from all the foregoing that it was open to the appellant in 2015 to introduce a new basis of apportionment - provided of course that such a basis was fair and equitable.

43. As regards the proper basis for consideration of whether the 2015 basis was fair and equitable Mr Letman accepted that it was for the F-tT to decide whether the 2015 basis was fair and equitable and that this was not a decision which limited the F-tT to being able only to displace the 2015 basis if it considered that such a basis was *Wednesbury* unreasonable. However Mr Letman submitted that the primary decision regarding the basis of apportionment to be introduce under paragraph (b) was a decision for the appellant and that the appellant enjoyed a margin of appreciation in such a decision. Accordingly if the appellant adopted a basis of apportionment which was fair and equitable the appellant was entitled to recover service charges apportioned upon this basis even though the F-tT itself might consider that another basis of apportionment was to be preferred as being more fair and equitable. Mr Letman referred to *London Borough of Hounslow v Waaler* [2017] EWCA Civ 45 especially at paragraphs 37-39 and to the decision of *Forcelux Limited v Sweetman* [2001] 2 EGLR 173 referred to therein. The *Waaler* case case was concerned with whether costs had been reasonably incurred. In paragraph 37 Lewison LJ stated:

> " In my judgment, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome. That said it must

> always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of a building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable. I agree with Mr Beglan that the tribunal should not simply impose its own decision. If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable."

Mr Letman submitted that the same process of analysis applied here. If the appellant has chosen a basis of apportionment which is fair and equitable then such a basis was validly adopted even if there was another basis of apportionment which was also fair and equitable.

44. At the hearing I drew attention to the recent decision in *Sheffield City Council v Oliver* [2017] EWCA Civ 225 especially at paragraphs 54-56. I invited the parties, if they wished, to put in further written submissions in relation to this point. Both parties did so. Mr Letman submitted that there was nothing in the decision in *Sheffield City Council v Oliver* to undermine the submissions he had already made based upon *London Borough of Hounslow v Waaler*. The appellant enjoyed a margin of appreciation in adopting an alternative basis under paragraph (b). The appellant had adopted a fair and equitable basis. The F-tT was not entitled to find such a basis invalid even if the F-tT preferred a different fair and equitable basis of apportionment.

45. Mr Letman noticed the reference in the F-tT's decision regarding an argument which was raised at a late stage on behalf of the respondents concerning an alleged estoppel by convention. Mr Letman pointed out that the F-tT did not decide the case upon the basis of any estoppel. There was no cross appeal. There was no basis upon which the Upper Tribunal, upon this appeal by way of review, could properly consider any question of whether the appellant was in some way estopped, whether by convention or otherwise, from seeking to depart from the 2008 basis.

46. In light of the foregoing Mr Letman submitted that there was no impediment to the appellant introducing a new basis of apportionment in 2015. The crucial question therefore became whether the 2015 basis was a fair and equitable basis. He submitted that the F-tT was wrong in concluding that it was not a fair and equitable basis.

47. Mr Letman drew attention to the extensive consultation upon the 2015 basis which started in February 2014 and submitted that the 2015 basis was supported by the overwhelming majority of the lessees in the building.

48. Mr Letman submitted that the F-tT was wrong in directing itself that for a basis of apportionment to be fair and equitable this introduced a "high threshold". He pointed out that the apportionment of service charges on the basis of square footage is frequently adopted. There is no justification for saying such an apportionment is not fair and equitable. Likewise there is no justification for saying that an apportionment is not fair and equitable where the apportionment is based in part (here as to a two

thirds part) upon the net internal area and in part (here a one third part) upon a charge per flat. This was a reasoned amalgamation of two separate widely used bases of apportionment, each of which was in itself separately fair and equitable.

49. He submitted that the F-tT had fallen into error by taking into account matters which were irrelevant to the consideration of whether the 2015 basis was fair and equitable, namely the personal circumstances of individual lessees which appear to have weighed with the F-tT, see paragraphs 49, 50 and 51 of its decision.

50. As regards the F-tT's comment in paragraph 55 of its decision that in order to be fair and equitable an apportionment should have regard to the system that it replaced and that, when viewed from that perspective, the move to a system which completely ignores values and is based entirely on a mixture of equal shares and areas may well be considered disproportionate, Mr Letman advanced the following submissions. He pointed out that the 2015 basis includes an apportionment (as to two thirds of the expenditure) based on net internal area. The net internal area of a flat will be one of the considerations which inform the value of the flat. Accordingly the 2015 basis does not ignore value. Separately from that Mr Letman submitted that the value of a flat may take into consideration the question of natural light and outlook and fitting out by an individual tenant. He pointed out that the quality of a view had nothing to do with the amount of services enjoyed by the occupant of the flat. It was the services which had to be paid for. A flat of a certain size in the basement or a lower floor would absorb just as much of the services as a similar sized (but potentially more valuable) penthouse.

51. In paragraph 46 of his skeleton argument Mr Letman in summary submitted that this Tribunal should conclude that the 2015 scheme is a fair and equitable alternative within paragraph (b) of clause 4(c)(iv) for the following reasons:

> "(a) the apportionment carefully allocates costs based on 2/3rds by NIA and 1/3rd divided equally to reflect the costs attributable to and benefit derived from different heads of expenditure,
>
> (b) it is primarily based upon a full measure of the NIA of all flats so as to achieve a comparable and transparent distribution of costs between all of them,
>
> (c) it removes the anomalies between flats highlighted above in the 2008 scheme,
>
> (d) as an indication of its fairness the 2015 scheme has overwhelming support amongst the 114 lessees at BCM,
>
> (e) moving from a purely value based scheme to one largely based on NIA does not render the new apportionment unfair and inequitable, where NIA is not only a good fit to costs and use of services but also correlates to value, whereas many factors which affect value (e.g. interior decoration or views) have no impact on services,

(f) that any hardship to a small minority arising from the change from RV does not mean that the new apportionment is not in itself 'fair and equitable' in accordance with clause (b).

(g) that whilst there is no doubt more than one possible alternative that is 'fair and equitable' a judgement has to be made and has been properly and reasonably made by the Appellant in the interests of the wider community at BCM, after due consultation and as approved by lessees at the 2015 EGM…."

52. Mr Letman made further and separate submissions in relation to the F-tT's conclusion that an order under section 20C of the Landlord and Tenant Act 1985 should be made. He submitted that the F-tT was in error in making such an order and that the appellant's appeal against such order should be allowed whether the appellant won or lost upon the substantive appeal as to whether the 2015 basis of apportionment should be adopted. Mr Letman also submitted that in any event, and whatever the result of the present appeal, no section 20C order should be made in respect of the costs of the proceedings before the Upper Tribunal. When reaching my conclusions on the substantive appeal I have not overlooked the representations made by the parties upon the section 20C matters in so far as such representations may be of any relevance to the substantive appeal.

The Respondent's submissions

53. On behalf of the respondents Mr Carr advanced the following submissions.

54. In summary Mr Carr argued as follows:

(i) In 2008 the appellant did validly operate paragraph (b) of clause 4(c)(iv) and did identify and adopt an alternative basis of apportionment which was fair and equitable.

(ii) Paragraph (b) can only be operated once, namely when the trigger event has occurred – the trigger event being it becoming impractical or impossible to apportion the relevant expenditure between all the flats in the building on the basis of relative rateable values. Mr Carr accepted that this relevant event occurred after 1990 as found by the F-tT and against which finding there is no cross appeal.

(iii) The 2008 basis was a fair and equitable basis of apportionment which properly had regard to the relative values of the flats as evidenced by their previous rateable values.

(iv) As the power to adopt an alternative fair and equitable basis of apportionment under paragraph (b) could only be exercised once and had been exercised in 2008, the appellant had no power to purport once again to exercise this paragraph (b) power and to adopt some different (and allegedly fair and equitable) basis of apportionment in 2015. The once and for all power had already been exercised once.

(v) However if the power under paragraph (b) was not a once and for all power, then in any event the 2015 basis could not be relied upon by the appellant because it was not a fair and equitable basis of apportionment.

(vi) The F-tT was correct in its decision on all the foregoing points and the appeal should be dismissed.

(vii) Mr Carr also advanced arguments regarding the question of the making of a section 20C order regarding costs of the proceedings, both before the F-tT and before this Tribunal, to which I will refer at the end of the present decision.

55. As regards the question of whether the 2008 basis had been validly adopted within paragraph (b) by the appellant, Mr Carr referred to the documentation leading to the EGM and the resolutions there adopted on 12 May 2008. The documentation prepared in advance of the EGM contained recognition that there was substance in the argument that the penthouses had an overly high rateable value (page 283 of the bundle). It was also contemplated that what would be fair and equitable and consistent with the spirit of the rateable values apportionment which originally operated under paragraph (a) was to adopt a new basis where there were fixed percentages which would be the same or as close as possible to the current charges (save for the penthouses) and with the reduction for the penthouses being funded by applying a service charge proportion to the three in-hand flats which apparently (and possibly wrongly) had not been contributing towards the service charges. Against this background it must be noted that paragraph (b) does not require any order of the F-tT as a prerequisite for some fair and equitable alternative basis of apportionment to become binding. The omission after the EGM in May 2008 to refer the matter back for formal approval by the LVT did not alter the circumstance that what had been done was within paragraph (b) of clause 4(c)(iv) and was the adoption of an alternative fair and equitable basis of apportionment. This was implemented for over 7 years with barely any complaint. It is true there could in theory have been a formal approval of the 2008 basis (as contemplated by the resolution) and there could also in theory have been variation of all the leases either by universal consent or through an order obtained from the LVT under section 37 of the 1987 Act. However the fact that these steps could in theory possibly have occurred and the fact that they were contemplated in the resolutions at the EGM as something that might occur, does not alter the fact that in May 2008 the appellant did formally decide to introduce the 2008 basis and thereafter did introduce it and did apply it for several years. The document convening the EGM on 12 May 2008 expressly referred in its recitals to clauses 4(c)(iv)(a)(b). Therefore the appellant purported to operate paragraph (b) and did in fact validly operate paragraph (b) by adopting the 2008 basis. The fact that the resolutions contemplated that some greater formality, by way of order of the LVT or variation of the leases, might in due course be carried out to confirm the adoption of the 2008 basis did not alter the fact that the 2008 basis had been validly adopted.

56. Mr Carr questioned the effect of the appellant's argument that the 2008 basis had not been validly adopted or, if purportedly validly adopted was not a fair and equitable basis of apportionment. Mr Carr queried what, on that basis, was the situation regarding the penthouses' service charges since 2008. Presumably, he

suggested, the lower percentage contemplated in the 2008 basis for the penthouses had not (on the appellant's argument) been validly adopted such that they should be paying the larger sum flowing from their historic rateable values.

57. On the question of whether the 2008 basis was fair and equitable Mr Carr advanced the following arguments. He pointed out that the lease provides no further guidance as to what is meant by fair and equitable. The lease should be construed upon normal contractual principles. Fair and equitable meant something more than reasonable. The question was: fair and equitable to whom? The answer must be: fair and equitable to the lessees who were required to pay the expenses to the appellant, with the intention that the appellant would recover 100% of its relevant expenses.

58. In order to decide whether a basis of apportionment will be fair and equitable to the lessees it is necessary to look not only at the lessees as a body but also at the lessees as individuals. Mr Carr did not suggest that it was relevant to examine the personal circumstances of each individual lessee, but it was relevant to look at the effect regarding quantum of payment and amount of variation from the old rateable value basis of apportionment which would effect each lessee. Whether a basis of apportionment was fair and reasonable was not to be decided in a vacuum or in relation to some notionally newly-created mansion block of flats. Instead it was to be construed in the circumstances as they existed in relation to this building and taking into account the terms of the lease including in particular the original basis of apportionment laid down in the leases, namely an apportionment on the basis of rateable values. The F-tT had been correct to analyse the matter in this way when considering the 2008 basis.

59. It was also relevant when considering whether a basis of apportionment was fair and equitable to consider the measure of support or lack of support for the proposed basis from the lessees as a whole, because this provided a barometer (as Mr Carr put it) as to whether the proposal was fair and equitable. In the present case the 2008 basis was supported by all persons voting (save for one abstention) there being no votes against and there were only limited subsequent challenges.

60. As regards the anomalies which the appellant contended arose under the 2008 basis, this involved an argument that it was right to look at some flats of similar area and to conclude that it is not fair and equitable if one flat pays substantially more than the other flat. However this does not recognise the way in which the rateable value system for domestic rating worked. The rateable value of a flat was not determined solely by size. It could be affected by location within a building and aspect and configuration and access and any other matters properly going to the national rental value of the flat upon the statutory terms. The original basis of apportionment in paragraph (a) was based upon the relative rateable values of the flats. Thus value was a crucial consideration in the basis of apportionment which the parties to the lease thought right originally to adopt. Once it was no longer practical or possible to use rateable values, an alternative basis of apportionment should, in order to be fair and equitable, continue to reflect the relative values of flats and do so in a more sophisticated manner than merely examining the net internal area.

61. On the question of whether paragraph (b) of clause 4(c)(iv) could be triggered more than once Mr Carr advanced the following arguments. The lease should be construed in accordance with the normal principles of interpretation and recognised in *Arnold v Britton* and in particular the seven factors identified by Lord Neuberger at paragraph 17. The new leases were granted in 1989 at a time when it was recognised (as shown by the inclusion of paragraph (b)) that the system of rateable values for domestic properties might well soon no longer continue in force. The lease contemplated an event which would trigger the need for an alternative basis of apportionment to be adopted. The lease contemplated the triggering event occurring only once – indeed the event could occur only once. It would occur when it became impractical or impossible to apportion on the basis of relative rateable values. That occurred after 1990. The occurrence of this triggering event gave the appellant one opportunity and only one opportunity formally to adopt an alternative basis of apportionment. This was done when the 2008 basis was adopted.

62. In answer to my question as to what the situation was for the year commencing, say, 29 September 1991 and each subsequent year, Mr Carr accepted that by each of these relevant years the triggering event had occurred. It was therefore no longer practical or possible to apportion the relevant expenses pursuant to paragraph (a) on the basis of relative rateable values in force at the end of the relevant year. However Mr Carr submitted that the ability to adopt an alternative fair and equitable basis of apportionment had not been used up by the appellant during any of these earlier years because what had been done was simply a tinkering on an ad hoc basis with the percentages which had been yielded by the old relative rateable system under paragraph (a). It was only in 2008 that a formal alternative basis was properly introduced, thereby using up the one and only opportunity to implement paragraph (b).

63. Mr Carr submitted that there was this single chance to adopt an alternative fair and equitable basis of apportionment under paragraph (b) and once this chance has been used then the parties are fixed with the new basis of apportionment. This is so even if the new basis of apportionment becomes unfair and inequitable. Alternatively if it was possible to operate paragraph (b) more than once, then paragraph (b) could only be operated for a second time if the then current basis of apportionment had become something which was no longer fair and equitable.

64. Accordingly the F-tT was correct to decide the 2008 basis was fair and equitable; it was correct to decide that paragraph (b) could only be operated once; it was correct to decide that paragraph (b) had been validly exercised by the introduction of the 2008 basis; and that in consequence the appellant was not entitled to seek to introduce a new basis of apportionment in 2015. Even if paragraph (b) could be operated a second time (namely in circumstances where the then current basis of apportionment was no longer fair and equitable) the circumstances in 2015 were that the then current 2008 basis remained fair and equitable, so once again the appellant was not entitled to introduce the 2015 basis.

65. In these circumstances it was not strictly relevant to consider whether the 2015 basis was fair and equitable. However Mr Carr submitted that the F-tT was correct in concluding that it was not fair and equitable. Mr Carr accepted that at certain points in its analysis the F-tT had appeared to take into consideration matters which strictly it should not have taken into consideration, namely the personal circumstances of individual lessees (see paragraph 49 and 51 of its decision). However the F-tT was entitled to take into account the substantial impact upon the owners of basement flats (paragraph 48 of its decision). He submitted that paragraphs 49-51 merely amounted to the F-tT giving examples of what was a legitimate consideration, namely the extent of disadvantage to the basement flats. He also submitted that the F-tT was correct in directing itself and deciding upon whether the 2015 basis was fair and equitable. Some regard should be had to the system that it was replacing. The F-tT was correct in concluding that the 2015 basis did not properly take into consideration the relative values of the flats, which had been an important ingredient of the original basis of apportionment in paragraph (a) when apportionment was based upon relative rateable values.

66. In summary the F-tT was entitled to conclude for the reasons which it gave that the 2015 basis was not fair and equitable.

67. Mr Carr made further written representations in relation to the question I raised at the hearing as to the relevance of the decision in *Sheffield City Council v Oliver*. He referred to the two earlier decisions of the Upper Tribunal which were considered in *Sheffield v Oliver* namely *Windermere Marine Village Limited v Wilde* [2014] UKUT 163 (LC) and *Gater v Wellington Real Estate Limited* [2014] UKUT 0561 (LC). He drew attention to the fact that even if a clause makes provision for a basis of apportionment (and in consequence the amount which is payable by way of a service charge) to be determined by some nominated person, such a provision is ineffective by reason of section 27A(6) of the Landlord and Tenant Act 1985 as amended. When the question arises for consideration under section 27A as to the amount which is payable by way of service charge it is for the appropriate tribunal (in the first instance the F-tT) to decide the amount. If the amount depends upon there being adopted a fair and equitable basis of apportionment then it is for the F-tT to decide upon such basis of apportionment. It is not for the landlord or its officer to decide the basis of apportionment with such basis only being displaced if the basis is one which the F-tT concludes is not fair and equitable or is in some other way irrational or flawed. In the present case the provisions of the lease do not even seek to place the decision as to what is "such alternative basis as shall be fair and equitable" into the hands of the appellant or its agent. The Court of Appeal in *Oliver* approved the Upper Tribunal's decision in *Windermere* and in *Gater* and it further approved the result in *Oliver*. In paragraphs 21 and 22 of his additional submissions Mr Carr stated as follows:

> ""21. Having regard to *Oliver* and *Gater*, the consequences for this case are as follows:
> (a) The Tribunal has jurisdiction under LTA 1985 s.27A(1) to consider both the quantum and apportionment of service charges.
> (b) Where the parties cannot agree what apportionment would be "fair and equitable", what is a "fair and equitable" service charge apportionment falls to be determined by the Tribunal ([74] of *Gater*).

(c) That exercise is a fundamentally different exercise from the one undertaken by the FTT in the case, when it asked itself whether the 2008 Scheme and/or the 2015 Scheme are "fair and equitable", rather than asking itself what a "fair and equitable" apportionment should be.
(d) In carrying out an apportionment, the Tribunal should have regard to the parties' agreement in the lease – in other words the requirement that any apportionment should be "fair and equitable".

22. As was submitted at the hearing, when it is determining the appropriate method of apportionment and what is "fair and equitable", the Tribunal should have regard to all of the terms of the leases, the effect of any scheme of apportionment on individual lessees and the method of service charge apportionment which is being replaced. The provision being replaced in this case is the apportionment of service charges according to the relative rateable values of the flats. It is submitted that it would be appropriate to replace that method of apportionment with a method based on valuation."

Discussion

68. I consider the appropriate starting point for the consideration of this case is the wording of the lease itself and in particular of clause 4(c)(iv)(a) and (b).

69. In paragraph (a) the parties to the lease laid down how the relevant expenditure was to be apportioned between all the flats in the building. This was by taking the relevant expenditure and by dividing this expenditure by the aggregate of the rateable values in force at the end of the relevant year of all of the flats in the building and then by multiplying the resultant amount by the rateable value in force at the same date for the flat in question. I observe at this stage that, by adopting this method of apportionment as the primary method of apportionment, the parties must in my view be taken to have recognised that such an apportionment was a fair and equitable apportionment for the purposes of the lease. Much of the argument on behalf of the appellant appears to proceed upon the basis that such an apportionment was not a fair and equitable apportionment.

70. Paragraph (b) of clause 4(c)(iv) only comes into operation once an event has occurred, namely it has become impractical or impossible to apportion the relevant expenditure between the flats in the building on the basis of relative rateable values. It was found by the F-tT (against which finding there is no appeal) that this event occurred after 1990, see the F-tT's analysis in paragraph 28 of its decision. In case there is any doubt as to what the F-tT means by "after 1990" I interpret this finding as meaning that anyhow for the service charge year commencing 29 September 1991 and all following years the relevant event had occurred and it had become impractical or impossible to apportion the relevant expenditure between the flats in the building on the basis of relative rateable values. In case there is any doubt as to what the F-tT's findings on this point was, I reach this conclusion myself, namely for the years commencing 29 September 1991 and following the relevant triggering event had occurred.

71. The occurrence of the triggering event brought into operation paragraph (b). Upon the question of whether paragraph (b) can only be operated once and whether some formality is required for its operation, it is necessary to look at the language of the lease and in particular of paragraph (b). I have regard to the principles of construction to which I was referred in *Arnold v Britton*. I give appropriate importance to the language used in the relevant clause. There is nothing in the relevant clause to indicate that any formality is needed in order to adopt such alternative basis as shall be fair and equitable. Nor is there anything in the language to indicate that a single alternative basis must be adopted once the triggering event has occurred and that this single alternative basis must be adhered to throughout the remainder of the 999 year leases. It would be remarkable if such a single alternative basis must be adopted and adhered to. This is particularly so bearing in mind that under paragraph (a) while it was in operation it was always possible for there to be changes in rateable value such that the relative rateable values would change. Under paragraph (a) it was necessary to examine these rateable values in force at the end of the relevant service charge year. This points against rather than towards paragraph (b) being intended to give rise to an immutable basis of apportionment. I note Mr Carr's argument that not only must there be a single operation of paragraph (b) but also that the basis of apportionment (which will of course initially be fair and equitable) which results from the operation of paragraph (b) must be adhered to throughout the 999 year leases even if it subsequently becomes unfair and inequitable.

72. In my judgment the wording of paragraph (b) is general and simple. Once it has become impractical or impossible to apportion that relevant expenditure between the flats in the building on the basis of relative rateable values (which occurred prior to 29 September 1991), then for each service charge year it is necessary to apportion the relevant expenditure between the flats in the building upon an alternative basis which is fair and equitable. This does not have to be same basis of apportionment as has been used in some previous year.

73. Both Mr Letman and Mr Carr appeared to submit that from 1991 onwards until anyway 2008 there had been an invalid and inappropriate ad hoc tinkering with the basis of apportionment, namely by taking the percentages given by the latest historic rateable value figures and by making practical adjustments when for instance a new flat was constructed from former business premises, namely by allocating some estimated value and hence percentage to that flat. Mr Carr submitted that that was inappropriate and did not constitute a proper operation of paragraph (b) – it was necessary for him so to submit because his argument was that paragraph (b) could only be operated once and that this one valid operation of paragraph (b) has occurred in 2008 when the 2008 basis was adopted. Accordingly upon Mr Carr's analysis, as I understood it, for the years from 1991-2007 the relevant expenditure was not apportioned under paragraph (a) (because paragraph (a) was no longer available) and was not apportioned under paragraph (b) either. As regards Mr Letman's submissions, he contended that paragraph (b) was not limited to a single operation. However he also submitted that there had merely been informal ad hoc amendments made to the apportionments during the period 1991 – 2007 being apportionments which were not validly made under paragraph (a) (because it was not available) and were not validly made under paragraph (b), because the apportionments continued to

reflect relative rateable values which gave rise to a basis of apportionment which was not fair and equitable (and hence not within paragraph (b)).

74. In my view both of these analyses by counsel are incorrect. In, for instance, 1991 the appellant was required to apportion the expenditure between the flats in the building upon some basis. Paragraph (a) was no longer available. I consider the appellant was entitled to continue to apportion the expenditure upon a list of percentages which as closely as possible reflected the previous apportionments which had been made in the most recent year to which paragraph (a) of clause 4(c)(iv) applied. The appellant was entitled to make appropriate judgments as to how to adjust these percentages based upon the advent of some new residential flat in the building. I am not aware of any significant complaints being made at the time regarding this conduct by the appellant. In my judgment the appellant, by acting in this manner, was validly apportioning the expenditure between the flats upon a fair and equitable basis and was therefore validly operating paragraph (b) of clause 4 (c)(iv), rather than the situation being that the appellant was failing to make any valid apportionment within the terms of the lease of the relevant expenditure.

75. The question which was raised before the F-tT was the question of the appropriate basis of apportionment for the year commencing 29 September 2015. The application also made reference to the proper basis for apportionment for future years, but the F-tT in its directions dated 23 February 2016 appear (correctly in my view) to have interpreted the application as one seeking a determination under section 27A of the Landlord and Tenant Act 1985 of the respondents' liability to pay interim service charges in respect of estimated expenditure for the year commencing 29 September 2015, rather than for that year and all subsequent years.

76. The question arises as to the proper approach to the apportionment of the relevant expenditure for the year commencing 29 September 2015, bearing in mind that the F-tT has correctly decided that by this date it was no longer practical or possible to apportion the expenditure on the basis of relative rateable values under paragraph (a).

77. Mr Letman submitted that the question of the basis of apportionment was primarily a matter for the appellant to decide; that the appellant had a margin of appreciation in deciding what was fair and equitable; that the F-tT could not interfere with the appellant's decision merely because the F-tT might prefer some other fair and equitable basis of apportionment; but that the F-tT could interfere with the appellant's decision if the F-tT decided for valid reasons that the basis of apportionment identified by the appellant was not fair and equitable. Mr Letman based these submissions upon *London Borough of Hounslow v Waaler* especially at paragraph 37 (see paragraph 43 above).

78. I am unable to accept Mr Letman's submission on this point. *London Borough of Hounslow v Waaler* was concerned with the proper approach to whether costs were reasonably incurred by a landlord. Where a landlord is faced with a choice of what

works to do in order to deal with a problem in the fabric of a building it is recognised that there may be many outcomes each of which is reasonable. The F-tT should not simply impose its own decision and thereby effectively take the decision for the landlord as to what ought to have been done. If the landlord chooses a course of action which leads to a reasonable outcome the costs of pursuing that course of action would have been reasonably incurred, even if there was another cheaper outcome which was also reasonable. However this is dealing with a different point from the point which arises here. In the present case the question to be decided under section 27A(1) is to the amount of service charge which is payable by each of the respondents as lessees of flats in the building. There is no issue regarding the total amount of the landlord's expenditure (anyhow so far as relevant to the present case). The only question is as to the appropriate apportionment. A decision as to the appropriate apportionment will thereby provide an answer to the question of the amount which is payable by each lessee. The terms of the lease do not purport to make a decision as to what is the fair and equitable basis of apportionment a decision for the appellant or for some agent of the appellant – even if the lease had done so such a provision would have been void under section 27A(6). In *Sheffield City Council v Oliver* the Court of Appeal approved the decision of the Upper Tribunal in both *Windermere Marine Village Limited v Wilde* and in *Gater v Wellington Real Estate*. In *Sheffield City Council v Oliver* the Court of Appeal quotes a passage from the Tribunal's decision in *Gater* at paragraph 24:

> "As is apparent from this passage, where a provision for determining an apportionment is rendered void by the operation of s.27A(6) of the 1985 Act, and the parties cannot agree what is fair, the consequence is that the fair proportion falls to be determined by the appropriate tribunal. That is a fundamentally different exercise from the one undertaken by the First-tier Tribunal in this case, when it asked itself whether the respondent's method of apportionment was fair rather than asking itself what the fair apportionment should be."

Accordingly it was for the F-tT to decide upon what should be the fair and equitable basis of apportionment for the service charge year commencing 29 September 2015. It was not for the F-tT to conclude that it must approve the 2015 basis as proposed by the appellant unless the F-tT concluded that such a basis was not fair and equitable. I refer also to paragraph 56 of the Court of Appeal's decision in *Sheffield City Council v Oliver* where the court concluded that it must itself determine the fair proportion of the council's costs to be levied as a service charge upon Ms Oliver "without having first to conclude that the council's apportionment was unfair and unreasonable."

79. Turning to the F-tT's decision, the F-tT decided that the 2008 basis of apportionment was fair and equitable. The F-tT gave its analysis in paragraphs 35-41 of its decision. In particular the F-tT correctly noted that the original system of apportionment was based largely on values and not either on the basis of equal shares or areas. The F-tT did not accept that a value based system of apportionment was inherently unfair or inequitable. The F-tT noted the substantial support for the 2008 basis and its approval at general meeting without objection and its use with few complaints over a 7 year period. I consider the F-tT was entitled to conclude for the reasons it gave that the 2008 basis was a fair and equitable basis of apportionment. This is a conclusion given in relation to this building in the context of the leases

which provided that the primary method of apportionment (i.e. the method to be used until it became impractical or impossible to continue to do so) was based upon relative rateable values. Any such basis may well give rise to anomalies and in particular may give rise to flats of lesser amenity value (e.g. those in the basement and with no use of the common entrances or with views into a light well) paying less per square foot than flats of greater amenity value. It is inherent (if not express) in the appellant's argument that the original basis of apportionment under paragraph (a) based upon relative rateable values was itself not fair and equitable and was a basis which was required to be substantially departed from as soon as the triggering event brought paragraph (b) into operation. I do not accept this argument on the part of the appellant.

80. The decision in *Sheffield City Council v Oliver* was not available to the F-tT. The F-tT did not expressly direct itself that it must itself decide upon the fair and equitable basis of apportionment. However in my view this is in effect what the F-tT has done. The F-tT by its decision has decided that for the year commencing 29 September 2015 the 2008 basis of apportionment is the appropriate basis to be applied, this being a fair and equitable basis of apportionment.

81. The F-tT was entitled so to conclude unless it misdirected itself as to the merits of the 2015 basis (which was the only alternative basis of apportionment being suggested to the F-tT for its consideration) such that the F-tT wrongly favoured the 2008 basis over the 2015 basis.

82. I accept that when analysing the 2015 basis the F-tT did refer to matters not relevant to its consideration namely the extent to which the 2015 basis would adversely affect certain individual tenants having regard to the particular personal circumstances of those tenants. However in my view the F-tT was merely referring to these matters as examples of the operation of a point which was relevant, namely the impact upon basement flats of the 2015 basis as analysed in paragraphs 48, 53 and 54 of its decision and to the failure of the 2015 basis to have regard to value save so far as value is a result of net internal area (paragraph 55 of its decision). The F-tT was entitled so to analyse the matter and I agree with its analysis.

83. I remind myself again that, as confirmed by *Sheffield City Council v Oliver*, it was for the F-tT to determine the fair and equitable apportionment of the relevant costs without first having to conclude that the appellant's apportionment (as contained in the 2015 basis) was unfair or unreasonable. However I conclude that there is nothing in the F-tT's analysis regarding the 2015 basis which undermines the F-tT's decision that the 2008 basis was the correct basis for the apportionment of the on account service charges for the year commencing 29 September 2015.

84. In the result therefore I uphold the F-tT's decision that for the year commencing 29 September 2015 the on account payments should be apportioned upon the 2008 basis.

85. In case the proper analysis of the present case is that, by reason of my disagreement with the F-tT upon certain points in its analysis although not with its conclusion, it is necessary for the Upper Tribunal to re-make the decision as to what is the fair and equitable basis to be adopted for the apportionment of the relevant expenditure for the on account payments for the service charge year commencing 29 September 2015, I conclude that the 2008 basis is a fair and equitable basis of apportionment and is the basis which should be adopted. My reasons for this conclusion are set out above and can be summarised as follows:

(1) The primary method of apportionment provided for in the lease was apportionment on the basis of relative rateable values.

(2) The parties to the leases must be taken to have adopted this primary method of apportionment on the basis of a mutual recognition that this was a fair and equitable basis of apportionment for the service charge of these flats in this building under these leases. Accordingly a value based method of apportionment was recognised as fair and equitable.

(3) After 1990 it became impractical or impossible to apportion on the basis of relative rateable values. By at latest the commencement of the service charge year on 29 September 1991 paragraph (a) was no longer available.

(4) The appellant was entitled from 1991 onwards to adhere to the percentages given by the previous rateable values and to make adjustments exercising judgement when it was necessary to do so in respect of newly created flats or other events. This involved the proper operation of paragraph (b).

(5) Paragraph (b) is not to be construed as being only applicable once.

(6) Subject to the anomaly that the in-hand flats appear to have made no percentage contribution towards the service costs (and this anomaly is not presently relevant) the appellant continued thereafter to operate a fair and equitable basis of apportionment under paragraph (b) until 2008.

(7) In 2008 a question arose as to whether the historic rateable values (and hence the percentage contribution) for the penthouse flats were unduly high. The 2008 basis was introduced. This was a fair and equitable basis of apportionment (and also removed the anomaly regarding the in-hand flats).

(8) No formality was needed to introduce the 2008 basis. This was introduced and was acted on. The parties thereby were properly using paragraph (b) and there was a continuing demand and payment of service charges on a fair and equitable basis of apportionment.

(9) In due course some lessees became uneasy (and this unease became shared by the board of the appellant) as to whether the service charge should continue to be apportioned on the 2008 basis or whether some other basis should be introduced. This led to substantial representations and discussion and a decision by the appellant in July 2015.

(10) The decision the appellant took was to introduce the 2015 basis, but the appellant correctly recognised that in view of dissent the appellant should obtain a ruling from the F-tT, to whom an application was duly made.

(11) The F-tT's role was not to afford some margin of appreciation to the appellant's decision to adopt the 2015 basis and only to interfere with that decision if satisfied that decision was wrong.

(12) Instead the F-tT's role was to decide itself under section 27A(1) the amount which was payable by the lessees by way of service charge. To do this it was necessary for the F-tT to decide upon the fair and equitable basis of apportionment which was to be applied.

(13) The F-tT decided that the fair and equitable basis of apportionment to be applied was the 2008 basis. I agree with that decision. If it is necessary for the Upper Tribunal to retake the decision upon this point then I myself decide (in agreement with the reasoning of the F-tT) that the 2008 basis of apportionment is a fair and equitable basis of apportionment and is the basis which should be applied for the apportionment of service charges for the year commencing 29 September 2015.

(14) In reaching this decision it is necessary to consider the merits/demerits of the alternative basis of apportionment proposed by the appellant, namely the 2015 basis. I have done so. In agreement with the F-tT I consider the 2015 basis to have substantial demerits as summarised by the F-tT in paragraphs 48 and 53 to 56 of its decision.

(15) The Tribunal is required to determine upon what is the fair and equitable basis of apportionment to be applied without having first to

conclude that the appellant's 2015 basis of apportionment was unfair or inequitable.

(16) If however, contrary to the foregoing, it is necessary for the Tribunal to decide if the 2015 basis of apportionment is fair and equitable, then I conclude that it is not for the reasons given by the F-tT in paragraphs 48 and 53 to 56 of its decision.

(17) It will remain open to the appellant to seek for future years to change from the 2008 basis of apportionment to another basis (being one which is also fair and equitable). Such alternative basis could be one which builds upon the 2015 basis but which makes adjustments to meet the legitimate concerns of the basement flats and the objecting respondents as recognised by the F-tT. Also the observations made by the F-tT in paragraph 71 of its decision are of relevance as showing other possible courses of action for the parties.

Conclusion

86. In the result I dismiss the appellant's appeal. I find that the basis of apportionment to be adopted for the on account payments for the year commencing 29 September 2015 is the 2008 basis.

Appeal against the F-tT's decision under section 20C

87. Section 20C of the Landlord and Tenant Act 1985 provides in sub-sections (1) and (3):

> "(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 … [the First-Tier Tribunal] or the [Upper Tribunal]… 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) …
>
> (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."

88. The F-tT recorded that an application was made to it under section 20C on behalf of the objecting respondents. The F-tT gave its conclusions upon the point in paragraphs 63-69 of its decision in the following terms:

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

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

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

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

67. The objecting respondents had asked for a list showing all the service charge percentages both under the 2008 scheme and under the proposed scheme but it had been denied them. It was only after we directed the company to make such a list available to the objecting respondents that it was produced to them, during the lunch adjournment. By that time it was too late for them to undertake a proper analysis and to reply on it when the closing submissions were made.

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

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

89. On behalf of the appellant Mr Letman submits that the F-tT was in error in so concluding and that this Tribunal should reverse the F-tT's decision to make this order under section 20C and should do so whether the appellant is successful or unsuccessful upon the main issue. In summary he advanced the following arguments:

(1) The Tribunal made unwarranted criticisms of the appellant's board when it referred to an "autocratic management style" and when it suggested that the consultation was not open and transparent.

(2) The F-tT, in making the criticisms it did, could not properly have taken into consideration the available documentation making clear the voluminous correspondence with the objecting lessees and the various question and answer documents which were circulated which demonstrate there was an open transparent and extensive consultation aimed at achieving a consensus. There was no justification for saying that the concerns of a significant minority of lessees were simply brushed aside. Mr Letman gave further explanations to meet the criticisms the F-tT had made regarding the alleged late provision of documents.

(3) He referred to the Lands Tribunal decision in *Langford Court v Doren Limited* LRX/37/2000 at paragraphs 28-32. He submitted it would not be just in the circumstances of this case to deprive the appellant of its rights under the leases to recover its cost of the proceedings before the F-tT.

(4) In short there was extensive and conscientious consultation carried out by the appellant upon a point of importance. The Section 20C order should not have been made.

90. On behalf of the objecting respondents (i.e. the eight respondents represented by Mr Carr), Mr Carr contended that the F-tT was entitled to make the Section 20C order in the terms it did for the reasons it gave. In particular it was entitled to do so having regard to the manner in which the proceedings were conducted.

91. I remind myself that the power under Section 20C to make an order in respect of the costs before the F-tT was a power vested in the F-tT. Also the F-tT had the benefit of having been the tribunal actually conducting the case before it and having heard the evidence from the witnesses. The Upper Tribunal should only interfere with an order made by the F-tT under section 20C on the basis that such a decision is not sustainable in law – not on the basis that the Upper Tribunal (if it had been its decision) would not have made an order or would have made a different order. In the present case I have concluded that the Section 20C order should not have been made by the F-tT. My reasons for so concluding are as follows.

92. In reaching its conclusion on this point the F-tT appears to have been particularly concerned with the details of the litigation rather than the substance.

93. The details of the litigation to which the F-tT appear to have given substantial weight are what the F-tT described as an autocratic management style, that the nature of the propositions on which the tenants were asked to vote were too restricted, that there were un-minuted meetings between directors and tenants and that information which the objecting respondents needed was not given to them until later than it should have been. The F-tT had regard to all the foregoing and concluded that legitimate concerns were just brushed aside.

94. The substance of the litigation to which in my view the F-tT did not have proper regard is the following. The appellant is not a commercial landlord. The appellant is a company owned by the lessees and run by some of the lessees (duly elected as officers of the appellant) who give their time free of charge. The appellant is dependant for most (if not all) of its income upon the receipt of service charges from the lessees in the building.

95. Against that background a serious problem arose. The provisions in clause 4(c)(iv) for the apportionment of service charge were giving rise to repeated substantial complaints from various lessees that such service charge apportionment was not being done correctly. This was a problem which had to be faced. It was recorded in a newsletter to all lessees dated February 2014 which included the following passage:

> "Over the past year or so, the Board has received representations from residents who feel that their service charges proportions are unfair, relative to other similar sized flats in the block. This is an issue that continues to come up year after year, and having spent some time looking in detail into this, and having taken legal advice on it, the Board has come to the conclusion, albeit with reluctance, that we do have an obligation to all members to review the way that services are paid for by the owners of the flats in the block and cannot put the issue off any longer. The way in which individuals contribute to the common costs of our small community is clearly a sensitive and complex issue and one that will require the most careful consultation with everyone concerned."

96. I conclude that the appellant correctly realised that detailed consideration and consultation was needed to enable the appellant to decide how best to proceed in accordance with the terms of the lease to ensure that the apportionment of service charge was done on a fair and equitable basis within paragraph (b).

97. I also note that once the 2015 basis had been approved by the appellant at an EGM in July 2015 the appellant did not merely seek to impose the new percentages and sue the tenants who failed to pay. Instead the appellant, in my view properly and responsibly, recognised the proper way forward was to lay the matter before the F-tT and to obtain the F-tT's ruling as to whether or not the appellant was entitled for the service charge year commencing 29 September 2015 to recover service charge on the 2015 basis.

98. In this appeal by way of review I cannot properly make findings disagreeing with the F-tT when it reaches conclusions, having heard the oral evidence and having conducted the hearing, as to the style of management of the appellant or as to whether some documents could properly have been produced earlier than they were. But whatever the shortcomings of the appellant regarding these matters, the fact remains that the appellant had to deal with the problem of the apportionment service charges. The problem was not going to go away. It dealt with the problem by lengthy and detailed consultation. I accept the submission by Mr Letman that the consultation was extensive as shown by the consultation documents referred to over two pages of text at the end of his second skeleton argument. This consultation was followed by a

decision to adopt the 2015 basis which in turn was followed by placing the matter before the F-tT. In doing so the appellant was, so I conclude, acting in good faith and with a view to doing what it considered it should do for the proper management of the building.

99. The fact that ultimately the F-tT reached a conclusion (upheld on this appeal) that the appellant was not entitled to introduce the 2015 basis, does not alter the fact that the appellant was properly seeking to find a solution to a genuine problem. This was a problem for the appellant and the lessees. The appellant is owned by the lessees and has to look to the lessees for payment of its management expenses by way of the service charge.

100. If some of the costs incurred by the appellant in pursuing the case before the F-tT were not reasonably incurred then, quite apart from any order under Section 20C, they will not be properly recoverable having regard to Section 19 of the 1985 Act. As regards those costs of the proceedings before the F-tT which were reasonably incurred by the appellant I conclude that the F-tT was wrong in making an order under Section 20C. It was wrong because, with respect, it failed pay adequate attention to the substance of the matter and instead paid too much attention to the detail of the matter. I do not consider it would be just and equitable to make the order sought by the objecting respondents under Section 20C in respect of the costs relating to the proceedings before the F-tT.

Section 20 application in relation to the proceedings before the Upper Tribunal

101. On behalf of the objecting respondents Mr Carr made an application for an order by this Tribunal under Section 20C to the effect that the costs of the proceedings before the Upper Tribunal should not be taken into account when calculating the service charges for the objecting respondents.

102. Mr Letman opposed this application whether the appellant was successful or unsuccessful upon the main appeal. He again referred to the principles he had advanced in support of the appellant's appeal regarding the section 20C order for the costs before the F-tT.

103. I have explained above that I conclude the appellant acted properly in seeking to deal with a genuine problem regarding the apportionment of service charges and by laying the matter before the F-tT for its decision. However the appellant obtained that decision. It did not like that decision and has appealed against it. The appellant has failed in its appeal. I am aware that the principle of costs following the event does not govern the question of whether any Section 20C order should be made. However the objecting respondents have been put to expense in successfully resisting the appellant's attempt to overturn the F-tT's decision which was given on the appellant's application to the F-tT. In my judgment it is just and equitable in all of the circumstances of the present case to order that all of the costs incurred by the appellant in connection with these proceedings before the Upper Tribunal are not to

be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the eight objecting respondents. I so order.

Dated: 3 July 2017

His Honour Judge Huskinson

APPENDIX 1

The Eight Respondents represented at the appeal by Adrian Carr of Counsel were as follows:

(a) Ms Lynne Truss, Flat 40

(b) Mrs Lailan Young and Mr Robin Young, Flat 54

(c) Dr Mireille Ribiere, Flat 55a

(d) Dr Michael Larsson, Flat 58b

(e) Mr Praful Patel, Flat 59/60

(f) Michael Beal, Flat 74a

(g) Dr Sean Glynn and Mrs Patricia Glynn, Flat 77

(h) Mr Kevin Fogarty and Mrs Ulrike Fogarty, Flat 81