FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LSC/2020/0125 V:CVP**
Property	**:**	**Flat 5, 89 Holland Park London W11 3RZ**
Applicants	**:**	**Andrew Lawson Dell** **Jennifer Simone Dell**
Representative	**:**	**Howard Kennedy LLP** **Mr Mark Loveday (of counsel)**
Respondent	**:**	**89 Holland Park (Management)Limited**
Representative	**:**	**KDL Law** **Mr Shomik Datta (of counsel)**
Type of application	**:**	**Reasonableness and payability of service charges**
Tribunal	**:**	**Judge Sheftel** **Mr T Sennett MA FCIEH** **Ms L West**
Date	**:**	**3 September 2021**

DECISION

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The parties have provided a Bundle of Documents for the hearing. The order made is described at the end of these reasons.

1. The Applicants seek a determination under section 27A of the Landlord and Tenant Act 1985 (the "1985 Act") as to the payability of sums incurred by the Respondent in respect of legal and professional costs

relating to a dispute with a third party, which have been demanded by way of service charges.

Background

2. The proceedings relate to the property at Flat 5, 89 Holland Park, London W11 3RZ ("Flat 5").

3. The Respondent is the freehold owner of land and premises at 89 Holland Park, London (the "Building"). The Respondent is a tenant-owned company and the Applicants hold one share.

4. The Building comprises a period villa on lower ground, ground and three upper storeys, which has been converted into 5 flats.

5. At all material times, the Applicants have been the joint registered leasehold owners of Flat 5, which is located on the third floor of the Building.

6. The lease of Flat 5 is dated 1 June 2007 (the "Lease") and substantially incorporates the terms of a lease of Flat 5 dated 23 June 1989 (the "1989 Lease").

7. Immediately to the south of the Building is a plot of land, the freehold title to which is registered with title no.NGL10711 (the "Building Site"). At all material times, the registered proprietor of the Building Site has been Sophie Louise Hicks ("Ms Hicks").

8. The current proceedings arise out of a dispute which arose in 2012 with Ms Hicks in relation to her proposals to build a house on the Building Site.

9. Ms Hicks's ability to develop the Building Site is restricted due to the fact that, by a Deed dated 10 July 1968, Ms Hicks's predecessor in title Brigadier Walter Buckley Radford entered into various covenants with the Respondent's predecessor in title France Elizabeth Danielle Dzou de Froberville ("the Deed"). The Deed contains covenants:

a) that the owner of the Building Site "*shall make no applications to the appropriate Planning Authority nor apply for any other necessary permissions from the local or any other Body or Authority in respect of any plans drawings and specifications which have not been previously approved by the [owner of the Building]*" (clause 2(b)); and

b) that "*no works shall be commenced upon the building site before the definitive plans drawings and specifications of the said buildings have been first approved by the [owner of the Building] or his surveyor*" (clause 3).

10. There have so far been 3 sets of proceedings in the High Court in relation to the dispute with Ms Hicks:

a) By a claim reference HC12C04553 (the "First Claim") dated 19 November 2012, the Respondent and the lessees of the flats (including the Applicants) sought a declaration against Ms Hicks that they had the benefit of the above restrictive covenants. Ms Hicks counterclaimed a declaration that the same were subject to an implied proviso that consent was not to be unreasonably withheld. Following a trial, Mr Robert Miles QC (sitting as a High Court Judge) ordered on 28 February 2013 that the Respondent and the Applicants both had the benefit of the above restrictive covenants, but that this was subject to an implied proviso that consent was not to be unreasonably withheld.

b) By a further claim made on 5 June 2014, (claim reference HC-2017-000083), Ms Hicks sought declarations that in 2013, the Respondent had unreasonably withheld approval to applications for permission under the restrictive covenants (the "Second Claim"). Ms Hicks withdrew the Second Claim on or about 15 March 2017.

c) Following refusal by the Respondent to consent to the making of a planning application in relation to the proposed house, by

claim made on or about 3 August 2017 (claim reference HC-2017-2199), Ms Hicks sought declarations against the Respondent that it had unreasonably withheld its approval to the applications under the restrictive covenants in the Deed ("the Third Claim"). This litigation has involved two trials in the High Court and, in between, an appeal to the Court of Appeal. Most recently, in April 2021, the High Court determined that the Respondent was entitled to refuse consent to Ms Hicks's proposal under the covenants contained in the Deed.

11. There have also been costs incurred by the Respondent in respect of objections to the local planning authority relating to Ms Hicks' application for planning permission for her proposed development.

12. As noted above, the current proceedings relate to the costs associated with the dispute with Ms Hicks, which the Respondent maintains are recoverable through the service charge, but which are disputed by the Applicants. The Applicants stress that they do not dispute other, 'regular' service charges, for example relating to routine maintenance, and these have been paid in full. Further, the Applicants do not dispute the costs associated with the First Claim. Rather, what is in issue are the legal and professional costs associated with the Second Claim, the Third Claim and the costs which relate to planning applications made by Ms Hicks.

13. The sums demanded of and disputed by the Applicants total £430,411.50. This comprises 17 demands referred to in the Applicants' statement of case, plus two further demands dated 5 January 2017 and 5 June 2018, which had been omitted in error but were formally added at the start of the hearing with the agreement of the Respondent.

14. In addition, the Applicants seek an order under section 20C of the 1985 Act that the costs incurred by the Applicants in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge. An order is also sought under paragraph 5A of Schedule 11 to the Commonhold and

Leasehold Reform Act 2002 (the "2002 Act"), to reduce or extinguish the Applicants' liability to pay an administration charge in respect of litigation costs.

15. A 3-day hearing took place by remote video conferencing on 5-7 July 2021. The Applicants were represented by Mr Mark Loveday and the Respondent by Mr Shomik Datta.

16. The tribunal heard evidence from the Applicants: Andrew Dell and Jennifer Dell. On behalf of the Respondent, evidence was given by Nicholas Winkfield of Winkfield Property Management Limited, the managing agents of the Building, and Dr Michael McKie, a director of the Respondent and a joint leaseholder of flat 3 (along with Maria Letemendia).

17. The tribunal is grateful to all parties for their assistance and the way that the hearing was conducted. Although the matter has clearly generated strong feelings and frustrations, in our view, all witnesses did their best to assist the tribunal.

The sums in issue

18. The Applicants maintain that they have discharged any purported obligation to contribute to the costs of the dispute incurred before 9 July 2014.

19. However, by an email dated 9 July 2014, Mr Dell emailed the other leaseholders stating that:

"*We have now reached a conclusion that we do not wish to spend any more on this series of legal actions. We also wanted to be very clear that we have no objection to anyone continuing with an action but we do not wish to be a party, either in law or financially…*".

20. Accordingly, the Applicants' case is that they should not be liable for anything after this date.

21. However, since 9 July 2014, the Respondent has demanded the following service charges from the Applicants relating to legal and professional costs incurred by the Respondent in connection with the dispute with Ms Hicks.

Date	**Inv. No**	**Amount**
09/12/2014	0220land	£10,000.00
07/06/2016	0240land	£10,000.00
24/10/2016	0250land	£9,915.00
27/02/2017	0266land	£8,923.50
15/05/2017	0271land	£11,898.00
12/10/2017	0286land	£11,898.00
17/01/2018	0296land	£11,898.00
08/03/2018	0301land	£11,898.00
23/07/2018	0316land	£19,830.00
03/10/2018	0321land	£14,872.50
12/12/2018	0326land	£9,915.00
07/02/2019	0336land	£59,490.00
28/02/2019	0341land	£83,286.00
30/04/2019	0346land	£11,898.00
28/06/2019	0351land	£57,507.00
27/11/2019	0365land	£32,650.00
27/01/2020	0375land	£19,830.00
	Total	£395,709.00

22. In addition, as noted above, two further invoices have now also been included – invoice dated 5 January 20217 for £14,872.50 and an invoice dated 5 June 2018, for £19,830 – bringing the total in dispute to **£430,411.50**.

23. The Applicants have made some payments in respect of the above sums. Invoices up to and including 27 February 2017 have been paid in full and 50% payments have been made on invoices up to and including 3 October 2018 – although the Applicants maintain that they are not

liable for any sums after 9 July 2014. According to Mr Winkfield's evidence, the Applicants' current arrears are £325,638.34.

24. On any view, these are vast sums by way of service charge for an individual flat. According to the Applicants, by 18 January 2021, the Respondent had invoiced the 5 lessees in the block a total of £2,763,531.03 in connection with the legal costs of the various disputes with Ms Hicks. Although the total sum that will ultimately have to be paid is likely to be lower than this because of costs orders in favour of the Respondent in the litigation with Ms Hicks, these costs dwarf the 'regular' costs of managing the Building. For example, in 2019 it appears that the Respondent incurred "legal and professional fees" of £1,292,157, while spending £30,645 on the routine costs of insurance and maintenance.

Confidential material

25. By application dated 9 June 2021, the Respondent sought an order that any material to be included in the hearing bundles insofar as such material relates to the Second and Third Claims which is protected by privilege (including legal professional privilege) (the "Confidential Material") should be redacted by the Applicants and/or to give such directions for the conduct of the hearing when considering such material which may involve considering such material in private.

26. On 21 June 2021, Judge Carr made an order that the Confidential Material would appear redacted in the main bundle and that a separate unredacted Bundle of Confidential Material would be provided. When considering the Confidential Material (including evidence or submissions on it), the Tribunal would convene or reconvene (as the case may be) in private pursuant to rules 17(8) and 33(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

27. However, as it transpired, no reference was made to the Confidential Material and accordingly the issue did not arise.

Issues before the tribunal

28. The question of whether the sums in question are payable, falls broadly into four issues:

a) **Does the tribunal have jurisdiction to consider all of the sums in issue?** The Respondent contended that the tribunal did not have jurisdiction to consider charges relating to the Second Claim or to planning by virtue of section 27A(4) of the 1985 Act.

b) **Do the sums fall within the category of costs which are recoverable under the terms of the Lease?** The Applicants deny that the legal and/or professional costs incurred by the Respondent in connection with the dispute fall within clauses 4.4(g)(ii) or 4(4)(l) of the 1989 Lease. Alternatively, it is contended that the sums were not "necessary … desirable [or] proper" and/or were not costs which "in the reasonable discretion" of a Lessor were either "necessary" or advisable.

c) **Are the sums payable having regard to the way they have been demanded?** There is no dispute that the demands did not (and did not purport to) seek payment of instalments of an Interim Charge under clause 3(4) and para 2 of Sch.5 of the 1989 Lease or to demand payment of a balance of a Service Charge under para 4 of Sch.5 to the 1989 Lease. Instead, they were described as ad hoc demands which the Lease does not provide for. However, the Respondent maintains that they are payable, principally on grounds of estoppel by convention and/or waiver.

d) **Have the costs been reasonably incurred within the meaning of s.19 of the 1985 Act?** The Applicants contend that the costs were not reasonably incurred on a number of grounds.

Issue 1: Jurisdiction

29. Section 27A(4) of the 1985 Act provides that:

> "*No application under subsection (1) or (3) may be made in respect of a matter which—*
>
> *(a) has been agreed or admitted by the tenant*
>
> *…* "

30. Section 27A(5) of the 1985 Act provides that:

> "*But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment*."

31. In the Respondent's submission, the tribunal does not have jurisdiction to consider charges relating to the First Claim (which are not disputed in any event), the Second Claim or the planning applications. In Mr Loveday's calculation, the charges in dispute that are affected by this issue amount to £53,711 – although notwithstanding a schedule contained in the bundle which purports to break down the invoices by reference to the various claims, it is not clear that this apportionment has been agreed.

32. In applying the legal test under section 27A(4) of the 1985 Act, both parties referred to the Upper Tribunal decision in *Cain v Islington* [2015] UKUT 542 (LC), where HHJ Gerald stated the following:

> "14. Before considering the facts of this case, it is necessary to consider the meaning and effect of section 27A(5). An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the tenant – usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two.
>
> 15. … Whilst it would generally be inappropriate to make such an implication or inference from a single payment because it could not be said that the conduct of the tenant was sufficiently clear, where there have been repeated payments over a period of time of sums demanded,

there may come a time when such an implication or inference is irresistible.

16. Taking matters one step further, it would be open to the F-tT to make such a finding even where there had been no payment at all but there were other facts and circumstances clearly indicating that the tenant had agreed or admitted the amounts claimed. What is required is some conduct which gives rise to the clear implication or inference that that which is demanded is agreed or admitted by the tenant. The relevant question, therefore, is: are there any facts or circumstances from which it can properly be inferred or implied that the tenant has agreed or admitted the amount of service charge which is now claimed against him?

...

18. ... the natural implication or inference from a series of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded. Putting it another way, it would offend common sense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest. Self-evidently, the longer the period over which payments have been made the more readily the court or tribunal will be to hold that the tenant has agreed or admitted that which has been demanded and paid. It is the absence of protest or qualification which provides the additional evidence from which agreement or admission can be implied or inferred."

33. It did not appear to be in dispute that in applying the analysis in *Cain v Islington*, while an agreement or admission for the purposes of section 27A(4) may be implied, it must be clear and the finding based upon the objectively ascertained intention of the tenant, which may be express or implied or inferred from the conduct of the tenant. Further, it was not in dispute that a tenant is not to be taken to have agreed something "by reason only of having made any payment", in accordance with section 27A(5) of the 1985 Act.

34. It was also submitted on behalf of the Respondent that once an agreement or admission is made, it is not open to the tenant to withdraw or resile from the same (*Tintern Abbey Residents Association v Owen* [2015] UKUT 0232 (LC)).

35. In support of its contention that the Applicants have 'agreed or admitted' the costs relating to the planning application and the Second Claim, the Respondent relies on the following:

a) In relation to planning, the pleaded grounds were as follows:

   i. The Applicants instructed Pinsent Masons in an individual capacity in relation to Ms Hicks' planning applications under reference PP/12/05035 and CC/12/05036. This is confirmed in Pinsent Masons' letter of 29 January 2013, written on behalf of the individual leaseholders.

   ii. By email of 21 May 2018, the Applicants requested that an objection to the council was filed on their behalf to the latest planning application made by Ms Hicks.

   iii. By email of 20 August 2018, Mr Dell requested that a partner of Taylor Wessing attend a planning hearing to deal with objections on behalf of the leaseholders. This request was repeated by email of 14 September 2018 and on 22 October 2018, Mr Dell wrote to all leaseholders expressing his view that counsel should be instructed to attend the planning hearing.

   iv. By email of 14 March 2019, Mrs Dell confirmed that she wished an objection to be lodged in the name of Mr Dell on the basis that it was alleged that Ms Hicks had not fulfilled condition 14 of the planning permission that had been granted by the council and that the Building would be at risk of structural damage from the proposed development.

b) In relation to the Second Claim, the pleaded grounds were as follows:

   i. In response to an email of 6 June 2013 outlining the next steps and costs (after the First Claim), on 6 June 2013 at 19.17, Mr Dell wrote agreeing the plan that Marc Jonas and Maria Letemendia review any further plans from Ms

Hicks, and that any subsequent response to a request for consent would be via solicitors: "*Appreciate your efforts. Outstanding payment follows*."

ii. Mr Dell resigned as a director of the Respondent by email of 20 June 2013, as he was unable to participate in board meetings due to travel. He stated, "*…I would appreciate being kept informed of material points in the usual way, and will be happy to continue to help as appropriate*."

iii. By Mr Dell's email of 31 July 2013, he stated, "*Looks to me like we need to steel ourselves to fight a series of claims, until she moves on*."

iv. Following extensive correspondence relating to the costs of the Second Claim, on 29 March 2017, and following Ms Hicks's notice of discontinuance in the Second Claim, Mrs Dell telephoned Dr McKie to inform him that the outstanding service charges for Flat 5 (including the legal fees invoiced) would be paid the following day.

v. This was confirmed by Mr Dell by email of 30 March 2017: "*…Jennifer agreed yesterday with Michael to pay the outstanding legal fees that have been levied and labelled as 'service charge' in order to be constructive*." Payment of £43,711 was made on 31 March 2017, and receipt confirmed by the managing agent.

36. Section 27A(4) of the 1985 Act refers to a 'matter' which has been admitted or agreed. While 'matter' is not defined, in the tribunal's view, the fact that a tenant may have agreed to a particular course of action, it does not follow that they have been taken to have agreed to every cost or expenditure within that category. By way of analogy, a tenant may agree that a roof should be repaired, but then disagree with the methodology or the costs. The fact that the tenant has agreed the roof should be repaired as a general principle does not mean that the

tribunal has no jurisdiction to hear a challenge to the costs of those repairs.

37. Accordingly, the fact that the Applicants have agreed to pay the costs of the First Claim, does not, in our view, assist in the exercise of finding agreement in relation to other litigation. There is also a fundamental difference between the First Claim, which sought to ascertain the scope of and enforce the restrictive covenants, and the Second and Third Claims, which concerned the refusal to give consent to Ms Hicks's proposals under those covenants. Added to this is the fact that the First Claim was brought in the names of the Respondent and the lessees of the flats whereas the Second and Third Claims were brought against the Respondent.

38. Putting it another way, the fact that: the Applicants agreed to contribute to the legal costs of the First Claim; or that consent should be refused which ultimately gave rise to the Second Claim; or even that a planning application should be opposed, does not give rise to an open-ended agreement to contribute to all future proceedings between the Respondent and Ms Hicks or indeed that the specific costs associated with such proceedings have been agreed or admitted for the purposes of section 27A(5) of the 1985 Act. As per Mr Dell's assertion at paragraph 114 of his witness statement, there is no evidence that the lessees (and the Applicants in particular) agreed to a broad indemnity or an open-ended commitment to enforce the covenants in the Deed.

39. While it is not disputed that payments were made after the Applicants' letter of 9 July 2014, it is contended by Mr and Mrs Dell that they were made under protest and/or duress:

    a) Mr Loveday referred to multiple emails in support of this contention between the start of 2015 and the start of 2017, where the Applicants' objections are recorded.

    b) Further, reference was also made to the fact that the Applicants' mortgagee had been contacted by the Respondent (or its

representatives) in April 2015 and November 2016 on the basis that the Applicants were in arrears.

c) Mr Dell also denied that the decision to pay 50% of certain invoices could be attributable to a genuine agreement as opposed to one made under duress and/or in an attempt to be neighbourly. At paragraph 193 of his witness statement, he stated that:

> "… I had suggested that as a compromise Jennifer and I could pay 50% of our share of the outstanding demands. Marc did not agree to this and I was clear that I did not agree we were liable for anything. The meeting was a pragmatic attempt to move forward and avert conflict. The repeated argument from the Respondent was that we should present a united front to Ms Hicks. Concerned to avoid further litigation, Jennifer and I decided to pay 50% of our share of the outstanding demands dating from 15 May 2017. The last invoice we paid 50% towards was that of 3 October 2018. We did not agree with the action being taken by the Respondent, but we hoped our payments would avoid further dispute and show the directors of the Respondent that we strongly objected."

40. As to the email from Mr Dell dated 31 July 2013 in relation to legal costs payable by Ms Hicks, in which he states "*Looks to me like we need to steel ourselves to fight a series of claims*", Mr Dell maintains that this was an expression of his concern and not in any way a commitment to litigate as it was not a detailed or considered response and had been typed quickly from his mobile phone. The tribunal agrees with Mr Dell to the extent that the email cannot be taken as an open-ended commitment to unlimited future expenditure. Even if we are wrong, Mr Dell's subsequent communications as set out above confirm the Applicants' objection to further litigation.

41. More generally, Mr Dell's evidence was that although at the start of 2012 he agreed to contribute to initial costs to take legal action in relation to the proposed development of the site – at least until the letter of 9 July 2014 – he did not believe that such costs would be part of the service charge. He also stressed that at such time, costs were expected to be relatively minor. This issue is addressed further below.

42. In summary, we determine that the incidents relied on by the Respondent do not, either individually or collectively, go as far as the Respondent contends, and accordingly we do not find that the Applicants have agreed or admitted the costs of the Second Claim or in relation to planning for the purposes of section 27A(4) of the 1985 Act so as to oust the tribunal's jurisdiction.

Are the sums recoverable under the terms of the lease?

Issue 2: The interpretation of the Lease

43. The relevant provisions of the Lease are as follows:

    a) By clause 4(4)(g)(ii), that the Lessor's obligations under the 1989 Lease included the employment of "*all such surveyors builders architects engineers tradesmen solicitors accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building*"; and

    b) By clause 4(4)(l), that without prejudice to the foregoing that the Lessor's obligations included doing or causing to be done "*all such works installations acts matters and things as in the reasonable discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building*".

44. The Applicants contend that as a matter of construction the sums in question do not fall within the above provisions. In contrast, in the Respondent's submission, the sums fall within clause 4(4)(g)(ii) as being legal and/or professional fees which were necessary or desirable for the proper maintenance, safety and administration of the Building and/or fall within clause 4(4)(l) as they arose from matters which in the discretion of the Respondent were necessary or advisable for the proper maintenance, safety, amenity and administration of the Building.

45. In the Respondent's submission, the approach to the interpretation of the relevant clauses involves applying general principles of contractual interpretation. Mr Datta referred to the well-known line of Supreme Court authorities on contractual interpretation stemming from *ICS v West Bromwich BS* [1998] 1 WLR 896, through to *Arnold v Britton* [2015] UKSC 36, and most recently *Wood v Capita Insurances Services* [2017] UKSC 24. The tribunal was referred to the passage from Lord Hoffman's judgment in *Chartbrook v Persimmon Homes* [2009] AC 1101, cited with approval in *Arnold v Britton*, that the purpose of interpretation of a contract is to identify the intention of the parties with reference to, "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*." In Mr Datta's summary, with which we agree:

    a) The starting point is the ordinary English meaning of the words used:

    b) That meaning will be informed by the context (i.e. the knowledge of the parties at the time, the purpose of the provision and the words of the whole agreement – here the 2007 Lease dated 1 June 2007, incorporating the provisions of the 1989 Lease);

    c) where there are ambiguities (e.g. in a poorly drafted provision), an interpretation which satisfies commercial common sense will generally be preferred (but ambiguities will not be sought to this end).

46. On behalf of the Applicants, reference was made to authorities specifically concerned with service charges, such as *St Mary's Mansions Ltd v Limegate Investments Co Ltd* [2002] EWCA Civ 1491 and *Philips v Francis* [2014] EWCA Civ 1395 in support of a proposition that the starting point is that whilst there is no need to construe service charge clauses restrictively, "clear and unambiguous lease terms are required".

47. The Applicants also referred to *Sella House v Mears* [1989] 1 EGLR 65, in which the Court of Appeal considered the effect of a covenant in almost identical terms to clause 4(4)(g)(ii) in this case. In that case, the Court of Appeal did not allow the costs of solicitors and counsel employed for the purpose of recovery of rents from tenants of the building.

48. Both sides also referred the tribunal to the decision in *Assethold Ltd v Watts* [2014] UKUT 0537 (LC). In that case, which concerned a clause very similar to clause 4(4)(l) in the context of a claim to an injunction to prevent works to a party wall in breach of the Party Wall Act 1996, the Upper Tribunal construed the clause as permitting recovery of litigation costs against a third party. However, while the clause in the above case is clearly similar to the one in the present, it must be remembered the contractual provisions must be construed on their own terms and in the context of the particular contract. Care should be taken on placing too much weight on previous decisions about the specific meaning of the terms of leases in other contracts and contexts – and certainly those decisions are not binding in determining clauses in the contract in the present case.

49. More generally, in the tribunal's view, the authorities referred to on behalf of the Applicants do not give rise to a different approach to contractual interpretation solely as a result of the subject matter of the matters in issue. In our view, the tribunal's task is to apply the principles of contractual interpretation as set out by the Supreme Court to determine whether the costs in question fall within the relevant lease clauses.

50. As to the clauses themselves, in the Respondent's submission, the factual matrix was of relevance in the present case. Specifically, reference was made to the fact that as at the date of the 2007 Lease (and the 1989 Lease), the parties had, or would be deemed to have, knowledge of the Covenants in the 1968 Deed, which enured for the benefit of both the freehold and leasehold interests in the Property. In

Mr Datta's submission, as at the relevant date, the parties would reasonably have had the possibility of development of the Building Site in their contemplation and, by extension, the possibility of dispute as to the nature or extent of that development, which development was contingent upon the approval of the Respondent as freeholder.

51. In relation to clause 4(4)(g)(ii), Mr Loveday noted that clause 4(4) contains covenants by the lessor with the lessee, all of which expressly deal with obligations to maintain the building, etc. Clause 4.4(g) follows this theme. With regard to clause 4(4)(g)(ii) in particular, the first four specified professionals ("surveyors builders architects engineers") all obviously deal with the continued running of the fabric of the building, etc. The next four ("tradesmen solicitors accountants or other professional persons") should be read in that light. So, the solicitors are solicitors who assist the management functions, not lawyers who support the landlord in other capacities. This also points to a close link between the critical words "*proper maintenance safety and administration of the Building*" and the continued maintenance of the building. In Mr Loveday's submission, the enforcement of restrictive covenants in a Deed which benefits the freehold interest has nothing to do with "*maintenance safety or administration of the Building*" – noting also that the Respondent has only a limited interest in the building and the premises.

52. Further, and in answer to the Respondent's submissions regarding the background factual matrix, it was notable that clause 4 omits any express reference to the rights relating to building on "adjoining or contiguous land", in contrast to the express references to such rights in clause 8(i) and paragraph 4 of Schedule 3. The same argument can be made in relation to spending money on objecting to planning applications on adjacent land. It was noted that there are specific references to the Town and Country Planning Acts (and monetary indemnities by the lessee) in clause 3(11) of the 1989 Lease, but there is no express reference to planning in clause 4.4.

53. Finally, the Applicants relied on the inclusion of the word 'proper', noting that the use of service charge money to fund multi-million pound litigation could not be said to be orderly, regular or proper.

54. Turning to clause 4(4)(l), in the Applicants' submission, this a 'sweeping up' clause, but the "the proper maintenance safety amenity and administration of the Building" adds nothing to the words of clause 4(4)(g)(ii).

55. In Mr Datta's submission, beginning with clause 4(4)(g)(ii), the various experts and lawyers engaged simply fall within the concept of 'other professionals' without any further limitation. Further, it was said that the instruction of these professionals was "*desirable*" for the "*safety and administration of the Building*". This was said to be the case not least given the risks to the structural integrity of the Building arising from Ms Hicks's proposed plans as referred to in Dr McKie's evidence in particular.

56. Similarly, as to clause 4(4)(l), it is said that the refusal of approvals on the successive requests by SH, and/or the defence of the Second and Third Claims were "*such things…as [89HPM] considered necessary or advisable [in its reasonable discretion] for the proper maintenance safety amenity and administration of the Building"*. It is also suggested that "*reasonable discretion*" underlines that the Respondent is to be afforded a wide 'margin of appreciation' in its decision-making in this regard – although this is addressed further below in relation to reasonableness.

57. In the tribunal's view, on the true construction of the terms of the Lease the legal and professional costs do, in principle, fall within clauses 4(4)(g)(ii) and 4(4)(l). The costs can be said to relate to the maintenance and/or safety of the Building, particularly insofar as one of the key concerns was the extent to which the structural integrity of the Building could be compromised by the proposals - as identified in the professional advice obtained by the Respondent as referred to in Dr McKie's evidence. We also note that clause 4(4)(l) also makes specific

reference to 'amenity … of the Building', which, in our finding, can also cover challenges to Ms Hicks's proposals on aesthetic grounds. Accordingly, the tribunal does not accept the argument that 'other professionals' should be construed solely by reference to assisting with regard to management functions. In our determination, the wording of the clauses is not so restrictive and, properly construed, extends to the type of costs in issue here, notwithstanding that there is no express reference to rights relating to building on "adjoining or contiguous land" in clause 4 or reference to spending to oppose planning applications.

58. However, that is not the end of the matter insofar as the clauses contain qualifications as noted above. As to whether the costs were "necessary … desirable [or] proper" and/or were costs which "in the reasonable discretion" of a Lessor were either "necessary or advisable", this is considered in our discussion of reasonableness below.

Issue 3: The mechanics of the lease

59. By clause 3(4) of the 1989 Lease, the Applicants covenanted to:

> "*Pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such charges to be recoverable in default as rent in arrear and without prejudice to the foregoing and to all other rights and remedies of the Lessor to recover arrears thereof to pay to the Lessor interest on the Interim Charge and any part thereof or any part of the Service Charge as shall not have been duly paid within fourteen days after the same shall have become due and payable at a rate of 5% above the base rate for the time being of the Bankers for the time being of the Lessor.*"

60. The 'Interim Charge' is defined at clause 1(9) as, "*such sum to be paid on account of the Service Charge in respect of each Accounting Period*

as the Lessor or her Agents shall specify at her discretion to be a fair and reasonable interim payment in account of the Service Charge." The relevant Accounting Period was 6th April to 5th April of each year by clause 1(5). However, according to the Respondent, since its incorporation, the Respondent has operated an accounting period ending 31 December of each year with the approval of its members.

61. The Fifth Schedule of the 1989 Lease provides the following framework for the recovery of the Service Charge:

    a) by paragraph 2, the first payment of the Interim Charge was to be on the execution of the Lease, and thereafter in equal payments in advance on 29th September and 25th March of each year.

    b) by paragraph 4, if the Service Charge exceeded the Interim Charge, the difference was payable within 28 days of service of a certificate provided for by paragraph 5.

    c) paragraph 5 requires the service of a certificate (as soon as practicable after the end of the Accounting Year) signed by the Company or its agents confirming the amount of the General Expenditure, the Interim Charge and any excess.

62. The Applicants' general challenge is that the demands in question do not comprise either interim demands or a balancing payment under the terms of the Lease. It is further accepted that there is no provision in the Lease for ad hoc payments. Neither proposition is disputed by the Respondent.

63. However, it is claimed that the requirement for strict compliance with the service charge machinery of the 1989 Lease was waived by the Applicants and/or that the Applicants are estopped from relying upon the strict terms of the service machinery under the 1989 Lease to contend that ad hoc service charge demands are not payable as they are not in accordance with the provisions of the Fifth Schedule to the 1989

Lease. We also note in passing that there is no dispute as to whether the demands complied with necessary statutory requirements, for example that they were accompanied by the summaries of rights and obligations prescribed by section 21B of the 1985 Act.

64. Before looking at whether the requirements of estoppel and/or waiver have been established, a preliminary issue raised by the Applicants is whether the demands are even service charge demands at all. It was submitted on behalf of the Applicants that they were not and that this was also relevant to the question of whether an estoppel can arise. In particular, it was said that the costs in question had never (and particularly initially), been treated as service charges. In this regard, the Applicants relied on various aspects of the treatment of the costs including:

a) They were demanded separately from the regular service charges; held in a separate account; and accounted for separately.

b) They were not included in annual budgets (except retrospectively at year end), kept as a running balance without any annual balancing adjustments at year end, occasionally credited with payments from Ms Hicks or loans by lessees.

c) The initial apportionment of the costs between lessees did not follow the provisions of the 1989 Lease. Between 9 December 2014 and 7 June 2016, the costs were apportioned equally between the five flats (i.e. 20% each), whereas under the terms of the 1989 Lease, the Applicants are required to pay 19.83%. Although this does not give rise to a significant difference in the amount of money demanded, in Mr Loveday's submission, it supports the argument that the sums were not treated as service charges.

65. Mr Winkfield addressed a number of the points above in his evidence. In particular, his evidence was that he treated the costs separately from

day to day service charge costs, but in the same way as he would other items of major expenditure. He did not accept that the costs were not treated as service charges and disputed that the reference to 'service charges' on the initial demands was simply a cut and paste from the 'regular' demands.

66. As to the apportionment point, Dr McKie accepted that this was done on his instructions. His evidence was that he simply didn't think about the exact percentages each flat was required to contribute by way of service charges under their leases.

67. The tribunal accepts Mr Winkfield's evidence that although he did not treat the sums in question as 'regular' service charges, he treated them as he would treat other significant costs, which would nevertheless be recoverable as service charges. Although the initial demands were not for the Applicants' contractual proportion as the Respondent admits, we do not find that this means they were not treated as service charges as per Mr Winkfield's evidence – albeit we agree that it must follow that the Applicants could only ever be liable for the proportion of costs as specified in their lease, assuming the charges are payable in all other respects. In reaching this conclusion, we note that the initial demands were described as 'service charges' (for example the invoice dated 2 January 2012) and also that the costs appeared as an item in the service charge budgets provided to the tribunal, albeit there was never advance budgeting for how much was expected to be paid in the coming year.

68. Returning to the question of estoppel, there was no significant dispute between the parties as to the legal test for estoppel by convention (or that the elements of waiver overlap considerably).

69. In *Republic of India v. India Steamship Co Ltd (No 2)* [1998] AC 878, Lord Steyn stated at 913E-G:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow

> him to go back on the assumption: K Lokumal & Sons (London) Ltd v. Lotte Shipping Co Pte Ltd [1985] 2 Lloyd's Rep 28 ; Norwegian American Cruises A/S v. Paul Mundy Ltd [1988] 2 Lloyd's Rep 343 ; Treitel , The Law of Contract , 9th ed. (1995), pp. 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

70. More recently, in *Blindley Heath Investments v Bass* [2015] EWCA Civ 1023, Hilyard J stated at para 73:

> "Estoppel by convention is not founded on a unilateral representation, but rather on mutually manifest conduct by the parties based on a common, but mistaken, assumption of law or fact: its basis is consensual. Its effect is to bind the parties to their shared, even though mistaken, understanding or assumption of the law or facts on which their rights are to be determined (as in the case of estoppel by representation) rather than to provide a cause of action (as in the case of promissory estoppel and proprietary estoppel); and see Snell's Equity, 33rd ed (2015), para 12-012. If and when the common assumption is revealed to be mistaken the parties may nevertheless be estopped from departing from it for the purposes of regulating their rights inter se for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so (and see, for example, Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd (The Vistafjord) [1988] 2 Lloyd's Rep 343 , 353 in the judgment of Bingham LJ)."

71. Accordingly, it is necessary to show:

a) a common assumption (a shared assumption of facts or law, communicated or acquiesced in between the parties);

b) detrimental reliance upon the same;

c) that it is unconscionable for the defendant to now seek to alter that common assumption.

72. It should, however, be noted that at paragraph 133 of *Blindley Health Investments v Bass*, Hilyard J cautioned that "*the circumstances in which an estoppel by convention is likely to arise are likely to be rare and the facts unusual*".

73. It appeared to be broadly accepted that estoppel by convention can only operate as a shield and not a sword. However, in the Applicants'

submission, the implication of the Respondent's argument was effectively to create a new category of service charge – and as such, was using estoppel by convention as a sword.

74. We do not accept the Applicants' suggestion that estoppel by convention would be used as a sword in the present case. Rather, the Respondent is asserting that the Applicants are estopped from relying upon the provisions in Schedule 5 that service charges must be demanded by way of interim or balancing charge and we agree with the Respondent that estoppel by convention could in principle operate in such circumstances.

75. Returning to the elements of estoppel by convention, in the Respondent's submission, the 'common assumption' was that *ad hoc* demands would be "a permissible means of recovery for irregular or special service charge expenditure". In support of this, the Respondent relies on the fact that in relation to 2007 internal and external works and 2017 roof works, ad hoc invoices were raised and no objection was made in relation to such method of charging. Another example could be said to be the costs associated with the First Claim, which the Applicants had agreed to.

76. In response, it was asserted on behalf of the Applicants that framing the assumption in this way, it becomes so vague as to be meaningless. What exactly are "irregular" or "special" service charge items? The effect would be that Applicants would become bound to pay almost anything demanded by the Respondent at any time which it thinks is "special" – and it would be surprising if any party shared that assumption.

77. We do not agree with the Applicants' argument that such an assumption could not have existed or would have been meaningless. Lessees would only be bound to pay sums due under the lease (and subject to the protections of the 1985 Act). However, there is no reason why there could not be a common assumption that extraordinary expenses could be the subject of ad hoc demands as a matter of form.

78. In addition, we consider that there is evidence of such shared assumption, namely the paying of other costs demanded by way of ad hoc charges as referred to above, without any objection to the *form* of demand. The fact that according to Mr and Mrs Dell, such costs had been agreed in advance (for example the roof and refurbishment), does not negate the point in relation to the *form* of the relevant demands. It is also the case that the Applicants made payments in relation to the First Claim at least, without knowing the precise costs from the outset and it should be remembered that Mr Dell was a director of the Respondent until June 2013, by which date the Applicants had paid four invoices relating to the dispute with Ms Hicks totalling £35,893.42. Two further invoices were also paid in full prior to the Applicants' email of 9 July 2014.

79. Further, such conclusion is not undermined by the fact that the Applicants have subsequently raised numerous objections to the costs which are the subject of these proceedings and/or made payment of only 50% of certain invoices. In the tribunal's determination, the Applicants' objections related to the *substance* of such charges rather than the *form* of demands, which was the subject of the common assumption.

80. In relation to detrimental reliance, in the Respondent's submission, in reliance upon the convention described above, the Respondent continued to incur expenditure pursuant to its obligations under the 1989 Lease, tendered ad hoc invoices in order to recover such expenditure (which ad hoc demands were satisfied by the majority of leaseholder members), and accepted payment or part payments of sums due from the Applicants. In the circumstances, the Respondent contends that it would be unconscionable to permit the Applicants to now seek to challenge the use of such ad hoc demands to recover such general expenditure via the service charge.

81. The tribunal accepts the Respondent's submission in this regard and finds that in all the circumstances, the elements of estoppel by convention are made out.

82. Mr Datta did, however, accept that any estoppel or waiver would be suspensory. In the Applicants' submission, discovery that the common assumption is erroneous "kills the estoppel stone dead". The issue, therefore, was at what point, if any, did this occur.

83. In the Applicants' submission, this occurred in July 2014 when Mr Dell indicated the Applicants' intention not to be required to contribute anything further to the costs of the dispute with Ms Hicks. However, the point at which any estoppel by convention ended depends on identifying the nature of the estoppel and/or waiver in the first place. In our view, the estoppel and/or waiver related only to the *form* of demands – given that the substance of the demands was, in our determination, recoverable under the terms of the Lease as set out above. Accordingly, the July 2014 email does not affect the Applicants' liability in principle for the costs in question in the same way as a tenant cannot unilaterally assert that they do not wish to pay for roof works when there is an obligation to do so under a lease (subject to challenges that the costs of the same were reasonably incurred etc). Mr Dell's email of 9 July 2014 does not object to the *form* of demand, i.e. that they were ad hoc demands. Accordingly, as this was the limit of the parties' common assumption, the email has no effect in this regard. Instead, we agree with Mr Datta's submission that the estoppel by convention and/or waiver only came to an end when the point was raised in these proceedings.

84. In the circumstances and for the reasons set out above, we do not accept the Applicants' challenge on this issue and consider that the form of demands is not a bar to payability in the present case.

85. If we are wrong on the above, the Respondent sought to rely on the fact that the paragraph 5 'certificates' have since been provided and as such it was suggested by the Respondent that there is no longer any issue in

this regard. However, the Applicants submitted that reliance on the certificates was not properly pleaded and therefore not something for which the Applicants were prepared to make submissions or on which the tribunal could make findings – and that to do so would result in substantial prejudice to the Applicants. Mr Datta took issue in relation to the pleadings, highlighting the fact that as set out in paragraph 29 of the Respondent's statement of case, it is stated that "certificates of actual expenditure were served upon the Applicants on 5 July 2019 and 25 January 2020".

86. In our view, it is not clear what objections the Applicants would look to raise in light of the service of the paragraph 5 certificates. However, in light of our conclusions as regards estoppel by convention and given that we did not hear full submissions from the Applicants as to why the sums should not be payable in light of the fact that such certificates have now been served, we make no finding in this regard such that this issue can be left for separate proceedings should the need ever arise.

Issue 4: Challenge to the sums demanded on grounds of reasonableness

87. The Applicants challenge whether the costs were reasonably incurred on a number of grounds, which broadly fall into two categories: the decision to put them through the service charge; and level of costs themselves.

Was it reasonable to recharge the sums in issue as service charges?

88. The Applicants' principal argument is not that the decision to initiate or defend litigation was of itself wrong or perverse, but that such costs should not have been recharged as service charges.

89. In support of their submissions, the Applicants highlight the substantial sums involved, which dwarf the 'regular' service charges. In

particular, it is said that no matter the perceived strengths or importance of the litigation, no reasonable landlord would operate its service charge fund so as to incur 40 times as much on litigation as it does on managing its building – as indeed this would risk the viability of the Respondent company itself. The point weas also made that the sums are trust moneys under section 42 of the 1985 Act.

90. In the Applicants' submission, the decision to incur legal and professional fees committed the Respondent to significant legal and professional liabilities without having funds available to cover the costs and therefore involved very large calls on the resources of the lessees at irregular intervals in a wholly unplanned and unanticipated way. In this regard, the Applicants note that the Respondent failed to budget for the costs other than retrospectively.

91. Further, it is said that the costs were disproportionate when compared to the Respondent's interest in the Building – although it is acknowledged that the Court of Appeal concluded that the Respondent acted properly in taking into account the interests of lessees when refusing consent to Ms Hicks. This leads on to another issue which is that not all of the considerations affected all lessees. In particular, the Applicants' make reference to the issue of aesthetics. Notwithstanding that the Court of Appeal concluded that aesthetics were a proper consideration for the Respondent, it does not follow that the Respondent was required to spend significant sums to prove the point – especially when it was an issue which the Applicants made clear they were not concerned by.

92. A separate issue raised by the Applicants was in relation to consultation and it is said that the Respondent failed to consult with the Applicants regularly, adequately or at all. In the Applicants' submission, the directors simply closed their minds and pursued the dispute irrespective of the cost or the benefits to lessees, particularly the 'minority' lessees who were not directly affected by Ms Hicks's

proposals. Ultimately, the Applicants submitted that the decision to charge the sums as service charges was *Wednesbury* unreasonable.

93. In response, Mr Datta submitted that as a starting point, the Respondent could not be faulted for incurring the costs in question. He made reference to the Court of Appeal's decision in *LB Hounslow v Waaler* [2017] EWCA Civ 45, which stated:

> "37. … 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.
>
> …
>
> 39. Once the landlord has consulted the tenants and taken their observations into account, it is then for the landlord to make the final decision. In considering whether the final decision is a reasonable one, the tribunal must accord the landlord what, in other contexts, is described as a "margin of appreciation". As I have said there may be a number of outcomes, each of which is reasonable, and it is for the landlord to choose between them."

94. It was also submitted that a landlord is entitled to take into account its own interests, and the interests of other leaseholders – noting that all other leaseholders were in favour of the action.

95. As regards the decision to incur the costs, Mr Datta submitted firstly that the Respondent acted wholly reasonably and properly in refusing consent to Ms Hicks:

    a) It took professional advice (from engineers, planners and arboriculturalists, and lawyers) upon the various requests for approval served by Ms Hicks – and disseminated that advice amongst leaseholders;

b) All leaseholders (aside from the Applicants) were clear that they wish to refuse each of Ms Hicks's requests for consent;

c) The Applicants themselves positively stated that they wished to refuse approval for the first and second requests for consent by Ms Hicks. Even after Mr Dell's email of 9 July 2014, in relation to the application for consent giving rise to the Third Claim, there are numerous instances where the Applicants reiterate their concerns regarding how Ms Hicks's proposals could impact on the structure of the Building.

In the circumstances, the Respondent maintains that it was reasonable to refuse consent to Ms Hicks on each occasion.

96. In the Applicants' statement of case, it was suggested that the Respondent acted "unreasonably" in refusing consent under the restrictive covenants. While this did not appear to have been pursued at the hearing, it is difficult to see how such contention could succeed in any event insofar as the Second Claim was discontinued and the Respondent was ultimately successful in the Third Claim.

97. Overall, in the tribunal's view, it cannot be said that it was not reasonable to incur professional fees in relation to the litigation with Ms Hicks per se. There were legitimate concerns regarding the proposed development, which in the case of the effect on the structure and safety of the Building were shared by the Applicants – even if they did not share the concerns regarding aesthetics. Similarly as regards Ms Hicks's applications for planning consent, we note that the Applicants were supportive of the objections to Ms Hick's planning applications and in any event, we consider that it was reasonable for the Respondent to incur professional costs in opposing the same. However, in reaching such conclusion, we stress that it does not follow that the same conclusion would necessarily be reached regarding future costs.

98. Turning to the decision to add the costs to the service charge, we agree with the Applicants that even if a type of costs are in principle recoverable by way of service charge under the terms of a lease, that cannot be the end of the matter having regard to the principles set out in *Waaler*. Such conclusion is arguably reinforced in the present case given that the Lease refers to costs being "necessary … desirable [or] proper" and/or "necessary or advisable" in clauses 4(4)(g)(ii) and 4(4)(l) as set out above.

99. Accordingly, having found that it was reasonable to incur costs per se, the next issue is whether they should have been recharged in a different way (e.g. as voluntary contributions from lessees or shareholders of the Respondent), as the Applicants contend. We agree that in light of *Waaler*, this is a matter that must be determined and we accept that the size of the sums involved must be a factor in this regard. It also must be right that even if it was reasonable to put costs of say the First Claim as service charges, it does not follow that the same applies to any and all costs in relation to the dispute with Ms Hicks.

100. When considering this question in general terms, an issue was raised as to the motives for incurring the costs in question. During the course of the hearing, there was cross examination of both Mr Dell and Dr McKie as to potential personal tax advantages arising from the litigation. From the tribunal's perspective, there were valid grounds for incurring the costs in question as set out above and whatever the tax issues involved, they do not negate or undermine this conclusion and for the avoidance of doubt we do not conclude that tax issues or incentives were a driving force behind the incurring of costs.

101. A further issue was whether the Respondent's decision making in refusing consent to Ms Hicks was motivated by hostility to *any* development by Ms Hicks. In response, Mr Datta referred to the finding of HHJ Pelling QC in the first trial in the Third Claim that this was not the case (in case [2019] EWHC 1301 (Ch) at para.123) and on the evidence before us, particularly that of Dr McKie, we do not dissent

from such conclusion. Dr McKie also referred to the fact that in a letter sent to Ms Hicks's solicitors dated 20 January 2017, refusing consent to her proposals, it acknowledged her right to build on the Building Site, and made clear that although consent was not being granted on this occasion, the Respondent looked forward to receiving a plan that would be acceptable.

102. On the question of consultation, while there was no requirement for statutory consultation in the present case (because the costs did not constitute works or a qualifying long term agreement), the tribunal accepts as a matter of principle that the greater the sums being expended, the greater the obligation on the landlord to keep lessees informed of costs. Mr Dell's evidence was that the costs information provided by the Respondent was "at best, sporadic" (para.114), it is clear that the costs escalated wildly beyond initial estimates. Mr Dell notes in his paragraph 258 of his witness statement that the costs have gone "*from anticipated £25,000 in December 2011, to a total of £2.6 million as at today's date*". Further, Mrs Dell's evidence was that the demands in this case tended to come as an unwelcome surprise as they were not budgeted for in advance.

103. However, we consider that the Respondent, in particular through Dr McKie, did try to keep lessees informed and updated and the bundle contains numerous such communications throughout the entire period in this regard. While it is completely understandable that the Applicants might have regarded the costs as getting out of control we find that there was a great deal of correspondence trying to keep lessees updated as detailed in Dr McKie's witness statement and the Respondent's response to the Applicants' request for further and better particulars. It is also the case that, save for the First Claim, the Respondent has, to an extent been reactive as the proceedings have been brought by Ms Hicks, albeit following refusal of consents by the Respondent and therefore would not have been unanticipated.

104. Turning back to the specific heads of claim themselves, the Second Claim was brought against the Respondent following refusal of consent to Ms Hicks, which action the Applicants had agreed to. The Respondent also relies on the email from Mr Dell dated 31 July 2013, in which he stated: "*Looks to me like we need to steel ourselves to fight a series of claims, until [Ms Hicks] moves on*". In our view, given that there was agreement by all lessees to reject Ms Hicks's request for consent which gave rise to the Second Claim, we consider that it was neither irrational nor unreasonable for such costs to be charged through the service charge.

105. In relation to costs incurred in objecting to planning applications, the Respondent's position is that the Applicants were supportive of the principle of opposing Ms Hicks's requests:

a) In response to the application made by Ms Hicks dated 14 April 2018, we note that on 18 May 2018 Dr McKie sent a copy of Taylor Wessing's proposed letter of objection to the planning application to the other leaseholders and asked whether they wanted to be included in the letter as an individual objecting. Mr Dell provided a form of wording objecting to the application on behalf of himself and Mrs Dell. According to Mrs Dell's evidence Dr McKie and Ms Letemendia were keen that there should be a united front and for there to be as many objections as possible. However, Mrs Dell stressed that this was just a two-line objection to be put on to the council's webpage.

b) In addition, the tribunal was referred to emails from Mr Dell (dated 20 August 2018, 14 September 2018 and 22 October 2018) in which he expressed that the Respondent should have legal representation at the committee meeting when Ms Hicks's planning application would be considered.

106. Notwithstanding that some of these costs post-date Mr Dell's email of 9 July 2014, having regard to what is set out above, we find that the Applicants were supportive in opposing the planning applications –

and indeed have referred to this as one of the more cost-effective alternatives to litigation (an issue which is addressed further below). In the circumstances, we consider that it was neither irrational nor unreasonable to add the costs relating to the planning objections to the service charge.

107. The costs relating to the Third Claim are less clear cut. The Respondent maintains that it acted rationally and reasonably in incurring costs in defending the claim and adding them to the service charge – noting that the course of action was supported by all lessees save for the Applicants.

108. In determining this aspect of the claim, a key issue here is the significance of Mr Dell's email of 9 July 2014 and the Applicants' express statement that they did not wish to incur any further costs in relation to the dispute with Ms Hicks. It is also worth noting that Mr Dell had earlier raised misgivings in relation to the course of action on 14 January 2014: stating that he was "*less than 100 pct happy*", including having regard to the fact that the matter "*has taken longer and cost more than indicated*".

109. As noted above a leaseholder cannot unilaterally assert that they do not wish to pay for a category of costs when there is an obligation to do so under a lease. However, in our view, the fact of the Applicants' objections to having to pay further costs is a matter which the Respondent ought to take into account when determining whether to incur further costs or whether to put them through the service charge. The question is a finely balanced one: from the Applicants' perspective, they are faced with huge costs which they do not support. In contrast, from the Respondents perspective, the Applicants' argument could effectively create a leaseholder veto over costs which are (in our finding) recoverable under the terms of the lease as service charges and which the majority of lessees support.

110. In the present case and having regard to all the circumstances, the Applicants' objection does not tip the balance or render the decision to

continue to dispute Ms Hicks's claim by the Respondent unreasonable. In particular, we note that:

a) All leaseholders initially agreed to the approach taken by the Respondent. Even after the Applicants sought to resile from this, the other lessees nevertheless appear to have remained supportive;

b) Notwithstanding the email of the 9 July 2014, the Applicants did nevertheless continue to retain some level of engagement in the ongoing litigation and although their position was that they did not oppose Ms Hicks's application for consent made on 4 November 2016 (see for example Mrs Dell's email of 4 December 2016), reiterated their concerns regarding the structural integrity of the Building as a result of Ms Hicks's proposed development notwithstanding the repeated objections to incurring further legal fees. Examples include:

    i. emails from Mr Dell dated 28 November 2016, 3 January 2017, 8 January 2018, 28 January 2019 and 13 August 2019;

    ii. email from Mrs Dell dated 12 September 2016, which in addition to asserting that legal fees had not been reasonably incurred, acknowledged that "*there is a communal interest to protect the structure of the block but it is only part of the whole*".

    iii. a conversation between Mrs Dell and Ms Letemendia on 11 January 2017, where, notwithstanding a disagreement as to whether Mrs Dell wished the Respondent to refuse consent to Ms Hicks, it is accepted by Mrs Dell that she had concerns as to the structure, albeit in her oral evidence she stressed that she wanted the directors to negotiate with Ms Hicks.

111. The accusation was expressly raised by Mr Dell in his witness statement that Dr McKie, Ms Letemendia and other directors used their position as directors to direct the Respondent to pursue their own personal objections as leaseholders as opposed to those of the freehold company. In so doing, it is said that they ignored the wishes of minority shareholders. In his witness statement, Mr Dell disputes the Respondent's contention that they 'have to' respond to Ms Hicks's claim, contending that although the Respondent may refuse consent, it did not have to and was therefore taking action which it was not required to do.

112. In the tribunal's view, although the decision to contest Ms Hicks's claim was not one the Applicants agreed with, as noted above, it appears to have had support of all of the other lessees. Further, insofar as one of the grounds of objection was the risk to the structure of the Building, this was a concern that was shared by all. Further, it is the case that the Respondent received professional advice throughout and so was not proceeding in a vacuum.

113. We are sympathetic to the Applicants and can readily understand why they will feel aggrieved at facing such demands. However, for the reasons set out above we cannot conclude that it was irrational (or indeed unreasonable) to seek to recover the sums through the service charge.

114. Ultimately, had the matters not been recharged as service charges, the Respondent would either have had to seek voluntary contributions from shareholders (lessees) or would have become insolvent. Having regard to the factors set out above, we do not consider it irrational or unreasonable to have demanded the sums by way of service charge.

115. Finally, we note the fact that by an email dated 31 October 2016 Mr Dell asked to discuss "*an appropriate pro ration between the private interests of the flats most directly affected…and the truly structural risk*" and by subsequent email dated 29 January 2017 he reiterated that the Applicants' concerns were purely structural, and that "*the balance*

between structural and aesthetic is 50:50". While it might be an attractive proposition to reduce the costs payable by the Applicants on this basis; there is no evidence that this would reflect the reality of how costs were apportioned. We also accept Mr Datta's submissions that:

a) The refusal of consent to Ms Hicks would have given rise to litigation in any event; but moreover

b) it would be analogous to a ground floor lessee refusing to pay for the carpeting of an entire communal stairwell and landing on the basis that he/she would only use a few feet to access their flat;

c) it would rewrite the parties' agreement which contains express apportionment of recoverable costs and/or would introduce a form of leaseholder veto as noted above.

116. Accordingly, for the reasons set out above, the tribunal rejects this head of challenge by the Applicants and determines that it was neither irrational nor unreasonable to add the costs to the service charge.

Were the costs excessive/not reasonably incurred?

117. The tribunal agrees that the costs are vast in sum and at least colloquially it is difficult to justify a conclusion that such level of costs are not excessive. It is important to stress, however, that the tribunal is not conducting an assessment of costs or a taxation of a solicitors' bill. Rather, the tribunal is required to apply the test set out in section 19(1) of the 1985 Act. This provides that:

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

118. As noted above, the costs in question are, on any view, huge. The Respondent, nevertheless, sought to place this in context:

a) It was submitted that overall costs incurred were not disproportionate or excessive in the circumstances. The Respondent asserts that the fees incurred were proportionate to the nature and complexity of the dispute, and its value. Ms Hicks' proposed development is estimated to be worth £10 million; the value of the flats and Building is estimated at around £25 million. From the tribunal's perspective, the difficulty with this argument was that there was no clear evidence as to how much the value of the various interests in the Building might be impacted by the proposed development. According to an email sent by Dr McKie on 6 January 2013 to update the leaseholders on the First Claim and the injunction proceedings, after noting that the legal work expert expenses were "costly", he stated:

> "*… We were going to use John D Wood to assess the loss of value to our flats due to the development (particularly loss of trees). In the event, they said they would only be able to argue for 1 - 2% and even that would be subjective. Given there is usually a margin of up to 10% in valuation and they would have charged £8,500 + VAT, I cancelled this.*

b) The overall expenditure needs to take into account costs orders achieved in favour of the Respondent and the interests of leaseholder members secured as a result. While this is correct, the precise figures had not been finalised as at the date of the hearing and the overall sums by the Company are still expected to be large – according to paragraph 258 of Dr McKie's statement, the Respondent is expecting to receive a further £440,000 from Ms Hicks (subject to agreement or assessment) which would mean the various issues (excluding planning) will have cost the Respondent approximately £1.917 million.

c) Further, it was said that the level of fees incurred were commensurate with the complexity of the issues arising (High Court actions, and an appeal to the Court of Appeal, conducted by leading counsel each with senior juniors that took silk in the course of litigation).

119. Aside from the observations as to the overall size of the costs, the Applicants referred to a number of aspects which, in their submission resulted in an inflation of the total costs. For example, criticism was made of the fact that:

a) The Respondent had engaged 4 sets of solicitors in connection with the dispute with Ms Hicks which has resulted in duplication of work and waste. It was also said that it was unnecessary to engage two leading counsel at the trial of the Third Claim;

b) That the approach taken in the litigation was unreasonable and/or other options besides litigation were not pursued or not pursued with sufficient resolve, which might have lessened the overall costs. In particular, reference was made to the fact that the Respondent ought to have pursued Party Wall proceedings, or a bond, or, in particular, could have resolved the dispute by negotiation. In relation to negotiation in particular, both Mr and Mrs Dell when giving evidence were highly critical of the Respondent's efforts to reach a resolution by negotiation, which they felt should have been achievable. They also were of the view that the Respondent had failed properly to consider alternative options.

120. However, one notable feature of the present case is that from the Applicants' perspective, the argument was that their liability should be zero, not that it should be a reduction in the amount charged. Further, there was no evidence or even assertion as to what extent such costs might have been reduced had a different course of action been taken. The tribunal was not referred to the actual costs or bills themselves and asked to determine that a specific proportion or item was excessive.

121. In any event, the Respondent sought to refute the above submissions. In relation to alleged duplication of costs, it was said:

a) While the Respondent initially obtained advice from Russell Cooke solicitors, upon discovering that Ms Hicks had retained

the City Firm, Mishcon de Reya, Dr McKie thought it appropriate to appoint another City firm and so engaged Pinsent Masons. In his evidence, there was no significant loss in doing so as by that point, most of the legal work had been carried out by counsel.

b) The change from Pinsent Masons to Taylor Wessing was made following a dispute about fees as the fees billed had been in excess of the estimate. In an email from Dr McKie dated 2 April 2015, replying to an email from Mr Dell the previous day, Dr McKie confirms that the invoices were being queried because "*in relation to the injunction, they seem excessive*". According to the Respondent, Pinsent Masons ultimately agreed to reduce their fees by £71,000 but part of the agreement was that the Respondent was required to instruct new solicitors. Taylor Wessing was recommended by the lessee of flat 1 and according to Dr McKie, the Respondent was able to secure a discount of 10% in their hourly rates.

c) The Respondent subsequently instructed Gowling WLG after the first trial in the Third Claim. According to Dr McKie, it was felt that the Respondent would benefit from a fresh set of eyes on the case. Further, the Respondent was able to agree no reading-in-of-papers fees so the change was set to be cost effective. In addition, Dr McKie's evidence was that he secured a good will discount of £30,000 on Taylor Wessing's final invoice.

d) As regards the use of counsel, Dr McKie's evidence was that the Respondent tried to maintain consistency as far as possible, noting that the Respondent was represented by Jonathan Karas QC for a number of years including the Second claim and the first trial in the Third Claim, along with Stephanie Tozer who took silk just before the first trial in the Third Claim but maintained her previous fee rate. It was also noted that Ms Hicks also instructed a QC and a junior who took silk shortly

before the trial. Following the change to Gowling WLG, on the advice of the partner, the Respondent instructed a different QC who appeared both in the Court of Appeal and the second trial in the Third Claim.

122. Notwithstanding the fact that different solicitors and counsel were used, there was no evidence referred to demonstrating duplication of work. While it might be said that this could be inferred as an inevitability, the Respondent has positively asserted that this did not happen (for example no reading in charges as set out above) and further, we would have no way to quantify how much it might have added to the overall costs.

123. As to the assertion that other options were not adequately explored, in the Respondent's submission planning objections and a Party Wall Award would not have secured the protection afforded by the judgments obtained in reliance on the restrictive covenants.

124. In particular, Dr McKie's evidence was that in relation to planning, the council department no longer analysed plans from a structural point of view, requiring only that they be signed off by a developer's structural engineer even where, as in the present case, serious engineering concerns were put forward. Further, although the council's senior tree experts recommended that the plans should be rejected because of post development pressure to cut back trees, this objection was overridden at a councillors' meeting. As such, although the Respondent made attempts to counter Ms Hicks's proposals by making objections to the planning department the objections ultimately proved ineffectual which, according to Dr McKie, again proved the worth of the covenants and the limitations of proceeding solely by way of planning objections.

125. Similarly, as regards the possibility of a Party Wall Award, according to Dr McKie, the Restrictive Covenants give control to the Respondent in approving what is to be built before an application for planning consent and prior to approval of definitive plans. In contrast a Party Wall Award cannot cover issues such as aesthetics or trees. Further, a Party

Wall Award is restricted in its control of structural issues outside its prescribed limits of three metres and six metres from the boundary wall. As such, given that one structural issue of concern was tree stability a Party Wall Award would offer no control over this risk. In the circumstances, the Respondent asserted that a Party Wall Award would have been considerably inferior to the protection given by the restrictive covenants.

126. We agree that these are valid concerns and the Respondent should not have had to forfeit the protection of the restrictive covenants in the circumstances.

127. Finally, in relation to the contention that the matter could have been solved by negotiation, the evidence before us is that attempts were made to reach a solution with Ms Hicks, including, for example, a meeting with Ms Hicks in early 2017 and another in January 2019 - in his oral evidence Dr McKie stated that seven meetings were held with Ms Hicks. Dr McKie also refers to an offer to settle made in March 2016. However, the Respondent's case is that Ms Hicks's position was that she was not prepared to amend her proposals at all. For example, in a letter sent by Ms Hicks's solicitors dated 17 February 2017 it was stated:

> "*These are the plans, drawings and specifications which our client intends to use in order to build her home. Our client has no intention of amending these drawings and they are, therefore, definitive plans, drawings and specifications.*"

128. In the circumstances, while the Applicants may criticise the Respondent's approach to negotiation and the fact that it did not achieve a positive resolution, we do not find that the Respondent failed to explore this as an option.

129. It was suggested to the Respondent's counsel by the tribunal during the hearing whether the sums reasonably incurred (at least in relation to litigation costs) might equate to the sums ordered to be paid by way of

costs orders made against Ms Hicks in favour of the Respondent in the various claims. However, in response it was submitted that the test applied in determining an inter partes costs order in litigation is conceptually not the same as the tribunal's exercise under section 19 of the 1985 Act. While this might have made a neat solution in the present case, we agree that it would not be correct to assess reasonableness on this basis.

130. This leaves the tribunal in the unenviable position of being faced with an 'all or nothing' argument with regard to the costs in question – although the Applicants would argue that they have already paid substantial sums in relation to the First Claim. Faced with such argument and against the background of our findings that (i) it was reasonable to incur the costs in question; and (ii) it was reasonable to demand them as service charges, we must further conclude on balance that the sums in question have been reasonably incurred. In so finding, we accept the Respondent's explanation of the context in which the costs were incurred, and the responses to the particular challenges raised by the Applicants as set out above.

131. Our conclusion on this issue is, however, subject to one minor caveat, namely that insofar as it is admitted that the demands dated 9 December 2014 and 7 June 2016 applied an apportionment of 20% to the relevant costs, rather than the Applicants' correct apportionment of 19.83%, the Applicants can only be liable for the proportion as set out in their Lease.

Conclusion and decision

132. For the reasons set out above, the tribunal determines:

a) That we have jurisdiction to determine all of the sums challenged by the Applicants.

b) That the sums in question are recoverable under the terms of the lease.

c) That the sums are recoverable notwithstanding that the sums were not demanded in accordance with the provisions of the Lease on grounds of estoppel by convention.

d) That the sums in question were reasonably incurred (subject to the minor adjustment referred to at paragraph 131 above).

133. We are acutely conscious of the significant sums involved and while we reach our finding in this application based on the evidence before us and having regard to the matters above, this finding should not be taken as a conclusion that any future costs associated with the dispute with Ms Hicks would necessarily be reasonably incurred.

Section 20C / Schedule 11

134. If the Applicants wish to pursue the applications under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, they should do so within 28 days of the date of this decision setting out the reasons why such orders should be made.

135. The tribunal will then issue directions to allow the Respondent the opportunity to respond.

Name: Judge Sheftel **Date:** 3 September 2021

Rights of appeal

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

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

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

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

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

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