FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LSC/2021/0422**
Property	**:**	**Third Floor Flat, 78 Cornwall Gardens, London, SW7 4AZ**
Applicant	**:**	**Miss Susan Annette Biddiscombe**
Representative	**:**	**Mr Aadil Masood**
Respondent	**:**	**Lysville Ltd**
Representative	**:**	**Mr James Fagan (Counsel)** Instructed by Bude Nathan Iwanier LLP
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Deputy Regional Judge N Carr** **Mr J Naylor MRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**8 November 2022**

DECISION

Decisions of the Tribunal

(1) The Applicant is estopped from challenging the fair and proper proportion of the service charge attributable to Third Floor Flat, 78 Cornwall Gardens, London, SW7 4AZ for the years 2006 – 2019.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2006 – 2019. .

2. Directions were initially given on 21 January 2022. It appears that there was then a large amount of correspondence emanating from the parties that caused a Judge to consider that a case management hearing would be to everyone's benefit. Renewed Directions were given on 7 June 2022.

3. The Applicant's case is that for the service charge years from 2006 to 2020 inclusive she should have been charged at a rate of 11.48% for internal works and 13.42% for external works rather than the share of 20% overall which was actually charged. There is no dispute between the parties as to the overall total service charge applicable to the whole building.

4. The parties were able to resolve the service charge apportionment for the year 2020 onwards prior to the hearing. The Applicant's remaining application is therefore for the years 2006 – 2019 inclusive, and the total sum in issue is therefore £19,592.44.

The hearing

5. The Applicant was represented at the hearing by Mr Aadil Masood, a tax adviser by profession, who as we understand it appears regularly in the Tax Chamber. The Respondent was represented by Mr James Fagan of Counsel. Also in attendance were the Applicant herself, Ms Basya Mansoor (an accounts Manager with OCK Chartered Surveyors, the Managing Agents for the Respondent), and Mr Immanuel Gabay (a Director of OCK).

6. A bundle of 219 pages was provided in accordance with the Directions. References to the bundle throughout this decision appear in bold square brackets **[…]**.

7. Mr Fagan provided a Skeleton Argument accompanied by a 206-page authorities bundle on 21 October 2022. Immediately prior to the hearing we caused the following additional cases to be handed to the parties, which had not been cited in Mr Fagan's skeleton argument:

   Arnold v Britton [2013] EWCA Civ 902
   Admiralty Park Management Company Limited v Ojo [2016] UKUT 421 (LC)
   Bucklitsch v Merchant Exchange Company Limited [2016] UKUT 527 (LC)

Jetha v Basildon Court Residents Company Limited [2017] UKUT 58 (LC)

8. We allowed the parties an hour to consider the cases, and to discuss whether there might be a negotiated settlement to be had, in circumstances in which the case appeared to us (and continues to be apt to be described as) 'all or nothing'. Unfortunately, the parties were unable to resolve the matter between them. The hearing therefore commenced shortly after 11am.

9. At the commencement of the lunch break, prior to hearing closing arguments for the Applicant, we also provided copies of *Cain v Islington* [2017] EWCA Civ 76 to the parties.

10. At the commencement of the hearing we confirmed that we would hear evidence from Ms Mansoor. Mr Masood confirmed the position the Applicant had taken when complying with directions previously; that in the Applicant's view this was not a case for evidence and therefore she was not giving any.

The background

11. The property which is the subject of this application is one of 7 flats in a Georgian white stucco building on a garden square in South Kensington. There are flats both at top floor and basement levels.

12. The Applicant holds a long lease of the property pursuant to a transaction between her and her predecessor, Mr John Baker. The original lease of the property was granted in August 1963 ('the 1963 lease'). The Respondent purchased the freehold interest in the building on 30 November 1978. On 9 August 2006, Mr Baker entered into a lease extension process and was granted a new lease of the property with the Respondent ('the 2006 lease'). He sold his interest to the Applicant sometime in the same year. Since then the Applicant has entered into a further lease extension/new lease, on 17 March 2017 ('the 2017 lease').

13. In the 1963 lease, the obligation on the lessee in respect of service charges was as follows:

    Clause 1:

    … "*PAYING by way of further or additional rents the proportion as therein set out of the costs expenses outgoings and matters mentioned in the Third Schedule hereto the amount of the said costs expenses outgoings and matters mentioned in the Third Schedule hereto to be determined by the Surveyor to the Lessor whose decision shall be final…*"

Third Schedule:

"*Costs expenses outgoings and matters in respect of which the Lessee is to contribute a proportion of one-fifth of the total costs expenses outgoings and matters of the said premises* [costs of specified obligations]
…
Costs expenses outgoings and matters in respect of which the Lessee is to contribute a proportion of one quarter of the total costs expenses outgoings and matters at the said premises [costs of specified obligations included]." **[36]**

14. The 2006 lease expressed the lessee's obligation as follows:

Clause 1(2):

"*…YIELDING AND PAYING therefore yearly during the term (i) one peppercorn (if demanded) (ii) by way of further rent the service charge payable under the provisions of paragraph 2 of the Fourth Schedule*"

Fourth Schedule:

"*2. To pay to the Landlord a service charge by way of a further rent in two equal instalments on the 25th day of December and the 24th day of June in each year free of deductions in advance and on account of such service charge herein mentioned such estimated sum as shall be required by the Landlord or its agents and notified to the Tenant the said service charge being a fair and proper proportion (such proportion to be conclusively decided from time to time by the Landlord's surveyor or managing agents whose decision shall be final save in the case of manifest error) of the expense to the Landlord of performing the obligations and covenants on its part herein contained…*" **[56-57]**

15. The 2017 lease was not provided to us. It was common ground, however, that the service charge provisions in it were identical to those in the 2006 lease.

Law

16. Section 27A(1) Landlord and Tenant Act 1985 ('the 1985 Act') provides that an application may be made to the Tribunal for determination of whether a service charge is payable, and if it is, as to the amount which is payable.

17. Section 27A(5) provides that a tenant is not to be taken as having agreed or admitted any matter by reason only of having made any payment.

18. Section 27A(6) provides that any agreement by the tenant is void insofar as it purports to provide for a determination (a) in a particular manner or (b) on particular evidence. Any agreement that purports to deprive the Tribunal of its role in determining the matters in section 27A(1) is void to the extent necessary to ensure that the Tribunal's jurisdiction is not ousted (*Windermere Marina Village Limited v Wild* [2014] UKUT 163 (LC); *Gater v Wellington Real Estate Limited* [2015] UKUT 0561; *Oliver v Sheffield City Council* [2017] EWCA Civ 225).

19. If the relevant costs are found to be payable as a matter of contract, then they are only payable to the extent that they are reasonably incurred, and (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, subject to any statutory limitation on their recoverability, the relevant limitations (or lessor suspensory effects), including those set out in sections 19 – 27 of the 1985 Act.

20. Section 56 of the Leasehold and Commonhold Reform, Housing and Urban Development Act 1993 ('the 1993 Act') provides the circumstances in which a landlord is required to grant a new lease to a qualifying tenant of a flat, "in substitution for the existing lease" (section 56(1)(a)).

21. Section 57 of the 1993 Act states as follows:

> (1) Subject to the provisions of this Chapter… the new lease to be granted to a tenant under section 56 shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date, but with such modifications as may be required or appropriate…
>
> (2) Where during the continuance of the new lease the landlord will be under any obligation for the provision of services, or for repairs, maintenance or insurance –
>
> > (a) the new lease may require payments to be made by the tenant (whether as rent or otherwise) in consideration of those matters or in respect of the cost thereof to the landlord; and
> >
> > (b) (if the terms of the existing lease do not include any provision for the making of any such payments by the tenant or include provision only for the payment of a fixed amount) the terms of the new lease shall make, as from the term date of the existing lease, such provision as may be just…

…

(6) Subsections (1) – (5) shall have effect subject to any agreement between the landlord and tenant as to the terms of the new lease…; and either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as –

(a) it is necessary to do so in order to remedy a defect in the existing lease; or

(b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.

22. The Tribunal's jurisdiction in relation to payability of service charges is declaratory in nature: *Termhouse (Clarendon Court) Management Ltd V Al-Balhaa* [2021] EWCA Civ 1881; the Tribunal cannot make an order for repayment of moneys found to have been paid in excess of what is reasonable *Warrior Quay Company Limited v Joachim* (2008) (unreported) LRX/43/2006.

The issues

23. There was no dispute that the costs and expenses demanded by way of service charge for the building were reasonably incurred and the provision of services/carrying out of works were to a reasonable standard. The Applicant's application was confined to the question of apportionment, which she said was not in accordance with the lease. Her position is that the very fact that the Respondent has, since she raised the issue, recalculated her proportion so that she is now paying in accordance with her floor area (at 13.42% for internal and 11.48% for external cost) 'speaks for itself' and demonstrates that the 20 and 25% proportions she has paid for the years 2006 – 2019 inclusive are not "*a fair and proper proportion*" in accordance with the lease.

24. The Applicant confirmed that she did not pursue a section 20C or paragraph 5 schedule 11 order.

25. The Respondent argued firstly that the apportionment terms of the 1963 lease continued to be the terms of the 2006 (and subsequently, 2017) lease by virtue of sections 56 and 57(1) and (2) of the 1993 Act, secondly that the Applicant's had not met her burden of proof to demonstrate that the 20 and 25% apportionment was not fair and proper, and thirdly in any event the Applicant could not challenge those proportions now 14 years later, on the basis of estoppel by waiver (which Mr Fagan agreed was more accurately to be described as

estoppel by acquiescence than waiver). It did not rely on limitation points, and also withdrew its reliance (in its statement of case) on estoppel by convention.

26. The parties identified the relevant issues for determination as follows:

    (i) Whether the 1963 lease terms are terms of the 2006 lease (and therefore subsequently also the 2017 lease);

    (ii) If not, whether the 20% and 25% proportions demanded by way of service charge during the period 2006 – 2019 were a "fair and proper proportion" of the overall service charge liability in the building;

    (iii) If not, is the Applicant now estopped from seeking to challenge those proportions now;

    (iv) If she is not so estopped, what is her remedy?

Evidence

27. The Applicant chose not to provide a witness statement or to give evidence.

28. We heard from Ms Mansoor for the Respondent, whose witness statement we have also read. That witness statement had a number of significant omissions.

29. In answer to Mr Masood's questioning, Ms Mansoor stated that she understood that the 1963 lease had an impact on the 2006 lease. She thought that the 20% was the apportionment because the 2006 lease was a lease on the same terms because it was an extension. She had no reason to think that it was not fair and reasonable to carry forward those percentages as those were what the 1963 lease provided for and "*based on that we carried it forward*". This was confirmed in her email of 11 May 2021 **[219].**

30. It was at no point brought to her attention before 2020 that the apportionment might not be fair. In any event, the calculation was calculated in accordance with other leases and the landlord was recovering 100%, so there was no reason to assume that the Applicant's was not a fair proportion. She did not have the documents with her that showed what the apportionment had been for the other flats or demonstrated that what was being recovered was 100%.

31. She confirmed that she had indeed threatened the Applicant with forfeiture **[217]** because as far as she was concerned, the Managing

Agents had done everything that they were required to do. The reapportionment was backdated to 2020 which was what "*we*" felt was fair and just.

32. In answer to our questions, Ms Mansoor confirmed for the first time in oral evidence that she had taken over as the account manager for this property sometime in 2009 when she started working at the company. She had not been at the company at the time when the 2006 lease extension/renewal had been entered into. Some of the information in her witness statement, though not attributed as it ought to be, was from what she had been told by the previous account manager before he retired, while he was training her. She did not exhibit any notes or other records as she didn't know she had to.

33. She had been confirmed in her assumptions about the 1963 lease terms applying when the solicitor had pointed her to section 57(1) and (2) of the 1993 Act. Paragraph 15 of her witness statement was her own words of what the solicitor had explained to her. She had never looked at section 57(6) and it had not been brought to her attention.

34. She stated that her understanding of the term "substitution" of the 1963 lease **[47]** was that the 2006 lease replaced the 1963 lease, but that it did not substitute all its terms, and that is the reason that there were references throughout the 2006 lease to "the existing lease". We asked her to identify where in the 2006 lease, other than the initial definition and at clause 1(2) where it was stated "*In substitution for the Existing Lease…*", there was any further reference to the 1963 lease. After taking some time to go through it, she confirmed that there was none.

35. We asked when Ms Mansoor first looked at this lease. She stated it had been in around 2009, 2010 in the course of familiarising herself with leases generally. She first asserted it was then that she had checked it to ensure it was correctly applied. She accepted that that had in fact been a review of the portfolio. She later stated that in fact she had not looked at the payment clause until "*definitely 2018, or maybe 2016*". She stated it had been when she was looking at the ground rent. She finally accepted that she had not looked at the service charge clause to actually consider its mechanics until 2021, when it had been raised by the Applicant. She later changed her evidence again to state that it had definitely been in 2018.

36. Ms Mansoor was not involved in the lease extension/renewal in 2006. She then stated that she was nevertheless positive that there had been no development at the property since 1963 to add additional flats, and that the landlord had not previously retained any of the flats. She said this appeared on spreadsheets, that again she did not have with her. She did not say what year those spreadsheets went back to. She "*imagined*" there had been no rooftop development. She could produce no evidence that the previous apportionment for the 1963 lease had

been between all seven flats, simply saying that it "*would have been*". She later changed her evidence and stated she "*did not know*" if all the flats in 1963 were leasehold. She did not know why the proportions in the 1963 lease had been applied initially. "*Perhaps they felt it was in accordance to the building*."

37. Ms Mansoor stated that all of the flats at the building had now had lease extension/renewals. She then changed her evidence to state all barring maybe the two top floor flats ("*the 6th and 7th floors. Or maybe the 5th and 6th. I can't remember the floors*") had now had lease extension/renewals, and that largely they were on fair and proper proportion terms. The two top floor flats were still on fixed proportion terms, "*something like 1/6 and 1/12*" of which she was "*99% certain*". The "*remaining 80%*" of the service charge was divided among the other flats.

38. Later in evidence she stated that the basement flat was also on different terms. The "fair and proper proportion" flats represented 70% of the overall costs. That had been reflected in what the Applicant had been charged as could be seen in the accounts. She could not identify in the accounts how it had been reflected save that there was some overpaid service charge that was recredited to the Applicant. She didn't have the paperwork – she was using her memory. She vehemently denied that the landlord simply had not turned its mind to the apportionment question until it was raised by the Applicant in 2020.

39. When we suggested it to her, she did now accept that there was a conflict between the apportionment clauses in the 1963 and 2006 leases. She accepted that it was possible that the new clause was inserted because the 1963 did not in 2006 represent a fair proportion of the costs for whatever reason. She did not accept that if the landlord had not turned its mind to it, it would be unfair for the Applicant to have to pay it, she said because the proportion was based on the 1963 lease.

40. Ms Mansoor stated that if we were against her on the 1963 leas terms applying, it would only be unfair to the Applicant to be liable for that proportion "*within reason*". It would be unfair for the other leaseholders to foot the bill for 14 years of service charges when their leases said something different. She accepted that there might not be a legal mechanism for recovery anyway.

41. The re-assessment of the apportionment had been done because of the Applicant's complaint, and on the basis of floor area. There was nothing she could look at to see why 20% had been applied. She sought to suggest that she had not actually been in the Applicant's flat, and that some of them were an unusual width spreading over two buildings, maybe that was why the Applicant's portion was larger. We drew to her attention the Respondent's own reapportionment on the basis of floor

areas, which did not appear to demonstrate (on her own evidence) that the Applicant had an unusually large flat in the building. She then said that it was done "*not exactly by square footage, but as fair as possible.*" She accepted it was carried out on the basis of the floorplans by the Respondent's surveyors, after deducting the top floor flats on fixed percentages, and the basement flat for the internals as it shared no common parts.

42. Ms Mansoor stated that after going through that exercise she would not stand by 20%, but that " *'fair and proper' could mean many things. We calculated the floor area. Others might use number of occupants. Floor area is not fair and proper, it is the way we have chosen to do it because the Applicant insisted on it*." Immediately afterwards she told us that the revised apportionment was fair and proper as opposed to 20%.

Decision and reasons

43. We have found this case difficult, due to the paucity of evidence we have been provided with.

44. On the Applicant's side, we have no evidence beyond the agreed fact: the service charge apportionment has been recalculated after she raised the issue, and left her with a significantly lower liability on the basis of the floor area calculation used. In effect we are asked to find that that speaks for itself.

45. On the Respondent's side, as can be seen from the evidence set out, Ms Mansoor was a demonstrably unreliable witness. Her answers were contradictory. She refused to accept reasonable propositions. We found her evasive when asked repeatedly when she had considered the service charge clause and actually turned her mind to its implications. She expressed overconfidence in answers about matters that substantially preceded her employment, and uncertainty over much more recent events that are at the heart of this application (i.e. the recent reapportionment exercise).

46. She was keen to cast the Applicant as unreasonable. She would simultaneously have us believe that the new apportionment is unfair and only done because that is the way the Applicant demanded it be done (and thus the Respondent had no agency it undertaking the exercise), but in the next breath that it is now fair and in accordance with the lease. She omitted material from her witness statement that was clearly relevant, asking us to believe documents existed and said what she said they said without disclosing them. We did not have confidence from the evidence that she gave that Ms Mansoor really understood even now what the basis of the new apportionment was, given what she said about the potential size of the Applicant's flat, the other flats and the basic mathematical inconsistencies.

47. Given the paucity of the evidence generally, and the quality of Ms Mansoor's evidence in particular, doing our best on the material before us, we make the following findings.

Issue 1: are the 1963 lease terms incorporated as terms of the 2006 lease (and therefore subsequently also the 2017 lease)

48. We are satisfied that the 1963 lease terms were not the terms of the 2006 lease.

49. Firstly, the plain wording of the 2006 lease is that it is in substitution of the 2006 lease **[47]**. As an instrument it clearly sets out all of the terms on which the lease is to be held. It makes no reference back to the 1963 lease save to say that the 2006 lease is in substitution for it. Whether one calls it a lease renewal or extension (the difference being no more than semantic, given the terms of the statute), it is clear that it is the entire contract binding the parties.

50. It is clear that the 2006 is on new terms agreed by the parties as is their entitlement pursuant to section 57(6) of the 1993 Act. The service charge clause itself **[56]** in no way harks back to a specified apportionment. It makes clear that the landlord is entitled to charge a "fair and proper proportion" for the services and costs therein set out. In order to determine that fair and proper proportion, the landlord's surveyor or managing agent is required from time to time to decide what that fair and proper proportion is.

51. There is no need for us to go further than the actual words used to construe this contract (*Arnold v Britton*). There is no ambiguity that requires us to intervene.

52. It is the Respondent's case that Ms Mansoor (and, she tells us, her predecessor) simply understood, contrary to the words used, that the previous apportionment would continue because this was a lease extension. That is plainly wrong in fact looking at the lease, and in law in light of section 57(6). Parties are free to agree any of the terms in their contract. We find that it is what they did, in providing for the new service charge apportionment mechanism.

53. We are therefore satisfied on the balance of probabilities that the terms of the apportionment terms of the 1963 lease were not terms of the 2006 (or subsequent 2017) lease.

Issue 2: were the 20% and 25% proportions demanded of the Applicant by way of service charge during the period 2006 – 2019 a "fair and proper proportion"

54. We find on the balance of probabilities that the 20% and 25% proportions demanded and paid by the Applicant throughout the years 2006 – 2019 were not a fair and proper proportion of the total sum for services in the building.

55. Ms Mansoor, however reluctantly, accepted that the Applicant's new proportion (13.42% for internal and 11.48% for external cost) is a fair and proper proportion.

56. It is Ms Mansoor's evidence that there has been no change in the building, whether in development or divestment of retained parts, since 1963. She simply did not provide any evidence for this, and ultimately conceded she in fact did not know whether that was true.

57. Importantly she also says that there has been no change in the overall use of the building since 2006, in circumstances in which she took over the portfolio in about 2009. If that is the case, and the apportionment by floor area is, as she now concedes, fair and proper, that presents a *prima facie* case for the Respondent to answer. It is for it to demonstrate that the previous apportionment was also fair and proper even though substantially different.

58. The Respondent has not answered that case. We understand, of course, that a fair and proper proportion could be calculated on a number of bases and achieve different net outcomes to the leaseholders concerned, but the argument was not put before us on the basis that the 20 and 25% apportionment were one of a range of reasonable apportionments. The Respondent's whole case rests on the incorrect application of the 1993 Act. It asks us to infer that the 20 and 25% apportionment were fair and proper because they existed in the previous lease, without evidence that anyone in fact came to that conclusion in 2006 or subsequently, nor evidence of how those proportions came to be in the 1963 lease, and on the basis of refusing to acknowledge (or at least, failing to recognise) that the 2006 lease terms were new terms agreed between the parties.

59. Just because the apportionment in 1963 was defined, does not mean it was a fair and proper proportion in 2006 on execution of the new lease. We find that the truth of the matter is that the Respondent simply did not exercise its mind over the apportionment clause until it was raised by the Applicant. It carried on as if the lease renewal/extension had no effect on the service charge apportionment, without ever informing itself of the new term or asking whether the previous apportionment was therefore justified.

60. The Applicant raised it in 2020. The reapportionment was carried out in 2021 and back-dated to 2020. If there was, as Ms Mansoor says, no change at all in the building from 2006, there is a strong inference to be

drawn that the 1963 proportions being demanded from 2006 were indeed unfair and improper.

61. Mr Fagan asserts that there is no positive requirement on the landlord to carry out the exercise contained in the clause. It is at its absolute discretion. We find, however, that in order to ascertain what the fair and proper proportion is the landlord has to take some positive action, at least on the first occasion the clause is engaged. A landlord has to carry out its obligations, and enforce its rights, in accordance with the lease. Failing to even recognise those rights and obligations are different from a previous lease is qualitatively different in nature from choosing not to engage in a new apportionment exercise because one has concluded that the previous proportions are indeed a fair and proper proportion. As soon as the first year's service charge demands were being made, someone in the Respondent's office should have exercised their mind over the apportionment. On the evidence we have been provided, they simply didn't even look at it until 2020.

62. Disclosure of documentation was not given by the Respondent generally, particularly contemporaneous evidence predating the Applicant's purchase of the leasehold interest, that was available only to it. The Respondent has not made a positive case that the 20 and 25% were a fair and proper proportion, rather it simply says that, if its case that the 1963 terms were in force fails, the Applicant has failed to prove that those proportions were not fair and proper.

63. It is not satisfactory for the Respondent to fall back on the burden of proof given the lack of disclosure it has provided, its failure to comply with the lease terms, and its rights under the lease being to a fair and proper proportion and no more. The Applicant having raised a *prima facie* case, and the Respondent having no answer to it other than a misapplication of the law, we are satisfied that this is a case that should not be decided on burden of proof.

64. The Respondent has failed to displace the *prima facie* case that, an apportionment exercise now having been carried out and the Applicant's proportion now ascertained to be 13.42% for internal and 11.48% for external cost from 2020, a fair and proper proportion was 13.42% for internal and 11.48% for external cost throughout the period 2006 – 2019, particularly in the context of there having been no material change at the property at least since the 2006 lease. Accordingly, we find on the balance of probabilities that that is the fair and proper proportion for that period.

Issue 3: Is the Applicant now estopped from seeking to challenge the service charge proportion for 2006 - 2019?

65. It should be noted that it remains the case that there is no unified theory of estoppel. On occasion, the terms used in caselaw pre-date a

modern taxonomy and are more apt to be described in a different way now from 70 years ago when they were decided. The use of the terminology is naturally a matter of anxiety to parties, and we will endeavour as best we can to make clear the sole basis on which the Respondent says that the Applicant is estopped from obtaining declaratory relief for the above findings.

66. The Respondent now relies solely on what its counsel called estoppel by waiver, but seemed to us to be more accurately termed estoppel by acquiescence, a form of proprietary estoppel (**Chitty** 34th Ed 27-060). As set out in **Snell's Equity** (34th Edition; 2020) at 12:009: "*For example, one form of proprietary estoppel, recognised by the House of Lords in* Ramsden v Dyson *[(1866) L. R. 1 H.L. 129*] *and in* Fisher v Brooker [[2009] 1 UKHL 41] *can be "characterised as acquiescence" and is thus based on a party's "passive" failure to assert a right, rather than on any positive representation or promise made by that party*."

67. Mr Fagan relied on Lord Denning MR's example *Panchaud Freres SA v Etablissements General Grain Company* [1970] Lloyd's Rep 53. In the case, although he called his examples 'estoppel by convention', we consider (and counsel agreed) that the example is more apt in modern taxonomy to describe estoppel by acquiescence (as estoppel by conduct – or representation (**Snell** 12-005) – requires a mutual agreement or understanding of the parties (see for example *India Steamship*), whereas, as set out in Lord Denning's example, estoppel by acquiescence does not require a party to have knowledge of the circumstances giving rise to the right nor the existence of the right they have "waived":

> "*When "waiver" is used in its legal sense, it only takes place when a man, with knowledge of a breach, does an unequivocal act which shows he has elected to affirm the contract as existing instead of disaffirming it as, for instance, in waiver of forfeiture… The present case is not a case of "waiver" strictly so called. It is a case of estoppel by conduct. The basis of it is that a man so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken as settled or correct… If a man, who is entitled to reject goods on a certain ground, so conducts himself as to lead the other to believe that he is not relying on that ground, then he cannot afterwards rely on it as a ground of rejection, when it would be unfair or unjust to allow him so to do… Another instance can be given from the sale of goods. If a buyer does not choose to examine the goods when they arrive, and puts it off beyond a reasonable time, he loses the right to reject; section 35 of the Sale of Goods Act 1893. Although he did not know they were not in conformity with the contract, nevertheless by letting a reasonable time go by, he loses his right to reject*."

68. **Snell** 12-034 sets out a useful example from Lord Neuberger in *Fisher v Brooker*:

"*The classic example of proprietary estoppel, standing by whilst one's neighbour builds on one's land believing it to be his property, can be characterised as acquiescence*".

69. The principle is, **Snell** continues: "*where B adopts a particular course of conduct in reliance on a mistaken belief as to B's current rights and A, knowing both of B's belief and of the existence of A's own, inconsistent right, fails to assert that right against B. If B would then suffer a detriment if A were free to enforce A's right, the principle applies. It therefore operates in a situation in which it would be unconscionable for A, as against B, to enjoy the benefit of a specific right*".

70. In such a case, the Tribunal is tasked with finding the following building blocks (**Snell** 12-038 et seq):

> (1) the landlord has adopted a particular course of conduct in reliance on a mistaken belief of its rights under the contract;
>
> (2) the leaseholder, knowing of her right under the contract and of the landlord's mistaken belief, fails to assert her right under the contract;
>
> (3) the landlord would suffer a detriment if the leaseholder were now able to enforce that right, such that it would be unconscionable now to let her resile from her previous acquiescence to the landlord's course of conduct in mistake of its rights.

71. This is a question that has come before the Upper Tribunal in a number of cases in recent years.

72. In *Clacy & Nunn v Sanchez & Ors* [2015] UKUT 0387 (LC), His Honour Judge Edward Cousins had cause to deal with an estoppel/waiver point on appeal. The principle point was on estoppel by convention, which he found established. In the alternative, however, he found that in the leaseholders not requiring certification in accordance with the lease mechanism, but accepting and paying demands made, they had "waived" their right to resile from position that had been adopted throughout the period of the preceding 19 years.

73. In *Admiralty Park Management Company Limited v Ojo* [2016] UKUT 421 (LC), His Honour Judge Martin Rodger KC (Deputy President) considered an appeal in which the landlord had throughout the years 2010 – 2014 used a different scheme to calculate Mr Ojo's proportion of the management charge than that prescribed in the lease. Neither Mr

Ojo nor any other tenant had objected to the scheme being used. At the hearing before the Tribunal, it had decided that the failure by the landlord to operate the terms of the lease resulted in Mr Ojo's liability being nil for the four years in issue. On appeal, Judge Rodger addressed the test laid out in *Republic of India v India Steamship Company Limited* [1998] AC 878 and concluded that, as the method of apportionment being used would have been obvious to leaseholders through the provision of the maintenance charge statements, despite the fact that Mr Ojo may not have fully appreciated the terms of his lease, he was capable of reading it and of informing himself by considering the maintenance statements that the landlord was not adhering to the lease terms. His failure to call it into question was a prolonged acquiescence, leading to it being unfair for Mr Ojo to be allowed to dispute his liability. The appeal was therefore allowed.

74. In *Bucklitsch v Merchant Exchange Company Limited* [2016] UKUT 527 LC, His Honour Judge Huskinson allowed an appeal against the Tribunal's decision that the leaseholder was estopped from challenging service charge apportionment for the years 2014 and 2015. In that case, the landlord relied exclusively on estoppel by convention. Judge Huskinson found that there was not the necessary common shared assumption in which the parties must share some responsibility, and did not amount to waiver such as to disentitle the leaseholder from taking the condition precedent point they relied on. He overturned the decision of the Tribunal, but did not go on to consider estoppel by acquiescence.

75. *Jetha v Basildon Court Residents Company Limited* [2017] UKUT 58 (LC) was another case in which the Upper Tribunal (His Honour Judge John Behrens) was considering only the question of whether an estoppel by convention arose. No argument was made in respect of estoppel by acquiescence.

76. Finally, in *London Borough of Southwark v Akhtar* [2017] UKUT 0150 (LC), Her Honour Judge Elizabeth Cooke considered an appeal from the Tribunal in a case in which it was asserted that the leaseholders had waived invalidity of notices given under paragraph 2(1) of their leases by taking advantage of a scheme for deferred payment. In overturning the decision of the Tribunal, Judge Cooke said that the leaseholder, by accepting the deferred payment scheme, had clearly by that conduct waived the irregularity in the notice.

(1) a particular course of conduct in reliance on a mistaken belief of its rights?

77. We find as a fact that the Respondent was indeed mistaken in its belief that the apportionment under the 1963 lease continued under the 2006 lease, and relied on that mistaken belief and applied that formula consistently throughout the Applicant's tenancy (up until it reviewed

the apportionment at her request), resulting in the Applicant paying one fifth and one quarter respectively for the internal and external service charge costs.

(2) did the leaseholder, knowing of her right under the contract and of the landlord's mistaken belief, fail to assert her right under the contract?

78. It is without question that the Applicant failed to assert her contractual rights until 2020, after she had had a conversation with another leaseholder and discovered by the conversation she was paying a larger apportionment than they were.

79. What Mr Masood argues is that she did not knowingly fail to do so. His submission to us was that the Applicant simply trusted in the managing agents that they were doing it correctly. She was, he asserted, 'financially unsophisticated'. It was unfair to expect her to question the Respondent's authority. He leans heavily on the fact that the Applicant is a lay person. The entry into the further 2017 lease was nothing to the point; it was, he submitted, a diversionary tactic from the real issue.

80. We consider that the interpretation to be put on Judge Rodger's decision in *Ojo* is that the question is not whether she knew (and for the avoidance of doubt, we only have Mr Masood's assertion she did not, the Applicant having chosen not to give evidence), but whether she ought reasonably to have known, from the material that was available to her, that the Respondent had made a mistake.

81. We find that at the very minimum, both when she purchased the leasehold title in 2006 and when she entered into the further lease renewal in 2017, the Applicant would have had in her mind the terms on which the lease was granted. It is likely (though we acknowledge we have no evidence on it), that she was assisted by legal advice at both these times, and could have therefore have queried the service charge scheme if she was unsure about it. Even if she was not legally advised, she would herself have had to have gone through the same exercise in the 2017 lease renewal of examining the terms on which the new lease would be granted. We are told by the Respondent that she neither raised it then or at any time before 2017, and we have no evidence otherwise.

82. We can also see that the yearly accounts **[153 – 184]** set out in relatively simplistic terms the total sums of the service charge liability year-on-year throughout the period. We have no evidence that the Applicant is 'financially unsophisticated' as Mr Masood asserts, but in any event we do not consider that she would need to be financially sophisticated to simply add up the quarterly payments she was making and compare them against the annual accounts to discover that they were around one fifth of the total charge for the year. She also

presumably knew at all times that her flat was, as Mr Masood asserts, no bigger than the others, and that there were 7 flats from the time she bought the leasehold interest. All of this information was available to her with little effort or sophistication required.

83. We are satisfied on the balance of probabilities that even if she did not actually know before 2020, the Applicant ought reasonably to have known that she was being charged around one fifth of the service charge, and that, in the context of the surrounding information, was likely not to be a fair and proper proportion in accordance with her lease.

(3) would the landlord suffer detriment if the leaseholder were now able to enforce the scheme of her lease, such that it would be unconscionable now to let her resile from her previous acquiescence to the landlord's course of conduct in mistake of its rights.

84. The Respondent has proceeded on the basis of its misunderstanding, without demur by the Applicant, for a period of 14 years up to the re-apportionment. It would, Mr Fagan says, be put into a position, were it to have to repay to the Applicant the £19,592.44 backdated overpayment she seeks, whereby is would suffer considerable detriment.

85. The other leaseholders would be exposed to charges that they had not been expecting, if indeed there is a mechanism for recovering the shortfall that would suddenly be created in the account.

86. It might be that, given the passage of time, claims in *quantum meruit* would have to be brought, at considerable cost to the Respondent and potentially to the leaseholders, who have done nothing wrong. Even those would be limited by the Limitation Act 1980, and therefore there would be a very substantial shortfall created in the account.

87. Given the passage of time, even those claims that could be made might well be affected by former leaseholders being untraceable or impecunious.

88. We accept those arguments. Moreover, the services that have been paid for have been received (the Applicant does not dispute this). We find it would be unconscionable now to make a declaration in the Applicant's favour, which would result in detriment to the Respondent (and potentially to other lessees), given her acquiescence during the period in the way that the service charge was being apportioned.

Issue 4: If she had not been so estopped, what is her remedy?

89. If, contrary to what we have found, there had been no estoppel by acquiescence, then the Applicant would have been entitled to a declaration that the fair and proper proportion for the services and charges reserved by the lease during the period 2006 – 2019 was 13.42% for internal and 11.48% for external cost. The Tribunal cannot order repayment of money in these type of proceedings, as the Applicant has sought by her application. Her remedy would be enforcement of the declaration in the County Court.

CONCLUSION

90. However, having found that the Applicant is estopped from asserting her true rights under the 2006 (and subsequent 2017) lease for the reasons set out above, we refuse to make such a declaration.

Name: Judge N Carr **Date:** 8 November 2022

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).