FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/43UM/LSC/2021/0104
Property:	Flat 51 Eastgate Station Approach Woking GU22 7PQ
Applicant:	Mr Fawad Mir
Representative:	Mr W Beetson of counsel
Respondent:	Southern Housing Group
Representative:	Ms E England of counsel
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay service charges) Tenant's application for the determination of reasonableness of service charges for the years 2018 to date.
Tribunal Members:	Judge A Cresswell Mr B Bourne MRICS Mr P Gammon MBE BA
Date and venue of Hearing:	15 March 2022 by Video
Date of Decision:	21 March 2022

DECISION

The Application

1. This case arises out of the Applicant tenant's application, made on 5 November 2021, for the determination of liability to pay service charges for the years 2018 to date.

Summary Decision

2. The Tribunal has determined as follows:
    a. The surveyor's involvement is a condition precedent to the demand for the estimated service charge and not having been so involved, there was no valid demand and the estimated sums are not (at present) payable.
    b. The demands (or repayments) of the differential between the estimated and final amounts were in accordance with the terms of the lease and are valid demands (or payments).
    c. The costs of Landscaping are not payable.
    d. The Door Entry costs are limited to £3,704.55.
    e. The Management Fees and Charges demanded in respect of freeholder costs are not payable for 2018 to December 2021 save for insurance for the building and its common parts.
    f. The Management Fees of the Respondent are not payable for the years 2018 to 2022 and thereafter start at £200 plus VAT per annum.
3. The Tribunal allows the Applicant's application under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus precluding the Respondent from recovering its cost in relation to the application by way of service charge or administration charge.

Inspection and Description of Property

4. The Tribunal did not inspect the property, but saw numerous photographs and descriptions.

5. The property**,** Eastgate, is a block of 60 units which form part of a wider estate known as 'Centrium' all owned by a single freeholder. On the ground floor, Eastgate presents as two separate cores with their own communal doors. The core separation does not continue on the upper floors and all flats can be accessed.

a. It has two lifts and is a mixture of one- and two-bedroom properties. The residential flats at Eastgate are situate above commercial units. The building is 9 storeys with general needs accommodation on floors 1-3 (flats 1-27). Shared owners, leaseholders and Intermediate Rents tenants are on the floors above. There are 26 Social Rented Units, 19 Shared Ownership Units, 12 Leasehold units, 1 Affordable Rent unit and 2 Intermediate Rent units.

Directions

6. Directions were issued on various dates. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.

7. This Decision is made in the light of the documentation submitted in response to those directions and the evidence and submissions made at the hearing.
Evidence was given to the hearing by Helen Bowerbank, Head of Home Ownership with the Respondent, and Sarah McCormack also of the Respondent and by the Applicant, Mr Mir.

8. The Tribunal has regard in how it has dealt with this case to its overriding objective:

The Tribunal Procedure (First-tier Tribunal)
(Property Chamber) Rules 2013

Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the

proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must:

(a)help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.

Ownership and Management

9. The Respondent is landlord as a result of being the leaseholder of the owner of the freehold of the property. It manages the property itself, but the property is also managed by a managing agent employed by the freeholder under the terms of the headlease.

The Lease

10. The Applicant holds Flat 51 under the terms of a lease dated 10 October 2006, which was made between Hyde Housing Association Limited as lessor and the Applicant as lessee.
11. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
12. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

15. *When interpreting a written contract, the court is concerned to identify the intention of the parties by 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", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.*

13. *Clause 1 (2) of the lease: The following expressions have where the context admits the following meanings*

(b) "the Common Parts" means the entrance landings staircases lift apparatus any communal aerials or entryphones bin store cycle store and other internal parts (if any) of the Building and any external parts of the Estate not Included in the Maintained Property which are intended to be or are capable of being enjoyed or used by the Leaseholder in common with the occupiers of the other flats in the Building

14. *"Estate"* is defined in the Particulars as *The land now or formerly comprised In the*
    a. *above mentioned Title and shown hatched black on Plan number 1*

15. Clause 1(2)(h) defines *the Maintained Property* as being that in the headlease, i.e. *means those parts of the Estate which are more particularly described in the Second Schedule and the maintenance of which is the responsibility of the Manager*

THE SECOND SCHEDULE

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The Maintained Property

1. The Maintained Property shall comprise (but not exclusively):

1.1 The Accessways the Parking Area the Communal Areas shown on the Plans the drying area (if any) bin and gardeners management stores (if any)

1.2 all Service Installations not used exclusively by any Individual Dwelling

2. EXCEPTING AND RESERVING from the Maintained Property:

2.1 All Service Installations utilised exclusively by individual Dwellings

2.2 The Retained Units

2.3 Any Service Installations exclusively serving the Retained Units

16. By Clause 3(2)(b) the Applicant is required:
To pay the Service Charge in accordance with Clause 7.

17. Clause 7 provides as follows:
7(1) In this Clause the following expressions have the following meanings
(a) "Account Year"' means a year ending on 31st March or such other date as the Landlord may from time to time reasonably designate
(b) "Specified Proportion" means the proportion specified in the Particulars
(c) "the Service Provision" means the sum computed in accordance with sub-clauses (4) (5) and (6) of this clause
(d) "the Service Charge" means the Specified Proportion of the Service Provision
(e) "the Surveyor" means the Landlord's professionally qualified surveyor and may be a person in the employ of the Landlord

18. By Clause 7(1), the Service Charge is the Specified Portion (in the Particulars of the Lease, 1.66%) of the Service Provision (set out in Clauses 7(4) (5) and (6)) as being those matters recoverable in the Service Charge.

19. The method of payment is set out in Clause 7(2) as follows:
7(2) The Leaseholder HEREBY COVENANTS with the Landlord to pay the Service Charge during the term by equal payments in advance at the times at which and in the manner in which rent is payable under this Lease PROVIDED ALWAYS all sums paid to the Landlord *in respect of that part of the Service Provision as relates to the reserve referred to in sub clause (4)(b) hereof shall be held by the Landlord in trust*

for the Leaseholder until applied towards the matters referred to in Clause 7(5) hereof and all such sums shall only be so applied. Any interest on or income of the said sums being held by the Landlord pending application as aforesaid shall (subject to any liability to tax thereon) be added to the said reserve.

20. The "*equal payments in advance at the times at which and in the manner in which rent is payable under this Lease*" specified in Clause 7(2) refers to Clause 2 of the Lease.

21. Clause 2 provides that payment be by "*equal monthly payments in advance on the first day of each month in each year of the term*".

22. The manner of payment is set out in Clause (3)(1) which provides "*To pay the Specified Rent and all other monies due hereunder (by Direct Debit Mandate or such other means as the Landlord shall require) at the times and in the manner mentioned above without deduction*".

23. Clause 7(3) requires the Landlord to compute the estimated cost to the Tenant of the Service Charge:

7(3) The Service Provision in respect of any Account Year shall be computed before the beginning of the Account Year and shall be computed in accordance with sub clause (4) of this clause

a. To consider the costs likely to be incurred in the coming Account Year

b. And in so doing, there are two matters that need to be taken into account:

i. The estimate expenditure, to be estimated by the Surveyor (Clause 7(4)(a));

ii. A consideration of the appropriate amount to be contributed to, or taken from the reserve fund (Clause 7(4)(b) and 7(4)(c)).

24. "*The Service Provision*" is set out in the Lease at Clause 7(4) as follows:

7(4) The Service Provision shall consist of a sum comprising

(a) the expenditure estimated by the Surveyor as likely to be incurred in the Account Year by the Landlord upon the matters specified in sub-clause (5) of this clause together with

(b) an appropriate amount as a reserve for or towards such of the matters specified in sub-clause (5) as are likely to give rise to expenditure after such Account Year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year including (without prejudice to the generality of the foregoing) such matters as the decoration or the

exterior of the Building (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year) but

(c) reduced by any unexpended reserve already made pursuant to paragraph (b) of this sub-clause in respect of any such expenditure as aforesaid

25. The relevant expenditure to be included in the Service Provision is set out in Clause 7(5) as follows:

7(5) The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and the Common Parts and shall include (without prejudice to the generality of the foregoing)

(a) the cost of and incidental to the performance of the Landlord's covenants contained in Clauses 5(2) and 5(3) and 5(4) including the cost of the relevant excess (if any) on any claim under the insurance policy effected in accordance with Clause 5(2) in the event of damage to the Premises by an insured risk

(b) the costs of and incidental to compliance by the Landlord with every notice regulation or order of any competent local or other authority in respect of the Building

(c) all reasonable fees charges and expenses payable to the Surveyor any solicitor accountant surveyor valuer architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Building including the computation and collection of rent (but not including fees charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work

(d) any rates taxes duties assessments charges impositions and outgoings whatsoever whether parliamentary parochial local or of any other description assessed charged Imposed or payable on or in respect

of the whole of the Building or on the whole or any part of the Common Parts

(e) any insurance cover the Landlord may effect in relation to the Common Parls

(f) any Interest paid or any money borrowed by the Landlord to repay any expenses incurred in connection with the repair management maintenance and provision of services for the Bullding

(g) the service charge payable in accordance with the terms of the Headlease

26. At the end of the Account Year, there is a final service charge determined by the Landlord, which is provided in accordance with Clause 7(6):

7(6) As soon as practicable after the end of each Account Year the Landlord shall determine and certify the amount by which the estimate referred to in paragraph (a) of sub-clause (4) of this clause shall have exceeded or fallen short of the actual expenditure in the Account Year and shall supply the Leaseholder with a copy of the certificate and the Leaseholder shall be allowed or as the case may be shall pay forthwith upon receipt of the certificate the Specified Proportion of the excess or the deficiency

27. By Clause 7(8) the Lease adopts ss.18 to 30 of the Landlord and Tenant Act 1985.

28. The Headlease provides in the Sixth Schedule those expenses for which it can raise a service charge against the Respondent.

29. Clause 7(5)(g) of the Lease says which of these service charges can be passed on in the Service Charge to the leaseholders under the Lease.

Surveyor Certificate Requirement

30. The Applicant raised a procedural issue regarding the effect of a failure to use a surveyor to certify the Service Charge costs. Relevant cases follow.

31. **Elysian Fields Management Company Ltd v John and Patricia Nixon; Imperial Buildings Management Company Ltd v John Nixon** [2015] UKUT 0427 (LC): A requirement within a Lease to audit accounts at the end of a Service Charge period, was not a precondition for requesting payment of an estimated Service Charge from a Leaseholder. Without wording which specifically stated that the auditing of accounts was a precondition of payment then monies could not be

withheld on that basis, and that the remedy available to the Leaseholder was to make a counter claim in the County Court for breach of lease.

32. **Warrior Quay Management Company and another v Joachim and others LRX/42/2006**

A failure to meet the contractual requirement of a Lease that a Service Charge demand be certified did not mean that payment of the sums due for the relevant periods could never be due for payment.

HH Judge Huskinson: *I therefore also agree with Mr Bayne's submissions that, if in such circumstances a leaseholder does make an application to the LVT for a decision (as happened in the present case), the LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against WQMC and may result in the LVT deciding that a lesser sum than hoped for by WQMC may be decided to be the amount payable. Also the absence of the certificate should result in the position being that the amount which is decided by the LVT to be payable by way of shortfall will not be payable until a proper certificate (certifying that at least this amount is payable) is provided by WQMC's auditors or accountants. However, if the LVT's decision is that the service charge payable for the relevant year is less than the sum paid on account, then the leaseholder is entitled to the benefit of that decision immediately (and without waiting for a certificate from the relevant auditor or accountant).*

Morshead Mansions Ltd v Mactra Properties Ltd [2013] EWHC 224 (Ch): The Lease, rather than accounting practice or other considerations, determines the way in which accounts are to be prepared.

33. **Urban Splash Work Ltd v Ridgway** [2018] UKUT 32 (LC)

74. In this case the terms of the agreement are clear. The Service Rent is payable "at the times and in the manner stipulated in the Fifth Schedule." Paragraph 4 of the fifth schedule provides that the Service Rent is to be "ascertained and certified by a certificate … signed by an independent qualified accountant." The Service Rent is not a sum which can be identified

by the appellant or its managing agent acting unilaterally. Until the Service Rent is certified it is not known how much is payable, and it follows that the liability to pay cannot yet have crystalised.

77. It may well be the case that, ordinarily, non-compliance with a certification regime will not prevent a landlord from recovering service charges payable on account (as in both ***Pendra Loweth*** *and* ***Elysian Fields****) but, if so, that is because payments on account are likely to be set by reference to an estimate of future expenditure, rather than by the definitive certification of past expenditure. Even on account charges may require certification before they become payable (as in* ***Rexhaven Ltd v Nurse and Alliance & Leicester Building Society*** *(1996) 28 HLR 241). In every case the function and significance of the certificate will depend on the terms of the agreement.*"

78. The FTT did not consider the sufficiency of the certificates relied on by the appellant. None of those which I have seen includes a statement of the sums already paid by the respondents in the year in question. Instead the certificates record only the respondents' share of the appellant's total expenditure, with lines to record "on account charges paid" entered as £0.00. In short the certificates relied on do not comply with paragraph 5 of the fifth schedule and, as a result, none of the balancing charges have yet become due from the respondents.

34. ***Elysian Fields v Nixon*** [2015] UKUT 427 (LC): The Tenant is not without a remedy if the Landlord fails in its obligation to certify the balancing charge:

42."The remedies potentially open to the Tenants were …, either (i) an action for damages or (ii) an action for specific performance or for an account or (iii) an application to [the F-tT] under the Landlord and Tenant Act 1985 for the determination of the service charges payable."

35. In **Powell & Co Investments Ltd v Aleksandrova and another** (2021) UKUT 10 (LC), the Upper Tribunal advised further:

21. In ***Urban Splash Work Ltd v Ridgway*** [2018] UKUT 32 (LC), after reviewing a number of cases about the certification of service charge accounts the Tribunal reiterated (at [77]) the fundamental but unsurprising

proposition that in every case the function and significance of the certificate will depend on the terms of the agreement.

22. The same is true of the form of a certificate. In *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 48, CA, the issue was whether a letter written by an architect had been a certificate validly granting an extension of time under a building contract. Roskill LJ said:

"*Though neither condition 2(e) nor condition 16 … prescribes any form in which the architect is to grant any extension or to certify his opinion, it is, in my judgment, essential that, while the architect is left free to adopt what form of expression he likes for the grant or certificate, as the case may require, he must do so clearly so that the intent and substance of what he does is clear. The court should not be astute to criticise documents issued by an architect merely because he may not use the precise language which a lawyer might have selected in order to express a like determination, but whilst this amount of latitude is permissible, it cannot extend to the court's treating as due compliance with contractual requirements documents which, however liberally interpreted, do not plainly show that they were intended to comply with, and, fairly understood, do comply with those contractual requirements.*"

36. This passage suggests that not only must a certificate be clear, but it must have been intended to comply with the requirements of the particular contract, and must in fact comply with those requirements.

37. The general function of a certificate is to provide confirmation of facts relevant to the obligations of a party under a contract. Where the certificate is provided by a third party, as is often the case where the certificate concerns service charges payable under a lease, it is also intended to provide an assurance to the paying party that an independent person, usually with some relevant professional qualification, has satisfied themselves that the facts being certified are true.

38. The accountancy profession does not consider that an audit is an essential precursor to certification of accounts or other forms of service charge document. In some cases an audit may be necessary because the lease requires one. In other cases, as a matter of professional judgment, an accountant instructed to provide the necessary document may consider that they cannot certify the matters stated in the document

as being correct without carrying out an audit. In this case, there is no such requirement in the lease.

39. The costs incurred by the applicant which the Tribunal found to have been reasonably incurred were not yet payable as the document relied on by the appellant was deficient because it did not certify the liability of the individual leaseholders, as required by the lease.

40. The issue of a valid certificate complying with the provisions of the lease will usually be a condition precedent to the tenant's obligation to pay. In **Akorita v Marina Heights (St Leonards) Ltd,** the lease required the landlord's surveyor to certify the year-end service charge account. No such surveyor's certificate was provided and the account prepared by the landlord's accountant did not suffice. Therefore, no service charge was due. The relevant term was:

> *"4.21 To reimburse to the Lessor a sum (hereinafter referred to as "the Service Charge") equal to one seventh (or such other proportion as may be determined by the Lessor's Surveyor depending upon the number of Units eventually using the access drains or other communal parts) of the costs expenses outgoings and matters mentioned in the First Schedule hereto the Service Charge to be due and payable on demand and the amount of the Service Charge to be ascertained and certified by the Lessor's Surveyor acting as an expert and not as an arbitrator once a year up to the Thirtieth day of June in each year (or if such ascertainment shall not take place on the Thirtieth day of June then the said sum shall be ascertained as soon thereafter as may be possible as if such sum has been ascertained up to the Thirtieth day of June aforesaid) commencing on the Thirtieth day of June next but not more frequently than once in every yearly period computed from the First day of July to the Thirtieth day of June next following* ***PROVIDED THEREFOR AND IT IS HEREBY AGREED*** *that the Lessee shall (if required by the Lessor) with every half-yearly payment of rent pay to the Lessor such sum on account of the Service Charge payable by the Lessee under this clause as the Lessor's Surveyor shall certify the first of such payments being payable on the signing hereof as being a reasonable interim sum to be paid on account of the Service Charge and that the Service Charge payable by the Lessee hereunder (or such balance as shall*

remain after giving credit for any half-yearly payment as aforesaid) shall be paid by the Lessee or any proper balance found to be payable to the Lessee shall be so repaid to him on the Twenty Fifth day of December next following the year ending on the Thirtieth day of June to which such contributions shall relate or as soon thereafter as may be possible ***PROVIDED LASTLY*** *that the Lessor shall not be entitled to re-enter under the provisions in that behalf hereinafter contained in respect of non- payment only of any such interim sum as is hereinbefore mentioned."*

41. In **Jacey Property Co Ltd v De Sousa**, the lease provided that the tenant was to pay the fair and proper proportion as determined by the landlord's surveyor, but the landlord's solicitor had determined the proper and fair proportion to be paid by a tenant of various costs incurred by the landlord in carrying out repairs. The Court of Appeal noted that a solicitor is neither qualified nor practises as a surveyor and therefore is not appropriately skilled to act as a surveyor for the purposes of determining a fair and proper contribution. The parties had agreed in the lease to bind themselves to a surveyor's determination and could not be bound by the solicitor's determination.

Waiver and Estoppel

Estoppel by convention

42. The Respondent has raised issues of waiver and estoppel. Relevant cases follow.

43. Lord Steyn in **Republic of India v India Steam Ship Co [1998] AC 878:** '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. It is not enough that each of the two parties acts on an assumption not communicated to the other. But….a concluded agreement is not a requirement'. In the last three years there have been a number of decisions in the Upper Tribunal which consider the application of this doctrine in service charge disputes, the results of which are difficult to reconcile with one another.

44. In **Clacy v Sanchez [2015] UKUT 0387 (LC)**, the Upper Tribunal was required to determine whether the certification of accounts was a condition precedent of a valid service charge demand and whether an estoppel by convention had arisen, which prevented the tenants from denying their liability to pay service charges even though the landlord had not provided certified accounts. It held that certification of the accounts was not a pre-condition of a valid demand and that an estoppel had arisen because of a 19-year old agreement, at a meeting where the former tenants had decided that certification of the annual service charge was not required. Alternatively, the tenants had waived the right to require or enforce certification of the accounts.

45. In **Admiralty Park Management Co Ltd v Ojo [2016] UKUT 421 (LC)** the lease required the tenants to pay a percentage of service charge for the maintenance and insurance of the building and then a different percentage contribution for the management area of the estate. The landlord's managing agents had failed to apportion service charges correctly between the tenants for at least seven years, an issue first raised by the FTT. The financial consequences of the incorrect apportionment were unclear. The Upper Tribunal accepted the contention that an estoppel arose where the tenant had never objected to the method of apportionment actually used (which was clear from the service charge statements) over many years, even in previous formal proceedings regarding disputed service charges. The Deputy President, Martin Rodger QC found that a 'conventional mode of dealing' existed between the parties and it would have been unfair to allow the leaseholder to resile from that convention.

> *Issue 2: estoppel by convention*
>
> *35. It is acknowledged by the appellant that the service charges were demanded during the relevant period in a manner inconsistent with the accounting provisions of the lease. The first issue is therefore whether it is open to Mr Ojo to rely on that discrepancy as a means of reducing his service charge liability, or whether the adoption of the same system of accounting for a prolonged period without objection from Mr Ojo prevents him from relying on that point.*
> *36. Mr Ojo has had notice that it would be the appellant's contention in the appeal that he is "estopped" or prevented from relying on the failure to*

implement the contractual scheme. That was made clear in Miss Fothergill's witness statement dated 8 July 2016, a copy of which was served on him on the same date. He has chosen not to participate in the appeal and I am satisfied that there is no unfairness in the Tribunal proceeding to re-determine the original application on all issues.

37. In the Republic of India v India Steam Ship Company Limited [1998] AC 878 Lord Steyn described the legal principle on which the appellant's rely in this case as follows: "It is settled that an estoppel may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by both of them or made by one and acquiescing by the other. The effect of the estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on an assumption.... it is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not required for an estoppel by convention."

38. The facts relied on by Mr Fain on behalf of the appellants are quite limited. Since at least 2009, and possibly since as early as 1993 when the lease was granted, the liability of leaseholders to contribute towards the expenses of the appellant have been calculated by apportioning the expenses incurred in the maintenance of all nine leasehold buildings amongst all of the leaseholders, rather than apportioning expenditure on individual buildings to the leaseholders of those buildings alone.

39. That method of apportionment was obvious to the leaseholders, including Mr Ojo, because the annual Maintenance Charge statements which they received showed that they were being charged 0.69444% of each item of estate expenditure (for example garden and grounds maintenance) and 1.0272% of block expenditure (for example general repairs, communal lighting and heating or buildings insurance).

40. No objection was taken by Mr Ojo or by any other lessee to this method of accounting. Mr Ojo made periodic payments of service charges in response to service charge demands supported by statements showing that breakdown. Moreover, on a previous occasion when service charges were disputed before the LVT, in January 2011, Mr Ojo was recorded by the

tribunal as saying that he did not deny his contractual liability to pay the service charges which were claimed against him but rather he understood that those charges had already been met by his mortgagee.

41. The opportunity for Mr Ojo to take issue with the manner in which the service charges had been calculated was thus available to him in formal proceedings in 2011, and was available once again in these proceedings but had not been taken. It was against that background that the appellant had continued to administer the service charge in the same way as it had always done and it would be unfair, Mr Fain submitted, for Mr Ojo now to be able to rely on the discrepancy between the contractual accounting method and the appellant's method to avoid liability to contribute towards the services which had been provided to him and other leaseholders.

42. I accept Mr Fains' argument. It would in my judgment have been clear to anyone who considered the Maintenance Charge statements that the expenditure on buildings maintenance was not being divided amongst 16 flats in a single building but was being apportioned amongst a much greater number. accept that it might not have been clear how the proportions for building and estate expenditure had been arrived, although was informed that the proportions are different because buildings expenditure does not include at cost in respect of the three buildings owned London & Quadrant, which undertakes its own building maintenance. It would nevertheless have been obvious to Mr Ojo, had he considered the statements, that he was being asked to pay a much smaller percentage of expenditure on the building than he would have been if only the leaseholders in his building had been required to contribute.

43. Mr Ojo acquiesced in that manner of calculating the Maintenance Charge (which may have been more or less favourable to him than the method strictly required by the lease). He may not have fully appreciated the requirements of the lease (as indeed the appellant and its managing agent appear not to have done) but he had the opportunity to read his lease and understand how service charges were supposed to be accounted for.

44. Taking his prolonged acquiescence into account, and having regard additionally to the fact that in 2011 Mr Ojo did not dispute liability in principle for charges computed in the same way, it seems to me that a

conventional mode of dealing existed between the appellant and Mr Ojo under which it was understood the Maintenance Charges were to be apportioned on the basis that each leaseholder was obliged to contribute towards expenditure on all nine leasehold buildings.

45. It would be unfair for Mr Ojo now to be allowed to dispute his liability in those circumstances on grounds which he had chosen not to raise for many years. For him to be permitted to do so would require the appellant to recalculate the service charges back at least to 2009 in order to ascertain Mr Ojo's correct contribution, which may be more or less than the sums he has actually been charged. If Mr Ojo has been overcharged (and there is no basis for the conclusion that he has) it would mean that other leaseholders in the estate have been under charged, but it would be difficult for the appellant to recoup the shortfall after so prolonged a lapse of time. In all of those circumstances I accept the appellant's case that Mr Ojo's liability should be ascertained on the assumption that the lease allowed the appellant to apportion liability for costs incurred in relation to the estate as a whole amongst all of its leaseholders, rather than requiring it to apportion liability for work to an individual building only amongst the leaseholders of that building.

46. I should add by a way of a footnote that was informed at the hearing of the appeal that the appellant has now instructed its agents to administer the service charge in accordance with the terms of the lease rather than on the basis which has been adopted for so many years.

46. **Bucklitsch v Merchant Exchange [2016] UKUT 527 (LC)** was, like **Clacy**, concerned with a requirement for accounts to be certified as a condition precedent of valid service charge demands. No objection had been raised about the certification of accounts by the tenant during his 11 years of owning the property notwithstanding that, as in **Ojo**, there had been a previous set of proceedings in relation to the service charge. The issue was first raised by the FTT, which concluded that an estoppel by convention had arisen. That decision was overturned by the Upper Tribunal on appeal, HHJ Huskinson holding that the mere failure to object over a prolonged period of time did not give rise to an estoppel.

47. In **Jetha v Basildon [2017] UKUT 58 (LC)** the deed of covenant between the tenants and the landlord did not provide for service charges to be collected in

advance: the only way they could have been so collected was if there had been a resolution agreed by a majority of the tenants at the company's AGM. In fact, service charges had been demanded in advance ever since a 1996 meeting and the tenants had paid the service charges without complaint since 2012. The FTT found that an estoppel by convention had arisen but on appeal the decision was overturned by HHJ Behrens, who was not persuaded of the existence of a common assumption by the parties. He also held that the tenants could not responsible for any common assumption that did exist because the communications had not 'crossed the line' and further there had been no real detriment suffered by the management company in circumstances where a resolution could still be passed which would allow the service charges to be recovered.

Surveyor Certificate; Waiver and Estoppel: The Arguments

The Applicant

48. The Applicant says that "*The Service Provision*" is the sum computed in accordance with clauses 7(1) (3) and (4) (see above). "*The Service Charge*" means the Specified Proportion of the Service Provision.
49. The Lease requires the Service Provision *to consist* of a sum computed by a *Surveyor*.
50. The sums which the Applicant disputes have not been computed by a surveyor at any point. The Respondent admits this. In this respect, see Paragraph 55 of the witness statement of Helen Bowerbank on Page 80.
51. The Applicant says that the Lease is clear on its face that the Service Charge must *consist* of a sum estimated by a surveyor. The Applicant says that the use of the word "consist" is significant in this respect in that it is clear that the surveyor's estimate is required to give the Service Charge materiality.
52. It is now trite law that landlords are obliged to follow the provisions of a lease strictly in the context of service charges.
53. 16. In **Akorita v Marina Heights** [2011] UKUT 255 (LC) at Paragraph 19:

> "*In my judgment it is clear on the proper construction of clause 4.21 of the lease that it is a condition precedent to any liability of the Lessee to make payment either on account of service charge or by way of final balancing service charge payment that the Respondent has obtained a Surveyor's*

> *certificate certifying the amount of the payment. This is what the clause plainly states. I notice from Woodfall's Law of Landlord and Tenant paragraph 1.780 that there is nothing surprising in this conclusion. As recorded above Woodfall states:*
>
> *"Where a lease provides for the amount payable to be certified by the landlord's surveyor or accountant, the issue of a valid certificate will usually be a condition precedent to the tenant's liability to pay"*

54. It is submitted that the provisions in the instant Lease as to the requirement for the involvement of a surveyor are higher than in **Akorita**.
55. Further, the Applicant notes that the Respondent states that the provisions of the Lease set out above are mere '*machinery*' as opposed to a condition precedent. However, the distinction between machinery and condition precedent has fallen into disuse.
56. In **Leonora Investment Co Limited v Mott Macdonald Ltd** [2008] EWCA Civ 857 (another case concerning whether the provisions of a lease had been followed in connection with service charges) at Paragraph 14 per Lord Justice Tuckey:

> "*The skeleton arguments referred to a number of cases in which the courts have had to consider whether terms in a lease are conditions precedent to obligations to pay, substantive procedural provisions which have to be followed to the letter before a liability to pay is triggered, or mere mechanics which do not have to be insisted upon regardless of the circumstances. I have not found these cases particularly helpful for the simple reason that we are only concerned with an issue of construction, the rules of which are not in doubt. The leases in this case must be construed in accordance with their own terms.*"

57. The Applicant therefore submits that no service charge is recoverable in relation to the period under challenge as a matter of contract. Simply put, the Service Provision does not *consist of a sum comprising the expenditure estimated by the surveyor*.
58. The Respondent also states that the Applicant is estopped from relying upon its failure to comply with the Lease in this respect. However, the species of estoppel

upon which the Respondent relies is not set out in its statement of case, nor is the point elaborated upon in the Respondent's witness statement. The Applicant states that there are no facts in this case which give rise to an estoppel of any kind.

59. The Applicant cannot be estopped when he did not know of the landlord's failure to use a surveyor. There is no evidence before the Tribunal to show that the previous landlord (before April 2018) failed to use a surveyor.
60. The Respondent does not have clean hands because it failed to comply with an essential term of the lease.
61. The Applicant's email of 6 April 2021 expressly says "*without prejudice to other matters*".

The Respondent

62. The Respondent admits that the Service Charge is calculated by the service charge team who do not have a surveyor in their team.
63. It says that this is part of the machinery of the lease rather than condition precedent for the Landlord to issue a final demand.
64. **Akorita** was in relation to a final demand and the condition here relates to surveyor requirement for estimated demands.
65. The lease does not require a surveyor's involvement in final demands. Clause 7(6) makes no reference to the surveyor, but rather to the landlord.
66. The surveyor's role is to assist in estimating the expenditure for the year.
67. The FTT(PC) does not consider the reasonableness and payability of an estimated charge, only the final demand.
68. There is an estoppel by convention, relying on **Admiralty Park Management Company Ltd v Ojo** [2016] UKUT 421 (LC). The Applicant is estopped from asserting that a surveyor must calculate the estimated service charges.
69. This is the Applicant's second trip to the Tribunal, the first being settled by the previous landlord.
70. The Applicant listed his concerns in an email to the Respondent of 6 April 2021 and had been in almost constant contact with the Respondent about the mechanics of his lease, yet only in these proceedings shortly before Christmas 2021 did he raise the issue of the surveyor. This raises a presumption of acceptance.
71. The Applicant has waived the right to assert that the service charges are not payable for this reason, by accepting this method over the duration of his interest in the Lease without complaint.

The Tribunal

72. The Tribunal has taken account of all of the guidance from the caselaw detailed above.

73. The Tribunal concludes that the estimation of the expenditure for the purposes of the estimated service charge demand is a condition precedent to that demand, relying upon the guidance in **Akorita**.

74. However, the Tribunal also finds that there is a difference here between the relevant clause in **Akorita** and what is required by this lease. In **Akorita**, HH Judge Huskinson found that both the estimated and final demands required the involvement of the surveyor. That, this Tribunal assumes, is because no distinction is drawn in the relevant clause there between estimated and final payments, there being no reference to any other actor being involved in the process. In this lease, however, there is a distinction because Clause 7(6) requires the landlord to establish the final demand, there being no reference in that sub clause to the surveyor.

75. Ms England suggested that the Tribunal should look only at the final demand and said, effectively, that that was the demand that mattered because expenditure was by then complete and was likely to be a fair demand for that reason. The Tribunal disagrees; it must comply with Section 27A of the 1985 Act.

76. What Clause 7(6) deals with is the calculation of the difference between the estimated service charge and the final demand and allows the landlord only to demand (or pay back) the difference between the 2 sums.

77. It follows, the Tribunal having determined that the surveyor's involvement is a condition precedent to the demand for the estimated service charge, and, a surveyor not having been so involved, there was no valid demand and the estimated sums are not (at present) payable.

78. It also follows from the above that the demands (or repayments) of the differential between the estimated and final amounts were in accordance with the terms of the lease and are valid demands (or payments).

79. The Tribunal could not see how there could be any estoppel or waiver here. Yes, there had been earlier proceedings, but these had been settled by the then Respondent cancelling any service charge demand for the Applicant from 2012 to 2018 without there being a substantive hearing at which he could martial his various arguments. There was no evidence before the Tribunal suggestive of an earlier awareness by the Applicant of the surveyor issue. As the Tribunal will relate

later, the communication of demands by the Respondent was so poor as to be almost unintelligible to anyone other than (and possibly including) its author.

80. Notwithstanding the above findings in relation to the surveyor issue, the Tribunal goes on, as HH Judge Huskinson did in **Akorita**, to consider some of the challenged items of expenditure. It points out now that so poor was the evidence provided by the Respondent that it could not even "do its best" in some situations, so that the necessity for the Respondent to employ a surveyor can only be of assistance to both parties.

The Law

81. The relevant law is set out in sections 18, 19, 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002.

82. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

83. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.

84. In reaching its Decision, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to

variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. In accordance with the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 *Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account.*

85. "*Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available:* **London Borough of Havering v Macdonald** [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.

86. The lessee is obliged to identify the costs which s/he disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee's challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, the Tribunal will expect him/her to produce evidence of the amount by which the landlord's costs should be reduced. It is a key element of the section 27A determination process (**The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** [2015] UKUT 0333 (LC)).

87. In **The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** (see below), the Tribunal was faced with a three-way choice:

1) To make no reduction, thereby leaving the costs as they were;
2) To adjourn to allow the landlord to provide evidence, or
3) To adopt the **Country Trade** "robust, commonsense approach".

The first of these options would have been wrong in the light of the landlord's concession that the CCTV charges included an element designed to allow the developer to recover some of its construction costs.

The second would have imposed a disproportionate burden on the parties in the

light of the relatively modest sums at issue.

The Tribunal concluded that the third was the right option to have followed. It may have been unscientific, but it was proportionate and involved the application of the Tribunal's overriding objective.

88. The Upper Tribunal reiterated in **Knapper v Francis** [2017] UKUT 3 (LC) that the Tribunal can make *its own assessment of the reasonable cost*.

89. **Continental Property Ventures Inc v White and another** [2006] 1 EGLR 85: *The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning, depend upon how the need for remedy arose*.

90. The relevant statute law is set out in the Annex below.

Bulk Refuse Clearance

The Applicant

91. The Applicant says that although there are clearly CCTV cameras located in the car park and communal areas, they are not to a reasonable standard or specification. It is not the case of perpetrators hiding their identities, but that the CCTV is so ineffective and of such poor specifications (including not recording images for a sufficient length of time to allow for replay) that since 2006 not a single person has been identified doing anything including vandalism, sleeping rough, defecating in the car park, theft, violence etc via the CCTV system let alone fly-tipping.

92. The Respondent has not acted reasonably by failing to pursue those responsible for the fly-tipping and other antisocial behaviour.

The Respondent

93. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (3) and 7 (5) of the Lease.

94. CCTV is located over each communal door, over the bin store and two cover the car park. The CCTV cameras are working and regularly maintained. The footage is only viewable from Eastgate. When a report has been made about bulk items being dumped in the communal areas, the Respondent has investigated this by looking at the CCTV cameras. As the Housing services managers have been following government guidance during the pandemic, it has not always been possible to visit the estate immediately. On each occasion that the Respondent has viewed the CCTV, unfortunately it has not been possible to identify those dumping the goods.

The Respondent will continue to work with residents at Eastgate in relation to this matter.

The Tribunal

95. The Tribunal has sympathy with the Applicant, but, following the guidance in **Continental Property Ventures Inc v White and another** (above), has to concentrate on the reasonableness of the actual charges. There being no challenge to the reasonableness of the charges, the Tribunal finds them to be payable.
96. This is, however, an example of where the property could be better managed.

Communal Cleaning

The Applicant

97. The Applicant says that the Respondent has not shown that using an 'in-house' team for cleaning is at 'market-rate' or to a reasonable standard.

The Respondent

98. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (3), (4) and 7(5) of the Lease
99. The block is cleaned weekly by the Respondent's in-house Estate Care Team and the standard is generally good. Weekly attendance is monitored by the Respondent. The social rent areas do not need a greater level or volume of cleaning than the shared owner areas and anecdotally the complaints about the quality of the cleaning are few.

The Tribunal

100. The Tribunal saw photographs submitted by the Applicant, but this was only a snapshot and not evidence that the cleaning paid for by the Respondent was not a reasonable expenditure and as such payable by the Applicant.
101. The marks indicated by the Applicant appeared more to be longstanding and indicative of a lack of maintenance/management.

Window Cleaning

The Applicant

102. The Applicant says that the glass area is relatively small and had not actually been cleaned quarterly despite what the Respondent states.

The Respondent

103. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (3) and 7 (5) of the Lease.

104. This covers the cleaning of the glass in the doors at the front and the back of Eastgate on a quarterly basis. The front entrances are mostly glazed. The Respondent does not generally receive complaints about this service or the level of charge. For example, the total cost for Eastgate for 2019/20 is £311 per annum which amounts to £77.75 a quarter with Mr Mir's contribution being £5.18 per annum.

Communal window cleaning is carried out quarterly by Cleanscapes. The Respondent does check the cleaning is undertaken through regular estate inspections.

The Tribunal

105. The Tribunal was provided with no evidence suggestive of a failure by the Respondent to have the windows cleaned as per the charges made. Again, there was only a snapshot provided and not evidence that the cleaning paid for by the Respondent was not a reasonable expenditure and as such payable by the Applicant.

106. The Tribunal took note of the proximity of dirt from the railway negating good cleaning works fairly rapidly.

<u>Communal Electricity</u>

The Applicant

107. The Respondent has been the owner of Eastgate since April 2018 and yet has only just elected to take a meter reading. This is the Respondent acting unreasonably and imposing on Leaseholders unreasonably high charges.

108. It is noted that the Respondent admits such and due to the Applicant has finally taken corrective action. Had the Applicant not taken such action, the Respondent would not have taken corrective action to the continuing detriment of Leaseholders.

The Respondent

109. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (4) and 7 (5) of the Lease.

There are two meters at Eastgate, one for communal supply and one for the lifts. All meter readings are estimates and the meters do not appear to have been read since ownership was transferred to the Respondent. The meters are being read week commencing 31 January 2022 and will be read every 3 months moving forward.

Attached as Exhibit HB5 are two spreadsheets which detail the monthly electricity costs for the two meters at Eastgate. This is pulled from a database which is shared between the Respondent and the supplier. The yellow box is where the Respondent changed supplier to Npower. As I explained earlier the consumption and charges are all based on estimated readings.

The Tribunal

110. The Tribunal notes the explanation given by the Respondent. This is further evidence of poor management, but, there being no evidence that the meters have not been now correctly read, the charges for same are payable in accordance with the terms of the lease.

Fire Alarm and Equipment Service

The Applicant

111. The Applicant says that the Respondent has made no effort or enquiry to try and minimise or reduce the number of false fire alarms sounding because it can simply re-charge most of the costs to long Leaseholders.

112. Due to the poor standard of repair to the communal doors, unauthorised persons have been able to gain access to Eastgate and so if those persons do set off fire alarms, they have only been able to so due to the Respondent's unreasonable behaviour and failure to adequately rectify the issues with the doors.

The Respondent

113. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (4) and 7 (5) of the Lease.

SHG has not identified any particular problems with the alarm system and there are no underlying issues. The alarms are working correctly. The call outs are for different issues. There have been two activations recently. One was caused by a resident cooking and the other by a deliberate activation by a visitor to the building. As yet it is unsure if any costs arose from the deliberate activation.

If this is the case, they will not be charged to the service charge account. It is not uncommon that alarms are accidently activated in large blocks or occasionally on purpose.

The Tribunal

114. The Tribunal notes that fire systems are absolutely vital, particularly here in a clad building. All alarms must be responded to.

115. The Tribunal has sympathy with the Applicant, but, following the guidance in **Continental Property Ventures Inc v White and another** (above) has to concentrate on the reasonableness of the actual charges. There being no challenge to the reasonableness of the charges, the Tribunal finds them to be payable.

Lift Service Contract

The Applicant

116. The Applicant says that there are two separate lifts in Eastgate, each exclusively serving each Section: one for Section 1 and one for Section 2 which is only used for floors 4 to 9.

117. The lift that serves Section 2 (flats 27-61) is continually breaking down. Instead of rectifying the root cause of the repeated breakdowns, the Respondent is content to simply call out Contractors to "re-set" the system and re-charge Leaseholders. The "repairs" are not to a reasonable standard and the lift simply breaks down again a few weeks later.

The Respondent has and continues to re-charge Leaseholders thousands of pounds a year rather than rectify the underlying issue.

The Applicant has been unable to identify "Eastgate" on the Respondent's Contractor's list of contracted sites/invoice and as such, costs cannot therefore be recovered for "Eastgate" residents.

The Respondent

118. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (3) and 7 (5) of the Lease.

There is no underlying single problem with the lifts. As can be seen from the invoices exhibited to this statement, the call outs are for a variety of reasons and some are for routine maintenance. Eastgate is 9 storeys high. The lifts are in heavy use. Contractors were having difficulty entering the building, particularly out of hours. This has now been rectified with the addition of a key safe.

The Tribunal

119. The Tribunal can see the invoices relative to the property and has sympathy with the Applicant in respect of the continued cost of repair.

120. It notes that the lifts are now of some age, but was not told by the Respondent of any service schedule or planned replacement. This again points to poor management.

121. Whilst having sympathy with the Applicant, there was not sufficient information available to the Tribunal to find other than that the costs were reasonably incurred and are as such payable.

Landscaping

The Applicant

122. The Applicant says that "Eastgate" has such little 'landscaping' that these costs are unreasonable and excessive.
123. The items stated such as litter-picking, sweeping are accounted for elsewhere and there is little or no leaves, moss hedges or grass on the site (see photographs).
124. The Respondent has failed to respond to any complaints from Leaseholders about this issue.
125. In any event, the costs are unreasonable and excessive.

The Respondent

126. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (3) and 7 (5) of the Lease
127. Groundscapes maintain the whole car park area. As this is a hardstanding area, the service provided is litter-picking, sweeping/blowing, moss removal and cutting any hedges or grass that may be on site. SHG does not do specific post-visit inspections but does respond to any complaints received from leaseholders and can confirm that the team don't recall any specific complaints although the area is difficult to keep tidy because of its location next to the railway line.

The Tribunal

128. The Tribunal feels that the title of this charge is misleading; it should be termed grounds maintenance.
129. There was no evidence of any checking or that such works were actually performed.
130. There was no evidence before the Tribunal that the invoices submitted related to this property, such that the Tribunal finds them not to be payable.

Door Entry

The Applicant

131. The Applicant says that there are two exclusive entrances to one for Section 1 and one for Section 2 residents.

132. The Respondent has been aware of the issues with both the front and rear doors of both Sections since taking over in 2018. Again, rather than addressing the root-cause of the issues, the Respondent has unreasonably spent thousands on sticking plaster repairs. Repairs have not been carried out to a reasonable standard and inevitably the door(s) break again shortly after.
133. Furthermore, the Respondent has often cited 'vandalism' as a reason for the damage to the doors. However, despite the presence of so-called CCTV at each entrance, the Applicant is not aware of a single person being identified as the culprit - see section re the CCTV above.
134. The doors are subject to 'normal' use as are the lifts. The Applicant says that it is the poor quality repairs and poor standard of door that means the doors break down so regularly.
135. The Respondent states that it has now (after 10 years of complaints from residents) finally commissioned a report on the entry system. This is clear evidence of the Respondent's complacency and due to the inaction, has exacerbated the damage to the doors.

The Respondent

136. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (3) and 7 (5) of the Lease
Historically, there has been a problem with one of the front doors not closing correctly which led to people gaining entry to the building. Work was undertaken to rehang the door at the end of 2018 and strengthen the maglocks which has solved this problem. The door does still break from time to time and SHG has sought a report from United Living, their repairs contractor, on how best to resolve the issue permanently. SHG do not consider there is an underlying problem with the door entry. It is possible there are problems due to the manner in which it is used but it is hoped the report will provide guidance on this point.

The Tribunal

137. The Tribunal is very surprised at the sums expended on the doors. Whilst accepting that doors in regular use are more likely to fail, the sums charged to the Applicant are wholly unreasonable.
138. That the Respondent is only now commissioning a study smacks of poor management.

139. Given the above, the Tribunal believes that the first year's expenditure of £3,704.55 should have been ample to solve the issues and limits recovery for the years in dispute to 2020/2021 to that amount.

Management Charges

The Applicant

140. The Applicant says that the Respondent's attempts to skim over one of the largest parts of the Service Charge expenditure in an attempt to evade attention to it.
141. The Estate Management Company costs are simply accepted by the Respondent on face value, never scrutinized, let alone checked, and are authorised by staff who are not professionally qualified surveyors.
142. The costs are unreasonable, unreasonably incurred and excessive for the services (if any) provided. Again, it is in the Management Company's interests to divide as much of the costs as possible in order to maintain their own budgets and fees, and reduce the costs apportioned to privately owned units in the Centrium building.
143. The Headlease provides for a fixed management charge that only increases by RPI "Part A Proportion" and "Part D, clause 12 of the Sixth Schedule". and no more, or for it to be a proportion/percentage of the overall SC costs.
144. The Respondent has not considered or raised this point with the Freeholder. Furthermore, the Respondent has apportioned the Applicant 2.94% of these costs without a lawful basis or explanation.
145. The "Area Services Manager" simply rubber-stamps the charges. The Applicant has requested any evidence of the charges being questioned by the ASM and the Respondent has failed to provide any. The Applicant can only therefore conclude that no such scrutiny takes place as the Respondent simply passes on the charges to Leaseholders without question.

The Respondent

146. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (3) and 7 (5) of the Lease.
Estate Management is provided by Pinnacle Property Management Limited.
When invoices are received, they are processed by the Respondent's finance department and sent (electronically) to the Area Services Manager for approval.
Except for the insurance costs, all costs have been consistent and reasonable so have not been challenged.

Due to the difference in the financial year the Respondent charges a year behind. The Pinnacle budget and accounts for 2018/19 was charged in the Respondent's 2019/20 financial year. The numbers do all reconcile. It chooses to do this rather than pro-rata the external managing agent's costs.

The Tribunal

147. The Tribunal was unable to understand how all of these charges were arrived at. It asked Ms Bowerbank to explain, but, frankly, she made the position only slightly clearer.

148. The best that the Tribunal can say is that some of the maintenance at the property and the insurance for it lies at the door of the freeholder. The freeholder sends "estimate accounts" to the Respondent each year in about November. The Respondent then checks that these are valid, (or so the Tribunal was told, yet it was clear from a further analysis of the freeholder's level of management fees that this was not wholly correct). These costs from various schedules (schedules 6 and 10), are then passed on to the leaseholders as part of their service charges, added to the costs and fees of the Respondent for its part in the maintenance, all of which should, in accordance with the terms of the lease, be overseen by a surveyor.

149. Strangely, the demands refer to the costs under different headings, block costs being used for some of the estate costs and estate costs being used for most of the block costs.

150. Rather oddly and wholly wrongly, the leaseholders have no way of knowing what the freeholder's costs are made up of. These are large sums of money. Ms Bowerbank first told the Tribunal that there was one line on the demands only for the freeholder's costs and that it was mostly made up of insurance. Then, the Tribunal pointed out a second line and was told that this too was mostly insurance connected with car parking. When asked how the leaseholders could possibly know what they were being asked to pay for, Ms Bowerbank, as she had replied to other such questions, said that the Respondent would give details if requested to do so.

151. The headlease has a mechanism for the increase in the costs of management by the freeholder. Ms Bowerbank seemed unaware of its existence and could give no assurance that it had been followed; certainly it had not been checked.

152. The lease permits the collection of service charges only in respect of the Building and Common Parts as the below makes clear:

7(5) The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and the Common Parts and shall include (without prejudice to the generality of the foregoing)-

(g) the service charge payable in accordance with the terms of the Headlease

153. The freeholder and the Respondent appear both to have ignored Clause 7(5), which is predicated on expenditure only relating to the building and its common parts. It would be rather strange, not to say wholly unfair, to expect, as this Respondent did, the leaseholders of Eastgate to pay towards, say, parking at another building to which they had no access or whatever else relating to other buildings or other parts of the freeholder's estate which remains hidden behind the titles of heads of expenditure unexplained by the Respondent in these proceedings.

154. It was only during these proceedings that Ms Bowerbank, wholly properly, conceded that the charges relating to a car park at another building should not have been levied. This came, however, after she had earlier told the Tribunal that apart from insurance nothing else in the freeholder's accounts needed checking. She had sought to justify these costs in her witness statement. She said that she looked at the consistency of the charges over the years, but not that she checked whether the charges should be levied at all.

155. The accounting by both freeholder and Respondent leads the Tribunal to have very grave doubts as to its reliability. Somebody needs to look again at the lease and to ensure that charges are only made in respect of expenditure allowed by the lease to be demanded of the leaseholders. They need to look at how the costs are described and to give sufficient information for the leaseholders to understand what the charges mean.

156. What then is to be done about these so-called management charges, where the Tribunal was not told anything about some by the Respondent and given misinformation about others and found that some were wrongly charged, and about the actual management costs sought by the Respondent for both it and the freeholder? The Tribunal has to do its best with the limited information available.

157. The Tribunal's best cannot be the best it would like, but it has concluded that, commensurate with its duty to be fair to both sides, it should give guidance here.

158. Insurance has been paid for the property. The Tribunal accepts the explanation of the Respondent that this has increased dramatically due to the cladding issue. The Applicant provided no comparative costs which would allow the Tribunal to say that cover could have been obtained at a lower cost. The Tribunal records here too that the building is to be de-clad at no expense to the leaseholders. The cost of insurance is payable by the Applicant.

159. The level of management fee chargeable by the freeholder (but limited to its work associated with the building and common parts) and passed on to the leaseholders via the service charge is limited by the terms of the headlease. The Respondent cannot, for the future, demand more than that charge. For the years 2018 to December 2021, the Tribunal determines that the charge is not payable. This has been a sorry tale of an inability on the part of both the freeholder and the Respondent to appreciate the vital role they play in ensuring that costs are allocated to people on a proper basis. The fact that the Respondent appeared unable even to comment on some of the items queried by the Applicant, and then to discover part way through the hearing that some should not be charged at all means that the Tribunal can have no confidence that it would be reasonable for the Applicant to pay either the management fees of the freeholder or the costs they seek to pass on to him via the Respondent for the years 2018 to December 2021, save for the exception of the insurance detailed above.

160. The Tribunal cannot see the basis for the relatively high management fees the Respondent seeks to charge. Putting aside for one moment its poor performance, detailed above, this is a 60-flat building, where the Tribunal would expect a charge per flat of no more than £200 plus VAT per annum. The Respondent does not have to arrange insurance or cover some of the maintenance, but this is balanced to some extent by its need to act as middle person between the freeholder and the leaseholders. Accordingly, the Tribunal finds that £200 plus VAT per annum is the reasonable charge for now that the Respondent can make of each flat for its management fees. Clearly that charge will not be fixed in time and will adapt to financial circumstances.

161. For the years 2018 to 2022, the Tribunal determines that the charge for Respondent's management fees is not payable. This has been a sorry tale of an inability on the part of both the freeholder and the Respondent to appreciate the vital role they play in ensuring that costs are allocated to people on a proper basis.

The fact that the Respondent appeared unable even to comment on some of the items queried by the Applicant, and then to discover part way through the hearing that some should not be charged at all means that the Tribunal can have no confidence that it would be reasonable for the Applicant to pay the management fees of the Respondent for the years 2018 to 2022.

162. Whilst there has been some criticism of Ms Bowerbank in this Decision, the Tribunal wishes to make it clear that it has no wish to "*shoot the messenger*". Ms Bowerbank was honest and helpful and the Tribunal notes that she has not long been in office and wishes her well in righting this sorry state of affairs.

Car Park, Gate Maintenance, Site Staff, Managing Agent and Accounting Fees

The Applicant

163. The Applicant says that the gate serves only the private underground car park where private owners of the Centrium building reside.

Furthermore, the Applicant will evidence that site staff only attend to matters related to Centrium private residents (not anything related to Eastgate).

Some of these "estate costs" such as litter-picking, and garden maintenance are duplicated by Service Charge charged by the Respondent itself - see Landscaping above.

The managing agent costs are unreasonable, excessive and wrongly accounted/proportioned.

The Applicant shows via photographs of the site that the Respondent is completely wrong about the 'gate' access to the communal parking area for Eastgate. Eastgate residents do not make any use of the electronic gates; they only serve the private residents of the Centrium building. This just shows that the Respondent (and their staff) have no actual knowledge of Eastgate.

The Respondent

164. The Respondent conceded the gate issue at the hearing.

The Tribunal

165. The Tribunal has dealt with these issues under Management Charges above.

Insurance Costs

The Applicant

166. The Applicant says that insurance costs are unreasonable and unreasonably incurred having seemingly gone up for Eastgate exponentially while Centrium having only a small rise without explanation.

Insurance costs were as per below and the Respondent has never sought to question or challenge the excessive increases (with no claims having been made on them):

£8,567.00 2016/17
£15,645 2017/18
£35,000 2019/20
£45,000 2020/21

The Respondent has failed to demonstrate that the amount charged is representative of the market, or best value. Therefore, the Applicant considers them unreasonably incurred and a burden to shared owner Leaseholders.

The Respondent

167. The Respondent says that this is chargeable under the Lease in accordance with clause 5 (2) and 7 (5) of the Lease.

Insurance for the building is the responsibility of the Freeholder. In December 2020 the Freeholder was unable to secure insurance for the building due to the external cladding. The Respondent took legal advice and decided it needed to fill the gap, and obtained insurance from its main insurer to prevent the building being uninsured. The freeholder signed a legal waiver for that year's insurance.

Insurance costs have increased, and the freeholder has continued to have difficulty obtaining cover due to the external cladding issues at the building and the hardening of the insurance market. The Respondent supported the freeholder in 2021 in its attempts to get the building insured. The Respondent had daily meetings in attempts ensure the building was insured and at the right level and at a reasonable cost for its residents. The Respondent viewed the Freeholder's quotes and even spoke to its brokers.

The Respondent has works underway currently to replace the cladding at Eastgate. These works are due for completion in October 2022 although this is subject to change. These costs will not be passed to any leaseholder via the service charge.

The Tribunal

168. The Tribunal has dealt with this issue under Management Costs above.

Other Costs Not Accounted For

The Applicant

169. The Applicant says that that Respondent has attempted to recharge Leaseholders various other costs without explanation or basis such as:

(a) Water & Mechanical Servicing contract;
(b) Mansafe System (estate);
(c) Lightening Protection;
(d) Mansafe System (block);
(e) Day-to-day repairs-Communal (block);

The Respondent

170. The Respondent gave no response.

The Tribunal

171. The Tribunal has dealt with these issues under Management Costs above.

Section 20c and Paragraph 5A Application

172. The Applicant has made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Respondent's costs incurred in these proceedings.

173. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

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

The … tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002 Schedule 11 Paragraph 5A Limitation of administration charges: costs of proceedings

(2)A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(3)The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(4)In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal

Section 20C

174. The Applicant submitted that it had been necessary for him to apply to the Tribunal for a determination. The Tribunal agrees with him; without his intervention, the Respondent is very likely to have continued wrongly to interpret the lease at cost to the leaseholders. Further, as a result of the proceedings, the Respondent conceded that it had charged an incorrect apportionment of the estate costs and conceded too that charges for a car park at another building were incorrectly demanded. Ms England submitted that the Respondent had only fought arguable matters and had conceded points properly at an early stage. The Tribunal agrees only in part with

that submission; it was only after the issues of the car park and the level of the freeholder's management fees were pointed out during the hearing that the Respondent made concessions in relation to them.

175. The Tribunal has weighed up the relevant factors here. It notes that the Applicant was substantially successful in his challenges to the payability of management fees. Whilst the Tribunal has supported the reasonableness of some payments, that is against the backdrop of a quite shambolic position taken by the Respondent. The Tribunal wonders whether the Respondent would have reached even its current level of very limited understanding, but for the Applicant's application. The Respondent's communication with the leaseholders could have been so much better. There are numerous instances where the Tribunal has pointed out poor management.

176. The Tribunal is aware that any costs will fall upon the Respondent, which may try to recover them from the other tenants by way of service charge, but the other tenants are able to challenge the ability of the Respondent to do so in accordance with the terms of the lease and the reasonableness of the Respondent seeking to do so and the reasonableness of any sums sought to be charged.

177. Taking a rounded view, the Tribunal allows the application under Section 20C of the Landlord and Tenant Act 1985. It directs that the landlord's costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.

Paragraph 5A

178. For the same reasons the Tribunal allows the Applicant's application under Section 20C above, the Tribunal also allows his application under Paragraph 5A, so that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any administration charge payable by the Applicant in this or any other year.

RIGHTS OF APPEAL

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

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

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

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

ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

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

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

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

19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the 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.

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

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

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

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration
agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.