FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00MG/LSC/2016/0068**
Property	:	**12 Alder Court, Redhouse Park, Milton Keynes MK14 5FL**
Applicants (Tenants)	:	**Mr Sandy Henry & Mrs Sally Henry**
Representative	:	**Mr Allan Calverley**
Respondent 1 (Current Landlord)	:	**Adriatic Land 2 Limited**
Representative	:	**JB Leitch, Solicitors** **Ms Elizabeth England, Counsel**
Respondent 2 (Previous Landlord)	:	**Avant Homes (Central) Limited (Co. Reg. No. 02443898) formally known as Country & Metropolitan Homes Limited)**
Representative	:	**Gowling WLG, Solicitors** **Mr Joseph Ollech, Counsel**
Respondent 3 (Management Company):		
Representative	:	**Redhouse Park (CP) Limited** **Gowling WLG, Solicitors** **Mr Joseph Ollech, Counsel**
Date of Application	:	**26th September 2016**
Type of Application	:	**A determination of the reasonableness and payability of Service Charges (Section 27A Landlord and Tenant Act 1985)** **An order that the landlord's costs of dealing with these proceedings shall not be added to any future service charge (section 20C Landlord and Tenant Act 1985)**
Tribunal	:	**Judge JR Morris** **Mrs M Wilcox BSc MRICS** **Mr O N Miller BSc**

Pre-Hearing Review Date:		**13th March 2017**
Date of Directions	**:**	**14th March 2017; Revised 11th April 2017**
Dates of Hearing	**:**	**2nd and 3rd July 2017**
Date of Decision	**:**	**30th August 2017**

DECISION

Decision

1. The Tribunal determines that although the Service Charges under Schedule 5 were not correctly apportioned under the Lease, the apportionment was not unreasonable and it would be inequitable to require Respondent 1 or 2 to retrospectively re-apportion the Service Charge for the years in issue.

2. The Tribunal determines that the Estate Charge demanded by Respondent 3 under Schedule 7 was correctly apportioned for the years in issue.

3. The Tribunal determines that the Service Charges for the years in issue are reasonable and payable by the Applicants to Respondent 1 for the years 2014 and 2015 when properly demanded, and to Respondent 2 for the years 2011, 2012, and 2013.

4. The Tribunal makes no Order under section 20C of the Landlord and Tenant Act 1985 against Respondents 1 or 3.

5. The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that 50% of Respondent 2's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.

Reasons

Application

6. The Application made on 26th September 2016 was for a determination of reasonableness and payability under section 27A of the Landlord and Tenant Act 1985 of the costs of the Service Charge to be incurred for the years ending 31st December 2011, 2012, 2013, 2014 and 2015.

Background to Proceedings

7. Under the Lease, which is tripartite, the Management Company primarily and the Landlord in a secondary capacity is required to provide services for which the Tenants pay a Service Charge. Therefore, both the Management Company and the Landlord were made a Respondents. Both the current and previous Landlords have been made Respondents as their respective interests cover the Service Charge periods in issue.

8. The Application Form had incorrectly named Adriatic Land 1 (GR2) Limited as the Landlord Respondent. This was due to the Service Charge notifications and demands wrongly stating this company as the Landlord. The current Landlord since 24th January 2014 is Adriatic Land 2 Limited as evidenced by an Official Copy of the Register of the Landlord's Freehold Title Number BM38672. Adriatic Land 2 Limited is referred to as Respondent 1.

9. The previous Landlord who held the Freehold title prior to 2014 is Avant Homes (Central) Limited (Co. Reg. No. 02443898) formerly known as Country & Metropolitan Homes Limited which is understood to be associated with the developer Gladedale Group Limited. An Official Copy of the Register of the previous Landlord's Freehold Title Number BM277075 (now cancelled) was also provided. Avant Homes (Central) Limited is referred to as Respondent 2.

10. Following the application, Adriatic Land 1 (GR2) Limited, the then named Respondent, made representations stating it was the wrong party. At the parties' request the proceedings were stayed until 15th February 2017 to allow for investigation and an attempt to settle the issues. After clarification of the parties and in the absence of a settlement a pre-hearing review was held on 13th March 2017.

11. At the Pre-Hearing Review, the parties were identified and it was agreed that they should be joined and Directions issued. The Respondent's Solicitor and Counsel provided draft Directions to assist the Tribunal.

12. Directions were issued on the 14th March 2017 following the pre-hearing review and revised Directions were issued as it was found that all the parties had not been served. These were extended to allow for the parties to prepare their cases. The case was then heard on 3rd and 4th July 2017.

13. On the Application Form and in the course of the inspection and prehearing review the following points were made in respect of the Tribunal's jurisdiction:

a) The Applicants referred to a failure on behalf of the Landlord to make repairs to the Building in which the Property is situated, in particular a damaged gutter and the need for the windows to be redecorated. The Tribunal has no jurisdiction with regard to these matters, as they are not the subjects of the service charges in issue.

b) Under the Lease the Landlord is responsible for providing the services set out in Schedule 5, which relate to the Building in which the Property is situated and the Management Company is responsible for providing the services set out in Schedule 7 which relate to the Estate. Also under the Lease, shares in the Management Company are to be taken by the long leaseholders, who will in time call an annual general meeting and appoint directors. In the meantime, as is common in new developments, the Developer appointed Directors. As yet no annual general meeting has been held and therefore the appointed directors are still running Redhouse Park (CP) Limited (Respondent 3). The Tribunal has no jurisdiction with regard to this matter. The Tribunal can only make a determination in respect of the reasonableness, apportionment and payability of the Service Charge.

c) It appears that Nationspaces Developments Limited was appointed by the Developer as the Managing Agent and that it has been managing both the Building in which the Property is situated (as well as other Buildings on the Estate) and the Estate. It has therefore been carrying out the role in respect of the provision of services and collection of Service Charges on behalf of the Landlord and the Management Company. The Tribunal can distinguish between the reasonable costs incurred under Schedule 5 and those under Schedule 7 and whether those costs should be attributed to the Landlord or the Management Company. However, the Tribunal has no jurisdiction to make an order that goes further than such determination.

Issues

14. On the Application Form the Applicants identified the following issues:

Apportionment

15. The main issue was that the Applicants claimed that the Landlord or its Agent has not calculated the Service Charges according to the Lease for the years ending 31st December 2011, 2012, 2013, 2014 and 2015. The Lease identified two service charges, one for the Building and one for the Estate, both of which are defined in Clause 1 of the Lease and the provisions relating to each are in Schedules 5 and 7 respectively.

16. According to the Annual Service Charge Estimates and Final Accounts, the Service Charges are calculated and apportioned to all the units in what is

referred to as Area 5 in particular proportions. The Building costs are apportioned to all the leaseholders on the Estate, currently on the basis of each leaseholder paying 1/51, i.e. the Building is treated as comprising all the Leasehold flats. The Estate costs are apportioned to all the Area 5 units, currently on the basis of each unit paying 1/96.

17. The Applicants contended that the apportionment should be the "Service Charge Percentage" as stated in the Particulars of the Lease as 1.5991%. The Applicants have taken this to mean that they are only obliged to pay that percentage of the costs either that directly relate to the Building or are Estate costs that are attributed to the Building. There was therefore an issue as to what the "Service Charge Percentage" related.

Reasonableness of Service Charge

18. The Applicants stated that without knowing the apportionments they could not say whether the items of the Service Charge were reasonable or not. Therefore, they in effect put all the Service Charge items in issue as follows:
    1. Commonway cleaning of hall stairs and landing and internal windows.
    2. External Window Cleaning
    3. Courtyard/Car Park Clean
    4. Block Landscaping
    5. Estate Landscaping
    6. Commonway electricity
    7. Courtyard Electricity
    8. Repair and renewals
    9. Bank Charges
    9. Accountancy
    10. Management Fees
    11. Sinking Funds:
        a. Fire Alarm/Smoke Detectors
        b. Door Entry
        c. Internal and external Decoration
        d. Landscaping/Parking/Drains/Lighting
        e. General repairs
    12. Fire Risk and Health and Safety Inspections

19. In the event the Applicants identified only the following items as being challenged:
    - Commonway cleaning of hall stairs and landing and internal windows.
    - External Window Cleaning
    - Courtyard/Car Park Clean
    - Block Landscaping
    - Estate Landscaping
    - Repair and renewals (Miscellaneous)
    - Accountancy
    - Management Fees

Payability

20. The freehold having been held by more than one landlord for the years in issue the Applicants sought confirmation as to which Landlord is responsible for which years as this has relevance with regard to payability of service charges.

21. In addition, it was alleged that the invoices issued by Nationspaces incorrectly identified Adriatic Land 1 (GR2) Ltd for the years 2014 and 2015 whereas the Landlord was in fact Adriatic Land 2 Limited.

22. It was alleged that the Managing Agent had failed to include a Statement of Rights and Obligations with service charge demands.

The Law

23. The law that applies is in the Landlord and Tenant Act 1985 as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

24. Section 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, improvement 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 of 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 period

25. Section 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.

26. Section 27A of the Landlord and Tenant Act 1985

(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 arbitration agreement to which the tenant was a party
(c) has been the subject of a determination by a court

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

27. Section 23 of the Landlord and Tenant (Covenants) Act 1995

Effects of becoming subject to liability under, or entitled to benefit of, covenant etc.

(1) Where as a result of an assignment a person becomes, by virtue of this Act, bound by or entitled to the benefit of a covenant, he shall not by virtue of this Act have any liability or rights under the covenant in relation to any time falling before the assignment.

(2) Subsection (1) does not preclude any such rights being expressly assigned to the person in question.

(3) Where as a result of an assignment a person becomes, by virtue of this Act, entitled to a right of re-entry contained in a tenancy, that right shall

be exercisable in relation to any breach of a covenant of the tenancy occurring before the assignment as in relation to one occurring thereafter, unless by reason of any waiver or release it was not so exercisable immediately before the assignment.

28. Section 47 Landlord and Tenant Act 1987

Landlord's name and address to be contained in demands for rent etc.

(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—
(a) the name and address of the landlord, and
(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where—
(a) a tenant of any such premises is given such a demand, but
(b) it does not contain any information required to be contained in it by virtue of subsection (1),then (subject to subsection (3)) any part of the amount demanded which consists of a service charge [F1or an administration charge] ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

(3) The relevant amount shall not be so treated in relation to any time when, by virtue of an order of any court [F2or tribunal], there is in force an appointment of a receiver or manager whose functions include the receiving of service charges [F3or (as the case may be) administration charges] from the tenant.

(4) In this section "demand" means a demand for rent or other sums payable to the landlord under the terms of the tenancy.

29. Section 47 Landlord and Tenant Act 1987

Notification by landlord of address for service of notices.

(1) A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.

(2) Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall (subject to subsection (3)) be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.

(3) Any such rent, service charge or administration charge shall not be so treated in relation to any time when, by virtue of an order of any court or tribunal, there is in force an appointment of a receiver or manager whose functions include the receiving of rent, service charges or (as the case may be) administration charges from the tenant.

Lease

30. A copy of the Lease for Flat 12 was provided. The Lease dated 8th January 2010 is for a term of 125 years from the 1st January 2009. The parties to the Lease are:
    (1) The Landlord: Gladedale (South East) Limited,
    (2) The Management Company: Redhouse park (CP) Limited
    (3) The Tenants: Applicants

31. The relevant Clauses under the Lease are as follows:

32. The Service Charge Percentage in the Particulars is stated as 1.5991% subject to the provisions of 9.5

33. The following definitions are set out in Clause 1 of the Lease:

    "the Building" is defined as *the Building the outline of which is shown on the Conveyance Plan delineated in blue subject to the provisions of clause 9.5.*

    "the Estate" is defined as *the Landlord's property forming title number BM280308 as at 1st June 2007 subject to the provisions of clause 9.5.*

    "Service Charge" is defined as *the service charge for the Building calculated and payable in accordance with the provisions of Schedule 5.*

    "Service Charge Percentage" is defined as *the Service Charge Percentage shown in the Particulars payable by the Tenant in accordance with the provisions of Schedule 5.*

34. Clause 9.5 states:
    At any time the Landlord acting reasonably in its discretion may change the extent and number of Units comprised in the Building the extent of the Building the extent and number and location of car parking spaces the extent of the Common Parts of the Building the extent of the Estate and the Service Charge Percentage provided that the Service Charge Percentage shall be calculated as near as may be as representing the proportion that the gross internal square measurement of the Demised Premises bears to the gross internal measurement of all parts of the Building forming Units or otherwise let or intended to be let.

35. The relevant operative tenant provisions of the Lease are:

    Clause 4.10
    "Service Charge"

To pay the Service Charge Percentage in accordance with the provisions of Schedule 5 on the Service Charge Payment Dates.

36. The relevant operative landlord provisions of the Lease are:

Clause 6
The landlord covenants with the Tenant (subject to the Service Charge Percentage being paid to the Landlord when due) to provide the Services in accordance with its covenants as set out in Schedule 5.

37. Further covenants of the Landlord with the Tenant

Clause 7.3
To provide the Services in accordance with Schedule 5 provided that the Landlord shall not be required to provide a Service save to the extent that it shall have received funds either from the tenants of the Units including the Tenant enabling it to meet the cost of supplying the Services

38. The operative Management Company provisions of the Lease are:

Clause 10
It is agreed between the Landlord the Management Company and the Tenant that the provisions of Schedule 7 shall be incorporated in this Lease.

39. Schedule 5 details the landlord's duties and service charge provisions in respect of the Building (the Landlord being responsible for the Building) in particular:

40. Paragraph 1
...the Landlord shall provide as set out in paragraph 2 below ("the Obligatory Services") and those services which the Landlord may at its discretion provide as set out in paragraph 3 (the Discretionary Services")

41. Paragraph 2 includes:
Cleaning and lighting the common parts of the Building,
Repairing renewing maintaining decorating and (where applicable) furnishing the Common Parts of the Building
Maintaining any landscaped and communal areas of the Building

42. Paragraph 4
The Service charge is defined as the aggregate costs listed which are in effect all the costs relating to the Building. Including professional fees of employing a managing agent.

43. Paragraph 4.8 states:
All professional fees properly incurred in connection with the administration and operation of the Building and the provision of Services including (without this list being taken as comprehensive) accountancy fees for auditing or inspection the Service Charge Accounts each year surveyors' fees in relation to the management of the Building and the provision of the Services solicitors fees for any advice required in connection with the

Building and the provision of the Services and in connection with any proceedings taken by or against the Landlord

44. Paragraph 5
Sets out the apportionment and Payment of the Service Charge
It includes the following definitions:

"Service Costs" means the total Service Charge during the Account Period (which is the year ending 31st December)

"Estimated Service Charge" means payment on account of the Service Charge

"Total Charge" means the total of all Service Costs expended during an Account Period

45. Paragraph 5.1.1.
The Tenant hereby covenants to pay the Landlord by way of equal instalments in advance on the Service Charge Payment Dates during each year of the Term and proportionately for less than an Account Period an Estimated Service Charge being such sum as the Landlord may reasonably demand having regard to actual and anticipated Service Costs...

46. Paragraph 5.1.4
If the Landlord incurs substantial expenditure in the provision of the Services which has not been taken into account in the Estimated Service Charge for the Account Period the Tenant shall pay an exceptional payment being the appropriate Service Charge Percentage of such expenditure such payment to be made within fourteen days of demand by the Landlord

47. Paragraph 5.2
States that as soon as practicable after the Account Date (31st December) the Landlord shall submit an Account Statement. If a balance is due form the Tenant then this shall be paid within fourteen days of receipt of the Statement, If the Account Statement shows a refund is due to the tenant then the refund shall be set off against future Service Charge Payments.

48. Paragraph 6.1
The intention of the provisions in this Schedule is that the Landlord should recover 100% of the Service Costs in respect of the Service Charge if all the Units in the Building (and other premises capable of separate occupation in the Building) are let on the basis that the tenants pay the Service Charge on terms substantially similar to those contained in this Lease.

49. Schedule 7 details the Management Company's duties and service charge provisions in respect of the Estate (the Management Company being responsible for the Estate) in particular:

50. "The Estate" is defined as being *all that land known oin the north side of Wolverton Road Great Linford Milton Keynes Buckinghamshire registered or formerly registered at HM Land Registry with Title Number BM 280308*

together with such other land in the vicinity as may be designated by the Transferor in writing within the Perpetuity Period as forming part of the Estate

"The Estate Charge" is defined as being *the charges specified in part 3 of this Schedule*

"The Estate Charge Proportion" is defined as *the proportion expressed as a percentage that the number of habitable rooms in the Demised Premises bears to the number of habitable rooms to be provided on the Estate when fully developed or such other proportion determined by the Landlord as being fair and reasonable in the circumstances and notified to the Tenant in writing*

"The Estate Communal Areas" are defined as *those footpaths forecourts accessways visitors parking spaces plat areas amenity land open spaces playground and associated drainage lighting and other associated facilities of any kind together with any other external parts of the estate from time to time made available for common use or enjoyment by the residents of the Estate*

51. The maintenance expenses include:
All reasonable and proper costs incurred in connection with repairing inspecting maintaining cleaning renewing lighting such parts of the Estate Roads as are not to be included in any agreement pursuant to Section 38 of the highways Act 1980 (or otherwise intended to be adopted by the Highway Authority)

52. Part 3 sets out the manner in which the Estate Charge is to be paid the provision of which are similar to that of the Building Service Charge.

The Bundles

53. Two Bundles were provided for the Hearing, the Applicants' and the Respondents'. Both contained all the Statements of Case, Witness Statements and Skeleton Arguments together with supporting documents. In addition, the Respondents' Bundle contained invoices and the full final accounts for the years in issue. Where documents from the bundle are referred to, the Bundle and page number are identified.

Background to the Development

54. The background was outlined at the pre-hearing review and further detail was provided by Ms Joanne Massey, who is the Company Secretary and General Counsel for Respondents 2 and 3, in her witness statement.

55. The background is relevant to identify the extent of the Development and the Estate as Mr Calverley on behalf of the Applicants raised some points regarding what amounted to the Estate under the Lease. Otherwise the background is relevant only to identify the parties and their responsibility for the particular years in issue.

56. The Property is part of an extensive new build development at the Redhouse Park estate. The Development consists of six phased areas which are nearing completion in the following chronological order:

- Redhouse Phase 3: completed in 2009.
- Redhouse Phase 5: 28 units completed in 2010, and a further 68 in 2011.
- Redhouse Phase 2B: completed in 2012.
- Redhouse Phase 2A: completed in 2014.
- Redhouse Phase 1: completed in 2015.
- Redhouse Phase 4: part completed in 2016, the remainder due to complete in 2017.

57. A plan of the whole Development was provided in the Applicants' Bundle at page C23. In addition, Schedule 7 incorporated a Land Registry map search plan of Title Number BM280308 which Ms Massey said amounts to the area defined as the "Estate".

58. The developer, Gladedale Ltd and then Country & Metropolitan Homes Ltd appointed Redhouse Park (CP) Ltd to manage the Development as it is the management company set up in the Lease. Redhouse Park (CP) Ltd is currently controlled by the Avant Homes Group, pending the handover of control to the residents of the Development. Redhouse Park (CP) in turn appointed Nationspaces in 2009 to act as the managing agent for the whole Development including the Estate and the Building. Nationspaces commenced day to day management of each phase as the development of that phase was completed.

59. The firm of solicitors which acted (WSM Solicitors LLP) would have drafted the Lease based on precedents that had been drafted for earlier phases of the development. The earliest transfers and leases were entered into in circa 2007.

60. As is common on developments of this nature, once some of the leasehold blocks had been completed, Avant sought to sell the ground rent investment of certain blocks, including Alder Court.

61. Adriatic's offer to buy the ground rent was accepted in 2013. Adriatic was advised of the management arrangements and that Redhouse Park (CP) was the management company and Nationspaces was the managing agent. Adriatic, at their request took over the placing of insurance from the Developer but made no request to change the managing agent.

62. Avant delayed the transfer of Redhouse Park (CP) Limited over to the residents once it became aware of these proceedings as they did not believe it would be responsible to try to transfer over the management company with an active dispute ongoing, and additionally it would not expect any residents to step forward as directors of the management company with an active dispute.

63. The Property itself falls within the Phase 5 area, and was among the first set of 28 units completed during 2010. It is one of six flats in a particular building on the estate, numbered 12, 14, 16, 18, 20 and 22.

64. The original owner and developer of the whole estate was a company called Gladedale (South East) Limited, Co.No.3236114 and the company is the original lessor under the Lease. Thereafter the freehold title to the Property was transferred to Avant. It was then transferred again to Adriatic on 24th January 2014. Redhouse Park has always been the management company under the terms of the Lease.

65. Evidence of the current Landlord's Freehold interest was provided in the form of an Official Copy of Land Registry Title Number BM386274. Evidence of the previous Landlord's Freehold interest was provided in the form of an Official Copy of Land Registry Title Numbers BM277075 and BM280308. From these documents, it appeared that Gladedale Homes Limited held the Freehold until 27th February 2012 when it was transferred to Country & Metropolitan Homes Limited who held the freehold until 24th January 2014 when it was transferred to Adriatic Land 2 Limited. These titles included areas of land previously registered

66. Therefore so far as the years in issue are concerned:
- Avant responds as Landlord for the years 2011, 2012 and 2013,
- Adriatic responds as Landlord for the years 2014 and 2015.
- Redhouse Park responds as the Management Company for all five years.
- Nationspaces Developments Ltd is accepted by Avant and Redhouse Park as being the Managing Agents for the years in issue.

67. The Tribunal was ready to hear legal submissions regarding any determination to be made with regard to the respective liabilities of the Landlords in relation to the Service Charges under section 23 of the Landlord and Tenant (Covenants) Act 1995. Such liability would in respect of these proceedings only relate to payability i.e. to whom or by whom the service charge was payable. It appeared to be accepted in this regard that each Landlord was responsible for the period up to the date of assignment only. So far as evidence of the service charges was concerned this was provided by Redhouse Park Management Company through their Agent, Nationspaces Developments Ltd.

Inspection

68. The Tribunal inspected the Block of flats in which the property is situated. The Tribunal had viewed the flats on the 13th March 2017 prior to the pre-hearing review although following that hearing, parties have been added. A further inspection was made in order that all parties could be present. The representatives present at the inspection were:
- Mr and Mrs Henry, the Applicants and their representative, Mr Allan Calverley.
- Ms Elizabeth England of Counsel representing Respondent 1.

- Mr Martin Thomas and Ms Steffanie Bennett, Solicitors and Mr Joseph Ollech of Counsel representing Respondents 2 and 3.
- Ms Joanne Massey, Company Secretary and General Counsel for Respondents 2 and 3 and Mr Ralph Syme, Director and Company Secretary for Nationspaces Developments Limited were also in attendance.

69. The Block is of three storeys constructed of brick under a pitched tile roof with double glazed upovc windows. Externally it is in fair to good condition. Around the Block is a relatively small area of beds with shrubs and a car park. The first floor extends to form an undercroft. There is external lighting around the Block. There are two bin stores with two 'euro' bins in each.

70. Entry to the Block is via a door entry system to the common parts which comprise an entry area, corridor and stairs to the first and second floor landings off which are the flats. The common parts are carpeted and lit by 'timed' lights. There are meter cupboards with tenants' and landlord's meters. The interior was in fair condition although it was noted that it appeared to be less clean than at the pre-hearing inspection. It was noted that there had been a break in cleaning because a new managing agent had been appointed and there was a hiatus of funds between April and June 2017 due to the changeover.

71. Following the inspection of this Block the Tribunal requested to see any other leasehold blocks that were included in the Service Charge Apportionment to see whether and to what extent they differed. The Tribunal was informed that there were three variants in design for the leasehold flats: flats without internal common parts, flats in three storey blocks and flats in four storey blocks.

72. A block without common parts was pointed out to the Tribunal. The Tribunal then inspected two attached four storey blocks in Sheep Way (numbers 28 to 36 and 38 to 48). The ground floor storey was given over to an undercroft for parking, bin stores and the entrance to the common parts. The exterior finish was in painted render and brick under a pitched tile roof with double glazed upvc windows. There was a car park at the rear which also gave access to the undercroft and beds with shrubs in the immediate vicinity of the blocks. The exterior was in fair to good condition.

73. A door entry system gave access to the entrance hall on the ground floor from which stairs rose to the first second and third floor landings off which were six flats in each of the attached blocks. Internally the common parts were carpeted and in fair to good condition.

74. Notwithstanding that the Sheep Way block was of four storeys and the Alder Court is three the internal and external common parts appeared to be of similar size overall.

75. In addition, the Tribunal asked to have the extent of the Estate as referred to in the Lease identified. The parties pointed out the verges to the side of the access roads, which were adopted and grassed areas around the perimeter of

the Estate including the fencing. Mr Calverley expressed the view that all these parts were adopted by the local authority.

The Hearing

76. The hearing was attended by the Applicants who were represented by Mr Allan Calverley. Ms Elizabeth England of Counsel represented Respondent 1. Respondents 2 and 3 were represented by Mr Martin Thomas and Ms Steffanie Bennett, Solicitors and Mr Joseph Ollech of Counsel. In addition, Ms Joanne Massey, Company Secretary and General Counsel for Respondents 2 and 3 and Mr Ralph Syme, Director and Company Secretary for Nationspaces Developments Limited attended as witnesses.

Apportionment

77. The Tribunal commenced with submissions regarding the apportionment of the Service Charge.

Applicants' Submission

78. Mr Calverley for the Applicants submitted written representations which he confirmed at the hearing. He stated that the Lease Agreement was a Contract to which both parties were bound.

79. Firstly, Mr Calverley addressed the apportionment of the service charge for the Building which is detailed in Schedule 5 of the Lease. He said that the Lease clearly states that the Service Charge should be at a defined percentage of the Service Costs attributable to the Building. He said the apportionment payable by the Applicants was the Service Charge Percentage which was specified in the Particulars as 1.5991%. Some contracts allow for variation. however, such changes must be documented and acknowledged by the parties.

80. Mr Calverley said that the Managing Agent had written to the Applicants on 11th May 2016 (copy provided) advising them that there were discrepancies in a variety of Lease Agreements in respect of the Leasehold Properties on Redhouse Park and that the Landlord would be changing the Service Charge Percentage in accordance with Clause 9.5 of the Lease. The letter went on to say that the "changes are to take effect from 1st January 2016".

81. Mr Calverley said that the Applicants rejected the Respondents' interpretation of Clause 9.5 empowering such change unilaterally or retrospectively.

82. Mr Calverley referred the Tribunal to Clause 9.5 highlighting that:
the Landlord may change the extent and number of the units,
the extent of the Building,
the extent and number and location of car parking spaces
the extent of Common parts of the Building and
the extent of the Estate.
He submitted that the word *extent* (emphasis added) only referred to extensions and modifications to a specific building and did not include

incorporating other buildings or car parks some distance away from one another into the definition of "Building".

83. Mr Calverley referred the Tribunal to the latter part of Clause 9.5 which states that the Service Charge Percentage can be changed but only so far *as representing the proportion that the gross internal measurement that the gross internal square measurement of the Demised Premises bears to the gross internal measurement of all parts of the Building forming Units or otherwise intended to be let.* He said that there was no evidence that any alteration met with this requirement.

84. Mr Calverley referred the Tribunal to Schedule 5 paragraph 6.1 stating that it had been suggested that it allowed the variation of the Service Charge Percentage. He highlighted the words that it was the *intention* of the Schedule that the Landlord should recover 100% of the Service Costs and that all the leases should provide that tenants pay the service charge on terms *substantially similar*. He submitted that it may be the landlord's *intention* but that was not carried out in the terms of the lease, in that the leases were not substantially the same. The Landlord should not then be entitled to alter the Service Charge Percentage to make good what it failed to do.

85. Secondly Mr Calverley addressed the apportionment of the Estate Charge which is detailed in Schedule 7 of the Lease. He said that the Management Company is responsible for performing the obligations set out in Schedule 7 independently of the Landlord. He referred the Tribunal to the definition of the Estate in Schedule 7 which referred to Land Registry Title Number BM 280308. He said that the plan for this Title Number (which was provided at page C22 and again at H16 of the Applicants' Bundle) incorporates Areas 3, 4 and 5 of the Development. He then referred to a plan (which was provided at page C23 of the Applicants' Bundle) which had been submitted by Respondent 2 and used to support a Planning Application for the development of Area 4. This plan showed a number of areas cross hatched blue which according to the key were "Extent of Estate Managed Areas. To be maintained by Estate Management Company." These were all outside Area 5, which is said to comprise the Estate in the Lease. The plan also showed a number of areas crossed hatched in pink. The key identified these as "Extent of Local Management Areas. To be maintained by Estate Management Company." Most of these were within Area 5.

86. Mr Calverley submitted that the only Estate area was the part of the plan which was cross hatched blue, all of which was outside Area 5. The areas cross hatched pink is either the verge of adopted road and therefore the local authority's responsibility or were areas around each block and so maintained as part of the Building Service Charge. Therefore, he submitted there is no Estate and can be no Estate Charge.

87. If it is found that there is an Estate, then it was submitted that the Estate Charge Proportion is wrongly assessed by being calculated according to the number of units i.e. unit paid an equal share there being 96 units.

88. The assessment should be done on the basis of habitable rooms. There is no definition of habitable rooms and the Management Company and Agent has interpreted this to be bedrooms as is noted in an email from the Agent to the Applicants dated 12th February 2015. There is no standard definition of habitable rooms but following the definitions in the Building Regulations it is any room in a dwelling including the kitchen but excluding: halls, landings and staircase, utility rooms, bathrooms, cloakrooms and lavatories.

89. It was noted that for the years in issue the calculation was according to the number of units.

Respondent 1's Submission

90. Ms England for Respondent 1, which is the current Landlord, Adriatic Land 2 Limited, confirmed that pursuant to section 23 of the Landlord and Tenant Covenants) Act 1995 Respondent 1 responded to the Application in respect of year ending 2014 and 2015.

91. She said that Respondent 1 continued to use Nationspaces during this period as its Agent in respect of the services and service charge having inherited the situation from Respondents 2 and 3. Nationspaces in turn continued to demand the service charge in the same way.

92. At the Hearing Ms England submitted that, on examining the wording of the Lease, the "Service Charge Percentage" defined as "1.5991% subject to Clause 9.5" was not intended to be the percentage apportionment payable by the Applicants of what might be described as the normal service charge. She said that the "Service Charge Percentage" referred to an exceptional sum that may be charged.

93. In support of her submission she referred the Tribunal to Paragraph 5.1.4 of Schedule 5. This states that:
If the Landlord incurs substantial expenditure in the provision of the Services which has not been taken into account in the Estimated Service Charge for the Account Period the Tenant shall pay an exceptional payment being the appropriate Service Charge Percentage of such expenditure such payment to be made within fourteen days of demand by the Landlord

94. She said that the words "*the Tenant shall pay an exceptional payment being the appropriate Service Charge Percentage*" provide a definition of the Service Charge Percentage which is lack elsewhere (underlining emphasis added). She added that Clause 1.1 does not define the Service Charge Percentage, it only refers to what it is in the Particulars and Clause 9.5 only states that it may be altered.

95. She went on to say that if this is the apportionment for an exceptional payment if substantial expenditure has been incurred over and above what has been the estimated, this begs the question of what is the apportionment for the estimated service charge. She referred the Tribunal to Paragraph 5.1.1.
The Tenant hereby covenants to pay the Landlord by way of equal instalments in advance on the Service Charge Payment Dates during each

year of the Term and proportionately for less than an Account Period an Estimated Service Charge being such sum as the Landlord may reasonably demand having regard to actual and anticipated Service Costs.

96. She submitted that the apportionment is *such sum as the Landlord may reasonably demand.*

97. She conceded that Clause 4.10 which is entitled *"Service Charge"* and requires the tenant *"To pay the Service Charge Percentage in accordance with the provisions of Schedule 5 on the Service Charge Payment Dates"* did not fit comfortably with her submission in that it supported the view that the Service Charge Percentage was the proportion of the Service Charge although it did not contradict it.

98. She said that if her submission was correct then by virtue of paragraph 5.1.1 of Schedule 5 the Landlord was in a normal year obliged to charge the Applicants a reasonable proportion of the service charge.

99. In reply Mr Calverley said he did not agree that the Service Charge Percentage only applied to exceptional service charge costs. He expressed the view that the Service Charge Percentage was as stated in the Particulars and that Clause 4.10 required that amount to be demanded by the Landlord and paid by the Tenant.

Respondent 2 and 3's Submissions

100. Mr Ollech considered Ms England's to be a possible explanation. However, he submitted that there was an alternative view.

101. It was accepted by Respondents 2 that, if 1.5991 % is intended under the Lease to be the percentage apportionment for the service charge payable by the Applicants to Respondent 2, the Landlord, under Schedule 5, then that is not the amount that was charged. Nationspaces were appointed as Managing Agents when the Development was in its early stages and were not aware of the terms of the Lease. Therefore, on behalf of Respondents 2, Nationspaces charged an amount that they considered to be a fair and reasonable sum. Mr Ollech submitted that they were entitled to make such alteration to the percentage under clause 9.5. Having made this alteration in 2011, since it has been unchallenged until 2016, the Applicants are estopped from seeking a recalculation.

102. Mr Ollech said that the uncertainty with regard to the service charge apportionment appears to arise largely because of the defined "Service Charge Percentage" in the Particulars and Clause 1.1. He said that it is apparent that but for the reference in the Lease to a defined "Service Charge Percentage" the scheme would operate well as a right to demand the "Service Charge" under Schedule 5, which would be "such sum as the Landlord may reasonably demand..." with the aim of recovering 100% of its costs. That accords with all the usual principles of service charge recovery. It also reinforces clause 7.3 of the Lease, which again anticipates the landlord achieving fully recovery.

103. The confusion that arises because of the "Service Charge Percentage" is accentuated by the fact that (a) nowhere is it defined what it is 1.5991 % of, (b) Schedule 5 does not refer to the Service Charge Percentage at all, and (c) it begs the question why clause 1.1 offers a definition of "Service Charge" at all if there is a defined "Service Charge Percentage". It is also apparent from the link to clause 9.5 that the underlying intention, even insofar as 1.5991 % was supposed to mean anything at all, was to allow the Landlord freedom to adjust the charge so as to recover its costs fully.

104. He said that insofar there is a tension in the Lease that cannot properly be resolved then it is submitted that it is open to the Tribunal to adopt the definition of "Service Charge" and its interaction with Schedule 5 and ignore the defined percentage that does not in fact lead anywhere. He suggested that authority for that proposition is derived from the comments of Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna "The Antaios"* [1985] 1 AC 191; [1984]; 3 WLR 592:

take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

105. He also referred the Tribunal to *Universities Superannuation Scheme Ltd v Marks & Spencer PLC [1999] L&TR* where Mummery LJ stated in relation to construction of the Lease:

The correct approach is to construe the lease in order to identify the nature and extent of the contractual obligation of the tenant to pay the service charge. The next step is to determine whether that obligation has been performed.

106. In addition, he referred to *Arnold v Britton and others* [2015] UKSC 36, in particular to Lord Neuberger's guidance at paragraphs 15 to 23 identifying the following passages:

15. [The meaning of the lease] 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.

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual

case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. *Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.*

19. *The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.*

20. *Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.*

21. *The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.*

22. *Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their*

contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC56, 2012 SCLR 114 where the court concluded that "any ... approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).

23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51 para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case.

107. Mr Ollech suggested that the Tribunal may take a purposive approach subject to the caveats referred to in the above extracts.

108. Mr Ollech said that the same flexibility to adjust the Service Charge Percentage through Clause 9.5 is shown in relation to the definition of the "Estate Charge Proportion" in Schedule 7 with regard to the collection of the "the Estate Charge" by Respondent 3, the Management Company. Subject to notice in writing the Management Company has freedom to determine the proportion subject to it being "fair and reasonable in the circumstances".

109. Mr Ollech added that Nationspaces has during the period in issue managed both the Building and the Estate for Respondent 2, the Landlord, and Respondent 3, the Management Company. If and to the extent that the "1.5991 %" percentage is operable and binding within the scope of the Lease then it is accepted that that is not the apportionment it used. Nationspaces operated a very precise mechanism with varying items charged to the Applicants in very particular amounts (see the invoices appended to the application notice). Respondents 2 and 3 in their statement of case dated 26th April 2017 explain why these particular proportions were adopted item by item, and they were a fair and reasonable reflection of the benefits enjoyed by each of the tenants and the Applicants.

110. Although it is true that in practical terms the specific charges for "the Building" were run together with the wider "Estate" charges this approach also had the effect of allowing the Landlord and Management Company fair recovery of all the costs associated with each building or unit and the estate. That accords with the sense of the defined "Service Charge" and Schedule 5 and, subject to notification by the Management Company, it also accords with the underlying right under Schedule 7 to have a fair and reasonable apportionment across the estate.

111. In response to the Tribunal's questions Mr Ollech submitted that Clause 9.5 allowed the definition of "Building" to include all the Leasehold properties. In addition, he submitted that Clause 9.5 did not require the Landlord to consult or inform the Tenants of any change to the "Percentage Service Charge" it being subject to the proviso that it be fair and reasonable. There was a requirement that the tenants should be informed in writing of any alteration to the "Estate Charge Proportion". Mr Ollech said that this had been done on every invoice. He said there was no requirement in the Lease for a particular form of notification e.g. letter, or period of notice, only that it be in writing.

112. In response to Mr Ollech's argument in respect of the Schedule 5 service charge Mr Calverley reaffirmed his view that the Building is as defined in the Lease and the extension referred to in Clause 9.5 only means an extension to a particular building not extended to mean all the leasehold flats in other blocks. Mr Calverley said that Nationspaces had sought to invoke Clause 9.5 retrospectively on behalf of the Landlord and referred to the letter dated 11th May 2016 from Nationspaces to the Tenants (a copy of which was included at page 163 of the Respondent's Bundle and C20 of the Applicant's Bundle). He said that this was just an attempt to justify an error rather than rectifying it.

113. He added that apportioning the service charges across all the leasehold flats was to ignore the relative sizes of the buildings and flats which differed significantly. He referred the Tribunal to the Inspection and the blocks in Sheep Way. He said the parking areas were larger and although the stairwells were similar there was an extra flight and landing. The only sensible, fair and reasonable way to apportion the service charge was according to the floor area of each flat expressed as a percentage of all the flats in the Building. By Building he meant the Block containing the six flats numbered 12 to 22 as defined in the Lease. He added that floor area may not be perfect but it was the best that could be done.

114. In response to Mr Ollech's argument in respect of the Schedule 7 service charge Mr Calverley said that the Applicants had not been informed in writing in accordance with the Lease. To change the apportionment would, as a matter of good practice, require consultation and the agreement of the tenants. Merely including it on the invoice was not enough.

115. Mr Ollech submitted a further, or alternative argument. He said that as set out in Respondent 2 and 3's statement of case, in light of the communications between the Applicants and Nationspaces between 2011 and 2015 the Applicants are bound by an estoppel by convention, alternatively by acquiescence, from now challenging the apportionments and charges for those periods. As per Lord Steyn in *Republic of India v India Steamship Co Ltd ("The Indian Endurance and The Indian Grace')* [1998] AC 878 at 913 - 914:

[A]n estoppel by convention may arise where parties fo 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.

...That brings me to estoppel by acquiescence. The parties were agreed that the test for the existence of this kind of estoppel is to be found in the dissenting speech of Lord Wilberforce in Moorgate Mercantile Co. Ltd. v. Twitchings X19771 A.C. 890. Lord Wilberforce said, at p. 903, that the question is:

"whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in fhe position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known ... "

Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence...

116. In support of this submission Mr Ollech referred the Tribunal to Appendix 2 of Respondent 2 and 3's statement of case on pages 148 to 193 of the Respondents' Bundle, which contained correspondence passing between the Applicants and Nationspaces, the Managing Agent for Respondents 2 and 3. He said that it went from a letter dated 17th April 2012 to an email dated 18th October 2016. He submitted that the Applicants had asked questions of the Managing Agent relating to the Service Charges which had been replied to and the Applicants had expressed satisfaction with the answers given.

117. In particular the following were referred to (copies on pages 193, 192, 190, 178 respectively:

An email dated 24th May 2012 from the Managing Agent to the Applicants in which it was said by way of explanation that "*the bin hire charges are split by the properties...*
2-12 (evens) Rowditch Furlong,
26-36 (evens) Sheep Way,
2-8 (evens) Alder Court,
12-22 (evens) Alder Court.
The flat costs are divided equally (51), however there are 6 flats over garages that do not share commonway costs but pay towards the courtyard (57)".

An email dated 29th May 2012 in which the Applicants thanked the Managing Agent "for *the explanation of the various splittings (among residents) of the charges levied".*

An email dated 7th August 2013 from the Applicants to the Managing Agents in which the Applicants state: "*your email of 2012 provided the answers (in part – in so far as it does not identify which actual residences share the charges, only the number of them) but never mind, I am happy with the information you have provided".*

A letter dated 9th February 2016 from the Applicants to the Managing Agent requesting an explanation of the "Estate Amenity Area" and an email dated 12th February 2016 which stated that "*the Estate Amenity Area referred to are the landscaped areas surrounding the whole of the Rehouse Park Development Phases 1-5. This was set up by the developer and costs are based on the number of bedrooms per property*".

118. In response to the Tribunal's questions it was confirmed that the "Estate Amenity Area" charge in the Service Charge Account for 2014 was the "Estate Landscaping" charge which is how it is itemised on all other Service Charge Accounts.

119. Mr Ollech said it is apparent that the Applicants accepted the explanations put forward by Nationspaces in relation to the apportionment, and the parties proceeded on that shared understanding right up until complaints were first raised in May 2016. Even if it is technically correct that apportionments could or should have been applied differently, Nationspaces conducted itself on behalf of Respondents 2 and 3 in the belief that its approach was acceptable to the Applicants it would be inequitable to retrospectively re-open those service charge accounts and provisions, in particular where objectively speaking Nationspaces was applying a fair and reasonable methodology in respect of the Building and the Estate generally.

120. Following the submission of the legal arguments in relation to apportionment Mr Henry gave evidence on the issue for the Applicants. He conceded that initially the relationship with Nationspaces had been amicable and matters had been dealt with more or less promptly in 2012. He said that in their ignorance he and his wife had accepted what the Managing Agent had said.

121. He said that he subsequently attended some meetings of the residents' association committee and found that several people had been unclear about the Service Charge Percentage rate in their Lease. Mr Henry said that Mr Calverley is a parish councillor and a resident on the Redhouse Park Development and has had some experience of leaseholds and service charges and was asked to advise. Mr Henry said he felt that after the letter from the Managing Agent of the 11th May 2016 the matter should be taken further. He referred to the correspondence between the Applicants and Managing Agent dated 15th May 2016, 29th July 2016 and 10th August 2016 (copies of which were provided in both Bundles) in which he posed a number of questions regarding the Service Charge with particular reference to the interpretation of Clause 9.5 and the apportionment of the Service Charge. As there was no resolution to the matter he applied to the Tribunal on 25th September 2016.

122. He added that the common parts and the flats were not the same and that any apportionment should be based on the costs incurred in relation to the specific block. He said the flats varied in size and layout and the number of bedrooms.

123. In response to questions from Mr Ollech Mr Henry said that he had written the letters referred to with help from Mr Calverley but had been happy to put

his name to them and for Mr Calverley to represent him in the course of the proceedings and the hearing.

124. Mr Syme, Director and Company Secretary for Nationspaces Developments Limited gave evidence for Respondents 2 and 3 based upon his witness statement.

125. He said Nationspaces was appointed by the original landlord ("Gladedale") to manage the development. Nationspaces did not have a copy of the Lease at the beginning and submitted a service charge regime which set out what each property on the development would need to be charged by way of service charge. A spread sheet was provided at pages 317, 318 and 319 of the Respondents' Bundle J32, 33 and 34 of the Applicants' Bundle showing this. Mr Syme said that initially no percentages were provided and Nationspaces recommendation was for each resident to pay an equal share of the services they received which was accepted. The percentage was added later on upon the request of the legal department of the developer. The methodology accepted by the developer was to divide the service charges on an equal basis across all the leasehold properties for all the services, apart from buildings insurance. Buildings insurance was calculated on a square footage basis of the total square footage of phase 5.

126. Mr Syme said that the 1.5991% figure defined as being the Service Charge Percentage for the Property related to an estimated charge of £700.62 given a total estimated spend of £43,813.88, as shown on the spreadsheet. This was a global percent as one of 96 properties on this development and of 51 other flats that shared the internal commonways. The 1.599% figure included the calculations for the estate charges for freehold properties as well as the leasehold charges so in his view should not have been used as a percentage on the original leases particularly when the lease then also described the building as the block of 6 apartments as detailed on the plan.

127. Unfortunately, Mr Syme said that Nationspaces was not provided with copies of the original leases, only a sample for each phase which, as a generalised document, had the specific percentages and descriptions of the buildings excluded. It was only later that Mr Syme found that the solicitors incorporated this percentage into the lease for the Property.

128. During 2014/15 Mr Syme said that it became apparent that the original lease percentages were inconsistent. This followed enquiries from phase 3 residents following the service of proposed section 20 expenditure to redecorate the internal and externals of the common parts. Nationspaces raised this matter with the legal department of Gladedale and they arranged to supply copies of all the leases for the flats on all the phases that had completed to that date.

129. Mr Syme provided a spreadsheet showing the breakdown of the actual percentages listed on the front of each lease for this particular phase. He said the same applied for the other phases of the development with discrepancies across the board. Following consultation with the Second Respondent he said it was agreed to invoke clause 9.5 of the lease to formally record a change in the service charge percentages as defined by the residents' leases.

130. With regard to Schedule 7 and the Estate Charge Proportion Mr Syme said that he understood that the developer is not able to supply details of the number of habitable rooms for the properties as this was not information they retained. They were able to supply the number of bedrooms for all of the properties and this has been used as a substituted measure for calculating this portion of the charge.

131. Mr Syme provided an analysis of the various percentages and proportions which had been used to calculate how much each resident is to pay for their share of the service charge. These proportions and percentages are as follows:

a. 1.691 %: this is based on the total square footage of Flat 12 vis-a-vis the total square footage of the Estate: (i.e. 704/41,613.30). This percentage has been applied in respect of the insurance.

b. 1/28 (or 3.57%): Phase 5 was handed over in two halves and 12 Alder Court was in the first phase and the 1/28 was the number of flats in the first phase of management and as such is a historic apportionment which relates to specific years only.

c. 1/57 (or 1.75%): This is the number of Leasehold flats that benefit from using the courtyard areas. This apportionment only applies to the items of the service charge relating to the courtyards and the cost of the item is only charged to properties that have the benefit of the courtyards.

d. 1/96 (or 1.04%): There are a total of 96 properties on phase 5 once it was fully completed. This is the Estate Charge Proportion.

e. 1/51 (or 1.96%): The number of Leasehold flats that share the communal entrance halls (there are others with their own front doors to the street which do not pay for items related to the communal entrance halls).

f. 1/22 (or 4.54%): This is the number of apartments that benefited from the supply of euro bins from the council. This was based on the properties listed on the council's invoices. This apportionment only applies to the provision of bin item of the service charge and is only charged to leasehold flats that have the use of a euro bin.

g. 15.8052%: this is what is now being charged and is based on the square footage of flat 12 vis-a-vis the square footage of the Building.

h. 1.0256%: this is based on the number of properties making use of the Courtyard areas

i. 1.498%: This is based on a calculation of the Management and Administration charge, which is weighted heavily in respect of the leaseholders. Freeholders have significantly fewer services and therefore pay a lower cost by way of 'Management and Administration'. In 2011, a freehold paid £36.90 for M&A compared to a Leasehold property which paid £147.60. (Both of these figures also include VAT the net figures are £30.75 and £123.00 respectively). This higher figure incorporates the estate (freehold) charge. Therefore, the cost can be broken down to £110.70 Leasehold and £36.90 Estate equating to £147.60 in total. These are then used to calculate a percentage which equates to 1.498% for a Leaseholder. The fire risk health and safety assessment is again more for the benefit of the leaseholders and that is why the same percentage is used as for the M&A.

132. Mr Syme said that although the method adopted may appear to be a little complicated, he believed it ensured that each resident paid a fair and reasonable proportion towards the costs of maintaining their building and the Estate as a whole. He added that as an overall percentage figure for the leasehold flats and the Estate, the service charge as calculated was not substantially different from the 1.599% figure incorporated within the lease for the Property. However, as a Service Charge Percentage within the meaning of the Lease and as the Development has progressed it has become dated.

133. With regard to the communications between the Applicants and Nationspaces as Managing Agent, Mr Syme acknowledged that at various times over the years in question the Applicants did raise queries about their service charge invoices. These queries were responded to in a timely manner and at all times the Applicants expressed satisfaction at the explanations in response to their queries. Communication between the Applicants and Nationspaces was, until this Tribunal, very amicable and positive, with the Applicants offering thanks for the assistance offered to them. Whenever a query was raised, once they provided an explanation as to how their charge had been calculated, they accepted that explanation and moved on. He added that he was surprised that the Applicants issued a claim in the Tribunal as the exchange of correspondence was amicable and courteous and he was unaware of any continuing unease by the Applicants, He said the Applicants have raised many issues in their statement of case that they had remained silent about prior to the issuing of this application.

134. Ms Massey gave evidence in addition to her witness statement regarding the background to the Development in respect of the extent of the Estate. She referred to the Conveyance Plan in the Lease which identified Area 5 as the Estate. She said that although the roads in Area are adopted by the local authority all the verges and areas adjacent the roads are not and are maintained by the Management Company, i.e. Respondent 3.

Decision Regarding Apportionment

135. The Tribunal's task is to determine what proportion of the service charge the Applicants should pay under the Lease and whether such proportion has been charged and whether such charge is reasonable.

136. The reason for the matter having arisen is that the Lease refers to the Service Charge Percentage. This appears on the face of it to mean the proportion of the Service Charge to be paid by the Tenant, in this case the Applicants, for the service charge costs incurred in relation to the Building. The Building is defined in the Lease as being a specific block of 6 flats. However, the percentage is 1.5991% which does not appear to be sufficient because under Paragraph 6.1 of Schedule 5 it is intended that *the Landlord should recover 100% of the Service Costs in respect of the Service Charge if all the Units in the Building are let.*

137. The Applicants together with other tenants on the Development noted from the Service Charge invoices and accounts that different apportionments were

being made which did not relate to the Service Charge Percentage in any of the Leases.

138. The Tribunal started its determination by considering how the Service Charge provisions in the lease were intended to operate firstly with regard to Schedule 5 and the Building and secondly with regard to Schedule 7 and the Estate. In particular it noted the summary of the approach to be taken, provided by Lord Neuberger's in *Arnold v Britton and others* [2015] UKSC 36. The Tribunal *assessed the meaning of the Lease 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.*

Service Charge with regard to the Building

139. First it considered the service charge provisions for the Building with reference to the Service Charge Percentage. This only relates to Respondents 1 and 2.

140. It was submitted on behalf of the Applicants that the Service Charge Percentage was the portion of the Service Charge Costs that the Applicants should pay in respect of the Building. Therefore, they should only have to pay the specified percentage of 1.5991% of those costs. Although Clause 9.5 could be invoked to alter this amount it either had not been applied or applied incorrectly.

141. Alternative submissions were made on behalf of Respondent 1 and Respondents 2 and 3.

142. Ms England submitted on behalf of Respondent 1 that the Service Charge Percentage may have been intended to be applicable to exceptional costs only, referring to Paragraph 5.1.4 of Schedule 5. Otherwise she submitted that the apportionment was such amount as was fair and reasonable, referring to Paragraph 5.1.4 of Schedule 5.

143. Mr Ollech in his submission on behalf of Respondent 2 accepted that the Service Charge Percentage was intended by the drafter of the Lease to be the portion of the Service Charge to be paid by the Tenant, in this case the Applicants, for the costs incurred under Schedule 5 in respect of the Building. However, he said that the percentage that was stated was not clear. He questioned of what the 1.5991 % was a percentage and, as a portion of the costs relating to the Building as 12 – 22 Alder Court, it did not reflect a fair and reasonable amount.

144. He therefore accepted the Applicants' basic position. However, notwithstanding the percentage being stated, the apportionment and the definition of the Building could be altered under Clause 9.5 at any time, at the Landlord's discretion and without notice, provided it was reasonable to do so. He added that although the apportionment should be according to the floor

area of the flats and Nationspaces had applied an equal fraction to all the Leaseholders, nevertheless it was still reasonable.

145. Ms England's submission was plausible as the 1.5991% Service Charge Percentage appeared more likely to be the Applicants' proportion of a charge levied against all the properties on the Estate. In addition, Paragraph 5.1.1 does not refer to the Tenant paying the Service Charge Percentage of the Estimated Service Charge but 5.1.4 does refer to the Tenant paying the Service Charge Percentage where there is an exceptional cost which was not included in the Estimated Service Charge.

146. However, Clause 4.10 appeared to the Tribunal to refer clearly to the 'unexceptional' service charge. In addition, her submission meant that paragraph 5.1.4 of Schedule 5 would provide a further definition of the Service Charge Percentage when one had already been provided in Clause 1. Also Paragraphs 5.1.1 and 5.1.4 of Schedule 5 would still read satisfactorily if the Service Charge Percentage was the portion of the Service Charge to be paid by the Tenant.

147. The Tribunal did not therefore agree with this submission.

148. The Tribunal considered the Applicants' and Mr Ollech's submissions with regard to the Service Charge Percentage. First it found that the Service Charge Percentage was intended by the drafter of the Lease to be the portion of the Service Charge to be paid by the Applicants, for the costs incurred under Schedule 5 in respect of the Building.

149. Taking the Lease as a whole, Paragraphs 1, 2 and 3 of Schedule 5 require the Landlord to provide services in respect of the Building which are to be paid for by way of Service Charge. Clause 4.10 requires the Tenant to pay the Service Charge Percentage in accordance with Schedule 5. Clause 1 defines the Service Charge Percentage to be the amount specified in the Particulars which is 1.5991%. Paragraph 5.1.1 of the Schedule enables the Landlord to demand a reasonable Estimated Service Charge. It does not state what proportion of the Estimated Service Charge the Tenant is to pay but taking into account the Particulars and Clauses 1 and 4.10 it can be assumed to be the Service Charge Percentage. Paragraph 5.1.2 states that where there is an exceptional cost which was not included in the Estimated Service Charge, the Tenant's contribution to this exceptional amount is to be the Service Charge Percentage. It would have been helpful if in Paragraphs 5.1.1 or 5.1.2 the drafter had referred to the Tenant's contribution to the Estimated Service Charge as being the Service Charge Percentage. Nevertheless, overall the Tribunal found that these provisions support the view that the proportion of the Service Charge payable by the Tenant, in this case the Applicants, whether Estimated, actual or exceptional is the Service Charge Percentage.

150. This was also the view of Mr Syme of Nationspaces, the Managing Agents. Mr Syme said in his witness statement that the 1.5991% figure defined as being the Service Charge Percentage for the Property related to a calculation that he had initially undertaken when Nationspaces tendered for the Managing Agent contract. The calculation was based on an estimated total service charge of

£43,813.88 for the costs incurred in relation to both the leasehold flats and the Estate to which 12 Alder Court's contribution was estimated at £700.62. Mr Syme was asked by the Developer's lawyers to translate this overall estimated costing into a percentage which was 1.5991% (£43,813.88 being 100%). However, Mr Syme said that it was not communicated to him for what the percentage was to be used. The percentage was therefore supplied and used out of context when inserted in the Lease as the Service Charge Percentage.

151. Mr Syme's evidence in this respect was particularly helpful as it provided the reason and method of calculation for the figure of 1.5991%.

152. From Mr Syme's evidence it is clear to the Tribunal that the Applicants' contribution of 1.5991% of the costs of the Building as defined by the plan in the Lease as being 12-22 Alder Court, is not in accordance with Paragraph 6.1 of Schedule 5 where it states "*The intention of the provisions in this Schedule is that the Landlord should recover 100% of the Service Costs in respect of the Service Charge if all the Units in the Building (and other premises capable of separate occupation in the Building) are let on the basis that the tenants pay the Service Charge on terms substantially similar to those contained in this Lease.* There was no evidence to suggest that the Units were not let on the same terms. To fulfil paragraph 6.1. the Service Charge Percentage would need to be 16% or thereabouts.

153. Secondly, having determined the operation of the service charge provisions in respect of Schedule 5 and the role of the Service Charge Percentage the Tribunal considered the application of Clause 9.5.

154. The Tribunal noted the historical background to the Development, in particular the appointment of the Managing Agent and the apportionment of the Services.

155. The Tribunal found that Respondent 2, through its Managing Agent, had invoked Clause 9.5 from the time the Applicants signed their Lease, whether it had done so consciously or serendipitously. The Tribunal considered the words of Clause 9.5 to determine whether the Clause had been applied correctly. It looked at the natural ordinary meaning of the words.

156. First, the Tribunal found that Clause 9.5 can be invoked "At any time" provided it is reasonable to do so. It determined that there was no restriction on the time when the Clause could be applied nor was there any obligation to give notice to the Tenants. Therefore, the Tribunal decided that the invoking of the provision from the time the Applicants signed the Lease was not contrary to its provisions and that the invoice itemising the proportions in which the cost of the services were being charged on the invoice was sufficient to inform the Applicants that the Clause had been operated. The letter of the 11th May 2016 was merely confirmatory of what had been occurring since the Applicants had taken possession. It also determined that taking into account the progress of the development it was reasonable for Respondent 2 to apply the Clause.

157. Secondly the Tribunal found that the Clause stated the Landlord, again acting reasonably, "*may change the extent and number of Units comprised in the Building the extent of the Building the extent and number and location of car parking spaces the extent of the Common Parts of the Building the extent of the Estate*". The Tribunal determined that the Clause was comprehensive. There was no restrictions subject to the proviso of reasonableness. The Tribunal determined that the Landlord could extend the definition of the Building to include all the Leasehold properties in Area 5.

158. The Tribunal also determined that it was not unreasonable to do so. The Tribunal found that the service charge costs for the years in issue in respect of Schedule 5 related to cleaning, electricity and maintaining the grounds around the blocks which were common to all the blocks of leasehold flats. The Tribunal might have thought differently if they were to include external decoration as Alder Court has a brick finish but Sheep Way has a painted render finish. It is notable from Mr Syme's statement that the issue regarding apportionment on other Areas of the Development was only questioned when these works were to be carried out.

159. Although Mr Henry stated that the blocks were significantly different, at its inspection, the Tribunal found that both external and internal common parts were similar in size. Where flats did not have internal common parts, they did not pay for items relating to those services e.g. cleaning. In addition, only those who have use of euro bins contributed to them. It also found from the schedule of rent and repair costs for the years in issue overall the costs balanced out with some blocks costing more one year and others blocks costing more in another. In fact, the cost of repairs for 12 – 22 Alder Court was slightly more than the charge the Applicants paid. Taking these factors into account the method of apportionment used was not unreasonable.

160. Thirdly the Tribunal found that Clause 9.5 allows the Service Charge Percentage to be varied. However, such variation must *be calculated as near as may be as representing the proportion that the gross internal square measurement of the Demised Premises bears to the gross internal measurement of all parts of the Building forming Units or otherwise let or intended to be let.*

161. The Tribunal applied Lord Neuberger's test in *Arnold v Britton* and found that the ordinary natural meaning of the words of Clause 9.5 of the Lease were quite clear. The Tribunal also applied the additional guidance he provided and found that the method of apportionment required by the Lease was not contrary to commercial common sense, the words were not unclear nor did they produce an adverse or imprudent result for one party over another and were an expression of the parties' intentions.

162. However, the Tribunal found that the apportionment actually used by Respondent 2 had been on the basis of each flat paying an equal share and therefore it had not complied with Clause 9.5.

163. In anticipation of this finding Mr Ollech had submitted a further submission that the Applicants are bound by an estoppel by convention or by

acquiescence, from now challenging the apportionments and charges for the years in issue.

164. Mr Ollech referred the Tribunal to Lord Steyn's definition of estoppel by convention and acquiescence in *Republic of India v India Steamship Co Ltd ("The Indian Endurance and The Indian Grace')* [1998] AC 878 at 913 – 914.

165. Applying Lord Steyn's definition, for there to be an estoppel, Respondent 2 would need to assume a state of facts, which in this case is that the leasehold properties pay an equal share of the service charge and the Applicants then acquiesce to this arrangement. This need not be a formal agreement between the parties as to the assumption but it must be communicated.

166. The communication in this case is the invoice for the service charge which sets out the proportions in which the items of the service charge are to be levied.

167. The acquiesce is twofold:
Firstly, the correspondence passing between the Applicants and Nationspaces, the Managing Agent for Respondent 2. In particular. An email dated 24th May 2012 from the Managing Agent to the Applicants in which it was said by way of explanation that "*the bin hire charges are split by the properties...*
2-12 (evens) Rowditch Furlong,
26-36 (evens) Sheep Way,
2-8 (evens) Alder Court,
12-22 (evens) Alder Court.
The flat costs are divided equally (51), however there are 6 flats over garages that do not share commonway costs but pay towards the courtyard (57)".
This is followed by an email in reply dated 29th May 2012 in which the Applicants thank the Managing Agent "*for the explanation of the various splittings (among residents) of the charges levied".*
Secondly, the lack of challenge to, and payment, of the invoices which identify the apportionment.

168. The Tribunal found that the Managing Agent had continued to apportion the service charge in equal shares in the belief that its approach was acceptable to the Applicants. The method may not have been technically correct but it was not unreasonable. The Tribunal therefore determined that it would therefore be inequitable to retrospectively re-apportion the service charges for the years in issue.

Service Charge with regard to the Estate

169. With regard to the service charge provision for the Estate the Tribunal noted the submissions of the Applicants and Respondent 3.

170. Mr Calverley submitted on behalf of the Applicants that there was no Estate. All the grounds were either adopted by the local authority or came within the Block and so were part of the Building service charge.

171. Ms England for Respondent 1 and Mr Ollech for Respondent 3 submitted that there were areas which were neither within the curtilage of the blocks nor adopted by the local authority which formed the estate.

172. The Tribunal found on its inspection and from examining the Conveyance Plan of the Lease which depicted Area 5 that there were paths and areas of grass land bordering the roads (whether adopted or not) and paths and around the perimeter of Area 5 of the Development which formed the Estate. These areas would require maintenance, including grass cutting, litter picking and fencing.

173. The plan produced by Mr Calverley at page C 23 of the Applicants' Bundle was for a planning application and the markings and related key were not intended to identify the Estate of Area 5. The Conveyance Plan Identified Area 5 as the overall extent of the Estate. It also identified the area around Alder Court which was the area around the Building (the borders, courtyards and car parks) the maintenance cost of which was to be within the service charge for the Building. This could be extrapolated to identify all such boundaries. It was clear to the Tribunal that were all such boundaries of the Building(s) including freehold houses to be identified, there would still be an area which was not maintained within the curtilage of a Building and so would come within the definition of the Estate and Estate Communal Areas in Schedule 7.

174. The Tribunal determined that there was an Estate and Estate Communal Areas.

175. The Applicants submitted that if there was an estate then the apportionment of the Estate Charge for its maintenance was incorrectly apportioned. Reference was made to the definition of the Estate Charge Proportion which should be "*expressed as a percentage that the number of habitable rooms in the Demised Premises bears to the number of habitable rooms to be provided on the Estate*". Mr Calverley said that this had been calculated according to the number of units i.e .each unit paid an equal share there being 96 units.

176. Mr Ollech agreed that the calculation had been according to the number of units in Area 5 and this was confirmed by Mr Syme in his evidence. He said that the apportionment had been altered under Schedule 7. Part 1, Paragraph 1 of the Schedule defines the Estate Charge Proportion stating that it should be "*expressed as a percentage that the number of habitable rooms in the Demised Premises bears to the number of habitable rooms to be provided on the Estate or such other proportion determined by the Landlord as being fair and reasonable in the circumstances and notified to the Tenant in writing*

177. Mr Ollech submitted that an equal share was fair and reasonable and that statement of the apportionment on the invoices had been sufficient written notification to the tenants.

178. The Tribunal found that Respondent 3 had altered the Estate Charge Proportion to an equal share from the time the Applicants took possession of their flat. The Tribunal was of the opinion that the Service Charge invoice for the Estimated Charge is a formal document and determined that identification

of the proportion on it was sufficient written notification for the purposes of Part 1, Paragraph 1 of Schedule 7 of the Lease.

179. The Tribunal therefore determined that the Estate Charge was correctly apportioned.

Reasonableness of the Service Charge

Applicants' Submissions

180. Mr Calverley provided a written Statement of Case confirmed at the hearing.

181. Mr Calverley stated that cleaning services are provided by Care Group Limited and are Respondent 1 and 2's responsibility under Schedule 5. These include the following:
Cleaning of the Communal Area
Communal Area Window Cleaning
External Window Cleaning
Courtyard/Car Park Cleaning
Block Landscaping

182. Care group Limited produce two invoices every two months. One for Communal Area Cleaning, External Window Cleaning, Courtyard/Car Park Cleaning and Block Landscaping. The other is for Communal Area Window Cleaning. The rates have not changed during the periods 2011 to 2013. Mr Calverley referred to a letter from Care Group Limited dated 4th April 2017, (Copy in the Respondents' Bundle at page 954) providing a breakdown of the charges as follows:
Communal Area Cleaning (Fortnightly) £48.00 per building per month
Communal Area Window Cleaning (Monthly) £18.00 per building per month
External Window Cleaning (Monthly) £6.00 per property per month
Courtyard/Car Park Cleaning (Monthly) £20.40 per building per month
Block Landscaping (Monthly) £40.80 per building per month

183. Mr Calverley said that the sum of the parts agreed, when the Estate Landscaping charge had been extracted (as this is the responsibility of Respondent 3), leaving just the Block costs.

184. He said, extrapolated, the annual costs are as follows:

Cleaning of the Communal Area and Windows	£672
External Window Cleaning	£432
Courtyard/Car Park Cleaning	£245
Block Landscaping	£490

185. Mr Calverley said that these are labour intensive services where the cost is the product of frequency, duration and rate. What amounts to reasonable frequency is subjective and is a balance between 'nice to do and need to do'. From a contractor's point of view the greater the frequency the more lucrative. Duration is the product of efficiency and need. He then gave an analysis and related submission with regard to the figures in the Care Group Letter.

Cleaning of the Communal Area

186. He said the Cleaning of the Communal Area (referred to in the accounts as Commonway Cleaning) is carried out fortnightly at a cost of £20 plus VAT per visit, although the adjoining Housing Association flats are only cleaned every four weeks. Mr Calverley submitted that a reasonable frequency would be every three weeks. He said that the Applicants had observed that a two-person team took no more than 20 minutes to dust, wipe away hand marks on light switches and bannister rails and vacuum.

187. Mr Calverley submitted that a local rate would be £18.00 per hour including VAT making the annual cost for 3-week cleaning £208 or £624 if done fortnightly. He said that £208 for the Block would be reasonable.

Communal Window Cleaning

188. Mr Calverley said that the Communal Window Cleaning was carried out monthly at a cost of £15 plus VAT per visit per Building. He submitted that a reasonable frequency would be every two months. Daily traffic in the communal area is less than every 30 minutes and the communal area is smoke free. There are 10 panes of glass which he said, by way of illustration, that three people (the Applicants and he) had cleaned in 5 minutes.

189. Mr Calverley submitted that a local rate would be £18 per hour including VAT which would make the annual cost for bi-monthly cleaning £36 whereas the current cost is £216.

External Window Cleaning

190. Mr Calverley said that External Window Cleaning is carried out monthly for the whole Block at a cost of £5 plus VAT per flat. He submitted that a reasonable frequency would be two months considering that Milton Keynes has one of the cleanest air qualities in England. Some of the cleaning is by pole cleaning but he considered that it should be possible for a person to clean the windows of all six flats in an hour.

191. Mr Calverley submitted that a local rate would be £18 per hour including VAT which would make the annual cost for bi-monthly cleaning £108 whereas the current cost is £432.

Block Landscaping

192. Mr Calverley said that Grounds Maintenance (referred to as Block Landscaping in the accounts) is carried out monthly at a cost of £17 plus VAT per visit per block. He said that the actual grounds pertaining to the blocks are covered with slow growing shrubs and bark chippings which is common to new developments and are used extensively in Milton Keynes parks. He said that Milton Keynes Council attend the park bushes either annually or every six months.

193. Mr Calverley submitted that arguably a reasonable frequency would be 4 times a year for 3 hours on each occasion, Spring to Autumn. A local maintenance rate would be £20.00 per hour excluding VAT. There is no need for landscapers and waste can go in the green bin for the Block. He submitted that the annual cost should be £288 whereas the current cost is £530.

Courtyard/Car Park Cleaning

194. Mr Calverley said that Courtyard/Car Park Cleaning is carried out monthly at a cost of £8.50 plus VAT per visit per block. He said that the Applicants had never witnessed this being done and when the Applicants had left 'test' empty cans there they were not removed.

195. It was submitted that it would take 2 persons 5 minutes to walk around the area every two weeks collecting litter. A local maintenance rate would be £18.00 per hour including VAT giving an annual charge of £78 whereas the current cost is £265.

Fire Alarms and Emergency Light Service

196. With regard to Fire Alarms and Emergency Light Service Mr Calverley referred the Tribunal to the inspection when it was noted that the Block only had emergency lights. There were not fire or smoke alarms. He noted that there had been only one charge in 2015 for £180 for this but submitted that a charge of £50 would be reasonable.

Repairs and Renewals

197. Mr Calverley said that certain Repairs and Renewals had not been specifically identified on the schedule presumably because there were not invoices and that they related to minor matters such as bulb replacement. He submitted that £30 per annum would be reasonable rather than the amounts which were £14.75 in 2012, £43.48 in 3013, £164.12 in 2014 and £293.70 in 2015.

198. In response to the Tribunal's questions Mr Calverley clarified this point stating that he was referring to an item in the Repairs Schedule for each year for each block of "Portion of shared costs".

Accountancy

199. Mr Calverley submitted that the Accountancy charge was no more than checking the book keeping and considered that the cost should be about £30 for the Block.

Management Fees

200. Mr Calverley submitted that the Management Fees should be related to costs or works done and said that the RICS recommended 15%. He said the management was minimal in that all the cleaning etc was sub contracted, the bin hire was an annual contract, only odd repairs were required and the sending out of bills every 6 months. The RICS consider that management fees should not be charged on sinking funds, as these are, because prepayment of

costs will occur within expenditure later and so come within the management fees at that time. Management fees should also not be charged on included billing for other costs that have already borne a management fee such as Estate Charges. He submitted a 10% charge would be reasonable.

201. In response to questions from Counsel, Mr Calverley stated that his assessment of local hourly rates and time taken to carry out work was from his own experience in employing cleaners as a trustee of an organisation. He also said he had some past knowledge and experience of landscaping and gardening.

202. In response to the Tribunal's questions he said his case was based upon his own experience but did not have any comparative quotations from cleaning and gardening companies. The Tribunal said that in the absence of such evidence to compare, the Tribunal would consider his submissions based upon the evidence submitted in respect of the work and the knowledge and experience of the Tribunal members. It would take account of commercial hourly rates which would include insurance and the provision of materials and machinery.

Respondents' Submissions

203. Mr Syme submitted a written witness statement in evidence as the Managing Agent on behalf of Respondents 1 and 2 for the years in issue, which was confirmed at the hearing.

204. He said that Care Group Limited had been employed as the contractor for Communal Area and Window Cleaning, External Window Cleaning, Courtyard/Car Park Cleaning and Block Landscaping.

205. He said that Nationspaces is a large firm based in Glasgow that manages properties across the UK. They have a bank of contractors available for different development locations. These contractors are selected based on the following criterion:
    a. They must have been the lowest tender within a competitive tendering process for a development.
    b. To be retained on the panel there has to be a track record of quality service.
    c. The contractual services must be regularly completed within the timescales agreed.
    d. There has to be a low percentage of complaints received regarding the services provided.
    e. The onsite inspections must verify that the services are being adequately provided.
    f. Prices are also cross checked against the other contractors that are on the panel that have also met the above 5 criteria.

206. Care Group Ltd were selected because they were of a size that could cope with a development that started with 58 residences increasing to a final estimated level of 495 residences as subsequent phases were added. They can also provide services across the maintenance spectrum of cleaning, landscaping,

cleaning external windows, and general repairs. They have service standards that require checks by supervisors and regular visits from the Company Directors. He added that the new managing agents appointed by Respondent 1 are continuing with the services of Care Group as they are on their panel of contractors. Care Group also provide services for other Managing Agents including Trinity, RMG, Warwick Estates, MCS, Carrington's & SDL Bigwood.

207. For Commonway Cleaning, Commonwav Window Cleaning and External Window Cleaning there is a rolling agreement with Care Group which runs month to month with the ability of either party to give one month's notice to terminate the agreement.

Cleaning of the Communal Area

208. Mr Syme said that the Applicants object to the Commonways or internal communal area being cleaned fortnightly, but he said that the Rehouse Development was relatively affluent and the residents in this type of community prefer for cleaning to be done weekly, although sometimes fortnightly in order to keep costs down, as is done with Alder Court. He said that it is very unusual for developments such as this to have communal areas cleaned anything less than fortnightly, as leaving it any longer will result in poor cleanliness, which results in complaints from the residents.

Communal and External Window Cleaning

209. With regard to the **Commonway and External Windows** Mr Syme conceded that the frequency was a subjective decision, but given the locality and the overall cleanliness of the estate, it was considered reasonable to clean the external windows on a monthly basis. He appreciated that some people might believe this is more than is necessary, but he was unaware of an overwhelming wish by the residents to clean the external windows any less frequently.

210. He said that he was unclear on what basis the Applicants based their calculations on the time taken to carry out the work.

Courtyard/Car Park Cleaning & Block Landscaping

211. In respect of the Courtyard/Car Park Cleaning Mr Syme said that in his experience if the courtyard was cleaned for just half an hour over the course of a month, the residents would soon be complaining of litter and about its general appearance being untidy. With regard to the Block Landscaping Mr Syme said that the Applicant's suggestion that only 8 hours attendance was required is wholly unsubstantiated, and shows an apparent lack of understanding of the work that is actually carried out. He referred the tribunal to their Inspection and submitted that the courtyards, car parks and the landscaping around the blocks were well kept.

212. Mr Syme added that he was unclear where the Applicants had obtained a figure of £18.00 per hour as being the applicable as a "local commercial rate" for cleaning work. He said the hourly rate was not just a case of paying for

work done on a purely time spent basis. Other factors must be taken into account. For example, it may cost less to have the grass mown fortnightly rather than monthly over the course of a year.

Fire Alarms and Emergency Light Service

213. In response to the tribunal's questions Mr Syme said that the Fire Alarms and Emergency Light Service item was for two six monthly checks on the emergency lighting for the Block.

Repairs and Renewals

214. With regard to the portion of the Repairs and Renewals costs shared across the blocks of leasehold flats Mr Syme said that this item was where work had been carried out over several blocks and which could not be specifically attributed to one block. The works carried out under this item were identified in a table at the top of the Schedule and, as Mr Calverley included replacement of bulbs and gutter clearing by a cherry picker, the cost of hiring the plant being shared between all the blocks as it was used to clear the gutters on all the blocks.

Accountancy

215. The Accountancy fees are for producing the Service Charge accounts which must be certified by the Chartered accountants.

Management and Administration Charges

216. Mr Syme said the Management and Administration Charges are based on the property type. Leasehold properties receive the most services and therefore the cost is higher. The management fee is a set figure per property type and has to include the services of paying all the contractors for the services of cleaning, landscaping, electrical supply, maintenance and repairs, door entry and fire prevention systems. Accounts are also maintained for the development as well as the individual leaseholder. Service charge demands are issued half yearly and there are costs in collecting the service charges, chasing late payments and dealing with enquiries from residents. He said they also liaise with the Chartered Accountants to verify the expenditure and produce the annual accounts.

217. He added that Nationspaces had taken on other developments from larger property management firms and in each instance their fees had been lower than their predecessor for the same services. He said they regularly receive new business for which they competitively tender which he said demonstrated they are competitive and reasonable in the current market.

218. In response to the Tribunal's questions Mr Syme said he visited the site each year. He said that Nationspaces rely upon Care Group Limited's supervisors to ensure that work is carried out regularly and to a satisfactory standard and that the schedule was kept in each block which the cleaners were to sign. He said that in his experience leaseholders would let the managing agent know if

the work was not being carried out properly. He said that he did receive calls requesting work to be done e.g. a shrub overhanging a car park making difficult for a person to access the vehicle. Such calls are always acted upon.

219. He said they did not have a customer satisfaction survey but they kept records of any complaints and ask for comments. He said that the residents of Redhouse Park appeared to be very satisfied with the service they received and on average there were about two complaints a year.

Determination of Reasonableness of Service Charge

220. The Tribunal considered the submissions of the parties and the evidence adduced by the Managing Agent on behalf of Respondents 1 and 2.

Communal Area and Window Cleaning, External Window Cleaning, Courtyard/Car Park Cleaning and Block Landscaping

221. Mr Calverley had submitted that the charges for Cleaning including Commonway Area and Window Cleaning, External Window Cleaning, Courtyard/Car Park Cleaning and Block Landscaping were unreasonable. He had then put forward lower alternative costings based on a lower frequency of attendance by the cleaners and gardeners and a lower hourly rate. However, this was based on his and the Applicants' opinion and experiments. No commercial quotations or witness statements from members of the industry were produced to support this case.

222. In the Tribunal's experience, the fortnightly cleaning of the common parts is not unreasonable and is more often than not the preferred frequency by tenants as a balance between maintaining a standard of cleanliness and an affordable cost.

223. The Tribunal noted the two letters from Care Group Limited The first dated 4th April 2017 providing a breakdown of costs (copy at page 954 of the Respondents' Bundle) which was referred to by Mr Calverley and the second dated 30th June 2017 (copy at page 971 of the Respondents' Bundle) giving details of the firm and its operation. The rates specified in the first letter were per visit whereas Mr Calverley was assessing the cost based on an hourly rate.

224. In an attempt to reconcile the two, the Tribunal considered what would be a reasonable time to allow for the cleaning of the internal common parts of the Block both stairs well etc and glass. The time allowed cannot be a 'stop watch' approach but is an average time to be allocated for the task by a single cleaner. In its experience, the Tribunal considered that an allowance of an hour and a quarter should be made. On this basis, the current charge is £27.50 plus VAT per visit of an hour and a quarter. This would give an hourly charge of £22.00 plus VAT. The Tribunal found that in its experience that this was reasonable taking into account the ancillary costs of insurance and supply of equipment and the employee costs referred to in Care Group Limited's second letter.

225. Calculated on the same basis this would mean that two and three-quarter hours per month are allowed for Block Landscaping and car park cleaning.

The Tribunal found that in its experience this time allowance and hourly rate was reasonable.

226. No issue was raised with the standard of the work.

Fire Alarms and Emergency Light Service

227. The Managing Agents supplied Certificates of Inspection for two six monthly checks for the emergency lighting for the Block together with invoices for £60.00 plus VAT for each visit. In the absence of evidence to the contrary the Tribunal found that this was reasonable.

Repairs and Renewals

228. The Tribunal found that Mr Syme's explanation of the "Portion of shared costs" in respect of the Repairs and Renewals item and in the absence of evidence to the contrary determined them to be reasonable.

Accountancy Fees

229. The alternative charge for the accountancy fees of £30 submitted by Mr Calverley on behalf of the Applicants appeared to be based on his opinion and no comparable quotations were produced to support this case. Therefore, in the absence of evidence to the contrary determined them to be reasonable.

Management Fees

230. The Tribunal considered the Management Fees on a 'per unit per annum' basis as this enables a clearer comparison with other developments of similar size and type. Therefore, it calculated the management fee for the Property i.e. 12 Alder Court. The Tribunal noted that the charge for 2011 was £147.59 per unit and for 2012, 2013, 2014 was £152.04 and for 2015 was £156.60.

231. In the Tribunal's experience, these fees are reasonable subject to the standard of service.

232. The Tribunal found that there was no evidence to show that the Management Fee was unreasonable.

Payability

233. It was agreed that:
Respondent 1, Adriatic Land 2 Limited, is the current landlord and in respect of these proceedings is the landlord responsible for the services under Schedule 5 and to whom the Service Charge is payable for the years ending 31st December 2014 and 2015.

Respondent 2, Avant Homes (Central) Limited, is the previous landlord and in respect of these proceedings is the landlord responsible for the services under Schedule 5 and to whom the Service Charge is payable for the years ending 31st December 2011, 2012 and 2013.

Respondent 3 is the Management Company, Redhouse Park (CP) Limited, and in respect of these proceedings is responsible for the services under Schedule 7 and to whom the Estate Charge is payable for the years ending 31st December 2011, 2012, 2013, 2014 and 2015.

234. The Applicants alleged that the invoices issued by Nationspaces incorrectly identified Adriatic Land 1 (GR2) Ltd for the years 2014 and 2015 whereas the Landlord was in fact Adriatic Land 2 Limited.

235. Copies of the invoices were in the bundle. No representations were made by the Respondents regarding this.

236. The Applicants alleged in its Statement of Case that the Managing Agent had failed to include a Statement of Rights and Obligations with service charge demands. At the hearing Mr Henry was asked to confirm this. He said that he could not recall whether or not the documentation was included or not.

237. Mr Syme said that the service charge invoices were always sent out in compliance with the relevant regulations, and the Applicants have never raised any concerns in this regard prior to these proceedings.

Determination on Payability

238. The Tribunal confirms the payability to the Landlords and Management Company above.

239. The Tribunal finds that the invoices issued by Nationspaces incorrectly identified Adriatic Land 1 (GR2) Ltd for the years 2014 and 2015 whereas the Landlord was in fact Adriatic Land 2 Limited. These invoices are not payable until issued correctly.

240. The Tribunal found that in the absence of evidence to the contrary on the balance of probability a Statement of Rights and Obligations was included with the service charge demands.

Application under 20C Landlord and Tenant Act 1985

241. An application was made by the Applicant for the limitation of the Service Charge arising from the landlord's costs of proceedings and an order that the fees should be reimbursed.

242. Mr Calverley submitted that the Application had arisen due to the incorrect aggregation of the Service Charge under Schedule 5 for 2 to 12 Alder Court with all the other leasehold units in Area 5. The Applicants referred the Respondents to the Lease and requested that the Service charge be apportioned by Building and in accordance with the floor area of the Property. The Respondents disagreed and so the Applicants had no alternative but to bring the proceedings.

243. With regard to the Estate Charge under Schedule 7, Mr Calverley, said that this also had not been apportioned correctly.

244. He said that he had on behalf of the Applicants attempted to obtain a satisfactory settlement through mediation but failed to receive a satisfactory reply and therefore they had no choice but to commence proceedings.

245. Ms England for Respondent 1 said that with regard to the Apportionment, Nationspaces as the Managing Agents for all the Respondents had always sought to be scrupulously fair and transparent about the charges. The invoices had stated the apportionment clearly and the Applicants had raised no issue from 2011 until 2016. The method of apportionment of the Service Charge under Schedule 5 was inherited by Respondent 1. Having been put on notice that the Lease requires this apportionment to be in accordance with the internal measurements and not in equal shares, Respondent 1 is now adjusting it to be compliant with the Lease.

246. She submitted that the Lease clearly included a service charge and that it was intended that 100% of the costs of the services provided should be recouped. This included the Estate and it was unreasonable for the Applicants to claim that they were not obliged to pay for the maintenance of the grass verges and related areas.

247. She submitted that the claim that the Service Charge under Schedule 5 was unreasonable for the years ending 31st December 2014 and 2015 was wholly unsubstantiated. There was no attempt to bring comparative evidence and Mr Calverley had acted as a witness rather than a representative in his submissions.

248. Overall, she felt the Applicants had been used as a 'front' by the Residents' Association to challenge the apportionment and amount of the service charge to test whether liability could be avoided and that it was disingenuous of them to think otherwise. She therefore questioned the genuineness of the proceedings. She suggested that other methods such as variation of the Lease might have been tried if the Applicants or Residents' Association considered the apportionment of the service charge unfair.

249. In conclusion, she referred the Tribunal to Section 20C and submitted that it was unfair to hold Respondent 1 liable for costs. As the freeholder, its only return was the ground rent.

250. Mr Ollech for Respondents 2 and 3 agreed with Ms England. In particular he said that an attempt had been made by the Respondents to settle the matter but the Applicants Representative had taken a dogmatic and intransigent stance with regard to the interpretation of the Lease which vitiated against any negotiation.

251. In addition, Mr Ollech referred the Tribunal to the case of *Conway & Others v Jam Factory Freehold Limited* [2013] UKUT 0592 (LC).

Decision with regard to Section 20C

252. First, the Tribunal considered whether an Order under section 20C should be made against Respondent 1.

253. The Tribunal determined that the Service Charges incurred by Respondent 1 were reasonable. Therefore, in relation to this aspect of the application the Tribunal makes no order under section 20C.

254. The Tribunal found that neither the differential in the common parts or the size of the flats made an apportionment in equal shares, which in the Tribunal's experience is not uncommon in similar developments, unreasonable. In addition, the apportionment had been applied for a number of years without any objection being raised by the Tenants, including the Applicants, before Respondent 1 inherited it. Therefore, there was nothing to alert Respondent 1 to the Lease not having been strictly complied with in respect of the apportionment of the Schedule 5 Service Charge.

255. The Tribunal understands that Respondent 1, now being aware of the requirement in Clause 9.5 that the service charge calculated by reference to the gross internal square measurement, is now ensuring strict compliance.

256. The Tribunal therefore makes no order under section 20C in respect of Respondent 1's costs, there being no improper or unreasonable behaviour by the current Landlord.

257. Secondly, the Tribunal considered whether an Order under section 20C should be made against Respondent 2.

258. The Tribunal determined that the Service Charges incurred by Respondent 2 were reasonable. Therefore, in relation to this aspect of the application the Tribunal makes no order under section 20C.

259. The Tribunal found that Respondent 2 was entitled to alter the Service Charge Percentage under Clause 9.5 of the Lease and had acted reasonably in doing so.

260. However, it had not altered the Service Charge Percentage strictly in accordance with Clause 9.5 as it had made the proportion an equal share and not a percentage in accordance with the *"gross internal square measurement"* as required. In addition, the need to alter the Service Charge Percentage was as a result of the incorrect figure of 1.5991% having been specified. Although the percentage may have been specified by the Developer the implementation of Clause 9.5 and the apportionment of the equal share in respect of the Applicants' property was while Respondent 2 was the Landlord.

261. The Tribunal found the apportionment reasonable in spite of not strictly complying with the Lease and determines that it would be inequitable to re-calculate the charge. The Tribunal did not consider Respondent 2 had acted improperly or unreasonably, however, the Tribunal is of the opinion that as the initial drafter of the Lease there is an onus on a landlord to ensure that

provisions such as the apportionment of service charges, for which Respondent 2 was responsible, are set and applied in accordance with the Lease and duly explained to the Tenants and this was not done here.

262. The apportionment provisions have taken some argument to unravel. Notwithstanding the apparently dogmatic approach of the Applicants' representative with regard to the interpretation of the Lease, the Tribunal consider it unlikely that the matter would have been settled without recourse to proceedings for which it is just and equitable that Respondent 2 should take responsibility.

263. Therefore, the Tribunal makes an order under section 20C in respect of 50% of Respondent 2's costs.

264. Thirdly, the Tribunal considered whether an order under section 20C should be made against Respondent 3.

265. The Tribunal found that Respondent 3 had altered the apportionment of the Estate Charge in accordance with the manner expressed in the definition of the Estate Charge Proportion. There was no record of how many habitable rooms each unit (whether house or flat) had on the Estate and therefore it was reasonable for Respondent 3's Agent to consider an alternative method of apportionment. All the units on the estate (whether house or flat) have the same benefit from the Estate and therefore an apportionment of the Estate Charge in equal shares is reasonable.

266. The reasonableness of the costs incurred under the Estate Charge was not in issue.

267. The Tribunal therefore makes no order under section 20C in respect of Respondent 3's costs there being no improper or unreasonable behaviour by the current Landlord.

268. The Tribunal makes no order in relation to the Application fees.

Judge JR Morris

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.