



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case reference** : LON/00BG/LSC/2020/0170

**HMCTS code  
(paper, video,  
audio)** : V: CVPREMOTE

**Property** : 4 Edgemere House, 3 St Anne's Street,  
London E14 7QA

**Applicant** : Gerard Edmund Airey

**Representative** : In person

**Respondent** : (1) Metropolitan Housing Trust Limited  
(2) Avon Ground Rents Limited

**Representative** : (1) Mr John Beresford, counsel  
(2) Mr Tim Hammond, counsel

**Type of application** : For the determination of the liability to  
pay service charges under section 27A of  
the Landlord and Tenant Act 1985

**Tribunal members** : Judge Nicola Rushton QC  
Mr Peter Roberts DipArch RIBA  
Ms Lucy West, lay member

**Venue** : 10 Alfred Place, London WC1E 7LR

**Dates of hearing** : 16 November 2020 & 3 February 2021

**Date of decision** : 31 March 2021

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**DECISION**

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## **Covid-19 pandemic: description of hearing**

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the tribunal were referred to were in a bundle of 764 pages, the contents of which we have noted. The hearing was held over 2 days on 16 November 2020 and 3 February 2021 (reconvened through lack of time). The tribunal also received a skeleton argument and bundle of authorities from each Respondent shortly before the first day, and a skeleton argument from the Applicant immediately before closing submissions, all of which we have considered.

On 9 February 2021, the tribunal requested further submissions from the parties on a point of law, for reasons explained below, to be received by 19 February 2021, with a right of reply by 26 February 2021. Further written submissions were received from all 3 parties, with no reply submissions.

## **Decisions of the tribunal**

- (1) The tribunal determines that service charges for the calendar years 2017 and 2018 and interim service charges for the years 2019 and 2020 are payable by the First Respondent to the Second Respondent in the amounts set out in the Schedule attached to this Decision.
- (2) The issue of the amount of the service charges payable by the Applicant to the First Respondent as a consequence of those determinations is adjourned for them to seek to agree the figures to be paid by the Applicant, with permission to either party to bring this application back to the tribunal for a further determination if necessary.
- (3) The tribunal makes the further determinations as set out under the various headings in this Decision.
- (4) The tribunal directs that the parties shall send to the tribunal, copied to the other parties, written submissions on all issues of costs and fees (including under section 20C of the Landlord and Tenant Act 1985, paragraph 5 of schedule 11 to the Commonhold and Leasehold Reform Act 2002, and/or any tribunal fees paid by the Applicant) within 21 days of the date this Decision is sent to the parties, following which the tribunal will issue a further determination on those issues.

## **The application**

1. The Applicant has sought a determination under s.27A of the Landlord and Tenant Act 1985 (“**the 1985 Act**”) of the amount of service charges payable by the him under his sub-lease with the First Respondent, in respect of the service charge years: 1 April 2017 – 31 March 2018; 1 April

2018 – 31 March 2019; 1 April 2019 – 31 March 2020; and 1 April 2020 – 31 March 2021.

2. Given the close relationship between service charges under the Applicant's sub-lease and those under the head-lease between the First and Second Respondents, the parties are agreed that the tribunal should at this stage only determine the amount of the disputed service charges payable by the First to the Second Respondent, under the head-lease. The service charge years under that lease are the calendar years 2017, 2018, 2019 and 2020. It is agreed by the First Respondent and the Applicant that following receipt of this Decision, they will seek to agree the effect on the service charges payable by the Applicant, with permission to return to the tribunal if agreement cannot be reached. The tribunal makes directions accordingly.
3. The service charges demanded under the head-lease for 2019 and 2020 (and under the sub-lease for 2019-2020 and 2020-2021) are interim only, under the provisions for interim service charges under those leases. Any issue of reasonableness in relation to the interim service charges for those years falls to be determined under s.19(2) of the 1985 Act. Nothing in this decision affects the ability of any party to apply to the tribunal to determine the reasonableness and payability of the final service charges for those years, under s.27A.
4. Extracts of relevant legislation are set out in an appendix to this decision.

### **The hearing**

5. The Applicant ("**Mr Airey**") appeared in person. Mr Airey is a solicitor and partner at Ronald Fletcher Baker LLP, practising in employment law. The First Respondent ("**MHT**") was represented by counsel Mr John Beresford, instructed by in-house solicitors. The Second Respondent ("**Avon**") was represented by counsel Mr Tim Hammond, instructed by solicitors Scott Cohen. Several other tenants in the block observed the remote hearing: Craig Blazey (Flat 1) and his partner Carissa; Isabel McKiernan (Flat 5); Selma Lewis (Flat 13) (day 1 only); Nyangala Zolho (Flat 3) (day 2 only) and Stephen Wisdom (Flat 8) (day 2 only).
6. In addition to the bundle, the tribunal received further documents before, during and after the hearing as set out in the preamble above.
7. The application is dated 9 June 2020 and was originally only against MHT, which is Mr Airey's immediate landlord. Avon is the freeholder.
8. Directions were issued by Judge Professor Robert Abbey on 13 August 2020. These provided for Avon to be joined as Second Respondent and for MHT and Avon to disclose copies of all service charge accounts and

estimates. They then provided for Mr Airey to complete a schedule of all items of service charge in dispute; to provide copies of alternative quotes and any other documents; to provide a statement of his case including legal submissions so far as not in the schedule, and any signed witness statements on which he relied. MHT and Avon were then to complete the schedule with their case, provide copies of any relevant invoices and documents, their statements of case in reply and any witness statements on which they relied. There was provision for a supplementary reply from Mr Airey.

9. The hearing was originally listed for one day on 16 November 2020, but it was not possible to complete it on that day. It was reconvened for a further day on 3 February 2021, allowing for the parties' availability.
10. The tribunal heard live evidence by video from Mr Yaron Hazan for Avon on the first day, and from Ms Marissa Kirby and Mr Robert Kuszneruk for MHT on the second day, all of whom had provided signed witness statements, with statements of truth. They were cross examined, and also answered questions from the tribunal. The tribunal then heard oral submissions from all three parties, having received written skeleton arguments (as set out above).
11. Mr Airey did not provide a statement of his case or any witness statements from himself or any other person, but relied on his case as set out in his application and in the schedule as completed by him. He did not therefore give oral evidence but only made submissions on the other oral and documentary evidence, and the law. This has placed limitations on what the tribunal can properly draw from his oral statements and submissions: it cannot treat them as evidence, even though it was inevitably difficult for Mr Airey to avoid straying into making statements based on his own knowledge where there was a dispute.
12. On 31 January 2021, Mr Airey made an application to the tribunal by email to put in evidence 9 further photographs, which he said post-dated the first day of the hearing, and he asked that Mr Hazan be recalled for further cross examination on them. Mr Hazan's evidence had been completed on the first day, but he made himself available for the reconvened hearing.
13. The application was heard at the start of the reconvened hearing. Mr Airey submitted that the photos all concerned matters which had arisen since 16 November 2020, relating to services including gardening, and recent communications with Mr Airey's block, Edgemere House.
14. The application was opposed by MHT and Avon on the grounds that the time available was tight; the relevance of the documents was unclear; Mr Airey had not put in any witness evidence on these issues himself and there was no supplementary witness statement from him explaining the

significance of the photos; and they had been sent to MHT and Avon so late as to amount to an ambush.

15. The tribunal determined that it would exclude the further photos and not recall Mr Hazan for further cross examination. Its reasons were given orally to the parties at the time, and were that (a) there was already real pressure of time to complete the hearing in one day and Mr Hazan's evidence had been completed; (b) since there was no witness evidence from Mr Airey explaining the photos or previously covering the issues to which they related, the extent to which further cross examination of Mr Hazan on them could add any value was limited. The hearing then proceeded, finishing at 4.45pm on that day.

## **Background**

16. The property which is the subject of this application is Flat 4 in a block called Edgemere House ("**Edgemere**"). Edgemere contains 17 flats and also 3 commercial units. It is one of 7 blocks in a mainly residential development known as Canary Gateway ("**the Estate**") which was constructed about 5 years ago. A canal and towpath run alongside the Estate, and the external communal areas are open to public access. Four of the blocks have roof gardens (not including Edgemere). There is an estate office in one of the other blocks, Elite House. The Estate also includes an underground carpark, although it appears none of the tenants of Edgemere have parking spaces there.
17. A plan of the site and a number of photographs of parts of the building or surrounding area were provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider one was necessary to resolve the issues in dispute, nor practicable given Covid-19 restrictions. At one stage during the first day of the hearing, Mr Airey with the permission of the tribunal pointed his laptop camera out of his window to show the tribunal what he said was the condition of the roof of the bike shed below (which was similar to that shown in photographs in the bundle of the same scene on earlier dates).
18. Edgemere and two other blocks, Vale House and Wessex House, are each held by MHT under separate head-leases from Avon. A copy of the 999-year head-lease relating to Edgemere, dated 19 August 2015 and originally made between Landeck Investments Ltd as landlord and MHT as tenant, was in the bundle ("**the Head-Lease**"). The Head-Lease is registered at HM Land Registry under Title Number AGL354430. The property demised to MHT under the Head-Lease comprises only internal parts of the various floors of the block, and not the structural parts, which are retained by Avon. MHT is a Community Benefit Society (registered number 16337R).
19. MHT has granted 17 shared ownership underleases to tenants. These include a 125-year, 50% shared ownership lease of Flat 4, commencing

28 February 2017, which was granted to Mr Airey, a copy of which was also in the bundle (“**the Sub-Lease**”). The Sub-Lease is registered at HM Land Registry under Title Number AGL407581.

20. Specific provisions of the Head-Lease and Sub-Lease will be referred to below, where appropriate. In contrast to Edgemere, flats in Vale House and Wessex House are let by MHT on short term tenancies.
  21. Both the Head-Lease and the Sub-Lease include provisions requiring the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The Head-Lease makes provision for both Block Service Charges and Estate Service Charges, as outlined below. In practice the great majority of the service charge said to be payable by Mr Airey to MHT is a contribution to service charges said to be payable by MHT to Avon.
  22. Avon has engaged Y&Y Management Ltd (“**Y&Y**”) to act as estate manager on its behalf, for the whole Estate.
  23. Mr Hazan is an employee of Y&Y, and is the assigned property manager for the Estate. He does not work on site, but at Y&Y’s offices. Mr Kuszneruk and Ms Kirby are employees of MHT. Mr Kuszneruk works as a senior service charge officer and Ms Kirby as a housing services officer, in each case with responsibility for Edgemere. Y&Y also employ a Mr Ernest Ofori as site supervisor, who is based in the estate office.
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24. It was agreed by all parties that Mr Airey had standing to challenge the reasonableness and payability of service charges from MHT to Avon under the Head-Lease, following the decision in *Oakfern Properties Ltd v Ruddy* [2006] EWCA Civ 1389.
  25. It is not in dispute that MHT is entitled under the terms of the Sub-Lease to recharge to Mr Airey a “fair proportion” of the service charges which are properly payable by MHT under the Head-Lease. It follows that insofar as the tribunal may determine that any of the service charges claimed by Avon from MHT are not payable, or that a reasonable amount would be less than that claimed, a consequential reduction should be made to the service charges payable by Mr Airey to MHT, so far as a proportion of those service charges have been recharged by MHT to him.
  26. There is also a dispute as to the period for which Mr Airey has in fact been charged service charges and whether this included any period before his lease commenced.

### **The issues**

27. The issues which arise for determination by the tribunal are as follows:

- (i) Whether there is provision under the Head-Lease for service charges for portage/concierge services;
- (ii) Whether the tribunal should reach its own decision as to the fair and reasonable proportion of Estate service charges to be attributed to Edgemere, or whether it is limited to reviewing whether Avon's decision was within a reasonable range of possibilities;
- (iii) Whether the 2017 and 2018 service charges for (1) portage/concierge, (2) estate office and (3) communal landscaping are payable by MHT and reasonable, in view of the extent to which such services have been provided to Edgemere;
- (iv) Whether the 2017 and 2018 service charges for the following further items are payable by MHT and reasonable: (4) lift maintenance; (5) lift telephone; (6) management fees; (7) audio entry system (2018); (8) CCTV (2018); (9) pump maintenance (2018); (10) staff supplies (2018); and (11) TV/satellite (2018);
- (v) Whether the interim service charges for 2019 and 2020 charged to MHT for (most of) the above items are payable and reasonable, plus: (12) general maintenance; and (13) engineering insurance;
- (vi) Whether Mr Airey has been charged service charges for a period before the Sub-Lease commenced. It is agreed by the parties that this would be wrong in principle if it has occurred;
- (vii) Whether it is open to Mr Airey to dispute the proportion of MHT service charges payable by him (charged as 5.99% of the total) and if so, what that proportion should be.

28. For (iii), (iv) and (v), the tribunal has completed the parties' Schedule with its conclusions, as attached to this decision.

### **The terms of the Head-Lease and Sub-Lease**

- 29. Avon has an obligation under clause 5 of the Head-Lease to provide "Services" to MHT. These are defined in clause 1 as meaning the services set out in the Sixth Schedule, which Avon covenants it will provide, and also such of the services set out in the Seventh Schedule as Avon may from time to time provide. Where Avon has a discretion to provide services it is obliged to exercise this properly and reasonably in the interests of good estate management.
- 30. The services in dispute are said by MHT and Avon to fall variously under either the Sixth and/or Seventh Schedules. MHT does not dispute that

these schedules provide for all of the services in issue, and Mr Beresford produced a helpful table setting out which term is said to make provision for which service. The detailed terms of the schedules will be considered below insofar as relevant to particular heads of dispute.

31. With one important exception, Mr Airey does not dispute that the Head-Lease requires or permits the services in issue to be provided. The exception is that he contends it makes no provision for a porter or concierge.
32. By clause 3 of the Head-Lease, MHT covenanted to perform the obligations in the Fourth Schedule. Paragraph 3 of that schedule requires MHT to pay a fair and reasonable proportion of the outgoings, expenses or assessments of the demised property, and of other parts of the Block (being Edgemere House) and the Estate. Paragraph 10(a) requires MHT to pay the "*Block Service Charge Proportion*" of such costs, charges and expenses as Avon has reasonably and properly designated "*Block Service Charge*" items. Paragraph 10(b) requires MHT to pay the "*Estate Service Charge Proportion*" of such costs, charges and expenses as Avon has reasonably and properly designated "*Estate Service Charge*" items.
33. By clause 1:
  - (i) A Block Service Charge Item is defined as "*an item of expenditure which is properly and reasonably incurred by [Avon] in providing the Services (or any of them) which is for the benefit of the lessees of the Block.*"
  - (ii) An Estate Service Charge Item is defined as "*an item of expenditure which is properly and reasonably incurred by [Avon] in providing the Services (or any of them) which is for the benefit of the lessees of the Estate.*"
  - (iii) "*Block Service Charge Proportion*" means "*such fair and reasonable proportion as the Landlord shall from time to time reasonably determine*"; and,
  - (iv) "*Estate Service Charge Proportion*" means "*such fair and reasonable proportion as the Landlord shall from time to time reasonably determine.*"
34. Paragraph 11 of the Fourth Schedule makes provision for twice yearly interim service charges on 1 January and 1 July, of half of the amount Avon has reasonably and properly estimated prospectively as payable by MHT under paragraph 10.
35. Avon has an obligation under paragraph 10 of the Sixth Schedule to keep proper books of account of the costs and expenses of providing the



Services and managing the Estate, and to produce a certificate of the total expenditure in the year and of the proportionate part payable by MHT, taking account of advance payments made.

36. Paragraph 12 of the Fourth Schedule provides for MHT to make any balancing payment to Avon within 28 days of receiving such a certificate. In practice Y&Y on behalf of Avon has arranged for service charge accounts to be prepared and for a final service charge statement, and invoice for a balancing charge, to be issued. This has only been done for 2017 and 2018.
37. There are two bases on which MHT puts its right to recharge service charges to Mr Airey under the Sub-Lease.
38. The main service charge provisions are in clause 7 of the Sub-Lease. Clause 7.1 is Mr Airey's covenant to pay the "Service Charge" to MHT. It is to be paid by equal instalments in advance at the same time as the rent, i.e. monthly.
39. Under the Definitions in Schedule 9, "Service Charge" is defined as the "*Specified Proportion of the Service Provision*". "Service Provision" is defined as the sum calculated in accordance with clauses 7.3 – 7.5. "Specified Proportion" is defined in the Particulars as "*A fair proportion assessed by the Landlord at its reasonable discretion...*".
40. The Specified Proportion has been set by MHT at 5.99% for Flat 4. Mr Kuszneruk explains at paragraph 13 of his statement that this has been calculated by applying a weighted bed method, Flat 4 having 2 bedrooms.
41. Clause 7.4 of the Sub-Lease provides that "Service Provision" includes all of the expenditure reasonably incurred by MHT in connection with repair, management, maintenance and provision of services for Edgemere and the Estate. It expressly covers both the costs of MHT complying with its own repair/insurance etc obligations, and also its costs of complying with its obligations under the Head-Lease, which it covenants to perform by clause 5.10. It also expressly includes MHT's own reasonable management costs for Edgemere (7.4(c)).
42. This means that "Service Provision" extends to MHT's costs of meeting any Block Service Charge and Estate Service Charge for which it is liable under the Head-Lease. This is not in principle disputed.
43. Clause 7.2 provides that the Service Provision under the Sub-Lease shall be calculated before the beginning of the Account Year (which runs from April to March). Clause 7.5 provides for MHT to determine and certify the difference between anticipated and actual expenditure as soon as practicable after the end of the account year, and any excess/deficiency is to be immediately allowed/paid thereafter.

44. The second basis on which MHT asserts a right to recharge any service charges for which it is liable to Avon is under clause 3.36 of the Sub-Lease. This obliges Mr Airey to pay the “Headlease Proportion” to Avon or MHT. “Headlease Proportion” is defined in Schedule 9 as meaning “*a fair proportion of the amounts due under the Headlease including but without limitation the Service Charge as defined in the Headlease*”.
45. The only item charged by MHT to Mr Airey as a service charge which does not also reflect a service charge from Avon, is MHT’s own management fee. Accordingly, all of the service charges to Mr Airey except the MHT management fee may in principle fall within clause 3.36 as well as under the ordinary service charge provisions in clause 7. This is of course subject to whether they are payable and reasonable.

### **Documentary records as to the service charges**

46. MHT and Avon have both disclosed documentary evidence relating to service charges which have been charged under the Head-Lease and the Sub-Lease. Those records show that:
- (i) In practice, in its Statements of both Anticipated and Actual Service Charge Expenditure, Avon does not distinguish between Estate and Block service charges. All expenses are said to fall under the heading “Estate Service Charge”. Different percentages are applied to different types of expenditure: MHT is charged 6.9468% of the Estate total for some types of expenditure and 7.431% for others, but it all falls under Estate Service Charge. The higher percentage appears to relate to expenditure on residential-only parts, although this is not made clear. The twice yearly advance service charges invoiced by Avon to MHT are based on these Statements of Anticipated Service Charge Expenditure.
  - (ii) The Service Charge Accounts which have been prepared for the years ending December 2017 and December 2018 do include three types of service charges: (1) Estate Service Charges; (2) Building Service Charges and (3) Car Park Service Charges. However, it is clear that the final Statements of Actual Service Charge Expenditure sent to MHT include only the items under (1), i.e. MHT’s percentage of the Estate Service Charges. As a consequence, the invoices for balancing charges sent to MHT also include only that expenditure. It is assumed therefore that (2) and (3) relate to other parts of the Estate. The great majority of the overall expenditure falls under (1), totalling £394,869 in the 2017 accounts and increasing to £549,590 in the 2018 accounts for the whole Estate.
  - (iii) Mr Airey has been sent Notices of the estimated monthly service charges for the coming year in February 2018 (for 2018-19), 2019 (for 2019-2020) and 2020 (for 2020-21). It is notable that

although the estimate dated 14 February 2019 stated that the service charges for 2019-20 would increase from £88.29 p.m. to £142.37 p.m., this change was not implemented. This is clear from the estimate dated 13 February 2020, which states Mr Airey had been paying a total of £707.10 p.m. including a service charge of £88.29 in the previous year, taken together with his account statements which show he was indeed paying £707.10 p.m. over that period. In February 2020 the estimate stated his service charge would increase to £181.73 and an overall monthly payment of £800.96. The account statements record that this is indeed what he has been paying monthly since 1 April 2020.

- (iv) Mr Airey has also been sent end of year reconciliations in September 2018 (for 2017-18), 2019 (for 2018-19) and 2020 (for 2019-20). The first of these stated that it covered a period starting 1 April 2017, i.e. after Mr Airey's lease commenced. The final reconciled figure for Avon expenditure which was recharged by MHT to the Edgemere tenants for that year was £17,654.44, of which Mr Airey was billed 5.99%, or £1,057.15.
- (v) MHT has produced a summary, in the bundle, of the apportioned Avon invoices which made up the figures for Avon service charges in each of the annual reconciliations sent to Mr Airey. That summary is consistent with the actual Avon invoices in the bundle. It records accurately that for 2017-18, all that was included in the reconciliation was the second on-account invoice of £8,889.62 for July-December 2017 and half of the first on-account invoice for January-June 2018 (£8,764.82, i.e. half of £17,529.64). These two total £17,654.44, as in the reconciliation.
- (vi) MHT further says that through an oversight it never recharged the balancing charge of £19,531.23 for 2017 to the Edgemere tenants, which was billed to it by Avon on 28 June 2018. This is consistent with the documents in the bundle, and the tribunal so finds. There is no evidence that that balancing charge has ever been recharged, and all the sums which have been recharged can be accounted for by other Avon invoices.
- (vii) Mr Airey complains, with some justification, that the reconciliation service charge statements from MHT do not include any breakdown of Avon's recharged service charges. There is a single, undifferentiated figure for the recharged service charges, described as "Third Party/Managing Agent". It is only possible to tell what this comprises from Avon's Statements to MHT. (It is clear from Mr Airey's Application that he was provided with a breakdown of the figures promptly at his request, on 3 October 2019, but it seems clear that the Avon Statements are not provided to the tenants as a matter of course.) MHT's

managing agent fee of £150 is then charged separately on the reconciliations, as is an auditor certification fee.

- (viii) MHT's reconciliation statements to Mr Airey include two headings, Total Estate Expenditure and Total Block Expenditure, the latter having a percentage of 5.99% applied. The lump sum service charge from Avon is included entirely under the "Block Expenditure" heading on all the reconciliation statements. Like Avon, MHT makes no attempt to differentiate between Estate and Block expenditure, however MHT describes the Avon recharge wholly as "Block Expenditure".
  - (ix) When the 2018/2019 and 2019/2020 reconciliations were prepared, MHT had not yet received (and still have not received) final accounts or final statements of service charges for 2019 or 2020 from Avon. The 2018/2019 reconciliation records total Avon charges of £34,933.02, and 2019/2020 records total Avon charges of £39,573.09. MHT's summary (supported by the invoices from Avon, apportioned to MHT years) shows that the 2018/2019 figure of £34,933.02 comprises only interim Avon service charges for 2018/19. The 2019/2020 figure of £39,573.09 includes interim Avon service charges for 2019/20 and the 2018 Avon balancing charge.
  - (x) Accordingly, it is clear that when recharging Avon service charges, MHT treats them as payable by the sub-tenants in the service charge year in which the invoices are received by MHT, not the year that the underlying Avon service charges related to. It seems likely that this has contributed to the variability and unpredictability of the service charges from one year to the next that Mr Airey has complained of, but it is not inaccurate.
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- 47. The tribunal has concluded that it is clear from these documents that Mr Airey has not been charged any service charges relating to any period before the commencement of his tenancy on 28 February 2017, and the tribunal so determines. Indeed he has not been charged service charges for any period before 1 July 2017.
  - 48. Avon has also disclosed copies of extracts from computerised ledgers kept by Y&Y, recording the items of service charge expenditure which have been incurred in the years in question.
  - 49. Disclosure has been provided of email complaints from Mr Airey about service charges and what services were or were not being provided to Edgemere by Avon. In particular, on 3 October 2019 Mr Airey sent a long and detailed email to Parm Jagdev at MHT setting out a list of services allegedly provided to Edgemere and contesting whether they had in fact been provided and/or whether the amounts were reasonable. From its

contents, it appears this list was prepared from sight of either the Avon service charge accounts or final Statement to MHT.

50. This and related complaints from a large number of other Edgemere tenants were investigated by Ms Kirby. The bundle included an email from Mr Kuszneruk of 12 June 2020 to all the Edgemere tenants, which was said to contain the conclusions of MHT's investigations, but consisted substantially of reporting back Y&Y's responses to Mr Airey's complaints. Also disclosed was a list of queries, with highlighted responses from Mr Hazan at Y&Y, which it appears was based on Mr Airey's email, and informed Mr Kuszneruk's email. It was clear from the witness evidence that the tenants were not satisfied with the reply of 12 June 2020 and that Ms Kirby's investigations continued. However the investigation was suspended once MHT became aware of Mr Airey's application.

### **The witness evidence**

51. Mr Hazan of Y&Y gave evidence on behalf of Avon on the first day. He was extensively cross examined by Mr Airey and also to a lesser extent by Mr Beresford on behalf of MHT. Mr Hazan works in Y&Y's offices and not onsite. His witness statement set out for each of the items in dispute details of why it was his and Avon's position that the services were provided and the charges were reasonable and payable.
52. In the tribunal's view Mr Hazan was able to give effective evidence as to the budgeting and accounting for service charges; what costs had been incurred for the different heads of service charge and why; and what Avon considered should be included under different heads of charge. However it considers that he was significantly less able to give effective evidence as to whether and how effectively services were actually carried out on the ground. The tribunal gained the clear impression that in some respects his evidence was how the services should be provided, not how they were being provided. He did not accept that there was any difference in the services provided to Edgemere as compared to other blocks, saying that he believed they had the same services as everyone else.
53. There was no oral evidence from Mr Ofori or any other site supervisor as to the position on the ground.
54. Ms Kirby gave evidence on the second day, as to the steps she took to investigate the tenants' complaints about the provision of services at Edgemere. In her witness statement she set out some of her conclusions as to which services were being provided and how well. She said she had visited about every 3 months since Covid restrictions were lifted in the summer.

55. It was clear from both her statement and oral evidence that the tenants were not happy with the response in the email of 12 June 2020, that her investigations continued, and that the apparent acceptance of Y&Y's position in that email was not MHT's final conclusion. She said that the tenants were "eyes and ears" for her, and while she accepted that she had not taken the initiative to ask tenants about their experience, she said a few had approached her and that she took on board their concerns. She accepted that she should have emailed all the tenants for their views originally, but she said she had been following up with Y&Y their complaints as to the lack of services. Her evidence was that, following her investigations, she had concluded concierge services had not previously been provided to Edgemere, and that after this had been raised as an issue, they started being provided in about June 2020 (albeit with Covid restrictions).
56. Ms Kirby gave the overall impression of having been genuinely concerned to properly investigate and respond to the tenants' complaints, including being willing to continue to investigate when it was made clear to her by tenants that Y&Y's responses as reflected in the email of 12 June 2020 were not wholly accurate. She was also willing to make concessions when giving evidence where this was appropriate. MHT's position is more independent than either Avon or the tenants including Mr Airey, being in part a mediator between them. Where Ms Kirby's evidence has differed from Mr Hazan's, the tribunal has for these reasons preferred that of Ms Kirby.
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57. Mr Kuszneruk's evidence on behalf of MHT was mainly directed to the mechanisms by which service charges were charged and recharged, including why they have substantially increased over the years since 2017. He was also the individual who formally responded to Mr Airey's complaint. He acknowledged there had been a gap of about four or five months between his original acknowledgement in October 2019 and Mr Airey's further enquiry by email in March 2020. He said that from September 2019 MHT had received service charge challenges from the residents of every one of the 17 flats. He said there were about 40 email chains with other residents as well as the 3 with Mr Airey. He said they reviewed this and raised the points made with Y&Y and that this took time. He also accepted that their communications system with tenants was not perfect and in particular there was no facility to remind them of emails which had not been responded to. In addition he had been absent for personal reasons in March 2020.
58. His evidence was that there were 5 tenants, not including Mr Airey, who were most active in raising the issues with services and service charges for Edgemere. Following the email of 12 June 2020, he had received a large number of responses immediately from tenants, relating to inconsistencies between the responses from Y&Y and what was actually happening. He said they recognised that further review and investigation was required. MHT considered the tenants were making valid points, but

then they became aware of Mr Airey's application, so it became necessary to consult their legal team and the investigation essentially stopped.

59. Overall the tribunal's conclusion was that Mr Kuszneruk gave balanced and careful evidence, that MHT had genuinely sought to investigate the tenants' concerns.
60. Reference is made to the witnesses' evidence in relation to specific service charge items where relevant below.

### **The tribunal's determinations**

61. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as to the service charges payable by MHT as follows.

### **Whether there is provision for a concierge/porter under the Head-Lease**

62. Mr Beresford took a preliminary point that the question of construction was not raised by Mr Airey in the Schedule or in any prior legal argument. The tribunal considers however that it was legitimate for the point to be raised at the hearing and now determined since (i) payability of service charges for a concierge/porter was certainly put in issue; (ii) the point could readily be argued and determined on the available material and (iii) it is a point on the Head-Lease, which needed to be disclosed by MHT/Avon first.
63. Mr Airey's key point was that there was no clear and express provision for a concierge or porter in either the Sixth or Seventh Schedules to the Head-Lease. It should be noted that this is therefore a point which relates to the whole Estate and not only Edgemere.
64. It is correct that there is no explicit reference to any obligation or power to provide a concierge or porter in those Schedules. The issue is therefore whether this would either fall within one of the broader provisions, or is to be implied from other parts of the Schedules or Head-Lease.
65. Mr Beresford relies on paragraph 23 of the Seventh Schedule to the Head-Lease in his table, supported by Mr Hammond. This permits Avon to: "*Provide a management office or concierge suite for use on the Estate (and to pay a reasonable rent in relation thereto provided that if the management office or concierge suite is within the Common Parts then the Landlord shall be entitled to a reasonable rent payable from the Service Charge for the provision thereof plus VAT if applicable).*"

66. Mr Beresford and Mr Hammond submit that provision for a concierge suite necessarily implies a discretion to provide a concierge. In addition paragraph 11 of the Seventh Schedule permits Avon to employ or engage persons in connection with the provision of the Services, which it is submitted could extend to a porter/concierge.
67. The tribunal accepts the submissions on behalf of MHT and Avon on this issue, and concludes that the terms of the Seventh Schedule do permit Avon to engage a concierge(s) or porter(s), by necessary implication under paragraph 23 and also if necessary under paragraph 11.

**Correct approach to the issue of reasonable apportionment of service charges to Edgemere**

68. As set out at paragraph 33 above, both the Estate and Block service charge proportions are defined in the Head-Lease as “*such fair and reasonable proportion as the Landlord shall from time to time reasonably determine*”. Further, by paragraph 10 of the Fourth Schedule, it is Avon which is to “*reasonably and properly designate*” a Service as either a Block or Estate Service Charge Item.
69. One of the main issues which was raised by Mr Airey, in his Application, the Schedule and his submissions, was whether it was reasonable for the tenants of Edgemere to be required to contribute by way of service charge to services, including the porter/concierge, estate office and communal gardening, from which he submitted Edgemere tenants did not receive any benefit, alternatively proportionately far less benefit. His case, on the facts, was that Edgemere tenants had not been permitted to use the concierge services based in Elite House and were not permitted to use the roof-gardens which are on 4 of the other blocks or the garden in Keymer Place.
70. In his skeleton argument and oral submissions on behalf of Avon, Mr Hammond made the positive submissions on these issues that Avon had a discretion (a) in determining what was a reasonable proportion to allocate to Edgemere and (b) in designating a charge as either an Estate or Block service charge, which could only be reviewed by the tribunal applying *Wednesbury* principles<sup>1</sup>. He submitted the tribunal could not substitute its own view as to what was a reasonable proportion or designation, in reliance on the decision in *PAS Property Services Limited v. Hayes*<sup>2</sup>.
71. Following the hearing, the tribunal became aware of the recent decision of the Court of Appeal in *Aviva Investors Ground Rent GP Ltd v.*

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<sup>1</sup> i.e. that its decision should not be interfered with so long as it was within the range of reasonable possibilities, and was not unreasonable.

<sup>2</sup> [2014] UKUT 0026 (LC)



*Williams*<sup>3</sup>, and was concerned that the conclusions and authorities summarised in that case, and in particular the effect of s.27A(6) of the 1985 Act in rendering certain types of provision in a lease void, might have a direct bearing on the way the tribunal should approach the issue of reasonable apportionment. It therefore invited and received written submissions on this question from all three parties.

72. Mr Airey submitted that the effect of that case and the decisions summarised in it was that any provision within a lease which purported to remove the tribunal's jurisdiction under s.27A(1) to determine whether a service charge was payable was void under s.27A(6). He submitted the clauses in the Head-Lease and Sub-Lease which provided that it was for the landlord to determine what were reasonable proportions therefore had to be amended as follows:
- (i) In the Head-Lease, "the tribunal" should be substituted for the "the landlord" in the definitions of Block and Estate Service Charge Proportion, so that each read: "*such fair and reasonable proportion as the tribunal shall from time to time reasonably determine*";
  - (ii) In the Sub-Lease, "the tribunal" should be substituted for "the landlord" in the definition of "Specified Proportion" and clause 7.8.1, and that clause 7.8.2 should be deleted [these latter two clauses relate to making changes in the Specified Proportion]. He further submitted that the tribunal should reduce the percentage payable by him from 5.99%, but did not say what it should be reduced to or on what basis.
73. Mr Beresford submitted that the Court of Appeal in *Aviva* had been considering clauses which provided for a fixed proportion of service charge contributions but with the proviso that the landlord might amend that proportion, i.e. in the form "[ ]% or such part as the Landlord may otherwise reasonably determine". The Court had held that the part of the clause which purported to provide that the landlord would determine the alternative percentage was void by reason of s.27A(6), but that where the parties could not agree the alternative percentage, it should be read as substituting "the tribunal" for "the landlord". He said the Court had not been considering a clause such as the present ones, which simply provided that the proportion should be "*such as the Landlord may reasonably determine*". However, he submitted that on the Court's reasoning, such a clause should be read as providing that the proportion was to be reasonably determined, but not exclusively by the landlord. Instead the proportion was either to be agreed between the landlord and the tenant or else determined by the tribunal.

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<sup>3</sup> [2021] EWCA Civ 27, handed down 18 January 2021

74. He also noted that Mr Airey had asked, for the first time, that the percentage paid by him should be reduced, but not why or on what basis it should be reduced and why Mr Airey should pay less than his neighbours. Mr Beresford submitted that while the tribunal had the jurisdiction (on the basis of *Aviva*) to determine what a fair proportion should be, this could only be on the basis of evidence. The only evidence before the tribunal was Mr Kuszneruk's evidence that Mr Airey's percentage had been set applying a weighted bed method. Therefore the percentage of 5.99% should be the one applied.
75. Mr Hammond submitted that his skeleton and submissions accurately presented the position on contractual/common law principles. He said that s.27A(6) was a statutory overlay which had to be positively raised by a tenant. He said that since Mr Airey had not raised in his Application, the Schedule, legal argument or evidence the issue of whether the exclusion of the tribunal's jurisdiction in favour of the landlord was void, it was too late now for this to be raised. He referred to the observations in *Windermere Marina Village Ltd v Wild*<sup>4</sup> at [45] to the effect that apportionment of service charges can be a complex matter, and that if the tribunal was going to substitute its own view of proper apportionment, it needed to bear in mind both the possibility of competing interests between different occupiers and the fact that the determination will only bind those who are party to it.
76. He observed that (as was made clear during the hearing) Estate service charges were currently apportioned on a square footage basis across the Estate, so that any change to this proposed apportionment would impact on all tenants.
77. Having considered all of the parties' submissions, the tribunal's conclusions on these related issues are as follows:
- (i) The issue of how service charges should be apportioned, especially in the sense of whether they should be designated as Block or Estate service charges/ how they should be apportioned to Edgemere as a whole, was clearly raised by Mr Airey in his Application and in the Schedule he completed. Avon's response to this (in part) was that allocation and apportionment were matters for its discretion as landlord, and the tribunal could not substitute its own view as to what was reasonable, but could only review whether Avon's apportionment decisions were reasonable.
  - (ii) This apportionment/ designation issue having been raised by the parties, the tribunal was entitled to raise with them the question of the possible effect of s.27A(6). It would be extremely artificial for it only to consider the common law position, and to ignore

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<sup>4</sup> [2014] UKUT 0163 (LC)

how this might have been affected by statute, merely because voidness under s.27A(6) had not been raised by Mr Airey, in circumstances where the issue of apportionment was live and given the relevance of s.27A(6) to that issue. The tribunal does not therefore accept the argument of Mr Hammond that it must ignore any effect of s.27A(6) in determining the test it should apply when considering apportionment.

- (iii) The tribunal considers that it is clear that the reasoning in *Aviva*, and the earlier decisions it approved, cannot be limited just to cases where the apportionment clause is in the form “[ ]% or such part as the Landlord may otherwise reasonably determine”, i.e. where a fixed percentage is set with a discretion to the landlord to determine a reasonable alternative. This is plain from [34] in the judgment of Lord Justice Lewison in which he confirms that “*the clear thread that runs through the previous decisions of the UT is that section 27A(6) is concerned with no more than removing the landlord’s role (or that of another third party) from the decision-making process; in order not to deprive the FTT of jurisdiction under section “27A(1).” and “... the statutory objective is satisfied if the landlord’s role is transferred to the FTT.”* Or, as he puts it at [36]: “*To put it another way, the “particular manner” in which the percentage is determined is by the landlord. All that is necessary for compliance with section 27A (6) is to deprive the landlord of its role in making the determination.*” As he further confirms at [37], the effect is to convert a unilateral right of the landlord into a bilateral right in which the lessee could also propose a change. This is because, by section 27A(4)(a), the right to apply to the tribunal for a determination under s.27A(1) does not apply to any matter which has been agreed by the tenant.
- (iv) Accordingly, the tribunal determines that the definitions of Block and Estate Service Charge Proportion in the Head-Lease must be read as if the reference to the landlord is replaced with the tribunal.
- (v) The tribunal considers that, as with other aspects of service charges which may be subject to challenge under s.27A(1) or (3), the apportionment applied by the landlord will be effective unless and until there is a successful application to the tribunal to determine a fair and reasonable proportion, or an agreement is reached between the parties to that lease of some other proportion.
- (vi) As to the proper apportionment in the present case, where a service is not provided or made available to the residents of Edgemere at all, but only to residents of certain other blocks, the tribunal determines that it is not reasonable for the cost of that

service to be apportioned to MHT/ Edgemere under the Head-Lease. It is not reasonable for such services to be designated as Estate Service Charge Items, rather than as block items for those blocks to which the services are provided. Alternatively, if such items are designated as Estate Service Charge Items, the only fair and reasonable proportion to be applied to MHT/ Edgemere for such items is zero. To be clear, this is not because the tenants of Edgemere have elected not to use those services; it is because the services are not provided or made available to them as a group.

- (vii) Further, where it is clear that the level of service provided or made available to the tenants of Edgemere as a group is lower than that provided or made available to the tenants of other blocks as a group, a reasonable apportionment is one which takes into account that difference in service. It is not reasonable to apply a blanket method of apportionment to the costs of such services which does not take into account that difference in service.
- (viii) The tribunal is fortified in its conclusions by the fact that in practice, Avon has apparently ignored the express provisions of the Head-Lease, that it should designate service charges as either Estate or Block depending on which residents benefit from those services, and instead has just treated all service charges wholesale as Estate ones. This is clearly inconsistent with what was contemplated by the parties when the Head-Lease was executed, has an obvious potential to generate irrational outcomes where there are differences in the services made available to the tenants of different blocks, and is unlikely to be consistent with good estate management. This is so even taking into account Mr Hazan's evidence that in general it is more efficient and cost-effective for Estate-wide contracts to be negotiated than for individual blocks: just because a single contract has been negotiated does not mean that the cost cannot be divided between different blocks by reference to where and how the services are actually provided.
- (ix) If the tribunal had been restricted to reviewing whether Avon's approach was within a reasonable range of possibilities, it would in any event have concluded that it was unreasonable insofar as costs were apportioned to Edgemere for services which were not provided or made available to the residents of that block, or were provided at a significantly lower level.
- (x) However, subject to these points and to findings below on specific items, insofar as a service has been provided or made available to the tenants of the Estate generally, the tribunal determines that the square footage basis applied by Avon is a reasonable method of apportionment, there being no evidence before it as to any alternative method. This method of apportionment will need to

be adjusted however where the evidence is that Avon has provided or is providing a different level of service to Edgemere from other blocks.

- (xi) As to the apportionment to Mr Airey in the Sub-Lease of 5.99%, this has never been questioned or challenged by him prior to his post-hearing further submissions. The tribunal considers that it is too late for him to raise apportionment under the Sub-Lease now as an issue. In any event, the only evidence before it is that of Mr Kuszneruk as to the weighted bed method applied in Edgemere, which the tribunal determines is a reasonable method of apportionment. Insofar as this is in fact necessary, the tribunal determines that 5.99% is a reasonable apportionment to Flat 4/ Mr Airey. In doing so, it has in mind the observations of the Upper Tribunal in *Windermere Marina Village Ltd* as to the interests of other parties and complexity of the matters which may be relevant to apportionment, which would make the tribunal unwilling to interfere with this approach.

### **Porterage/concierge**

78. As set out above, Avon has the power under the Head-Lease to provide porterage/ concierge services to Edgemere.
79. There are however a number of indications that historically, it was not contemplated that Edgemere would have such services, and it was Mr Airey's submission that this was not intended. The first Statement of Anticipated Service Charge Expenditure provided by Avon to MHT dated 14 July 2017 included no provision for porterage/ concierge. Mr Hazan confirmed that the developers' budget had not included provision for porterage/ concierge for Edgemere, it being provided for under "Building" and not "Estate". (It appears "Building" costs in that budget did not apply to Edgemere.)
80. There is no dispute that no concierge has ever been based in Edgemere itself – the issue is whether the concierge/ porterage staff based in Elite House (or other blocks) have been or should be providing such services to Edgemere and its residents as well.
81. On 29 November 2017 Mr Hazan wrote to the Leaseholder (MHT), enclosing among other things the service charge budget for 2018. Under the heading "2018 Budget", his letter said there had been a number of changes and increases in the 2018 Budget, including: "*Concierge/ Porterage – this has been moved to Estate fund and has increased to allow for the amount of staff required across the 2 parts of the building.*"
82. However, the same change was also made retrospectively for 2017 in the final Service Charge Statement dated 31 December 2017, which included

an item of £152,319 for portorage for the Estate (of which 7.431% or £11,319.82 was apportioned to Edgemere). The same figure for portorage appears in the 2017 service charge accounts, signed off by Y&Y on 14 June 2018.

83. Given there was no provision for concierge/portorage to Edgemere in the 2017 budgets and estimates, it seems unlikely that portorage services were being provided to Edgemere during 2017. In those circumstances, it is concerning that a change which the letter of 29 November 2017 said was going to be made for 2018 was also applied retrospectively to 2017.
84. While this addition of a portorage charge to 2017 will have affected the service charges paid by MHT to Avon, it should be noted that it will not have affected the services charges paid by Mr Airey and the other Edgemere tenants. This is because it was a new charge which was not in the estimates but was only added to the final 2017 Statement. Therefore all of it must have formed part of the balancing charge of £19,531.23 which was invoiced by Y&Y on 28 June 2018, but which through an oversight was never recharged by MHT to the Edgemere tenants.
85. In 2018, the anticipated cost for portorage in Avon's Statement of Anticipated Service Charges was £150,000. The final cost was £140,547, of which MHT's 7.431% was £10,444.05.
86. The total estimated costs under this head for the next two years were £138,000 for 2019 and £140,000 for 2020. MHT's share at the same percentage will have been £10,254.78 and £10,403.40 respectively.
87. In his witness statement, Mr Hazan explained that this head covered the staff on site, which included a site supervisor and 3 concierges. The cost is therefore essentially their salaries and employment expenses. This is clear from the detailed computer printouts from Avon's service charge records, exhibited to Mr Hazan's statement.
88. Mr Hazan set out in his statement a list of all the tasks and services which he said were undertaken by these four members of staff. His evidence was that these were services which were for the entire Estate, including Edgemere. In his oral evidence he said he believed Edgemere residents had the same services as everyone else. These tasks included such things as receiving parcels and arranging for their collection; patrolling corridors; checking lifts, alarms, plant room, doors, emergency lighting, smoke vents, gardening and cleaning; monitoring CCTV; managing keys and fobs and dealing with neighbour complaints, trespassers and emergencies.
89. Mr Airey's case was that no portorage or concierge services had been provided to Edgemere, in line with the intentions of the developers. He relied in particular on an email exchange in May 2020 between one of

the tenants, Ben Reilly, and the site supervisor Mr Ofori, which Mr Reilly had forwarded to Ms Kirby. In that exchange Mr Reilly said he had received an email from MHT saying that Edgemere residents were entitled to the concierge service provided by Mr Ofori and his colleagues, and asked when this had started. He said he had been told several times at the start of his lease that this was not the case. Mr Ofori replied on 20 May 2020 that Mr Hazan “*has informed me to start offering concierge services to Edgemere house again. I believe concierge services to Edgemere house has always been part of the duty of the front desk at Canary Gateway but however there was a slight misunderstanding from our previous site supervisor. I am more than happy to offer concierge service to all residents at Edgemere house unless Yaron [Hazan] says otherwise. That being said, I will commence my concierge services after the issue of the corona virus has been resolved. At the moment we are not taking parcels due to the pandemic of the corona virus and after the virus is over I will start taking them please.*”

90. Mr Reilly forwarded this exchange to Ms Kirby on 27 May 2020, saying that this was confirmation that concierge services had not been supplied to the residents of Edgemere, and Y&Y were in error when they said they had been. He commented that other charges that he had disputed were of a similar nature, in that they were services only supplied to particular buildings, not including Edgemere, but charged to the whole Estate, and he was surprised Y&Y had not accepted this.
91. In her evidence Ms Kirby said that although her initial conclusion, based on what she had been told by Mr Hazan, was that Edgemere were receiving the whole concierge service, she had then spoken further with the tenants and had concluded that there were some services that they should have been getting but were not. She said there had been some sort of misunderstanding, and that Mr Ofori had not known he was supposed to be providing some things such as fobs to Edgemere residents. She said that it was MHT who dealt with fobs and related matters for Edgemere tenants. She said Mr Ofori did patrol the lobby of Edgemere, but no further. She said that upon investigation, she was told the services were not put in place at the beginning, but on speaking to Y&Y, she understood they should have been and would be. She also confirmed that she knew the Edgemere residents were not getting concierge services prior to 2020. She said she was told that it had been acknowledged there had previously been a problem with these services being provided, before Mr Ofori started. In response to a question from the tribunal, she said she would say concierge services started being provided to Edgemere in June 2020.
92. As noted above, Mr Kuszneruk confirmed that he had received email challenges from tenants in every one of the 17 flats about the charges being made for services in 2018.

93. In submissions, Mr Beresford said that MHT endorsed Mr Airey's challenge regarding the lack of concierge service to Edgemere House. In reliance on Ms Kirby's evidence, he said MHT should not have to pay for a service which Edgemere had not received prior to about May/June 2020. He submitted that Mr Hazan's evidence that a concierge service was fully provided to Edgemere sat very uncomfortably with the email exchange between Mr Reilly and Mr Ofori. He pointed out that Mr Hazan had not confirmed, despite being directly asked, whether his evidence was based on any firsthand knowledge.
94. Mr Hammond's position was that there was no positive evidence on which the tribunal could rely to find that the concierge service had not been provided, in contradiction to Mr Hazan's evidence. He said that there was nothing that the tribunal could rely on in the evidence of Ms Kirby on this point and that the email from Mr Reilly did not give evidence. He also submitted that Mr Airey's position ignored the full range of estate services which were provided by the onsite staff.
95. The tribunal's conclusion is that while the evidence as to what has actually been happening is sketchy, it is satisfied that at least until June 2020, Edgemere residents have not been receiving a concierge service which is at all comparable to that of other blocks such as Elite House. This is clear from the evidence of Ms Kirby as to the complaints made to her by residents and the email exchange between Mr Reilly and Mr Ofori, both of which the tribunal considers are good pieces of evidence on which it can rely. In the absence of any oral evidence from either Mr Airey or Mr Ofori, ~~who might have been able to give firsthand evidence as to actual service levels,~~ this is the best the tribunal can do. As to timing, it accepts Ms Kirby's evidence that the residents of Edgemere were not getting concierge services provided to them prior to June 2020.
96. There is also significant circumstantial evidence, in the form of the developers' budget and initial service charge estimates, that Edgemere was not originally intended to benefit from a concierge service. This makes it more credible that onsite staff did not believe they should be providing such a service to Edgemere, and so did not do so.
97. The tribunal considers that Mr Hazan's evidence that Edgemere tenants received the same concierge service as those in other blocks is undermined by the fact he does not work on site and was not speaking from firsthand knowledge. It also considers that his evidence was influenced by a wish to maintain and justify Y&Y's practice of treating all service charges as Estate charges, regardless of whether there has in fact been a difference between the service received by different blocks.
98. The reality is that if concierges are based in other blocks and not in Edgemere, it will be difficult for Y&Y to maintain the same level of service for Edgemere as those other blocks. However that is what Avon and Y&Y will have to do for it to be reasonable to continue to treat portage/



concierge services as an Estate rather than a Block service charge under the Head-Lease, without any adjustment of the apportionment by square footage.

99. However, the tribunal also accepts that some of the activities of the on-site staff will be for the benefit of residents of the Estate generally and not for individuals in any particular block. It accepts that they are carrying out tasks such as reviewing CCTV (the evidence being that most of the cameras were outdoors), pump maintenance, patrolling external common areas, liaising with cleaners and gardeners and dealing with trespassers and local issues.
100. No issue has been raised with the reasonableness of the actual costs of portage/ concierge (which as noted are essentially staff costs); the issue is with the allocation of these costs given the service provided to Edgemere.
101. Applying a fairly broad brush approach, the tribunal's conclusion therefore is that for the period up to June 2020 (treated as 30 June 2020 for accounting purposes), concierge services were not being provided to Edgemere residents, so they benefitted only from the general estate activities of staff. For this period the tribunal considers that the amount which it was reasonable for MHT to pay is 30% of the amount charged (as final charges for 2017 and 2018 and as interim charges for 2019 and 2020).
102. With effect from 1 July 2020, the tribunal considers it has been recognised that Edgemere should be receiving concierge services; however it remains unlikely that an equivalent service is being provided to this block as compared with say Elite House, for the reasons set out above. The tribunal considers therefore that a reasonable interim charge for the remainder of 2020 would be 60% of the amount charged. Overall therefore for 2020, a reasonable interim service charge is 45% of the total charged under this head to MHT.
103. The specific amounts allowed for portage/ concierge for these years are set out in the attached Schedule. For clarity, these are the charges for MHT alone (not the total for the Estate, unlike the "cost" figures in the Schedule).

### **Estate office**

104. Mr Airey's position was that this is provided for the use of the on-site concierge/ portage staff, and so the same principles should apply to the charges for this as for the staff themselves. In addition, he challenges the fact that Avon makes an overall charge of £12,000 p.a. for the "rent" of it providing an office in Elite House. He says that since Avon is the freeholder, it is not reasonable for it to charge rent to itself.

105. In general terms, this latter is a point which might have had some force. However, as quoted above, paragraph 23 of the Seventh Schedule to the Head-Lease expressly provides that if the estate office is within the common parts of the Estate (which it is), then Avon is entitled to a reasonable rent payable from the service charge for the provision of the office. As Mr Hammond emphasised, no evidence was submitted from any party as to alternative rents for an office. The tribunal therefore concludes that the rent charged would in principle be recoverable as part of the estate office cost.
106. Mr Beresford did not make separate submissions on this point orally or in his skeleton argument. Mr Hammond confined his submissions to the level of the charges and lack of alternative evidence.
107. The tribunal's conclusion is that the charges for the estate office should be treated as falling under the same umbrella as portage/ concierge and so should be subject to the same reductions set out above. Otherwise it considers the costs themselves are reasonable, there being no alternative evidence available.
108. The percentage applied to MHT for this head in the Service Charge Statements is also 7.431%. The specific amounts allowed for each year are set out in the attached schedule.

### **Communal landscaping**

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109. Although not a large head of charge, a disproportionate amount of time was spent on this issue at the hearing. Mr Airey's main complaint was that most of the gardens on the Estate are ones to which Edgemere tenants are not permitted access, that is the four roof gardens and Keymer Place (which has locked access). He also disputed the quality of the maintenance of the paths and verges of the common parts of the Estate, by reference to photographs in the bundle.
110. Mr Hazan confirmed, in answer to a question from the tribunal, that for the rooftop gardens, only those within that block will have a fob to access them. He also confirmed in cross examination that Edgemere residents did not have access to the Keymer Place garden. He said there were other communal spaces to which Edgemere tenants had access, but the only photographic evidence of this were small verge areas around Elite House and a small untidy grassed area next to the bicycle cover. On a separate occasion, he said Edgemere tenants could request fob access to the other parts, but the tribunal prefers his earlier answers that the Edgemere tenants did not have access (this also being inherently more likely).
111. In his statement and oral evidence, Mr Hazan explained that a significant part of the work under this head was maintaining the walkways, pathways, entrances and smaller grassed areas in the communal parts.

112. It was apparent from the photographs of the top of Edgemere's bicycle shed, and some of the small grassed areas, that some of these areas looked neglected. Most if not all of these photographs were taken during periods of lockdown, when it appears less gardening/ maintenance work was possible. In any event, there was no challenge to the interim charge under this head for 2020 in the Schedule (it is unclear why this is so, but this was only an interim service charge).
113. All of these works were carried out under a single contract arranged by Y&Y. However, the tribunal considers that it is and was unreasonable to apportion to MHT/ Edgemere the costs of the gardening to the roof gardens and Keymer Place, from which Edgemere residents could not benefit. It is apparent from the service charge accounts that other costs (e.g. electricity, cleaning and general maintenance) can and have been apportioned to certain buildings and not Edgemere depending on use, so there appears to be no good reason why this could not also be done with gardening costs.
114. Currently the whole of the gardening cost has been treated as an Estate charge. Doing its best with the limited information available, the tribunal considers that 50% of this should be treated as referable to the common parts of the Estate generally including paths and walkways, and 50% to the "private" roof gardens and Keymer Place. Since Edgemere does not have the benefit of any such private garden space, the tribunal considers that the final expenses attributed to Edgemere/ MHT for 2017 and 2018 should be reduced by 50%, as should the interim charges for 2019.
115. No evidence was before the tribunal as to alternative costs under this head, so the tribunal accepts the actual costs incurred as reasonable.
116. The specific amounts allowed for each year under this head are set out in the attached schedule. The Estate Charge percentage applied to MHT/ Edgemere under this head in the service charge Statements is 6.9468%.

### **Lift maintenance**

117. This was in issue for all 4 service charge years. Mr Airey's position in the Schedule was that the charge seemed excessive, and he said he had not seen any lift maintenance being carried out.
118. In his statement, Mr Hazan explained that there was a contract for fully comprehensive maintenance, covering visits for 7 lifts and one platform lift, across the Estate. It included 6 maintenance visits per year per lift and 24/7 access to a customer care centre.
119. The charge for the whole estate was £14,117 in 2017 and has reduced slightly in the following 3 years.

120. In the absence of any alternative evidence, the tribunal concludes that these costs were reasonable. It also accepts that it was reasonable to treat this as an Estate cost, since it is provided to all blocks. It therefore accepts the costs as being payable as charged.

### **Lift telephone**

121. Mr Airey disputed in the Schedule whether this should be a separate charge from lift maintenance, and disputed whether there was in fact any telephone in the lift. He also argued that the interim charges for 2019 and 2020 were excessive, since they had greatly increased on the earlier years (2017: £384; 2018: £1,057; 2019 and 2020: £3,700).
122. In his witness statement Mr Hazan explained that this was not a telephone but an emergency button in the lift, and that the charge was for line rental. He said the charges were from BT.
123. The computer records support the figures for 2017 and 2018, although the charge is said to be to Rose Communications Ltd. Mr Airey challenged Mr Hazan on this discrepancy in cross-examination. Mr Hazan explained that Rose managed the line but it was supplied by BT. The tribunal accepts that explanation and the evidence on this issue in Mr Hazan's statement, and determines that the charges for those years are reasonable and payable.
124. However, when Mr Hazan was asked in cross examination why the interim charges sought for 2019 and 2020 had increased so dramatically, he said he did not know. In those circumstances the tribunal considers that an advance figure which is a slight increase on 2018 is reasonable, and allows £1,100 per year, this being the total charge. MHT's percentage of this Estate charge is 7.431%, so its share would be £82 (rounded).

### **Avon's management fees**

125. Mr Airey queries what this item relates to, and also argues that it overlaps with the portage/ concierge charge. He has also clearly misread the figure for 2018, because he queries why it is so much lower than the other 3 years (this is not the case, as is clear from the Service Charge Statements).
126. Mr Hazan set out in detail the work which is carried out by Y&Y under this heading, which is primarily the work which he himself does. The tribunal does not consider therefore that there is an overlap with the concierge/ portage charges, which are for those employees on site.
127. Mr Airey disputed the level of these fees, which Mr Hazan said equated to £51 per unit plus VAT in 2017, and a little less in subsequent years. Mr Airey disputed whether these calculations were exactly correct

mathematically, but the tribunal accepts that they were intended to be approximations. Mr Airey also argued that the management fees should be reduced on account of the poor maintenance which he said was evident from the photographs.

128. Applying its expertise as a specialist tribunal, the tribunal's conclusion is that these management fees are on the low side for a development such as this. It also considers that while there might be issues as to specific areas of maintenance, it does not consider that it has seen evidence of substantial failures of management by Y&Y. Accordingly, it concludes that the management fees are reasonable and payable as charged.
129. The tribunal records that no issue was raised by Mr Airey in the Schedule or his skeleton in relation to MHT's management fees.

### **Audio entry system**

130. Mr Airey's challenge on this item was to the cost, and how much maintenance of the audio entry system was actually required. He also queried why it had been leased rather than purchased.
131. Mr Hazan covered this in his witness statement. He said that the cost covered a handset in every room, panels within the front door, cabling and handsets for the concierges. He clarified that the cost for 2017 had been included in the service charges for 2018 together with the charges for that year, because the contractor had delayed in sending the invoice. This is explained in a letter to leaseholders dated 20 August 2019 which he exhibited.
132. The final Service Charge Statements to MHT for 2017 and 2018 show only £2,104 in 2017 and £45,128.92 for 2018, which is consistent with his evidence on this last point.
133. The anticipated charges for 2019 and 2020 are both £30,000 (the Schedule incorrectly states the 2020 cost as £4,000). The detailed service charge records support the figures in the Statements. For 2018, the audio rental charge was £20,000 for the 12 months, and there are also charges totalling about £10,000 for the door entry system. There is also a charge for rental of audio equipment of £15,123.28, which is likely to be the 2017 charge.
134. Paragraph 4 of the Sixth Schedule to the Head-Lease obliges Avon to maintain the facilities benefitting Edgemere, including paying any rental payments including maintenance payments which may be payable, and paragraph 5 contains an equivalent provision as regards the Estate.
135. The tribunal considers that it was reasonable for Avon, in exercise of its obligations to provide communal services which would obviously include

an audio entry system for a development like this one, to lease that equipment. It is reasonable for this to include an agreement to maintain the equipment as required.

136. There is no other evidence before the tribunal as to the costs of such a system, and the tribunal accordingly concludes that the percentage charges to MHT for 2018 are reasonable and payable. On the basis of the incurred charges for 2018, it also considers that the interim service charges for 2019 and 2020 are reasonable and payable.

### CCTV

137. The Applicant complains that the cost of the CCTV system is very high. He produced an online Google search which he had carried out, asking for the cost of a basic CCTV system, which return the answer £225 for a basic system with 4 cameras, or £300-£500 for 8 cameras.
138. Mr Hazan explains in his witness statement that the service charge costs are for renting CCTV for the whole Estate including 17 cameras located externally throughout the site, monitoring and recording equipment, cabling and maintenance. Mr Airey complained that only one of the cameras monitors Edgemere, but Mr Hazan explained that the CCTV system is mainly for external areas.
139. There are no further details provided by Mr Airey, but it seems very likely that his “quote” is for a simple domestic system purchased by an individual. This is plainly not comparable to the 17-camera system on the Estate, which is a complex system covering multiple premises and areas, together with monitoring and recording. No evidence has been put before the tribunal of alternative costs of a system with a similar specification to that on the Estate.
140. The actual costs in 2018 of the CCTV system were £21,036.54. The charge in 2017 was only £300, which again was because the 2017 costs were not billed to Avon until 2018. The advance charges for 2019 and 2020 for the whole Estate are £13,500 p.a.
141. As with the audio entry equipment, the tribunal is satisfied that it is reasonable for Avon to enter into agreements for the leasing and maintenance of this equipment, rather than outright purchase. Mr Airey’s comparables are much too simplistic and dissimilar to be of any assistance to the tribunal, and in any event are not actual cost quotations.
142. Overall the tribunal considers that expenditure at this level on CCTV for an estate of 7 blocks plus commercial units, and including multiple access routes open to the public is reasonable. It accordingly considers that MHT’s share of this expenditure in 2018 is payable as charged. It

also considers that the interim charges for 2019 and 2020 are reasonable estimates of future expenditure based on past costs.

### **Pump maintenance**

143. In the Schedule Mr Airey only challenges the charge for pump maintenance in 2018, for which there is an Estate-wide charge of £87,128. He provides no alternative quotations or other evidence as to such costs, but merely asks what it is for and why it is so high.
144. In his witness statement, Mr Hazan explains that this relates to the heating interface unit in each flat, and includes the costs of servicing each unit, plus the pumps, boilers and water storages tanks in the plant room. He says this is the cost of the service contract, which is renewed annually, and he exhibits a copy of the contract setting out the services provided.
145. There is specific provision in paragraph 12 of the Sixth Schedule for Avon to maintain, repair and renew the “Communal Supplies” and “Communal Apparatus” (defined at paragraph 26 of the Fourth Schedule as the communal hot water and heating system), including taking out maintenance and insurance contracts. This is also an item which it would be reasonable to treat as an Estate cost, as it is supplied in a similar fashion to all blocks.
146. Mr Airey also complains that he has asked Avon to provide evidence of visits to flats to maintain the heating and hot water system, and has received no response. However, the tribunal is prepared to conclude, based on the information available and its expert knowledge, that this is a complex heating and hot water system, provided to all the residential parts of the Estate, for which it would be reasonable to enter into annual maintenance contracts, whether or not there have been specific callouts. In the absence of any evidence to the contrary, it is also willing to accept that £87,127.72 is a reasonable cost for such a service for 2018. It determines that MHT’s share (at 7.431%) is reasonable and payable
147. The interim charges for 2019 and 2020 are £95,000 and £102,000. In a covering letter dated 12 December 2019, Mr Hazan wrote to the Leaseholders that the pump maintenance contract had increased by just over 3% for 2020, that it would be tendered that year to ensure it was in line with market value, and that also now included were heating and metering charges. It does not appear from the Schedule that Mr Airey was challenging these interim charges, but they do in any event appear reasonable as interim charges.

### **Staff supplies**

148. This was an Estate-wide charge of £1,185 in 2018. Mr Airey merely queries what it is for.

149. Mr Hazan explains in his witness statement that it was for staff uniforms, which were only charged under a separate service charge head in 2018. It is supported by computer records of expenditure.
150. In the absence of any other evidence, and given the relatively small sum involved, the tribunal is prepared to conclude that MHT's share of this sum was reasonable and payable for that year.

### **TV/Satellite**

151. This item is challenged by Mr Airey in the Schedule for 2018 only, where the Estate-wide cost was £35,123. He asks why it is so high and questions whether any maintenance is taking place.
152. Mr Hazan explains in his statement that this is the cost of renting the equipment for communal satellite TV, including aerials, amplifiers and connections for flats. The rental costs are clearly evidenced in the computer records, and Avon has the power to rent such equipment in provision of services.
153. In the absence of any alternative evidence as to costs, the tribunal accepts that MHT's 7.431% share of these costs is reasonable and payable as charged.

### **General maintenance (interim service charge only)**

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154. This is an estimated charge of £4,000 Estate-wide for 2019 and 2020. Mr Airey argues that Edgemere House has not incurred significant maintenance costs. He complains in particular that the roof of the bike cover area has not been maintained and has had rubbish on it for an extended period. In support of this, he relied on photographs from 2020 in the bundle, and live video of the area during the hearing.
155. In his statement, Mr Hazan said that this included maintenance works throughout the year. He relied on the evidence in the computer records for 2018, which recorded that the cost under this head was £3,960. This is a relatively modest cost for the whole Estate.
156. Given that Mr Airey is challenging charges which are only interim and not final, the tribunal considers that £4,000 p.a. for 2019 and 2020 for the whole Estate is reasonable and payable (as to MHT's share). It is also a cost which in principle is referable to the whole Estate.
157. However, the photographs of the top of the bike cover do clearly suggest that lack of maintenance of this area is a longstanding problem. It was also apparent from Mr Hazan's oral evidence that the pandemic affected the extent to which maintenance could be carried out in 2020. It seems



likely therefore that the final service charge payable under this head for 2020 will ultimately be less than that estimated.

**Engineering insurance (interim service charge only)**

158. Mr Airey questions whether this cost duplicates the lift maintenance costs.
159. Mr Hazan explains in his statement that in 2017 it was under warranty, but since then it has been necessary for there to be insurance of the lift in place. In oral evidence he said it covered risks such as vandalism which would not be covered by the maintenance contract. He also explained that it was a separate contract from the insurance for other plant and machinery.
160. The tribunal accepts Mr Hazan's explanation on this point. In the absence of any other evidence as to costs, it determines that the interim charges for this head of expenditure are reasonable and payable (as to MHT's percentage).

**Application under s.20C/Schedule 11 and refund of fees**

161. The tribunal directs that the parties should make any consequential submissions and applications relating to the costs of these proceedings by filing and exchanging written submissions within 21 days of the date on which this Decision is sent to the parties. This should include any applications for orders under 20C of the Landlord and Tenant Act 1985, paragraph 5 of schedule 11 to the Commonhold and Leasehold Reform Act 2002, and/or any tribunal fees paid. This should include submissions on any factual issues which may be relevant to the determination of such issues. The tribunal will then send a further written determination on any such issues to the parties.

**Name:** Judge Nicola Rushton QC      **Date:** 31 March 2021

**Rights of appeal**

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

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

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

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

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

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

## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985 (as amended)**

#### **Section 18**

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

#### **Section 19**

(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 provisions 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.

#### **Section 27A**

(1) An application may be made to the appropriate 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 the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

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(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination -

(a) in a particular manner; or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

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

## Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

## Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

### Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

## **Commonhold and Leasehold Reform Act 2002**

### Schedule 11, paragraph 1

(1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

#### Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

#### Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

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of any question which may be the subject matter of an application under sub-paragraph (1).



**SCHEDULE**

<b>ITEM</b>	<b>COST</b>	<b>TENANT'S COMMENTS *</b>	<b>LANDLORD'S (1<sup>ST</sup> RESPONDENT) COMMENTS *</b>	<b>2<sup>ND</sup> RESPONDENT'S COMMENTS</b>	<b>LEAVE BLANK (FOR THE TRIBUNAL)</b>
Communal landscaping	£5050	Edgemere House has one piece of grass next to it. Photo provided (GA1). Other than that, there is no access to the grass which benefits Edgemere residents. I believe there is a rooftop garden on Elite House but we do not have access to that. The piece of grass in Edgemere House is also rarely maintained as can be seen in GA1. To be charged 6.9468% of £5050 is excessive. This area should not cost more than £100 per year to maintain.	It is agreed that Edgemere House only has one piece of grass next to it and Edgemere residents do not have the benefit of the other communal landscaped areas on the wider estate which are fenced off. The second Respondent provides this service through the 3 <sup>rd</sup> party managing agent Y&Y. This cost is for the whole of the Canary Gateway estate and the second	The charges for Landscaping are for services provided to the entire estate as detailed at paragraphs 8-19 in the witness statement of Mr. Yaron Hazan and not solely to the area adjacent to Edgemere House	MHT share £175

			Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House which is 6.9468%. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.		
Estate Office	£22,759	I have no idea what this payment is for or what is carried out by Estate Office. This cost also seems to be excessive. I can only respond to this cost once I know what it is.	There is an office on the Estate for 3 members of staff that work on site. This office is managed and maintained by the third party managing agent Y&Y on behalf of the second Respondent.	Details of the Expenditure as set out at paragraphs 20 of the witness statement.	MHT share £507

			<p>This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.</p>		
Lift Maintenance	£14,117	<p>This charge seems excessive. I have not seen any lift maintenance be carried out at any point. I require evidence relating to when this has been</p>	<p>This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each</p>	<p>Details of the Expenditure as set out at paragraphs 21 of the witness statement.</p> <p>Expenses are incurred in relation</p>	As charged

		carried out and the cost for Edgemere's maintenance.	block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.	to the entire estate for which a proportion is billed to Edgemere house as per the terms of the lease.	
Lift Telephone	£384	It appears to me that this charge should fall within the charge for lift maintenance.	This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17	These are charges from British Telecom and would not be included in the lift contract Details of the expenditure are as set out at paragraph 23 of the Witness Statement.	As charged

			flats within Edgemere House by the first Respondent and has been correctly demanded.		
Porterage	£152,319	Edgemere House residents have not been able to use the porter, Ernest. There is email evidence to confirm that it was the exception rather than the rule that we can use Ernest (GA2). In addition, Ernest spoke to me on 22 May 2020 and told me we were going to start receiving the concierge service. This is evidence we were not receiving it before. The only time we use Ernest is to report repairs as we need to raise these to Y & Y through him as we don't have a direct contact email. I also	It appears that the porterage service has not been offered fully to Edgemere House residents until May 2020. The third party managing agency, Y&Y, on behalf of the second Respondent charges a lower Management fee because some of the management duties are passed on to the on-site staff. The reduced management fee reflects the fact that the on site staff carry out a number of the	The costs for porterage relate to the provision of more than one staff member and the services provided are as detailed in paragraphs 24-25 of the witness statement of Mr. Yaron Hazan. The breakdown of the services given shows the benefit to the leaseholders across the estate and does not relate specifically to the building in which the office is located.	MHT share £3,396

		<p>provide the evidence that this is a building cost and not an estate cost and Edgemere House was not to be charged this building cost (GA3). The Concierge is based at Elite House and is in essence a concierge for that building.</p>	<p>management duties. This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.</p>		
Sundries	£130	I don't know what this is	It is not uncommon to see a charge for sundries in the service charge accounts for	The detail is set out at paragraph 26 of the Witness Statement	No longer disputed

			<p>blocks of flats. The second Respondent will need to explain the costs included within this heading. This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.</p>		
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Management fees	£14,340	There is no explanation of what this relates to. This costs £1664 in 2018 so I don't understand why this is this expensive here.	This is the management fee incurred by the 3 <sup>rd</sup> party managing agent, Y&Y. This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.	The Applicant has made an error and the expenditure was not £1664 in 2018. Mr. Hazon gives a breakdown of the management service in the witness statement at paragraphs 3-7. the charge for management fee per unit is £51 plus VAT (233 units onsite).	As charged
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**The above is for the year 1 January 2017 to 31 December 2017**



**1 January 2018 to 31 December 2018**

ITEM	COST	TENANT'S COMMENTS *	LANDLORD'S (1 <sup>ST</sup> RESPONDENT) COMMENTS *	2 <sup>ND</sup> RESPONDENT'S COMMENTS	LEAVE BLANK (FOR THE TRIBUNAL)
Audio entry system	£45,129	The cost of this system went up from £2104 in 2017 to £45,129 in this accounting year. The increase is not explained. I also don't understand how this can cost this sum. I am unaware of there being any maintenance to this system and surely the cost should be one off as any rectification is needed.	This has not been brought to the first Respondents attention until now so was not included within the first Respondents investigations. This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then	Details of the Expenditure as set out at paragraph 27 of the witness statement. The increase arose because charges for 2017 were included in 2018.	As charged

			apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.		
CCTV	£21,037	<p>The cost of CCTV has gone up from £300 in 2017 to this sum. That seems extraordinary. Once CCTV is fitted, I can understand there being the odd charge for maintenance or replacement every now and then but not to this level. A general google of CCTV costs suggest that this price is extortionate (GA4).</p> <p>My initial understanding is that there was no CCTV, but I am now led to believe there is CCTV as you enter the</p>	<p>There is CCTV on site that covers the lobby and mailbox areas within all blocks and within some of the lift areas including within Edgemere House.</p> <p>This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House.</p>	<p>Details of the Expenditure as set out at paragraph 28 of the witness statement. The increase arose because charges for 2017 were included in 2018.</p>	As charged

		building, but not once you pass the first door.	This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.		
Communal Landscaping	£7460	This cost has risen from £5050 in 2017. My comments on the communal landscaping can be found in the 2017 schedule above.	See response for Communal Landscaping in the 2017 schedule above.	The 2 <sup>nd</sup> respondent repeats its comments as set out in the 2017 schedule	MHT share £259
Estate Office	£16,123	This cost has reduced from £22,759 in 2017. I do not know what this cost relates to.	See response for Estate Office in the 2017 schedule above.	The 2 <sup>nd</sup> respondent repeats its comments as set out in the 2017 schedule	MHT share £359
Lift maintenance	£13,565	This cost has slightly reduced from £14,117 in 2017. Again, I am unaware of any lift maintenance. My comments on this issue can be found in the 2017 schedule.	See response for Estate Office in the 2017 schedule above.	The 2 <sup>nd</sup> respondent repeats its comments as set out in the 2017 schedule	As charged
Lift Telephone	£1057	This has increased from £384 in 2017.	See response for Lift Telephone in	The 2 <sup>nd</sup> respondent repeats its	As charged

		There is no telephone in the lift. I understand that there is an emergency line, but I would expect that in all lifts (GA6). This shouldn't cost this sum and also it appears that this should be part of the lift maintenance and surely there is a level of overlap there.	the 2017 schedule above.	comments as set out in the 2017 schedule	
Porterage	£140,547	This has gone down from £152,219 but again is not a service Edgemere House receives. This is a service that Elite House have. I expect that the Respondent state that general monitoring of the site is carried out by the Porter. If that is the case then the bike area should not be in the condition that it is (GA5).	See response for Lift Telephone in the 2017 schedule above.	The 2 <sup>nd</sup> respondent repeats its comments as set out in the 2017 schedule	MHT share £3,133
Pump maintenance	£87,128	I am not entirely sure what this is. In	This has not been brought to the first	Details of the expenditure are set	As charged

addition, it has significantly risen from £1044 in 2017 to this huge sum. This needs to be explained by the Respondents.

Respondents attention until now so was not included within the first Respondents investigations. This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.

out at paragraph 31 of the witness statement.

Staff supplies	£1185	I am not sure what this relates to.	<p>This has not been brought to the first Respondents attention until now so was not included within the first Respondents investigations.</p> <p>This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and</p>	Details of this expenditure is set out in paragraph 33 of the witness statement	As charged
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			has been correctly demanded.		
TV/Satellite	£35,123	I appreciate that there may be a cost to maintain these items, but I am unaware of this maintenance taking place. Also, I would not expect this to be a cost that amounts to this much each year.	There is a communal satellite dish. Residents have asked for an upgrade to SkyQ and Y&Y have said they were looking into this but found the quote to be excessive. This has not been brought to the first Respondents attention until now so was not included within the first Respondents investigations. This cost is for the whole of the Canary Gateway estate and the second Respondent apportions the charge to each block and charges	Details of this expenditure is set out in paragraph 30 of the witness statement	As charged

			<p>the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.</p>		
<p>Management fees</p>	<p>£1664 – should be £11,664</p>	<p>This is significantly down from £14,340 in 2017. This makes me query the excessive cost in 2017. I am also not sure what this relates to.</p>	<p>This is the third party managing agent, Y&amp;Y's, annual Management Fee. This cost does not seem excessive for the whole Estate. It covers Y&amp;Y's sole services, excluding the concierge as most of the management duties are supplied by the concierge service. This cost is for the whole of the</p>	<p>The Applicant has again quoted the incorrect figure and relies on same as the basis for dispute. As shown by the accounts the management fees were £11664 in this period. Details of the service provided are enclosed within paragraph 3-7 of Mr. Hazan's witness statement.</p>	<p>As charged</p>



			<p>Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and has been correctly demanded.</p>		
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**1 January 2019 to 31 December 2019**

ITEM	COST	TENANT'S COMMENTS *	LANDLORD'S COMMENTS *	2 <sup>ND</sup> RESPONDENT'S COMMENTS	LEAVE BLANK (FOR THE TRIBUNAL)
Audio entry system maintenance	£30,000	I don't understand how this can cost this sum. I am unaware of there being any maintenance to this system and surely the cost should be one off as any rectification is needed. This should be costed per building rather than on the basis of the cost to the estate.	It is likely that there is one system that serves the whole Estate, therefore, the cost is charged to the whole of the Estate. The second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	As charged

			has been correctly demanded.		
General Maintenance	£4,000	I appreciate that there will be a need for general maintenance, but I do not think Edgemere House has incurred significant general maintenance costs. I would like this to be explained, particularly in light of the fact that there has not been maintenance of the bike cover area (GA5).	This cost includes the shared bin area and the first Respondent is aware that some residents do not tie their refuse bags, the lock malfunctioned for the bin area and there were issues of fly tipping. However, the first Respondent has had to instruct their own contractors to clean up the bin areas due to a lack of maintenance by Y&Y. Y&Y maintain the bicycle store area and fence panels. This cost is for the whole of the Canary Gateway estate and the	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate.	As charged

			second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and correctly demanded.		
CCTV	£13,500	This cost has reduced from £21,037. This also makes me query this figure. I also don't understand how this can cost this sum. I am unaware of there being any maintenance to this system and surely the cost should be one off as any rectification is needed.	See response for CCTV in the 2017 schedule above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate.	As charged

				Comments made above with respect to the expenditure are repeated here.	
Communal Landscaping	£8,000	I don't believe Edgemere House residents should pay this much for the maintenance of a small piece of grass located at the back of the building. The cost of this landscaping is excessive.	See response for Lift Telephone in the 2017 schedule above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of landscaping services across the Estate. Comments made above with respect to the expenditure are repeated here.	MHT share £278
Lift Maintenance	£12,600	My comments on this can be found in the 2017 schedule.	See response for Lift Telephone in the 2017 schedule above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on	As charged

				this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	
Lift Telephone	£3,700	This has increased from £384 in 2017 and £1057 in 2018 to this sum. I believe this to be extremely excessive and I think this should be within lift maintenance.	See response for Lift Telephone in the 2017 schedule above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. Comments made above with respect to the expenditure are repeated here.	MHT share £82
Estate Office	£13,500	I do not know what this sum relates to.	See response for Lift Telephone in the 2017 schedule above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the	MHT share £301

				Lease provides for billing of services across the Estate.	
Porterage	£138,000	This is not a service Edgemere House receive and we should not be charged for it. The reality is that Elite House get the use of the Porter and nobody else. They should therefore pay for this or the substantial element of this.	See response for Lift Telephone in the 2017 schedule above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate.	MHT share £3,076
Engineering insurance	£2,000	I am confused about this payment. If we are paying for lift maintenance and lift telephone, then why are we paying insurance. Surely, we would pay insurance and then not the lift maintenance and telephone. I am not sure what else this would cover for Edgemere House. I also don't believe this	This cost would cover insurance for plants such as the plant for the lifts and is not necessarily linked to maintenance. It is a requirement for the plant equipment to be insured against possible injury to a third party, for example. This cost is for the whole of	These sums are budgetary in anticipation of the expenditure and details of the expenditure are given at paragraph 32 of the Witness Statement	As charged

		is charged in the previous years and it doesn't appear in the 2020 estimate of charges.	the Canary Gateway estate and the second Respondent apportions the charge to each block and charges the first Respondent for the contribution of Edgemere House. This charge is then apportioned and charged to the 17 flats within Edgemere House by the first Respondent and correctly demanded.		
Management Fee	£11,664	This cost £1664 in 2018. This makes me query this cost. I am also not sure what this relates to.	See response for Management Fee in the 2017 schedule above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for	As charged



				billing of services across the Estate.	
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**1 January 2020 to 31 December 2020**

ITEM	COST	TENANT'S COMMENTS *	LANDLORD'S COMMENTS *	2 <sup>ND</sup> RESPONDENT'S COMMENTS	LEAVE BLANK (FOR THE TRIBUNAL)
Audio Entry System Maintenance	£4,000 – should be £30,000	Please see my comments above relating to this.	Please see response above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	As charged
General Maintenance	£4,000	Please see my comments above relating to this.	Please see response above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this	As charged

				item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	
CCTV	£13,500	Please see my comments above relating to this.	Please see response above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	As charged
Lift Maintenance	£13,200	Please see my comments above relating to this.	Please see response above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of	As charged

				previous expenditure on this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	
Lift Telephone	£3,700	Please see my comments above relating to this.	Please see response above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	MHT share £82
Estate Office	£13,500	Please see my comments above relating to this.	Please see response above.	These sums are budgetary in anticipation of the expenditure and	MHT share £451

				reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	
Porterage	£140,000	Please see my comments above relating to this.	Please see response above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	MHT share £4,682

Management Fee	£12,014	Please see my comments above relating to this.	Please see response above.	These sums are budgetary in anticipation of the expenditure and reasonable given the level of previous expenditure on this item. the Lease provides for billing of services across the Estate. Comments made above with respect to the expenditure are repeated here.	As charged
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