FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00AY/LSC/2021/0369 and LON/00AY/LSC/2023/0064**
Property	**:**	**Flat 298 Drake House, 14 St George Wharf London, SW8 2LS**
Leaseholder	**:**	**Mr John Burke**
Landlord	**:**	**Fairhold Holdings (2005) Limited**
Representative	**:**	**JB Leitch Ltd**
Freeholder	**:**	**St George South London Limited**
Representative	**:**	**Forsters LLP**
Type of application	**:**	**Reasonableness and Payability of Service Charge**
Tribunal	**:**	**Judge Vance** **Mr S Mason FRICS**
Date of Hearing	**:**	**22 – 23 January 2024**
Date of Decision	**:**	**21 February 2024**
Date of Addendum	**:**	**9 August 2024**

Decision with Addendum

Decisions

1. Except as set out in the following paragraph, the entirety of the actual service charge sums incurred for the 2018, 2019, 2020, 2021, and 2022 service charge years, and the interim service charge costs demanded from him the service charge year ending 31 December 2022, are payable by him to Fairhold Holdings (2005) Limited, in his apportioned shares.

2. The following sums are not payable by Mr Burke, by way of service charge:

   (a) £40 per year in respect of estate service charge expenditure (Sector 1 Development costs); and

   (b) £9,725, in respect of the costs of an expert report from Mr Peter Forrester, FRICS.

Background

3. At a hearing that took place on 22 and 23 January 2034 the Tribunal heard:

   (a) applications brought by Fairhold Holdings (2005) Limited ("Fairhold") (LON/00AY/LDC/2023/0224) and St George South London Limited ("St George) (LON/00AY/LDC/2023/0181) (together, "the Landlords") under s.20ZA Landlord and Tenant Act 1985 ("the 1985 Act") seeking dispensation from the statutory consultation obligations imposed under s.20 of that Act ("the s.20ZA Applications"). Dispensation was sought regarding entry into management agreements with Rendall & Rittner ((R&R"); and

   (b) consolidated applications brought by Fairhold (LON/00AY/LSC/2021/0369) and Mr Burke (LON/00AY/LSC/2023/0064) seeking a determination of Mr Burke's liability to pay service charges under s.27A of the 1985 Act and administration charges under Schedule 11, para. 5 Commonhold Leasehold and Reform Act 2002 ("the 2002 Act").

4. This is the Tribunal's decision in respect of the two s.27A/Schedule 11 applications. A decision regarding the s.20ZA Applications will be issued separately. Numbers in bold and in square brackets below refer to pages in the main hearing bundle prepared by Fairhold (2022 pages). Page numbers following the prefix "Supp" refer to pages in the 95-page supplementary bundle provided.

5. S.27A allows both landlords and leaseholders to apply to the Tribunal for a determination as to whether a service charge is payable and, if it is, by whom, to whom, the amount payable, the date by which it is payable, and the manner in which it is payable.

6. Mr Burke is the original long leaseholder of a triplex penthouse, Flat 298, ("the Flat") situated on the 18th, 19th, and 20th floors of Drake House, one the several blocks comprising the large riverside development at St George Wharf, London, SW8 2LS ("the Development"). His lease ("the Lease") is dated 30 April 2002 **[1637]** and it is registered at HM Land Registry against title no.TGL203850 **[1717]**. He is resident in Monaco and has not resided in the UK since 2008. He retains the Flat as an investment.

7. Mr Burke's immediate landlord is Fairhold, which holds a headlease of Drake House dated 12 April 2005 ("the Headlease") **[1666]**, registered at HM Land Registry under title no.TGL287211) **[1722]**. The Headlease was originally granted by St George to St George Wharf (Block D) Residential Ltd, but was acquired by Fairhold on 3 May 2016. Fairhold's landlord, and the freehold owner of the entire Development is St George. Both St George and Fairhold have retained R&R as their managing agents, and R&R have managed the Estate since 2012. It entered into management agreements with St George on 1 January 2012 (renewed 21 March 2023) **[1382]**, and with Fairhold on 15th July 2020.

8. The Tribunal inspected the external areas of the Development on the afternoon of the second day of the hearing, after the hearing had concluded. It also inspected the facilities for the collection of rubbish from Drake House. The Development is a large mixed-use site, consisting of 1,185 residential units and 29 commercial units. The commercial units include a resident's gym, a small business lounge, an estate management office and a 24-hour concierge service. Also present is a Pret-a-Manger café, and waterside restaurants/bars run by Cottons, Youngs, and Waterfront Brasserie. The landscaped areas include water features and communal gardens. A Thames riverboat stop is located immediately next to the Development at Vauxhall (St George Wharf) Pier, near Vauxhall Bridge, and the Thames Path public thoroughfare runs along the riverside frontage. The Development is a short walk from Vauxhall underground station.

9. Construction of the Development commenced in or around 1999. At the time Mr Burke acquired his Lease in 2002, only four residential blocks had been constructed, comprising 336 residential units and four commercial units, although none of the commercial units had been let at that point in time. A substantial amount of further construction therefore took place before the Development was fully completed. Final residential completions occurred in Spring 2011.

10. Located at the south-western end of the Estate, next to the waterfront, is a tall, circular, building called "the Tower". It is common ground that the Tower is within the curtilage of the Development, and within St George's freehold title. The land currently occupied by the Tower was originally intended to be used for offices, as can be seen from a plan included in a 2001 marketing brochure **[Supp 4]**. Text at the bottom

of that plan refers to a pending planning application for the creation of a "residential office tower". Construction of the Tower was completed in 2013 and our understanding is that all flats are let on residential long leases.

The Headlease

11. By clause 4.1 of the Headlease, St George covenants with Fairhold to observe and perform various obligations, including those set out in Part I of the Sixth Schedule (entitled "Estate Costs/Insurance") which includes obligations to inspect, repair, maintain etc, the wider areas of the Estate and other communal facilities.

12. By clause 3 of the Headlease, Fairhold covenants with St George to observe and perform its obligations in the Seventh Schedule and its obligations in Parts I and II of the Eighth Schedule. This includes, at para. 1 of the Seventh Schedule, payment of the Lessee's Proportion of the Maintenance Expenses. The Lessee's Proportion is defined in para. 9 of the Particulars as being a "fair and reasonable proportion". Maintenance Expenses are defined in clause 1 as meaning St George's costs incurred in carrying out its obligations under part I of the Sixth Schedule and such parts of Part II of the Sixth Schedule as are applicable.

The Lease

13. By clause 4.1 of the Lease, Fairhold covenants with Mr Burke to observe and perform obligations set out in Part I of the Schedule 6. Those obligations are divided into three heads: (a) Sector 1 Development Costs, which include inspecting, repairing, maintaining etc the communal areas of the Estate; (b) Sector 2 Block Costs, which include inspecting, repairing, maintaining etc. Drake House and its common parts; and (c) costs concerning the supply of domestic cold water and associated sewage charges and inspecting, maintaining etc any related apparatus or equipment.

14. By clause 3.1 of the Lease, Mr Burke covenants to observe and perform the obligations specified in in Parts 1 and 2 of Schedule 8, which includes at para. 2, an obligation to pay the Lessee's Proportion of the Maintenance Expenses incurred by Fairhold, in accordance with Schedule 7. Maintenance Expenses are defined in clause 1 as meaning Fairhold's costs incurred in carrying out its obligations under Schedule 6.

15. The Lessee's Proportion is defined at clause 1.1 of the Lease, as the percentages specified in the Particulars in respect of the Maintenance Expenses payable by Mr Burke in accordance with Schedule 7. The original percentages were:

    (a) Sector 1 (Development Costs): 0.98%

    (b) Sector 2 (Block Costs): 3.27%; and

(c) Sector 3 (Domestic Cold Water): 0.30%

16. It is common ground when the Lease was entered into the percentage contributions specified in definition of the Lessee's Proportion were calculated on a square footage basis in respect of Development and Block costs, and on the number of bedrooms for the water costs. Mr Burke's percentage contributions were therefore calculated according to the square footage and the number of bedrooms in his Flat, in proportion to the remainder of the Development.

17. In practice, what has happened is that St George has incurred costs in carrying out its obligations in respect of "estate" services under the Headlease, a proportion of which are charged to Fairhold in accordance with the terms of the Headlease. Fairhold then re-charges a proportion of those costs to Mr Burke in accordance with the Lease, together with a proportion of the costs it incurs in carrying out its obligations regarding "block" services.

18. It is common ground that the Lease envisaged that as the Development progressed, and further units were built, a re-apportionment of the service charge proportions payable by Mr Burke would occur. Clause 5.2 of the Lease reads as follows:

> " Until the last lease of the Flats comprising the remainder of the Development has been completed if in the reasonable opinion of the Lessor it shall be desirable to recalculate or reapportion the whole or any part of the Maintenance Expenses on the basis of the Lessee's Proportion then any one or more of the percentages or proportions specified in the Particulars as the Lessee's Proportion may be varied and shall be such part of the whole or any part of the Maintenance Expenses determined at the reasonable discretion of the Lessor."

19. In addition, clause 5.3 of the Lease provides that:

> "If due to any variation in the design or the layout of the Development or any other reasonable cause it shall at any time become necessary or equitable to do so the Lessor may recalculate on an equitable basis the Lessee's Proportion for the Demised Premises and for each of the Properties and shall thereafter notify the Lessee and the lessees of the Properties accordingly and in such case as from the date specified in the notice the new percentage or proportion notified to the Lessee in respect of the Demised Premises shall be substituted for those set out in the Particulars….."

20. The Lessee's Proportion has been varied on several occasions (this appears to have been in 2003, 2005, and 2011) and is currently:

(a) Sector 1 (Development Costs): 0.3676%

(b) Sector 2 (Block Costs): 3.27%

(c) Sector 3 (Domestic Cold Water): 0.1772%

21. Mr Burke's contribution towards Development Costs has therefore decreased from the original percentage of 0.98% to 0.3676%. His contribution towards Block Costs has remained the same, and his contribution to water costs has decreased from 0.30% to 01.772%. Both Respondents asserted that these reductions were made in accordance with clause 5.2 of the Lease. Neither suggested that they were made under the power conferred by clause 5.3, and St George expressly denied this at para. 25 of its Statement of Case **[237]**.

22. It is Mr Burke's case that his contributions towards Development Costs and Block Costs have been incorrectly calculated because an inappropriate apportionment methodology has been adopted.

Procedural background

23. The procedural background to the s.27A applications is a long and complex one and we only consider it necessary to provide some brief details in this decision. Fairhold's application was made first, on 15 September 2021 **[13]**. In its application, it stated that Mr Burke had service charge arrears in the sum of £81,810.87. A determination was sought as to his liability for the 2018, 2019, 2020 and 2021 service charge years. By amended directions issued on 9 December 2022 **[71]** Judge Vance granted Fairhold permission to amend its application to include further service charges said to have accrued for the service charge year ending 31 December 2022. These were said to amount to £102,438.95, as of 23 June 2022.

24. Mr Burke's application is dated 20 January 2023 **[28]** and was pursued against both Respondents. It was accompanied by a statement of case received on 20 January 2023 in which he raised several points regarding the construction of his Lease and the Headlease. Both his and Fairhold's applications were consolidated at a Case Management Hearing ("CMH") that took place on 17 April 2023 **[99]**.

25. Following that CMH, and after service of the parties' statements of case Mr Burke pursued multiple interim applications, including for disclosure of documents. The outcome of those applications is summarised in Judge Vance's directions of 11 September 2023 **[122]** which were made following a further CMH that took place on that date. By those directions the application was listed for hearing on 22 and 23 January 2024.

26. In summary, by reason of the applications made by Fairhold and Mr Burke, the Tribunal is required to determine the following:

    (a) the actual service charge costs payable by Mr Burke for the years 2018; 2019, 2020 2021, and the 2022 service charge years; and

(b) the interim service charge costs payable by him for the service charge year ending 31 December 2022.

27. Until very recently Mr Burke has acted in person in these proceedings. However, by the date of the final hearing he had instructed solicitors, and was represented at the hearing by Mr Demachkie, of counsel. St George was represented by Mr Fain, and Fairhold was represented by Mr Bates, both of counsel. We heard witness evidence from Mr Burke, Mr Gareth Cunnew, a Customer Service Director at St George, and Mr Paul Denton, a Director at R&R. All those witnesses had previously provided written witness statements.

Apportionment of Costs

28. At para. 8 of his witness statement **[1370]**, Mr Denton explained that R&R was appointed to manage the Development following resident dissatisfaction with the service provided by the previous managing agents, Consort Property Management. This, he said, led to proceedings in the Leasehold Valuation Tribunal (as this Tribunal was formerly known), and R&R's appointment following a detailed tender exercise which included meetings with the St George Wharf Resident's Association ("SGWRA").

29. At some point prior to R&R's appointment in 2012, service charge expenditure started to be allocated using a service charge matrix consisting of six costs schedules:

    (i) Residential Development Costs;

    (ii) Commercial Development Costs;

    (iii) Residential Block Costs;

    (iv) Commercial Block Costs

    (v) Domestic Water Charges; and

    (vi) Commercial Water Charges.

30. Neither Mr Denton nor Mr Cunnew could say when these costs schedules were first introduced. Their introduction pre-dated R&R's appointment, and although Mr Cunnew is now a Director of St George, his evidence was that he was originally employed in a customer service role between 2006 and 2008/9 and did not know when they first started to be used.

31. Mr Demachkie suggested that they may have been introduced following the lease back (to St George) of commercial sub-leases which, for the first time, separated out Development and Block Costs into residential and commercial sectors. By way of example, he referred us to a lease dated 19 April 2005 from St George Wharf (Block D) Residential Limited to St George **[Supp 6].**

32. Mr Denton confirmed that the costs schedules were reviewed following R&R's appointment and their use was maintained, with some 'tweaks'. His evidence was that R&R reviewed them again in 2013/14, following the completion and letting of the units in the Tower. A copy of the current service charge matrix, providing computations for the actual service charge costs incurred for 2020/21 and estimated costs for 2021/22 and 2022/3 (based on the costs schedules) was exhibited to Mr Denton's witness statement and provided to the Tribunal in the form of an Excel spreadsheet ("the Spreadsheet"). As one would expect from a Development of this size and complexity it is a detailed document.

33. At para. 17 of his statement Mr Denton explained that commercial units are required to be treated slightly differently to residential units, because of differences in their lease provisions and because the Development is VAT-elected, meaning that VAT receipts need to be issued to commercial lessees. He also explained (paras. 22-23) that the reason why no reference is made to the other, commercial, costs schedules in the service charge demands sent to Mr Burke is because he has no liability to contribute towards such costs.

34. An explanation as to how the current percentage contributions payable by Mr Burke are arrived at is found at para 26 of Mr Cunnew's witness statement:

" **Schedule 1 – Estate**

Allocated based on square foot across the entire development, including commercial units

Apt 298 - 3,981 sq. ft / Development 1,082,996 sq. ft x 100% = 0.3676%

Schedule 4a – Block D Drake House

Allocated based on square foot across Drake House

Apt 298 - 3,981 sq. ft / Drake House 121,838 sq. ft x 100% = 3.27%

Schedule 8 – Domestic Cold Water

Allocated based on the number of bedrooms, across Blocks B to J, excluding Block A (which has its own statutory water supply and own allocation) and commercial which has a separate allocation.

Apt 298 – 3 bedrooms / total bedrooms 1,693 x 100% = 0.1772%"

35. Allocation therefore continues to be based on a square foot calculation in respect of Development and Block Costs, and by number of bedrooms for water costs.

36. A different service charge structure is applied in respect of lessees of the Tower and is described at paras 37-44 of Mr Denton's witness statement. Mr Denton describes the Tower as a largely self-contained tower block, gated from the remainder of the Development, and with its own private staff and car park, the costs of which are paid entirely by the lessees of the Tower.

37. He states that in 2013/14, after completion of the Tower, St George asked R&R to devise an appropriate mechanism to ensure that a fair and reasonable service charge contribution was payable by lessees of the Tower given its location within the estate area of the Development. The contribution to be made was, he said, the subject of extensive consideration and consultation before being implemented, including with the SGWRA, who agreed the final scheme.

38. The mechanism arrived at was that apart from a few items of expenditure, Tower lessees were to contribute 22% of the Development costs incurred, based on the relative square footage of the Tower compared with the combined square footage of the remaining blocks at the Development. Smaller contributions were to be paid in respect of certain costs, which we refer to below.

39. At para. 43 of his statement Mr Denton stated that contributions made by lessees of the Tower are treated as income for the purposes of the estate costs schedule for the Development, rather than by way of a reduction in the percentage contributions payable by each leaseholder of the Development.

40. Mr Burke's primary and overarching challenge regarding apportionment is one of contractual legitimacy, namely that service charges demanded from him have not been demanded in accordance with the terms of the Lease. This, he says, is because the Landlords were not entitled to expand on the cost sectors set out in the Lease through use of the cost schedules. We will address this issue first before turning to the other, specific, challenges raised by Mr Burke, including the treatment of the Tower lessees.

41. Mr Demachkie submitted that at the time the Lease was granted, and even though all parties to it envisaged further units being constructed at the Development, the parties chose not to differentiate between commercial and residential expenditure. Instead, reference in the Lease to the Lessee's Proportion provided a fixed and transparent formula for the calculation of Mr Burke' service charge contributions. As new properties were constructed at the Development, clause 5.2 allowed for, and envisaged, a re-apportionment (and reduction) of the percentage contributions payable Mr Burke towards the Sector 1, 2 and 3 costs.

42. This, argued Mr Demachkie, had to be recalculated using the same methodology as provided for under the Lease by allocating all expenditure incurred to the three cost Sectors and reducing the percentage apportionments payable by the existing lessees. What the

Landlords were not entitled to do, according to Mr Demachkie was to introduce new cost sectors which differentiated between the contributions to be made by residential lessees and those to be made by commercial lessees. This approach has, he said, has resulted in Mr Burke being asked to contribute an unreasonable amount by way of service charge costs as evidenced by the specific examples we address below.

43. Mr Demachkie also argued that to the extent that the service charge obligations under the commercial leases (and those of the Tower) result a service charge shortfall, that is a financial burden that falls on the Landlords to bear and is not one that can be passed on to Mr Burke (skeleton argument, paras. 22-24).

44. We do not agree with Mr Demachkie' s submissions regarding Mr Burke's apportionment challenge. Before explaining our reasoning, we should first address the Tribunal jurisdiction regarding such challenges in light of the Supreme Court decision in *Aviva Investors Ground Rent GP Ltd v Williams* [2023] UKSC 6 and subsequent Upper Tribunal decisions. In the present case, it is common ground that following *Aviva* the Tribunal's jurisdiction is limited to a review of the landlord's re-apportionment for contractual and statutory legitimacy. It is not part of the Tribunal's task under section 27A(1) or (3) to make its own decisions on apportionment, because those are discretionary management decisions for the landlord.

45. Where the parties diverge is on the question of the standard of review to be applied by the Tribunal when reviewing the Landlords' re-apportionment of service charges. Mr Fain referred us to two post-*Aviva* Upper Tribunal decisions which, in his submission, give conflicting answers to that question.

46. The first in time was the decision of Judge Cooke in *Hawk Investment Properties Ltd v Eames & Oths* [2023] UKUT 168 (LC) where she considered a clause that allowed for a re-apportionment to be "calculated by some other just and equitable method to be conclusively determined by the Landlord's Surveyor". Counsel for the landlord contended that where a landlord is required to act "reasonably" (as was the case in *Aviva*) the exercise of that discretion may only be challenged on grounds of rationality, in the sense described in the Supreme Court decision in *Braganza v BP Shipping Limited* [2015] UKSC 17.

47. Judge Cooke disagreed, saying, at para. 52, that it was particularly difficult to see that if the Landlord were to impose an apportionment method devised by its surveyor that was not "just and equitable", that it would not be in breach of contract. She considered that to restrict the FTT to a rationality review would render redundant the additional words that the parties to the lease had agreed to include. They wanted a new apportionment to be just and equitable and the lease specifically required that the method be just and equitable [para. 54]. She

concluded that in assessing the contractual legitimacy of service charges based on the new proposed apportionment, the FTT was required to assess whether the method determined by the landlord's surveyor was "just and equitable" as required by the lease [para. 57].

48. Judge Cooke's decision in *Hawk* was issued on 21 July 2023, and was followed, on 2 October 2023, by the decision of the Deputy President, Martin Rodger KC, in *Braganza v The Riverside Group Ltd* [2023] UKUT 243 (LC) (*"Riverside"*), an appeal that was determined on written representations.

49. *Riverside* concerned a lease clause that gave the landlord the power to increase or decrease service charge proportions if "in the reasonable opinion" of the landlord's surveyor "it shall at any time become necessary or equitable to do so". The Deputy President considered the decision in *Aviva* as well as the line of authority that preceded it. It appears, however, that Judge Cooke's decision in *Hawk* was not drawn to his attention because, as Mr Bates, who appeared for the landlord in that case explained to us, written submissions in *Riverside* closed before Judge Cooke's decision was published.

50.. At para. 45 of his decision the Deputy President said as follows:

> "45. It follows that, after *Aviva*, the FTT's only task when a leaseholder challenges a discretionary apportionment made by a landlord or its surveyor will be to consider whether the apportionment was "rational", in the sense that it was made in good faith and not arbitrarily or capriciously, and was arrived at taking into consideration all relevant matters and disregarding irrelevant matters. Unless for one of those reasons the decision was not one which any reasonable landlord could make, the FTT must apply it, and may not substitute an alternative apportionment of its own."

51. He concluded that there was nothing irrational in the apportionment reached by the landlord's surveyor. The surveyor had not taken into account arbitrary or capricious considerations, as had been suggested by Mr Braganza [para. 47]. Nor was there anything irrational in the surveyor's decision to apportion some heads of expenditure to leaseholders of flats only, and other expenditure to all leaseholders. In completing the lease in the way that they had the parties had agreed that the surveyor was to have the discretion to vary the service charge proportions, thereby leaving it to the surveyor to determine how that amount was to be ascertained [para. 48].

52. We do not agree with Mr Fain that the decisions in *Hawk* and *Braganza* conflict with each other as to how the decision in *Aviva* should be implemented by this Tribunal. The Deputy President's comments at para. 45 of his decision were made in connection with a rationality challenge made by Dr Braganza, namely that the surveyor's apportionment was not rational [para. 40]. It is therefore unsurprising

that the Deputy President focused on that aspect of *Aviva* that addressed the question of whether a re-apportionment was "rational". We do not interpret his decision as suggesting that this Tribunal has no jurisdiction to also consider whether the outcome of a re-apportionment was reasonable. This must be the case given what Lord Briggs said at para. 33 of *Aviva* (our emphasis):

> " Applied to the provisions in issue in the present case, the construction which I now consider to be correct applies as follows. Those provisions gave the landlord two relevant closely related rights: first to trigger a re-allocation of the originally agreed contribution proportions and secondly to decide what the revised apportionment should be. In both respects the landlord is contractually obliged to act reasonably. The FtT decided that the landlord had acted reasonably in making the re-apportionment which was challenged, and it is not suggested that it fell foul of any part of the statutory regime, apart only from section 27A(6). But that subsection did not avoid the power of the landlord to trigger and conduct that re-apportionment, because the jurisdiction of the FtT to review it for contractual and statutory legitimacy was not in any way impeded. **The original question, whether there should be a re-apportionment and if so in what fractions, was not a "question" for the FtT within the meaning of section 27A(6). The question for the FtT was whether the re-apportionment had been reasonable**, and that question the FtT was able to, and did, answer in ruling on the tenants' application under section 27A(1)."

53. In this context, "reasonableness" does not mean reasonableness for the purposes of s.19 of the 1985 Act, which provides that relevant costs, for service charge purposes, are only payable to the extent that they are reasonably incurred. As Judge Cooke pointed out at in *Hawk* [para. 34], only contractual legitimacy was in issue in that case because there is no statutory restriction on a landlord's exercise of a power to re-apportion, "there being no provision in the 1985 Act that apportionments have to be fair, or reasonable, or anything else".

54. Instead, the reference to "reasonableness" at para. 33 of *Aviva* must be to a requirement to act reasonably in contractual dealings between landlords and tenants. The requirement that a re-apportionment must be reasonable may be a specific contractual obligation, as Judge Cooke found in *Hawk*, where she found that the lease provisions required a re-apportionment methodology to be "just and equitable". However, it may also be implied as was the case in *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581, where it was held that it was an implied term of the lease that service charge costs recoverable from a tenant should be limited to an amount which was fair and reasonable, in order to give business efficacy to a lease.

55. Nor is “reasonableness” the same as “rationality” as was made clear in the reference in *Braganza* at [23] quoting Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17, at [14], where it was said:

> "Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions…A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes . It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

56. In the present case, it is our view that clause 5.2 of the Lease gave the landlord the discretion to re-apportion the percentage proportions payable by Mr Burke towards the Maintenance Expenses, but that such discretion had to exercised reasonably. Following Aviva, our only jurisdiction regarding the decision to reapportion, or the percentages decided upon, is whether those management decisions were exercised in a way that was contractually legitimate, to which we apply a Braganza rationality test. However, clause 5.2 requires the landlord to act reasonably in the exercise of that discretion, and we therefore also have jurisdiction to determine whether the landlord’s decision to re-apportion resulted in a reasonable outcome. That is what the parties to the Lease agreed to. If a decision to re-apportion is rational, and leads to a reasonable outcome, the tenant can have no complaint.

57. In our determination, there was nothing irrational in the Landlords’ adoption of the cost schedules objected to by Mr Burke. Clause 5.2 accorded Fairhold a discretionary power to re-apportion the Lessee’s Proportion, by adjusting the percentages payable, at any time up to the completion of the last lease of the flats in the Development, if in its reasonable opinion, it was desirable to recalculate or re-apportion those costs. It was Mr Cunnew’s unchallenged evidence that variations were made in 2003, 2005, and 2011 (para. 20 of his witness statement) and all were therefore made before the final residential completions on the Development in Spring 2011 (see paras. 7-10 of Mr Cunnew’s statement) **[1198]**.

58. The only contractual obligation imposed was that the discretion needed to be exercised reasonably. Similar to the situation in *Riverside*, in completing the Lease in the way that they had the parties had agreed that the Landlord was to have discretion to vary the service charge proportions, thereby leaving it to the Landlord to determine how that amount was to be ascertained. When the Lease was entered into, none of the commercial units had been let, and the Lease made no provision as to what was to happen when that occurred. A methodology therefore had to be introduced to ensure that the service charge contributions

payable by Mr Burke, and the other residential lessees, were varied to reflect those new commercial lettings.

59. There is nothing at all in the Lease to suggest that the use of the six costs schedules resulted in any contractual illegitimacy. Looking objectively, we see nothing to suggest any bad faith in the methodology adopted, nor any evidence of arbitrariness or capriciousness or reasoning so illogical as to be perverse. On the contrary, it appears to us to be eminently sensible for expenditure on Development Costs, Block Costs, and Water Charges to be split between residential and commercial lessees given Mr Denton's unchallenged evidence regarding the different provisions in the commercial leases compared to the residential leases, and that VAT receipts must be issued to commercial lessees.

60. Mr Demachkie submitted that as new units were let the Lease required the service charge proportions to be recalculated by allocating all expenditure incurred to the three cost Sectors and reducing the percentage apportionments payable by the existing lessees. However, that is exactly what happened. Before and after each variation of the Lessee's Proportion payable by him, Mr Burke remained liable to pay towards the same three cost sectors, Development Costs, Block Costs, and Domestic Cold Water costs, and each re-apportionment resulted in a reduction in the proportions payable by him. In addition, allocation continued to be based on a square foot calculation in respect of Development and Block costs, and by number of bedrooms for water costs. The use of the cost schedules was not, as Mr Demachkie submitted, the introduction of new cost sectors. On the contrary, they were a legitimate method for R&R to use when deciding how to allocate incurred costs to one of the three existing cost sectors.

61. As to whether the re-apportionments resulted in a reasonable outcome, we conclude that they did, On each occasion, Mr Burke's contributions towards Development and Water costs decreased and his contributions towards Block costs, as is to be expected, remained the same. This cannot be regarded as anything other than a reasonable outcome.

62. Mr Fain helpfully took us to some examples of how costs are apportioned between residential and commercial lessees, as shown in the Spreadsheet:

    (a) Staff uniforms – in 2020/21 total expenditure was £14,782 of which £1,704 was allocated to Estate Commercial, leaving £13,078 allocated to Sector 1 Estate costs;

    (b) Plant & Equipment - in 2020/21 the block cost for Drake House was £7,759, with the commercial lessees paying a Block cost of £346.

63. Those figures do not appear to us to be unusual for a Development with 29 commercial units, and for a block (Drake House) with four commercial units. There is nothing to suggest that the use of the six

costs schedules has resulted the Landlords' re-apportionments resulting in an unreasonable outcome.

64. We now turn to the specific examples that Mr Burke suggests evidences the unreasonableness of the current service charge apportionment regime as well as costs he considers have been unreasonably incurred and therefore not payable by him.

R&R Management Fee

65. At paras. 7 - 9 of his witness statement, Mr Denton referred to several centralised services and systems present at the Development, namely fire alarm system that covers all blocks and which are monitored centrally, as well as the centralised refuse collection area, shared water supply system, shared car park, and shared management/staff facilities. The Tower, however, has its own supplies for both water and electricity, as well as its own car parking area and its own concierge and management staff. He explained that given the number of headleases and different parties involved, all the landlords agreed that the Estate would be best managed by a single managing agent. There are separate agreements between R&R and each of the various landlords at the Development.

66. At para. 13 of its Statement of Case, of St George stated that R&R charge a per unit fee to manage the Development, which is apportioned between the Blocks based on the number of units in each Block. As there are 1,215 units at the Development (including residential and commercial), and 118 units at Drake House, this means that 118/1215 of the cost of the management fee is allocated to Drake House. This is treated as a Sector 2 (Block) Cost, for which Mr Burke's contribution is set at 3.27%.

67. As for lessees of the Tower, Mr Denton's evidence was that a notional allocation of R&R's management fees is made at the rate of 25%, reflecting R&R's assessment of the approximate division of time between the estate and the blocks. Of this, lessees of the Tower pay 22% of that figure, by way of a contribution towards estate costs, i.e. 5.5% of the total.

68. Mr Burke's position is that R&R's fees should be treated as Development Costs rather than Block Costs because part of the work that R&R carries out benefits the Development rather than the Blocks. He suggests that this means that costs incurred by R&R in managing the Development are being inappropriately subsidised by lessees of the Blocks, to the unfair benefit of the commercial lessees. At para. 11 of his statement of case he said that each of the five original penthouse apartments on the Development were being charged a similar amount as him towards R&R's fees and that their combined contribution is almost the same as the total sum contributed by all the commercial units. Another example of the unfairness caused by the current approach was, he suggested, the treatment of Sentinel House, an empty

office block on the development of approximately 63,000 square feet, previously let to Lambeth Council who paid about £300 per annum towards R&R's management fee, whereas Mr Burke's contribution was around £1,600 per annum.

69. Paras. 3.1 and 8 of Part 2 of Sixth Schedule to the Lease includes within the definition of Maintenance Expenses the costs of engaging management agents in respect of the Maintained Property. What constitutes the Maintained Property is defined in clause 1 as being those parts of the Development described in Part 4 of Schedule 2. The parts described in Part 4 of Schedule 2 include both elements relating to the Block, such as its common parts, as well as the Development, such as the "Communal Areas and Facilities" which concerns its communal areas used in common as amongst lessees.

70. The Lease provisions therefore entitle Fairhold to demand a contribution from Mr Burke towards the costs of management of both the Block and the Development. The Lease does not, however, require those costs to be apportioned between Block and Development costs. We see nothing irrational in R&R's fees being calculated on a fixed fee per unit basis across the Development and then allocated as Sector 2 (Block) Costs. It would be completely disproportionate to expect R&R to separate out the time they spend managing the estate and the blocks, and then split their fee between two costs sectors.

71. Mr Fain explained how R&R's fee is broken down in the Spreadsheet. R&R's fee calculated based on £318.33 per unit, net of VAT. R&R's total management fee for 2021 was £464,118.29 inc. VAT, of which £45,074.86 was paid by the lessees of Drake House (118 units x £318.33 plus VAT). This is treated as a Block cost for which Mr Burke's contribution is calculated at 3.27% of £45,074.86, namely £1,473.95 including VAT. If, however, R&R's total fees were treated as Development costs, as Mr Burke suggests, his contribution would be calculated at 0.3676%, i.e. £1,706, substantially more than the £1,473.95 he was asked to pay. The outcome of the methodology adopted by R&R and the Landlords cannot, therefore, be said to have produced an unreasonable outcome compared to the alternative suggestion advanced by Mr Burke.

72. We identified no evidence to support the suggestion that under the current methodology commercial parties are being subsidised by residential tenants. As is shown in the Spreadsheet, all commercial lessees contribute towards R&R's management fees on the same per unit basis as the residential lessees. If, as Mr Burke suggested, each of the five lessees of the tower penthouse flats pay a similar amount towards R&R's fees, that would amount to around £7,370 in total. It is clear from the Spreadsheet that the allocation of R&R's fees to the commercial lessees is over £11,000 plus VAT, so the evidence does not support Mr Burke's assertion that the lessees of the penthouse flats are paying a similar amount to the commercial lessees.

73. As to Sentinel House, it was clear from our inspection that this has been vacant for a long period of time and therefore cannot involve significant R&R management time. We do not know when it became vacant, but St George's position was that during the period it was occupied by Lambeth Council, the Council managed the building itself, with very limited recourse to R&R's management services. There is no evidence before us to suggest R&R has had any significant management role in respect of the building, or that the single unit Block allocation was irrational. We determine that R&R's costs are payable by Mr Burke, in full, for each of the service charge years in dispute.

The Tower contribution

74. As stated above, apart from a few items of expenditure, Tower lessees contribute 22% of the Development costs incurred, based on a floorspace calculation. The allocation is set out in a table page **[1258]** of the bundle. In Mr Demachkie's submission, if the 22% floorspace figure is accurate, lessees of the Tower should be paying 22% of all the costs charged to the entire Development, without distinction. The current regime, argued Mr Demachkie, means that Mr Burke is subsidising the Tower lessees due to the artificial re-allocation of some of the Development Costs on a different basis to that provided in the Lease.

75. Mr Burke's contentions are predicated on his view that lessees of the Tower should be treated in exactly the same as the other residential lessees in the Development. We do not agree. Mr Burke's lease was entered into in 2002. Construction of the Tower was not completed until 2013. Although it forms part of the Development, we accept the Landlords' submission that in 2013 it was rational for them to adopt a different regime towards the collection of service charge contributions from Tower lessees to that set out in Mr Burke's lease.

76. This is because the Tower lessees have separate provision for several important services enjoyed collectively by the other residential lessees of the Estate. As Mr Denton said in cross-examination, the Tower has its own metered gas, water, and electricity supplies. It also has its own separate fire alarm system, with a monitoring room in the Tower itself. We could see from our own inspection that the Tower is physically gated off from the rest of the Development, with its own separate communal garden and car parking areas. It is, in our view, distinct from the other residential blocks, albeit that it falls within the geographical boundary of the Development. Lessees of the Tower obviously enjoy some of the wider benefits of the Estate, such as use of the communal areas, and it is therefore appropriate for the Landlords to require them to contribute towards the Development Costs. It would, however, be inappropriate and unreasonable for lessees of the Tower to have to pay towards services that they do not receive and Mr Burke's suggestion that they should be treated in such a way is untenable. Nor is there is any evidence before us to support the suggestion that the 22%

allocation is irrational or that the outcome of such an apportionment has been unreasonable.

77. The principal items of expenditure for which a smaller contribution than 22% is sought concerns concierge costs and the costs of yardman salary and uniforms. Apportionment of this expenditure is explained at para. 32 of Mr Denton's witness statement **[1204]**. As to concierge costs, he said that as it is estimated that the concierge spends 17% of their time on estate matters as opposed to Tower matters. Lessees of the Tower are charged 22% of that figure, i.e. 3.77% of the total. Mr Denton also stated that the Tower lessees pay separately for their own concierge service for key holding, parcel management, patrolling the building and gardens, cleaning, and maintenance of the designated Tower external grounds, as well as dealing with enquiries and assisting residents. As such, and given the unique nature of the Tower, compared to the other blocks, we accept that it was rational and reasonable for concierge time to be assessed and allocated in this manner.

78. Mr Denton explained that there are seven yardmen, employed to work at the Development, of which two are permanently assigned to deal with refuse removal. The remaining five deal with estate duties, including estate cleaning. He also said that the Tower lessees do not benefit from the services provided by those two permanently assigned yardmen because they have their own staff managing refuse removal. As such, 71% of the cost of the yardmen is allocated to the Tower lessees, for which they pay 22%, i.e. 15.62%. Again, we see nothing irrational in such an allocation or that it led to an unreasonable outcome.

79. In addition, some items of Development expenditure, namely pest control, eyebolt testing, and aerial maintenance are not charged to lessees of the Tower at all, on grounds that they derive no benefit from them. Mr Denton was cross-examined in respect of these matters and we found his evidence to be persuasive. We identify no irrationality in the allocation of these costs or that it led to an unreasonable outcome. Mr Demachkie suggested that Tower lessees should contribute towards the costs of removing litter from the communal bins on the Estate but we accept Mr Denton's evidence that the costs of doing so, when compared to the removal of refuse from the blocks is so small as to be *de minimis*. Tower lessees contribute towards estate cleaning, so it may be that this these costs are included, in any event.

80. Similarly, we accept Mr Denton's evidence that the costs of estate pest control are so small as to be *de minimis*. An examination of the Spreadsheet indicates that no costs were incurred for estate pest control in 2021, with £825 budgeted for 2022. This is clearly *de minimis*. We were not provided with any evidence to suggest the contrary in respect of either litter removal or pest control. As for eyebolt testing, Mr Denton explained that the eye bolts sit on the blocks and not the Tower. Aerial maintenance, he said, refers to maintenance of the TV satellite aerials located elsewhere on the Estate and not on the

Tower. Given his unchallenged evidence, we see nothing irrational in the approach adopted in respect of the allocation of these costs or that it led to an unreasonable outcome.

Retail Terraces

81. At paras 33-38 of his witness statement, Mr Cunnew explained that an open terrace area in the common parts of the Estate, (coloured purple in a lease plan at **[1753]**) has been enclosed, and is used by three food and beverage operators, all of which have been granted the right to do so under leases granted to them by St George. In his witness statement **[1580]** Mr Burke said that there is a further terrace adjacent to a now empty retail unit, which remains 'closed off' to residents.

82. Mr Cunnew stated that the three food and beverage operators, Youngs, Cottons and Steax, all contribute towards the costs of cleaning the Terrace area used by them, as well as to the maintenance of lighting and furniture, and additional security in the summer months. In addition, they, like all the commercial operators contribute towards Estate costs on a GIA square footage apportionment. Mr Cunnew also said that some other food and beverage operators, such as Pret-a-Manger, have seating areas and put out tables and chairs each day, but these are removed at night. The areas used by them are not closed-off.

83. It is Mr Burke's case that as the closed-off terrace areas cannot be used by the residential lessees, a proportionate reduction should be made to the costs payable by them towards the Development Costs. In addition, any sums associated with the increased costs involved in these areas, such as Estate lighting, security, and CCTV monitoring, should be entirely excluded from the Development Costs paid by residential lessees.

84. At para 28 of its statement of case St George stated that if these terraced areas were included as Sector 1 costs it would reduce Mr Burke's service charge liability by about £40 per year. It then stated that "These costs have been excluded from the Tenant's service charges". The figure of £40 was not challenged by Mr Burke but Mr Demachkie argued that if correct, the sum should not be charged to Mr Burke. Mr Fain's position was that sum was so small as to be *de minimis* and that although St George had said that they would not charge him the £40 sum, there was no reason for it not to do so.

85. Given the lack of challenge to the £40 per annum figure, and the lack of evidence to the contrary, we accept it as accurate. For the service charge year ending 31 December 2023 Mr Burke's estimated contribution to Development costs was £6,714.17. £40 of that sum equates to 0.6%, a sum that we consider to be borderline *de minimis* for the purposes of this determination. Nevertheless, we agree with Mr Burke's contention that as these areas have been excluded from the communal areas of the estate, it is unreasonable for him to have to contribute towards Development costs for those areas. We also

consider St George conceded this point at para 28 of its statement of case.

86. Adopting a broad brush approach, we determine that there should be a reduction of £40 from the Development costs payable by Mr Burke for each of the service charge years in issue in this application on the basis that the outcome of the re-apportionments resulted in this unreasonable outcome.

The Pier

87. At paragraphs 38-40 of his Statement of Case **[202]** Mr Burke stated that the Pier was constructed by St George after the date he entered into his Lease and was built for the use of the Thames Riverboat service, currently operated by Uber. He suggested that St George was negligent when it subsequently sold the Pier for £1 in 2016. In his view, St George failed to ensure that the new owners were obliged to contribute to the Development Costs of the Estate. This, argued Mr Demachkie, should have happened because the use and operation of the Pier results in additional CCTV monitoring, security patrols, cleaning, and management costs because of the estimated 40-80,000 persons using the Riverboat service each year. Many of those passengers, he suggested, would have made use of the footpaths, communal gardens, and seating areas of the Estate.

88. At paras. 39-43 of his witness statement **[1207]** Mr Cunnew explained that construction of the Pier was a requirement of the Section 106 agreement which St George signed with the London Borough of Lambeth on 12 October 2000. It was required to either build the Pier or pay a commuted sum to the council of £1 million (index linked).

89. As part of the sale in 2016, St George granted a licence that permits the Pier to rest on the Development. Mr Cunnew agrees that some passengers will walk through the communal parts of the Estate to access the Pier, but he considers the impact this has on management and maintenance of the communal parts is negligible. We accept that is likely to be the case and there is no evidence before us to suggest otherwise.

90. In any event, this Tribunal has no jurisdiction to determine whether St George should have acted differently in its sale of the Pier and sought a contribution towards the costs of maintaining the Development. We cannot therefore do what Mr Demachkie invited us to do, which is to determine that as no contribution was agreed as part of the sale conditions that it is unreasonable for Burke to have to pay towards costs that could have been the subject of a potential agreement.

Expert's Advice

91. Mr Burke has been disputing the proper apportionment of service charges since at least 2018, as can be seen from the letter sent to him by R&R dated 14 November 2018 **[245]** in response to multiple queries raised by him. At para. 72 of his witness statement Mr Denton said that because of this ongoing dispute a decision was taken to engage an external expert to review the service charge apportionment regime at the Development, with particular focus on the areas of dispute raised by Mr Burke. In an email dated 29 July 2019 Mr Peter Forrester, FRICS was asked to provide that advice, "ahead of a likely FTT application" **[1633]**.

92. A copy of his report is at **[1613]**. Paras. 4–7 identify his terms of reference which was to "carry out an independent review of the existing estate service charge apportionment matrix for the development" and "particularly in response to a tenant challenge that the commercial tenants should be making a larger contribution due to their use, the basis of apportionment of the management fees, and the extent to which the pier should be contributing to the estate service charge."

93. The cost of the report amounted to £9,725, the entirety of which was billed to Mr Burke, as is shown in the running balance of his statement of account, with a line entry date of 19 October 2020 **[1079]**. We were not taken to either a copy of Mr Forrester's invoice, nor a copy of the demand for payment sent to Mr Burke, and neither document appears to have been included in the hearing bundle.

94. In his skeleton argument, Mr Demachkie submitted that the basis upon which payment was sought from Mr Burke, and Fairhold's entitlement to do so under the Lease, had not been made clear. He also argued that the report had not been relied upon by either of the Landlords in these proceedings and that its contents sought to abrogate the role of the Tribunal in determining whether the current method of apportionment was reasonable. The report, he said, served no purpose, and its cost was not recoverable from Mr Burke.

95. Both Mr Bates and Mr Fain argued that it was reasonable for R&R to incur these costs. At para. 59 of his skeleton argument Mr Fain, with whom Mr Bates agreed, submitted that the costs are recoverable as service charge under one or more of paras. 3.1, 8, 9 and 14 of Part 2 of 6th Schedule to the Lease. The problem with these submissions is that it is clear that the cost of this report has not been demanded from Mr Burke as service charge. The cost does not appear to have been included either the 2019/20 or 2020/21 service charge accounts. If its cost had been demanded from all lessees then Mr Burke would obviously only have been asked to pay his apportioned contribution. Instead, the entirety of the cost has been charged to Mr Burke.

96. Fairhold could only recover the full costs of Mr Forrester's report from Mr Burke if the costs were payable by him as an administration charge under the provisions of the Lease. An administration charge is defined at para. 1(1) of Schedule 11, Commonhold and Leasehold Reform Act

2002 ("the 2002 Act") as meaning 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.

97. The cost of Mr Forrester's report does not appear to fall within this definition. The closest one gets is para. 1(1)(c) but the terms of reference suggest that the report was commissioned in response to Mr Burke's challenges regarding apportionment, and not in respect of his failure to pay service charge. Furthermore, a variable administration charge does not become payable until properly demanded, and by paragraph 4 of Schedule 11 of the 2002 Act, a demand for the payment of an administration charge must be accompanied by a summary of the tenant's rights and obligations and a tenant is entitled to withhold payment until that requirement is complied with. No demand for payment of Mr Forrester's invoice as an administration charge, nor a summary of tenant's rights and obligations, appears to have been sent to Mr Burke. We find that the cost is not, therefore currently payable by Mr Burke as an administration charge. Nor is the cost of the report payable by Mr Burke by way of service charge for the years in issue in this application, because it has not been demanded as such.

Lifts

98. At paras. 49-52 of his witness statement **[1376]** Mr Denton addresses challenges made by Mr Burke to the costs of replacement of the lifts at Drake House that appear to have been completed in late 2019 **[644]**. 2021. He explained that the decision to replace the lifts was taken following advice from specialist lift consultants, Cook & Associates, who by email dated 15 August 2018 **[1385]** and subsequent letter dated 15 October 2018 **[1387]** indicated that the lifts:

    (a) had reached the end of their useful life, with concerns raised regarding the availability of spare parts;

    (b) had been installed 18 years prior to the date of their report during which period safety standards had increased, while the availability of parts and support from the manufacturer had become more limited; and

    (c) the lifts had deteriorated due to the counterweight guide rails becoming deformed.

99. The consultant's recommendation that the lifts be replaced rather than repaired was, said Mr Denton, discussed with Fairhold and the

SWGRA, and was then the subject of a statutory consultation with leaseholders under s.20 of the 1985 Act.

100. In his witness statement **[1582]** Mr Burke asserted that he only received a copy of the s.20 notice long after the period of consultation had expired and a contractor appointed. This submitted Mr Bates, did not seem to be correct as the notice of intention was sent to him on 2 August 2017 **[1391]** and Mr Burke was corresponding about the lift works in September-October 2017 **[215-217]**. Mr Bates also suggested that Mr Burke must have received the notice of estimates dated 26 June 2018 **[211]** because he replied to it on 8 August 2018 **[213]**.

101. At the hearing, Mr Demachkie made clear that Mr Burke was not arguing that the statutory consultation process was defective. His challenges were that:

(a) the commercial units on the ground floor of Drake House should have been asked to contribute towards the costs of the lift repairs;

(b) Cook & Associates' report indicated that the lifts had been 'value engineered', which Mr Burke interpreted as being a euphemism for using inferior quality products (para. 28 of his witness statement). In addition the consultants had suggested that the associated guard rails were bent, possibly because of defective construction. As such, the Landlords should have reverted to the original developers or contractors and sought a contribution from them to compensate for the defective installation; and

(c) the Landlords had not explained why the size and capacity of the lifts had been increased, and nor had they carried out a cost benefit analysis as to whether they could have been repaired rather than replaced; and

102. We do not agree with Mr Burke's contentions. Firstly, as Mr Bates submitted, Mr Cunnew's evidence at para. 15 of his witness statement **[1200]** and Mr Denton's evidence, at paras. 18 and 30 of his statement **[1372],** was that the residents' lifts do not serve the commercial premises. Instead, access to the commercial units is via the car park entrance door to Drake House, which is not part of the block. Their evidence in this respect was not challenged on cross-examination and, as such, we agree with Mr Bates that it is unsurprising that there is no obligation on the commercial units to contribute, given that they have no access to the lifts.

103. It is correct that in its report Cooke & Associates said that the Drake House lifts "include a degree of 'value engineering' which has contributed to the wear experienced". However, our understanding, as an expert tribunal, is that value engineering is a term generally used to describe the substitution of materials and methods with less expensive alternatives, without losing functionality. It involves a balancing between cost and performance. As such, even if there was an element of

value engineering in their construction, that does not, in itself mean that the installation was defective or that the costs of installing the lifts were unreasonably incurred. Nor has Mr Burke produced evidence from his own lift expert to suggest that this was the case. In any event, Mr Brown of Cooke & Associates clarified in an email dated 29 November 2018 **[1384]** that when he spoke to Mr Burke in a conference call he explained that their use of the term 'value engineered" in correspondence was a "side issue entirely" and was not the reason why the lifts needed modernisation. The main reason, said Mr Brown, was obsolescence and that sourcing spare parts for components may prove difficult, if not impossible.

104. As Cooke & Associates pointed out in their email of 15 August 2018, the lifts were by then over 18 years old, and the submission that Fairhold should have sought a contribution from the original developers, St George, or its contractors, for lifts constructed over 18 years previously, is simply not tenable. Any guarantees or warranties given following the installation would long since have expired. It is true that in their email Cooke & Associates refer to the counterweight guide rails becoming deformed, and that this may have occurred "as a result of the construction process" but they also suggest that this may be due to "building settlement".

105. There is no evidence that persuades us that that the original installation was defective. Rather, the position evidenced from the email from Cooke & Associates is that the lifts had simply "reached the end of their useful life, when access to spares will become increasingly difficult and lift reliability will inevitably deteriorate due to wear and tear on parts. The evidence is compelling and we find that this was the reason for the replacement of the lifts.

106. As to the scope of the works, Mr Bates accepted that this was not simply a like-for-like replacement, and that there was an element of modernisation. Mr Denton, at para. 52 of his witness statement agreed that the new lifts were larger than those they replaced but said that this was beneficial to residents who were moving furniture in or out of the block. We accept Mr Denton's evidence that there was a benefit to residents in increasing the size of the lifts also find that given the clear evidence regarding obsolescence and difficulties in sourcing parts it was entirely reasonable for Fairhold to accept the consultant's advice to replace the lifts without carrying out a repair/replacement cost benefit analysis.

Next Steps

107. Although the hearing bundle contained copies of the service charge accounts for the 2018 – 2021 service charge years, and the estimate for 2022, we were not provided with a clear breakdown of the total amounts that the Landlords consider are payable by Mr Burke for the years in issue. The parties should seek to agree the service charge sums payable by Mr Burke in light of the reductions made in this decision.

This should be a straightforward exercise, but if agreement is not reached, either party may apply to the tribunal for a final determination of the specific amounts payable.

108. Mr Burke has made an application for an order under s.20C Landlord and Tenant Act 1985. At the hearing, we indicated that we would give directions on that application with this decision. We therefore direct as follows:

(a) If Mr Burke wishes to maintain his s.20C application he must provide written representations to the Tribunal and the other parties by **8 March 2024**;

(b) The Landlords may make written submissions in response by **22 March 2024**;

(c) The Tribunal will then issue a short supplementary decision by way of an addendum to this decision.

Addendum dated 9 August 2024

Applications under S.20C Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002

109. As Mr Burke has maintained the above applications, they require a determination from the Tribunal. Both are refused for the reasons stated below.

110. S.20C of the Landlord and Tenant Act 1985 enables the Tribunal to make an order that all or any of the costs incurred, or to be incurred, by a landlord in connection with proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by a tenant or any other person or persons specified in the application. The Tribunal may make such order on the application as it considers just and equitable in the circumstances.

111. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 empowers the Tribunal to make an order reducing or extinguishing a tenant's liability to pay a particular administration charge in respect of litigation costs incurred, or to be incurred, by the landlord in connection with proceedings before it. Again, the Tribunal may make whatever order on the application it considers to be just and equitable.

112. Mr Burke has made written submissions dated 20 June 2024 in support of his application as well as supplementary submissions dated 5 July 2024. Mr Bates KC has made written submissions on behalf of

Fairhold dated 26 June 2024 and Mr Fain has made submissions on behalf of St George dated 28 June 2024 and 8 July 2024.

113. Mr Burke's position, in summary is that the Landlords, their managing agent (R&R) and Fairhold's solicitor all behaved unreasonably in their response to his efforts to resolve his dispute informally rather than through litigation. He suggests that they refused to engage in discussions with him, refused to meet him, refused to accept a payment from him to 'get the parties to the table', refused to agree to mediation, and failed to engage in his efforts to narrow the issues in dispute in the proceedings. He also contends that Fairhold's application was issued prematurely .

114. Mr Fain and Mr Bates both contend that it would be wrong in principle to make a s20C or para 5A order in circumstances where Mr Burke failed in all of his many service charge challenges except for the sum of £40 per year in respect of estate service charge expenditure and £9,725 in respect of the costs of Mr Forrester's expert report. St George denies acting unreasonably and asserts that it engaged with Mr Burke's queries and participated in without prejudice meetings with him. In Mr Fain's submission, if anyone has acted unreasonably, it is Mr Burke who now owes in excess of £150,000 in service charges.

115. We agree with Mr Bates' submission that the primary consideration when considering if it is just and equitable in all the circumstances to make a s.20C order (and, by analogy a para. 5A order) is, as was stated in *Tenants of Langford Court v Doren Ltd* [2001] EW Lands LRX/37/2000 [31]

> "that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which has heard the litigation giving rise to the costs can avoid arguments under s.19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably and properly incurred by the landlord, it would be unjust that the tenants or some particular tenant should have to pay them.

116. Mr Bates is also correct to point out that where, as in this case, a tenant has been unsuccessful in an application before the Tribunal there needs to be "some unusual circumstances" to justify making a s.20C order in their favour. This was held to be the case in *Shilling v Canary Riverside Development PTE Limited* LRX/26/2005 [13] and reinforced in *Church Commissioners v Derdabi* [2011] UKUT 380 (LC), [19] where it was said that a landlord should not be prevented from recovering via the service charge its costs of resisting the unsuccessful parts of a

tenant's claim as this would usually amount to "an unjust and unwarranted infringement of his contractual rights".

117. Mr Burke rightly points out that the Leasehold and Freehold Reform Act 2024 introduces new limits on a landlord's right to claim litigation costs arising from a service charge challenge by leaseholders through the service charge. However, the relevant section of the Act, s.62(3), which introduces the new s.20CA into the 1985 Act is not yet in force. As such, Mr Burke's s.20C application has to be determined on the law as it currently stands.

118. There can be no doubt that Mr Burke has been overwhelmingly unsuccessful in the service charge challenges he pursued before the Tribunal. He lost on his challenges to: the apportionment of costs, which Mr Fain correctly describes as his major challenge (paras. 56-64 above); R&R's Management Fee (paras. 70-73); the Tower Contribution (paras. 75-80); the Pier (para. 90); and the Lifts (paras. 102-106). Given the comprehensiveness of his loss, and the very minor points on which he was successful, the question for us is therefore whether there is anything unusual in the wider circumstances that would justify making a s.20C and/or para. 5A order in his favour for some, or all, of the litigation costs incurred by the Landlords.

119. In our determination, no such circumstances are evident. It is important to bear in mind that this litigation commenced when Fairhold issued a s.27A application in circumstances where Mr Burke was said have service charge arrears of £81,810.87 due in respect of the 2018, 2019, 2020 and 2021 service charge years. Permission was later granted to amend that application to include further service charges said to have accrued for the service charge year ending 31 December 2022. Mr Burke's arears were, at that time, said to amount to £102,438.95, as of 23 June 2022. Mr Burke then issued his own s.27A application against both Fairhold and St George on 20 January 2023.

120. It was, of course, always open to Mr Burke to pay his service charges whilst still disputing his liability to pay costs in the sums demanded, and if he wished, to pursue a service charge challenge before this Tribunal. Until making his 20 January 2023 application, he chose not to do so and instead allowed very substantial arrears to develop. In such circumstances it was clearly not unreasonable for Fairhold to issue and pursue its s.27A application and for Fairhold and St. George to advance their positions in response to Mr Burke's s.27A application.

121. We are not persuaded by Mr Burke's suggestions of unreasonable conduct. It is true that correspondence exhibited to his submissions references his requests for meetings with the Landlords and/or R&R in order to clarify and resolve issues in dispute. However, the evidence clearly indicates that the Landlords and R&R did, in fact, engage and meet with Mr Burke.

122. Firstly, as Mr Bates points out, steps were taken for Mr Burke to have a meeting with the lift engineer to try and resolve his concerns regarding the lift replacement **[1384]**.

123. Secondly, it is abundantly clear to us from the contents of Mr Denton's witness statement **[1379-80],** and the correspondence exhibited to it, that concerted efforts were made by R&R, over several years, to address Mr Burke's concerns. At paras 73–75 of his witness statement Mr Denton said as follows:

> "73. Over a number of years, a significant volume of correspondence has been exchanged, and meetings have taken place (**PD1/9-185**). However, it has not proven possible to reach any resolution in relation to the complaints raised: Mr Burke's view is that the service charge apportionments are incorrect but, as explained above, that is not the view of R&R or our landlord clients. Our view is that the service charge apportionment at the site is reasonable and complies with the requirements of the lease.
>
> 74. The failure to resolve this issue has led to considerable arrears being accrued. The picture painted when considering the account statement for Mr Burke's apartment (**PD1/186-192**) is not a happy one. The last time that Mr Burke was fully up to date with his service charges was in late 2017 (there were in fact arrears of £2 at this time). Indeed, the payments received on 29th December 2017 are the most recent payments received.
>
> 75. Since this time, the arrears on the account have increased significantly. As at today's date, the total balance outstanding is £131,511.66…"

124. Amongst the correspondence exhibited to Mr Denton's witness statement were copies of letters from R&R to Mr Burke dated 24 August 2018 **[1389]** and 29 October 2018 **[1546]** which responded to his queries concerning the replacement of the lifts at Drake House. Also exhibited was a copy of a letter dated 14 November 2018 sent by R&R to Mr Burke **[1548-51]** which responded in detail to numerous queries concerning his service charge liability raised with the R&R's Senior Portfolio Accountant on 26 October 2018. Accompanying that letter was a full apportionment matrix, details of all the residential and commercial units' square footages, and a list of commercial tenants. A breakdown requested by Mr Burke as to what Drake House commercial units were paying was also provided.

125. In a letter dated 1 March 2019 **[1552]** Mr Rendall of R&R said as follows:

" Having reflected on this issue, I have formed the view that there is little to be gained by continuing our dialogue in correspondence and that we need to refer the matter to the First Tier Tribunal and obtain a definitive ruling. Over the last few months I have done my utmost to explain the cost structure for the Estate and the background to the impending lift project and so there is nothing further that I have to add. We anticipate that the FTT will support the position we have taken but you will be receiving formal papers in due course which will enable you to take your points up with them.

It is regrettable that we have been unable to resolve this matter through informal dialogue as substantial time and money will now be expended. However, you evidently feel there are important issues of principle at stake, as of course do we. We need to establish whose position is correct so that we can move forward with the management of the Estate."

126. Mr Rendall wrote again to Mr Burke on 18 March 2019 **[1553]** responding to his complaint that his requests for information had been met by "silence", saying:

" With respect, we cannot accept this as a fair or accurate suggestion. Considerable efforts have been made over many months to explain both the background to the current lift project and the derivation of your service charge. I refer, in particular to my letters of 14th November, providing a 23 point detailed explanation of the latter (plus enclosures) and my letter of 29th October (plus enclosures) summarising the reasons for and background to the lift project. I also refer to the conversations that we have had, which have included specialist input from the supervising lift surveyors on the lift project, arranged specifically by ourselves to address your concerns." Mr Denton went on to identify the central issues that he believed remained in dispute and on which a determination would be required from this Tribunal. He invited Mr Burke to inform him if he considered that any issues had been omitted.

127. On 5 April 2019, Mr Rendall wrote to Mr Burke saying:

"I find it disappointing that your letter reads as if you have constantly raised questions and had those questions ignored. As you are aware, over the last six months or more we have had several very lengthy phone calls, have provided substantial accounting material for you to consider and exchanged numerous letters, all in an attempt to deal with your queries.

Despite these efforts you have not paid anything towards your service charge for well over a year and still protest that you have many unanswered questions. With respect, your liability to settle your service charge cannot be postponed indefinitely simply by

> you asking more and more questions and then complaining that the answers you receive are inadequate.
>
> Your suggested way forward starts with a request that the questions you have raised are answered. I believe the vast majority of your questions have already been answered, and it is more the case that you don't like the answers provided. However, for clarity, please set out a definitive list of the questions that remain unanswered in your opinion.
>
> Your way forward also suggests that a "meeting of all Principals be held". I do not believe that this is likely to be possible when you have such a large liability unpaid. I will ask the question, but I would respectfully ask you to bring your service charge up-to-date as a gesture of good faith and as a precursor to any such potential meeting. Even then, the need for such a meeting will be dependent upon the definitive list of unanswered questions that you set out."

128. Then by letter dated 11 April 2019 **[1558]** Mr Rendall informed Mr Burke that although neither of the Landlords were amenable to meeting him at that time, Fairhold "would be amenable to a conference call, provided that the agenda for that call was clear and the list of unanswered questions is defined. In his response to that letter, Mr Burke stated that the issues to be answered were those set out in his previous letters to R&R and St George in November and December 2018, his letter to R&R of 19 March 2019 and his letter to Fairhold's agent of 7 March 2019. That response did not, in our view, amount to the closely defined list of issues requested from Mr Burke, but Mr Rendall nevertheless tried his best, replying on 24 April 2019 **[1559]** as follows:

> "In your letter you failed to provide a definitive list of outstanding issues but referred instead to various items of past correspondence. I have reviewed this past correspondence and extracted the issues that I think you may be referring to."

129. In that letter, Mr Rendall then went on to address what he believed were Mr Burke's outstanding queries including such matters as: the allocation of Estate service charge costs as between Commercial and Residential Units; the costs of maintaining the Pier; water charges; and the service charge contribution payable by the commercial lessees in respect of the Retail Terrace.

130. In our assessment, this correspondence clearly indicates that R&R, on behalf of the Landlords, acted reasonably in responding to Mr Burke's enquiries and that it did so in an attempt to resolve the dispute with Mr Burke informally before these proceedings were issued and in an attempt to avoid litigation. Contrary to Mr Burke's submission, the evidence indicates that the Landlords did not refuse to engage in discussions with him or to meet him. Mr Fain stated in his written submissions that St George met with Mr Burke on a without prejudice

basis on 13 June 2023 in person and on 17 July 2023 by telephone. Mr Burke, in his supplemental submissions (para.9) acknowledges that the meeting of 13 June took place but asserts that it was not a genuine attempt to compromise the claim. He makes no comment about the 17 July 2023 telephone conversation. It is not for us to identify whether St George went into the 13 June meeting with a genuine attempt to seek a compromise but clearly Mr Burke was wrong to assert that they refused to meet him or engage in ADR.

131. As to Mr Burke's suggestion that St George refused to accept a payment from him to 'get the parties to the table', we see no evidence of any such refusal in the documentation before us. Mr Burke suggests that he made an offer of £10,000 in May or June 2019. He has not pointed us to any document containing an unequivocal offer in that amount although there is reference in a letter dated 19 September 2019, exhibited to his s.20C submissions, in which he stated that he had made such an offer. A note of actions arising from a conference call involving Mr Burke, Mr Rendall and others on 3 May 2019 (exhibited to Mr Burke's supplemental submissions) records that Mr Burke agreed to speak to his advisers about making a part payment of the outstanding service charge and that it had been suggested that he pay 50%.

132. Mr Burke may have made such an offer but, as Mr Fain points out, in July 2019, his service charge arrears stood at £23,658.68 **[1073],** more than double any £10,000 offer if made at that time. It was incorrect for Mr Burke to say that St George "sought to mislead the Tribunal" by denying in para. 6 of its statement of case that Mr Burke "had offered to pay half the service charge" **[234]**.

133. Even if Mr Burke had offered to pay half the service charge outstanding in June 2019, we do not consider that to be sufficient justification to make a s.20C order given that Mr Burke in the end made no payment at all despite Mr Rendall writing to him on 21 May 2019 **[1565]** as follows:

> "When we discussed these on 3rd May the final point we covered was your long overdue payment. You agreed to discuss making a part payment with your advisors. As has hopefully been made clear, the central tenet of your queries, namely that the allocation of the service charges as between Commercial and Residential units is incorrect, is disproved. In fact, the structure and cost allocations within the service charge have been proved to be correct, and in accordance with your covenants under your lease. Please, therefore, remit the balance you owe."

134. In addition, it is clear that Mr Burke subsequently refused to make any payment towards his very substantial service charge arrears because of his entirely mistaken belief that most of what was said to be outstanding was not due. This is evident from a letter to Fairhold's, solicitors, JB Leitch, dated 17 May 2021 (exhibited to his s.20C submissions) in which he said:

> " I offered a payment previously as a goodwill gesture to get the parties to the table.....but that was rejected. That ship has sailed. I do not accept such a precondition for a discussion to take place and certainly not the part payment of a sum most of which is not due".

135. In our assessment Mr Fain is correct in describing Mr Burke as someone who was not simply prepared to accept that he was wrong in his contentions, in particular in relation to the service charge apportionments. We also concur with Mr Bates that the evidence strongly suggests that Mr Burke's approach has been to withhold payment of his service charge contributions in an attempt to create a point of leverage. As Mr Fain submits, in his witness statement of 16 October 2023, para. 7, Mr Burke expressly stated:

> "...In each instance I withheld payment of service charges to 'bring them to the table' which resulted in them eventually capitulated, engaged in meeting and the issues were resolved...".

136. That this was Mr Burke's approach to this dispute is clearly evident in the correspondence we refer to above. In the circumstances the Landlords were entitled to seek a determination from this Tribunal in respect of both s.27A applications. We see nothing unreasonable in their conduct and nothing in the wider circumstances of this case that makes it just and equitable, despite to make either a s.20C or paragraph 5A order in Mr Burke's favour.

137. Finally, we address the suggestion made Mr Burke's supplementary submissions that as St George is not his landlord, then there is no basis on which any costs incurred by it can be added to his service charge. We reject that contention. As explained in para. 17 above a proportion of costs incurred by St. George in carrying out its obligations in respect of "estate" services under the Headlease are charged to Fairhold in accordance with the terms of the Headlease. Fairhold then re-charges a proportion of those costs to Mr Burke in accordance with the provisions of the Lease, together with a proportion of the costs it incurs in carrying out its obligations regarding "block" services." A proportion of St George's costs are therefore passed through to Mr Burke through that chain.

138. The problem with Mr Burke's submission is, as Mr Fain points out in his submissions in reply that this exact point was considered in relation to the St George Wharf and Battersea Reach estates by Judge McGrath, the President of this Tribunal, and Judge McNall and Mr Holdsworth in applications LON/00AY/LSC/2019/0330 & 0338 and LON/00BY/LSC/019/0330. In a decision dated 24 June 2024 (a copy of which was annexed to Mr Fain's submissions) that Tribunal held that legal costs of defending tribunal proceedings were contractually recoverable by both Landlords under the occupational leases. As that decision was issued after the date of Mr Burke's submissions, we

allowed him the opportunity to respond to it. He did so in further supplemental submissions dated 5 August 2024.

139. Although the 24 June 2024 decision is not binding on us we respectfully agree with its conclusions in para. 38 as to the recoverability of legal costs under the occupational leases. In our determination, legal costs are recoverable by both Landlords by reason of clauses 3.1 and 14 of Schedule 6, Part 2 of Mr Burke's Lease **[1653-1654]** which are mirrored in clauses 3.1 and 15 of Part II of the Sixth Schedule to the Headlease**[1690]**. In addition, we also consider the costs are recoverable under clause 8.1 of Schedule 6 of both the Lease and Headlease.

140. Clause 3.1 refers to Maintenance Expenses and provides for the recovery of sums incurred in "Providing and paying for the employment of such persons as may be necessary in connection with the upkeep and management of the Maintained Property and performance of the covenants on the part of the Lessor in this Lease including fees charges expenses salaries wages and commissions paid to any auditor accountant surveyor or valuer architect solicitor managing agent or other agent…"

141. Clause 14 allows for the recovery of "All other expenses (if any) properly incurred by the Lessor in and about the maintenance and proper and convenient management and running of the Development including in particular but without prejudice to the generality of the foregoing … any legal or other costs bona fide incurred by the Lessor and otherwise not recovered in taking or defending proceedings (including any arbitration) arising out of any lease of any part of the Development or any claim by or against any lessee or tenant thereof or by any third party against the Lessor as owner lessee or occupier of any part of the Development".

142. At para. 10 of his submissions dated 5 August 2024, Mr Burke submits that the only solicitors' costs that can be recovered under clause 3.1 are those relating to the 'maintenance' of the "Maintained Property". He gives, by way of example, the costs of obtaining advice regarding compliance with health and safety regulations. At para. 11 of his submissions he contends that in order for legal costs to be recoverable as service charge under clause 14 it is a condition precedent that there must first have been an unsuccessful attempt to recover those costs by another method.

143. We do not accept Mr Burke's submissions. Both clauses 3.1 and 14, and the respective clauses in the Headlease are widely drafted and it is appropriate to consider them both in the context of the whole of Schedule 6 and the Lease as a whole. Clause 3.1 is not limited solely to the recovery of costs in respect of maintenance of the Development. It expressly allows for the recovery of costs incurred in respect of "management of the Maintained Property and performance of the covenants on the part of the Lessor". Any doubt as to whether the

reference to "management" includes the recovery of the costs incurred in this litigation is allayed by the provisions of clause 14 which specifically includes, within the costs of "maintenance and proper and convenient management and running of the Development"..... any legal or other costs bona fide incurred by the Lessor and otherwise not recovered in taking or defending proceedings..... arising out of any lease of any part of the Development or any claim by or against any lessee or tenant thereof or by any third party against the Lessor as owner lessee or occupier of any part of the Development".

144. It is not suggested that the costs incurred by the Landlords were not incurred *bona fide* and even if it was, we see no evidence that would support such a suggestion. Nor is it a condition precedent that recovery of costs through an alternative method must first be attempted before recourse to clause 14. The clause simply prevents recovery of litigation costs through the service charge where they have been recovered elsewhere. As this Tribunal has no power to award inter-party costs outside of a Rule 13 order, the only method by which the Landlords can recover their litigation costs is through the contractual mechanisms in the Lease and Headlease.

145. Further support for the contention that references to the costs of "management" in clauses 3.1 and 14 includes the recovery of the litigation costs can be found at clause 8.1 of Schedule 6 which includes, within the definition of Maintenance Expenses, the costs of "running and management of the Development and in the collection of the reserved rents and in the enforcement of the covenants and conditions and regulations contained in the leases of the Properties and any Estate Regulations". In the case of the Lease, the reserved rent includes the sum payable by Mr Burke, by way of service charge, towards the Lessee's Proportion of the Maintenance Expenses. In our determination. litigation costs incurred in collecting service charges payable by Mr Burke, and in enforcing his obligation to pay them, are therefore also recoverable under clause 8.1, as well as clauses 3.1 and 14. When these three clauses are read together (all of which are mirrored in the Headlease), we consider it unarguable that the ordinary and natural meaning of each of the clauses allows for the recovery by the Landlords of their legal costs incurred in these applications.

146. Furthermore, as submitted by Mr Fain, and found by the Tribunal determining the St George Wharf and Battersea Reach applications, we agree that given that St George is the freehold owner of St George Wharf, and the original landlord of Mr Burke's lease, it is entitled, notwithstanding the grant of the concurrent Headlease, to enforce the tenant covenants in the Lease pursuant to section 15 of the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act").

147. We accept Mr Fain's submission that under the 1995 Act, the Lease takes effect as a lease of the reversion because s.15(1) provides that where any tenant covenant of a tenancy, or any right of re-entry contained in a tenancy, is enforceable by "the reversioner", then it is

also enforceable by any other person (other than the reversioner) who, as holder of the immediate reversion, is for the time being entitled to the rents and profits under the tenancy.

148. Mr Burke disputes this, arguing that by reason of s.3(3) of the Act, the benefit of the covenants he gave to St George in the original Lease passed to Fairhold on creation of the Headlease. He contends that it is only Fairhold, as the holder of the immediate reversion, that is entitled to enforce the covenants under the Lease. We do not agree. Mr Burke is correct that the effect of s.3(3) is that on the assignment of the reversion, an assignee landlord becomes bound by the landlord covenants in an extant lease, and also becomes entitled to the benefit of the covenants contained in it. However, for a post-1996 lease, such as this Lease, s.15(1) provides that the landlord who granted the lease can nonetheless enforce the lessee covenants contained in it as against the original lessee. This provision covers situations such as where a tenant's breach of covenant causes loss not only to the interest of the lessee of the immediate reversion but to the landlord's ultimate reversion.

149. We also accept Mr Fain's submission that because service charges head up the chain between Fairhold and St George, St George is entitled to recover the costs it has incurred in these proceedings under the contractual provisions of the Lease and Headlease referred to above.

150. For the above reasons we do not consider it to be just and equitable in the circumstances to make either a s.20C order or Para. 5A order.

Appendix - 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).