FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00CT/LSC/2021/0003** **BIR/00CT/LIS/2020/0027**
HMCTS Code	**:**	**V:CVPREMOTE**
Property	**:**	**Dickens Heath Estate, Shirley, Solihill ("the Estate")**
Applicant	**:**	**Dickens Heath Management Company Limited ("Man Co")**
Representative	**:**	**Mr Simon Allison (counsel) instructed by JB Leitch Limited**
Respondents	**:**	**(1)The residential leaseholders of Dickens Heath Estate ("Leaseholders")** **(2)The participating residential leaseholders of Garden Square West application ("the GSW Applicants")**
Representative	**:**	**Ms Rowena Meager (counsel) instructed by the GSW Applicants.**
Type of application	**:**	**Liability to pay service charges and/or administration charges**
Tribunal	**:**	**Judge D Barlow** **Mr Wyn Jones**
Date of Hearing	**:**	**10 March 2022**
Date of Decision	**:**	**19 May 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The parties have provided a Bundle of Documents (1284 pages) and additional spreadsheets containing evidence to which reference is made in this decision.

Decision of the Tribunal

(1) The Tribunal determines that the fair and reasonable percentage of the 2021 service charge (which is to be applied retrospectively to the 2020 service charge through the balancing charge), payable by the Leaseholders is as set out in paragraph 128 of this Decision.

(2) The Tribunal makes no order under section 20C of the Landlord and Tenant Act 1985 or under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

The Applications

1. By application dated 4 August 2020, 66 leaseholders of Garden Square West applied for determination of the payability and reasonableness of service charges for the service charge years 2018–2020 under case number BIR/00CT/LIS/2020/0027. By a Settlement Agreement dated 27 May 2021, paragraph 1.1 (c) – the GSW Applicants agreed not to pursue the matters raised in the GSW Application save for the issue of the allocation of estate-wide service charges, including those applied to the houses within the Garden Square West part of the Estate. That issue remains the only outstanding issue to be determined by the Tribunal. Only 18 of the original 66 leaseholders wished to participate in determination of this issue.

2. By application dated 22 June 2021, Man Co applied for a determination of the proper allocation and apportionment of service charges for the Estate for the year 1 January 2021 - 31 December 2021. Man Co also applied for consolidation of this application with the GSW Application.

3. The applications were served on the Leaseholders asking if they wished to participate in the proceedings. Responses were received from 32 participating leaseholders. Statements were filed on behalf of the GSW Applicants. Only two of the other participating leaseholders filed statements, Laura Rudge of 2 Heritage Court, and Nicole Geoghegan of 12 Customs House. Laura Rudge, David Hardisty of 94 Rumbush Lane, (represented by his daughter Ms Alison Smith who spoke at the hearing) and John Dunn of 4 Gorcott Lane also attended the hearing. These are the only "active Respondents" to Man Co's application. The remaining Leaseholders have not participated in these proceedings ("the passive Respondents").

4. The consolidation application was determined at a CMH on 5 October 2021 and the parties agreed that the outstanding issues to be determined by the Tribunal were:

    (i) The balancing charge for the 2019 service charge, although as Man Co were intending to calculate the 2019 balancing charge on the same basis as the interim charge for that year, it was anticipated that this may not remain an issue, and did not in fact remain an issue.

    (ii) Whether the service charge apportionments for the years 1 January 2020 to 31 December 2020; and the year 1 January 2021 to 31 December 2021 have been calculated in accordance with paragraph 1.6 of the Sixth Schedule to the leaseholders' lease(s).

Background

The Estate

5. The Estate includes most of what was originally conceived as the Dickens Heath Village Centre. Planning permission for development of a village estate at Dickens Heath was granted in the 1990's. It was constructed in phases commencing in the early 2000's. There were issues which caused certain phases to be delayed or not finished. It now has three distinct areas.

6. The Market Square, area is at the most northerly end of the village. Market Square now comprises 6 blocks of mixed commercial and residential apartments either side of Main Street, all maintained by Man Co. There is a seventh block, Parkridge Court, (the freehold of which was recently sold) which is no longer maintained by Man Co, but contributes to the costs of some shared services. There are external car parks with spaces allocated to the leaseholders and some unallocated spaces used by shoppers and visitors. It is the retail centre of the village with a number of attractive shops and café premises and some 'on street' parking, all of which is maintained by Man Co. There is a community centre, a library and medical centre which contribute to the Estate service charge and a Village Green, now maintained by the council, which does not contribute.

7. South of Market Square is the Garden Square area. Garden Square West and Garden Square East. Garden Square West comprises 7 blocks of 85 apartments and 21 leasehold houses. There is a private enclosed communal garden with private underground parking for the leaseholders and their visitors. The freehold of Garden Square East has been sold and is no longer maintained by Man Co. It does not contribute to the service charge.

8. The final and most southerly phase is Waterside which comprises 7 blocks of mixed commercial and residential apartments. There are communal ornamental water gardens, 97 apartments, 21 office/studio units, 2 retail units and an art gallery. There is private underground parking allocated to

the leaseholders with some unallocated spaces. Waterside is maintained by Man Co. Adjacent to Waterside, separated by the canal, is the Nature Reserve which is also maintained by Man Co.

9. In total the Estate comprises 365 residential leasehold properties (a mixture of 1-3 bedroom apartments and 3-5 bedroom houses) and 45 commercial units, with above and below ground parking, communal gardens, roadways and other facilities such as pumping stations.

The dispute

10. This dispute has its genesis in a fire that broke out on the balcony of a flat in Waters Edge in June 2018. Inspection reports raised serious concerns about fire risks within the Waters Edge and Waterside Heights (2 of the 7 blocks within Waterside), which necessitated the engagement of a waking watch pending essential remedial fire stopping works. The cost was anticipated to exceed £350,000 over 2019/2020 with additional fire stopping costs of £220,000 being charged in 2020.

11. On the advice of Savills, Man Co initially intended spreading the costs across the whole Estate rather than allocate them to the two affected buildings as had hitherto been the method of apportioning building specific costs. The rationale for that decision appears to have been twofold. First, the lease permits calculation of a whole estate charge for repairs to the structural parts of the buildings. Secondly the waking watch and fire stopping costs would be ruinous if only charged to the leaseholders of Waters Edge and Waterside Heights.

12. Savills advice to spread the costs across the Estate appears also to have triggered a review of the service charge apportionments. Savills found what were considered to be errors in the floor areas of 21 houses and 45 apartments. Without any apparent consideration of the basis for the original methodology, Savills determined that some of the floor areas had been incorrectly calculated when the service charge methodology was first considered and needed to be corrected.

13. A substantial number of leaseholders were unhappy with the decision to spread the waking watch and fire stopping costs across the Estate. The GSW house owners were additionally concerned about the proposed variation to the proportions, because it resulted in a significant increase to their allocation. Applications were made to the tribunal by 4 sets of residents to determine service charges for 2018 to 2020, including whether the budget service charge demand for 2019/2020 was reasonable and whether the proposed new proportions were reasonable. All four applications were settled by the Settlement Agreement, with the exception of the outstanding proportions issue adversely affecting the 21 houses on Garden Square West.

14. As determination of that issue could affect all other leaseholders on the Estate, Man Co applied for a determination of a fair and reasonable apportionment of all Estate service charges for 2021 which it proposes to then apply to the balancing charge for 2020.

The parties and the leases

15. The participating GSW Application leaseholders own 17 of the 21 leasehold houses. It is common ground that all residential leases on the Estate contain service charge provisions that are materially identical. The specimen lease provided by both parties is that of 92 Rumbush Lane, which is the lease of one of the GSW Applicants. It is referred to as "the Lease" throughout this decision.

Service charge provisions in the lease

16. The key definitions in the Lease, so far as are relevant to apportionment issue, are found at paragraph 1:

    (a) 'Building' is defined as the land and buildings numbered X on plan B to the Lease. In this instance, the Building is numbered 15. Plan C shows Building 15 in more detail as comprising 6 terraced houses (together with their own demised outdoor space), attached to a block of 20 flats. The flats are 1-20 Rose Court; the houses are 90-100 (evens) Rumbush Lane.

    (b) 'Estate' is defined as Dickens Heath Village Centre shown edged green on plans A and D. It includes all three phases described above.

    (c) 'Common Parts' means all the parts of the Building available for the common use of two or more tenants of the Building or members of the public, including access roads, walkways. Serviced Areas, landscaped areas, gardens corridors, lifts, staircases, bin stores and visitors car parking spaces, but excludes any areas over which the tenant has been granted exclusive rights.

    (d) 'Main Structure' includes the foundations, roofs, canopies and all structural and loadbearing walls, pillars, columns, slabs and ceilings and any lift or ventilation shafts within the Estate.

    (e) 'Premises' means the plot edged in red on plan C to the Lease. It is an 'internal shell' demise, that is it includes the internal plasterwork of walls and ceilings, floor surfaces, fixtures and fittings, the surface of any balcony, patio or terrace, but not the structural parts of the Building, including the roof and roof void, foundations, window frames, timbers and joists, main walls etc. This is apparently the same for all leases whether or not the demise is of a house or a flat.

    (f) 'Services' means the services provided in Schedule 5.

    (g) 'Serviced Areas' means all parts of the Estate not included within a lettable unit and includes the Main Structure, all forecourts entrance halls, shopping malls, walkways, staircases escalators and lifts. All play areas and public

facilities. All premises exclusively used by the Landlord and its staff to manage the Estate. All car parks, service yards, refuse collection areas and roads. Any heating lighting or other systems benefitting the Estate, Service Media, fire escapes, boundary wall and fences. The Village Green and the Nature Reserve.

(h) 'Service Charge' means the sum to be paid to the Man Co for the provision of the services in Schedule 5.

17. The key terms of the Lease, so far as are relevant to apportionment, are as follows:

(a) Paragraph 6.1 of the Lease, the Man Co covenants with the leaseholder to carry out and provide the services specified in Schedule 5 (subject to provisos).

(b) Paragraph 2 of Schedule 5 sets out the Man Co's obligations. These include:

> 2.1 To insure the demised premises and all those parts of the Estate not intended to be a Lettable Unit.
>
> 3.1 To provide the services set out in Paragraph 4

(c) Paragraph 4, of Schedule 5 details the *'Estate Services'*, which include repairing, cleaning, maintaining and renewing the 'Serviced Areas', including works to lifts, cleaning the Common Parts, maintaining the common facilities, providing fire-fighting equipment and security, planting and maintaining gardens, complying with statutory requirements, and providing for refuse disposal.

(d) Paragraph 5, of Schedule 5 details the '*Building Services*', which include works to repair and renew the Main Structure, Service Media not exclusively serving a Lettable Unit, the Common Parts of the Building itself, and the parking spaces (if any) and decoration of the exterior of the Building and Common Parts.

18. Schedule 6 contains the service charge mechanism. The following provisions are material:

(a) Paragraph 1.1 - the Service Charge year is 1 January to 31 December.

(b) Paragraph 1.5 - the Service Charge costs for the Estate include all costs in connection with the execution of work and provision of services as described in Schedule 5, together with the further costs described in Schedule 6.

(c) Paragraph 1.6 provides that the Service Charge for the Premises shall be '*a fair and reasonable percentage of the Service Charge costs for the Estate, but may be varied:*

a) from time to time and from such date as the Management Company may reasonably specify, by notice in writing to the Tenant;

b) if the Management Company reasonably considers that it would be unfair to continue to compute the Service Charge for the Premises or to apportion any item or items of expenditure to the Premises on that basis.

Management of the Estate

19. The Lease is a tri-partite lease that places primary responsibility for management of the Estate on Man Co. Man Co was incorporated in 2002 by the original developer Dickens Heath Development Company Limited ("DHDC"), to manage the common parts of the Estate. The first properties were sold in 2005. DHDC ran into financial difficulties in 2011 before the final phase was developed and receivers were appointed. The receivers sold off the undeveloped parts of the Estate and some partially developed areas including Garden Square East. It has now sold the reversionary freehold interest in all but 3 of the 22 blocks on the Estate.

20. Man Co is owned by its shareholders. 1 'B' ordinary Share should have been issued to each residential leaseholders of the Estate, a 'C' ordinary share was to be issued to each commercial tenant. DHDC was issued with 1 ordinary 'A' share, which the receivers will ask to be cancelled following disposal of the final 3 blocks. The receivers also propose making a contemporaneous transfer of the reversionary estate in the remaining common areas to Man Co for nil consideration. This will pass full effective control of Man Co and the common parts of the Estate to the leaseholders.

21. Two of the current directors of Man Co, appointed in 2016 provided evidence. They are William Wardrop, an accountant, who provided a Witness Statement and attended the hearing, and Robert Wiggins, the compliance director who also provided a Witness Statement and attended the hearing. There were no substantive issues concerning the service charge when they were appointed but since early 2019 they have engaged with an informal residents association to discuss how improvements could be made to the services. They have also set up a Leasehold Advisory Board comprising 6 residential leaseholders, one commercial leaseholder and two directors, to improve communications and give the leaseholders a voice in the management of the Estate.

22. In 2011, following DHMC's receivership GBR Phoenix Beard Property Consultants ("GBR") were jointly appointed by Man Co and the receivers, as managing agents. The GBR team were merged into Savills mid-2016. Savills continued as managing agents until September 2020 when they were discharged and replaced by Centrick Property Limited ("Centrick"), the current managing agents.

23. Centrick's Operations Manager, Luke Ingram, has been involved in the day to day management of the Estate since early September 2020. He provided a Witness Statement and also spoke at the hearing. When Centrick took over the Estate it was, he said, lacking general upkeep of repairs and cyclical maintenance. There were issues with the 2020 Budget Demand issued by Savills, which included waking watch costs allocated across the Estate. No reserve fund had been accumulated for renewal costs and cyclical maintenance. Savills had failed to communicate issues with the apportionment allocations to the leaseholders before issuing the 2020 budget demand. The budget demand was insufficient to cover required maintenance leaving Centrick to manage the leaseholders' expectation that the maintenance costs demanded would be sufficient.

24. Centrick has experienced considerable difficulty obtaining end of year statements from Savills, and those produced apparently contained material omissions. Consequently, there was some delay issuing final accounts for 2020 although draft accounts were provided by Centrick. Final accounts will, Mr Ingram states, be issued for 2020 following issue of the Tribunal's decision, using the methodology determined by the Tribunal.

The issues

25. Man Co submit that the issues to be determined can be simply put. There is no dispute with the basis of the apportionments for 2019 because that was calculated using the former methodology. The variation implemented in 2020 by Savills for the budget demand is not supported by Man Co, it will adopt the methodology determined by the Tribunal and recalculate the service charge for 2020 on that basis when calculating the balancing charge. The variation determined by the Tribunal will be put into effect across the Estate for 2021 on.

26. For that reason, Man Co submit the principle issue for the Tribunal to determine is the fair and reasonable apportionments for 2021.

27. Mr Allison submitted that the effect of s27A(6) of the Act on clause 6.1 of Schedule 6 is as highlighted in *Gater v Wellington Real Estate Ltd [2014] UKUT 561 [1149]* . The Tribunal stands in the shoes of the Man Co in reaching a decision as to apportionment. Accordingly the question for the Tribunal is to ask what is a fair and reasonable percentage of the various service charge costs that each leaseholder on the Estate should pay for the purpose of clause 1.6, and whether the Tribunal considers it would be unfair to continue to compute the Service charge or apportion any particular item or items of expenditure on the former basis. In other words, the Tribunal must first determine what a fair and reasonable percentage is, before it can consider whether it would be unfair to continue to compute the service charge on the former basis.

28. On behalf of the GSW Applicants Ms Meager advocated a more nuanced approach to the issues. There were she suggested three principle issues.

29. First, whether the 2020 service charge should be calculated on the former basis. The interim demand issued by Savills was she submitted, calculated on an invalid basis, without notice to the leaseholders of the proposed variation, without reference to Man Co, in a way that Man Co acknowledge

was clearly unsatisfactory and in circumstances that they say would have led them to intervene had they been aware of them. The fact that Man Co is now seeking sanction for what it considers to be a fairer methodology does not allow a retrospective variation to be applied to the apportionments for 2020, because the leaseholders did not have notice of the proposed variation at the relevant time. Which she argues must be in advance of the variation taking effect for the year in question.

30. Secondly, she argued that absent any change that would render the former basis of calculation unfair, there is no contractual basis for Man Co to vary the basis of apportionment. Ms Meager submitted that the effect of clause 1.6 is that should the Management Company wish to vary the apportionment applicable to individual tenants under the lease it must (a) reasonably consider that it would be unfair to continue to charge on the then current basis, and (b) give notice of that variation in writing. The service charge has been demanded and collected on the former basis for a decade without any known complaint and there is no cogent explanation of why that basis is now considered to be unfair. In other words the Tribunal must first consider whether the right to vary as set out in clause 1.6 (a) and (b) is engaged, and only if it determines that the variation provision is engaged should it go on to determine the third issue which is what should be the varied methodology.

31. The Tribunal considered the parties representations and concluded that the issues it should determine in this case are; whether clause 6.1 of Schedule 6 to the Lease is engaged; and if so what is a fair and reasonable percentage of the 2021 service charge costs that each leaseholder should pay. The Tribunal will then also determine if its determination should apply retrospectively to the 2020 service charge.

The evidence

Apportionment methodology - existing

32. The original apportionment of service charges which included the GSW part of the Estate was set, so far as the Man Co is able to ascertain, around the time the first GSW units were sold in 2010. The system adopted is, broadly:

    a) Services are split into three main schedules (1) Estate wide costs (2) Area/phase specific costs, and (3) Building specific costs. Any commercial only costs were not charged to the residential leaseholders;

    b) The costs for each schedule are allocated as to 70% to the residential properties and 30% to the commercial properties (with a few exceptions for commercial and residential only costs, such as residential lifts and residential common parts decorations and electricity). The 30% contribution is allocated amongst commercial properties on an area basis.

c) The 70% balance of the charges is levied to residential properties by reference to relative floor area within the Building / Area /Estate.

33. This methodology was consistently used up until Savills reviewed the allocations in early 2020 and issued a budget demand for 2020 on a revised basis. The revised methodology has been disavowed by Man Co and it serves no purpose therefore to elaborate further on the detail. Therefore, the original methodology remains the current system of apportionment unless varied by this Tribunal.

34. Centrick argues that the current system is unfair because the developer had reduced the square footage for 21 houses and 24 apartments in GSW (and 3 apartments elsewhere) so that it did not accurately reflect the actual square footage. Mr Ingram put it as follows:

> "*it was clear that it was no longer fair nor reasonable to continue allocating the service charges the same way. We now know that this is not accurate and is detrimentally impacting numerous leaseholders from a financial perspective.*
>
> *Although this miscalculation might have benefited certain leaseholders in that the service charge contribution was reduced, this does justify the inaccurate figures. Centrick are the managing agents appointed by the Applicant to manage the entire Dickens Heath Estate and we have a duty to ensure that the service charge apportionments are reasonable for every contributing leaseholder."*

35. Centrick also deemed that a recalculation of the estate charge based entirely on square footage as proposed by Savills, to be unreasonable. Centrick have therefore proposed a methodology that apportions the general Estate costs and the Area specific costs on a 'per unit' basis, leaving just the Building specific costs to be apportioned on a floor area basis.

Apportionment methodology - proposed

36. The new methodology proposed by Man Co is as follows:

(i) All costs applicable to the entire Estate (broadly, those particularised under the 'Estate' heading at paragraph 4 of Schedule 5 to the Lease), are split between residential and commercial areas as a whole based upon floor area being:

a) Total Area Residential = 306,838sqft

b) Total Area Commercial = 54,032sqft

(ii) A weighting of 30% is added to the commercial units bringing their weighted square footage to 70,241 sqft. The weighting is justified on the basis of higher administration and site management time, relative to the residential units and recognises the additional footfall the commercial premises bring

to the wider estate. This increases the percentage share allocated to the commercial units from 14.972% of the unweighted total Area, to 18.627% of the total weighted Area.

(iii) Shifting the 30% split of overall estate services costs to a 30% floor area weighting reduces the percentage share born by the commercial units to:

c) Total Commercial = 18.6278%

d) Total Residential = 81.3722%

(iv) Man Co will then split the residential share of the costs between the residential properties on a 'per unit' basis i.e. a 1 bedroom flat will contribute the same toward wider estate costs as a 5 bedroom house. The commercial unit contributions will continue to be split by the floor area of each commercial unit.

(v) Costs that are only referable to a particular Area/phase of the Estate (e.g. Garden Square West, Waterside, Market Square) will be apportioned in the same manner, i.e. allocated on a 'per unit' basis, as between the units within those areas.

(vi) Costs referable solely to a particular Building (as defined in the Leases), e.g. repairs to the fabric of the Building, will be charged to the units within that Building and apportioned by reference to floor area. The costs will principally relate to the services set out in paragraph 5 of Schedule 5 to the Lease. This broadly follows the system of allocation that has always been used. However, in order to ensure a fair allocation in circumstances where the definition of 'Building' incorporates a block which contains flats with associated internal communal areas as well as attached houses and/or commercial units, the charge will be allocated by breaking down the costs further into costs solely relating to the houses, costs solely relating to the flats, and those costs common to both, with all resulting costs apportioned according to floor area.

(vii) An example of the proposed new allocation was set out in draft budget accounts prepared for 2021 (Annex C of the Applicant's Statement of Case).

(viii) Costs referable to the car parking areas will be 'hived off' from the general Estate costs. Currently, the units all pay on an equal basis for the car parking areas. The proposal is that a points based system based on actual allocation of spaces is used.

Rationale for the current methodology

37. Robert Wiggins stated that after enquiring with his co-director, who was involved with the developer at the time, he understood that the reason for DHDC agreeing a reduced square footage for some of the properties was to assist with a quick sale. At the time the developer was facing insolvency. Mr Wiggins was candid about not knowing if this was categorically the case.

38. Mr Wiggins was however quite certain that the reasons put forward by the GSW Applicants for the reduced floor areas are incorrect and that there is no intentional weighting system. He was aware of the October 2004 document titled Dickens Heath Village Centre Estate Management and Service Charges ("the 2004 Document") setting out the proposed basis of the service charge allocation. The 2004 Document predates completion of any of the development phases and the sale of any properties on the Estate by some years, and he only became aware of its existence in 2020 when the GSW leaseholders raised their concerns about the budget demand. It appears to have been revised from time to time as the planned build was itself revised during the construction phase. In the appendix to the 2004 Document indicative service charge weightings are shown as follows:

    i) Restaurant/Bar: 1.2 (estate); 1 (block)

    ii) Retail: 1 (estate); 1 (block)

    iii) Offices: 0.75 (estate); 0.75 (block)

    iv) Apartments: 0.5 to 0.6 (estate); 0.5 (block)

    v) Houses: 0.3 (estate); 0.35 to 0.6 (block)

39. Mr Wiggins investigations led him to conclude however that these weightings were never applied. He made enquiries of Jo Foxton at Savills, who has been the accountant responsible for DHMC since the early days of the development and was told that to her knowledge, this proposed basis of allocation had never been adopted and no significant changes to allocations had been made until 2020. Although the GSW houses are the only houses in the development, 27 apartments also had reduced square footage applied and none of the weightings set out in the 2004 Document appear to have been applied to the other types of property.

40. Savills recalculation of the estate wide costs in the 2020 budget resulted in:

    i) An increase in service charge proportions for the 21 houses averaging 226%
    ii) An increase in service charge proportions for the 27 apartments averaging 12%
    iii) A decrease in service charge proportions for the other property owners averaging 9%

41. Only one email received from Savills made reference to correcting the square footage of a number of properties in the 2020 budget calculation. Mr Wiggins took this to mean that Savills had simply corrected their schedule. The directors were unaware of the significant changes to the apportionment schedule or the dramatic impact it would have on a sizeable number of leaseholders. Had he been aware, he would have intervened immediately and sought a determination by the Tribunal before making any changes.

42. Mr Wiggins acknowledged the strength of feeling of the GSW Applicants and the lack of communication which had exacerbated their frustration. In fact, so dissatisfied was Man Co with the service provided by Savills it was

seeking legal redress for the financial impact of their poor service. Unfortunately, they could not now simply revert to the status quo because other leaseholders had become aware of the significantly lower proportion allocated to the houses and were concerned that they were subsidising them. If Man Co took what might appear to be the easier route of restoring the status quo it would likely lead to further applications by the apartment leaseholders.

43. Mr William Wardrop confirmed that he was involved with DHDC during the construction phase. He was instructed as a consultant from June 2009 to August 2011 to assist with recovery of DHDC's parent company following the 2008 financial crash. His duties included reviewing the financial position and cash management of DHDC. He believes that DHDC was seeking to ensure a quick sale of the properties to avoid insolvency and that the reduced square footage was more likely to have been an oversight of DHDC in its haste to get sales through rather than an intentional weighting system.

44. Mr Ingram only arrived on the scene on 7 September 2020. He can therefore provide little relevant evidence concerning the rationale for the current scheme. His view is that the current scheme does not reflect the actual square footage of some properties and it would therefore be unfair and unreasonable to continue apportioning the service charge using the current methodology.

The GSW Applicants

45. The GSW Applicant's filed a Statement of Case in relation to their application and a response to Man Co's application. Two of the applicant's, Ms Victoria Skilbeck and Mr Alun Thomas also spoke at the hearing.

46. Their relevant evidence concerning the current methodology is as follows:

    (i) GSW consists of 106 properties within 7 blocks. 85 x 1 and 2 bedroom apartments and 21 x 3, 4 and 5 bedroom houses. Each leaseholder currently pays a service charge which covers 3 costs centres, the Estate charge, the GSW (area) charge and the Building (block) charge. The service charges are apportioned between the leaseholders. The % apportionments are based on relative floor area, weighted in the case of the GSW houses. The weighting applied to the GSW houses is broadly in line with the incremental loadings set out in the Dickens Heath Village Centre Estate Management and Service Charges document dated 2003 and the 2004 Document. The GSW Applicants believe the loadings were reflective of the relative costs of managing the differing user groups to ensure each group paid a fair and reasonable proportion. This is, they argue, an industry accepted methodology as referenced by Gerald Sherriff in his text: *Service Charges for Leasehold, Freehold and Commonhold*.

    (ii) The building specific charges for the GSW houses are minimal because there are no communal areas to heat, light, clean and repair. There are no lifts to maintain. Although some of the

GSW houses are twice the floor area of the smaller apartments they do not benefit from twice as many services. In fact, the houses derive less benefit from many service charge items. For instance the houses do not require the same level of security and they take up less management time.

(iii) Houses in Dickens Heath do not generally pay service charges. GSW is a unique situation which they believe was taken into account by DHDC when the apportionments were initially fixed. The weightings applied to the GSW houses have been consistently applied since completion of GSW in 2009. The methodology has been in place for over a decade and not challenged or questioned.

(iv) Savills were not instructed by Man Co to consider or review the apportionments. The general level of service charge for Dickens Heath Village is above average due to the high costs of maintaining a very large estate. The impact of increasing the GSW houses proportion of an already inflated service charge, by some 70% has been catastrophic for the GSW houses while providing only a small benefit the apartments.

(v) The GSW Applicant's proposal is that the relative apportionments are re-instated. The 59% budgetary increase for 2020 can then be spread across the Estate on the same basis as that on which the leaseholders all purchased their properties. It complies with the principles set out in the Residents Handbook and is the methodology that has been accepted for over 10 years.

(vi) Since issue of the 2020 budget demand it has been impossible to sell GSW houses. Evidence provided from local estate agents confirms that sales have fallen though due to the high level of service charge, and that the GSW houses were effectively deemed unsellable by one agent with service charges at the level of the 2020 budget demand (i.e. between £4,211.00 and £6,012.00). By contrast several apartments have sold over the same period.

47. In relation to Man Co's suggestion that the loadings reflect a mistake in the initial calculation or were offered as an incentive they point out that there is no evidence a mistake was made. The 2003 and 2004 Documents provide an explanation for the use of floor area loadings and the GSW houses were sold over a period of years beginning on 15 January 2010, ending with the final sale on 29 July 2013. All leaseholders purchased on the basis that their service charge calculation was based on weighted floor area.

48. The GSW Applicants put forward a theory about the 24 apartments in GSW that were allocated a reduced square footage. They noticed that they all had a roof terrace or balcony, the area of which appears to be consistent with the 'discrepancy' noted by Savills. When added to the original square footage their schedule indicates that the balcony/roof terrace areas account for what has been characterised as a mistake or an incentive. They suggest the original calculation, based on net internal floor area, simply

did not include the external square footage of these apartments. This theory was not challenged by Man Co.

Rationale for the proposed methodology

49. Centrick argue that apportioning the broader Estate costs on a 'per unit' basis is the only fair solution. Centrick carefully considered whether differing groups of leaseholders benefitted differently from various Estate costs but found no discernible difference. All residential properties benefit in the same way from the general Estate services, such as security and management and from maintenance of the communal areas of the Estate, whether or not they choose to utilise the facilities (such as the landscaped areas). The relative size of the residential unit has no bearing on the cost. On that basis, a change to a 'per unit' allocation was indicated.

50. The car parking areas including the two under croft car parks (in GSW and Waterside) have been included in the GSW and Waterside Area charges. All residential leaseholders (and some commercial units) benefit from at least one allocated parking space. It does not appear that the commercial units currently contribute to the under croft parking area costs. A one off sum for 41 temporary spaces in the Garden Square under croft, was paid to Man Co by the developer in 2016.

51. It is proposed that from 2020, those who benefit from any car parking allocation should pay a proportion of the costs that reflects their allocation. The proposed allocation is as follows:

    (a) Residential leaseholders with 1 allocated parking space will be charged 1 whole share of the services which include fire systems, bin stores, and accessways. Residents with additional allocated parking spaces will be allocated an additional .5 share per additional space to take account of additional use of facilities such as the gates, lighting and wear and tear to the fabric.

    (b) Commercial units allocated parking bays will pay a .5 share because they only benefit from the use of the space and not the other services which relate to the structure.

    (c) The unallocated bays will either be allocated (with an additional .5 share), allocated as visitor parking or other use or removed from the allocation altogether to avoid any issue with void income in the accounts.

52. Ms Geoghegan, the leaseholder of 12 The Customs House filed a witness statement which broadly supports Man Co's proposed allocations. She expressed an additional concern about application of settlement monies received from DHDC under the terms of the Settlement Agreement. Man Co has agreed that the settlement monies should be applied equally for the benefit of leaseholders. She suggests that the GSW houses will receive a share of the settlement which is disproportionate to their contribution if assessed using the current methodology. If the basis proposed by Man Co is adopted, this will not be an issue.

53. Application of the settlement monies to the service charge account is not an issue before the Tribunal on this application. Furthermore, the Tribunal has not been provided with any detail of the settlement monies, Man Co's intentions as regards its allocation, or any argument concerning whether it would be affected by the current or proposed methodology. It is therefore not a factor the Tribunal can take into account in making its determinations on the issues before it.

54. Ms Laura Rudge, the leaseholder of 2 Heritage Court provided a witness statement and spoke at the hearing. Her property is a 1 bedroom apartment in GSW. She opposes Centrick's methodology based on a 'per unit' charge because it disproportionately benefits larger units at the expense of smaller units. Her relevant evidence is as follows:

55. Ms Rudge produced an email dated 13 December 2012 provided to her by Barbara Cooper of DHDC concerning the service charge structure. The email confirms the proposed service charge structure. There would be two tiers. Services shared by all occupiers (Estate Services) and services shared by smaller groups of occupiers (Block Services. The arrangements were broadly stated to be as follows:

    (a) All occupiers contribute to the general Estate Services, which included maintenance and cleaning of the public access areas, landscaped areas, nature reserve, village green, community hall and all footpaths lighting drainage and water pumping equipment.

    (b) The occupiers benefitting from the Block Services (including maintenance and cleaning of individual buildings including underground carparks) provided for occupiers or defined user groups. (excluding direct costs associated with a demised building (i.e. a leasehold house) which was the responsibility of the leaseholder).

    (c) Under Apportionment of Costs the email confirmed:

    "Our objective has been to achieve a fair and reasonable allocation of costs between all contributors.

    Contributions have been calculated by carefully taking into an account the benefit derived by each user group from the services provided. The basis of the allocation is the relative floor area of each unit adjusted to account for large area single users, combined with a 'loading' adjustment, to take into account perceived benefit."

56. Ms Rudge argues that this method ensures that the charge is proportionate to the size of the unit. A 'per unit' charge leaves the smaller properties subsidising the larger ones. The proposed variation will significantly affect her finances and the saleability of her apartment because the increased service charge proposed is not within the range reflective of her property type. She does not think there is sufficient information about how the new methodology translates into actual charges, so that it can be seen if they

are proportionate to the size and value of the property, and realistic in terms of saleability.

57. Given that the property types range from 1 bedroom apartments to 5 bedroom houses a 'per unit' charge is not appropriate. Ms Rudge was told by Centrick that it reflects best practice despite creating winners and losers, in this case her being one of the losers. She points out that the high level of charge was originally predicated on the assumption that many more leaseholders would contribute to the exceptional amount of public space and infrastructure, which continues to be enjoyed by the whole village and not just those leaseholders footing the bill.

58. Ms Rudge has not been provided with any information that confirms why the proposed unit charge method has been chosen over other options, what the review is based on, or why a 'per unit' charge is considered preferable to floor area. She says that there are many apartments owners that do not support the proposed methodology that have approached her since she was named as a participating leaseholder. She does not consider that the proposed 'per unit' basis of charging for the car parking is fair because there are differing allocations. It would leave her subsidising people with two or more spaces. Ms Rudge would like the fair and reasonable proportions to be based on floor area across all heads of expenditure.

59. Ms Alison Smith explained the impact of the 2020 budget demand on her father Mr David Hardisty, one of the GSW Applicants. She said that her father was elderly and now trapped in an unsaleable house that he could not manage. He always expected that some increase in the service charge would be made, but persistent mismanagement of the Estate had resulted in an astronomical charge that was completely disproportionate to any benefit he had received. He could not now sell his house and asked the Tribunal to determine the issues in a way that was fair and reasonable to all.

The GSW Applicants

60. The GSW Applicants' reiterated their objection to any variation of the current methodology, but have considered Centrick's rationale for its proposed method. Their relevant evidence in connection with the proposed methodology is as follows:

    (i) They do not consider a 'per unit' basis to be fair way to apportion charges without including some weighting to reflect the reduced benefit the self-contained GSW houses derive from some of the services. Also, a 'per unit' calculation would still result in the GSW houses facing charges of between £2,199.00 and £3,099.00 for 2020/2021 which would render their properties unsaleable.

    (ii) Furthermore, as GSW only makes up 20% of the total area of the Estate as compared to Market Square, 51% and Waterside 29% the other two areas account for a far greater proportion of the common areas and the consequent costs of providing the general Estate services. GSW is only 20% of the total area, pays separately for the maintenance and upkeep of its private garden

square and yet is expected to also contribute equally to large areas of the Estate that predominantly benefit the other two areas.

(iii) The GSW Applicants expand on this argument by providing a comparison from the 2019 service charge which shows that the costs of security and cleaning included in the whole Estate charge was allocated to reflect the reduced benefit to, or size of, GSW. The security costs allocated to GSW in 2019 were £5,226.05 compared to just over £9,000.00 for both Waterside and Market Square. The cleaning costs allocated to GSW in 2019 were £2,343.20 as compared to £4,302.08 for Waterside and £3942.48 for Market Square.

(iv) There are several items included within the whole Estate charge which they argue benefit other users more than the GSW houses. These include:

(a) the costs of the Building Manager whose time is likely to be significantly greater dealing with issues relating to the apartments than the houses, which do not have any common parts or communal facilities and consequently have less scope for noise and anti-social behaviour issues to arise.

(b) The same applies to associated Building Manager costs such as Staff costs, the Management Centre rent, the Site Office consumables and the Health and Safety Audit.

(c) The security staff patrol the site daily but do not need to enter the houses which all front an adopted highway and sit adjacent to their private rear gardens. Unlike the apartments which have extensive common parts within their blocks.

(d) The CCTV cameras are primarily located in and around the apartment blocks and publicly accessible common areas. The security costs are therefore significantly less for the houses relative to the apartments.

(e) Garden and grounds costs. GSW has its own private garden area exclusively paid for the GSW leaseholders. They do not share an equal benefit of the broader Estate gardens and grounds.

(f) Cleaning of the communal parts of the broader Estate is of less benefit to GSW leaseholders who pay separately for the cleaning and maintenance of their self contained gardens and under croft parking.

(g) Drains for GSW houses are connected directly to the public system. The costs of drainage for the under croft car park is charges only to GSW residents. GSW should not therefore contribute to general estate drainage.

(h) The water feature located in Waterside predominantly benefits the residents of Waterside which overlook it and should be included in the Waterside Area charge. GSW residents derive almost no benefit and yet are expected to contribute to the upkeep. The Resident's handbook anticipated that the Area charges would include items such as GSW private gardens, the undercroft parking and water feature maintenance. All the items listed as falling within the three Area charges have been so allocated, apart from the water feature on Waterside.

(v) The GSW Applicants do not object to a square footage allocation of the specific Building costs However there are costs within the block specific charge that the GSW houses believe relate more to the apartments such as lightning protection. Their specific concerns about the Building specific charges are:

(a) The pumping station costs relative to GSW should be charged on a per unit basis in the same way as the whole Estate pumping station charges, because the charges do not include the cost of the water supplied and do not reflect the size of the properties. A house will pay nearly five times the costs charged to an apartment on the proposed basis.

(b) The costs of the buildings insurance (£336.52 per house) is thought to be increased by linking the houses to the apartments blocks. These anomalies could be resolved if the blocks containing the houses were treated as separate buildings. As they are vertically divided from the apartments only sharing a party wall there is no reason not to have separate charging basis for building specific house costs and apartments costs.

(c) Charges for drains repair and cleaning appear inconsistent and no drains or gutters have been cleaned in the past ten years.

(d) The lightning protectors on the roof of the taller apartment blocks do not protect the houses.

(e) Management fees are not incurred relative to the size of the property and should be charged on a per unit basis. Apartments are more time consuming that houses to manage and the unit charge for the houses should be lower than the unit charge for the apartments.

(f) Accountancy and audit fees are not incurred relative to the size of the properties and should also be split on a per unit basis which is consistent with the whole estate accountancy and audit charges.

(g) 24/7 Emergency Response – for the same reason this should be charged on a per unit basis.

(vi) In respect of the GSW Area charge, the GSW Applicants welcome a variation that brings the commercial units within the ambit of the car park charges. The commercial units have a large allocation of bays but it is not clear that they currently contribute anything to the costs of maintenance. The GSW applicants do not object to a charge based on allocated spaces provided the area they are paying for does not include any part of the Garden Square East undercroft and the commercial units contribute on the same basis i.e. one full share for the first space allocated and .5 per any additional allocation.

Man Co's response

61. A response on behalf of Man Co was filed which deals briefly with Ms Rudge's concerns and those of the GSW Applicants.

62. Ms Rudge as owner of a one bedroom flat is one of the losers to the proposed variation but any change will result in some leaseholders paying more and some less. The question for the Tribunal is however, what is a fair and reasonable way of allocating the service charge? The propose methodology will result in increased charges for those with the smaller units, such as Ms Rudge and the 21 GSW houses. A solution that is fair and reasonable overall is however what needs to be determined.

63. Ms Rudge will no longer be subsidising those with two or more spaces on the proposed allocation because the charges will be linked to the number of allocated spaces.

64. In Relation to the GSW Applicants' concerns Man Co make the following points:

(i) While noting that the principle of a 'per unit' charge is agreed for Estate costs and Area/phase costs Man Co disagree that there should be some additional weighting in favour of the houses for some heads of charge. The per unit charge method is based on the premise that each unit has the potential to derive the same unrestricted benefit and use from the Estate and Area services regardless of the size of the property and provides a straightforward methodology which is simple to understand and implement.

(ii) Man Co deny that apartments require materially more management and administration time with regard to the Estate and Area costs. The costs vary depending on circumstances and it is not practicable to undertake apportionment on a 'per costs' basis looking at every invoice. A broad brush approach necessary and the only practical way to proceed.

(iii) Security provided across the Estate is of general benefit to all residents. There is no emphasis on patrols for apartment blocks and internal patrols form no greater time costs than other areas.

(iv) The Building Manager is responsible for the day to day management of the entire Estate and is available on site to support all properties equally. *However, the GSW houses do pay a reduced managing agent fee which reflects the lower level of services provided overall to the houses vs the apartments.*

(v) The houses are entitled to benefit equally from the communal gardens and grounds throughout the Estate. The Lease clearly includes the costs of maintaining all communal gardens and grounds in the Estate charge and grants rights to all leaseholders to use them It is fair that the GSW houses contribute equally to the maintenance, cleaning and drainage of these areas. By contrast, residents of Waterside and Market Square do not have access to the GSW private garden square.

(vi) Insurance for non-lettable buildings is an Estate wide cost. Insurance of a lettable Building (as defined in the lease) is recharged as a Building/block cost. The premium is apportioned by floor area per unit because it is a good proxy for calculating relative re-instatement value within a building. Re-instatement value being the basis for all building insurance premiums.

(vii) Lightning protection is charged at £110.00 per Building. It protects taller buildings on the Estate and all structures forming part of the Buildings. It is an across the Estate benefit and charged as such.

(viii) 24/7 protection is a service that is available to all properties equally. If a roller shutter or water pump fails all units will be affected. It is an Estate wide service that benefit all units and is charged as such.

(ix) The Residents Handbook was updated in 2009 and predates all GSW sales. It makes no reference to 'loadings' and confirms that allocation was to based on floor area.

Analysis and deliberation

Effect of s27A(6) of the 1985 Act on clause 6.1 of Schedule 6.

65. It is common ground that the anti-avoidance provision renders void so much of clause 6.1 as has the effect of providing for the determination in a particular manner of any question which could be referred to the appropriate tribunal under section 27A(1). A determination to vary the fair and reasonable proportions by Man Co is such a provision, whether or not it is said to be final and binding.

66. Where a provision for determining an apportionment is rendered void by the operation of s.27A(6) of the 1985 Act, and the parties cannot agree what is fair, the consequence is that the fair and reasonable proportion falls to be determined by the appropriate tribunal. However, in carrying

out that determination the tribunal will have regard to the parties' agreement, so far as it remains.

67. Applying these principles to clause 6(1), section 27A(6) substitutes the references to "the Management Company" for "the F-tT" so that it is that tribunal which has the discretion to vary the fair and reasonable proportions, if it determines that the Management Company reasonably considered that "*it would be unfair to continue to compute the Service Charge for the Premises or to apportion any item or items of expenditure to the Premises on that basis.*" What the section does not do is strike down those words or render them void.

Is clause 6.1 of Schedule 6 engaged?

68. It is therefore necessary for the Tribunal to determine first whether it was reasonable for the Management Company to have concluded the that it would be unfair to continue with the former basis of computing the service charge (which does not appear to have been varied since the leases were granted). If the answer to that question is yes, the Tribunal must then determine what is a fair and reasonable proportion. However, when considering the fairness of the current basis, other comparative methodologies and the rational for those and the current methodology, are relevant considerations.

Meaning of clause 1.6 of Schedule 6

69. Generally, you would expect there to be some change in the nature of the Estate or the services provided that would render the former basis of computation unfair or unreasonable. Circumstances or events that could trigger a review are often specified in the lease. There is nothing in this case to assist in identifying in what circumstances it would be reasonable for Man Co to consider the former basis to be unfair or unreasonable. Critically however, the contractual right to vary is only engaged if the former basis is (for whatever reason), now considered to be unreasonable or unfair and not because there may be other methods of computing the proportions that are in opinion of Man Co, preferable or more appropriate.

70. Ms Meager provided extracts from *The RICS Code of Practise (3rd ed) para 7.7* and also Gerard Sherriff - *Service Charges for Leasehold, Freehold and Commonhold* which says at paragraph 4.40:

> *"If the lease does not state how the percentage is to be assessed then it is not necessary to change the percentage unless circumstances substantially change. If the lease provides for a 'fair proportion' then the landlord should consider whether circumstances have changed requiring an adjustment either up or down"*
>
> And at para 4.41:

> *"It is recommended that the managing agents who are first employed (and who normally set the first service charge percentages) keep records showing how the figure was reached … As and when circumstances change and a new percentage needs to be calculated the change can be demonstrated to the tenants (and the landlord) by reference to the former statistics. It is good practice in such cases for the service charge accounts to have notes explaining the reason for the change"*

71. Unfortunately, neither Man Co or its managing agents have followed recommended good practice and cannot now say with any certainty how the original apportionments were calculated or what the rationale was for the weightings applied to the GSW houses. They have put forward two possible theories to account for what Man Co sees as an unjustifiable weighting in favour of the houses and questioned the relevance of the only documents in evidence that provide some background to the possible adoption of a weighted floor area calculation. Those documents being the various iterations of the Residents Handbook and the 2003 and 2004 Estate Management and Service Charges documents. As these are the only documents that provide relevant evidence of the developer's original intentions concerning computation of the service charge the Tribunal has taken them into account.

72. Man Co do not appear to argue that there has been any material change in the nature or extent of the Estate, or the services provided, that have rendered the former basis of calculation unfair. Its basic position is that the previous square footage calculation was either flawed (due to a mistake in the initial assessment), or was offered by DHDC as an incentive to facilitate quick sales when the developer was in a precarious financial situation.

73. The difficulty with the first argument is that there is no evidence of an arithmetical mistake, in fact the evidence, such as now exists, indicates that DHDC intended to adopt a loaded floor area basis of calculation. The loadings were carefully calculated as a basis to allocate costs fairly, between groups of users that benefit differently from the services provided. The methodology originally proposed was based on square footage, weighted for different user groups, as shown in the 2003 and 2004 version of the Estate Management and Service Charges document. A relevant extract from this document was being provided to prospective leaseholders as late as 2012.

74. It is therefore unsurprising that a variation of this approach was ultimately adopted. The original proposal gave incrementally higher weightings to offices, retail, restaurant and bar premises, with lower weightings allotted to apartments and lower still to houses. However, the approach ultimately adopted allocates a straight 30% of the overall service charge to the commercial units (i.e. restaurant, retail and offices), the 70% balance is then split between the residential units by reference to floor area, with the houses retaining a weighting of .27 - .28%.

75. There has been no variation of this methodology since being adopted in 2009, until Savills clumsy effort in 2019. The lower percentage paid by the GSW houses only became apparent to the other leaseholders when flagged

by Savills. It was only when the leaseholders were asked to share the costs of the waking watch and fire-stopping works, that they became aware of the issue and began to question the basis for the apportionments.

76. Man Co say that the loadings set out in the 2004 version have never been adopted to determine the service charge and that may be correct, However, the GSW houses contribution has been consistently based on a weighted floor area that reflects the principle set out in an earlier iteration of the Resident's Handbook, which states: *"contributions are based upon gross internal floor area weighted to achieve fairness, reflecting that the benefits of the Landlord's services are not necessarily enjoyed in direct proportion to size or between one use and another"*.

77. Although the 2009 version of the Handbook only states that contributions are based on gross internal floor area, the possibility of loadings is not discounted. The wording could indicate that the basis for calculation would be by unweighted floor area. It could equally indicate that having decided to proceed on a basis which allocates a straight 30% of the charges to commercial units, with the residential units contributing the remaining 70% by reference to floor area, it was not necessary to specifically reference a weighting which only applied to 21 houses. Particularly as DHDC was still referring to weighted contributions in correspondence with leaseholders in 2012.

78. On balance therefore it is more likely that the original calculation was not based on an unintentional error, but intentionally based on internal square footage, weighted to achieve fairness between the two residential user groups, i.e. the houses and the apartments. (After stripping out the 30% commercial allocation).

79. This brings us onto Man Co's second argument, which is that the loading applied to the GSW houses was a developer incentive. The difficulty with this argument is the lack of any reliable evidence. Mr Wiggins's opinion is based on conversations with other directors serving at the relevant time. It is not reliable evidence and there is little to support his theory, other than the known economic conditions at the time, which were not good for house builders and developers. DHDC had conceived this scheme in the halcyon years prior to the 2008 bank collapse. It was intended to create a new village of prestigious properties with a flourishing commercial/retail centre and would doubtless have blossomed into just that, if not for the economic crisis precipitated by the bank collapse. DHDC was facing insolvency and it is therefore quite plausible to suggest that an incentive was offered to house buyers.

80. However, if correct it does not assist Man Co. A contractual incentive acted on by the other party cannot be unilaterally withdrawn. It would have slightly increased the proportions paid by the apartment leaseholders, but that might nevertheless have been regarded by DHDC as fair and reasonable on the basis that the houses would be unsaleable if allocated an unweighted proportion. Empty, hard to sell properties would have detracted from the overall amenity of what was intended to be a high-quality village estate. Unfortunately, the absence of any reliable evidence means that we simply do not know why loadings for the GSW houses were retained and can only draw inferences from the known facts.

81. Man Co's position is that it would be unfair to continue with a system that disproportionately favours the GSW houses. Little evidence or argument has however been provided by Man Co to establish that the previous calculation was, or is, manifestly unfair. The evidence is principally focussed on Man Co's preferred methodology and approach to apportioning services that are not enjoyed equally, rather than explaining why it is saying that the previous methodology is unfair or unreasonable.

82. Man Co's assessment of disproportionality appears to based solely on the size of the weighting. There is no analysis that concludes the weighting is disproportionate in relation to the services the GSW houses actually benefit from. Man Co accept that there is a case for saying that the houses receive a reduced level of service compared to the apartments but propose addressing this by separating into a separate schedule, costs that are specific to the houses because they include *"only a fairly limited basket of costs, including external maintenance, management fees, and house specific reserve fund. This better reflects the reduced level of specific services houses receive compared to the flats.."*. Man Co also state in relation to fees: "*However, the GSW houses do pay a reduced managing agent fee which reflects the lower level of services provided overall to the houses vs the apartments*." So, despite acknowledging that the houses receive less benefit from some services as compared to the apartments, no attempt has been made to quantify that difference in order to establish that the weighting system is, even after accounting for the reduced benefits, manifestly unfair.

83. There are, as was acknowledged by Mr Allison, a range of fair and reasonable approaches to apportioning costs that Man Co could justify adopting. It must however, before adopting an approach that varies the existing proportions, reasonably determine that the previous method of calculating the service charge is not fair and reasonable. Not just that its proposed methodology produces an outcome that Man Co deems preferable.

84. Man Co also questions the appropriateness of apportioning general estate costs and area specific estate costs by reference to floor area, its preferred methodology being a 'per unit' charge. It does not go as far as suggesting that the previous methodology is unfair or unreasonable, just that it is not the most appropriate method, because the benefits of the Estate services are of a more general, non-property specific nature.

85. That being said it is right that Man Co keep the method of apportionment under review so as to ensure that it is demonstrably fair and reasonable and that individual leaseholders bear an appropriate proportion of the total service charge expenditure that reflects the availability, benefit and use of the services. Indeed, Man Co could be rightly criticised if it failed to do so. If that review engages clause 6.1(a) and (b) then a variation should always be considered.

86. The Estate includes extensive communal gardens and grounds, a nature reserve, water features and communal facilities that are expensive to maintain. The burden has fallen on far fewer leaseholders than was originally envisaged. Large parts of the original development have been

sold, such as Garden Square East, which has left the remaining leaseholders shouldering the burden of a very high estate charge. That burden has been slightly lessened by the recent transfer of the village green to the council, but the overall costs remain very high. No review of the service charge has taken place until now.

87. There is a case for saying that changes occurring since the service charge was first introduced, such as disposals of parts of the estate including Parkridge House and Garden Square East, and the allocation of 41 car parking spaces in the Garden Square car park to commercial units, should have triggered a review. Weightings applied in 2009 to the GSW houses may be less fair when applied to the current level of charge. The square footage basis of allocating estate wide services that bear little relation to the size of the properties, could also be seen as increasingly unfair when applied to escalating charges.

88. While overall levels of charge are comparatively modest and not manifestly unreasonable or unfair, then absent leaseholder concerns, it would generally be considered disproportionate for a management company to embark on a root and branch variation of the service charge, even if the methodology used was not based on best practice. However, in this case concerns have been raised and Man Co's review has led it to conclude that the current methodology is no longer yielding a fair and reasonable apportionment.

89. The Tribunal agrees, not because it finds there was any mistake in the original computation, or that the original computation was necessarily unfair, but because changes in the initial concept of the estate on which the current methodology is based, will almost certainly have affected the overall level of service charge and the leaseholders anticipated contributions to it. The Tribunal is therefore satisfied that clause 1.6(a) and (b) of Schedule 6 is engaged and it will therefore determine what is a fair and reasonable apportionment.

90. The Tribunal does not find anything in the wording of clause 1.6 (a) that restricts the time from which any variation can take place to a future date. The Tribunal has power to determine both the fair and reasonable proportions and the service charge year(s) to which they apply, which can and often does, require an adjustment to previous years accounts.

What is a fair and reasonable apportionment?

91. The Tribunal was assisted by its visit to the Estate on 1 March 2022 when it inspected the external common parts of all three phases, the GSW private grounds and the two areas of undercroft parking. With that and the parties evidence in mind, the Tribunal determined the following factors to be relevant in determining the new methodology:

    (a) Simplicity of operation. The method must be proportionate.

(b) Transparency. The method and the manner in which it is implemented should be understood by the leaseholders to avoid future challenges.

(c) Ease of amending the apportionments in the light of future changing circumstances. The more complex the method of apportionment the greater the difficulty in refining the apportionments if units are added to or removed.

The Estate wide charge and the Area specific charge

92. The Tribunal first considered first whether the current floor area basis of apportionment is fair and reasonable. It has determined that while a floor area calculation could form the basis of a fair and reasonable apportionment for the Estate wide and Area specific charge it would need some refinement to properly reflect availability, benefit and use of these services. This has been addressed in part by the 30% pre-allocation to commercial units and the GSW houses weightings, but it leaves the apartment leaseholders paying charges that are not remotely referable to the size of their properties by reference to their floor area, which now include balconies and terraces. Additional weightings could be considered but that would add to the complexity of the calculation.

93. The GIA of each unit has not been measured since construction because it would be disproportionately expensive. However, balconies and terraces have been added, further floors could be added in the future which might eventually necessitate an estate wide recalculation.

94. The major disadvantage of a floor area computation is first, that complex weightings of the kind originally contemplated by DHDC are necessary to make it demonstrably fair to units of widely varying sizes, and secondly any estate wide re-calculation of GIA would be disproportionately expensive.

95. A unit charge method of calculation has the benefit of simplicity, transparency and ease of amending/updating It is regarded by Centrick as best practice because each unit has the potential to derive the same benefit and use of the estate wide services.

96. The Tribunal agrees that unit charge method of calculation provides a more fair and reasonable basis for the calculation of the Estate wide and Areas charge, because the services provided under these schedules are not increased by the comparative size of the units and (save for the exceptions set out below), each unit has the capability of deriving the same benefit from them.

97. The Tribunal took careful note of Ms Rudge's helpful evidence and her contribution to the hearing, and appreciates that this determination will not be welcome. A unit based method of apportionment will always favour larger properties, but having accepted that the cost of services included in the Estate and Area charge are not determined by the size of the properties, this was the only fair and reasonable determination the

Tribunal could make. It is hoped that the impact on the smaller apartments will however be offset, to an extent, by some of the Tribunal's other determinations.

98. The Tribunal carefully considered the arguments put forward by the GSW Applicants for a further weighting to reflect the smaller comparative area and numbers of residents in GSW as compared with Waterside and Market Square and the fact that GSW leaseholders pay the entire costs of their private courtyard. The Lease does however make abundantly clear that the extensive communal grounds and facilities were being provided for the general benefit of the Estate leaseholders who would all be expected to share the burden of maintaining them. The costs have been apportioned between the commercial and residential units and weighted in favour of the houses to address uneven use. Costs have been allocated to area and block specific schedules to further refine the proportions. The introduction of further refinements to take account of comparative areas and numbers of residential units within them will unduly complicate an already complex calculation and is likely to be disproportionate.

99. However, there are four factors that need to be addressed.

(a) The current weighting for the GSW houses
(b) The proportion allocated to the commercial units
(c) The allocation of services to the correct head of charge
(d) The treatment of the car parking areas

GSW houses

100. The Tribunal is unable to determine that the weighting currently allocated to the GSW houses is a mistake. From the limited evidence available the Tribunal has determined that on the balance of probabilities DHDC made a conscious decision to treat the houses differently from the apartments. It is clear from Man Co's evidence that the houses require less management. They are completely self-contained, opening at the front onto adopted streets and to the rear onto their private garden areas. They are unlikely to make the same use of the communal gardens in GSW because they have their own private albeit small rear gardens. However, the GIA of the houses is comparatively high which would have resulted in a disproportionately high level of service charge. The Tribunal finds it likely that saleability was on the mind of DHDC when marketing the houses and likely therefore that the different treatment was intended to reflect not just the 'limited basket' of services the houses require, but to fix a level of charge that would not be a major disincentive potential buyers.

101. The Tribunal does not consider it unfair or unreasonable for the houses to be treated differently for the same reasons. The evidence provided by the GSW houses demonstrates that reverting to an unweighted charge in the 2020 budget account led to a virtual quadrupling of the charge which has rendered their properties unsaleable. A change to a Unit based charge for the Estate and Area charge and the further refinement of separating out the Building charge costs referable to the houses goes some way to addressing this, but still leaves the houses facing significantly higher increases to their charge than that of the apartments.

102. The Tribunal finds therefore that some weighting should continue to apply to the GSW houses that better reflects the overall reduced level of service they require and benefit from. As the change in the basis of computation is more favourable to larger premises the weighting does not need to be at the same level as before. Unfortunately, no comparative figures have been provided by Man Co showing how the comparative methods of apportionment would impact on the GSW houses as compared to the apartments, so we are unable to base our decision on actual figures. The Tribunal has, using the draft accounts provided, but with that limitation in mind, determined that the unit charge applied to the Estate charge and the Area charge for the GSW houses should be .75 of a unit.

Commercial Units

103. The proposed methodology considerably reduces the share of the service charge previously allocated to the commercial units which was a straight 30% of the overall cost of the services, with a few exceptions for services that were wholly or largely of more benefit to either residential or commercial users. No cogent reason has been put forward for the proposed variation to a 30% weighting based on floor area.

104. The effect of this change on the 2021 draft account is to reduce the commercial unit contribution to Estate charge of £459,030.08 to just £63,407.00. A contribution of about 14% rather than the 30% previously allocated. Man Co's statement confirms that the proposed variation reduces the commercial units overall contribution to some 18%.

105. There is nothing in the statements filed by Man Co to explain or justify this apparent favouring of the commercial units at the expense of the residential units. When challenged about this at the hearing, the explanation provided by Mr Allison (having taken instructions) was that there had been a change in the VAT treatment of certain charges following the de-registration of Man Co for VAT in 2019/2020. Savills advice was that this would lead to some net gains for the residential units because the insurance premiums would no longer carry VAT, but it would adversely affect the recovery of input tax on the service charge, for some of the commercial units giving them a net increase of about 18%. Mr Allison accepted that he was effectively giving Man Co's evidence on this, such as it was. It was however accepted that the variation favoured the commercial units.

106. Mr Allison argued that there had been no scientific basis for the current allocation (a speculation based on no discernable evidence) and none was applied to the proposed allocation. It was therefore up to the Tribunal to decide what was a fair and reasonable allocation.

107. On this paltry, inadequate explanation, provided as late as the middle of the hearing, the Tribunal is unable to conclude that the historic 30% allocation of service charge costs to the commercial units was or is unfair or unreasonable. There is no evidence of any change in the number of commercial units or the relative floor area occupied by them. The Tribunal has not been provided with any reliable evidence or argument that either

justifies a variation, or suggests that the proposed variation is demonstrably fair. It therefore determines that no variation should be made to the previous method of allocating 30% of the service charges within the three schedules to the commercial units, save for those specific exceptions where the costs are only, or predominantly, referable to the residential units; and save for the car parking areas which are dealt with separately below.

Allocation of heads of expenditure to the correct schedules

108. These are largely the concern of the GSW houses summarised in paragraph 60 above and can be dealt with quite simply.

109. The Tribunal does not find that it would be proportionate even if possible, to attempt to allocate the proportionate benefit of charges for the pumping stations, drainage, lightning protection or the 24/7 response service between the houses and apartments, all of which are capable of benefitting equally from these essential services.

110. The Tribunal has taken account of the reduced level of service required by the GSW houses in respect of management time, management fees, security, the services of the Building Manager and associated costs, in fixing the reduced unit charge for the Estate and Area charge.

111. The Tribunal does however agree that that the large ornamental water feature in the centre of Waterside largely benefits the leaseholders of Waterside that surround it. It materially enhances the daily visual amenity of the Waterside apartments in a way that is not shared by the remainder of the Estate, who will only see the feature if they happen to walk through Waterside. It is therefore fair and reasonable for the leaseholders of Waterside to bear the bulk of the costs of the water feature. The Tribunal assesses that 80% of the charges for maintenance and repair of the water feature should be allocated to the Waterside Area charge. The Tribunal determines that allocating the remaining 20% of the costs to the general Estate charge, fairly reflects the more occasional benefit enjoyed by the other leaseholders of the Estate.

112. The remaining communal gardens and grounds are capable of providing equal benefit to all leaseholders of the Estate and are correctly allocated to the general Estate charge.

Car parks

113. GSW and Waterside have underground carparks which sit within the footprint/foundations of the blocks constructed above them. Access is through electronic security barriers. Pedestrian access and egress is by both stairwells and lifts to certain of the apartment blocks. The parking areas also serve as a bin store, cycle store and housing for essential plant and maintenance equipment. All residential leaseholders have at least one allocated space.

114. Market Square has on street parking in front of the retail shops and cafes and large areas of external parking behind the commercial/apartment blocks. All residential leaseholders have at least one allocated space.

115. Maintenance and repair of the carparking areas has previously been included as part of the Estate or Area charge which does not reflect the actual allocation of spaces. Man Co confirmed that the car parking charges will include maintenance and repair of the fabric and internal parts of the undercroft parking areas. These include the automated gates, smoke vents, emergency lighting, bike stores, residential bin stores, cleaning and insurance.

116. There is no objection to a variation to put the car parking areas into a separate schedule that is more fairly apportioned to reflect allocation of the parking bays. Man Co's proposal is that the charges should be allocated on the following points basis:

(a) All residential units with an allocated bay – 1 share

(b) Residential units with additional allocation - .5 share per additional allocated bay on the basis that the additional costs associated with maintaining an additional bay will not be double the costs of a single bay.

(c) Commercial units - .5 share per allocated bay.

117. The explanation for the reduced contribution allocated to commercial units is that they do not share the benefit of the additional amenities such the bike and bin stores (the commercial refuse area being separately charged to the commercial units) and unlike the residential users are unlikely to use the spaces on a 24/7 basis.

118. The Tribunal does not find that the difference in user between the commercial and residential users is likely to be such as to justify different treatment. The spaces are available 24/7 and may well be used on that basis if any commercial owners/staff are also residential leaseholders. The additional costs of cleaning and maintaining the bike and bin areas are unlikely to have more than a minimal impact on the overall costs.

119. Furthermore, the proposal does not adequately deal with unallocated bays, visitor or shopper bays. The sample budget accounts provided do not include any drafts for Market Square. The methodology needs to be as simple and as transparently fair as possible.

120. The Tribunal finds that a points based system is a suitable compromise between a per unit or floor area charge but needs to include provision for unallocated bays, visitor and shopping bays. Unallocated bays should be treated as void areas and charged to the landlord on the basis of .5 share per bay (to reflect the lack of actual use). Unallocated bays available for shoppers should be charged to the commercial units on the basis of 1 share per bay (to reflect intensive use during opening hours of the retail and bar/restaurant units). Bays allocated to visitors of residential occupiers

should be included within the relevant Area charge at the rate of a .5 share per bay (to reflect a less intensive use).

121. A fair and reasonable allocation is therefore as follows:

(a) All residential units with an allocated bay to be charged 1 share.

(b) Any bays allocated to commercial units to be charged to the commercial units at the rate of 1 share per bay.

(c) Every additional bay allocated to any unit (i.e. residential or commercial) to be charged an additional .5 share per bay.

(d) Visitor bays to be charged at the rate of .5 share per space as part of the relevant Area charge.

(e) Bays allocated for shoppers to be charged to the commercial units at the rate of 1 share per bay.

(f) Unallocated bays to be treated as void areas charged to the landlord at the rate of .5 share per bay to reflect their lack of use (unless actually used on a temporary or other basis, in which case to be charged at the full rate of 1 share per bay).

<u>The Buildings charge</u>

122. Man Co propose that the costs referable to a particular Building (as defined in the Lease) will continue to be charged to the Building charge schedule and apportioned by reference to floor area. This broadly follows the current system save that the GSW house weightings have been removed.

123. All charges will be apportioned on a floor area basis rather than a unit charge, because relative floor area is the fairest basis for allocation of these types of cost. Maintenance and repair of the fabric and interior of the buildings is directly referable to the size of the component properties and reinstatement values that determine insurance premiums are also based on floor area.

124. To ensure fairness between the houses and apartments a further refinement is proposed which is that costs relating solely to the houses part of the Building (such as maintenance and repair of the fabric and associated fees) and those relating solely to the apartments part of the Building (such as maintenance of the external and internal common areas and associated fees) will be separated into two schedules the *Houses Charge* and the *Apartments Charge*. A third schedule, the *Building Charge* will include only the costs that are common to both the houses and the apartments, (such as buildings insurance, water pumping, lightning conductor, and drainage).

125. Draft budget accounts showing the proposed allocation for the mixed blocks within GSW were provided. The GSW Applicants have objected the inclusion of buildings insurance in the Building Charge schedule because they believe that the houses could be separately insured for less. They also object to the 24/7 call out charge being included in the block charges because they are not referable to relative floor area. Man Co have however confirmed that the 24/7 service will be moved the general Estate charge schedule for the 2021 account.

126. The Tribunal considers that a calculation based on relative floor area produces the fairest allocation of the costs falling within the Building charge schedule for the reasons put forward by Man Co. The Tribunal also finds that while dividing the costs between the Houses, Apartments and Building (common benefit) schedules, introduces another level of complexity, it assists in relieving any concerns that one user group might have about subsidising the other.

127. In relation to buildings insurance, block insurance is the usual and generally most economic method of insuring leasehold blocks. The premium is divided on a floor area basis which is the fairest method as it reflects the reinstatement value calculation on which the premium is based. The costs associated with procuring separate insurance for the houses is likely to be disproportionate to any benefit, if indeed there is any benefit to be had if they are insured on a like for like basis to that of the apartments.

Conclusion

128. The Tribunal finds, for the above reasons, that the fair and reasonable proportion to be applied to the 2021 Service Charge (and retrospectively to the 2020 Service charge through the balancing charge) is as follows:

(a) 30% of the costs allocated to the Estate, Area and Building charge schedules is to continue to be allocated to the commercial properties, save in respect of those services which historically have been allocated on a different percentage basis because they exclusively or predominantly benefit one or other user group.

(b) The balance of the Estate charge and Area Charge is to be apportioned between the residential leaseholders on a 'per unit' basis, varied in respect of the GSW houses to .75 of a unit. The costs for the ornamental water feature within Waterside is to be allocated 80% to the Area charge and 20% to the Estate charge.

(c) The services allocated to the Building charge schedule is, where a Building includes both apartments and houses, to be further allocated to three schedules, for costs exclusively relating to the Houses, costs exclusively relating to Apartments and common Building costs. All costs allocated to the Building charge schedules, are to be apportioned on the basis of comparative unweighted floor area.

(d) The car park costs are to be allocated to separate Area schedules and the charges allocated as set out in paragraph 121.

Costs

129. The GSW Applicant have applied for an order under section 20C of the Landlord and Tenant Act 1985 that the landlord's costs arising from the of proceedings should be limited in relation to the service charge and for an order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 to reduce or extinguish the Tenant's liability to pay an administration charge in respect of litigation costs.

130. Dealing with paragraph 5A, the Lease does not impose any contractual liability on the tenant to pay litigation costs incurred by Man Co on applications to the Tribunal to determine the payability or reasonableness of service charges, therefore no order is required under this section. The Tribunal therefore makes no order under paragraph 5A.

131. Schedule 6 paragraph 2.4 provides that costs of certain proceedings can be added to the service charge. Those proceedings do not include applications of this type made under s27A of the 1985 Act, to determine the payability and reasonableness of service charges. However, clause 2.7 allows Man Co to include the cost of employing professional advisors in connection with disputes and clause 2.8 allows the proper fees of managing agents incurred in managing the Estate to be recovered.

132. Section 20C allows the Tribunal to make an order that the costs of these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the GSW Applicants. The costs would, if added to the service charge, be divided between the remaining Leaseholders.

133. The GSW Applicants say they have tried but failed to negotiate an acceptable compromise with Man Co and were therefore forced to make this application.

134. Man Co disagrees saying that it has managed to negotiate settlements with all other groups of residents except the GSW Applicants and pursuing this application forced Man Co to file its application for a whole estate determination, which has considerably increased costs. Mr Ingram did however indicate that Man Co had some non-service charge reserve funds available from the settlement with the DHDC's receivers, which Man Co would use to settle the litigation costs.

135. The GSW Applicants have succeeded in securing a modest reduction in the service charge proportion allocated to the houses and the Tribunal has little doubt that these proceedings are a direct consequence of Savills unfortunate reaction to the fire at Waterside in 2018, compounded by the landlord's receivership. However, a review of the service charge proportions was overdue, and Man Co are endeavouring to seek redress from Savills. The evidence also suggests that Centrick are doing a much better job of managing the Estate than Savills. As any order would have the effect of pushing the costs onto the shoulders of the remaining

Leaseholders, who are already suffering escalating charges, on balance the Tribunal does not think it just and equitable to make an order under s20C.

Service of this Decision

136. The Tribunal will serve a copy of this decision on Man Co's lawyers, the GSW Applicants and the active Respondents. Man Co is directed to serve this decision on the passive Respondent leaseholders.

Judge D Barlow **Date: 19 May 2022**

NOTES

(a) Whenever you send a letter or email to the tribunal you must also send a copy to the other parties/participating leaseholder and note this on the letter or email.

(b) If the applicant fails to comply with these directions the tribunal may strike out all or part of their case pursuant to rule 9(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

(c) If a respondent fails to comply with these directions the tribunal may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.