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

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| **Case reference** | **:** | **LON/00AG/LVT/2019/0001 and LON/00AG/LSC/2018/0351** |
| **Property** | **:** | **Munro House, 14 St Cross Street, London EC1N 8UN** |
| **Applicants** | **:** | **Munro RTM Ltd<br>Mr P Aquilina (Flat 1)<br>Dr C Pager (Flat 2)<br>Mr M & Mrs C Brailsford (Flat 3)<br>Mr R Maule (Flat 4)<br>M S Scinaldi (Flat 5)<br>Mr P Needleman (Flat 6)<br>Puissant Ltd (Flats 7 & 10)<br>Mr A Russell (Flat 8)<br>Mr W Bishop (Flat 9)** |
| **Representative** | **:** | **Dr C Pager (Flat 2)** |
| **Respondents** | **:** | **Steeparches Limited** |
| **Representative** | **:** | **Michael Walsh, counsel** |
| **Type of application** | **:** | **Variation of lease under s35 of the Landlord and Tenant Act 1987 and liability to pay service charges under s27A of the Landlord and Tenant Act 1985 and other applications.** |
| **Tribunal members** | **:** | **Judge T Cowen<br>Mrs Redmond MRICS<br>Mrs West** |
| **Venue** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of hearing** | **:** | **11 March 2019** |

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**DECISION**

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## Orders of the Tribunal

(1) The leases listed in the Appendix hereto ("the Flat Leases") are all hereby varied as follows:

The phrase "Maintenance Charge" in the definitions section of the particulars of the Flat Leases (F.6) shall be deleted and the following text shall be inserted in its place:

> "The annual or other contribution payable by the Lessee under the provisions of this Lease which shall be such proportion ('the Proportion') of the Management Expenditure less any contribution recovered from the Commercial Units, as is equal to [xx] per cent thereof"

For the avoidance of doubt, the "[xx]" represents a numerical value which is different in each lease. The effect of the Tribunal's order is that the number represented by "[xx]" should remain unchanged in each of the Flat Leases.

(2) The said variation shall have retrospective effect as if each Flat Lease had been varied as ordered from its date of grant.

(3) The Tribunal determines under section 27A of the Landlord and Tenant Act 1985 that:

a. The service charge apportionment between Flat Lessees and commercial tenants for the years 2012-2017 should be 86.43% and 13.57% respectively ("the general apportionment"), save that:

i. The apportionment for electricity should be 94.02% and 5.98% respectively; and

ii. The costs of general repairs should be allocated as set out in detail in the decision below.

iii. The service charges for the remainder of 2018 after the commencement of the RTM are payable in respect of the

costs incurred and claimed by the RTM Company, save that the General Apportionment shall be applied to those costs.

b. The remainder of the Applicants' challenges to the service charges for the years in question are rejected.

(4) The Tribunal determines that the amount of accrued uncommitted service charges held by the Respondent on 28 May 2018, the RTM acquisition date, was the sum of £20,223.92.

(5) The costs applications under section 20C of the Landlord and Tenant Act 1985 and paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 are dismissed.

(6) The reasons for the orders made above are set out in the remainder of this decision.

## REASONS

### The Background to the Applications

1. The Property is a block containing ten flats and two commercial units. The commercial units are on the ground floor and basement of the building. The upper part of the building was converted into residential use in 1997. The Respondent is the freeholder of the building and the landlord of the Applicants.

2. The Applicants are (i) the leaseholders of the ten flats at the Property ("the Flat Lessees") and (ii) the RTM company which took over the management of the building on 28 May 2018. They have made the following applications:

2.1. An application under section 35 of the Landlord and Tenant Act 1987 by the Flat Lessees to vary their leases. The RTM company is not an applicant in this application. We shall call this "the Variation Application".

2.2. A determination under section 27A of the Landlord and Tenant Act 1985 of the amount which is payable for service charges due in respect of the flats at the Property for the years 2012 – 2018 ("the Section 27A Application").

2.3. A determination under section 94 of the Commonhold and Leasehold Reform Act 2002 of the amount of accrued uncommitted service charges which was payable by the Respondent to the RTM Company on the date of acquisition of the right to manage by the RTM Company. The RTM Company is the applicant in this application. ("the section 94 Application").

2.4. An application by the Flat Lessees under section 20C of the Landlord and Tenant Act 1985 in respect of costs of the proceedings and an application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 to reduce or extinguish an administration charge relating to litigation costs ("the Costs Applications").

3. Overall, this is largely a dispute about apportionment. The Property is a mixed use building and the Flat Lessees are unhappy about the balance of contributions required to be made by them on one hand and by the commercial tenants on the other hand. It is this complaint which has prompted the Variation Application (which concerns the balance of contributions) and was the primary original motivation for the Section 27A Application. The same complaint was one of the issues which led to the Flat Lessees deciding to acquire the right to manage through the RTM Company and it is that acquisition which has resulted in the Section 94 Application.

4. Despite the fact that all of the applications derive from one central dispute and they are understandably intertwined in the minds of the parties, they each involve different legal criteria and different arguments and evidence. We will therefore deal with each of them separately, as follows.

5. We heard evidence and submissions from the Applicants and the Respondent and we have considered written submissions from both parties thereafter which dealt with issues which could not be covered in

the time set aside for the hearing. The parties all consented (through their representatives) for the Tribunal to decide the issues covered by the written submissions to be decided on paper, in the interests of saving costs.

**The Variation Application**

6. In order to succeed under section 35 of the 1987 Act, the Applicants need to satisfy subsection (2). The Applicants in this case rely upon the criteria set out in subsection 2(f) and (4), namely those relating to the way service charges are computed and in particular the way that proportions are calculated.

7. Subsection (2)(f) allows an application to be made where:

> "(2) …the lease fails to make satisfactory provision with respect to…:
> (f) the computation of a service charge payable under the lease.

8. Subsection (4) defines that situation as follows:

> "(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—
>
> (a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and
>
> (b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and
>
> (c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

9. In essence, the Applicants' case is that the long leases of the flats and the commercial leases, taken together, entitle the Respondent to collect

more than 100% of the expenditure incurred by the Respondent landlord.

10. We have seen a copy of the lease of Flat 2 dated 13 February 1998, which is a sample of the Flat Leases. It is common ground that all of the Flat Leases are in the same terms, as far as is relevant for the purposes of these proceedings.

11. The Flat Leases contain provisions requiring the landlord to repair and maintain the building and to provide various other services which one would expect of this type of building. They also contain provisions for the leaseholders to pay service charges to reimburse the landlord for the costs incurred in carrying out those works and services.

12. The phrase "Maintenance Charge" is currently defined in the definitions section of the particulars of the Flat Leases (F.6) as follows:

> "The annual or other contribution payable by the Lessee under the provisions of this Lease which shall be such proportion ('the Proportion') of the Management Expenditure as is equal to [xx] per cent thereof".

13. An actual number appears in each lease in the place of the [xx]. It is common ground that the aggregate of all of the percentages in the residential long leases amounts to 100%. The Applicants submitted that the [xx]% in respect of each flat should be the Property's internal floor area divided by the internal floor area of all Flats in the Development, but that was not a relevant consideration for the issues before us.

14. It is also common ground that the Management Expenditure, as defined in the residential long leases, includes the costs and expenses incurred by the landlord in repairing and maintaining the structure and common parts of the entire building.

15. There are two commercial leases: (i) the ground floor shop lease dated 25 March 1998 for a term of 125 years and (ii) the basement workshop lease for a term of three years from 29 September 2017.

16. The service charge provision in the ground floor shop lease requires the tenant to pay a "Maintenance Charge" which is defined as "a fair and reasonable proportion ('the Proportion') of the Management Expenditure. The Management Expenditure is defined in the same terms as in the Flat Leases. In other words, the ground floor flat lease requires the tenant to pay a "fair and reasonable proportion" of an amount 100% of which is already being paid by the Flat Lessees. It is, of course, theoretically possible for the "fair and reasonable proportion" payable by the ground floor shop tenant to be 0%, in which case the aggregate of the service charges would not exceed 100%. It is, however, clear that it would not be fair and reasonable on any basis for the ground floor shop tenant to pay no service charges at all and that is clearly not the intention of the ground floor shop lease.

17. The basement workshop lease contains the following service charge clause at paragraph 1.6 of the Schedule:

> "The annual amount of the service charge payable by the tenant aforesaid shall be such yearly sum as represents 8.66% of the said expenses and outgoings set out in paragraph 2.1 of this schedule and 9.55% of the said expenses and outgoings set out in paragraph 2.2 of this schedule incurred by the Landlord … PROVIDED THAT the said percentages may be varied by the Landlord in the event of a change of circumstances during the Term which affects the tenant's liability under this provision."

18. There is no evidence of any variation of the percentages pursuant to the proviso. In any event, as with the ground floor shop lease, the only way to vary the percentages to prevent the aggregate of service charges exceeding 100% of expenditure would be to reduce both of them to 0%, which would not be appropriate for obvious reasons.

19. As long as the basement workshop tenant is liable, under the terms of its lease, to pay 8.66%/9.55% (or any other percentage higher than 0%) and as long as the "fair and reasonable proportion" payable by the ground floor shop tenant is more than 0%, the aggregate service charge payable to the landlord exceeds 100% of the service charge expenditure.

20. That is the basis of the Applicants' application to vary the Flat Leases. The Applicants seek to vary the definition of the phrase "Maintenance Charge" in each of the Flat Leases The proposed variation would replace that definition with the following:

> "The annual or other contribution payable by the Lessee under the provisions of this Lease which shall be such proportion ('the Proportion') of the Management Expenditure **less any contribution recovered from the Commercial Units,** as is equal to [xx] per cent thereof"

21. The part highlighted in bold is the phrase to be added by the proposed variation. It is not intended that they should appear in bold in the proposed varied leases, the emphasis is just for ease of reading in this decision.

22. The effect of the phrase which the Applicants want to add would be to provide for the following process:

A. calculate the total management expenditure

B. calculate the service charges payable by the commercial units

C. deduct the total of B from A to produce "C"

D. apply the existing percentages in the Flat Leases to C.

Without the variation, the current system provides for the percentages in the Flat Leases to be applied to A.

23. The Applicant's claim as framed by the Applicant appears therefore to satisfy the test in subsections 35(2)(f) and 35(4) of the 1987 Act and the proposed variation would seem to resolve the apparent defect.

24. The Respondent contends that the Applicants' case is a misunderstanding of the Lease; properly understood, the definition of the maintenance charge is not defective and therefore does not require variation. The Respondent concedes that there is no express wording in the service charge definitions or any other clause requiring the landlord

to deduct the commercial tenants' contribution from the commercial tenants from the fixed percentages to the Flat Lessees. But the Respondent argues that the Flat Leases, properly interpreted as a whole, do have the effect of requiring this deduction. They also rely on the fact that this deduction has always historically been made as a matter of fact.

25. This last point is common ground between the parties as a matter of fact. The Applicants do not claim that service charges amounting to more than 100% have actually been charged in the past and they accept that the Respondent has been carrying out the deduction which the proposed variation would require. The Respondent for its part is clear that it has no intention of seeking to recover more than 100% of the expenditure.

26. The Tribunal accepts that. However, the application must be decided on what the various leases actually mean, rather than on how the parties happen to have operated the service charge mechanism as a matter of fact. One obvious reason is that a future landlord might not have such a benevolent approach and may seek to exploit any provision which allows for recovery of more than 100% of expenditure.

27. The Respondent also submitted that there is now an RTM Company which is in control of demanding service charges under the Flat Leases. Since the RTM Company is effectively controlled by the other Applicants, there is no risk of more than 100% of expenditure being recovered. However, the same reasoning applies here as in the previous paragraph. Section 105 of the 2002 Act provides a number of circumstances in which the right to manage can cease to be exercisable by an RTM Company. If that happens, then the risk revives.

28. The Tribunal has approached this application therefore on the sole basis of the interpretation of the leases in the context of the Property, and without regard to the present parties to the leases. Since the Flat Leases and the Ground Floor Shop Leases are for terms of 125 years from 1997, the Tribunal's concern is for the structure of the leasehold estates as a whole, rather than the conduct of the current parties.

29. The Respondent's principal argument on the interpretation of the leases is that the Flat Leases, properly interpreted, already require the deduction which is sought by the variation. Mr Walsh, for the

Respondent, relied mainly on paragraph 5 of part 2 of the 4th Schedule to the Flat Leases which provides for the following covenant by the lessor:

> "**To recover from the Lessees of the Commercial Units such proportion of the Management Expenditure as is appropriate** in respect of insurance repair and maintenance of the Main Structure the Service Installations and such other benefits and facilities which the lessees of the Commercial Units actually enjoy the use of or benefit from (**subject to the terms of any subsisting lease of such Commercial Units or any of them**). (our emphasis)

30. It does not say anywhere in the Flat Leases that this proportion recovered from the commercial units should be deducted from the service charges.

31. The Respondent submitted that it is necessary to read this covenant together with the 5th Schedule to the Flat Lease (which details the service charge mechanism) and the Flat Lease as a whole. In other words, there is no point in the landlord covenanting, in paragraph 5 of Part II of the 4th Schedule, to recover an "appropriate" proportion of expenditure from the commercial tenants if Schedule 5 entitles the landlord to collect 100% of that expenditure from the Flat Lessees. It therefore must follow, according to the Respondent, that the commercial tenants' contribution must be deducted before the Flat Lease percentages are applied.

32. Mr Walsh submitted that he was not claiming that the deduction was an implied term, but rather that the deduction was a necessary way to read the lease when properly interpreted. We disagree. It is very difficult to see how such a precise method of calculation could simply be read into the lease without any specific wording. It is certainly possible to see that the covenant in the Fourth Schedule demonstrates some intention by the parties to provide for the commercial tenants to pay a fair proportion, but that is not at all the same as providing an effective mechanism to ensure that would happen. It may be that the parties intended to provide for such a mechanism and omitted it by mistake. We have no evidence of any such mistake here, it is that kind of mistake which the common law of variation is designed to resolve. In other words, the fact that the parties demonstrate some intention to have provided a fair mechanism

but failed to do so is a reason to vary the lease rather than to interpret it as if they have.

33. The Tribunal is mindful that if it were to be possible to interpret the lease in such a way as to resolve the problem then that would be preferable to ordering a variation. The Respondent went so far as to say that a decision of this Tribunal interpreting the lease (in the way sought by the Respondent) would be as effective as a variation, because it would be a binding decision requiring the parties to make the deduction. Leaving aside the complicated question whether a decision of this Tribunal in these proceedings would be binding on future third parties, the correct test for interpreting the lease is not whether a particular interpretation would lead to a desirable outcome. The purpose of interpretation is to work out what the lease actually means.

34. In this case, the Flat Lease clearly does not provide for the proposed deduction to be made. The mere fact that the landlord covenants to collect an appropriate proportion from the commercial tenants does not demonstrate a clear intention not to charge more than 100% overall in any event. There are any number of other reasons why the parties may have included the covenant in paragraph 5 of Part II of the 4th Schedule. For example it could be read with paragraph 4 of the same Schedule, which generally requires the landlord to impose common covenants. Even if the parties knew that the leases overall allowed the landlord to collect more than 100% of expenditure, the 4th schedule covenant may be desirable as a back-up in the case of recalcitrant Flat Lessees who fail or refuse to pay. In addition, even if the original parties to the lease did intend to avoid exceeding 100%, it is not clear that the proposed deduction would have been the only mechanism available for doing so. It would then not be possible as a matter of law for this Tribunal to choose such a mechanism as being the true interpretation (in the absence of express words), even if the current parties and the Tribunal all thought that would be a good idea.

35. For all the above reasons, the Tribunal has decided that the Flat Leases on their true interpretation, taken together with the commercial leases, satisfy the test in subsections 35(2)(f) and (4) of the 1987 Act. We have also decided that we should exercise our discretion to vary the Flat Leases to remedy the defect. Our decision to exercise our discretion in

that way is based on the fact that both parties essentially agree that the proposed deduction should be made. They are only arguing over the mechanism for achieving it. The Respondent says that the lease already provides for it and that the service charges have in fact been collected on that basis already. We have rejected the Respondent's submissions on interpretation. The Applicants' case is that such result can only be achieved by variation. We agree.

36. In addition, even if the lease could possibly be interpreted in the way suggested by the Respondent, it is at best ambiguous. An ambiguous lease would not, in our judgment, constitute "satisfactory provision" for the purposes of section 35 of the 1987 Act. We have also considered section 38(6) of the 1987 Act. The Respondent did not provide evidence of any prejudice nor any evidence that "adequate compensation" could not be given. It is of course a feature of this case that the Respondent claims to have been making the deductions to the Flat Leases' service charges as if the variation had already been made. So the variation does not effect any real change - it merely regularises the position and prevents a future landlord from exploiting the original unsatisfactory position.

37. We have further decided that the variation proposed by the Applicants in their application form would effectively remedy the defect which is the subject of the application. The proposed variation would be "satisfactory provision".

38. The variation claim is also made by the Applicants under section 37 of the 1987 Act. The majority test in that section is satisfied in this case. The requirement in subsection 37(3) that "the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect", as interpreted in paragraph 71 of *Shellpoint Trustees v Barnett* [2012] UKUT 375 (LC), [2013] L. & T.R. 21 is also satisfied for all the reasons stated above, in our judgment. We have identified the object and the necessity for all of the Flat Leases to be varied accordingly.

39. We would therefore make the proposed variation under both section 35 and section 37 and for that reason we have made the order recorded above.

40. We have also decided to give the variation of each Flat Lease retrospective effect[1] as if each Flat Lease had been varied as ordered from the date of its grant, because the parties have been conducting themselves at all material times as if the leases had been so varied and it would be unconscionable for either of the parties now to claim that the service charge provision should be recalculated for a period during which the leases were not yet varied.

**The Section 27A Application**

41. The Flat Lessees have applied for a determination of the amount payable in respect of service charges for the service charge years 2012-2018. We will deal with each of the challenges raised by the Flat Lessees as follows.

*Apportionment*

42. As discussed above, the apportionment of service charges as between the Flat Lessees is fixed by the numerical percentages in each Flat Lease. It is also common ground that the Respondent has been apportioning the services charges for the years in question as a matter of fact, and separate from the question whether the Respondent was legally obliged by the leases to do so at the time.

43. The Flat Lessees challenge the basis on which the service charges were apportioned in those years. In essence, their contention is that the commercial tenants were not charged a high enough service charge. The Flat Lessees supplied the following figures:

[1] See *Brickfield Properties Ltd v Botten Re 17-64 Carlton Mansions* [2013] UKUT 133 (LC); [2013] 2 P. & C.R. DG8

| Service charge item | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|---|---|---|
| Fire precautions | 2,733.60 | 2,531.20 | 2,432.88 | 2,134.45 | 2,455.80 | 4,648.45 |
| Building Insurance | 7,753.90 | 8,223.72 | 6,470.13 | 12,627.74 | 8,870.96 | 8,911.47 |
| Management fees | 5,040.00 | 5,040.00 | 5,040.00 | 6,000.00 | 6,000.00 | 6,000.00 |
| Accountancy/ certification | 1,000.00 | 1,080.00 | 1,080.00 | 1,080.00 | 1,080.00 | 1,080.00 |
| External decorations + fees | | 37,557.00 | | | | |
| Electricity | 2,234.00 | 1,807.07 | 3,133.75 | 4,402.56 | 2,645.94 | 3,608.28 |
| General repairs and renewals | 10,668.43 | 1,778.99 | 2,109.46 | 1,193.52 | 5,916.59 | 3,441.73 |
| Total | 29,429.93 | 58,017.98 | 20,266.22 | 27,438.27 | 26,969.29 | 27,689.93 |
| | | | | | | |
| Contribution charged to commercial tenants | 759.10 | 805.49 | 664.80 | 1,297.50 | 1,015.87 | 1,053.30 |
| Commercial tenants' contribution as a %-age | 2.6% | 1.4% | 3.2% | 4.7% | 3.8% | 3.8% |

44. It is reasonably clear that the percentage of service charge expenditure charged to the commercial tenants over the relevant years has been in the region of 2.5-4.5%. 2013 was clearly an outlying year because a large amount of external redecoration work was carried out at the building which distorted the figures.

45. The Applicants' case is that the commercial tenants should be paying 15.6% of the service charge expenditure every year based purely on floor area. It is clear that the figures actually charged to the commercial tenants are well short of that.

46. The Respondent argues that a flat rate percentage for the commercial tenants is not appropriate and that a consideration of the fair and reasonable proportion should take place each year based on more than just floor area. The Respondent's statement of case contains a suggested two-stage approach:

    46.1. Identify the benefit from service charge expenditure which is enjoyed by each of the commercial tenants on the one hand, and the Flat Lessees on the other; and

    46.2. Apportion accordingly by reference to the relative floor areas of the respective properties in the building.

47. We agree with the Respondent's approach as a useful starting point. We do not accept that a blanket fixed percentage of 15.6% (or any other) should be applied to the commercial tenants, because the leases taken together anticipate that the service charges contributed by the commercial tenants will be based on a case-by-case assessment of what is fair and reasonable rather than a flat percentage across the board.

48. In order to apply the two-stage approach, it makes sense firstly to decide the proportion of floor area to be attributed to the Flats on the one hand and the commercial premises on the other hand.

49. **Floor Area allocation** – The best evidence of floor area, in our judgment, is the Respondent's evidence of a digital survey carried out in 2016. We accept that evidence and we reject the evidence of the Applicants which is taken from 1996 planning documents. The more recent digital survey is likely to be more up-to-date and more accurate. The floor area apportionment attributable to each type of occupier for the purposes of service charges is therefore as follows:

| | |
|---|---|
| Flats: | 86.43% |
| Commercial premises: | 13.57% |

50. The figure of 13.57% is comprised of the following figures found in the Respondent's account of the 2016 digital survey:

| | |
|---|---|
| Basement workshop: | 5.50% |
| Ground floor shop: | 6.68% |
| Basement Stairs: | 1.40% |
| TOTAL: | 13.57% |

51. The Respondent submitted that the 1.40% of the floor area taken up by the basement stairs should be apportioned with the Flat Lessees because they use the basement stairs to access water pumps. We disagree. The basement stairs are predominantly used by the commercial occupiers and any minimal use by the Flat Lessees is balanced out by the fact that the commercial tenants use the communal stairs to access utility meters in the ground floor communal area. We have therefore decided to

attribute the floor area of the basement stairs to the commercial occupiers (as above).

52. **The Benefit Enjoyed by the Commercial Tenant –** In respect of each of the items which are specifically challenged by the Flat Lessees in the Schedule of Items in Dispute at paged B3-B5 of the Service Charges Application Bundle ("the Scott Schedule"), we have decided as follows:

    i) *Fire Precautions/Building Insurance/ Managing Agents Fees/ Accountancy* – The commercial tenants benefit from all these items to the same extent as the Flat Lessees. The cost of such items should therefore be allocated on the floor area basis (86.43/13.57).

    ii) *External decorations* – The Respondent argued that the external decorations only benefit the commercial tenants to a very limited extent because they are on the ground floor and basement, so the decoration of higher storeys is of no benefit to them. We disagree; the benefit of occupying a building which looks well maintained and the protection from the elements afforded by external decoration benefits all the occupants of the building to the same extent. This should also be allocated on the floor area basis (86.43/13.57).

    iii) *Electricity to common parts* – The Respondent correctly argued that the Flat Lessees benefit much more from the supply of communal electricity because of the lift and heating of the common parts, none of which is used by or accessible to the commercial tenants. The Applicants conceded in paragraph 60 of their statement of case that the Flat Lessees benefit from electricity more than the commercial tenants. The commercial tenants do benefit from some electricity in the common parts which serve their premises – such as the lighting in the basement stairs and the fire alarm. With the benefit of the Tribunal's experience and expertise and on the basis of the evidence we have heard, we have decided to accept Mr Boon's figure for electricity and so 5.98% is the appropriate percentage which should have been contributed by the commercial tenants, leaving the Flat Lessees to pay the remaining 94.02%.

iv) *General Repairs (2015–2018):* We accept the benefit analysis by the Applicants of the Park View Services invoices for general repairs in 2015-2018 following paragraph 71 of the Applicants' Statement of Case. We have therefore decided that of the £11,526.55 (including £1,252 in 2017 which does not appear on the Applicants' schedule and is dealt with below) incurred by the Respondent during that period:

a. £6,976.35 was solely for the benefit of the Flat Lessees

b. £1,404.00 was solely for the benefit of the commercial tenants (being maintenance of the basement and the workshop WC).

c. £3,146.20 (including the £1,252 mentioned above) was for the benefit of the whole building and should be allocated proportionately on the floor area basis (86.43/13.57).

v) *General Repairs (2012-2014)* – The invoices for this period have been lost. We have therefore decided that the fairest outcome would be to apportion all of the amounts incurred in that period proportionately on the floor area basis (86.43/13.57). It is clear that the invoices for these amounts did once exist, so we do not agree with the Applicants' submission that we should disallow all of these sums.

*VAT on electricity and Climate Change Levy*

53. The Applicants submitted that VAT should not have been paid at the higher rate on electricity costs and that the climate change levy should also not have been incurred by the Respondent. The Respondent's reply was that it had taken expert tax advice on the question and was relying on that advice. We have decided that we cannot go behind that advice. The amount paid by the Respondent in respect of electricity was properly and reasonably incurred in the circumstances. It is a matter for the new RTM Company to decide whether it now wants to apply for a rebate from the authority to which the charges were paid and if successful they will get money back. Until then it is a properly payable and reasonable item of service charges.

*General Repairs in 2017*

54. The Applicants challenged £1,252 of the amount of £3,441.73 which appeared in the service charge accounts for general repairs and renewals in 2017. The basis for this challenge was that there was no invoice for that amount produced by the Respondent. The Respondent responded that the invoice was missing and had been lost, but that it had once existed and related to costs of works which were properly incurred. In our judgment, the chartered accountants, Poole Mordant, who prepared the service charge accounts must have had sight of the invoice in question before it went missing in order to be able to certify the accounts. Since the only challenge against this item by the Applicants is that the invoice is missing, we reject the challenge and the full amount of £3,441.73 is recoverable.

*Management Fees*

55. The Applicants' challenge to the amount of management fees being charged is of a more general nature. Effectively their challenge is that the reason why so many items in the service charge accounts are liable to challenge is because of management mistakes. Therefore, the Applicants contend, the Respondent should not be able to recover management fees for incompetent levels of management. In our judgment, the managing agents have performed their function to a level of reasonable competency. A reasonable standard is not the same as a perfect standard, therefore there is an allowance for some mistakes. In this case, there is no evidence of such serious errors as to take the management performance outside the range of a reasonable standard of service.

*Section 103 of the 2002 Act – post May 2018 service charges*

56. The Applicant also put their service charge claim in terms of section 103, namely that the RTM Company is entitled to recover from the Respondent the shortfall in service charges attributable to "excluded units" – here the commercial premises. In our judgment, however, this Tribunal does not have jurisdiction to entertain a claim under section 103 by an RTM company simply claiming such sums as a debt. The Tribunal's only jurisdiction under that section might be if there is a challenge to the reasonableness of service charges claimed under section 103.

57. The parties are in dispute in this case as to whether section 103 applies at all. Paragraph 5 of Schedule 7 to the 2002 act makes the RTM Company into the "landlord" under sections 19 and 27A of the 1985 Act and the landlord becomes the "tenant". Now that the variation discussed above has been made retrospectively, section 103 does apply with respect to any service charges alleged to be payable after May 2018, the date when the RTM Company took over. As a result, the RTM Company as "landlord" has standing to apply under section 27A for the determination of the payability of service charges which fall due after that date.

58. In relation to that period, the Respondent has not made any specific challenge. We therefore determine that the service charges falling due between 28 May 2018 and 31 December 2018 (the end of the service charge year in question) are as calculated by the RTM Company save as to apportionment which should be carried out as we have decided above.

*Section 27A Conclusion*

59. We do not have the material necessary to calculate every Flat Lessees' service charge bill for the years 2012-2018, and it would probably not be the best use of the Tribunal's resources to do so. We have instead decided the principles upon which they should be calculated which we have recorded in our order above.

**The Section 94 Application**

60. Under section 94 of the 2002 Act, where the right to manage premises is to be acquired by a RTM company (as here), the landlord must make to the RTM Company:

"a payment equal to the amount of any accrued uncommitted service charges held by him on the acquisition date".

61. "Accrued uncommitted service charges" are defined in subsection 94(2) as follows:

"the aggregate of—

(a) any sums which have been paid to the person by way of service charges in respect of the premises, and

(b) any investments which represent such sums (and any income which has accrued on them),

less so much (if any) of that amount as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable.

62. Subsection 94(3) allows the RTM Company to make an application to this Tribunal for a determination of the amount of the section 94 payment. The RTM Company in this case has made that application.

63. The acquisition date in this case was 28 May 2018. The amount which was paid by way of a section 94 payment by the Respondent to the RTM Company was £20,000.00.

64. In order to make the determination, we need to make findings as to:

**A.** the aggregate of any sums paid to the landlord by way of service charges in respect of the premises (we are not aware of any investments)

**B.** how much was required to meet the costs incurred before 28 May 2018 in connection with matters for which the service charges were payable.

65. Our determination should therefore be a matter of deducting B from A.

***A.*** *The aggregate of sums paid as service charges as at 28 May 2018*

66. As to **A**, the starting point is that the Respondent produced evidence that it was holding onto the sum of £25,723.88 as at 31.12.17 in respect of service charges received. We accept that evidence.

67. Thereafter:

67.1. The Respondent received interest on deposits up to 28 May 2018 in the sum of £29.00.

67.2. The Respondent received further service charges from Flat Lessees pursuant to 31 March 2018 invoices in the sum of £16,771.50 and £1,053.30 from the commercial tenants.

68. This brings up figure **A** to the sum of £43,577.68 as at 28 May 2018, the date of acquisition.

***B.*** *Service charge costs incurred before 28.05.19*

69. Before we consider the individual costs which are disputed, there are a number of more general arguments raised in relation to the calculation of this item.

70. Firstly, Dr Pager for the Applicant invited us to carry out the section 94 determination on the basis of an earlier set of accounts supplied to the RTM Company. These contained some inaccuracies and were superseded by a later set of accounts. Dr Pager did not argue that the later set of accounts were unreliable, but simply that it would be more just for the Respondent to be held to the figures they originally produced.

71. The purpose of this determination is to arrive at the most accurate figure for the statutory payment amount. Dr Pager was effectively submitting that we should carry out the determination on the basis of an account which we know to be wrong and incomplete. He said that we should do so based on an estoppel, because the RTM Company budgeted based on those earlier figures. In our judgment however, the necessary elements of an estoppel are not present here, because there is no evidence of any actual loss or detriment as a result of the RTM Company relying on the earlier figures. In any event, it is the duty of the Tribunal to do an accurate accounting exercise under our section 94 jurisdiction, regardless of any previous errors by the parties.

72. Another way of putting it is that Dr Pager is saying that we should decide this part of the case based on evidence available at the time when the application was issued and ignore all documents disclosed as part of the litigation. That seems to us to be contrary to the entire purpose and practice of the process of litigation, particularly the process of disclosure of documents.

73. For all those reasons, we have decided to base our section 94 determination on the latest most accurate statement provided by the Respondent and we do so below.

74. Secondly, a number of Dr Pager's challenges relate to the question whether the Respondent should have incurred the charges which are the subject of the section 94 determination: in other words, whether they were reasonably incurred. That question was considered by the Upper Tribunal in *OM Ltd v New River Head RTM Co Ltd* [2010] UKUT 394 (LC). HHJ David Mole QC said as follows at paragraph 24:

> 'The sums must have been paid "by way of service charges". Those underlined words, to my mind, are there to make it plain that there is to be no argument so far as the payment is concerned about whether or not the charges are in fact justifiable and reasonable service charges; if they were paid 'by way of service charges' they are service charges for the purpose of section 94.'

75. It seems clear as a result that any challenge based on whether the charges should have been incurred cannot be considered by us in carrying out this section 94 determination.

76. Thirdly, Dr Pager complains that tribunal directions for disclosure have not been complied with by the Respondent. In our judgment, this simply means that the matter can only be decided based on the evidence available to the Tribunal at the hearing and we do so.

77. Fourthly, Dr Pager contends that many of the charges were not "incurred" prior to 28.05.18. In our judgment, a charge is "incurred" when an unavoidable liability to pay that charge arises upon the paying party, here the Respondent. The question for us therefore is whether, in respect of each disputed charge, it was "incurred" before 28 May 2018. We shall apply that test to the individual disputed items below.

78. Fifthly, Dr Pager objects to the fact that the Respondent claims to have paid over more than it should have done under section 94 and contends that the Respondent should have brought its own application to recover any such overpayment. This argument is based on a misconception of the section 94 jurisdiction. The Tribunal's jurisdiction is not in the nature of a claim against a counterclaim. Section 94 simply requires us to determine objectively the amount payable over under section 94 regardless of whether that ends up requiring a payment in the landlord's favour or in the RTM Company's favour, if any. We cannot make an actual order for payment or repayment.

79. Finally, there was a discussion at the hearing as to the relevance of service charge arrears which were not collected by the Respondent. These were shown on the accounts prepared by the Respondent's accountants, but of course they are shown as a credit to the Respondent in accordance with usual accountancy practice and this does not indicate whether or not they were actually paid. In any event, the law is clear that no account is to be taken in a section 94 determination of service charges which should have been collected by the landlord. This was dealt with in the *New River Head* case (see above), at paragraph 23, in connection with the interpretation of the words in section 94 as follows:

> "The natural meaning of those words is that what has to be paid is **what the landlord or manager has actually got; not what he was entitled to have but failed to get** or had at one stage but does not have now." (our emphasis added)

80. Having dealt with those general considerations, we turn to the specific items of service charge costs said by the Respondent to have been incurred before 28.05.19 being figure **B.** These fall into two categories:

80.1. Invoices received by the Respondent before the date of acquisition.

80.2. Items said to fall due after 28.05.19, the date of acquisition, but for which the liability had already been incurred.

81. In respect of the first category, some of those invoices may already have been paid by 28.05.18, but we do not have that evidence. However, the logical way to approach those items would be as follows. The figure we have arrived at in respect of **A** above represents the cash in hand as at 31.12.17, minus the amount received by the Respondent since that date. Therefore if we deduct items in this first category from **A** then we will either be reflecting that they have already been paid or providing for an amount to be retained to enable them to be paid. For that reason, we can safely deduct all legitimate items in this category without needing to know whether or not they were paid before 28.05.18.

82. The individual items which fall into the first category are contained in Appendix B together with our discussion of the issues which arise.

83. The individual items which fall into the second category and are said to have fallen due after 28.05.18 are contained in Appendix C (also with our comments).

84. As a result of our decisions recorded in those appendices, the total for figure **B** is the sum of £23,353.76, being the sum of (i) the total allowable deductions in Appendix B and (ii) the total allowable deductions in Appendix C.

85. Therefore in order to arrive at our final section 94 determination, we deduct £23, 353.76 (figure **B**) from £43,577.68 (figure **A**) to reach the figure of £20,223.92 and we therefore make our section 94 determination in that sum.

**Costs**

86. There were originally costs applications before us under section 20C of the 1985 Act and paragraph 5 of Schedule 11 to the 2002 Act. However, it was correctly agreed between the parties that because of the RTM, the Respondent is not in a position to charge any costs to the Flat Lessees, because the RTM Company has complete control of the service charges and administration fees. The Respondent confirmed that it had no intention of trying to do so in any event. With the parties' consent, we therefore dismiss the costs applications.

87. For all the above reasons, the Tribunal made the orders set out above.

**Name:** Judge T Cowen **Date:** March 2019

## Rights of appeal

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

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

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

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

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

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

**APPENDIX A - LIST OF LEASES TO BE VARIED ("THE FLAT LEASES")**

All leases are for a term of 125 years from 25.06.1997

| Flat No. | Date of Lease | Current leaseholder | HM Land Registry leasehold title no. |
|---|---|---|---|
| 1 | 13.02.1998 | Rita Anne Lowe and Peter Michael Aquilina | NGL759695 |
| 2 | 13.02.1998 | Chet Kelii Pager | NGL761612 |
| 3 | 13.02.1998 | Mark Russell Brailsford and Clare Elizabeth Brailsford | NGL759689 |
| 4 | 13.02.1998 | Robin Martin Guerin Maule and Minou Maule | NGL759694 |
| 5 | 31.03.1998 | Salvatore Scinaldi | NGL793223 |
| 6 | 13.02.1998 | Peter David Needleman | NGL760301 |
| 7 | 13.05.1998 | Puissant Limited | NGL761610 |
| 8 | 13.02.1998 | Andrew John Russell and Nadia Russell | NGL759688 |
| 9 | 13.02.1998 | William Dutton Bishop | NGL759693 |
| 10 | 13.02.1998 | Puissant Limited | NGL761605 |

**APPENDIX B – Invoices received by the Respondent BEFORE the date of RTM acquisition**

| Date of invoice | Description | Amount (£) | Discussion |
|---|---|---|---|
| 01.01.18 | Cleaning | **410.20** | Not disputed |
| 01.02.18 | Cleaning | **410.20** | Not disputed |
| 01.03.18 | Cleaning | **410.20** | Not disputed |
| 01.04.18 | Cleaning | **410.20** | Not disputed |
| 01.05.18 | Cleaning | **410.20** | Not disputed |
| 23.04.18 | Entryphone | 421.57 | This amount is the full year's charge for maintenance of the entryphone system. Dr Pager argues that a full year's maintenance contract should not have been entered into only 5 weeks before the date of RTM acquisition. The question for us is whether this was in fact incurred before 28.05.18 rather than whether it should have been incurred before that date. We have seen the document which is said by the Respondent to have given rise to this liability. It is a document dated 23.04.18 from "The Entryphone Co Ltd" headed "Annual maintenance renewal" and specifies a single payment cost for entryphone maintenance for the year commencing 1 April 2018. Does this document itself create a liability to pay? The answer is no, because the document contains the following statement: "This is not an invoice but payment of this offer entitles you to one years single fee annual maintenance". The document is an offer to enter into a maintenance contract and the contract is only completed by acceptance which is communicated by actual payment. We have no evidence from the Respondent that this amount was actually paid to Entryphone Co Ltd before 28.05.18, therefore we have no evidence that this cost was ever incurred. Mr Walsh's written submissions on this point simply says "the work" was carried out before |

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| | | | 28.05.18 which makes no sense, because it would not have been a contract for any specific item of work. We therefore have decided that this sum is not an accrued service charge at the date of acquisition and cannot form part of figure **B** to be deducted from figure **A.** |
| 01.05.18 | Fire extinguisher | **92.16** | This amount is the full year's charge for maintenance of the fire extinguisher. Dr Pager's arguments are the same as in relation to the entryphone above and our approach is the same as well, but this time the document relied upon by the Respondent is a full invoice indicating that the Respondent was liable to pay and had therefore incurred the full cost in advance on 01.05.18 before the date of acquisition. This item is therefore an accrued service charge to be included in figure **B**. |
| 07.02.18 | Building Insurance | **10,111.59** | Not disputed |
| 07.02.18 | Eng insurance | **477.49** | Not disputed |
| 16.05.18 | Lift line | **88.56** | Not disputed |
| 22.12.17 | Door repair | **354.00** | There is clear evidence that this work was done and therefore the cost incurred in December 2017, which was prior to the date of acquisition. The date of the invoice was 22.12.17. That was before 31.12.17, the date of the cash-in-hand figure of £25,723.88 which we used in paragraph 66 of our decision as the starting point for calculating figure **A**. The only question which arises for the Tribunal therefore is whether this sum be treated as having already been included in that cash-in-hand figure so that it cannot be deducted again here. Dr Pager points to the 2017 accounts which do not include that figure. but that is not the correct test for a section 94 determination. The only question is whether it was paid before 31.12.17. The Respondent provides no evidence as to payment, but on the balance of probabilities, we think that an invoice posted on 22.12.17 is unlikely to have been paid before 01.01.18 considering the Xmas holiday period. It follows that, on the |

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| | | | balance of probabilities, this sum was paid after 31.12.17 and the Respondent is entitled to have it included in figure **B.** |
| 14.02.18 | Carpeting | **5,365.50** | Not disputed |
| 15.02.18 | Clean entrance | **675.00** | Not disputed |
| 11.04.18 | Door repair | **190.08** | Not disputed |
| 18.05.18 | Clean gutters | **67.20** | Not disputed |
| 22.03.18 | Repair blocked sink | **187.20** | Not disputed |
| 26.05.18 | Test alarm/ lights | **534.00** | Not disputed |
| 28.03.18 | Tuckerman | **1,500.00** | These are management fees charged by agents in respect of management services provided for 25.03.18-23.06.18. The liability to pay the invoice was incurred before the date of acquisition and even though some of the work was done after 28.05.18, the Respondent is entitled to retain the full amount under section 94 for reasons which we have given in respect of other disputed items. We therefore include it in figure **B.** |
| **TOTAL** | **of Figure B** | **21,693.78** | **to be deducted from figure A** |

## APPENDIX C – Invoices received by the Respondent AFTER the date of RTM acquisition

| Date of invoice | Description | Amount (£) | Comments |
|---|---|---|---|

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|---|---|---|---|
| 16.07.18 | Accountant | **1,080.00** | Not disputed by RTM Company |
| *01.06.18* | *Cleaning* | *410.20* | *Conceded by the Respondent* |
| *01.07.18* | *Cleaning* | *410.20* | *Conceded by the Respondent* |
| *01.08.18* | *Cleaning* | *410.20* | *Conceded by the Respondent* |
| 11.06.18 | Light repair | 1,254.00 | The question is simply whether this cost was incurred before 28.05.18. The invoice shows that repair work was carried out at the building but does not show on what date it was done. The Respondent's evidence was that this work was ordered prior to 28.05.18 and the Respondent argued that the cost was therefore "correctly incurred" before that date. As we have stated in our decision, the test under section 94 is not whether the cost was "correctly" incurred but whether it was in fact incurred prior to 28.05.18. The Respondent has offered no evidence as to when the work was done. We note that the Respondent does not even assert that the work was done prior to 28.05.18. The only evidence for that is the evidence of Dr Pager himself that he saw it being done on 06.06.18 and he produced an installation report from Firetecnics which shows that date. We accept the Applicant's evidence. On those facts, it must be the case that the cost was incurred on 06.06.18, after the date of acquisition, when the work was done. It cannot be the case that the cost was incurred when the Respondent ordered the work to be done unless the terms of the contract with Firetecnics were such that if the Respondent cancelled the work, the Respondent would still have been liable. There is no evidence of such onerous contractual terms. Therefore we find that the cost was incurred after 28.05.18 and this sum is to be excluded from figure **B**. |
| 11.07.18 | Alarm | 749.40 | This relates to the six-monthly service of the fire alarm. Dr Pager produced an email dated 10.12.18 from the service co-ordinator of Firetecnics Systems Limited who stated that this invoice was for fire alarm service visits on 18.06.18 and in December 2018. We accept that evidence. There is no evidence that the Respondent had incurred these costs prior to |

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| | | | 28.05.18. The Respondent simply asserted in submissions that "this could not be terminated at short notice". There is no evidence for that assertion. There is no evidence for how much notice the Respondent was required to give nor of the terms of any contract which made the Respondent liable for these sums. We have therefore decided to exclude this sum from figure **B**. |
| 12.06.18 | Tuckerman | 1,500.00 | These are management fees charged by agents in respect of management services provided for the period 24.06.18-28.09.18 which is a period during which the RTM Company was managing the building. It is difficult to see how it can be said that these costs were incurred prior to 28.05.18.<br><br>The Respondent's submission on this item is "Tuckermans are entitled to their fees to cover work on the handover". That may or may not be true, but that is irrelevant for the purposes of this section 94 determination. As we have stated a number of times, the only question for us is whether the charge was incurred before the acquisition date. We are not concerned with whether it was reasonable for the Respondent to incur that cost. The Respondent's written submissions also say that both this invoice and the invoice dated 28.03.18 (discussed in Appendix B above) "bear incorrect dates" and that "these invoices relate to management for the period before 28 May 2018". There is no evidence for that assertion nor is there any assertion as to what the correct dates of the invoices or the correct dates for the periods of the services should be. We cannot make any finding therefore other than that this invoice relates to a cost entirely incurred after the date of acquisition and we accordingly find that it should be excluded from figure **B**. |
| *01.11.18* | *Lift contract* | *692.07* | *This item was conceded by the Respondent.* |
| 02.11.18 | Electricity | 3,184.48 | The electricity bills are very unclear and it is difficult to work out what charges were incurred in respect of what periods. There is no electricity invoice to cover the period of electricity consumption from 02.12.17 to 22.02.18. The only amount for which we have any satisfactory evidence is that there was consumption of electricity in the sum of £589.90 |

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| | | **of which 579.98 allowed** | plus VAT from 23.02.18 to 30.06.18. With the benefit of the Tribunal's expertise and experience we find that charges for electricity are incurred only when the electricity is actually used. Although we have seen evidence of unpaid electricity bills in large amounts in the past in relation to this building, we have no evidence as to whether there were any outstanding historic electricity charges unpaid and due as at 28.05.18. We therefore agree with the submissions of Dr Pager that the only sums which the landlord is entitled to retain are those for the period from 23.02.18 to 28.05.18 shown on the only clear invoice we have seen. The period from 23.02.18 to the date of acquisition amounts to 94 of the 127 days covered by bill. This amounts to a sum of 458.45 plus standing charges of 24.87 for the same period plus VAT on that amount charged at 20% giving a total retainable by the Respondent of £579.98 and we have therefore decided to include that amount in figure **B.** |
| **TOTAL** | **of Figure B** | **1,659.98** | **to be deducted from figure A** |