FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/29UN/LIS/2018/0039**
Property	**:**	**11B Arlington House, All Saints Avenue, Margate, Kent CT9 1XR**
Applicant	**:**	**Metropolitan Property Realizations Limited**
Representative	**:**	**Miss Iris Ferber, instructed by JB Leitch Solicitors**
Respondent	**:**	**Mr John Moss**
Representative	**:**	**-**
Type of Application	**:**	**Determination of service charges**
Tribunal Members	**:**	**Judge E Morrison** **Mr R Athow FRICS MIRPM** **Mr P A Gammon MBE BA**
Date and venue of Hearing	**:**	**23 & 24 April 2019 at Comfort Inn, Ramsgate**
Date of decision	**:**	**7 June 2019**

DECISION

The application and procedural background

1. On 30 May 2018 the Applicant lessor issued proceedings in the county court under Claim No. E50YX388 against the Respondent lessee claiming arrears of service charges and administration charges in the principal sum of £5672.49, together with interest and costs.

2. In his Defence dated 12 June 2018 the Respondent disputed liability for an element of the claim. He stated he was unable to quantify the extent of the dispute until he had had an opportunity to inspect the invoices supporting the service charges. He asked that the case be transferred to the Tribunal for determination.

3. By an order in the county court dated 24 July 2018 "the claim" was transferred to the Tribunal.

4. On 19 September 2018 a tribunal judge gave directions. These explained that although claims for interest and costs are not within the Tribunal's jurisdiction, judges of the First-tier Tribunal are designated as county court judges by the County Courts Act 1984 as amended by the Crime and Courts Act 2013, and so a Tribunal judge would determine those issues. All Tribunal members would determine the service and administration charges.

5. The Respondent's statement of case provided subsequently included an application for an order to restrict or limit recovery of the Applicant's litigation costs pursuant to section 20C of the Landlord and Tenant Act 1985 and/or pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

6. This document records the Tribunal's determination of the matters within its jurisdiction. A separate written order of the county court, recording the decisions of the tribunal judge on the county court issues, will be issued.

Summary of Decision

7. The service charges recoverable and payable by the Applicant from the Respondent are as follows:

Service charge year	**Total payable by lessees £**	**Total payable by Respondent £**
2013	150,089.11	900.53
2014	152,934.51	917.60
2015	153,925.97	923.55

2016	179059.37	1074.35
2017	168,661.30	1011.96
2018 (on account only	179,248 (for entire year)	537.74 (for first half year demand)

8. No administration charges are recoverable from the Respondent.

The lease

Superior leases

9. The freehold of Arlington House is owned by Thanet District Council. By a lease dated 19 May 1965 Arlington House, Arlington Square (a shopping precinct), and an adjoining car park were demised for a term of 199 years from 1 October 1961. Metropolitan Property Realizations Limited ("Metropolitan") acquired the leasehold interest in 1969.

10. By an intermediate lease dated 3 April 2014 between Metropolitan and Deritend Investments (Birkdale) Limited ("Deritend"), Arlington House (save for certain ground floor areas including the pump room and bin store) was demised to Deritend for a term of 199 years less 3 days from 1 October 1961.

11. By a deed dated 27 April 2017 the intermediate lease was surrendered. By a Deed of Assignment dated 8 March 2018 Deritend assigned to the Applicant its right to receive and/or collect arrears pre-dating the surrender.

The Respondent's lease

12. The Tribunal had before it a copy of the original lease for Flat 11B dated 12 July 1979. The lease is for a term of 114 years from 1 October 1961. The Respondent ("Mr Moss") acquired the lease in 2003. On 9 February 2012 a supplemental lease was entered into between Thanet District Council and the Respondent which extended the term of the lease to 204 years from 1 October 1961. The new lease provided that the covenants and conditions of the original lease remained in effect, subject to some specified variations.

13. Unfortunately the copy original lease provided to the Tribunal was not fully legible. Certain clauses were obliterated by rider clauses placed on top of them, and clauses had been re-numbered in manuscript meaning that clauses did not always follow consecutively. The Tribunal was told that this was the best copy available, and the Applicant provided a fully legible copy of the lease for Flat 6H, said to be in the same form. The Tribunal notes that it is not in fact in the same form because (i) it does not include the provisions added by way of rider to the 11B lease and (ii) it does not include the variations made by the supplemental lease.

14. Doing the best it can by reference to these documents, we summarise the relevant provisions in the lease as follows:

(a) The lessee is liable to pay 0.60% of the service charge covering the costs described in clause 2(a) (i) – (viii) (these costs will be referred to in more detail below as necessary)
(b) On account payments towards the service charge are payable by the lessee on each 25 March and 29 September in such sum as the lessor or its managing agents may determine
(c) The service charge year runs from 1 January to 31 December and as soon as practicable after the end of each year the amount of the service charge for that year shall be ascertained and certified by the lessor's auditors
(d) The certificate shall contain a summary of the lessor's expenses together with a summary of the relevant details and figures forming the basis of the service charge
(e) As soon as practicable after the certificate is signed the lessor shall give the lessee an account of the service charge payable by the lessee, credit given for the on account payment, and the lessee shall pay any balance owed or the lessor shall credit the lessee's account with any overpayment as appropriate
(f) The lessor's repairing and insurance obligations are set out at clause 5.

The inspection

15. The Tribunal inspected the site immediately before the hearing. Arlington House is a 1960s tower block, occupying a prominent position on the Margate seafront. It was built as part of a larger development which includes Arlington Square, comprising some 50 shop units and a large multi-storey car park. At present the shops are vacant and boarded up. There are 142 flats over 18 floors. A significant number of the flats are not demised on long leases but are retained by the Applicant and let out to tenants.

16. On the ground floor beyond the entrance area is a porter's office, store room and electricity meter room, and there is external access to a bin store, and the pump room. There are fire escape staircases at both end of the building.

17. Within the office the Tribunal was shown the door entry system control box, a computer, and the elements of a new door entry system. The electric room also houses the CCTV monitoring system. The fire alarm control box showed 2 orange lights indicating faults to various parts of the building.

18. The ground floor pump room and refuse chute collection area were in a poor condition with water on the floor in the pump room. The walls were undecorated concrete. In the undercroft area of the building the Tribunal noted the rat traps and its generally unkempt condition.

19. During the extensive inspection of the internal common parts, the Tribunal noted the worn condition of the flooring with many missing or damaged tiles, and the poor decorative and structural condition of the walls and ceilings in some areas. One of the two lifts was out of action, and a notice indicated that it had been out of action for some time. It appeared that there is an ongoing programme of replacing old lights with new ones to the communal areas. Some recently replaced light fittings were loose. Others had their covers missing. One had a "fault" sticker on the cover.

20. Some of the fire doors on the communal landings did not close. One electrical riser cupboard was unlocked. Another was missing its door. Many of the windows on the landings are rotting and lack paint. On the 16th floor the fire door to the waste chute did not close. Some intumescent strips to the fire doors were noted to be missing or damaged.

21. The Tribunal looked at the top floor (19th) of the building. Access to this area is difficult, via a vertical ladder (with no safety features) to a heavy trap-hatch which needed to be unlocked and manually lifted. This enabled access to the top floor loft rooms which house further water tanks, and the condition and extent of the equipment was noted. The lift motors and controls are on this floor. Doors from this area give access to the rooftop. There are several telecommunication aerials on the rooftop, together with their electrical equipment in the top floor rooms. Additionally, communications equipment for the local emergency services and offshore windfarm communications are situated in this area.

22. The Tribunal did not view the Respondent's flat or any of the other flats internally.

The law and jurisdiction

23. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

24. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. When service charges are payable in advance, no more than a reasonable amount is payable.

25. Under paragraph 2 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 an administration charge is payable only to the extent

it is reasonable. An application may be made to the tribunal under paragraph 5 of Schedule 11 to determine if the charge is payable.

Evidence before the Tribunal

26. The county court Particulars of Claim, verified by a statement of truth, and accompanying documents were initially responded to by a brief Defence filed with the court. Following transfer to the Tribunal, disclosure of some copy invoices, and the Tribunal's directions, Mr Moss served a very lengthy and detailed statement of case, including numerous challenges to the invoices he had been provided with, and contending that charges for which there were no invoices should be disallowed. At the same time he provided signed witness statements from four other individuals, and produced a number of documents upon which he relied.

27. It is a striking feature of this case that although the directions afforded the Applicant the opportunity to serve a reply (and by implication witness statements), the response failed to address in any detail the vast majority of the challenges made by Mr Moss. Moreover, although Mr Moss had pointed out that there were no invoices for more than £430,000.00 of claimed expenditure over a period of 5 years, the Applicant's response to this point was covered in two short paragraphs. It contended that "the Respondent's allegations relating to 'missing' invoices' are misconceived". There was no suggestion that in fact there might be other invoices in existence which had not been disclosed to Mr Moss.

28. The Response attached expenditure listings in spreadsheet format (referred to herein as the "journal entries") for the first time, listing items within each head of expenditure matching those set out in the annual service charge accounts. This at least enabled Mr Moss to cross-reference the invoices he had against the journal entries and to identify the nature of the invoices which he had noted were missing.

29. The Applicant's response was not verified by a statement of truth or signed by any identified individual at J B Leitch. Furthermore, the Applicant did not serve any witness statements, or seek to adduce oral evidence at the hearing.

30. The result of what can only be described as the Applicant's lack of engagement with the litigation process and the many challenges made by the Respondent was that, at the hearing, Counsel for the Applicant was essentially confined to making submissions based on the documentary evidence. Nor did Miss Ferber seek to cross-examine Mr Moss's witnesses. Our findings must be viewed in this context. The Applicant simply did not prepare for the detailed case it had to meet.

31. On the morning of the second day of the hearing, Miss Ferber informed the Tribunal that she had just been provided with a very large number

of copy invoices that she had not previously seen and which, more critically, contained documents that had not been disclosed to Mr Moss. She sought time to consider these and to make submissions thereon. Although it was entirely the Applicant's fault that these invoices had not been disclosed to the Respondent or indeed to Miss Ferber, Mr Moss did not object to Miss Ferber's proposal so long as the hearing continued to consider his existing challenges, and so long as he had the opportunity to review the new documents and also make submissions in reply to any made by the Applicant. In light of the fact that the missing invoices represented a very large sum of money, and the lack of objection by Mr Moss, the Tribunal agreed to allow both sides the opportunity to review, and make submissions on, the 'new' invoices.

32. The hearing continued and all Mr Moss's existing challenges were considered. Directions were then issued permitting the Applicant to make written submissions in relation to the new invoices, and for Mr Moss to respond. It was stipulated that copies of all relevant invoices must accompany the Applicant's submissions and be clearly cross-referenced to the journal entries.

33. In breach of the directions, the Applicant produced over 1000 pages of copy invoices, the majority of which were not cross-referenced to the journal entries. In its written submissions it incorrectly claimed that the "the Tribunal decided it wished to have copies of all invoices…". While admitting that many invoices had never been sent Mr Moss, it contended that some had been sent to him in March 2018, an allegation clearly contradicted by Mr Moss's communications during the relevant time period. Even more surprisingly, the Applicant sought to blame the Tribunal for its own lack of disclosure.

34. The Applicant's further (unsigned) written submissions relating to the 'new' invoices are brief. However the Applicant also supplied further copies of the journal entries with an additional spreadsheet column headed "comments". It is unknown who authored these comments and they are unverified in any way. However, where a comment is self-explanatory and uncontradicted by other evidence, it has been taken into account by the Tribunal and given appropriate weight.

35. In response Mr Moss produced another extremely lengthy submission, running to over 60 pages. Insofar as he has attempted to introduce evidence that was available to him at the original hearing, this has not been considered. However the many issues he has raised in relation to the invoices not previously disclosed to him have been taken into account. The Applicant has not applied for permission to make any response.

36. Even in the minority of instances where the Tribunal has a positive submission from the Applicant with respect to a disputed invoice, it has not always been possible to accept what has been said. For example, there is an invoice from Ottimo in the sum of £3789.06 for "Supplies"

with no other detail. In response to Mr Moss's query, the Applicant has listed (without supporting documentation) the materials supplied, including 515 litres of paint, and stated "the relevant invoice relates to decorating supplies which were necessary to paint the pump room". However the Tribunal viewed the pump room; its concrete walls are not painted.

37. The Tribunal has had to do the best it can, in effect often carrying out a forensic accountancy exercise, on the evidence available.

38. In considering who has the burden of proof in respect of any allegation the Tribunal has taken a general view on the evidence before it in order to see which case is preferred. It has also borne in mind the comments made by HH Judge Rich in *Schilling v Canary Riverside* 2005 LRX/26/2005. It should not be a surprise to the Applicant that where Mr Moss has raised a credible challenge to an invoice or charge, to which there is no answer from the Applicant, the Tribunal has often concluded, on a balance of probabilities, that the challenge is well-founded.

The issues

39. Although the specific challenges made by Mr Moss are numerous, there are some discrete issues, which it is convenient to consider first.

The claimed administration charge

40. The claim includes an administration charge of £150.00, described an "admin fee on referral" dated 3 July 2017. The statement of account provided with the Particulars of Claim noted a number of other similar fees, all of which were later credited out. The Applicant did not provide any other information or documentation relating to this charge, which Mr Moss disputed, and it is therefore disallowed.

The certification of the service charge accounts

41. The service charge accounts for the five years 2013-2017 have all been certified by Booth Ainsworth LLP, chartered accountants. In every year Note 1(a) to the accounts explains that as the accounts for year ended 31 December 2010 did not include a balance sheet and Trinity (Estates) Property Management Limited ("Trinity") were appointed as managers on 1 February 2012, it has not been possible accurately to ascertain the opening position and "in view of this the accounts have been prepared using accounting estimates". Furthermore, the accountants' certificate of factual findings, at the end of the accounts, contains some wording, unfortunately itself not clearly expressed, possibly meaning that the accountants are unable to express an opinion as to whether the accounting records, based on a sample, were supported by receipts etc. Mr Moss suggested these matters supported his view that the service charges cannot be justified.

42. Miss Ferber referred the Tribunal to a letter from the accountants dated 6 June 2017 sent to Arlington House Residents Association. This stated that " a sample of transactions relating to expenditure were selected by us and these were all successfully vouched to supporting invoices and/or other documentation provided to us by Trinity". Ms Ferber invited the Tribunal to refer to this letter as providing the clearer explanation. Mr Moss pointed out that the letter also stated, in response to an enquiry about the cost of getting the accounts audited, that "any audit report… would include multiple qualifications which in all likelihood would prevent us from forming an opinion upon the accounts".

43. The Tribunal finds that Note 1(a) relates only to the balance sheet. It does not affect the Income and Expenditure account with which we are concerned. As regards the accountants' verification of expenditure, it is clear that there has been no audit, but we are satisfied that there has been some verification based on a sample. We therefore are satisfied that there is no reason why we cannot take the heads of expenditure in the accounts as a reliable starting point, especially when each of those heads matches the totals found in the journal entries. Therefore we do not accept Mr Moss's suggestion that the accounts are themselves evidence in support of his challenge to the service charges.

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44. Due to the enormously high number of invoices in dispute, it is not practicable or proportionate to detail and set out a decision for each one separately. The Tribunal now addresses a number of the challenges made by Mr Moss which apply to multiple invoices and sets out the principles we have applied.

Caretaker telephones

45. The full-time caretaker has had three telephones available to him: a land line in the office in the ground floor lobby area, and two mobile telephones, one provided by his employer Ottimo, and one by the Applicant. The costs of the land line and the mobile provided by the Applicant have been charged to the service charge. Mr Moss contended that the landline and a second mobile was surplus to requirements and the lessees should not have to pay for them. Miss Ferber said it was reasonable to have a landline, noted that the cost of a second mobile was modest and it was reasonable to have a back up.

46. The Tribunal finds it is reasonable to for the caretaker to have access to both a landline and a mobile in this large building; the landline is back up if the mobile network is not operating. However there is no evidence why the Applicant needs to provide a second mobile when the caretaker's employee has already provided one, which is presumably paid for by the lessees as part of the cost of the caretaker. Thus all invoices for the Applicant-provided mobile (telephone no. ending 888) have been disallowed.

47. In 2015 - 2017 there are also charges for a broadband connection to the landline but Mr Moss states that the broadband has never been installed or connected, a point confirmed by the caretaker during the Tribunal's inspection. Accordingly these charges have been disallowed.

Ottimo - Cleaning costs

48. Although described as "cleaning" expenses in the accounts, these costs are the charges of New Horizon, then Ottimo, for providing a full-time caretaker. The caretaker's duties extend to the Applicant's commercial areas. While New Horizon provided the caretaker, 10% of the cost was removed from the service charge, and according to Mr Moss this was to reflect the amount that the Applicant should pay. Once Ottimo took over, the monthly cost remained almost the same, but the 10% deduction ceased. Mr Moss submitted that the 10% deduction should be applied to all the cleaning costs, and referred to the cleaning schedule that the Tribunal saw during the inspection, and which provided that the caretaker should spend Friday mornings at Arlington Square.

49. In the "comments" column of the latest journal emtries spreadsheet it is stated that Ottimo has invoiced separately for the commercial premises and therefore no 10% deduction should be applied. However there is no corroborating evidence to support this assertion, and even if it is right then the lessees are being charged 10% more, Ottimo's monthly charge of £2877.00 being only £15.00 less than New Horizon's charge, an increase which, being wholly unexplained, cannot be regarded as reasonably incurred. The same caretaker has been employed by the new and old supplier. The Tribunal finds that the lessees should not have to pay for the caretaker's time while at Arlington Square, and should not, on the available evidence, have to pay more for the caretaker as an Ottimo employee than as a New Horizon employee. A 10% deduction has therefore been applied to all the monthly Ottimo invoices.

50. Mr Moss also argued that a further 10% should be deducted because the cleaning was not carried out to a reasonable standard. He referred to cobwebs shown to the Tribunal on one of the stairwells during the inspection. The Tribunal does not accept that the presence of a few cobwebs in April 2019 is any evidence that cleaning was not carried out to a reasonable standard during the 5 years in issue. No further deduction is made.

51. Objection was also made to a number of Ottimo invoices over the 5 year period for cleaning equipment, on the basis that such equipment should be supplied by Ottimo as part of its service covered by the monthly charge. No copy of the contract between Ottimo and Trinity, which operate from the same address in Hemel Hempstead, was in evidence. If cleaning equipment is not provided as part of its service, it is surprising that there were not many more such invoices from Ottimo

to Trinity. It is the general practice that a cleaning contractor will supply the equipment needed for the job, and be responsible for its maintenance e,g, PAT testing of electrical devices. The cost of the service will take into account the expense of this equipment. There is no evidence whatsoever that the Applicant has maintained any equipment. On balance the Tribunal is not satisfied that Ottimo was entitled to charge for these items and the sums claimed have been disallowed from the service charge.

Ottimo invoices – further problems

52. Ottimo operates from the same offices at Trinity. They are the cleaning contractors for the block who employ the full time caretaker. Monthly charges are made for this service. However there are many other invoices from Ottimo, for a wide variety of works/services. Many of the invoices issued are wholly deficient in terms of detail, simply saying for example "Services rendered" or "Materials". Where this has occurred, the invoice has been disallowed unless there is other evidence that the cost was incurred on an expense within the service charge. Even where more detail is given, the Tribunal has concluded that this detail has generally been transposed from an (undisclosed) sub-contractor's invoice. In many instances, the Tribunal suspects that the sub-contractor has charged less than the sum charged by Ottimo. There is a serious lack of transparency in respect of Ottimo, exacerbated by the fact there is no evidence of any written agreement in place between Ottimo and Trinity.

Door entry system

53. Mr Moss has challenged the annual hire and service fee paid to Stanley Security Solutions in 2013-2015 as being excessive. He argues that the fact that a new agreement with Stanley was entered into in 2016 with a much reduced fee demonstrates that the amount paid previously was not reasonably incurred. The previous agreement with Stanley was not in evidence. However, the Tribunal has read the previous decision in Case No. CHI/29UN/LIS.2015/0011, and notes from paragraphs 66-68 that the earlier agreement was produced in those proceedings. It had been entered into in 2008 for 3 years, but in 2011 had rolled over for another 5 years, expiring in 2016. Trinity's witness stated that to terminate early would incur a penalty which was not cost-effective. Stanley's annual fee in 2009 – 2012 was determined to be payable. This Tribunal makes the same determination. There is no evidence that it would have cost less to cancel the existing contract with Trinity and start again with a new contract, than to continue with the existing contract until it expired.

Electricity – contribution from third parties

54. From 2015 onwards the service charge has been credited with £1500.00 against the annual electricity costs to acknowledge the fact

that electricity has been consumed by the telecommunications companies' equipment on the 19th floor and roof area. The Applicant has now conceded that the same credit should be applied in 2013 and 2014.

55. Mr Moss points out that the third party usage has not been measured in any way. Although there has been no change in residential consumption over the 5 year period, the cost has steadily increased. He proposes that the third party contribution should be increased to the same extent. This logic is irrefutable and therefore the 2016 credit has been increased by £150.00 and 2017 credit by £300.00. For the future, arrangements should be made so that the third party usage is properly measured and priced.

Use of non-local tradesmen

56. There are a number of invoices challenged by Mr Moss on the basis that the cost is unreasonably high due to the contractor/supplier having travelled from outside the local area and in some instances explicitly charging for travel time. In some cases the work is entirely straightforward, in others it is more specialist in nature. The issue is whether the cost has been reasonably incurred. Each invoice has been considered individually, but the Tribunal has applied the following approach.

57. In *Waaler v Hounslow London Borough Council* [2017] EWCA Civ 45 the Court of Appeal made it clear that the enquiry into whether costs are reasonably incurred within section 19 of the Act must focus not only on whether the landlord's decision making process was reasonable, but also on whether the actual outcome was reasonable. If the outcome is reasonable, costs are reasonably incurred even though there might have been a cheaper alternative. However, in determining whether there has been a reasonable outcome, the cost to the lessees is part of the context.

58. In *COS Services Ltd v Nicholson* [2017] UKUT 382 (LC) the Upper Tribunal, dealing with the cost of insurance under a landlord's block policy, stated:

"It would not be necessary for the landlord to show that the premium was the lowest that could be obtained in the market. However….[I]t would require the landlord to explain the process by which the particular policy and premium had been selected, with reference to the steps being taken to assess the current market. Tenants could place quotations before the tribunal, but had to ensure that the policies were genuinely comparable in the sense that the risks being covered properly reflected the risks being undertaken pursuant to the covenants in the lease. It was open to any landlord with a number of properties to negotiate a block policy covering the entirety, or a significant part, of their portfolio. However, it was necessary for the landlord to satisfy the Tribunal that a block policy had not resulted in

a substantially higher premium being passed on to tenants of a particular building without significant compensating advantages to them" (see paras 37-38, 46-49 of judgment).

59. The Tribunal had no evidence from the Applicant explaining why or how it had chosen particular contractors for a particular type of work, or whether any specific contractor was used by the Applicants for a number of different properties under a "block" contract. There was no evidence as to market testing as to the cost of services provided by a local contractor versus a distant contractor. Ms Ferber could not of course give evidence but she submitted that one of the benefits of a large managing agent, in this case Trinity, was economies of scale. They could engage contractors under larger contracts, leading to a lower price overall. It was cost effective for the managing agents to have to deal only with one contractor for all properties, rather than many different local contractors, for the same type of work. The problem with that submission is that there was no evidence of a multi-property contract in place for the invoices challenged by Mr Moss on this ground, and no evidence either of any cost savings, or compensating advantages for the higher cost.

60. Accordingly, where it appears that straightforward work has been carried out by a contractor outside Kent whose charge has included travel time/costs, and/or there is evidence, or the Tribunal is aware from its own knowledge and experience, that a local contractor would have cost substantially less, a reduction has been made to the amount recoverable. A particular difficulty is posed by many Ottimo invoices for small jobs of a type that a local person could easily have undertaken (e.g. changing lights, clearing away rubbish). Ottimo is based in Hertfordshire. However, the only conclusion the Tribunal can reach, having perused many of these invoices, and noting that labour rates for the same type of work vary from invoice to invoice, is that in fact Ottimo has subcontracted the work to local tradesmen and then added its own mark-up to produce the final invoice. While we have allowed many of these invoices in full, because there is insufficient detail on the invoice to establish whether the cost is unreasonable, the Tribunal suspects this practice provides extremely poor value for money to the lessees.

<u>Work inside lessees' flats</u>

61. There are a large number of invoices challenged by Mr Moss where the invoice refers to work inside a particular flat. A typical example is found at page 578 of the bundle. This is an invoice from UKDN Waterflow who attended Flat 16D, and the work described is "drain unblock/clearance". Mr Moss's argument in relation to these invoices, many of which mention blocked sinks, pipes, stack pipe, or drains, is that lessees are responsible for works required within their own flats, and that under clause 2(2) (iii)(a) of his lease the service charge only covers works to the "main drains".

62. To support his submission that lessees should pay for works within their own flats, Mr Moss refers to a copy of the new lease for Flat 4H dated 4 August 2018. By clause 4(8) of this lease the lessee covenants to repair and maintain the Flat "and all walls pipes drains conduits flues cables wires exclusively serving the Flat". By clause 4(9) the lessee covenants "to repair the cause of any escape of water from the Flat … and to compensate fully the party or parties who have suffered damage therefrom". However, neither Mr Moss's own lease nor the lease for Flat 6H contain these provisions. Instead there is simply a general repairing covenant at clause 2(7) to maintain the Flat "and the walls pipes cables wires and appurtenances thereof".

63. Turning to the costs which the leases specifically include within the service charge, in addition to the "main drains" referred at clause 2(2)(iii)(a), the following provision in all the available copy leases covers the cost of maintaining and repairing "the gas and water pipes electric cables and wires in under or upon the said Buildings".

64. Miss Ferber said that jobs which began in a particular flat could relate to problems in the communal pipework. She suggested that invoices included in the service charge would only be those where this had occurred. Sometimes the communal pipework could be accessed only via a flat. She surmised that the managing agents would understand that there must have been a problem in the communal system before costs were allocated to the service charge account.

65. The Tribunal finds that the cost of repairs or maintenance to the communal pipework, wherever that is located, and however the problem was caused, is recoverable though the service charge (clause 2(2)(iii)(a) of the lease). The only information as to the work done is that set out in very summary form in the various invoices. Sometimes the invoice indicates that work was carried out in individual flats, but also refers to what appear to be communal pipes. Generally it is not possible to discern whether a problem in a particular flat was caused by a problem in a communal pipe, or vice versa. Doing the best it can on this very limited evidence, in most invoices of this type relating to plumbing work the Tribunal has allowed 50% of the cost within the service charge, disallowing the remaining 50% as a cost that should have been charged to individual flats.

66. Where the work inside a flat is other than plumbing, we have considered the merits of each invoice separately.

Key Fobs

67. There is a door entry system for the main entrance at Arlington House and for the residents' car park (this is not the car park referred to at paragraph 9 above). Residents are provided with a key fob which is used to obtain access.

68. In service charge years 2013-2015 the cost of obtaining new key fobs has been charged to the service charge account, less sums received from sale of those fobs to residents. The amount charged is considerably less than the amount received. Unsold stock is not accounted for in the balance sheet. Mr Moss suspected that Trinity sold the fobs at a profit and/or did not credit the service charge account with sums received and/or were not recovering the full cost of the fobs when selling them. Miss Ferber suggested that selling key fobs was a normal procedure and there was no evidence of profiteering.

69. The Tribunal does not consider that the supply and sale of key fobs is a service charge item. The lessees pay for the maintenance of the door entry system through the service charge, but the provision of fobs is a service to individual lessees which they should pay for individually. The Applicant should purchase the fobs, sell them when necessary, and account for the stock in its own balance sheet. If it were the case that the Applicant recovered all its costs, the process would be cost neutral, and inclusion in the service charge account would make no difference. However, large amount of fobs are purchased and then unaccounted for, with costs of purchase far exceeding receipts from sales. The lessees should not have to pay for this lack of management. Therefore all credit and debit items relating to the key fobs have been disallowed.

Works/services benefitting third parties

70. Above the top (18th) residential floor at Arlington House is the tank room and outside flat roof (see paragraph 21 above). In both areas there is a large amount of equipment belonging to third parties including telecom companies and the emergency services. It is self-evident that these parties will from time to time require access to inspect and maintain their equipment.

71. A general objection has been made by Mr Moss to the lessees being charged with 100% of the cost of works to these areas, including the annual maintenance check of the lightning conductor, on the basis that as the third parties also benefit from them there should be an apportionment of cost. For example, in respect of the lightning conductor he suggested that it is the telecom equipment which creates the greatest risk of a lightning strike, and in respect of new doors he said it is third parties who will use them more than anyone else.

72. Miss Ferber responded that if the leases provided for the residential lessees to pay 100% of these costs, then that was dispositive.

73. The Tribunal agrees that there is no power to disallow all or part of service charges just because third parties also benefit. If the costs are fully chargeable to the residential lessees' service charge account under the leases, and there is no other objection to payability, that is the end of the matter unless it can be established that the reason for incurring the costs is attributable to the third parties, in which case it might be considered that the costs are not reasonably incurred so far as the

lessees are concerned. That is the approach we have taken. Thus, where the third parties have used communal electricity it is right they should pay for their usage. However, where works have been carried out on the 19th floor without any evidence that this has been required only due to third party usage the cost has been allowed.

Works/services benefitting Applicant's commercial premises

74. Some costs have been apportioned between the lessees and the Applicant because the costs have been incurred for the benefit of both e.g. pest control in an area beneath Arlington House which also runs alongside closed shop units. Where the apportionment has been varied without explanation we have applied the apportionment most favourable to the lessees for all periods, on the ground that there is no evidence as to why it has been departed from.

75. Costs only attributable to the Applicant's commercial premises have been disallowed.

Window repairs

76. There are various invoices for repairs to flat windows. Mr Moss submits that lessees are responsible for repairing their own windows and therefore these costs should not form part of the service charge. A number of different forms of lease for different flats have been provided; it is not clear how many forms of lease are in place over the building. However Mr Moss's lease and the leases for Flat 1C (which has had window repairs) are in the same form (so far as relevant). The description of the demise is silent as to whether it includes the windows, but clause 2(2)(a)(iii) (a) requires the lessee to contribute to the cost of "maintaining repairing redecorating and renewing: the structure of the said Buildings including the … external doors and windows (including frames)…". The lessee's repairing obligations do not specifically extend to the windows. The Tribunal finds that these leases do not include the windows within the demise and permit window repair costs to be recovered through the service charge.

77. The lease for Flat 1E, which has also had window repairs, has a similar general demise. Clause 2(2)(a)(iii) omits any reference to the windows but includes an obligation to contribute to the cost of repairing "all parts of the Buildings not included in this demise or in the demise of other flats". The following sub-clause provides that the service charge will cover "the cost of decorating the exterior of the window frames … and of repairing the same before such decorating if the same shall not have been properly repaired by the lessee in accordance with clause 2(9) hereof". Clause 2(9) requires the lessee to repair and maintain the windows and window frames. There is no provision which would require the lessee to pay for window repairs in other flats unless they can be regarded as part of "the structure" of the building. Flat 4H has similar provisions.

78. The work in Flat 1C was glass replacement. The Tribunal finds the window glass is not part of the demise and the cost is therefore recoverable. Under the Flat 1C lease and Mr Moss's lease, it is covered by clause 2(2) (a)(iii) (a). Under the leases flats 1E and 4H, it is covered by the requirement to contribute to the cost of repairing areas not included in a flat demise In any event, this case concerns Mr Moss's service charge. We find the cost is recoverable under his lease.

79. The work in Flat 1E was repair to window hinges. Under the lease for Flat 1E this repair is the lessee's responsibility. The cost should not have been included in the service charge.

Refuse removal

80. In 2017 and 2018 there are a significant number of invoices under the head of "reactive refuse removal". Many of the items removed are household items e.g. fridges, kitchen cupboards. Where invoices refer to "dumped" items, the cost has generally been allowed, if not clearly excessive. Mr Moss's submission that the Local Authority's cheaper rubbish removal service should be used is not accepted, because there is no evidence it is available for fly-tipping. Where the invoices simply refer to removal of rubbish of a domestic nature, without any mention of dumping, the cost has been disallowed, because there is no evidence that this is not an expense which should be met by the owner of the rubbish, or where one of the Applicant's tenants has moved out of a flat, by the Applicant itself.

Missing invoices

81. Although Mr Moss therefore initially contended that all costs not supported by invoices should be disallowed, having seen the journal entries he accepted that many of these costs were regular charges for an ongoing service. In many instances the journal entries indicate that there is no invoice because the supplier has provided one bill for all sites, and so the work for Arlington House is not the subject of a discrete invoice. The 'new' invoices produced after the hearing appear to have greatly reduced the number of missing invoices. The Tribunal has adopted a common-sense approach. Where it is clear that the work/service has in fact been provided (e.g. electricity, management fees, insurance), the cost has been allowed, despite the absence of an invoice or other supporting documentation, subject to other grounds of challenge. Where there is no evidence or admission that the work/service has been provided at all, the cost has generally been disallowed.

Accountants fees

82. The accountants have charged £1500.00 for each year's accounts. Mr Moss has suggested this should be reduced to £600.00. He believes the accountants have simply transposed Trinity's journal entries without carrying out proper checks, using a template document for the accounts, and that if checks had been carried out many of the discrepancies he has raised should have been noticed. There is no information as to the time spent or hourly rate applied.

83. The Tribunal finds that a fee of £1200.00 + VAT for producing the accounts is reasonable. Large sums of money are involved, the accountants are required to provide a professional certification, and there is no evidence that they have not carried out checks based on a sampling of invoices.

Management fees

84. Trinity charges a management fee each year entered as a monthly figure in the journal entries. The annual cost was £26,903.52 in 2013, rising to £29,928.00 in 2017. There are no supporting invoices. No written agreement between the Applicant and Trinity has been produced.

85. In the Tribunal's previous decision in Case No. CHI/29UN/LIS.2015/0011 dated 15 December 2015, the management fees for 2009- 2012 were reduced by 10% to reflect the excessive delay in producing service charge accounts. Mr Moss submits that the same deduction should be made to reflect the late production of the accounts for 2013-2017. The accounts for 2013-2015 were not prepared until April 2017. The accounts for 2016 were prepared in June 2017. The accounts for 2017 were prepared in August 2018.

86. Mr Moss's lease requires that the accounts be prepared "so soon after the end of the Lessor's financial years as may be practicable". There has been no explanation for the delay in producing the 2013-2015 accounts. Lessees should not have to wait years before receiving accounts, and they cannot sensibly ask to inspect the invoices until that occurs. In the interim evidence may be lost. Due to Trinity's continuing failings in this respect, the Tribunal applies a 10% deduction for the first three years. The accounts for 2016 and 2017 were not unduly delayed and no reduction is made on this ground.

87. Mr Moss then contends that the management fees should be further reduced on the basis that the management has not been of a reasonable standard. He suggests a 10% reduction due to the failure to supply him with the invoices in connection with these proceedings, a 10% reduction for the accounting errors he has identified, and a 20% reduction for shortcomings in the management of the building with many tasks not

carried out and money wasted. He points to matters referred to in the statements of his witnesses.

88. The Tribunal does not consider any reduction is justified on the basis of the Applicant's conduct in these proceedings, although it may be taken into account by the county court judge in relation to costs orders.

89 More generally, the Tribunal shares Mr Moss's view of the shortcomings of the managing agents. The overall impression we have obtained, after a two day hearing and considering many hundreds of pages of submissions and evidence, is that Trinity gives very little attention to detail and there is insufficient financial scrutiny either when works are commissioned, or when invoices are received, by checking the work that has been carried out and to what standard. There is no evidence that any one or more individuals within Trinity have specific responsibility for Arlington House. We note in that in the previous proceedings a knowledgeable employee of Trinity provided a detailed witness statement and attended the hearing. In these proceedings neither the Applicant nor Trinity relied on any witnesses.

90. The lack of financial scrutiny is particularly evident with regard to invoices from its connected company Ottimo. See paragraphs 48-52 above. Moreover, given the number of very small jobs which Ottimo, based in Hemel Hempstead, is asked to attend to in Margate, it is clear that in effect Trinity is delegating its job of instructing contractors to Ottimo, who then charge for this service. It is not reasonable for the lessees to have to pay extra for Ottimo as a "middleman" in this situation, and it is another failing of Trinity's management. As the Tribunal has been unable to identify the additional Ottimo charge (due to lack of transparency in invoicing) it is another fact taken into account when considering the reasonableness of Trinity's fees.

91. There are many instances of accounting errors in Trinity's journal entries (e.g. debits instead of credits, double-charging) and, of even more concern, instances where the invoicing makes it impossible to have any confidence as to what work was done. For example, there are two completely different versions of Ottimo's invoice no. 00026222 dated 1 December 2016, although the amount has only been charged once. Both are for £420.00 with work done on 21 November 2016. However, one invoice describes the work as "To remove rubbish from within the car park" (which could be the lessees' car park: chargeable - or the commercial car park: non-chargeable), and the other describes the work as "Carpet clean". Trinity is not picking up on these problems.

92. In addition to this lack of financial scrutiny, and delay in producing accounts mentioned above, the inadequacies of Trinity include but are not limited to:

- Failing to deal with fire safety issues in a tower block over a prolonged period, despite the conclusions of fire safety assessments dating from 2015, resulting in an Enforcement Notice from the Fire Brigade in 2018

- Lack of financial transparency e.g. no written agreement with Trinity for management, no written agreement between Trinity and connected company Ottimo for its services
- Failing to instruct local tradesmen directly to reduce costs, and instead using non-local pre-selected contractors, there being no evidence justifying this
- Failing to respond adequately (or in some cases at all) to communications from lessees and the Residents Association
- Failing to ensure routine maintenance and repair tasks are carried out e.g. maintenance of the common areas
- Failing to complete section 20 process for required major works, thereby also wasting costs incurred on surveys/specifications with a limited shelf life.

93. It is accepted that Arlington House is not a straightforward property. It is a high rise block with mixed tenure occupancy, third party usage of common parts, and aged equipment requiring regular call-outs. Trinity manages from a distance, with no local representative in the Margate area.

94. Its management fee would certainly not been unreasonable were its services being carried out to a reasonable standard. However, taking everything into account the Tribunal finds that the deficiencies in the standard of service provided by Trinity warrant a further deduction of 20% from its gross annual fee in each year.

Out of hours fees

95. In each year's accounts there is a monthly "out of hours" fee raised by Trinity, the managing agents. There are no supporting invoices. Although Trinity took over management in January 2012 the Applicant has been unable to produce a copy of any management agreement between them. The only document made available to the Tribunal is an unsigned and undated form of agreement between the Applicant and Trinity's predecessor noting a commencement date of 1 January 2009. This clearly cannot be regarded as evidence of the terms of the management agreement in place in 2013-2017, but in any event it does not provide for any additional out of hours fee. These fees have therefore been disallowed.

Bank charges

96. In every month of each year there is a "bank charge". From 2014 it has been £5.25 per month. There is no supporting documentation but the Applicant submits that Trinity's bankers charge this monthly sum on each development they manage. Mr Moss queries the amount charged, which he says would amount to £57,960.00 per annum on all Trinity's estates. There is no specific clause in the lease permitting recovery of bank charges. The only provision that might apply is clause (2)(a)(viii)

which provides that the service charge may cover "… the fees of the Lessor's managing agents for the collection of the rents of the flats in the said buildings and for the general management thereof". As the bank charge is an expense incurred by Trinity, the question is whether the management agreement between Trinity and the Applicant provides for bank charges to be paid in addition to Trinity's general management fee. This has not been addressed by the Applicant, although it clearly could have been. Without evidence that the management agreement permits Trinity to re-charge banking costs,, rather than treat them as part of its overheads of providing the management service, the Tribunal cannot be satisfied that the bank charges are payable by the lessees and they have been disallowed.

Determination for 2013-2017

97. Annexed to this Decision are spreadsheets showing the Tribunal's determination for each year. Items challenged by Mr Moss have been identified. The amount claimed and the amount allowed is set out for each item. Brief reasons are provided.

98. The sums found to be recoverable from Mr Moss are set out at paragraph 7 above.

Determination for 2018 – on account demand only

99. The Applicant's budget, on which on account demands have been based, is £190,720.00. Mr Moss's only challenge was to the budget of £19,472.00 for door entry. The 2017 budget for this item was £6,500 and the sum allowed by the Tribunal for that year is £7830.57. The Applicant has now conceded the budget figure for 2018 is in error and should be reduced to "roughly half". The Tribunal allows £8000.00 under this head, reducing to the total budget to £179,248.00, of which Mr Moss's contribution is £537.74 per half year.

Concluding Remarks

100. There have now been two sets of complex proceedings before the Tribunal, in each one of which several years of service charges have been considered, with voluminous documentation and points arising. It is suggested that any future challenge is dealt with year by year, which would be much more manageable for the parties and the Tribunal. Once accounts are provided, hopefully more promptly than hitherto, any request by a lessee to inspect vouchers, or any other queries, should be raised and responded to promptly. If matters cannot be resolved, a prompt application to the Tribunal should be made.

Dated: 7 June 2019

Judge E Morrison

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.