FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Property:	**Kenwood House, 83-85 Queen's Parade, Scarborough, North Yorkshire, YO12 7HH**
Applicants:	**Kenwood House RTM Company Ltd**
Respondent:	**Mr Paul Ablett**
Case number:	**MAN/36UG/LSC/2018/0024**
Type of Application:	**S27A Landlord and Tenant Act 1985**
Tribunal Members	**K M Southby (Judge)** **W Reynolds (Expert Valuer Member)**
Date of Decision:	**18 September 2019**

DECISION AND REASONS

DECISION

1. **The Respondent is to pay to the Applicant the sum of £731 in respect of the service charge years 2015, 2016 and 2017 plus interest on that sum in accordance with the terms of the lease from 2nd August 2018 to the date of payment.**

2. **No determination is made in respect of service charge year 2018**

3. **There is no order as to costs**

BACKGROUND

1. The Tribunal has received an application under s27A of the Landlord and Tenant Act 1985

2. Following an inspection of the property on 19th November 2018 by the Tribunal in the company of both parties , the first hearing at Bridlington Magistrates Court on that date was adjourned with further directions issued dated 22 November 2018. This was due to the incompleteness in the documentation provided by the Applicant. A subsequent hearing was held at Bridlington Magistrates Court on 30th April 2019. Both parties were unrepresented at the hearings..

3. The application before the Tribunal was for the determination of the reasonableness and payability of service charges for the years 2016, 2017 and 2018.

4. At the second hearing, it was agreed between the parties that the Application should be considered to be amended so as to also include the service charge year 2015 and the Tribunal agreed to proceed with the case on that basis. It became apparent at the second hearing that there were still some omissions in the documentation provided to the Tribunal in respect of some of the issues. It was agreed by the parties that in the interests of expediency and justice the Tribunal would hear oral evidence on the issues of lease construction concerning:

    1. The railings
    2. The dado rail
    3. External windows

PRELIMINARY ISSUES

5. The Tribunal is in receipt of correspondence dated 8 July 2019 from the Respondent complaining that the Applicant has provided evidence after the deadline set out in direction number 3 of the Tribunals Directions dated 4th June 2019.The Respondents complaint is that this provided an opportunity for the Applicant to introduce new evidence and to attempt to discredit him and his arguments, which the Respondent was not provided with an opportunity to challenge. The Tribunal is mindful of the importance of

complying with Tribunal directions and also the need to balance the overriding objective to deal with the matter fairly and justly. The Tribunal has the power under Rule 6(3)(a) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("The Rules") to extend or shorten the time limit for any direction.

6. The Tribunal notes that the Applicant prefaces their late submissions (dated 28 June 2019 and received by the Tribunal on 2 July 2019) by stating '*Whilst I do not feel that there is anything I can add to help the determination of the points currently being considered by the Judge…'* We note that the Applicant has in covering correspondence explained that this correspondence was copied to the Tribunal purely because of the direction that all correspondence to the other party should be likewise copied to the Tribunal. We take this to mean that these documents were not intended to form part of the Applicant's submissions in this matter. This coupled with them being outside the deadline set out in the directions means that we are not minded to admit them by way of late evidence. Accordingly we do not include them as part of the evidence bundle and they do not form any part of our consideration or decision making.

THE INSPECTION

7. The Tribunal inspected the Property and found the property to be a mid-terrace double fronted property comprising 9 apartments over five floors. The top four floors comprise two apartments and the basement comprises one apartment occupied by the Freeholder. The property fronts onto the road at both sides, and has a communal entrance hall, lift, and exterior paving and small grassed area.

8. The Tribunal observed on inspection that the shared entrance hall and staircase has a wooden dado rail fitted. The Tribunal were shown the previous paper border, a small part of which remained visible in the understairs area. The Tribunal were also shown the exterior and interior windows of Mr Ablett's flat. These were observed by the Tribunal to be painted over the opening joints both internally and externally in certain areas. The Tribunal were also shown the railings on the balcony outside Mr Ablett's flat. These were observed to be severely rusted and in a poor state of repair.

THE LEASE

9. The Tribunal was shown a copy of the Applicant's lease. The relevant provisions of the Lease for the purposes of the Tribunal are as follows:

(1) In this Lease the following expressions shall have the following meanings:

a. "The Building" shall mean the property known as Kenwood House 83/85 North Marine Road Scarborough aforesaid consisting of nine flats

b. *"The Demised Premises" shall mean <u>ALL THAT</u> flat known as Flat Number [ ] aforesaid situate on the [ ] floor of the Building and shown edged red on the plan annexed hereto including*
    i. *.....*
    ii. *....*
    iii. *....*
    iv. *The windows window frames glass sash cords doors frames pipes and electrical and heating installations in the Demised Premises*
c. *"The Other Flats" shall mean the other flats in the Building not demised by this Lease*
d. *....*
e. *....*
f. *.....*
g. *.....*
h. *.....*
i. *"The Service Expenses" shall mean the costs expenses outgoings and matters set out in the Third Schedule hereto*
j. *"The Common Parts" shall mean all parts of the Building apart from the Demised Premises and the Other Flats and including (but without prejudice to the generality of the foregoing):*
    i. *The entrance hall staircases passages lift and landings of the Building*
    ii. *The front paths front steps the car parking area and bin storage area of the Building and the boundary walls thereof (so far as the same belong to the Building)*
    iii. *The roof and roof voids of the building and the basements and foundations thereof*

(2) (a)The service rent shall consist of one ninth of the service expenses

<u>The Third Schedule</u>

1. *The expense of maintaining repairing redecorating and renewing the Common Parts*
2. *The expenses of lighting and cleaning the entrance hall lift staircases passages and landings of the Building*
3. *The expenses of maintaining the lift at the Building EXCEPTING that the Basement Flat Number 1 and the Ground Floor Flats 2 and 3 shall not be responsible for any proportionate part of such maintenance thereof*
4. *The expenses of decorating the exterior of the Building heretofore or usually painted*
5. *All rates taxes outgoings (if any) payable in respect of the Common Parts*
6. *The costs of insuring the Building against the Insured Risks*

7. *The fees disbursements paid to any managing agents appointed by the Lessor in respect of the Building and in connection with the collection of rent and service rent from the Lessee and from the lessees of the Other Flats*
8. *The fees and disbursements paid to any accountant solicitor or other professional person in relation to the preparation auditing or certification of any accounts of the costs expenses outgoings and matters referred to in this Schedule and the rents and service rents reserved by this Lease and the lease of the Other Flats*
9. *……..*
10. *…….*
11. *Such sum as shall be estimated by the managing agents or if none the Lessor to provide a reserve to meet part or all of all or some or any of the costs expenses outgoings and matters mentioned in the foregoing paragraphs of this Schedule which the Managing Agents or if none the Lessor anticipate will or may arise during the following three years and the reserve fund shall be placed on an interest bearing Bank or Building Society Deposit Account*
12. *So long as the Lessor does not employ managing agents he shall be entitled to add the sum of Fifteen per cent to any of the above items for administration expenses.*
13. *All such sums as may be paid by the Lessee being sums mentioned in paragraph 11 of this Schedule shall on payment be credited to him in the books of the managing agents or if none of the Lessor and shall be held in trust for him until applied towards the Lessee's contributions towards the costs expenses outgoings and matters mentioned in paragraphs 1 to 9 of this Schedule and all such sums only be so applied*

THE LAW

10. S47 of the Landlord and Tenant Act 1987 states as follows:

Landlord's name and address to be contained in demands for rent etc.

(1)Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—

(a) the name and address of the landlord, and

(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2)Where—

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

11. Section 27A(1) of the 1985 Act provides:

> *An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to-*
>
> *(a) the person by whom it is payable,*
> *(b) the person to whom it is payable,*
> *(c) the amount which is payable,*
> *(d) the date at or by which it is payable, and*
> *(e) the manner in which it is payable.*

The Tribunal is "the appropriate tribunal" for these purposes, and it has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

12. The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It means:

> *… an amount payable by a tenant of a dwelling as part of or in addition to the rent–*
> *(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlord's costs of management, and*
> *(b) the whole or part of which varies or may vary according to the relevant costs.*

In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

> *Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-*
> *(a) only to the extent that they are reasonably incurred, and*
> *(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*
> *and the amount payable shall be limited accordingly.*

13. "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

> *the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*

ISSUES

14. The issues the parties have raised before the Tribunal are as follows:

a) Whether the Applicant has the standing to bring the claim
b) Fraud regarding the previous Tribunal decision
c) Determination of Service Charge for 2015, 2016, 2017 and 2018, and in particular arrears and admin charges
d) Dado
e) External Window Painting
f) Railings

EVIDENCE

15. At the second oral hearing Mr Ablett argued that the RTM company does not have standing to bring the claim, as it is a dormant company. This was not an argument he had previously made, nor had he put the Applicant on notice that this was his position. It was accepted by the parties that the transfer of the Freehold to the RTM company had not taken place. No evidence of the grant of Right to Manage had been provided by the Applicant in advance of the second oral hearing. The parties agreed that this was an issue which could be dealt with by the Tribunal as a preliminary issue on the papers following written submissions. The Tribunal with the agreement of both parties issued directions to this effect.

16. Mr Ablett argues that the RTM company is a dormant company and that a dormant company cannot bring a claim. He was invited by the Tribunal to provide any legal authorities in support of this argument. He also argues that they should not be registered as dormant.

17. Mr Ablett has provided the Tribunal with evidence from Companies House that at the time he searched the RTM company was dormant. Mrs Hardcastle on behalf of the Applicant at the second oral hearing did not dispute that the RTM Company was at that time dormant and stated that this was because it was inactive from an accounting perspective with invoices being issued and sums of money collected by the Managing Agents on behalf of the RTM Company. The Tribunal finds the dormant status or otherwise of the Company and the accuracy of this status to be a matter for Companies House and outside the scope of what the Tribunal is asked to determine. We therefore do not consider it any further here.

18. The Tribunal does not find the dormancy of the RTM Company to be a matter of dispute but does not find dormancy to be a reason why the company cannot bring a claim. The dormancy of the company exempts it from certain audit requirements but does not in turn remove from it other rights as a body corporate and legal entity. Whether or not its bringing of a claim renders it no longer dormant is not a matter for this Tribunal and we reject Mr Ablett's assertion that the RTM Company is unable to bring the claim by virtue of its dormant status at Companies House.

19. Mr Ablett also argues that the RTM Company never had the benefit of the transfer of the freehold of the property, and that no evidence has been provided that any grant of the right to manage has been given to them and the appropriate notices have not been served. It appears that the argument which flows from these assertions is that accordingly the RTM Company is not properly constituted, and therefore does not have the Right to Manage, and in the absence of the Right to Manage has no right to bring proceedings.

20. It is agreed between the parties and confirmed by oral evidence from Mrs Strickland at the second hearing that the freehold of the Property held by her has never transferred and remains vested in her. Mrs Strickland's evidence was that Kenwood House RTM Company applied to take over the right to manage from her in November 2014 and that the Right to Manage was granted on 22 April 2015. She did not oppose the claim by the RTM Company for the Right to Manage.

21. The RTM Company was incorporated on 4 November 2014. The Claim Notice provided by the Applicant was sent by a covering letter from SLC Solicitors dated 16 December 2014 and gives a date upon which the company intends to acquire the right to manage the premises as 22 April 2015. Correspondence dated 20 January 2015 from North Yorkshire Law acting on behalf of Mrs Strickland states '*Further investigation has revealed that when the flats were sold off and each lease created Mrs Strickland and her husband retained one flat i.e. Flat 1 which she now occupies but that was never subject to a lease. She is therefore the freehold owner of the building as a whole including Flat 1. She will not object to the company taking over the management as of April of this year she would wish to become a member of the company. Please arrange for the company to forward the necessary documentation to her direct*'

22. Mr Ablett states in his written submissions dated 24 June 2019 '*the Applicant has failed to show any evidence of their Right to Manage the property, therefore making any application before the Tribunal invalid. No notices regarding this have been served on me under Schedule 2 to the Right to Manage (Prescribed particulars and forms) Regulations 2010. The Applicant has failed to complete the requirements set down for the Landlord and requested by the Landlord's solicitor.'* He states that Mrs Strickland has never received any such documentation and therefore the RTM Company is not properly constituted.

23. The Tribunal assume that Mr Ablett is referring to the requirement for the RTM Company to serve a Notice Inviting Participation. Such notice must be in writing and in the prescribed form and must be served on all qualifying leaseholders who are not, at the time of service, members of the RTM company or who have not already agreed to be members. It is clear from the evidence provided to the Tribunal that Mr Ablett was not a leaseholder at that time having acquired his flat in May 2015. Mr Ablett suggested to the Tribunal that Mrs Strickland had not received the correct notices. Mrs Strickland was not a leaseholder, having retained the freehold and never having been subject to a lease. Whilst as the landlord, once the right to

manage had been acquired, the Landlord is also entitled to membership of the RTM Company there are no specific notice requirements in respect of this.

24. We find on the basis of the evidence presented to us that there was no counter-notice given under s84 Commonhold and Leasehold Reform Act 2002, and therefore there was no dispute about entitlement and accordingly the acquisition of the right to manage was the date specified in the claim, being 22 April 2015. We find no evidence to support Mr Ablett's claim that there were irregularities in the notice requirements, and therefore accordingly we conclude that the Right to Manage Company is properly constituted and has the right to bring the application before the Tribunal.

25. Mr Ablett makes further arguments in his written submissions that Mrs Hardcastle does not have the standing to represent the RTM Company as she is no longer a leaseholder. The Tribunal does not detain itself with this argument, as whether or not Mrs Hardcastle is or was a leaseholder, the RTM Company is entitled to appoint whoever it chooses to represent it before the Tribunal.

26. Mr Ablett also argues that there is no connection between the RTM Company and himself, as all of the invoices issued for payment of the service charge have been issued by managing agents – initially Town and Country, and more recently Adair Paxton. The Tribunal do not accept this argument as the invoices have been issued by the agents naming Kenwood House RTM Company Ltd as the Landlord for the purposes of s47 and 48. The Tribunal noted at the first oral hearing that there was a discrepancy in the invoices in that the invoices dated 1 January 2018 [page 513] and 27 September 2018 [page 512] issued by Adair Paxton name Mrs Avril Strickland as Landlord. The Tribunal requested that the Applicant clarify why the name had changed and what its position was in this respect.

27. The Tribunal remains unclear what the Applicant's position is in this respect but observes that given that Tribunal's conclusion that the RTM Company is properly constituted then the Landlord for the purposes of administering the service charge is the RTM Company , and therefore it is the RTM Company that should be named on the service charge demands. Having not done so in respect of the two invoices identified above means that these invoices have not been properly demanded and are not payable until they are correctly demanded. Accordingly, no interest for non-payment of these invoices can accrue.

28. Mr Ablett further make written submissions about bad character evidence and fraud in respect of the sums payable under the terms of the previous Tribunal decision which covered the service charge years 2010 to 2014. The Tribunal does not involve itself in these issues as they do not form part of what is before the Tribunal for determination on this occasion, other than to observe that Mr Ablett purchased the property at Kenwood House on 21 May 2015 and so would not have contributed to the service charge prior to that date. It has not been made clear to the Tribunal the basis upon which Mr Ablett took on the lease of Flat 3, and whether in doing so he also took on the service charge

debts (or credits) of the previous owner. Again, we are not asked to determine this here, although it forms part of the backdrop to the ongoing dispute.

29. The Tribunal is asked to consider reasonableness and payability of the service charge for the years 2015 to 2018. In particular the Tribunal is asked to consider the Dado Rail, the external window decoration and the railings, and also the sums which have accrued as interest and debt collection charges. Mr Ablett's argument appears to be that if he is correct that elements of the service charge were never recoverable under the lease it is not appropriate that interest and debt collection charges should accumulate on sums which he was never due to pay. Accordingly, we have considered the specific items first, and then having determined whether or not they are payable under the service charge we then proceed to consider the reasonableness or otherwise of the service charge in general, and the manner in which it has been administered.

RAILINGS

30. The Tribunal observed on inspection that the metal railings around the balcony outside the kitchen of Mr Ablett's flat to the front elevation of the building are in poor repair and need replacing. The equivalent railings to the other side of the building have been replaced at the individual leaseholders' expense. The railings to the centre which flank the communal staircase have been replaced and charged to the service charge account, and this is not disputed. The issue for the Tribunal is whether the railings outside Mr Ablett's balcony are properly construed as falling within the service charge, or whether they form part of his demise and therefore any replacement is to be paid for by him alone.

31. The Lease does not deal specifically with this point. The Demised Premises is defined as:

"ALL THAT flat known as Flat Number 3 aforesaid situate on the Ground floor of the Building and shown edged red on the plan annexed hereto including

(i) the plaster paint paper and other decorative finishes applied to the interior surface of the exterior walls of the Building

(ii) a moiety only severed vertically of walls dividing the Demised Premises from the other flats (as hereinafter defined) or from common parts (as hereinafter defined)

(iii) a moiety served horizontally of floors and ceilings separating the Demised Premises from the other flats (as hereinafter defined) or from the common parts (as hereinafter defined)

(iv) the windows window frames glass sash cords doors frames pipes and electrical and heating installations in the Demised Premises

(v) any pipes that exclusively serve the Demised Premises but that are not within the provisions of sub-clause (iv) hereof

....

(j) "The Common Parts" shall mean all parts of the Building apart from the Demised Premises and the Other Flats and including (but without prejudice to the generality of the foregoing)

(i) the entrance hall staircases passages lift and landings of the Building

(ii) the front path front steps the car parking area and bin storage area of the Building and the boundary walls thereof (so far as the same belong to the Building)

(iii) the roof and roof voids of the Building and the basements and foundations thereof

(iv) the exterior walls of the Building

(v) a moiety only severed vertically of walls dividing the Common Parts from the Demised Premises or from the other Flats

(vii) all pipes in the Building the use of which is shared by one or more of the Demised Premises and the Other Flats

(viii) the electricity meter relating to the Common Parts"

32. Mrs Strickland provided oral evidence about the intentions at the time that the Building was developed, and states that the railings were intended to be common parts. We considered also the plan attached to the Lease which shows the red outline of the Demised Premises. This clearly includes the balcony area, but it does not offer any clarity on the issue. We find after careful consideration of the wording of the Lease that the railings on the balcony of Flat 3 do not fall within the definitions of what comprises the Demised Premises and therefore must be within the Common Parts, which is an inclusive term comprising all parts of the Building apart from the Demised Premises and the Other Flats. This is clearly a non-prescriptive list not limited only to those items listed, and we conclude that as Common Parts the railings and therefore their maintenance, repair and replacement falls within the scope of the service charge and the cost should be shared accordingly between the Lessees. We find this to be both consistent with the wording of the Lease and consistent with the apparent intention of keeping the outside of the Building uniform in appearance through regular communal decoration.

DADO RAIL

33. The Tribunal observed the wooden dado rail when it inspected the Property, which extended throughout the hall and up the stairs to the top floor in the communal hallway and stairwell. The Tribunal heard oral evidence from Mrs Hardcastle that prior to the fitting of the dado rail there was a strip of wallpaper which ran in the same location along the wall. Mrs Hardcastle stated that there was a general consensus that having been in place for many years this wallpaper strip was shabby and that given that the lower part of the wall received more wear and tear it was easier to touch that part of the wall up if it was separated, and a rail was more in keeping with the age and style of the property. The decision was made by the members of the RTM Company and voted on unanimously. She stated that the Property could not have paper strips forever as trends come and go and that the dado rail was a better solution which enhances everyone's entrance.

34. Mr Ablett gave evidence to the Tribunal that in his view the dado rail was betterment. He accepted that it was preferable to the paper border but argued that this was not what was specified under the lease.

35. The relevant provision in the Lease is the third schedule which sets out the costs expenses and matters in respect of which the Lessee is to contribute. This includes '*the expense of maintaining repairing redecorating and renewing the Common Parts'*.

36. It is not disputed by the parties that the original condition of the hallway and stairwell was that it was papered and painted. The lease provides for maintenance, repair, redecoration and renewal. We take this to mean acts performed to restore an asset's physical condition, prevent further deterioration, replace or substitute a component at the end of its useful life. We find that the dado rail was not a replacement or like for like substitution but was an improvement which was performed to improve the state of the common parts. Indeed, we accept the evidence of Mrs Hardcastle that the dado rail enhances the entrance for all tenants, but we agree with Mr Ablett that the work was outside the scope of what was chargeable under the lease through the service charge and therefore is not payable.

37. The Tribunal therefore disallows the sum charged to the service charge account for the installation of the dado rail. This is identified at page 336 as being £640.

WINDOWS

38. Mrs Hardcastle gave evidence that under the lease the external elevations have to be painted every three years. The painter instructed by the RTM company had attended to paint the exterior windows, and following concerns raised by Mr Ablett had attempted to return to resolve the issue of the windows being painted shut but was unable to access the flat. He finally achieved access via Mr Ablett's tenant, and found the windows to be painted shut on the inside.

39. Mr Ablett gave oral evidence that prior to the exterior painting the windows had opened, he accepted that it was difficult prior to the exterior painting, due to some painting across the joints, but stated that it was possible. In his response to the Scott Schedule Mr Ablett appears to accept that there is an internal problem with the opening of the windows [unnumbered pages, 11th and 12th page after page 208]

40. The Tribunal were also provided with an undated statement from Mr Mark Davey, the painter who carried out the work to the exterior of the windows. He states '*On the 17th of August I attended apartment 3 Kenwood House having previously painted the exterior side of the windows on the Queens Parade elevation for the property. I had been informed that there was an issue with some of the windows not opening. Whilst painting the outside window frames the only windows that were painted closed were ones that had previously been sealed shut. Having looked at the windows from the inside it is clear to see that several of the windows have also been painted closed from this side.'*

41. The Tribunal was shown the interior and exterior of the windows in Mr Ablett's flat. The Tribunal observed that the windows had been painted over from the exterior and also on inspection it could be seen to the exterior that certain of the joints where the windows sit in the frame appeared to have been filled and painted over.

42. The Tribunal observed that there was also evidence of some paint across the joints on the interior side of the windows.

43. We accept the evidence of Mr Davey that the interior of several of the windows on the front elevation were painted across the joints at the time when Mr Davey came to paint the exterior making them difficult to open without breaking the paint seal. However, we do not accept that they were irretrievably painted shut. Upon inspection of the inside we agree with Mr Ablett's analysis that they could have been freed and opened with difficulty. On the basis of our inspection we conclude that the exterior of the windows to the Respondents flat were not merely painted shut but that certain of them were also filled and sealed shut in a manner which presently renders them impossible to open.

44. We do not consider that sealing these windows in the manner which is apparent from inspection is reasonable. We are not provided with specific evidence of how or by whom the filling and sealing was carried out, but we conclude on the balance of probabilities that it was either by those instructed by and under ultimate responsibility of the RTM company or ought to have been identified as an issue requiring to be resolved by the RTM company prior to the decorating taking place. We find that the external decorating costs is not reasonably payable until the windows can be opened and any remedial work to make that happen is at the lessees' expense internally and the lessors externally, with such work by the lessor not reasonably payable and therefore not recoverable through the service charge.

45. We have considered the documentation provided to us to try to establish the sum charged to the service charge account for the exterior decorating. We find the supplementary serve charge demand dated 7 August 2017 [page 500] refers to '*External Decoration and New Railings'* we also note there is a statement [page 509] which splits the service charge demand on page 500 between the 9 flats and refers to £3590 external decoration by MR Davey, £2200 scaffolding by Infinite Scaffolding and £908 for Railings. No supporting invoices have been provided for these sums.

CALCULATION OF SUMS OUTSTANDING

46.` The Applicant claims that the Respondent owes £3074.36 in service charges, interest and debt collection fees for the period 2015 to 2018 together with £1917.92 of expenses. The Respondent accepts that he has not paid any service charge for some time but disputes the Applicant's figures and states that his account has been in dispute throughout because the RTM Company has not administered the lease in the manner in which the lease specifies. Despite repeated requests the financial information provided by the Applicant

for the management of this Property is at best opaque and the Tribunal has done its best to penetrate the figures to establish what the current position is.

47. The Lease states at Clause 2 that

'(b) *The Service Expenses for each calendar year shall be estimated by the Lessor's managing agents…as soon as practicable after the beginning of the year and the Lessee shall pay the contribution on the first day of January in that year*

(c) As soon as reasonably may be at the end of each calendar year when the actual amount of the Service Expenses for that year has been ascertained the Managing Agents…shall give notice thereof to the Lessee and the Lessee shall forthwith pay the balance due to the Managing Agent…within seven days after being demanded or be credited in the books of the Managing Agents…with any amount overpaid.'

48. It is clear from the documentation that the Lease has not at any point been administered in this manner. Indeed, Mrs Hardcastle on behalf of the Applicant confirms this in the Detailed Particulars of Application [page 40] where she states, " *Although the lease states that service charge demands are due January 1 each year, historically the service charge demands have been made twice yearly; due January 1st and July 1st each year.*" This statement from Mrs Hardcastle rather oversimplifies the situation which is that whilst service charges for the year have been demanded in January in 2017 and 2018 there were also supplementary service charge demands during the course of the year for decorating in 2015 and 2018, together with other ad hoc demands mid-year. There were also no balancing charges applied to the individual lessees accounts at the end of each year to reflect the actual expenditure versus the budgeted expenditure.

49. Clause 4(a) of the Lease includes a Lessee's covenant '*to pay the Rent and the Service Rent during the said Term at the times and in the manner aforesaid without any deduction.*' The intention of the Lease appears to have been so that regular expenditure and proposed works to the common parts were budgeted for so that leaseholders know in advance what it is they are paying for. The Lease provides for this by stipulating external decorating works are done at three yearly intervals, and also allows for a reserve fund to enable sums to be collected in anticipation of future works.

50. A significant part of the Applicant's claim is based upon the Respondent's withholding of payment, claiming that his account was 'in dispute' rather than 'in arrears'. As the disagreement continued increasing numbers of debt collection and interest charges also accrued on the Respondent's account.

51. The Tribunal's initial starting point was to consider the service charge budgets which under the terms of the Lease should form the basis of the annual service charge demands and to cross reference these demands with the final service charge accounts and the supporting invoices in order to establish what sums are payable. By virtue of the opacity of much of the documentation, the figures arrived at by the Tribunal are as close an approximation to what we consider to be reasonable and payable in the circumstances. The basis for our findings are set out below and in Annex A.

2015

52. The Tribunal considered the service charge budget for 2015 [page 421] which shows a budget service charge for Flat 3 of £306 for the period 22 April 2015 (when the RTM company took over) to 31 December 2015. This figure is shown in column two of the table at Annex A.

53. This figure of £306 accords with the service charge demand [page 439] for £306 which was sent to Mr Ablett (column 3 of Annex A), albeit that this demand was backdated to 1 January 2015, despite being sent on 1 July 2015. It appears from the Service charge Statement [page 438] that interest was charged on the sum of £306 backdated to 1 January 2015 notwithstanding that it was not demanded by the Managing Agents on behalf of the RTM Company until 1 July 2015. The position taken by the RTM Company appears to have been that the sum of £306 was theoretically due under the lease on 1 January 2015, with interest accruing in accordance with Clause 7 which states

> "*ALL SUMS (whether rent service rent or of any other kind) payable by the Lessee to the Lessor hereunder shall carry interest at the interest rate from the date when payment is due until the date of actual payment.*"

54. The Tribunal observes that the demand for 2015 at page 439 to Mr Ablett also contains an amount of previous arrears of £334, although these arrears are never referred to again in the statements provided by the Applicant. We have no information about what preceded this date and given that the Applicant have not sought during these proceedings to take issue with any sums prior to their involvement we disregard this arrears figure and take for the purposes of this decision a starting point of a zero balance as at 1 January 2015. We also consider 1 July 2015 (being the date when the service charge for the year was demanded) for these purposes to be '*as soon as practicable after the beginning of the year'* given that the RTM had taken over in April 2015 and appointed new managing agents. We find the wording of the Lease to be internally inconsistent, and to lead to the scenario where a leaseholder is due to have paid a sum on 1 January which has been neither calculated nor demanded by that date. We do not consider that interest can run from 1 January where the sum due has not been demanded, and therefore we disallow all backdated interest prior to the first service charge demand being served on 1 July 2015.

55. We also note that the service charge budget for 2015 was calculated at page 421 using three Schedules for apportionment of charges which do not accord with the terms of the Lease. The Lease states at Clause 2(a) that the service rent shall consist of one ninth of the service expenses, with the exception (at paragraph 3 of the Third Schedule) of expenses related to the lift which is not payable by Flats 1, 2 and 3. The previous Tribunal decision clarified that the Lease does not include a term to reapportion the lift expenses between six, with any shortfall once the six flats 4-9 have paid their one ninth share falling upon the Landlord.

56. Whilst we accept that the service charge budget for 2015 was prepared prior to the previous Tribunal decision, this does not alter the fact that it does not accord with the terms of the Lease and has not been rectified following clarification in the previous decision.

57. The correct service charge demanded from Mr Ablett in 2015 based upon the 2015 service charge budget figure of £3291.76 should have been £298.77, being one ninth of the total less the lift expenses. Mr Ablett's share of the 2015 service charge based upon the service charge statement of account (page 427) but after excluding lift costs is £1,324.56 and this figure is reflected in the fourth column of the table at Annex A

58. We note that the service charge budget [page 421] does not include any sum for insurance (other than lift insurance), stating that this was 'paid before this budget period' and nor does it include a budgeted figure for decoration which is stipulated in the Lease at Clause 5 (g) as being a three yearly obligation

> *"(g)…in every third year of the Term decorate such parts of the exterior of the Building as are usually painted with two coats at least of good quality paint."*

59. Notwithstanding the mechanism stipulated in the Lease the Applicant through their Managing Agents demanded building insurance in the sum of £310 [page 450] on 15 May 2015 and £680.56 for external decorating on 21 October 2015 [page 454]. We do not see any mechanism under the Lease by which the Applicant through their Managing Agents can demand additional sums during the course of the year. The Lease anticipates some items of decoration which should reasonably be planned into the budget if they have fallen due, and if additional costs are reasonably incurred these become payable following the balancing exercise at the end of the calendar year. The Lease also anticipates budgeting for future unplanned expenditure through the reserve fund.

60. The Tribunal has considered the elements which comprise the insurance demand and finds no basis under the Lease for Directors and Officers insurance to be recoverable through the Service Charge as it does not fall within the scope of the Third Schedule. This sum is shown as £233.20 on the supporting invoice [page 242] for the period 3 June 2015 to 2 June 2016. When apportioned this represents the £135 reflected in the service charge reconciliation account [page 427]. The Tribunal therefore disallows the sum of £135 from the 2015 service charge reconciliation account. Mr Ablett's share of this disallowed sum is £15 and is shown in column 6 of the table at Annex A.

61. We are unable to fully reconcile the sums demanded from Mr Ablett with the sums in the accounts, or with the invoices provided. For example, the supplementary service charge demand from Mr Ablett [page 454] for exterior decorating is for £680.56. The sum in the accounts [page 427] is £6015, which when divided down by nine gives £668.33. A subsequent credit for £5 was applied for the roof of the lift cover [page 462] and Mr Ablett paid £675.56 on 11 November 2015. Invoices are provided only for £3975 [page 260].

62. The Tribunal has considered how to deal with the apparent inconsistencies in the documentation. The service charge reconciliation accounts as a whole for 2015 [page 427] show the budget figure of £3292 which accords with page 421, and it shows an actual expenditure for 2015 of £12,272 including a transfer to the reserve fund of £1000. The invoices provided by the Applicant to support the actual expenditure for 2015 come to £8339.01 together with £3907.24 provided by Mrs Strickland some of which need to be apportioned to reflect the part years to which they apply. The Tribunal finds that very few of the figures in the invoices appear to directly match the figures in the accounts even when Mrs Strickland's handwritten notations on her bank statements are taken into account, and the sums for insurance and lift insurance are apportioned to the appropriate dates. However, we note that the accounts include a statement from the chartered accountants who prepared them [page 426] which states

> "*1. We obtained the service charge accounts and checked whether the figures in the accounts were extracted correctly from the accounting records maintained by the managing agent*
> *2. We checked, with the exception of trivial items, whether all of the entries in the accounting records were supported by receipts, other documentation or evidence we inspected; and*
> *3. We checked whether the balance of service charge monies for this property shown on page 5 of the service charge accounts reconciled to the bank statement for the account in which the funds are held."*

63. The Tribunal is therefore persuaded by the accountants' statement that the actual figures in the 2015 accounts are accurate and that whilst the supporting documentation provided by the Applicant is incomplete they were satisfied that there were supporting invoices at the time the accounts were prepared.

64. Given that there is no basis for service charge demands to be made other than at the start of the year based on the budget, and the balancing demand based on the actual sums expended in the previous year, we conclude that no interest is payable on the insurance demand or the exterior decoration demand. Both of these demands were paid in full by Mr Ablett during the course of 2015 before they should have been properly demanded by way of a balancing demand at the start of 2016. Accordingly, we disallow all interest charges on these sums.

65. We accept that it is allowable under the Lease for the Lessor to charge interest on sums which remain unpaid the only period where we can identify that the Respondent did not pay sums which were due under the Lease was from 1 July 2015 to 4 November 2015 in respect of the on account service charge demanded. Daily interest at 5% above Nat West base rate (5.5%) on the sum of £298.77 (the sum due had lift expenses been excluded) is therefore due for this period of [126 days equating to £5.67]

66. The Applicant's managing agents have invoiced the respondent for a variety of debt recovery fees and charges. It appears that they rely upon Clause 4(d) of the lease which contains a covenant on the part of the lessee 'to pay all costs charges and expenses (including all Solicitors costs, Counsel's fees and ….Surveyor's fees together with any Value Added Tax or other tax payable in

respect of such costs and fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court'.

67. The Tribunal considers the situation to have similarities with that ruled upon by the Upper Tribunal in Barrett v Robinson [2014] UKUT 322 (LC). The Tribunal finds that for costs to be recoverable under Clause 4(d) , the RTM company would have to show that they were incurred in or in contemplation of proceedings, or the preparation of a notice under s.146. The statutory protection afforded by the Housing Act 1996 s.81 requires an application to be made to the Tribunal for the determination of the amount of arrears of a service charge or administration charges which were payable before a s.146 notice might be charged. Costs would only be incurred in contemplation of proceedings, or the service of a notice under s.146, if at the time the expenditure was incurred the RTM Company had such proceedings or notice in mind as part of the reason for this expenditure.

68. The application before the Tribunal relates to the reasonableness and payability of service charges and the Tribunal finds that there is nothing in the landlord's statement or correspondence from his managing agents or solicitors which in any way suggests that forfeiture of the lease in question was intended. The Tribunal does not allow the debt recovery charges claimed, many of which in any event are based upon incorrect demands being issued. This is not a situation where Mr Ablett was ever entirely clear about what sums he could expect to pay, and how much he owed at any point in time, or even when he could expect a demand and it is clear from the correspondence in the bundle before the Tribunal that Mr Ablett had been querying the sums being demanded from 22 June 2015 onwards. Whilst this does not absolve him from his obligations to pay Service Charges properly demanded under the Lease, we do not find the debt recovery charges to be payable and we accordingly disallow them.

69. It is clear from the difficulties the Tribunal has had in establishing the sums payable under the service charge, that there has been poor management by the Managing Agents, who have not administered the service charge in accordance with the terms of the Lease. The Tribunal do not suggest that there has been anything untoward in this regard. We are mindful that the RTM Company took over the management of the Building following a period of poor management by Mrs Strickland, and they understandably handed the task of issuing service charge demands over to Managing Agents who they might reasonably have assumed would do so in accordance with the terms of the Lease. This was not the case. We do not find any suggestion that the Applicant was acting other than honestly, but we do find that the level of service received from their Managing Agents was poor and that therefore the full sum invoiced by those Agents should not be recoverable through the service charge account. We have reduced the sum recoverable by 50% to reflect the poor manner in which the service charge has been administered.

70. The Tribunal has compared the sums budgeted, sums demanded, actual sums accounted for, and sums paid, and applied to those figures the adjustments made by the Tribunal for sums disallowed. These figures are set out at Annex A. We find that at the end of 2015 having applied all of our adjustments and disapplied the interest and debt recovery charges Mr Ablett was in fact in credit in the sum of £342.11.

2016 and 2017

71. The Tribunal has carried out a similar process for the years 2016 and 2017, which are also set out in Annex A below. The service charge budget for 2016 [page 422] gives a total budget of £8229.76 which corresponds with the figure in the 2016 service charge reconciliation accounts [page 434]. The budgeted sum due for 2016 was calculated (excluding the lift costs) as £855.15 for Flat 3. This was demanded in two parts the first being for £427.57 for 1 January 2016 to 30 June 2016, which was demanded on 20 January 2016. The second demand was also for £427.57 [page 481] demanded on 20 June 2016. There was also a demand served for an ad hoc car park cleaning charge [page 475] of £42.22 demanded on 17 June 2016. Under the terms of the Lease the Tribunal would therefore expect to see a balancing charge applied to the service charge account '*as soon as reasonably may be at the end of each calendar year when the actual amount of the Service Expenses for that year has been ascertained.*' The Tribunal would expect to see the differential between the 2015 budget (as invoiced to the leaseholders) of £3292 and the actual 2015 expenditure of £12272 being charged to the service charge account at the start of 2016. This is not the case.

72. In addition, on 22 June 2017 £151.67 of window cleaning costs were credited back for 2016 and 2017 and £80 of window cleaning costs were credited back into the service charge year for 2015. These sums are reflected as credits in column 3 of Annex A for the years in question and also at column 4 when the service charge account has been certified by the Chartered Accountants prior to the date the credit was issued.

73. The Tribunal has deducted one ninth of £640 from the service charge which Mr Ablett has been asked to pay representing the charge for the dado rail which has been disallowed for the reasons set out above. However, it is unclear from the documents provided to the Tribunal which service charge demand includes this sum. The invoice for £640 from Adam Beswick [page 336] for the cutting and fitting of the dado rails is dated 22 March 2017. The subsequent demand dated 7 August 2017 is for £746.44 [page 500] and refers to both internal and external decoration yet appears to only cover external decoration and new railings. The supporting documentation [page 509] states that this comprises £3590 external decoration by M Davey [no invoice provided], £2220 scaffolding [no invoice provided] and £908 railings [no invoice provided] totalling £6,718 with one ninth of this sum being equal to the sum demanded on 7th August 2017.

74. The Tribunal concludes for the reasons given above that management fees for this period should be reduced by 50% to reflect the lack of clarity in the service charge demands and accompanying statements, and the fact that the service charge has not be administered in accordance with the lease. Mr Ablett's account was in credit according to the Tribunal's adjusted figures for the duration of 2016 and therefore all interest and debt recovery charges for this period are disallowed.

75. In 2017 it appears that Mr Ablett made no payments towards the service charge account at all. Whilst we share some frustration with Mr Ablett as to the difficulties in establishing exactly what it being invoiced and why, it remains an obligation under the Lease to contribute to the service charge account, and we can appreciate the difficulties faced by the Applicant in attempting to run the Building with a shortfall in the income necessary to pay for the services. We consider that interest is payable from 3 February 2017 (when the service charge demand was made [page 487]) with due allowance for the credit balance from prior years and the window cleaning credit applied in June 2017 based upon 5.25% for the period to 02/11/17 (272 days), 5.5% for the period 02/11/17 to 02/08/18 (273 days) and 5.75% thereafter (£29.92 to 02/08/18)

76. We have also adjusted management fees to 50% as set out above and deducted the sum charged for the external painting works for the reasons explained above. We have allowed the sum for the painting of the railings because that work was not disputed by the parties. The Applicant has credited by 151.67 for window cleaning charges in this period which are reflected in Annex A.

77. The Tribunal includes its calculations in Annex A in order to provide further support for its reasons as set out above, but observes that by the very nature of the opacity of the documentation and the lack of clarity in the accounts it prefers to impose a figure broadly in line with these calculations which reflects in the view of the Tribunal a fair and reasonable figure payable by the Respondent to the Applicant. This is in no small part to prevent this matter continuing to come before the Tribunal with further requests for the Tribunal to pick over these calculations in additional detail. It is incumbent upon the Tribunal to act fairly and proportionately and accordingly we find the sum reasonably payable by the Respondent to the Applicant to be £731 plus interest in accordance with the terms of the lease from 02/08/18 to the date of payment.

2018

78. The Tribunal was asked to make a determination on the service charge payable for 2018. However we have not been provided with a budget. The information provided for 2018 shows that two service charge demands have been issued, neither of which have been substantiated with supporting invoices, and both of which have been incorrectly issued with Mrs A Strickland named as the Landlord. Whilst she is the Freeholder, and remains the Landlord for the purposes of the Rent (if any – not seemingly charged on the basis of the information before the Tribunal) the Landlord for the

purposes of the recovery of the Service Charge is the RTM Company and therefore these invoices are not payable until properly served.
In the absence of a budget upon which to comment, the Tribunal is unable to make a determination . This however does not preclude the final service charge accounts for 2018 being the subject of future scrutiny as no determination has been made in this respect.

79. The Applicant made written representations to the Tribunal stating that they have re-issued the original service charge demands substituting the name of Mrs Strickland in place of the RTM Company. The Applicant states that this was done at the request of the Tribunal. This is not the case. The Tribunal queried at the hearing in April why some of the demands were issued in the name of the RTM Company and some in the name of Mrs Strickland and requested an explanation. This was reflected in direction 8.3 of 4th June 2018 which requested "an explanation for the name of the Landlord on service charge invoices from 2015 to 2018." The Tribunal observes that the original demands naming the RTM Company were correctly demanded, with the exception of those naming Mrs Strickland, for the reasons set out above.

80. In addition to their claim for service charges the Applicant also claims for £1917.92 of legal costs and other associated expenses, including debt collection fees, court fees, postal costs and stationery. The Tribunal finds that this is a situation where neither party assisted the other through clear communication and performance of their obligations. We find that Mr Ablett was right that he couldn't know what was going on and could not be confident that he understood what he was being requested to pay and why. On the other hand he had an obligation under the lease to keep paying and he failed to do so, and ultimately the Tribunal has concluded that Mr Ablett owes some outstanding service charge to the Applicant which he had refused to pay, albeit significantly less than was claimed. We conclude that the Tribunal is not primarily a cost shifting jurisdiction, and we decline to make any specific order for costs in this regard.

ANNEX A	Service Charge Budget (£)	Sums Demanded (£)	1/9 Actual Service Charge from Service Charge Reconciliation Accounts less irrecoverable expenses)(£)	Sums Paid by Respondent (£)	Amount Payable including Tribunal deductions (£)	Tribunal Commentary	Sum Due from Respondent Less Sum Paid (£)
2015	306.00	306.00	1324.56	310.00	1309.56	*One ninth actual less lift expenses & D & O insurance*	
		680.56		532.00			
		310.00		675.56			
		-5.00			-5.00	£5 credit applied by Applicant for roof of lift cover	
		-80.00			-80.00	£80 window cleaning credit applied by Applicant in 2017 after the 2015 service charge account reconciliation	
					-43.44	reduce management fees by 50%	
					5.67	Interest at 5.5% on £298.77 from 1/7/15 to 4/11/15	
	306.00	**1211.56**	**1324.56**	**1517.56**	**1186.79**		**-330.77**
2016	855.15	427.57	909.22	351.74	909.22	One ninth actual less lift expenses & D and O insurance	
		427.57		42.22	-71.11	Dado not recoverable	
		42.22		352.00			
		-151.67	-151.67		-151.67	window cleaning credit applied by Applicant in 2017 after the 2016 service charge account reconciliation [i]	
					-42.56	reduce management fees by 50%	
	855.15	**745.69**	**757.55**	**745.96**	**643.88**		**-432.85**
2017	930.88	930.88	1829.33	0	1829.33	One ninth actual less lift expenses & D and O Insurance	
					-746.44	Painting over external windows disallowed	
					100.89	allow painting railings	
		-151.67			0	window cleaning credit applied by Applicant in June 2017 prior to the 2017 service charge account reconciliation in July 2018	

					-49.50	reduce management fees by 50%	
					29.92	*Interest **	
	930.88	**779.21**	**1829.33**	**0**	**1164.20**	**0**	***731.35***
2018	Not seen	718.14	Not seen	213.33	0	Invoices not properly demanded	

[i] The credit was dated 22/06//2017 whereas the accountants certification is dated 29/01/2017

* The respondent was invoiced £930.88 on 03/02/17 but was in credit by £444.19 at end of 2016 so balance for interest would be £486.69 from 03/02/2017 but only until 22/06/17 (139 days at 5.25% = £9.73) when he was credited £151.67 so balance for interest would then be £335.02. (133 days to 02/11/17 at 5.25% = £6.41) plus (273 days from 02/11/17 to 02/08/18 at 5.5% = £13.78) with daily interest from date of payment to 02/08/18 as per lease Excluding the daily rate from 02/08/18 to date of payment, total interest is therefore £9.73 + £6.41 + £13.78 = £29.92.