FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/LSC/2019/0279 & 0280 & 0281 & 0282 & 0316**
Property	**:**	**Various flats at Quayside House, 302 Kensal Road, London W10 5BL**
Applicant	**:**	**Network Homes**
Representative	**:**	**Mr T Salter of Counsel**
Respondents	**:**	**Ivan Daniels and Veneta Daniels (Flat 49), Sandra Barron (Flat 56), Eveline Gieb-Huane (Flat 61) and Elizabeth Miller (Flat 62)**
Representative	**:**	**In person**
Type of Application	**:**	**For the determination of the liability to pay service charges**
Tribunal Members	**:**	**Judge P Korn** **Mr A Harris LLM FRICS FCI Arb** **Mr O Miller BSc**
Date and venue of Hearing	**:**	**20th and 21st January 2020 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**26th February 2020**

DECISION

Decisions of the Tribunal

(1) The Respondents' respective contributions towards the annual management fee for the years 2013/14 to 2017/18 inclusive are reduced by 60%.

(2) Subject to point (3) below, Ms Gieb-Huane's and Ms Miller's respective contributions towards the service charge for 2012/13 are reduced from £3,082.80 to £2,303.61.

(3) Ms Gieb-Huane's and Ms Miller's respective contributions towards the annual management fee for the years 2011/12 and 2012/13 inclusive are reduced by 60%. Specifically in relation to 2012/13 this means that the management fee as stated in the Applicant's final account is reduced by 60% and that the figure representing that 60% reduction needs to be deducted from the reduced overall figure of £2,657.76 to produce a final figure for that year.

(4) Whilst these points do not form part of the Tribunal's formal determination, it is noted that the Applicant has agreed to remove the charge for the items specified in paragraph 4 below.

(5) All of the other charges which are the subject of these applications are payable in full.

(6) The Tribunal makes an order under section 20C of the 1985 Act that none of the costs incurred by the Applicant in connection with these proceedings may be recovered through the service charge. The Tribunal also makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing the Respondents' liability to pay any of the costs incurred by the Applicant in connection with these proceedings.

Introduction

1. The Applicant is the freehold owner of the building ("**the Building**") of which the Property forms part. The Applicant seeks a determination pursuant to section 27A of the 1985 Act as to the reasonableness and payability of the service charges for the years 2013/14 to 2017/18 inclusive and of the estimated service charges for the years 2018/19 to 2019/20. The Respondents are leaseholders of various flats within the Building as specified on the front-sheet.

2. Separately, Eveline Gieb-Huane and Elizabeth Miller (two of the Respondents) have also made their own joint application for a determination as to the reasonableness and payability of certain specific service charge items for the years 2011/12 to 2017/18 inclusive and they are therefore technically the 'Applicants' in respect of those challenges. However, to avoid confusion, all of the persons named as Respondents on the front-sheet will collectively be referred to throughout as the Respondents.

3. The relevant statutory provisions are set out in the Appendix. The hearing bundles contain a sample lease ("**the Lease**"), being the lease of Flat 49. It is dated 29th October 2004 and was originally made between Stadium Housing Association Limited (1) and Anne Doorley (2). It is common ground between the parties that all of the other leases are in the same form as the sample lease for all purposes relevant to the issues in respect of which a determination is sought.

Agreed points

4. As part of its written submissions the Applicant has agreed in relation to Ms Gieb-Huane and Ms Miller only to remove (a) the £2.98 charge relating to electrical repairs for 2011/12 and (b) the £1.46 charge described as 'renters cost' also for 2011/12. This concession is only for the benefit of Ms Gieb-Huane and Ms Miller because the other Respondents are not party to the application in respect of the 2011/12 year.

5. At the start of the hearing the Applicant confirmed its agreement that items numbers 3.2.1 on pages 37 to 39 in Tab 4 of Hearing Bundle 1 were not payable to the extent stated on those pages. A copy of those pages (headed 'Annex 3: 2013/2014') is attached at the end of this determination.

THE PARTIES' RESPECTIVE CASES

6. There are four hearing bundles in total and the parties have also made extensive oral submissions over two days. We do not consider it feasible or desirable to summarise every submission, and therefore this determination just records those points which in our view it is appropriate to refer to.

7. During the process of exchange of statements of case and disclosure it emerged what the key issues were. The parties' basic position on each issue is as follows:-

Building insurance – recurring issue

Respondents' position

8. The Respondents state that they have seen no invoice or other evidence of building insurance, the Applicant being obliged under the terms of the Lease to provide such evidence when requested, and therefore that the insurance premiums are not payable.

Applicant's position

9. The Applicant accepts that there is no invoice in the hearing bundles, but as stated in Renee Clarke's witness statement there is a block policy in place. The Building is, and always has been, insured and the Applicant believes the cost of that insurance to be reasonable. Ms Clarke adds in her witness statement that

it is standard and accepted practice for landlords with numerous properties to insure them using a block policy.

Entryphone 2013/14

Respondents' position

10. The Respondents had requested a copy of the invoice relating to this charge but had only been supplied with a copy of a works order. In the absence of an invoice they submit that the charge is not payable.

Applicant's position

11. Works were needed both to the entryphone and to the communal doors, as there were various issues to attend to. In the Applicant's submission, its comments on the communal doors related charges for 2012/13 (see later) apply also to these charges.

Communal electricity – recurring issue

Respondents' position

12. The Respondents state that if there is a qualifying long term agreement in place in relation to the supply of communal electricity then they have not been consulted on it and therefore pursuant to section 20 of the 1985 Act the amount recoverable by the Applicant is limited.

13. In addition, the Respondents consider the communal electricity charges to be very high. They accept that they have not brought any comparable evidence but state that it is difficult to obtain such evidence as the particular scheme is not a common one.

14. At the hearing the Respondents referred the Tribunal to the fact that the Applicant had accepted in writing back in 2010 that an investigation was needed into how the communal lighting operated. They also referred to an email from 2016 in which the Applicant accepted that the electricity charges "do appear to be more substantial than expected" and the Respondents expressed disappointment that seemingly no progress had been made on this issue despite investigations having begun in 2010.

15. The Respondents also noted that electricity charges had dropped substantially in the 2017/18 year, which suggested that the charges in previous years had been unreasonably high.

16. In addition, the Respondents raised the point as to whether some of the charges levied related to commercial or other premises outside the Building. On examining one invoice in particular the Respondents were concerned that part

the address specified on the invoice appeared to be the local Job Centre and part of it seemed to relate to a non-existent building. There was also a report commissioned by the Applicant which specified the address for electricity charges as "Landlord's Supply, Quayside House, 248-300 Kensal Road" and also separately referred to "292 and 300 Kensal Road", when the address of the Building was in fact 302 Kensal Road.

Applicant's position

17. The Applicant states that there are two meters at the Building, one for residential units and one for commercial units. Only the cost incurred on the residential meter is charged to residential leaseholders. It notes that the Respondents argue that the cost is too high and that it must include some of the commercial cost, but the Applicant submits that they have not provided any evidence to support this assertion. In particular they have not provided any comparable evidence or evidence of any equipment being faulty.

18. The Applicant had provided the Respondents with what it considered to be reasonable evidence of the cost, but as the Respondents were unhappy with the information provided the Applicant decided to carry out further investigations to check whether there was a problem with the meters. Having completed that investigation it has now reached the conclusion that the charges are accurate. This is broadly because each meter shows a distribution diagram indicating which services are connected to which meter and there is no evidence that the commercial supply is wired to the residential meter. The distribution board shows the full address for Quayside House as being 298-312 Kensal Road. The Applicant is not re-charging the cost of these investigations, even though the cost is recoverable under the Lease.

19. The Applicant also states that the electricity charges are in line with other schemes of a similar size owned or managed by the Applicant. The invoices indicate that the maximum usage occurs between 7.30 and 8pm, which is consistent with the proposition that the charges relate to the residential units. There was indeed a drop in electricity charges in the 2017/18 year but this was mainly due to more efficient fittings being installed.

20. As regards the Respondents' speculation that there might be a qualifying long term agreement in place, the Respondents have not mentioned this point in their statement of case.

Latent defects 2012/13 and 2013/14

Respondents' position

21. The Applicant had already agreed in principle that the remedying of latent defects was not recoverable via the service charge, but there was a disagreement between the parties as to what constitutes an inherent defect. At the hearing the Respondents referred the Tribunal to examples of what they considered to

be a latent defect, namely items described as "water damage leaks" within the 2012/13 year and an item falling within the 2013/14 year described as "Professional fees – out of hours emergency cover". They also referred the Tribunal to an invoice for repairs to lights that were no longer working and submitted that these too involved the remedying of a latent defect.

Applicant's position

22. The Applicant argues that the charges being challenged by the Respondents do not relate to the remedying of a latent defect.

'Commercial only' charges 2013/14

Respondents' position

23. The Respondents are querying a specific charge for £1,342.18 which is described by the Applicant as being part of an agreement with the British Waterways Board to allow access to use the eight fire escape doorways adjoining the towpath. The Respondents' objection is that the access can only be used by the commercial tenants and therefore residential leaseholders should not have to contribute towards the cost.

Applicant's position

24. At the hearing the Applicant referred the Tribunal to the relevant invoice and to the relevant charging provisions in the Lease. The Applicant added that it simply was not the case that the fire escape could only be used by the commercial units and that all occupiers of the Building could use it.

Missing invoices 2012/13

Respondents' position

25. The Respondents state that the copy invoices supplied by the Applicant amount in aggregate to £2,028.57 for a 2-bed flat but that the charges for that year amounted to £3,551.52. It follows that there are missing invoices.

Applicant's position

26. Ms Clarke in her witness statement comments that the Respondents' challenges in relation to £1,522.95 of the charges have not been explained.

27. At the hearing, the Applicant referred the Tribunal to the final account and submitted that the Respondents' case on this point was unclear. In any event, contrary to the Respondents' own assertion the Applicant did not accept that the Respondents had made a request under section 22 of the 1985 Act for copy invoices in respect of this year.

Podium / slab issue 2012/13

Respondents' position

28. The Respondents state that the Applicant agreed not to charge for this item in 2013/14 and they argue that it should not have been charged in 2012/13 either.

Applicant's position

29. The Applicant in response states that the Respondents' argument appears to be that the relevant works constitute the remedying of a latent defect. The Applicant denies that this is the case, argues that the Respondents have brought no evidence in support of their assertion and states that the works constitute simple maintenance.

Communal doors 2011/12 and 2012/13

Respondents' position

30. The Respondents argue that the work on the communal doors was only necessary because the doors were not fit for purpose. They do not accept that the Applicant was simply repairing damage caused by vandalism, but even if the repairs did relate to vandalism the doors should have been more robust so that it was less easy to damage them. Repairs had been required far too often, and therefore there was not only a door quality issue but also a question of general mismanagement and a failure on the part of the contractor to repair the damage in an effective manner.

Applicant's position

31. Ms Clarke in her witness statement states that there were two call-outs in 2011/12 for different one-off faults and that this does not demonstrate a lack of fitness for purpose. As for the 2012/13 year, there were varying reasons for the call-outs as can be seen from the copy invoices. There were instances of vandalism and there was also a lot of traffic through these doors and therefore the volume of repairs undertaken is not considered by the Applicant to be unreasonable. In addition, even if, which is denied, the doors were not fit for purpose this does not affect the reasonableness of the charges themselves.

32. At the hearing the Applicant referred the Tribunal to the various copy invoices. The Applicant accepted that the invoices did not just relate to the repair of damage caused by vandalism but said that repair works are needed from time to time and that it considered the works and the charges to be reasonable. There was no evidence of repeat problems which suggested defects or poor workmanship.

Gritting 2011/12 and 2012/13

Respondents' position

33. An unreasonable amount has been spent on gritting because, in the Respondents' view, too much grit had been ordered.

Applicant's position

34. The Applicant states that it ordered the grit that it needed in order to do the job and that there was no build-up of excess grit. Gritting is undertaken on an 'ad hoc' basis when weather forecasts indicate that it is necessary.

Repair of cold water supply 2012/13

Respondents' position

35. The Respondents state that there are three separate invoices relating to work needed to the cold water supply and question why it took three attempts to do the same job.

Applicant's position

36. The Applicant states that there were just three call-outs and that each call-out was to address a different problem. The Tribunal was referred to the relevant invoices at the hearing.

Balcony doors 2012/13

Respondents' position

37. The Respondents' position is that the cost of the repairs to the balcony doors was excessive, and they have provided cheaper alternative quotes in the hearing bundles.

Applicant's position

38. The Applicant states that the repairs were to two separate doors. As regards the alternative quotes obtained by the Respondents, these were not comparable quotes in any real sense as it was unclear what work and materials were included in their quotes.

Lift issue 2011/12 and 2012/13

Respondents' position

39. The Respondents note that the fire brigade only charge for each third call-out and state that it follows from the fact of the charges levied by the fire brigade that they must have been called out many times. Any problems with the lift breaking down should be dealt with by the Applicant's own emergency call-out service and if this service fails then the Applicant should bear the cost.

Applicant's position

40. The Applicant states that it has no control over the level and frequency of these charges. There is no evidence that the Applicant's own emergency call-out service was not working properly and therefore it has to be assumed that residents chose to contact the fire brigade.

Satellite charge 2012/13

Respondents' position

41. In the Respondents' view, this charge arose because the aerial system had not been repaired properly on previous occasions and therefore the Respondents should not have to pay for the work. In any event, according to the cycle of renewal/inspection seen by the Respondents the aerial should last for 20 years.

Applicant's position

42. The Applicant does not accept the Respondents' analysis, but in any event the key point is that it needed replacing at the time and therefore the Applicant is entitled to recover the cost through the service charge.

Renters cost 2012/13

Respondents' position

43. The Respondents consider this repairing charge to have been mis-apportioned on the basis that it relates to an internal door within a flat. This is because it relates to a wooden door and there are no wooden doors in the common parts.

Applicant's position

44. Ms Clarke in her witness statement comments that the Respondents' challenge is based on the misapprehension that a metal door would not be sanded and painted. The supporting invoice confirms that the works were done to a communal door.

2011/12 – specific issues

Respondents' position

45. The main concern on the Respondents' part in relation to 2011/12 is the lack of invoices. In addition, they have a concern that the repairs to the lights (at a cost of £2.98) indicate that the lighting system itself is faulty. The Respondents are also concerned about the amount of the invoice for £9,200.88 + VAT for 5 yearly wiring testing and inspection, and they question the need for it. In addition, there is a charge relating to the maintenance of a handrail which they believe forms part of the commercial area and therefore should not be charged to residential leaseholders.

Applicant's position

46. The Applicant is not aware of the Respondents having served a section 22 request for copy invoices for this year and submits that all sums due were lawfully demanded and all information was provided to the Respondents in accordance with the Applicant's contractual and statutory obligations. Ms Clarke in her witness statement comments that the Respondents' challenges in relation to £1,126.67 of the charges has not been explained.

47. As regards the cost of repairs to the lighting (£2.98), the Applicant does not agree with the Respondents' analysis but is prepared to remove this small charge. Regarding the handrail, the handrail is located just outside the entrance to the reception area to comply with disability discrimination and equality regulations and it is not exclusive to commercial tenants as residential leaseholders have access to this area and do in practice go into the reception area where the security guards are based.

48. The wiring testing and inspection is a statutory requirement, and the cost is considered reasonable as the Building consists of 108 units.

2014/15 – specific issues

Respondents' position

49. The Respondents state that the final accounts were issued 2 years late and do not even contain actual figures as each item is identical in amount to the estimated figure. They add that the electricity charges for this year seem particularly unreasonable, as do the charges for what seem to be the remedying of inherent defects.

50. When asked at the hearing what they considered would be a reasonable total service charge for the year they said that for a 2-bed flat a reasonable amount might be £1,800, partly because this was more in line with the estimates for 2018/19 and 2019/20.

Applicant's position

51. Ms Clarke in her witness statement comments that the Respondents' challenges in relation to £2,746.94 of the charges have not been properly explained.

52. The electricity charges have been explained by the Applicant and are considered to be reasonable. The Applicant considers that there is no proper basis for any of the Respondents' challenges.

2015/16 – specific issues

Respondents' position

53. The Respondents have a concern about the level of the managing agents' fees. As with 2014/15, they consider that for a 2-bed flat a reasonable amount might be £1,800.

Applicant's position

54. Ms Clarke in her witness statement comments that the Respondents' challenges in relation to £2,834.05 of the charges have not been explained.

55. There are invoices for the managing agents' charges and the Applicant considers them to be reasonable. Again, the Applicant considers that there is no proper basis for any of the Respondents' challenges.

2016/17 – specific issues

Respondents' position

56. In addition to the general concerns about the communal electricity charges, the Respondents' challenge relates to missing invoices. Formal requests for these were made.

57. At the hearing the Respondents explained that in their view mere provision of works orders (as distinct from invoices) was insufficient as they did not give enough information.

Applicant's position

58. The Applicant accepts that a formal section 22 request for information was made in respect of this year but states that it sent all copy invoices to Ms Miller on 15th April 2019.

59. Ms Clarke in her witness statement comments that the Respondents' challenges in relation to £2,740.77 of the charges have simply not been explained.

2017/18 – specific issues

Respondents' position

60. Again the Respondents have a concern that in relation to some charges they have only been provided with copies of works orders (as distinct from invoices) and that these did not give enough information.

Applicant's position

61. Ms Clarke in her witness statement comments that the Respondents' challenges in relation to £3,079.30 of the charges have not been explained.

62. As regards any alleged failure to provide copy invoices, the invoices and supporting documents were sent to the Respondents on 12th November 2018, and copies of the disputed invoices were provided as part of these proceedings on 25th October 2019.

2018/19 and 2019/20 estimated charges – specific issues

Applicant's position

63. At the hearing the Applicant referred the Tribunal to the estimated figures and submitted that they were reasonable.

Respondents' position

64. The Respondents felt that the estimates were a little high and that both should be reduced by, say, 30% so as to make them slightly lower than the highest actual figure for any of the last few previous years.

Renee Clarke's witness statement

65. Ms Clarke is a Leasehold Services Manager for the Applicant and has given a witness statement. Her witness statement contains comments on the challenges for each service charge year. Where relevant, the information contained in her witness statement is referred to above.

66. In cross-examination she accepted that she did not have any direct involvement in relation to the Building until September 2018.

67. Ms Clarke did not know why there had been so much electricity usage during the day, but in relation to another question on electricity she said that there were separate cost codes for residential and commercial. She added that the issues raised about the electricity meters had been investigated and that it had been concluded that the meter readings were accurate.

68. As regards the electricity billing address, she was unable to explain why that specific address had been used other than to say that it was the same address as appeared on the distribution board. She did not think that it was possible that the residential bills included commercial as the commercial units got their own separate invoices.

69. Regarding vandalism, Ms Clarke said that the Applicant had spoken to those persons who they knew had deliberately caused damage. As regards the question of missing invoices, Ms Clarke believed that the Applicant had complied with the directions and had provided copy invoices where possible. In some cases they had supplied works orders instead, but that was where no individual detailed invoices existed because the contractor provided more generic invoices when carrying out works under a qualifying long term agreement on which the Applicant had gone through a section 20 consultation process.

70. As to why the estimated and actual figures for 2014/15 were identical, Ms Clarke said that HML Shaw, who were managing at the time, did not provide a final account and therefore the Applicant's own final account had to be based on the estimate. When asked why the Applicant did not follow this up, she said that it was because there was no further information available but she agreed that there should have been.

71. Ms Clarke apologised for the failure to provide a copy of the building insurance policy.

Witness statement of Veneta Daniels

72. Ms Daniels is one of two joint leaseholders of Flat 49 and has given a witness statement.

73. Ms Daniels summarises her concerns about the Applicant's documents and accounts being inaccurate and irreconcilable. The Home-Owner Account Statement is missing numerous payments that have been made. For certain years the Respondents have received multiple versions of the Final Account. The service provided by the Applicant is considered to be below a reasonable standard as there has been an endless lack of care, negligence and waste of money. This includes ceilings collapsing due to water ingress and mould overgrowth and fallen windows.

74. Ms Daniels mentions a specific series of problems with the phone entry system in which she is highly critical of response times and the ability or willingness of the management to solve the problem. She also criticises the Applicant for being unwilling to repair or replace the flat's windows and doors to remedy the problems with damp and mould which adversely affects her child who has a severe sleep apnoea.

75. Ms Daniels was not cross-examined on her witness statement at the hearing but she made it clear that she was prepared to be cross-examined.

Witness statement of Elizabeth Miller

76. Ms Miller is the leaseholder of Flat 62 and has given a witness statement.

77. Ms Miller summarises previous disputes in relation to her service charges, including an intervention by the Housing Ombudsman and by her then MP. Like Ms Daniels, she refers to concerns about multiple final accounts and missing payments. She also mentions missing invoices, what she describes as spurious service charge budgets without consultation, and non-transparency in respect of the Applicant's obligations under the Lease

78. Ms Miller was not cross-examined on her witness statement at the hearing but she made it clear that she was prepared to be cross-examined.

Follow-up points

79. In relation to the estimated charges for 2018/19 and 2019/20, the Applicant said that they were lower than the actual charges for 2015/16 to 2017/18 inclusive. The Applicant also argued at the hearing that most of the Respondents' challenges were too generic to be sustainable.

80. The Respondents said at the hearing that there had been miscommunication in relation to the communal electricity since 2013. They also argued that as the accounts had been issued and re-issued so often there was a general problem of reliance. In addition, they argued that the Applicant's management had been poor in relation to various issues, including the lift, the satellite dish, broken doors and antisocial behaviour.

TRIBUNAL'S ANALYSIS

General observations

81. The Respondents have asked the Tribunal, both in written submissions and at the hearing, to set out a framework to which the Applicant must adhere in the future and have also asked the Tribunal to make a determination on matters such as whether the Applicant is complying with its obligations under the Lease. However, as explained at the hearing, the Tribunal's function in response to an application under section 27A of the 1985 Act is to make a determination – after considering the parties' respective submissions – as to whether the service charge items which are the subject of the application are payable. The Tribunal's jurisdiction derives from statute, and it is not open to the Tribunal to make a determination on matters which fall outside its statutory remit. There could be circumstances in which a tribunal might feel that it would be helpful to the parties to a dispute to make some general recommendations, but in our

view tribunals should generally be cautious about making recommendations in such circumstances, however tempting it may be to do so.

82. As regards what has actually been paid by the Respondents, as distinct from what is payable, if and to the extent that there is an ongoing dispute between the parties on this question which cannot be resolved between them direct then the appropriate forum for resolving it is the county court.

83. It is also not part of the Tribunal's remit in response to an application under section 27A to make a determination as to whether a landlord is in breach of its obligations under the relevant lease, save to the extent (if at all) that this is relevant to the payability of a service charge.

84. It is clear to us that the Respondents have put considerable time into preparing their case. We are also satisfied, based on the evidence before us, that the Respondents are sincere and have presented their case in good faith, and we consider some of their frustrations regarding their interactions with the Applicant to be justified. However, at the same time, we consider that their case has in many ways been quite a weak one. Whilst we cannot know for certain whether their case would have been stronger if they had received the benefit of professional advice, we have some concerns as to the approach that has been taken. No real distinction has been made between issues involving large sums and issues involving tiny sums, which has possibly resulted in the Respondents being unable to focus as much as they should have done on the key issues. Many points that have been made are in our view simply unrealistic (for example some of the arguments about inherent defects) or are too general or are not supported by proper evidence. We note what the Respondents say about the difficulty of obtaining comparable evidence on cost, but the fact remains that there has been no comparable evidence on some issues and unconvincing comparable evidence on others. In addition, the Respondents' witness evidence does not tackle key issues, such as the allegedly sub-standard nature of certain work, in an effective manner.

85. In view of the number of different items being challenged we do not consider it proportionate to make detailed observations on each individual item, and therefore our comments on most items will be relatively brief.

<u>Issue relating to missing invoices</u>

86. In relation to the missing invoices, we do not accept that as a general principle if a landlord fails to provide its tenant on request a copy of the invoice that relates to a particular item of expenditure it necessarily follows that the expenditure in question is not recoverable through the service charge. The evidence needs to be looked at as a whole, including why a copy invoice is unavailable, how long ago the expenditure was incurred, what alternative documentation can reasonably be provided and what evidence the tenant has managed to produce which provides some basis for questioning whether the charge in question is a reasonable one.

87. On the basis of the evidence that we have seen and heard, we are not persuaded – with the exception of the 2012/13 service charge year – that the Applicant has acted unreasonably in failing to provide copy invoices in respect of every item of challenge, and we consider the works orders to be a sufficient substitute on the facts of this case where copy invoices have not been available to the Applicant to pass on in the absence of a more credible challenge by the Respondents. To the extent that there is a dispute as to whether the Applicant did send and/or was obliged to send copy invoices to the Respondents, we accept the Applicant's evidence on this point on the balance of probabilities save to the extent that this point forms part of the Applicant's case in relation to the 2012/13 year.

88. In relation to the 2012/13 year, the evidence indicates that the Respondents made a request for copy invoices and that there was a substantive failing on the Applicant's part to provide the Respondents with copy invoices for this year. The Applicant argues that no request for invoices was made but we do not accept this. According to the Applicant's own figures, the actual service charges for 2012/13 for a 2-bed flat was £3,082.80, which is much higher than for 2011/12 (£2,034.06) and for 2013/14 (£2,042.71). For 2014/15 the Applicant has provided a figure of £3,215.66, but the Respondents submit that this figure does not conform to any version of accounts for this year before or during the Tribunal process. The Applicant's figure for 2015/16 is £2,834.05, for 2016/17 it is £2,740.77 and for 2017/18 it is £3,079.30.

89. We have significant concerns about the reliability of the overall figure for 2012/13 in the light of the evidence before us and we consider that it should be reduced given that it is also significantly higher than that for the immediately preceding and following years. Whilst it is difficult to state what the exact figure should be, this is not a reason to make no reduction but we are forced to take a 'broad-brush' approach. In this imperfect scenario, we consider that our best option is to aggregate the actual charges for all of the other years (i.e. 2011/12 and 2013/14 to 2017/18 inclusive), which leads to a reduced service charge for a 2-bed flat for 2012/13 of £2,657.76. This only applies to Ms Gieb-Huane's and Ms Miller (as they are the only ones to have made a challenge in respect of the 2012/13 year), and it is subject to the further reduction in respect of the management fee referred to below.

Individual items

90. In relation to the **communal electricity charges**, the Respondents are suspicious as to the reliability of the charges but we consider that the Applicant has done enough to create a presumption that the charges were reasonably incurred and the Respondents have not done enough to rebut this presumption. There has arguably been a management failing on the part of the Applicant in not having got to grips more quickly with the questions being raised by leaseholders, but no specific problem has been uncovered, we are not persuaded on the evidence available that residential leaseholders have been charged for electricity consumed by commercial units within or outside the Building, and the annual charges are not self-evidently unreasonable. The reduction in

charges in later years can plausibly be explained by the installation of new fittings which were not previously available, and in any event electricity charges fluctuate from time to time in the market for a number of reasons.

91. In relation to the challenge raised by the Respondents as to whether the agreement relating to the supply of electricity is a qualifying long term agreement in respect of which the Applicant should have consulted leaseholders but failed to do so, this did not form part of their original case and it is also a speculative point unsupported by any evidence.

92. Therefore, our determination is that the electricity charges have been reasonably incurred and are payable in full.

93. In relation to the alleged **latent defects**, in our view this has been a misconceived aspect of the Respondents' challenge. The evidence indicates that the items challenged on this basis are either minor or, in some cases, more significant maintenance items but do not constitute latent defects, i.e. (broadly speaking) inherent defects in the original design and/or construction of the Building or in any major works carried out after the original construction. Our determination is therefore that the service charge items characterised by the Respondents as relating to the remedying of latent defects are payable in full.

94. In relation to the **management fee**, we share some of the Respondents' concerns in relation to the quality of management. In particular, the Applicant should not have allowed a situation to arise in which perfectly legitimate questions had been raised about the communal electricity in 2010 and yet – despite the matter being raised again several times thereafter – the Applicant had seemingly not made much progress in getting to the bottom of the issue for several years. The constant issuing and re-issuing of the final accounts has been another management failing, as has the periodic failure to get final figures certified and the failure to obtain a final figure at all for 2014/15. There also seems to be no adequate explanation for the Applicant's failure to provide a copy of the building insurance policy. In addition, general communication with leaseholders has often been poor.

95. There is no suggestion that the amount of the annual management fee would be unreasonable if the quality of management was good, and therefore it is just a question of making a reduction to reflect the sub-standard nature of the management. Bearing in mind that certain management functions were still performed adequately each year and that a value can be ascribed to those aspects of management that worked adequately, we consider that it would be appropriate to reduce the annual management charge by 60% for each year between 2013/14 and 2017/18 inclusive. In relation to the additional years challenged by Ms Gieb-Huane and Ms Miller, namely 2011/12 and 2012/13, we consider it likewise appropriate to reduce their annual management charge by 60% for each of those years. In relation to the estimated management charges for 2018/19 and 2019/20 it is not appropriate to reduce these because they are mere estimates based on an assumption that the service will be (or will have been) provided to a reasonable standard. It will be open to the Respondents to

challenge the actual management fee for 2018/19 and 2019/20 once known, although it is not for this Tribunal to pre-judge whether the actual fee will be reasonable once known.

96. In relation to the **satellite dish**, the Applicant has made a basic case as to why this is payable and we are not persuaded by the Respondents' arguments. Even if we were persuaded that there was evidence of past neglect it would not follow that the cost of the repair in question was irrecoverable. In relation to what the Respondents have characterised as **'commercial only' charges**, we are not persuaded that there is a problem here and on the basis of the evidence provided we consider that all occupiers of the Building can use the fire escape. As regards the **entryphone charges**, it is arguable that the Respondents have shown that the Applicant's management response was poor at times, but there is no credible evidence that the work did not need doing or that repeat work was required due to past failings or that the cost was unreasonable. Therefore, all of these charges are payable in full.

97. In relation to the **building insurance**, the Applicant should have provided a copy of the insurance policy when asked, but the failure to do so is a management issue and arguably a breach of covenant. It does not follow that the insurance premiums are not payable. On the basis of the evidence before us, we are satisfied that the Building was insured in each year and that the cost of insurance was reasonable. Therefore, these charges are payable in full.

98. As regards the **gritting** issue, the charges are not self-evidently unreasonable and there is no credible reason for reducing them, as the Respondents have not brought any detailed evidence as to weather conditions or any expert evidence on quantities needed or any other relevant evidence to rebut the presumption that they are payable in full. In relation to the work to the **cold water supply**, it is true that there were three visits but the invoices indicate that they addressed three separate issues at three separate times and there is no proper basis for this challenge. In relation to the **balcony doors**, the comparative quote provided by the Respondents is too basic for us to have any confidence that it is truly comparable and it appears not to include the fitting of the doors or any ironmongery. The Applicant has provided an explanation and there is no other real evidence before us to demonstrate that the cost of the work is unreasonable. In relation to what has been characterised as a **renters cost** for 2012/13, it is speculation on the Respondents' part that the work in question cannot have related to a communal door and we have seen an invoice which states that it does, and therefore on the balance of probabilities we do not accept that the Respondents' challenge can be sustained. Therefore, all of these charges are payable in full.

99. In relation to the **lift issue**, i.e. the fire brigade call-outs, there is no suggestion that the Applicant had any control over the level of the charges themselves or that the charges are unreasonable. Instead, the point raised by the Respondents is that the fire brigade was only called out because the Applicant's own out of hours service was not working properly. Their only real evidence for this is that the fire brigade's policy is only to charge on the third call-out and from this they

deduce that the fire brigade must have been called out many times and therefore that the Applicant's out of hours service cannot have been working. However, this seems to be mere speculation on the Respondents' part, and if occupiers are calling out the fire brigade for whatever reason and there is a charge levied as a result it is reasonable in principle for this to be added to the service charge. It might be that the Applicant could make more of an effort to impress upon occupiers the need to use the fire brigade as a last resort, but to the extent (if at all) that the Applicant has failed to make this clear to occupiers this would be a management failing and relevant to the level of the management fee. Therefore, these charges are payable in full.

100. Regarding the charges for **wiring testing and inspection**, the evidence indicates that it was a statutory obligation to carry out this work, the charges seem reasonable in the light of the number of units in the Building and there is no sustainable basis for the Respondents' challenge. Regarding the **handrail**, the evidence indicates that it forms part of the common parts, we agree with the Applicant that the cost is recoverable under the terms of the Lease and the cost seems reasonable. Therefore, these charges are both payable in full.

101. As regards the **estimated service charges for 2018/19 and 2019/20**, the Respondents' sole basis of challenge appears to be that they are slightly higher than certain other years. Not only is this not by itself a sufficient basis for reducing them but it is also inaccurate as the estimated charges are lower than the actual charges for 2015/16 to 2017/18 inclusive. We have no good reason to conclude that the estimates are unreasonable, and therefore these charges are payable in full. In due course, once the actual charges are known, it will be open to the Respondents to challenge the reasonableness and payability of those actual charges, although in practice they should only do so if they have a proper basis for doing so.

<u>COST APPLICATIONS</u>

102. The Respondents have made an application under section 20C of the 1985 Act for an order that the costs incurred by the Applicant in connection with these proceedings should not be charged to leaseholders through the service charge. They have also made an application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform act 2002 ("**CLARA**") for an order extinguishing the Respondents' liability to pay any of the costs incurred by the Applicant in connection with these proceedings.

103. The Respondents have been successful on very few points, and it would be normal in the absence of any other relevant factors to refuse the Respondents' cost applications in these circumstances. However, the circumstances of this case are unusual in that – whilst the Respondents have largely been unsuccessful – we have much sympathy with their position. There have been significant management failings, including a failure to get to the bottom of the electricity cost issue in a timely manner, the constant issuing and re-issuing of final accounts, the periodic failure to get final figures certified and the failure to

obtain a final figure at all for 2014/15, the failure to provide a copy of the building insurance policy and poor general communication.

104. Whilst it is arguable that the Respondents should have sought legal assistance to present their case, obtaining legal advice can be expensive and it is not always a straightforward calculation as to when to seek legal advice. The Respondents came across sincerely both at the hearing and in written submissions, and it is clear that they have genuine and serious frustrations with the quality of management. The application for a determination was made by the Applicant (albeit that two of the Respondents then made a separate application as a follow-up to the main application), and whilst a landlord is obviously entitled to make such an application it seems to us that the Applicant has brought the application upon itself through poor management and through not dealing with the Respondents' genuine concerns in a more sensible and proportionate way.

105. Therefore, in the unusual circumstances of this case, the Tribunal:-

- makes an order under section 20C of the 1985 Act that none of the costs incurred by the Applicant in connection with these proceedings may be recovered through the service charge; and
- makes an order under paragraph 5A of Schedule 11 to CLARA extinguishing the Respondents' liability to pay any of the costs incurred by the Applicant in connection with these proceedings.

Name: Judge P Korn **Date:** 26th February 2020

RIGHTS OF APPEAL

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

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

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

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

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" 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.

(2) The relevant costs are 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.

(3) For this purpose -
    (a) "costs" includes overheads, and
    (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) 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 provisions 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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited … unless the consultation requirements have been either – (a) complied with in relation to the works or agreement or (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

Section 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section –

"qualifying works" means works on a building or any other premises, and "qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement – (a) if it is an agreement of a description prescribed by regulations, or (b) in any circumstances so prescribed.

Section 27A

(1) 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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
  - (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
  - (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.