FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/OOFN/LIS/2018/0071** **BIR/OOFN/LLC/2019/0005** **BIR/OOFN/LLD/2019/0006**
Property	**:**	**Apartments 53, 58, 60, 65, 94 and 117** **Alexandra House,** **47 Rutland Street, Leicester LE1 1SQ**
Applicant	**:**	**AH Management Company Limited (1)** **E&J Ground Rents No.3 LLP (2)**
Representative	**:**	**PM Legal Services (1)** **E&J Estates (2)**
Respondents	**:**	**Keith Barton (Apartments 94 and 117)** **Robert Ernest Price (Apartments 53, 58, 60 &65)**
Type of Application	**:**	**Service Charges**
Date of hearing	**:**	**10th, 11th and 12th September 2019** **3rd February 2020** **Centre City Tower Birmingham**
Tribunal	**:**	**Judge D Jackson** **Mr I Taylor FRICS**
Date of Decision	**:**	**24 April 2020**

DECISION

Background

1. Alexandra House is a residential development comprising 179 residential apartments each let subject to the terms of a long lease. The development was completed in 2004-2006 by Saxon Urban (Two) Limited who are part of the Roxylight Group. In 2011 Saxon sold the freehold of the Property to E&J Ground Rents No.3 LLP ("the Landlord"). The insurance function under the long leases is reserved to the Landlord. All other management and service charge functions are discharged under the Lease by AH Management Company Limited ("the Management Company"). For the period 2008 to 2019 the Management Company employed Peach Property Management Limited ("Peach") as its managing agents. Peach are also part of the Roxylight Group.

2. On 21st October 2015 a Tribunal ("the 2015 Tribunal") issued a Decision in relation to service charges for the period ended 31st December 2007 to 31st December 2012 (BIR/OOFN/LIS/2013/0043 and others). The Lead Respondent in those proceedings was Keith Barton (who is also the First Respondent in the present proceedings).

3. By application dated 26th November 2018 the Management Company made Application to the Tribunal for determination of liability to pay and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). The named Respondent was Keith Barton who is the leaseholder of Apartments 94 and 117. The application sought a determination in relation to service charge years 2013 to 2018. However, pending finalisation of the accounts for service charge year ended 31st December 2018, the Management Company has not sought a determination from this Tribunal in relation to service charge year 2018. Mr Barton does not object to that course of action.

4. The Landlord has been joined as Second Applicant in relation to reasonableness and payability of premises insurance premiums only. The leaseholder of Apartments 53, 58, 60 and 65, Robert Price, has successfully applied to be joined as Second Respondent. Both Respondents have made application for Orders under section 20 C of the 1985 Act and Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

5. The Tribunal has considered a Bundle of documents (pages 1 – 2451) which contains financial information and supporting invoices for the period 2013-2017. Page references in this Decision are, unless otherwise stated, to the page numbers in the Bundle. A copy of a specimen lease ("the Lease"), in common form, dated 4th August 2006 and made between Saxon Urban (Two) Limited (1), Keith Barton (2) and the Management Company (3) whereby the Apartment was demised for 125 years from and including 1st January 2003 at an initial rent of £150 per annum is at pages 30 – 54.

6. These matters were initially heard over 3 days, 10th – 12th September 2019, in Birmingham. The Management Company was represented by Miss Zanelli of PM Legal Services. Mr Stephen Boon of E&J Estates (on behalf of the Landlord) attended on the morning of the first day of hearing only to address the question of the reasonableness of insurance premiums. Mr Barton represented both himself and Mr Price. The Tribunal also received evidence from Mr Ray Petty, who until his retirement in 2019 was a representative of Peach, and from Mr AS Cook in his capacity as Director of the Management Company. Representatives of Inspired who are the new managing agents from August 2019 also attended.

7. At the conclusion of the first three days of hearings the Tribunal issued Directions (dated 18th September 2019) in relation to the following 5 outstanding issues:

> 1. When were service charge demands served upon the Respondents and were those demands in the appropriate from (including summary of rights and obligations)?
> 2.Have Certificates and Interim Payment Certificates been prepared and given in accordance with Part 1 of Schedule 5 to the Lease?
> 3. Apportionment (on a percentage basis) of Expenses between estate expenditure and car parking expenditure.
> 4. Tenant's Share of the Expenses. Apportionment (on a percentage basis) of Expenses (both estate and car parking) to be paid by leaseholders of Apartments 53, 58, 60, 65, 94 and 117.
> 5. Applications under Paragraph 5A, Section 20C and Rule 13.

8. Pursuant to those Directions the Tribunal has considered undated Submissions on behalf of Management Company received on 31st October 2019, undated Supplementary Submissions on behalf of the Management Company received on 1st November 2019, Landlord's Reply dated 4th December 2019 and Written Submissions on behalf of the Respondents dated 22nd November 2019. It is regrettable that the Management Company's Submissions and Supplementary Submissions have not been numbered sequentially following on from the Bundle (pages 1 – 2451). Accordingly, in this Decision references to documents exhibited to the Management Company's Submissions (31st October 2019) are to pages AS 1 – 692 and to the Management Company's Supplementary Submissions (1st November 2019) are to SS 1 – 119.

9. On or around 7th October 2019 Mr Barton requested an oral hearing in relation to the 5 outstanding issues. A further hearing took place in Birmingham on 3rd February 2020. The Management Company was represented by Miss Zanelli of PM Legal Services. Mr Barton represented both himself and Mr Price. E &J Estates on behalf of the Landlord indicated to the Tribunal that they would not be in attendance due to their client's limited involvement with the outstanding issues. At that hearing the Management Company was given leave to file further evidence. The Tribunal has considered the Witness Statement of Colin Morgan (Peach) on behalf of the

Management Company dated 18th February 2020 and Respondents' Reply dated 21st February 2020.

10. In accordance with Directions the parties have prepared a Scott Schedule which is attached to this Decision and records the Tribunal's determination in relation to the disputed items of service charge expenditure 2013 – 2017.

Inspection

11. The Tribunal inspected the Property on the morning of 9th September 2019. The development consists of five linked buildings (Alexandra, Rutland, Courtyard, Wimbledon and Southampton) surrounding a central gravelled courtyard. The main pedestrian entrance is located in the Alexandra Building. Vehicular access is via Wimbledon Street. Alexandra Building (Apartments 1-37) is four storey building on the corner of Rutland Street and Southampton Street. It was built in 1897 by one of the largest boot lace manufacturers and exporters in the world. It is listed in Pevsner and described as "the finest warehouse in Leicester and one of the finest in the country". The exterior is clad in buff terracotta. Rutland Building (Apartments 38 -75) is a five storey building linked to the Alexandra Building. There is a middle staircase between Alexandra Building and Rutland Building. Courtyard Building (Apartments 76 – 124) is a new build of eight storeys which is linked to Rutland Building. Wimbledon Building (Apartments 125 – 161) is a five storey building which sits between Courtyard and Southampton Buildings. Southampton Building (Apartments 162 -179) is a four storey building which is linked to Wimbledon Building. Southampton Building is also linked to Alexandra Building thus completing the circuit of five linked buildings which surround the central gravelled courtyard. There are 5 lifts (one for each building). Each building has a flat roof with 5M membrane. The roof has a "man safe" system.

12. The development comprises 179 Apartments. There are 81 two bedroom Apartments. The rest are one bedroom Apartments. All of the two bedroom Apartments (except one) have car parking rights in the underground car park accessed from Wimbledon Street. However, there are no allocated car parking spaces. The underground car park has a myriad of pillars making designated parking impracticable. Parking of residents' vehicles is carried out on their behalf by the on site valet parking operatives. Valet parking is staffed 24 hours each day, seven days each week, 365 days a year. There is no caretaker at the Property. Instead one of the valet parking operatives closes the valet parking office from 10:30 to 11:15 and walks around the Property taking meter readings and checking for obstructions in the communal areas. The valet parking office also monitors the fire alarm panels and acts as an unofficial help desk for residents. Communal staircases, lifts and corridors were clean and well maintained. There was some fading to certain areas of the carpeting. This is a still a new development (completed 2006) and the communal areas and exterior of the buildings were still in good condition and well maintained.

Service Charge Demands

13. The Management Company has produced copy service charge demands for the period 2013-2017 in relation to Apartment 94 (AS 4-46), Apartment 117 (AS 47-79) and Apartments 53, 58, 60 and 65 (AS 80-239). We were told by Miss Zanelli that the Management Company, out of an abundance of caution, had reserved all demands in October 2019 (Apartments 94 and 117 (SS 1-39) and Apartments 53, 58, 60 and 65 (SS 40 -119)). Miss Zanelli also told the Tribunal that all demands were for "on account payments" and that the only "balancing charge" raised was for service charge year 2013. A schedule of demands has been prepared at AS 580. Demands for 2013, 2014, 2015 and the first instalment for 2016 were served by post. Mr Barton confirmed that, although he denied receipt of some of the demands, his address in Hazlewood Road, Wilmslow was correctly stated. The second instalment for 2016 and the 2017 demands were sent by email to "kthbrtn". Mr Barton, although again disputing receipt of some demands, confirmed that was his correct email address.

14. Service Charge machinery is set out in Part 1 of Schedule 5 of the Lease (page 45). The "Accounting Period" is defined at clause 1.1 as "the period of twelve months ending on the last day of December (or another date specified by the Management Company) every year". Clause 3 of Part 1 to Schedule 5 is of particular relevance:

> "3.1 Before the start of each Accounting Period and six months into each Accounting Period (subject to paragraph 3.3) the Management Company may give to the Tenant an Interim Payment Certificate for that Accounting Period (the First and Second Interim Payment Certificates).
>
> 3.2 The Tenant is to pay the Interim Payment in advance in two equal instalments on 1 January and 1 July in that Accounting Period
>
> 3.3 If the Management Company does not give the Interim Payment Certificate to the Tenant before the start of an Accounting period it may give it to him at any time afterwards and the Tenant is to pay immediately any money which he would already have paid had the Interim Payment Certificate been given to him before the start of the Accounting Period
>
> 3.4 As soon after the end of each Accounting Period as is reasonably practicable the Management Company is to give the Tenant the Certificate for that Accounting Period which is to contain:
>
> 3.4.1 A summary of the expenditure incurred by the Management Company in respect of the Expenses: and
>
> 3.4.2 A statement of the amount of the Tenant's Share of the Expenses.

3.5 Immediately the Tenant receives the Certificate:

3.5.1 Where he has not received an Interim Payment Certificate for that Accounting Period he is to pay the Tenant's Share of Expenses specified in the Certificate

3.5.2 Where he has received an Interim Payment Certificate for that Accounting Period then either:

3.5.2.1 The Tenant is to pay the shortfall to the Management Company; or

3.5.2.2 The Management Company is to credit the excess to the Tenant's next payment of the Tenant's Share of the Expenses."

15. Accordingly, under the terms of the Lease in relation to the "on account payments" due in January and July 2013 -2017 the Tribunal has to consider whether Interim Payment Certificates have been "given" under clause 3.1 which would trigger the obligation to make payment under clause 3.2. In relation to the 2013 "balancing charge" the wording of clause 3.5 requires the Tribunal to consider whether or not the Tenant has "received" a Certificate which would trigger a requirement to pay "immediately". We will consider the precise form of Certificates required in the next section of this Decision. For the present we will examine the question of service and, in particular whether Certificates have been "given" and, where appropriate, "received".

16. Clause 8 of the Lease contains service provisions in relation to Notices (page 40):

"8.1 A Notice given under this Lease must be in writing and may be served:

8.1.1 Personally;
8.1.2 By first class post;
8.1.3 By facsimile transmission; or
8.1.4 By leaving it for the Tenant at the Apartment.

8.2 A notice is deemed to be served:

8.2.1 At the time of service if it is served personally;
8.2.2 Forty eight hours after it is posted (excluding the hours of any day which is not a Working Day) if it is served by post; or
8.2.3 At the time of transmission if it is served by facsimile transmission"

17. Mr Barton argues that service of demands by email from July 2016 onwards is not good service. Having considered the Bundle it is clear that there has been extensive and successful email traffic between Mr Barton and the Management Company. We find that he has clearly acquiesced to service by email. Mr Barton has confirmed that

the Management Company has been using his correct email address. We also find that the wording of clause 8 of the Lease is not exhaustive and does not prevent service by email. The point was considered in **G&O Investments Ltd v Khan** [2014] UKUT 96 (LC):

> "It is clear that the wording is not exhaustive of the methods of service and is not intended to prescribe the only methods of service to be utilised. On the contrary, I find that the provision is permissive in that it does not prevent other means of service of the demands. In other words, it does not displace other methods of actual service of demands for payment".

18. It is conceded by the Management Company that the name of the Landlord in some of the demands is incorrectly given as **A**&J Ground Rents No.3 Limited rather than **E**&J Ground Rents No.3 Limited. Mr Barton argues that the Respondents obligation to pay is suspended until the correct information is furnished. He relies on sections 47 and 48 of the Landlord and Tenant Act 1987. However, in **Pendra Loweth Management Limited v North** [2015] UKUT 0091 (LC) at paragraph 56 the Deputy President held in relation to section 47:

> "Alternatively, the only effect of the sanction, if it were to be applicable, would be to cause the charges not to be "due from the tenant to the landlord". Since the charges were due to the Management Company the lessee's obligation to pay them would be unaffected".

Accordingly, Mr Barton's submission on this point fails because the Respondents' obligations are to pay service charges to the Management Company under clause 2 of Part 1 of Schedule 6 to the Lease. The 2015 Tribunal reached a different conclusion no doubt because the decision in **Pendra Loweth**, having been handed down by the Upper Tribunal on 19th March 2015 was not referred to in argument at the hearing before the FTT which took place 7th – 10th April 2015, albeit that the final Decision was not issued until October of that year. The decision in **Pendra Loweth** is conclusive and we do not, therefore, have to consider the effect of reservice of demands in October 2019 by the Management Company at a time when it would appear that the freehold had been transferred by way of internal reorganisation to RMB102 limited (transfer in July 2019 registered on 7th October 2019 – Title number LT49549).

19. Mr Barton disputes receipt of demands for both instalments in 2014 and 2015 and also the second (July) 2016 instalment. The 2014 and 2015 demands would have been sent by post whereas the July 2016 instalment would have been sent by email. Those demands are all "on account" payments and under clauses 3.1 and 3.1 of Part 1 of Schedule 5 of the Lease the requirement on the Management Company is to "give" an Interim Payment Certificate to the Tenant. In relation to 2014 and 2015 Mr Barton denies receipt of any demands and further argues that as forfeiture of his Lease was being actively considered at that time, the Management Company would not have

issued any demands as to do so would be to waive the right to forfeiture. Mr Barton further invites the Tribunal to view with suspicion the copy demands served by the Management Company. There is a difference in style between the demands issued to Mr Price and those issued to Mr Barton (contrast, for example AS 7 and AS 83). That difference can only be attributable, in his submission, to the documents having been produced at different times. Mr Barton also points out with some force that the copy of Summary of Rights and Obligations (AS 8) said to have been issued with the demand dated 3rd January 2013 refers to the FTT. That cannot possibly be correct as the FTT did not replace the LVT until 1st July 2013. In relation to the July 2016 Demand Mr Barton in his oral evidence to the Tribunal said that he had searched diligently but could find no email to him in July 2016. He relies on the concession at paragraph 11 of the undated Submissions on behalf of Management Company received on 31st October 2019 that:

> "Due to the passage of time, the Applicant [Management Company] is unable to locate the covering email under which service charge demands for the period 1st July to 31st December 2016 were served on Mr Barton".

That something went wrong at that time is evidenced by an email of 7th September 2016 sent to Mr Price (AS 114). Mr Barton submits that this shows that the July 2016 demand was not served on Mr Price either and that he (Mr Price) had to take steps to request a copy.

20. The Management Company's document retention policy is such that it cannot rely on the usual deemed service provisions which have been reproduced at clause 8.2 of the Lease. Instead Miss Zanelli relies on the fact that the disputed invoices were clearly raised as evidenced by the copies contained within Submissions of 31st October (see for example Apartment 117 – January 2014 (AS55), July 2014 (AS59), January 2015 (AS65), July 2015 (AS69) and July 2016 (AS74)). Miss Zanelli also relies on the concession made by Mr Barton in his oral evidence to the Tribunal that he did not raise the issue of none receipt until after the issue of these proceedings. Miss Zanelli invites the Tribunal to view that conduct with suspicion in view of the assiduity with which Mr Barton has conducted all other aspects of his dealings with the Management Company.

21. The Tribunal has considered the Witness Statement of Colin Morgan made on behalf of the Management Company, containing a signed statement of truth, dated 18th February 2020. Mr Morgan joined Peach in early 2015. He cannot therefore give direct evidence in relation to the service of the disputed 2014 demands. However, the procedures he describes would have been adopted in previous years. It would appear that the demand is printed with Summary of Rights and Obligations on the reverse. The demands are sent out en masse with a covering "Dear Leaseholder" letter. All 179 letters are "printed at the touch of a button". Letters and accompanying demands are then sent either by first class post or by email. Mr Morgan confirms that Mr Barton's

details are recorded on the Peach system and letters to him would have been amongst those system generated letters. From 2016 Mr Barton's details were toggled to be sent by email and he would have received a "send to all" email. Mr Morgan specifically confirms that no block was put on Mr Barton's account. Mr Morgan also confirms that he attended at the April 2015 Tribunal proceedings. It appears that Mr Barton also raised "none receipt" as an issue before the 2015 Tribunal. Mr Morgan's evidence is that on 7th April 2015 he generated copies of all demands to date and that on the following day, 8th April 2015 counsel for the Management Company personally served upon Mr Barton copies of all demands up to the end of 2014. In his Reply dated 21st February 2020 Mr Barton indicates that he only recalls reissued demands for the period 2006-2012 being handed to him (see paragraph 10 of Reply). Mr Barton submits (paragraph 26): "I invite the Tribunal to conclude that the First Applicant [the Management Company] intended to seek forfeiture and it was advised by PDC Legal [its advisors at the 2015 Tribunal] not to issue any further demands at that time". We find that submission to be misconceived because the right of re-entry (forfeiture) under clause 7.2 of the Lease is reserved to the Landlord and not to the Management Company.

22. We find that the Statement of Colin Morgan is "sufficient to tip the balance of probabilities" (see **CHG Residents Company Ltd v Hyslop** [2020] UKUT 21 (LC) and that the disputed demands for 2014, 2015 and July 2016, accompanied by Summary of Rights and Obligations, have been sufficiently served on the Respondents for the purposes of clause 3 of Part 1 of Schedule 5 of the Lease.

Certificates

23. Clause 1.1 of Part 1 of Schedule 5 to the Lease gives the following definitions:

> "Certificate – The certificate specifying the Tenant's Share of the Expenses for an Accounting Period.
>
> Interim Payment Certificate – The certificate specifying the Interim Payment payable for an Accounting Period"

Clause 2.1 further provides:

> "The Certificate and the Interim Payment Certificate are to be prepared by the Management Company or (at its discretion) on its behalf by its managing agent, accountant or surveyor."

24. The Management Company relies on Budgets for years ending December 2013 – 2017 (AS 307 -311), Section 21 year end certificates 2013 – 2017 (AS 312-316) and year end service charge accounts (AS 317-365). All Budgets, with the exception of 2013, are marked as approved by the Management Company and are signed and dated. All

section 21 certificates contain a signed "Report of the Auditors to the Members". The service charge accounts for 2013 contain a "Report of the Manager" signed by a Director on behalf of the Board of the Management Company. We find that for the purposes of clause 3.5.1 of Part 1 of Schedule 5 to the Lease that the signed "Report of the Manager" for 2013 cures any defect (i.e. the unsigned Budget) in the Interim Payment Certificate for that year. Service charge accounts 2014-2017 contain Report of the Directors, signed on behalf of the Management Company. In short, the Management Company's case is that the Budget is the "Interim Payment Certificate" and the section 21 certificate is the "Certificate" required in all years in accordance with Part 1 of Schedule 5 of the Lease.

25. Mr Barton submits that the Budget is not an Interim Payment Certificate because it does not specify the "Interim Payment" namely "The Management Company's estimate of the Tenant's Share of the Expenses for an Accounting Period specified in the Interim Payment Certificate". Similarly, neither the section 21 certificate nor the service charge accounts contain "A Statement of the amount of the Tenant's Share of the Expenses" as required by clause 3.4.2. Put simply neither the Budget, the section 21 certificate nor the service charge accounts set out the amount that the amount to be paid by the individual Tenant. Mr Barton also disputes service of the budgets, service charge accounts and the section 21 certificates.

26. The Management Company at paragraphs 52 and 57 of its Submissions received 31st October 2019 indicates that Budgets were served prior to the January "on account" service charge demand. The section 21 certificates were served together with the year end service charge accounts. The evidence as to service contained in the Management Company's Submissions is augmented by the Witness Statement of Colin Morgan, who at paragraphs 25 -28 gives further evidence as to service of Budgets for 2014- 2015.

27. We find on the balance of probabilities that the Budgets, section 21 year end certificates and service charge accounts contained at pages 307 – 365 were given and received in accordance with Part 1 of Schedule 5 to the Lease. In **Skelton v DBS Homes (Kings Hill) Ltd** [2017] EWCA Civ 1159 the Court of Appeal held that a demand and estimate could be served separately. By analogy we find that the Budget, section 21 certificate and service charge accounts when read together with the January and July "on account" service charge demands satisfy the requirements of the Lease in relation to "Certificate" and "Interim Payment Certificate". We find that there is no requirement, as claimed by Mr Barton, for there to be a covering letter from the Management Company "stating that it was serving a certificate in accordance with the lease".

28. To the extent that Mr Barton is to be taken as arguing that failure to provide Certificate and Interim Payment Certificate means that nothing is payable, that submission fails. Proper compliance with the certification provisions set out in the Lease is not always a condition precedent to a leaseholder's obligation to pay service

charges. In **Warrior Quay v Joaquim** LRX/42/2006 it was held that the absence of a certificate did not have the effect of rendering nothing at all payable as service charges for the disputed years. The present Tribunal has reached "the best informed decision it can upon the material available to it". Indeed Mr Barton, who had failed to pay any service charges since 2013, belatedly made payments in October and November 2019 in the sums of £6643.86 for Apartment 94 and £2693.54 for Apartment 117. On that basis it is not open to him to argue that nothing at all is payable because of the alleged failings of the Management Company to comply with the service charge machinery set out in Part 1 of Schedule 5 of the Lease.

Apportionment – estate and car parking expenditure

29. The Lease does not make any provision for the apportionment of Expenses between estate and car parking expenditure. Neither "Services", "Expenses" or "Tenant's Share of Expenses" under the Lease make any distinction between estate and car park expenses. However, it is common ground between both parties that there should be an apportionment. In any event the Management Company has some discretion under the Lease in that clause 1.1.22 defines "Tenant's Share of the Expenses – A fair proportion of the Expenses as determined from time to time by the Management Company". The Management Company argues that valet operative wages should be apportioned 1/24 to the estate and 23/24 to car parking expenditure. The rationale is provided in a letter to leaseholders from the Management Company of 3rd July 2014 at AS686. It would appear that concerns had been raised that valet operatives whilst employed for the benefit of the 80 apartments which have the benefit of parking "have also been undertaking some sundry tasks for the benefit of the development as a whole":

> "These duties primarily involve a daily walk around of the communal areas of the development in order to ensure that the corridors and stairwells are clear of obstructions, the fire doors closed properly and the smoke vents are closed. Once a week a fire call point test is carried out which lasts for approx. 30 mins.
>
> Together with other sundry tasks of reading electrical meters, reporting maintenance items and providing access for routine and emergency purposes etc it has been assessed that a total of 7 hours of operatives time per week is a fair proportion …."

We take into account that the proposed apportionment was approved by Directors of the Management Company following a General Meeting on 29th April 2014 (AS 687 – 692). However, that approval was give before the Management Company had the benefit of considering the findings of the 2015 Tribunal.

30. On inspection we found (see paragraph 12 above):

> "Valet parking is staffed 24 hours each day, seven days each week, 365 days a year. There is no caretaker at the Property. Instead one of the valet parking operatives closes the valet parking office from 10:30 to 11:15 and walks around the Property taking meter readings and checking for obstructions in the communal areas. The valet parking office also monitors the fire alarm panels and acts as an unofficial help desk for residents."

As set out in our findings under the heading of "Management Fees" below (paragraphs 47-50) we find that Peach has no employees. As a consequence, we find that the valet operatives also act as de facto caretakers, receiving post and other deliveries and are in effect the first port of call for leaseholders.

We find the submissions of Mr Barton at paragraphs 269 – 316 of his Submissions of 22nd November 2019 to be persuasive. He identifies the myriad tasks undertaken by the valet operatives and points out with force the inconsistent and unexplained apportionments applied by the Management Company.

We prefer the apportionments determined by the 2015 Tribunal (paragraphs 100 – 103 of the 2015 Decision):

- Valet operative wages and social security – 75% car park and 25% estate
- Telephone charges – 12.5% car park and 87.5% estate
- Miscellaneous car park expenses – 50% car park and 50% estate
- Light and heat – 15% car park and 85% estate.

Tenant's Share of the Expenses

31. The parties have agreed the following percentage figures set out at AS681 -4:

- Apartment 53 – 0.449400
- Apartment 58 – 0.520690 plus 1.25 car parking
- Apartment 60 – 0.446540
- Apartment 65 – 0.541590 plus 1.25 car parking
- Apartment 94 – 0.600530 plus 1.25 car parking
- Apartment 117 – 0.493460

Insurance

32. Paragraph 6 of Schedule 7 to the Lease contains a Landlord's obligation to the Tenant: "To provide such of the services as are set out in Part 2 of Schedule 4".

Part 2 of Schedule 4 provides:

> "1. Keeping the Building insured in the joint names of the Landlord and the Management Company for the full reinstatement costs (including demolition, shoring-up and site clearance and professional fees) against the Insured Risks with such company and through such agency as the Landlord decides provided the Building is to be deemed to be insured for reinstatement cost although the policy contains an excess provision if the Landlord considers it is in the general interest of the tenants of the Dwellings.
>
> 2. If the Building is damaged by any of the Insured Risks applying the money received under the insurance policy (other than money received for loss of rent and property owner's public and third party liability) towards reinstatement provided that if such money is insufficient to meet the cost of reinstatement then the deficiency is to be treated as a further item of expense under this part of this schedule recoverable from the tenants of the Dwellings.
>
> 3. Keeping the Estate Communal Areas insured against the property owner's public and third party liability and such other risks with such company and through such agencies as the Landlord decides in such amounts as the Landlord considers necessary in the general interest of the interest of the owners of the Dwellings."

Clause 1.1.14 defines "Insured Risks – Fire, lightening, storm, flood, explosion, and any other risks which the Landlord or the Management Company may reasonably specify".

33. "Expenses" as defined at clause 1.1.13 of the Lease includes monies expended by the Landlord to provide the Services. Part 1 of Schedule 4 sets out the Services to be provided by the Management Company (pursuant to "The Management Company's obligations to the Landlord and the Tenant" set out in Schedule 8). Paragraph 10 of Part 1 of Schedule 4 provides that:

> "For the avoidance of doubt this includes payment to the Landlord of the premiums paid by the Landlord in respect of the Services set out in Part 2 of this Schedule".

In simple terms, the Landlord retains the insurance function under the Lease. Insurance premiums are recoverable by the Management Company as part of the Tenant's Share of Expenses. The Management Company in turn reimburses the Landlord. The Respondents do not dispute that arrangement.

Quite separately from the premises insurance, amounts are payable for lift insurance and for vehicle movement insurance (in relation to the valet car parking service – which accordingly has been allocated to car parking expenditure) both of which are

payable to and effected by the Management Company. Those amounts are not disputed by the Respondents.

34. The Landlord was represented by Mr Boon of E&J Estates who attended at the hearing on the morning of 10th September 2020 only. The Tribunal has considered Second Applicants Statement of Case dated 21st February 2019, the Respondents' Reply dated 20th June 2019 and the Second Applicant's Skeleton Argument dated 6th September 2019.

35. The Landlords insurance year runs from 25th March to the following 24th March. This differs from the Management Company's "Accounting Period" which is "The period of twelve months ending on the last day of December …" (paragraph 1.1 of Part 1 of Schedule 5 to the Lease). The Landlord is only able to charge to the service charge account insurance costs which it has paid or has become liable to pay on the presentation of an invoice during the Accounting Period. This is consistent with the definition of "Expenses" at clause 1.1.13 of the Lease which refers to "monies actually expended" (see **Morshead Mansions Ltd v Mactra Properties Ltd** [2103] EWHC 224 (Ch.) where it was held that the words "actually paid or incurred" mean when the obligation to pay actually arose). However, service charge accounts have been, perfectly properly prepared, on the usual accountancy basis of accruals and prepayments. As a matter of case management and to avoid further delay in sending this matter back to the Management Company for recalculation the Tribunal has treated the insurance premium attributable to the period from 25th March in a given year as being the premium payable for the whole of that Accounting Period e.g. premium 25th March 2013 to 24th March 2014 has been treated as the premium for the 2013 service charge year. We have done so because we are not, as Mr Barton would wish, charged with rewriting the service charge accounts. Instead we have to determine the amount that is reasonable and payable by him. As the 2015 Tribunal has determined the amounts payable 2007 -2012 and we are to determine amounts payable for 2013-2017 any prepayments and accruals should not make an appreciable difference to any of the parties to the present dispute.

36. The 2015 Tribunal found that commissions payable in relation to insurance premiums should be limited to 15%. On that basis Mr Boon and Mr Barton have agreed the following the following premiums (figures adjusted to reflect commission of 15%) as payable and reasonable in amount:

    Insurance 14/15 (service charge year 2014) - £43968.76
    Insurance 15/16 (service charge year 2015) - £45256.82
    Insurance 16/17 (service charge year 2016) - £56962. 58
    Insurance 17/18 (service charge year 2017) - £57746.56

    The only outstanding dispute remains in relation to premises insurance for the period 25th March 2013 to 24th March 2014 (service charge year 2013).

37. Paragraph 3.1 of the Landlord's Statement of Case dated 21st February 2019 sets out the premiums paid to insurers:

> 2013/14 - £66,011.08
> 2014/15 - £43968.76
> 2015/16 - £45256.82
> 2016/17 - £59450.39
> 2017/18 - £61274.64

The premiums for 16/17 and 17/18 were based on commission of 19.6% and 21.3% respectively (see paragraph 4.1). Those premiums have been reduced to £56962.58 and £57746.56 by agreement between Mr Boon and Mr Barton based on commission of 15%. It can readily be seen why the Respondents challenge the premium of £66,011.08 for 2013/14 (service charge year 2013 for the purposes of this Decision) as that premium appears "out of line" with subsequent years.

The Landlord, at paragraph 3.2, explains why there was a significant reduction in 2014/15 (service charge year 2014):

> "As a result of the application in 2013 culminating in the Tribunal's decision dated 21st October 2015 the Second Applicant invited insurers to review the level of the buildings insurance premium which result in the premium being significantly reduced for the period of insurance 25.03.2014 to 24.03.2015. The terrorism insurance premium was reduced from £12,120.79 for the previous period to £2,366.37 because insurers assessed the building as being in a low risk location."

This begs the question – why was the premium so egregiously high in 2013/14?

38. Concern over the level of premiums of 2013 was also shared by the Management Company. There is a note in the service charge accounts for year ended 31st December 2913 (AS 319) that "the premiums charged for the current year are still under discussion". The 2013 accounts were presented to a General Meeting of the Management Company on 29th April 2014 where it was noted (AS 690):

> "TC confirmed that after successfully arguing on behalf of the Company that the buildings were over insured by the freeholder in 2012 credits had been received. It was also confirmed that the 2013 premiums were also being queried which resulted in the interim payment having been made to the freeholder for this period. TC was also pleased to confirm that the insurance premiums had significantly dropped for 2014 resulting in a saving of approximately £26,500 from that budgeted within the service charge – this would again be credited back to members against their next service charge bill"

The evidence given by Mr Cook, Director of the Management Company, at the hearing was one of general dissatisfaction with the insurance arrangements put in place by E&J when they acquired the freehold in 2011. A particularly glaring example is the recommendation of an increase in Declared Value to £42 million with effect from a mid term adjustment in October 2012. The Management Company objected on the basis that the square footage of the site had been incorrectly calculated and as a result that figure was revised downwards to £28.4 million. The original invoice for insurance premiums was an eyewatering £97,616.70 (see invoice at page 9 of Second Applicant's Statement of Case). Following the Management Company's protest, a credit note was issued in September 2013, covering both 12/13 and 13/14 in the sum of £46,592.70 (at page 10 of Second Applicant's Statement of Case). Deducting the 13/14 credit of £31605.62 from £97616.70 gives the revised premium of £66,011.08.

39. Insurance for service charge year 2012 is dealt with at paragraphs 161-170 of the 2015 Tribunal Decision. There appears to be a typographical error at paragraph 169 – premises insurance should be *£55180.22* as appears in the table at paragraph 178 which together with lift insurance of £1176 totals £56356.64. Accordingly, the 2015 Tribunal determined premises insurance for 2012 at £55180.22. On that basis the premium of £66,011.08 for 2013 is £10,830 more than the previous year (2012) and £22,043 more than the subsequent year (2014). That discrepancy calls for an answer from the Landlord.

40. The Landlord's case is set out more fully in Second Applicant's Skeleton Argument dated 6th September 2019 [N.B. paragraph 2 is incorrect – the 2012 figure is £55, 180.22]. The Landlord argues that that the premium for 13/14 was "on all fours" with the 2015 Tribunal's determination for 2012 save that the Declared Value increased from £24.5 million to £28.4 million. The biggest increase in 2013 related to terrorism insurance from which increased from £6867.20 to £12,120.79 based on insurers' decision that the Property was in "a high risk zone". However, whilst the Landlord may be able to claim that the 2013/14 premium is "on all fours" with the 2015 Tribunal's determination for 2012 it does not explain why insurance was available £22,043 cheaper in 2014 and £20,755 cheaper in 2015.

41. In 2012 insurers assessed the Property as being in a high risk zone. However, with effect from 25th March 2014 insurers reassessed the Property as being in a low risk location (resulting in lower premiums for 2014). As can be seen from the table at paragraph 2 of the Second Applicants' Skeleton Argument the rate applied to determine buildings insurance reduced from 0.0018925 to 0.0014322 and the rate for terrorism insurance from 0.0004256 to 0.0000814. As a result, premises insurance fell by £22,0143. Mr Boon for E&J, whilst accepting that the reassessment process resulted in lower premiums, argues that "there is no evidence that a lower premium would have been available" in 2013 (paragraph 14 of his Skeleton Argument). The Tribunal disagrees. The Landlord has wholly failed to show why its chosen insurers

misdescribed the Property as being in a high risk zone. No locational evidence has been produced to suggest that description was ever correct. Rather it appears to be one of a number of errors made by brokers and insurers the most egregious of which was the increase in the Declared Value to £42 million (subsequently revised to £28.4 million – see paragraph 6 of Second Applicant's Skeleton Argument).

42. We have regard to the guidance in **Cos Services Limited v Nicholson** [2017] UKUT 0382 (LC). At paragraph 46 HHJ Bridge quotes with approval a passage from **Waaler v Hounslow LBC** [2017] EWCA Civ 45: "In my judgement, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome". Paragraph 48 of **Cos Services** makes it clear that: "it will not be necessary for the landlord to show that the insurance premium sought to be recovered from the tenant is the lowest that can be obtained in the market." However, HHJ Bridge continued at paragraph 49:

> "It is however necessary for the landlord to satisfy the Tribunal that invocation of a block policy has not resulted in a substantially higher premium that has been passed on to tenants of a particular building without any significant compensating advantages to them."

Unlike HHJ Bridge we are not faced here with "a mystery" (see paragraph 67 of **Cos**) in considering the substantial contrast between the premium for 2013 as against the premia for 2012 and 2014. The Landlord receives a significant commission from its placing and arranging of insurance and has very considerable delegated authority from its insurers (see paragraph 4 of Second Applicant's Statement of Case). The egregious premium for 2013 can be readily explained by the Landlord failing to ensure that brokers and insurers were fully aware of the correct zoning of the Property and the rate to be applied to both buildings insurance and terrorism insurance. The Landlord failed to do so (as it also failed in relation to the £42 million Declared Value) and has therefore failed to satisfy the Tribunal that the amounts sought to be charged to the leaseholders were "reasonably incurred".

43. The Respondent's in their Reply of 20th June 2019 at paragraphs 13 and 21 invite the Tribunal to use the premium from the following year in determining the amount reasonably incurred for 2013. This result in a figure of £41,000 plus £2,300 for terrorism insurance making a total of £43,300. Whilst the Tribunal broadly agrees, there can be no justification for a reduction of £668.78. The Tribunal, therefore, determines that the reasonable amount payable for premises insurance for service charge year 2013 to be the same as that agreed between the parties for the following service charge year 2014 namely £43,968.76.

Excess

44. Items described as "Excess" appear in a number of years. Mr Petty (Peach) explained that when a leaseholder made a claim on the premises insurance for damage to their Apartment loss adjusters would appoint Peach to carry out the repairs. Peach would accordingly be paid by the insurers less any excess. As there was at all times, 2013-2017, an excess on the policy Peach, rather than recover the excess from the leaseholder who had made the claim, instead raised an invoice for the amount of the excess and put it through the service charge accounts under the heading of Insurance. Miss Zanelli for the Management Company argues that insurance excesses are chargeable as Services under paragraph 10 of Part 1 to Schedule 4 of the Lease. The Tribunal disagrees. Paragraph 10 covers taxes and like outgoings in relation to the Communal Areas. It does not cover insurance excesses.

45. The repairing obligations of the Management Company relate to repair Structural and External Parts of the Building only (see paragraph 1 of Part 1 of Schedule 4). Similarly, decoration relates to the exterior of the Building (paragraph 2 of Part 1 of Schedule 4) and not the interior of an Apartment. The position is, of course, different in relation to works to the exterior of the Building (as opposed to repairs to the interior of lessee's Apartments) which are the responsibility of the Management Company.

46. However, clauses 1 and 2 of Part 2 of Schedule 4 (Landlord's obligation to the Tenant under clause 6 of Schedule 7) provide:

> "1. Keeping the Building insured in the joint names of the Landlord and the Management Company for the full reinstatement costs (including demolition, shoring-up and site clearance and professional fees) against the Insured Risks with such company and through such agency as the Landlord decides provided the Building is to be deemed to be insured for reinstatement cost although the policy contains an excess provision if the Landlord considers it is in the general interest of the tenants of the Dwellings.
>
> "2. If the Building is damaged by any of the Insured Risks applying the money received under the insurance policy (other than money received for loss of rent and property owner's public and third party liability) towards reinstatement provided that if such money is insufficient to meet the cost of reinstatement then the deficiency is to be treated as a further item of expense under this part of this schedule recoverable from the tenants of the Dwellings."

Accordingly, the Landlord is permitted under the Lease to take out a policy which contains an excess provision. To do so is entirely standard practice and results in a lower premium payable by the Tenant and is, we find, in the general interest of the Tenants. Furthermore any "deficiency" i.e. an excess, is specifically stated as being recoverable from the Tenants as an Expense.

It is also suggested by the learned authors of Tanfield Chambers: Service Charges and Management (4th Edition at 6-11) that:

> "It may be arguable that, as an excess is a usual aspect of insurance cover and as the insured self-insures for the excess, this is part of the "cost" of insurance" (see **Lord Napier and Ettrick v Hunter and v RF Kershaw Ltd** [1993] AC 713).

Accordingly, we find that the reasonable costs of Peach in relation to "Excess" are recoverable.

Management Fees

47. Peach were appointed as manging agents in 2008. Mr Cook on behalf of the Management Company told the Tribunal that the fee charged by Peach was not based on a fee per apartment and that instead a global fee was agreed "in accordance with market norms". Peach resigned as managing agents at the end of July 2019. Peach were replaced by Inspired who are RICS and ARMA regulated. Inspired's fee for 2019 is £180 plus VAT per apartment. Mr Petty told us that Peach were part of the Property Redress Scheme from 2015/16 and that he personally was an IRPM member for the past 18 months. Apart from those two matters Peach were wholly unregulated and did not belong to any trade body.

48. There was some considerable uncertainty on the part of the First Applicant as to Mr Petty's employment status. Mr Petty corrected his original evidence and told the Tribunal that Peach paid his pension and holiday pay only. In relation to remuneration he submitted an invoice for the work he had done (this invoice was generated by Peach on his behalf). In addition to Mr Petty there were 3 or 4 others who carried out repairs who were drafted in from Roxylight and were not Peach employees. Administration and accounts was carried out by Roxylight at its offices in Aylesbury.

49. Peach, it would appear therefore, has no employees. It is unregulated. The insurance function is dealt with by the Landlord. The valet operatives act as de facto caretakers, carrying out fire tests, receiving post and other deliveries and are in effect the first port of call for complaints. The development is relatively new and little by way of major works is yet to be required. Mr Barton makes no complaints about failures to look after the Property by Peach. However, he vigorously complains about the way in which service charge accounts have been kept and failures to comply with RICS Code.

50. Clearly, some work in relation to management has been done by Peach. However, we agree with Mr Barton that the standard of management by Peach has fallen below that of regulated managing agents. We find that the sum of £100 plus VAT per apartment (total £21480) is reasonable.

Fire Risk Assessment

51. In its replies to the Scott Schedule the Management Company submits that "matters of health and safety are paramount". The Tribunal entirely agrees. The Management Company further submits that Mr Petty "is more than adequately placed to conduct the FRA". We were told by Miss Zanelli that Mr Petty prepared the Fire Risk Assessment ("FRA") himself and that his qualifications are "school of life". The Tribunal was told that a specialist company prepared the FRA until 2010. In that year the Fire Brigade described the FRA as "too tick box" and "too generic". From 2011 onwards, Mr Petty decided to carry out the FRA himself. However, after the Grenfell Tower tragedy he had a "wake up call" and decided that he did not want the responsibility of preparing the FRA any longer.

52. There is an evacuation rather than a stay put policy at the Property. An FRA is carried out annually. There are fire drills twice a year. Advice is taken from the Fire Service as necessary. The valet operatives liaise with the Fire Service if there is an activation of the fire alarm. The Property contains 179 Apartments over five separate blocks. The blocks are between four and eight storeys high. Fire safety is of paramount importance and FRA's must be carried out by specialist contractors. The use of those trained in the "school of life" is wholly unacceptable. The Tribunal disagrees that Mr Petty "is more than adequately placed to conduct the FRA" and disallows this head of claim by Peach in its entirety.

Accountancy

53. Accounts have been prepared by David Simon Limited who are Chartered Certified Accountants. The Management Company is not profit making and has no liability for UK corporation tax. Mr Barton relies on an alternative quotation in the sum of £260. We find that to be wholly unrealistic for the preparation of accounts for a Property consisting of 179 Apartments.

54. In 2013 David Simon's fees (inclusive of VAT) were £2800 (page 913), in 2014 - £2760 (page 1331), in 2015 - £2000 (page 1678 – but accounts show only £1500), in 2016 - £2100 (page 1994 – but accounts only show £1800) and in 2017 - £2160 (page 2289 – but accounts only show £2000). This variation is unexplainable as plainly, it would appear, the same amount of work has been carried out in each year. We allow £2000 (inclusive of VAT) for all years.

QLTA

55. It is conceded by the Management Company that it entered into a three year QLTA with EON for the supply of energy. No consultation has been carried out. Accordingly, in some years the relevant contribution required under the terms of the Lease for each

Apartment is limited to £100. We have allowed credits against Tenant's Share of the Expenses in those years where the contribution in relation to an Apartment would otherwise exceed £100.

Reserve Fund

56. Expenses as defined at 1.1.13 includes any "Reserve in respect of the Services". Reserve is defined at 1.1.18 as "Anticipated future expenditure which the Management Company decides it would be prudent to collect on account of its obligations in this Lease". At the hearing Mr Barton confirmed that he had "no problem in principle" with the concept of a Reserve Fund.

57. The service charge accounts distinguish between "The Reserve Fund" which is for capital maintenance and "The Maintenance Levy Fund" which is for general day to day running costs. The Business Review included in the service charge accounts for the year ended 31st December 2013 (AS 319) gives further details:

> "The Reserve Fund is intended to accumulate the funds required for long term capital maintenance items such as roof repairs, carpets and building decorations. The funds are not used for day to day maintenance or running expenses. The Budget each year includes an expense item for this fund so that leaseholders can see that funds are being accumulated for these long term maintenance projects."
>
> The Maintenance Levy Fund is the cumulative surpluses arising since the formation of the company from the service charges received less the expenditure incurred during the same period."

In 2013 the reserve fund was split into Reserve Fund for capital maintenance (£34,777) and the balance on the Maintenance Levy Fund of £98,077 as at 31st December 2012. The Directors decided to transfer the net expenditure for 2013 (i.e. the shortfall of income over expenditure) of £84,551 to the Maintenance Levy Fund leaving a balance of £13,526 as at 31st December 2013. Clause 3.5. of Part 1 of Schedule 5 to the Lease makes provision for circumstances in which the amount paid "on account" (under an "Interim Payment Certificate") exceeds the amount actually payable once final service charge accounts (the "Certificate") have been prepared:

> "3.5 Immediately the Tenant receives the Certificate:
>
> 3.5.1 Where he has not received an Interim Payment Certificate for that Accounting Period he is to pay the Tenant's Share of Expenses specified in the Certificate

3.5.2 Where he has received an Interim Payment Certificate for that Accounting Period then either:

3.5.2.1 The Tenant is to pay the shortfall to the Management Company; or

3.5.2.2 The Management Company is to credit the excess to the Tenant's next payment of the Tenant's Share of the Expenses."

We find that in accumulating cumulative service charge excesses in the Maintenance Levy Fund pending the transfer of net expenditure as happened in 2013 is permitted by clause 3.5.2.2. In acting as they did in 2013 the Directors of the Management Company have properly given effect to the requirement of crediting excesses to the Tenant's next service charge payment. Put concisely had the shortfall not been paid from the "Maintenance Levy Fund" the Management Company would have had to "demand a levy from leaseholders …. which levy would have had to be paid by the leaseholders before 31st December 2013" (see AS 319). Either the Directors sanctioned payment from the Maintenance Levy Fund or demanded a further payment. The net effect as far as the Respondents are concerned is exactly the same. What the Lease does not require is for any excess to be returned to leaseholders; merely a credit given against future payments. Accordingly, the Tribunal approves the policy of the Management Company of allocating any surplus service charge contributions to the Maintenance Levy Fund to be applied against a shortfall in future years in accordance with Part 1 of Schedule 5 to the Lease.

58. In relation to the Reserve Fund Mr Cook told the Tribunal that the Management Company does not have a formal reserves policy but puts aside monies for anticipated major works – single ply roof membrane (30 year life expectancy), 5 lifts, external decoration to timber windows, listed building façade with terracotta detailing, water pump in underground car park, communal areas carpeting and communal areas decoration.
59. The development was completed in 2006 and we find that the sums transferred to reserve fund in all service charge years in dispute to be entirely reasonable in anticipation of future major expenditure.

Legal and Professional Fees

60. In 2014/15 the Management Company was involved in substantial litigation with Mr Barton and other leaseholders. The Management Company commenced proceedings in the County Court to recover arrears of service charges. Those proceedings were transferred to the Tribunal. Mr Barton and others had in the meantime applied to the Tribunal for Appointment of Manager under section 24 of the Landlord and Tenant Act 1987. Both proceedings were heard together over 7 days (3-5th December 2014 and

7th-10th April 2015). The Management Company was represented by PDC solicitors and counsel.

61. Mr Cook told the Tribunal that the Management Company had incurred costs of approximately £37,000. Mr Barton and 13 others were granted an Order under section 20C of the 1985 limiting Landlord's costs to £10,000 including VAT in relation to the service charge proceedings. The Appointment of Manager application was refused and no section 20C Order was made in respect of that application. Mr Cook told the Tribunal told the Tribunal that the Management Company had decided in early 2016, on the advice of counsel, to deal with costs as follows:

> a) £10,000 costs in relation to service charge proceedings to be divided between and charged as contractual costs to Mr Barton and the other 13 Respondents. This sum not to be charged to the service charge account but as an administration charge payable personally by the Respondents to the service charge proceedings.
> b) £13,000 costs in relation to the Appointment of Manager to be divided between Mr Barton and the other Applicants. This sum not to be charged to the service charge account but as an administration charge payable personally by the Applicants in the appointment of manager proceedings.
> c) The balance of £14,000 to be charged to the service charge account. However, Mr Cook confirmed to the Tribunal (and Miss Zanelli took specific instructions from him on this point) that these service charge costs were not to be charged to Mr Barton through his service charge payments. (The Management Company it would appear is content to recover against Mr Barton by way of contractual costs). However, in relation to Mr Price that concession does not apply as he does not have the benefit of a section 20C Order and he is, therefore liable to pay his share of the £14,000.

62. The position in relation to the service charge costs is set out slightly differently in the service charge accounts:

> 2014 (AS328) – "The Company has incurred legal fees of £15,412 to date in respect of the First-tier Tribunal case brought against the company by Mr Barton and others. The costs have been expensed against service charges received pending a determination by the Court of the allocation of these costs"
>
> 2015 (AS337) – "The Company incurred legal fees of £15,743 during the year in respect of the First Tier Tribunal case brought against the company by Mr Barton and others. The costs have been expensed against service charges received. The Court has determined that £10,000 in total of the legal expenses can be recovered from the 'Respondents' in the service charges section of the Hearing. The legal costs in respect of the manager application will be fully recovered from the applicants."

2016 (AS350) – "The company also recovered legal fees for the amount of £10,000 during the year in respect of the First Tier Tribunal case brought against the company by Mr Barton and others …"

63. The costs of the 2015 Tribunal were paid by the Management Company to its then solicitors PDC over three service charge years 2014-2016. PDC invoices totalled £12853.08 in service charge year 2014, £13756.94 in 2015 and £8172.50 in 2016. Details of those invoices are set out in the Scott Schedule. The total of those invoices is £34782.52 (inclusive of VAT) which is slightly less than Mr Cook's approximate figure of £37,000. The Tribunal also notes the discrepancy between the invoices in the Bundle (£34782) and the legal fees recorded in the accounts set out in paragraph 62 above which total £31,155.

64. Clearly there is some inconsistency in the Management Company's approach. However, we prefer the oral evidence given by Mr Cook. On the basis of his evidence £10,000 in relation to service charge proceedings and £13,000 in relation to the AOM proceedings were dealt with as contractual costs and should not appear within the service charge accounts. Mr Barton is rightly concerned that he has the benefit of a section 20C Order in relation to the balance that has been put through the service charge accounts. However, the effect of Mr Cook's evidence is that the balance is not payable by Mr Barton an any event. As far as Mr Price is concerned he does not have the benefit of either a section 20C Order from the 2015 Tribunal or the Management Company's arrangement. We find that in relation to Mr Price the balance is reasonable and payable.

65. For simplicity we have "stripped out" £10,000 in 2014 as attributable to paragraph 61a) above being the contractual costs charged as administration charges against Mr Barton and the other Respondents in the service charge proceedings. The balance of £2853.08 has been charged to the service charge account in accordance with paragraph 61c) above but, following the Management Company's decision on costs, does not form part of the service charge payments due from Mr Barton. For this reason, the amounts payable by Mr Barton and Mr Price differ.

66. In service charge year 2015 we have "stripped out" £13000 as attributable to the AOM proceedings and which has been charged as an administration charge against Mr Barton and the other applicants in accordance with paragraph 61b) above. The balance of £756.94 has been charged to the service charge account but not to Mr Barton in accordance with paragraph 61c). Again, for that reason the sums payable by Mr Barton and Mr Price differ.

67. In service charge year 2016 PDC invoices total £8172.50. As we have already given effect to paragraphs 61 a) and b) no further sums fall to be stripped out. The whole of that sum falls to the service charge but is not payable by Mr Barton under paragraph

61c). Accordingly, Mr Barton (but not Mr Price) is entitled to a credit of his share of £8172.50 which on the basis of the Management Company's decision in relation to the 2015 Tribunal costs is not payable by him. Again, the sums payable by Mr Barton and Mr Price differ.

Applications under Paragraph 5A, Section 20C and Rule 13

68. This is a dispiriting case. The 2015 Tribunal heard evidence and submissions over 7 days. On 21st October 2015 the Tribunal issued its determination in relation to service charge years 2007-2012. The written Decision was impeccably reasoned and ran to 81 pages. It was not appealed. It would appear either that neither party has read that Decision or having done so has chosen to ignore many of its findings.

69. Although we have not expressed ourselves in such trenchant terms as the 2015 Tribunal we have reached substantially the same conclusions. Much of the work undertaken by Peach was either not reasonably incurred or of a greater amount than is reasonable. The Landlord has conceded that it has continued to receive insurance commissions in excess of the 15% determined by the 2015 Tribunal.

70. The Tribunal understands why Mr Barton has challenged the Peach charges and insurance commission. However, at paragraph 122 the 2015 Tribunal observed:

> "The Tribunal simply does not have the time or the resources to conduct the forensic investigation Mr Barton requests. In any case, as the Tribunal repeatedly emphasised to Mr Barton during the Hearing, the Tribunal has no jurisdiction to conduct an account between the parties"

Further at paragraph 184 the 2015 Tribunal said:

> "The Tribunal considers that Mr Barton's approach to financial accounting has been over zealous, particularly with regard to the electricity accounts, but also in general, and that this approach lengthened the Hearing to an unnecessary extent."

71. We entirely agree. It would appear that Mr Barton too has failed to read and learn the lessons of the October 2015 Decision. As a result of his "over zealous" approach and the complete failure by the Management Company to act on the criticisms of Peach made by the 2015 Tribunal, the present Tribunal has spent 4 days considering this further application. The Management Company has incurred costs of £34,296 with anticipated future costs of £7,650 totalling £41,946 inclusive of VAT. Mr Barton in his Rule 13 Schedule claims to have spent over 650 hours on this case. Neither party appears to have considered that the costs and time spent far exceed any financial benefit to either of them. Had both parties read and acted upon the Decision of the

2015 Tribunal time spent and costs incurred would have been very significantly reduced.

72. However, the decisive factor here is that Mr Barton has not paid any service charges since 2013. On inspection we found the communal areas and the exterior of the buildings were in good condition and well maintained. Although vigorously disputing their level of charging Mr Barton makes no complaints about failures by Peach to properly maintain the Property. Under those circumstances Mr Barton's failure to pay any service charges since 2013 (other than payments belatedly made in October and November 2019 in the sums of £6643.86 for Apartment 94 and £2693.54 for Apartment 117) must weigh heavily against him. Faced with arrears going back to 2013 the Management Company had no option but to commence proceedings.

73. We express our concern at the level of costs incurred by the Management Company which are projected to reach nearly £42,000 (inclusive of VAT). Those costs are far in excess of the estimate of "likely to exceed £25,000" given at paragraph 71.6 of the Applicant's Submissions received on 31st October 2019. The costs of the present proceedings are substantially higher than the £34,782.52 (inclusive of VAT) incurred by previous solicitors and counsel for what was a 7 day (rather than 4 day) hearing with the added complication of a disputed Appointment of Manager application. Of course, as Miss Zanelli rightly reminds us, the Management Company seeks its costs under a contractual indemnity. Nevertheless, having regard to Miss Zanelli's own estimate and benchmarking against costs before the 2015 Tribunal we find that costs in relation to the present proceedings, even allowing for the additional 4th day requested by Mr Barton, should not have exceeded £25,000 inclusive of VAT.

74. We deal first of all with the application by the Respondents for an Order under section 20C of the 1985 Act. At page AS580 Miss Zanelli sets out the budgeted and balancing payments 2013-2017 which were outstanding at the date of commencement of these proceedings. The total outstanding for Apartments 94 and 117 owed by Mr Barton was £19313.24. It is accepted by the Management Company that Mr Price has not been in arrears and in any event, he applied to join rather than proceedings being commenced against him. The total amount that we have determined to be payable in relation to Apartments 94 and 117 is £14229. Based on Miss Zanelli's own estimate and benchmarking against costs incurred in 2015 we find that the Management Company's legal costs should not exceed £25,000 inclusive of VAT. The Management company has recovered approximately 75% of the sums claimed. We therefore find that it is just and equitable to make a section 20C Order limiting costs recoverable through the service charge to £18750 (being 75% of £25000). That sum is inclusive of VAT

75. The Respondents also apply for an Order under Paragraph 5A of Schedule 11 to the 2002 Act. However, there is a difficulty here very similar to that encountered in

Pendra Loweth. Paragraph 5A is concerned with litigation costs which are defined at paragraph 5A(3)(a):

> "Litigation costs" means costs incurred, or to be incurred, by the *landlord* in connection with proceedings… [Tribunal emphasis]

Section 30 of the 1985 Act defines "landlord" as including any person who has a right to enforce payment of a service charge. That assists in relation to the Section 20C application under the 1985 Act. However, that wider definition has not been adopted by the 2002 Act, save in relation to a statutory tenant (paragraph 6(3) of Schedule 11 of the 2002 Act and section 37(a) of the 1985 Act). Under those circumstances we do not have any jurisdiction to make a Paragraph 5A Order against the Management Company.

[The Respondents are not, however, precluded from applying to the Tribunal for a determination as to the reasonableness of administration charges under section 1 of Schedule 11 of the 2002 should they dispute any demand for legal costs made by the Management Company as those provisions apply to amounts payable "directly or indirectly"]

76. The Landlord in Second Applicant's Reply dated 4th December 2019 indicates that it seeks to recover costs in relation attendance at the hearing on 10th September 2019 in the sum of £1650 plus VAT. The Landlord relies on breach by the Respondents of their obligations to pay service charges to the Management Company. There is no direct covenant to pay service charges between the Landlord and the Respondents. Our findings are that notwithstanding the 2015 Tribunal's decision the Landlord has continued to receive insurance commissions in excess of 15%. In addition, the Landlord has been unsuccessful in persuading the Tribunal to find that the egregious 2013 insurance premium was reasonable. Under those circumstances it is just and equitable that litigation costs incurred or to be incurred by the Landlord be extinguished.

77. Mr Barton seeks an Order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2103. His claim is for 650.7 hours totalling £78,084 together with a further £2,880 to be incurred. These proceedings were commenced because Mr Barton has paid absolutely nothing towards service charges 2013-2017. The Management Company had no choice but to apply to the Tribunal. It has acted perfectly reasonably in doing so. Mr Barton has been to use the words of the 2015 Tribunal "over zealous". He has taken every point, good or bad. Whilst he has some very strong arguments in relation to Peach and the level of insurance premiums he has taken up an inordinate amount of time in arguments over items of expenditure which, even in successful, would have made, at most, a difference of few pounds either way. The Management Company and the Landlord have acted perfectly reasonably in their conduct of these proceedings. As Mr Barton has taken every possible point the

Applicants have had to provide a response to every point raised incurring significant costs in the process and taking up a disproportionate amount of Tribunal time. The application under Rule 13 is refused.

Decision

78. The amount of service charges payable by the Respondents to the First Applicant Management Company in respect of each of the Apartments owned by them for service charge year ended 31st December 2013 is:

    Apartment 94 (Mr Barton) - £1455
    Apartment 117 (Mr Barton) - £561
    Apartment 53 (Mr Price) - £511
    Apartment 58 (Mr Price) - £1365
    Apartment 60 (Mr Price) - £507
    Apartment 65 (Mr Price) -£1388

79. The amount of service charges payable by the Respondents to the First Applicant Management Company in respect of each of the Apartments owned by them for service charge year ended 31st December 2014 is:

    Apartment 94 (Mr Barton) - £ 1917
    Apartment 117 (Mr Barton) - £842
    Apartment 53 (Mr Price) - £780
    Apartment 58 (Mr Price) - £1796
    Apartment 60 (Mr Price) - £775
    Apartment 65 (Mr Price) -£1832

80. The amount of service charges payable by the Respondents to the First Applicant Management Company in respect of each of the Apartments owned by them for service charge year ended 31st December 2015 is:

    Apartment 94 (Mr Barton) - £1985
    Apartment 117 (Mr Barton) - £905
    Apartment 53 (Mr Price) - £828
    Apartment 58 (Mr Price) - £1854
    Apartment 60 (Mr Price) - £822
    Apartment 65 (Mr Price) -£1890

81. The amount of service charges payable by the Respondents to the First Applicant Management Company in respect of each of the Apartments owned by them for service charge year ended 31st December 2016 is:

    Apartment 94 (Mr Barton) - £2112

Apartment 117 (Mr Barton) - £1023
Apartment 53 (Mr Price) - £968
Apartment 58 (Mr Price) - £ 2001
Apartment 60 (Mr Price) - £962
Apartment 65 (Mr Price) -£2043

82. The amount of service charges payable by the Respondents to the First Applicant Management Company in respect of each of the Apartments owned by them for service charge year ended 31st December 2017 is:

Apartment 94 (Mr Barton) - £2291
Apartment 117 (Mr Barton) - £1138
Apartment 53 (Mr Price) - £1036
Apartment 58 (Mr Price) - £2111
Apartment 60 (Mr Price) - £1030
Apartment 65 (Mr Price) -£2159

83. Costs incurred, or to be incurred, by the First Applicant Management Company and the Second Applicant Landlord in connection with these proceedings before the First-tier Tribunal in aggregate and in excess of £18750 (inclusive of VAT) are not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the First and Second Respondents.

84. The liability of both the First and the Second Respondents to pay an administration charge in respect of the Second Applicant Landlord's litigation costs incurred, or to be incurred, in connection with these proceedings before the First-tier Tribunal is extinguished.

D Jackson
Judge of the First-tier Tribunal

A party may appeal this Order to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends its written reasons for the Decision to the party seeking permission.