FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BB/LSC/2020/0094 V:CVP**
Property	**:**	**Flats 1, 8, 9, 10 and 14 Onyx Mews, London E15 4HU**
Applicants	**:**	**Mr J Khan (Flat 1), Ms S Mohahmood (Flat 8), Dr S Mohamed (Flat 9), Ms Y Mohamed (Flat 10) and Mrs M Shah (Flat 14)**
Representative	**:**	**Mrs Shah as lead Applicant**
Respondent	**:**	**The Quadrangle RTM Company Limited**
Representative	**:**	**Mr G Bridges, director**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge P Korn** **Mr A Lewicki FRICS MBEng**
Date of hearing	**:**	**14th and 15th September 2020**
Date of Decision	**:**	**4th November 2020**

DECISION

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Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was **V:CVP**. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in a series of electronic bundles, the contents of which we have noted. The decision made is set out below under the heading "Decisions of the tribunal".

Decisions of the tribunal

(A) The balancing adjustments (i.e. excess of actual service charge over estimated service charge) for the years in dispute will be properly payable – subject to the effect of any other aspects of the tribunal's decisions below – once the Respondent has served a valid accountant's certificate for each relevant year.

(B) The Applicants' challenge to the validity of each of three 'section 20B' notices is dismissed.

(C) The Applicants' challenges relating to the commercial units and to the fire risk issues are dismissed.

(D) The Respondent has wrongly allocated vehicle access gate maintenance to Accessway Costs and should instead have allocated them to Parking Space Costs. This should be remedied with retrospective effect.

(E) The Respondent has wrongly allocated management fees. They should instead be allocated 80% to Block Structure / Building Costs and 20% to Block Internal. This should be remedied with retrospective effect.

(F) The Respondent has wrongly allocated the cost of fire equipment maintenance etc. All of these costs should be allocated to Block Internal, and this should be remedied with retrospective effect.

(G) The Respondent has wrongly allocated bin costs. All of these costs should be allocated to Block Structure / Building Costs, and this should be remedied with retrospective effect.

(H) The Respondent has wrongly allocated gardening costs. All of these costs should be allocated to Block Structure / Building Costs, and this should be remedied with retrospective effect.

(I) The Respondent's revised allocation of concierge costs, cleaning charges, telephone charges and electricity charges – as proposed at the hearing – is acceptable.

(J) All of the Applicants' other challenges to the Respondent's re-allocations are dismissed.

Introduction

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the payability of certain service charges.

2. The Applicants' respective flats are all within a building called Onyx Mews. Onyx Mews comprises 15 two-bed maisonettes and is part of a wider development, the largest part of which is Quadrangle House which comprises 75 residential flats. Also included within the development are 12 flats located in Topaz House and 5 commercial units including a gymnasium and a business centre.

3. The Respondent is the 'Right to Manage' company that manages Quadrangle House and Onyx Mews. It acquired the right to manage on 6th June 2012 and has engaged Rendall & Rittner as its managing agents since January 2016.

The issues

4. The service charge years which are the subject of this application are the years 2014/15 to 2020/21 inclusive. In relation to the years 2014/15 to 2017/18 the challenge is to the actual service charge costs, whereas in relation to the years 2018/19 to 2020/21 the challenge is to the budgeted or estimated costs, as service charge accounts for those latter years were not available at the time the application was made.

5. The main **issue** for determination, as set out in the tribunal's directions and as clarified with the lead Applicant (Mrs Shah) at the hearing, relates to the Respondent's re-allocation of costs which we understand to have taken place in May 2019. The Applicants' respective leases allocate expenditure to separate categories, with Part A relating to "Accessway Costs", Part B relating to "Building Costs" or "Block Structure Costs (both terms are used), Part C relating to "Block Internal Costs", Part D relating to "Gymnasium and Business Centre Costs", Part E relating to "Parking Spaces Costs" and Part F relating to "Domestic Cold Water Costs". There is also a Part G which contains a list of categories of cost which are expressed to be applicable to any or all of Parts A to F. By way of example, Mrs Shah pays 1.05% under Part A, 0.95% under Part B, nil under Part C, 1.11% under Part D, 2.04% under Part E and nil under Part F.

6. According to Mr Bridges on behalf of the Respondent, in the course of setting the 2019 budget the then new managing agents – Rendall & Rittner – noticed flaws in the allocation of costs previously being

applied. For example, the 2016 and 2017 budgets allocated all concierge costs to Part C, which meant that Onyx Mews leaseholders paid nothing towards these costs even though (in his submission) they benefited from the concierge services. The Applicants' position is that these adjustments are contrary to the provisions of their leases.

7. In addition to the main issue referred to in paragraphs 5 and 6 above, and insofar as this is not also an allocation issue, the Applicants also challenge the payability of their contribution towards (a) 'waking watch' costs in 2019, (b) costs relating to 'sounders' and (c) planned major works in 2020 to address fire deficiencies.

8. The Applicants also challenge the payability of certain service charge costs on the basis that the Respondent has failed to comply with its obligation under their leases to provide a service charge certificate and/or on the basis that certain of the service charge demands do not comply with the provisions of section 20B of the 1985 Act.

9. It is specifically recorded in the tribunal's directions and was accepted by Mrs Shah at the hearing that the Applicants are not challenging the need for the major works referred to above, and nor are they challenging the quantum (i.e. the overall amount) of the service charge costs for the Quadrangle estate

10. The Applicants have also applied for cost orders under section 20C of the 1985 Act ("**Section 20C**") and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**Paragraph 5A**"). In addition they have applied for the reimbursement by the Respondent of their application and hearing fees under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**Paragraph 13(2)**").

11. The relevant statutory provisions are set out in the Appendix to this decision. Mrs Shah's lease ("**the Lease**") is dated 23rd December 2003 and was originally made between EDF Energy PLC (1) Barratt Homes Limited (2) Peverel OM Limited (3) and Dinesh Somchand Shah and Manjula Dinesh Shah (4). In the absence of any evidence to the contrary, our working assumption is that all of the Applicants' leases are identical for all relevant purposes.

The Applicants' and Respondent's respective cases

General

12. Both parties have made voluminous written submissions on multiple issues and it is neither practical nor desirable in our view to summarise all of the material provided in any detail. The factual summary in

relation to each issue will therefore be confined to what we consider to be the salient points.

13. The tribunal notes the contents of the various witness statements. We would specifically mention in this regard the summary in the witness statement of Ms Belinda Greenberg (Senior Property Manager at Rendall & Rittner) as to how costs have been apportioned. We also note the point expressed by Mrs Helen Bridges, one of the directors of the Respondent company, that some Onyx Mews leaseholders were given significant service charge reductions in 2014/15 and 2015/16 for reasons which were never explained. Her stated belief is that the failure to repeat these unexplained reductions in future years may in part have led to the current dispute.

14. The Applicants have raised various points which are not relevant to the issues in dispute. For example, they have criticised the service charge accounts in a general way but have not articulated a clear connection between those criticisms and the specific challenges that they have made.

Cost Allocation

General point about Accessway

15. The Applicants argue that the Respondent has effectively manipulated the service charge provisions in their leases by allocating to Accessway Costs items that have nothing to do with the Accessway in order to increase the proportion of the overall service charge that Onyx Mews leaseholders are required to pay.

Entrance hall

16. The Applicants state that the Respondent has redesignated the entrance hall as forming part of the Accessway but that according to the Lease entrance halls form part of the definition of "Internal Common Parts" and therefore costs incurred in relation to them should form part of Block Internal Costs to which Onyx Mews leaseholders are not required to contribute.

17. The Respondent argues that it is unfair for Onyx Mews leaseholders to pay nothing towards the cost of maintaining the entrance hall as they use it for access and derive much benefit from it. It is also the only pedestrian entrance into their building and paragraph 3.2 of the Fifth Schedule to the Lease allows the Respondent to alter the layout of the Accessways and therefore to include this entrance hall within the Accessway Cost heading. There are also witness statements from Mrs Bridges and from Mr Jack Jervis and Mr Saagarkumar Patel, two other

directors of the Respondent company, stating that Onyx Mews residents use the entrance hall.

18. There was a long debate at the hearing, by reference to the Lease plan and other plans, as to whether the entrance hall did form part of the Accessways, as well as a debate on whether residents of Onyx Mews only used that entrance hall because their previous access route had been blocked off.

Concierge cost

19. The Applicants state that all of the concierge costs have been categorised as Accessway Costs even though it is clear that the concierge does not spend a large proportion of his time looking after the Accessway. The vast majority of his time involves internal block matters.

20. The Respondent argues that the reference in paragraph 2 of Part G to the cost of *"providing and paying such person(s) as may be necessary in connection with the on-site management and upkeep of the Maintained Property"* is wide enough to cover a concierge. The Respondent has also carried out a Time & Motion Study (copy in the hearing bundle) and argues that the Study shows the allocation to be a fair reflection as to how the concierge spends his time.

21. In their witness statements Mrs Bridges and Mr Patel state that they have seen the concierge taking in parcels for Onyx Mews residents on many occasions.

22. At the hearing Mr Bridges conceded that it would not be fair to allocate 100% of concierge costs to the Accessway, and instead he proposed 40% which he felt would be fair.

23. In cross-examination, Ms Greenberg of Rendall & Rittner said that the concierge did in fact spend much of his time on the Accessway and that this has been specifically monitored.

Cleaning

24. The Applicants felt that there was no consistency in the accounts when it came to cleaning costs. Their basic point – on the actual subject of their challenge – was that only 10% of the value of the cleaning related to the Accessways and therefore that only 10% should be charged to Accessway Costs.

25. At the hearing Mr Bridges commented that the lack of consistency was because there had been problems with cleaners. The Respondent was,

though, prepared to agree to allocate just 10% to Accessway Costs if 60% was allocated to Block Internal and 30% to Gymnasium and Business Centre.

Electricity

26. The Applicants argue that the amount of electricity used in relation to the Accessways is negligible and they propose an allocation of 3% to the Accessway Costs, 7% to the Gymnasium and Business Centre and 90% to Block Internal.

27. Mr Bridges at the hearing said that a fairer allocation would be 12% to Accessway Costs and 8% to the Gymnasium and Business Centre. There was significant use of electricity in the Accessways, including bollard lights, and there were lampposts and fluorescent lights in the car parking area.

Gardening

28. Mrs Shah submitted that gardening should not be included in Accessway Costs because gardening costs were not listed under Accessway Costs. Instead they are part of Building Costs, because paragraph 1 of Part B of the Sixth Schedule related to *"keeping the Communal Areas … neat and tidy … and tending and renewing any lawns flower beds shrubs and trees …"*.

29. In response Mr Bridges said that the gardening is included in Accessway Costs because not all buildings have access to the garden area, for example Topaz House. The Respondent concedes that the garden is not wholly part of the Accessways but considers it fairer to deal with the cost this way, as the previous solution was very unfair on Topaz House.

Repair and maintenance

30. At the hearing Mrs Shah said that certain block internal expenses have been allocated as Accessway Costs even though they do not relate to the Accessways. In making this point she referred to certain specific invoices.

31. At the hearing Mr Bridges accepted that it was possible that there had been some 'mis-postings', i.e. expenditure accidentally allocated to the wrong heading, but equally he felt that there had also been mis-postings the other way, i.e. in the Applicants' favour, and that the net effect was likely to have been zero. He also made the point that in his view Mrs Shah's submissions on this issue went outside the scope of her application which did not relate to queries about specific invoices but rather to the re-allocation of costs in a more general sense.

Telephone charges

32. Mrs Shah said that the apportionment was wrong. These costs should be allocated in the same way as the concierge costs as the concierge was the one using the telephone. Mr Bridges agreed that the telephone charges allocation should be the same as for concierge charges.

Management fees

33. Mrs Shah said that the Applicants feel that too high a percentage of these fees has been placed in Accessway Costs. The Accessways are just a courtyard and the managing agents do not spend much of their time dealing with the courtyard.

34. In response Mr Bridges said that the Respondent's management agreement with the managing agents anticipated that the managing agents would charge a certain amount for each category of unit, and so the Respondent had used a common-sense approach to make the apportionment of charges under the Lease compatible with the management agreement.

35. Mr Bridges later offered a compromise whereby 19% of these fees would be allocated to Accessway Costs and 19% to Gymnasium and Business Centre, but Mrs Shah rejected this.

Commercial units

36. Mrs Shah said that in respect of the 2019/20 year the Respondent is billing the commercial units but is not deducting the amount received from the commercial tenants from the amount payable by the residential leaseholders.

37. In response Mr Bridges said that most of the commercial units did not form part of the Quadrangle estate. How exactly to deal with the commercial units was a difficult issue which had been discussed and debated for a couple of years. Mrs Bridges described the issue of what to do in relation to the commercial units as a "minefield".

38. Mr Paul Jepps, Head of Service Charge at Fortus Midlands Limited (previously Haines Watts), who were appointed by the Respondent to audit the service charge accounts in April 2016, noted at the hearing that the 2019/20 accounts had not been finalised and that the charges for that year were only estimates. At the point of sign-off of the budget for 2019/20 the Respondent had needed to take a view as to whether any money was recoverable from the commercial units and it had concluded – reasonably in his view – that it was not.

Roof works

39. On a separate point relating to the commercial units, Mrs Shah expressed a concern that they had not contributed to the cost of work done last year on the roof. In response Mr Bridges said that the commercial units were merely adjoining. In any event, the Lease only required the landlord to deduct from the service charge amounts actually received from the commercial tenants, and no contributions had been received.

Fire equipment

40. The Applicants argue that costs relating to fire equipment should be charged as Block Internal, not Block Structure/Building Costs, as the relevant part of paragraph 2 of Part C (which relates to Block Internal Costs) reads *"inspecting maintaining renting renewing reinstating replacing and insuring the fire protection system(s) …"*.

41. In response the Respondent notes that the paragraph quoted by the Applicants relates to *"the fire protection system(s) the security system … and such other equipment relating to the Internal Common Parts …"* and contends that the clause is only for costs relating to the Internal Common Parts, whereas the fire equipment does not relate to the Internal Common Parts.

CCTV

42. The Applicants argue that maintenance of the CCTV should be treated as Block Internal Costs rather than Accessway Costs. The Respondent argues that there are various CCTV cameras in different locations and that the allocation reflects this.

Door entry

43. The Applicants argue that door entry maintenance should also be treated as Block Internal rather than Accessway, but the Respondent argues that the entry door has been used for access by the Applicants many times and therefore is part of the Accessways.

Office supplies

44. The Applicants feel that a fairer split would be for these costs to be 80% to Block Internal Costs. Mr Bridges in response said that his view was that the office supplies allocation should follow the concierge allocation but also that the Applicants were arguing about a tiny amount of money.

Bins

45. The Applicants said that these costs should form part of the Block Structure/Building Costs as paragraph 3 of Part B (relating to Block Structure/Building Costs) included *"keeping the refuse storage facilities … in good and substantial repair order and condition"*. Mr Bridges said that the charge was not merely a general charge for bin maintenance but it also included disposing of large items dumped in the bin area by residents.

Vehicle access gate maintenance

46. The Applicants argue that these gates should be treated like all other gates and included within Block Structure/Building Costs. The Respondent contends that everyone benefits from these gates and therefore that it is appropriate to allocate them as part of Accessway Costs. The Applicants are not prejudiced by this re-allocation and these gates are certainly not part of the Block Structure. In her witness statement Ms Greenberg states that according to the Lease they should be allocated to Car Park but that there is an argument that they should be allocated to Accessway Costs as residents of both Onyx Mews and Quadrangle House benefit from them.

Waking Watch costs and sounders

47. The Applicants argue that this service only benefits residents of Quadrangle House and therefore should be charged as Block Internal Costs rather than Accessway Costs. The waking watch only takes place in Quadrangle House and the sounders have only been installed in Quadrangle House.

48. In response the Respondent states that the waking watch is a service that has been provided for residents of all blocks other than Topaz House and that the sounders can easily be heard in the courtyard of Onyx Mews and has led to Onyx Mews residents being evacuated in response. In cross-examination Ms Greenberg said that regardless of the precise location of the waking watch and the sounders the system had been shown to have worked for Onyx Mews residents. Mr Jervis added in cross-examination that all of the buildings are interconnected for fire and other purposes and that he personally saw Onyx Mews residents evacuating in response to the last fire alarm.

Fire risk issues

49. The Applicants have referred us to a report called the Sandhurst Report dated 28th March 2019 which identified certain fire risk issues and recommended that certain works be carried out to address these issues. As regards the allocation of charges for these works, the Applicants

argue that 95% of the issues identified relate to Quadrangle House and therefore the charges should have been allocated to Block Internal. The Respondent counters that many of the issues relate to the structure and therefore it is not appropriate to treat them as purely internal issues.

Lease Certificate issues

50. The Applicants state that paragraph 5 of the Seventh Schedule to the Lease requires the landlord (or, to be precise, the Manager under the Lease) to prepare an account of the Maintenance Expenses each year as soon as is practicable and then to serve a copy of that account and an accountant's certificate on the tenant. Then under paragraph 6.2 the tenant/leaseholder is obliged to pay the difference between the actual service charge and the estimated service charge for the year in question (if the actual service charge is higher) within 21 days after the accountant's certificate is served on the tenant. The Applicants state that they have never received an accountant's certificate.

51. For the Respondent Mr Bridges accepted that accountant's certificates had not been issued and that the relevant balancing charges were not properly payable until after the relevant accountant's certificates had been served. However, his understanding was that the certificates could be issued at any time.

Section 20B issues

52. The Applicants query the validity of three separate section 20B notices served on them by the Respondent. The first is a notice dated 3rd February 2017 relating to the service charge year ended 30th June 2016, the second is a notice dated 20th November 2017 relating to the service charge year ended 24th December 2016 and the third is a notice dated 20th December 2020 relating to the service charge year ended 30th June 2019.

53. In relation to the first notice, the Applicants argue that it is invalid on the ground that they believe it to be one month out of date. The Respondent does not accept this, arguing that the costs to which it relates were incurred less than 18 months prior to service of the notice. In relation to the second notice, the Applicants argue that it is invalid on the ground that the year-end has been wrongly stated. The Respondent counters that this was merely a typing error in the covering letter and the year-end was correctly stated in the notice itself. In relation to the third notice, the Applicants argue that it is invalid on the grounds (a) that the letter is dated 20th December 2020, this being a date in the future and therefore clearly wrong, and (b) that it was not a notice as it did not recite the matters required to be recited. The Respondent counters in relation to ground (a) that this was obviously a typing error as the notice was received in December 2019 and the error should not invalidate the notice. In relation to ground (b) the

Respondent disagrees that the information provided was insufficient to make it a valid section 20B notice.

Closing submissions

54. Mr Bridges said that the Respondent's proposed apportionment of costs was as set out on page 586 of the hearing bundle (in Section H6) save for the following concessions:-

- Cleaning costs – 10% to Accessway, 30% to Gymnasium and Business Centre and 60% to Block Internal

- Management fees – 19% to Accessway, 19% to Gymnasium and Business Centre and 62% to Block Structure / Building Costs.

Tribunal's analysis and determination

Accounting issues

55. The Applicants have raised various accounting issues in their submission, but these do not form part of the Applicants' application and are therefore only relevant at most, if at all, as background information.

Lease Certificate issues

56. It is common ground between the parties that the Respondent has not served an accountant's certificate on the Applicants after ascertaining the amount of the Maintenance Expenses in each year. The Respondent also accepts that it should have done so and that the balancing adjustment payable at the end of each year (i.e. the amount, if any, by which the actual service charge expenditure exceeded the estimated expenditure) is not payable until it has done so.

57. The Applicants' position is, or seems to be, that it is now too late to serve an accountant's certificate in respect of previous years and therefore that the Respondent has lost the right to recover the relevant balancing adjustments.

58. In our view, a straightforward reading of the relevant wording in the Lease indicates that there is no time limit for recovery of these amounts. Paragraph 6.2 of the Seventh Schedule to the Lease states that *"within twenty one days after the service by the Manager on the Lessee of a certificate in accordance with Paragraph 5 of this Schedule for the period in question the Lessee shall pay to the Manager the balance by which the Lessee's Proportion received by the Manager from the Lessee pursuant to Sub-Paragraph 6.1 of this Schedule falls*

short of the Lessee's Proportion payable to the Manager as certified by the said certificate during the said period ...". Time is not expressed to be 'of the essence' and we do not accept that delay in sending out such a certificate by itself renders the balancing charge no longer recoverable.

59. Therefore, as proposed by the Respondent, and in the absence of any other valid legal arguments having been raised (subject to the Section 20B arguments dealt with separately below), the Respondent can recover the balancing adjustments by serving the necessary certificates on the Applicants subject to making any adjustments which are necessary as a result of other aspects of the tribunal's determination.

Section 20B issues

60. Section 20B of the 1985 Act limits the recovery of service charge costs which were incurred more than 18 months before a demand for payment was made. In such circumstances, the landlord can only recover the relevant costs if it has served on the tenant a valid section 20B(2) notice.

61. Under section 20B(2), the costs which would otherwise not be recoverable can be recovered *"if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge".*

62. The Applicants have challenged the validity of three section 20B(2) notices served on behalf of the Respondent. The first is a notice dated 3rd February 2017 relating to the service charge year ended 30th June 2016, and the Applicants argue that it is invalid on the ground that they believe it to be one month out of date. This seems to be on the basis that the service charge year in question began on 1st July 2015 and that 3rd February 2017 is 19 months after the date on which that service charge year began. However, this argument assumes that the costs themselves were actually incurred (in whole or in part) during July (and/or early August 2015) and there is no evidence before us that this was in fact the case. It is true that a budget would have been set for the purposes of estimating the service charges for the year, but setting a budget and incurring actual costs are too entirely separate things. Accordingly, this challenge fails.

63. The second notice is a notice dated 20th November 2017 relating to the service charge year ended 24th December 2016, and the Applicants argue that it is invalid on the ground that the year-end has been wrongly stated. However, as the Respondent points out, whilst the date is incorrect in the covering letter the year-end has been correctly stated in the notice itself. Looking at the notice and covering letter as a whole, it is not in our view credible to suggest that leaseholders would

genuinely have been misled into thinking that it related to a different service charge year or misled in any other sense, and therefore we do not accept that this obvious typing error renders the notice invalid.

64. The third notice is dated 20th December 2020 and relates to the service charge year ended 30th June 2019, and the Applicants argue that it is invalid on the grounds (a) that the letter is dated 20th December 2020, this being a date in the future and therefore clearly wrong, and (b) that it was not a notice as it did not recite the matters required to be recited. In relation to the first point, it would have been obvious to the Applicants that the letter had not been written in December 2020 and it is very hard to see how anyone would have been misled by what is obviously just a typing error. In relation to the second point, we simply disagree with the Applicants' analysis as it seems to us to contain the information that a leaseholder needs to know in order to understand the maximum amount that he or she will be required to pay.

65. Therefore, all of the section 20B challenges fail.

Commercial units (including roof works issue)

66. Although presented as part of the allocation issue, in fact the issue relating to the commercial units is separate. It was initially unclear how wide-ranging the Applicants' point was, but it was then established that their objection was merely the failure in the 2019/20 service charge year to ensure that the commercial tenants paid a contribution towards the overall cost of services in such a way as to reduce the amount of expenditure to which the residential leaseholders had to contribute.

67. However, the charges levied to date on the Applicants for the 2019/20 year are estimated amounts only, the actual amounts not yet having been ascertained. Therefore, the charges only being estimates they cannot reflect either actual expenditure or actual contributions towards such expenditure; they can only be a projection as to what was believed at the time to be a reasonable estimate of the amounts that would be payable by leaseholders.

68. Being estimated charges, the charges only need to be reasonable estimates based on the information available to the Respondent at the time the budget was set. We have heard evidence as to the difficulties that the Respondent has experienced in trying to work out to what extent (if at all) commercial tenants can be required to contribute, and we consider that evidence to be credible. The Applicants' evidence on this point, by contrast, is largely speculative. It may be that there will a basis for a challenge when the actual service charges for 2019/20 have been ascertained and certified, but we do not accept that the Applicants have shown that there is any proper basis for a challenge to the estimated charges for 2019/20 on the ground that it does not take into

account an appropriate deduction to reflect a contribution from the commercial tenants.

69. As regards the issue about the commercial tenants and the roof works, again the same point applies. If they have not contributed but should have done then this is at most an issue as regards the amount of the actual service charge for the year once ascertained.

70. This challenge therefore fails.

Fire risk issues

71. In our view this challenge is misconceived. The recommended works arise out of a report dated 28th March 2019 and the cost of carrying out those works, as we understand it, have not yet been charged as part of the actual service charge. This challenge is therefore premature. If we are wrong on this point, on the basis of the limited information that we have, we accept the Respondent's evidence that dealing with these issues benefits Onyx Mews as well as Quadrangle House and therefore that these costs should not be disallowed in whole or in part.

Allocation issues

72. There has been much argument about the extent to which Onyx Mews leaseholders and occupiers benefit from the various services and the extent to which it is appropriate to allocate particular charges to particular heads of charge. There have been discussions as to the exact wording of various aspects of the Sixth Schedule to the Lease and as to precisely what the term "Accessways" relates to, whether by reference to the Lease plan or other plans, or by reference to the practicalities of how the Estate is currently run or even by reference to how it used to be run.

73. In our view, a large part of the reason for the detailed discussions on the wording of the Lease itself and about the Lease plan is that both are unsatisfactory in certain respects. It is, for example, very difficult to know how to interpret the phrase in the Lease "The Accessways shown on Plan No 1" when the plan in question is so unclear as to where the Accessways actually run. Furthermore, although the different parts of the Sixth Schedule (Part A, Part B etc) all have sub-headings, these sub-headings are not all defined terms and there are also some contradictions. For example, the "Part B Proportion" is expressed in the Particulars at the beginning of the Lease to relate to Block Structure Costs (itself not defined) whilst Part B of the Sixth Schedule for some reason refers instead to "Building Costs" (also not defined).

74. In relation to the Applicants' various challenges as to which services are allocated to which category of charge and in what proportion, there

have been a large number of challenges. Some of the concerns raised by the Applicants are financially significant, but others are not. Mrs Shah was invited to consider withdrawing the more trivial challenges, but she chose not to do so.

75. In response to the Applicants' challenges, the Respondent has generally offered one of two approaches. Either it has argued that the wording of the Sixth Schedule to the Lease allows it to re-allocate the cost of the service in the way sought or it has argued that it would be fair to be allowed to do so even if it is not technically permitted under the Sixth Schedule. In addition, the Respondent has considered the points made by the Applicants and have offered certain concessions.

76. Dealing specifically with the merit or otherwise of the arguments raised by the Respondent in response to the Applicants' case on allocation, in our view some of these are weaker than others. For example, the fact that the management agreement envisages a particular principle as to how much is payable per unit does not mean that this is the position under the Lease. If there is a mismatch between the management agreement and the Lease then in principle this is the landlord's problem, not the leaseholder's problem. The leaseholders are not a party to the management agreement and their obligations are set out in their respective leases.

77. The Respondent also argues that the reference in paragraph 2 of Part G to the cost of *"providing and paying such person(s) as may be necessary in connection with the on-site management and upkeep of the Maintained Property"* is wide enough to cover a concierge. However, Part G is simply a list of "Costs applicable to any or all of the previous parts of this Schedule", and its purpose in our view is simply to identify the sorts of activity that could be chargeable under the relevant Schedule or Schedules, not to allow the landlord to allocate to (say) Accessway Costs activities that do not relate to the Accessways.

78. Also, the argument that gardening is included in Accessway Costs because not all buildings have access to the garden area is an argument as to fairness rather than as to what the Lease actually says.

79. Some of the Respondent's arguments justifying the re-allocation of certain costs to different heads of charge and/or justifying a different weighting as between different heads of charge are more persuasive, but the point is that we are not persuaded by all of them.

80. Having made the above point, a separate angle to this question is the extent to which the Respondent's re-allocation has led to a fair and reasonable outcome. We have considered the parties' respective submissions and the witness evidence, including the Respondent's concessions at the hearing, and we are satisfied on the basis of what we have seen and heard that the Respondent's re-allocation (as varied by

its concessions at the hearing) seems to be broadly reasonable. We note the contents of the Respondent's Time & Motion Study together with the evidence of its managing agents, its auditor and various of its directors, and in aggregate it presents a pattern of a group of people – many of them unpaid – doing their reasonable best to allocate costs in a fair manner in the context of leases which are confusingly drafted and arguably not fully fit for purpose to allocate costs reasonably when applied literally.

81. Whilst it is possible, for example, that the Applicants' previous access route has been blocked off and that Onyx Mews residents cannot hear fire alarms quite as well as Quadrangle House residents, overall we accept the Respondent's evidence as to the respective benefits enjoyed by Onyx Mews residents compared to residents of other blocks, including the right of access through the entrance hall, the benefits of the concierge service, the waking watch and sounders and the various other services.

82. This brings us to clause 7.14 of the Lease, which reads as follows:

"If at any time (including retrospectively) it should become necessary or equitable to do so the Manager (acting reasonably) shall recalculate on an equitable basis the percentage figure(s) comprised in the Lessee's Proportion appropriate to all the Properties comprising the Estate or Block (as the case may be) and shall then notify the lessees accordingly and in such case as from the date specified in the said notice the Lessee's Proportion so recalculated and notified to the Lessee in respect of the Demised Premises shall be substituted for that set out in the Particulars and Paragraph 1 of the Seventh Schedule and the Lessee's Proportion so recalculated in respect of the said Properties shall be notified by the Manager to the lessees thereof and shall be substituted for those set out in their leases".

83. At first sight the above clause appears to contain a suitable solution. If, as we consider to be the case, the Respondent's proposed re-allocation is broadly fair and reasonable and as the recalculation envisaged by clause 7.14 can be retrospective, the Respondent could recalculate the Lessee's Proportion retrospectively and substitute an equitable allocation. The problem, though, is that clause 7.14 only deals with a recalculation of the percentages themselves and does not allow the Respondent to move particular types of charge from one part of the Sixth Schedule to another (for example, to move a charge from Block Internal Costs to Accessway Costs).

84. We are therefore forced to reach a conclusion as to which costs (if any) have been wrongly re-allocated.

85. As regards the entrance hall, we note that the definition of "Internal Common Parts" in the Lease includes entrance halls. However, we also

note the Respondent's evidence – which we accept – that the entrance hall in question has become much more than just an entrance hall and that it is used regularly by Onyx Mews residents for access to and from their respective flats. We also note that the exact extent of the Accessways is ambiguous from the Lease, due to the poor Lease plan and/or poor definition of Accessways. Insofar as the entrance hall does not already form part of the Accessways (on the basis that it is used for access), we consider that the right for the landlord in paragraph 3.2 of the Fifth Schedule to the Lease to *"alter the layout of the Accessways"* is sufficient to enable the Respondent treat the entrance hall as part of the Accessways and therefore to treat its upkeep as part of Accessway Costs, given that the Applicants do now benefit from its use as an access way.

86. We also accept the Respondent's evidence as to the amount of concierge time attributable to each area and the Respondent's proposal at the hearing as to the appropriate percentage split. Similarly with telephone charges, cleaning costs and communal electricity. We further accept the Respondent's evidence as to the positioning of the CCTV cameras and the resulting cost allocation. In addition, we accept on balance (as with the entrance hall) that door entry maintenance can reasonably be treated as relating to access and therefore allocated to Accessway Costs.

87. In relation to the waking watch and sounders, we consider the Applicants' challenge to be misconceived. As regards the ability to benefit from a service, the exact physical location of the service is not the key issue, and we are persuaded by the Respondent's evidence that Onyx Mews residents can and do benefit from these services.

88. In relation to repair and maintenance, the Applicants' challenge has turned out not to be a challenge to the general principle of how these costs are allocated but instead it is a challenge to certain specific invoices. As this is outside the scope of the current application this is not a challenge with which this tribunal can deal.

89. In relation to office supplies, this relates to a tiny amount of expenditure and there is insufficient information before us to indicate that it has been wrongly allocated.

90. In relation to building insurance, we note that this was originally one of the issues in dispute. However, it was not raised at the hearing, possibly because the parties are now in agreement that the cost should be allocated entirely to Block Structure. As there is no dispute before us on this issue we have no jurisdiction to make a determination.

91. However, as regards the Applicants' allocation of vehicle maintenance gates costs to Accessway Costs, this is incorrect as paragraph 2 of Part E of the Sixth Schedule (Parking Spaces Costs) relates to the cost of *"inspecting maintaining renting renewing reinstating replacing and*

insuring the vehicle access gates serving the Parking Spaces …". Therefore, these costs should be allocated to Parking Space Costs, not Accessway Costs (or Block Structure / Building Costs).

92. In relation to the management fees, the evidence indicates that these have been re-allocated in order to fit in with the management agreement. As noted above, this is inconsistent with the Lease. The parties' evidence on what would be a fair alternative consistent with the Lease is very thin, and we are reluctant to impose a specific allocation in circumstances where the parties may be able to agree something between them which is based on more detailed knowledge of the facts. However, in the absence of more information we consider that our only option is to revert to what the Applicants state was the previous allocation, on the assumption that previously the Respondent was endeavouring to follow the Lease. This would mean an allocation of 80% to Block Structure/Building Costs and 20% to Block Internal.

93. In relation to the fire equipment, we note the Respondent's view that it does not seem logical to allocate the maintenance of fire equipment to Block Internal rather than to Block Structure/Building Costs. However, the Respondent has not really articulated precisely how these costs are covered in the section dealing with Block Structure/Building Costs. In our view, as the Lease is drafted, the only basis for recovery of these charges is under paragraph C of the Sixth Schedule under Block Internal Costs, and therefore these costs need to be allocated to Block Internal.

94. In relation to the bins, whilst we note the Respondent's arguments as to what would be a reasonable solution, the costs in question all seem to relate to the bin storage area, even if the costs are increased by unknown persons dumping large items in or by the bin storage area. As paragraph 3 of Part B (relating to Block Structure / Building Costs) includes *"keeping the refuse storage facilities … in good and substantial repair order and condition"* it seems to us that according to the Lease all of these costs should be allocated to Block Structure / Building Costs.

95. In relation to gardening costs, we do not accept that the Lease allows these costs to be allocated entirely to Accessway costs simply on the basis that Topaz House does not benefit from them, even if this seems fair in principle. We therefore accept the Applicants' argument that they are part of Block Structure / Building Costs by virtue of paragraph 1 of Part B to the Sixth Schedule which relates to *"keeping the Communal Areas … neat and tidy … and tending and renewing any lawns flower beds shrubs and trees …"*.

Cost applications

96. The Applicants have made Section 20C and Paragraph 5A cost applications, as well as an application for the reimbursement of the application and hearing fees.

97. The relevant parts of Section 20C read as follows:-

(1) "A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before … the First-tier Tribunal … are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant …".

99. The relevant parts of Paragraph 5A read as follows:-

"A tenant of a dwelling in England may apply to the relevant … tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs".

100. Paragraph 13(2) reads as follows:-

"The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor."

101. A Section 20C application is therefore an application for an order that the whole or part of the costs incurred by the Respondent in connection with these proceedings cannot be added to the service charge. A Paragraph 5A application is an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be charged direct to the tenants as an administration charge under the Applicants' respective leases. A Paragraph 13(2) application is an application for the tribunal to order the Respondent to reimburse the application and hearing fees paid by the Applicants.

102. In the present case, the Applicants have to some extent been successful on certain issues. However, on many issues they have been unsuccessful and in purely monetary terms they have not gained a great deal. Their approach to this dispute has in our view been disproportionate. They have produced voluminous documentation, have disputed a large number of issues and have not had any triviality threshold. Many of the challenges have been misconceived and they have used up more of the tribunal's time and more of the Respondent's time than is reasonable for a case of this nature.

103. By contrast, the Respondent's approach has in our view been relatively measured, realistic and reasonable and the Respondent has sought compromise in certain areas. It is fair to add that the Respondent has relied too much at times on what it believes to be a fair cost allocation rather than on what the Lease says, but that needs to be viewed in the context of the nature of the Respondent company. It is a 'right to manage' company whose directors are volunteers and who, on the basis of the evidence before us, have in good faith tried to come up with a fair allocation of service charge costs.

104. In the circumstances we do not consider that it would be appropriate to make a cost award against the Respondent, and accordingly the tribunal dismisses all three cost applications.

105. If either party has any further cost applications that it wishes to make it must send written submissions to the tribunal in support of that cost application **within 14 days** after the date of this decision, with a copy to the other party. Any such written submissions must clarify the legal basis on which the cost application is made and must provide full details of the costs claimed. If any further cost application is made, the party against whom the cost application is made may make written submissions in response to that cost application. Those written submissions (if any) must be sent to the tribunal **within 28 days** after the date of this decision, with a copy to the other party.

Name: Judge P Korn **Date:** 4th November 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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant

shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.