FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	:	**BIR/00CN/LIS/2020/0034** **BIR/00CN/LIS/2020/0035**
Property	:	**Apartments 101, 106, and 205, 7 Ownall Road, Shard End, Birmingham B34 7AH**
Applicants	:	**Danielle Akers (case 0034) ("First Applicant")** **Mariam Sattor Awan (case 0035) ("Second Applicant")** **Blair Weetman (case 0034) ("Third Applicant")**
Representative	:	**None**
Respondents	:	**Clarion Housing Association Ltd (1)** **LCP Securities Ltd (2)**
Representatives	:	**Weightmans solicitors (1st Respondent)**
Type of application	:	**Applications for (a) a determination of the liability to pay and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 ("the Act"), (b) an order under section 20C of the Act, and (c) an order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")**
Tribunal members	:	**Judge C Goodall** **Mr R P Cammidge FRICS** **Mrs K Bentley**
Date and place of hearing	:	**23 & 24 June, 4 & 5 October, and 23 November 2022 at Centre City Tower, Birmingham**
Date of decision		**06 March 2023**

DECISION

Background

1. In the region of 12 -13 years ago, there was a substantial redevelopment of land owned by Birmingham City Council around the junction between Ownall Road and Shard End Crescent in Birmingham to provide housing, retail, and community facilities.

2. One facility provided during this redevelopment was residential accommodation in two 3/4 story buildings with retail shops at ground level and residential apartments above. The two blocks form the northern and southern sides of a square, with public car parking in the middle and a library facility on the eastern side. The road on the western side is Shard End Crescent. The two buildings and the car park are defined in this decision as "the Development".

3. The southern block has the postal address of 7 Ownall Road. The residential accommodation comprises 12 apartments over two floors. In this decision, this block is known as Block A. The northern block has 14 residential apartments and it is known as Block C. There is a car park at the rear of Block A with parking for Block A residents only. There is a service yard at the rear of Block C which on inspection appeared to be used exclusively by the commercial units.

4. The residential accommodation in Blocks A and C is leased to Clarion Housing Association Ltd, the First Respondent ("Clarion"). In turn, Clarion has leased three apartments in Block A to the Applicants on long term residential leases on a shared ownership basis with the lessee paying a partial premium and a market rent for the non-purchased share. Under these leases, the Applicants must pay a service charge. It is not known what the status is of the remaining nine apartments in Block A, save that the Tribunal understands they are all let by Clarion to residential occupiers and at least some might also be let on long leases.

5. Over some years, the First and Second Applicants developed some disquiet over the amount of the service charge they have been asked to pay. Accordingly, they commenced this application for a determination of the payability of their service charges, in October 2020. The application asks the Tribunal to consider payability of service charges in six service charge years, being 2015/16, 2016/17, 2017/18, 2018/19, 2019/20, and 2020/21. The applications also include requests for costs protection orders under the provisions set out in the title page above.

6. The application was originally listed for inspection on 5 July 2021, and for the hearing to take place on 9 July 2021. The Tribunal did inspect the development on 5 July 2021 but postponed the planned hearing following the inspection for production of further documents.

7. The Third Applicant requested permission to be joined as an Applicant on 27 July 2021, which was granted on 29 July 2021.

8. The hearing commenced on 18 October 2021, but it quickly became clear that important documents had not been provided, and that hearing effectively became a case management conference, resulting in the issue of Directions Order 6 on 19 October 2021. Further case management conferences have been held, on respectively 14 January and 9 May 2022, and in the course of the case 13 sets of directions have been issued.

9. Following the CMC on 14 January 2022, the Applicants applied for an order adding the Second Respondent as a Respondent in the proceedings, which was granted on 1 February 2022.

10. The case eventually came on for hearing over two days on 23 & 24 June 2022, but it was part heard. Two and a half further hearing days were held on 4 & 5 October and 23 November 2022. The last hearing was adjourned for provision of written closing submissions. These were received on 13 December 2022.

11. At the hearing, the Applicants attended and presented their own case. The First Respondent was represented by Ms Sian Evans, who is a solicitor from Weightmans, Solicitors. The Second Respondent did not appear and was not represented.

12. This Decision makes a determination of the service charges payable for the service charge years in dispute, a determination of the applications for costs protection orders, and gives reasons for our determinations.

Law

13. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

14. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

    a. The person by whom it is or would be payable
    b. The person to whom it is or would be payable
    c. The amount, which is or would be payable
    d. The date at or by which it is or would be payable; and
    e. The manner in which it is or would be payable

15. Section 19(1) of the Act provides that:

    "Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

    (a) Only to the extent that they are reasonably incurred, and

(b) Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

16. Section 19(2) of the Act provides that:

"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."

17. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100 / Schilling v Canary Riverside - Unreported 2005 LRX/26/2005 Lands Tribunal / Daejan Investments Ltd v Benson [2011] EWCA Civ 38*).

18. Section 20B of the Act provides:

"20B Limitation of service charges: time limit on making demands.

(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."

19. Time stops for the purposes of section 20B(1) when the costs incurred are demanded from the tenant in the form of a contractually valid demand for their payment. The demand has to be based on actual expenses, rather than estimates. For the purposes of section 20B(2), the notification of costs has to be based on costs that have actually been incurred, not on costs to be incurred in the future, i.e. not based on estimated costs (*Brent London Borough Council v Shulem B Association Ltd [2011] EWHC 1663*

(Ch) / Service Charges and Management 4th edition – Tanfield Chambers, at paragraph 32-09 – 32.12).

20. In respect of demands for payments on account, in *Gilje v Charlegrove Securities Ltd [2003] EWHC 1284 (Ch)* the High Court held that that s.20B did not apply where (1) payments on account were made in respect of service charges; (2) the lessor's actual expenditure did not exceed the payments on account, and (3) no request by the lessor for any further payment by the tenant needed to be or was in fact made. The High Court did not say that payments on account would be subject to section 20B if the lessor's expenditure did exceed the payments on account. The precise effect of *Gilje* is explained in the subsequent Upper Tribunal decision of *Holding & Management (Solitaire) Ltd v Sherwin [2010] UKUT 412 (LC)*.

21. In that case, the Tribunal analysed the demands for payments on account (as long as they were in accordance with the contractual right to demand payments on account) as being demands under section 18 of the Act, which could not be demands for payments of service charges incurred more than 18 months before the demands were made, as by definition, the costs had not been incurred. Thus the President of the Upper Tribunal at the time was able to say:

> "Thus section 20B(1) does not apply so as to limit the tenant's liability in respect of the advance payments. That is what was held to be the case in Gilje, to which I will refer shortly."

The Leases

22. The lease arrangements are complex.

23. The freeholder is Birmingham City Council. In June 2012 it granted a development lease to BDW Trading Ltd, pursuant to a development agreement signed in 2010, until 31 May 2162 of land that included the Development.

24. An underlease of the Development land alone was then granted to Stoford Retail Ltd for a term expiring on 18 September 2160. We describe this lease as Lease 1.

25. Stoford Retail Ltd then granted a sub-underlease of the residential units and the residential common areas in Blocks A and C only to BDW Trading Ltd for a term expiring on 15 September 2160. This is Lease 2.

26. BDW Trading Ltd then granted a number of sub-sub-underleases, each being a lease of a single residential apartment in one of Blocks A and C to Affinity Sutton Homes Ltd. These leases are each in similar form and they expire on 12 September 2160. They are called Lease 3.

27. Affinity Sutton Homes Ltd then granted sub-sub-sub-underleases to the purchasers of individual apartments in Blocks A and C. As Affinity was a housing association, new leases were granted, rather than the individual lease 3's being assigned to the purchasers, so that shared equity and stair-

casing provisions could be built into the leases. These leases all expire around 25 years before the expiry of leases 1, 2, and 3. They are called Lease 4.

28. Stoford Retail Ltd's interest in Lease 1 has now been assigned to the Second Respondent, LCP Securities Ltd, ("LCP").

29. BDW Trading Ltd's interest in Lease 2 has been assigned to Affinity Sutton Homes Ltd. Affinity thus became both the landlord and the tenant of Lease 3. Those interests did not merge.

30. Affinity Sutton Homes Ltd has now merged with Clarion.

31. Thus Clarion is now the lessee of the residential apartments and residential common parts in Blocks A and C under Lease 2. Its landlord is LCP. It is both the landlord and the tenant of Lease 3 and it is the landlord of Lease 4.

Lease 1

32. There are no service charge provisions in Lease 1. LCP, as tenant, has covenanted with its landlord to keep Blocks A and C and the car parking area in good and substantial repair and condition, to clean, decorate, and generally to manage the Development.

33. The demise to the Lessee of Lease 1 is "the Premises", as defined. The definition is "the Site together with every Building or Dwelling from time to time on the Site".

34. The Site is defined as "ALL THAT piece or parcel of land at Shard End Crescent and Ownall Road Shard End … shown coloured pink … on the Plan". The Plan clearly shows that Blocks A and C are included in the area coloured pink, as is the car parking area between them.

Lease 2

35. The property interest demised in Lease 2 is "the Property". That is defined as meaning "the Residential Units and the Residential Common Parts" shown edged red on the plan in the lease. The Residential Units are "the flatted residential dwelling units on the first floor and floors above the first floor within the Building …". The Residential Common Parts are "all those parts of the Estate allocated as areas ancillary to or for the common use of the Tenant or two or more Owners or occupiers of the Residential Units … which are not also allocated as areas ancillary to the Commercial Units…".

36. The Building is "the building or buildings (of which the Property forms part) within the Estate …". The Estate is the land defined as the Site in Lease 1.

37. In Lease 2, Clarion must pay a service charge to LCP to cover 56.26% of the Total Expenditure, which is "the reasonable and proper total expenditure reasonably and properly incurred … in any Accounting Period

in providing the Services". The Services are set out in the Fourth Schedule and include keeping the Building in good repair and condition; i.e. essentially doing what LCP covenanted with its landlord in Lease 1 to do. This includes maintenance and repair of the commercial units, hence (the Tribunal assumes) Clarion's contribution is only a proportion of the costs of providing the Services.

38. There is a contractual mechanism for determination of and payment of the service charge under Lease 2 in the Third Schedule of that lease. It provides that an interim charge is payable in two instalments on 25 March and 29 September (the Accounting Period as defined in clause 1 of Lease 2) in each year for such sum as LCP shall specify to be a fair interim payment for the Accounting Period 25 March to the following 24 March. LCP may reasonably specify an alternative Accounting Period if they wish.

39. Paragraph 2 of the Third Schedule then provides:

> "2. As soon as is practicable after the expiration of each Accounting Period the Landlord or it's accountants shall prepare a Service Charge Account ("the Certificate") in respect of each such Accounting Period which shall be served upon the tenant containing the following information:-
>
> 2.1 the amount of the Total Expenditure for that Accounting Period
>
> 2.2 the amount of the Interim Charge paid by the Tenant in respect of that Accounting Period together (in each case) with the surplus (if any) carried forward from the previous Accounting Period
>
> 2.3 the amount of the Service Charge in respect of that Accounting Period and the excess or deficiency (as the case may be) of the Service Charge over the Interim Charge
>
> 2.4 details of the accountant appropriately employed by the Landlord or managing agents who has audited the Service Charge Account in order to confirm that the Certificate is correct"

40. Paragraph 5 of the Third Schedule provides:

> "Subject to any statutory provisions from time to time in force the said Certificate (save in respect of manifest error) shall be conclusive and binding on the parties hereto but the Tenant shall be entitled at his own expense within one month after the service of such Certificate to request one free copy of the accounts and to inspect at the offices notified by the Landlord to the Tenant the receipts and vouchers relating to the Total Expenditure"

Lease 3

41. The individual Lease 3 leases each contain service charge provisions. Clause 1 contains definitions as follows:

"Definitions

1.6 – the Building - the building or buildings of which the Apartment hereby demised forms part

1.7 – the Certificate – means the certificate of the Lessor or its managing agents or accountant certifying the amount of the Service Charge

1.8 – the Development – means the property specified in Part III of the First Schedule. In that schedule, Part III defines the Development as "ALL THAT … land and buildings …. situate on east and west sides of Ownall Road Shard End …".

1.18 – the Interim Maintenance Charge – such sum in respect of each Maintenance Year as the Lessor its managing agents or accountants may from time to time and at any time specify at its or their reasonable and proper discretion to be a fair and reasonable sum in the circumstances

1.20 – Lessee's Covenants – means the covenants on the part of the Lessee set out in the Fourth Schedule hereto

1.23 – the Maintenance Year – a period commencing on the 25 March in each year and ending on 24 March in the following year or such other annual period as the Lessor may in its discretion from time to time determine as being that in respect of which the accounts of the Lessor relating to the Development are made up

1.28 – the Premises – the property hereby demised as described in Part I of the First Schedule…

1.34 – the Reserved Property – that part of the Development not included in the Apartments being the property more particularly described in Part II of the First schedule hereto

1.36 - Service Charge – a fair and reasonable proportion attributable to the Premises (as reasonably and properly determined by the Lessor or its managing agents having regard to the number and size of the Apartments or other residential units in the Development from time to time and the services provided to each Apartment) of the total Service Costs …

1.37 - Service Costs – the proper and reasonable costs and expenses which are properly and reasonably incurred and lawfully recoverable described in the Sixth Schedule thereto …

1.39 - The Services – the services to be provided by the Lessor hereunder and described in the Fifth Schedule

42. Lease 3 demises "the Premises" to Affinity Sutton Homes Limited

43. The First Schedule Part II includes a definition of the Service Charge Payment Dates, which are 25 March and 29 September in each year.

44. The Fourth Schedule Part II contains covenants by the Lessee, including the following:

> "2.1 To pay the Service Charge … as certified in the Certificate issued as soon as conveniently possible after the expiry of each Maintenance Year
>
> 2.3 To pay … the Interim Management Charge in advance on account of the Lessee's liability for payment of the Service Charge
>
> 2.4 Upon the Certificate being issued as aforesaid to pay … any shortfall between the Interim Management Charge and the Service Charge so certified and the Lessee shall be credited with any excess payment that he may have made"

45. The Fifth Schedule contains the Lessor's covenants. There is a comprehensive list of covenants relating to repair maintenance and management of the Reserved Property. The list includes:

> "15 – to cause to be prepared annual audited or certified accounts of the expenditure incurred in performing and observing the Lessor's Covenants."

46. The Sixth Schedule sets out what the Lessor's Expenses are for the purpose of identifying what costs are included within Service Costs. In broad terms, all the costs incurred in complying with the Lessor's Covenants are included within costs of discharging the Lessor's Covenants.

Lease 4

47. Lease 4 service charge provisions split charges into Management Charges and Service Charges. The key provisions are:

> "Clause 2 – …the Landlord lets the Premises … to the Leaseholder, the Leaseholder…paying… a Management Charge being the Landlord's reasonable administration fee in respect of this Lease and the payments made under this Lease ("the Management Charge") …to be paid by equal monthly payments in advance on the first day of each month or as otherwise specified by the Landlord…
>
> Clause 3 – The Leaseholder covenants with the Landlord ..to … pay … the Management Charge
>
> Clause 5.7 – the Landlord shall pay all costs and charges for which it is liable pursuant to their Leasehold Title (including but not limited to the Superior Lease)
>
> Clause 7 – Service Charge – The Leaseholder covenants with the Landlord to pay the Service Charge during the term by equal payments

in advance at the same time and in the same manner in which the Specified Rent is payable under this Lease

Schedule 9 – Service Charge means all sums payable under the terms of the Landlord's Leasehold Title to the Premises (including but not limited to the Superior Lease)."

The Tribunal's interpretation of the Leases

48. Although more complex than is normally seen, the Leases, in our view, work as follows:

    a. Under Lease 1, LCP (as tenant) manage and maintain the structure of Blocks A and C, and the private roads and various other facilities on the Site (as defined in their lease);

    b. Under Lease 2, LCP make a charge to Clarion of a proportion of the costs they incur (around 56%) in carrying out those responsibilities;

    c. LCP can levy an interim, on account, service charge to Clarion for the anticipated costs they budget to incur in an Accounting Period, by invoicing twice yearly on 25 March and 29 September in each year (with the right to change those dates if they have reasonably specified an alternative Accounting Period);

    d. At the end of each Accounting Period, LCP must provide a certificate showing the actual expenditure incurred. To the extent that the certificate does not provide an adequate account of that expenditure, Clarion have the right to inspect the receipts and vouchers that justify that expenditure;

    e. Under Lease 3, management of the internal parts of the residential flats (including for instance, internal cleaning, decorating of internal surfaces, security arrangements for access, post boxes, and lighting) is Clarion's responsibility, in their capacity as landlord. They may charge (technically to themselves) a service charge for this service, which must be a fair and reasonable proportion of the expenditure;

    f. Lease 3 is unclear on the question of whether costs incurred at Block A should be exclusively borne by the Block A Lessees (and similarly for Block C) or whether all Lessees contribute to all the Clarion costs;

    g. The answer is driven by the definition of Service Costs. Those are the costs referred to in the Sixth Schedule. Unfortunately, that Schedule describes costs that relate to the Development, the Reserved Property, and the Building;

    h. Our interpretation of Lease 3 is that the Building can only refer to a single block. The definition of Building (which awkwardly expressly states that it refers to a building or buildings – so could be both blocks) includes a requirement that the Apartment demised must form part of the Building. An Apartment can only be part of one

building; an Apartment in Block A cannot be a part of Block C. So reference to Building must mean only one of Block A or Block C;

i. Conversely, the definition of Development clearly includes both blocks. Development expressly refers to the buildings on both the east and west side of Ownall Road, Shard End, Birmingham;

j. The definition of Reserved Property in Part II of the First Schedule refers to both the Development and the Building;

k. Strict compliance with Lease 3 in respect of Services provided by Clarion (not the LCP services) would require each item of expenditure to be allocated to one or other clauses of the Sixth Schedule, and then apportioned according to whether that clause related to services provided to the Building, the Development, or the Reserved Property (in the last case, Part II of the First Schedule then being consulted as to which element the cost related);

l. During the course of the hearing, Clarion moved to a position of accepting that its costs relating to Block C should not be charged to the Block A lessees, and vice versa. They accepted that shared costs for both Blocks would be apportioned. No party has contended for what we regard as the rather more nuanced interpretation of Lease 3 that we have reached. We are content to work on the basis eventually conceded and adopted by Clarion, and contended for by the Applicants, expecting that the legal principles of estoppel, consent, or waiver would provide support for this approach unless or until it is further challenged;

m. We do not reach a conclusion on how LCP should apportion expenditure on the structure and exterior of the Blocks between the Blocks. Clarion would have to pay its proportion of any valid demand for payment of that expenditure under Lease 2. We think Schedule 9 of Lease 4 would then bring that charge into the service charge payable by the Applicants, and it is arguable that if, say, the roof of Block C required replacing, the Applicants may be required to pay a contribution. Fortunately, this issue does not arise in this case and we express no view;

n. Once Clarion has identified the expenditure which it incurs itself by way of service charge under Lease 3, being the expenditure incurred in their chosen Maintenance Year (set as 25 March to the following 24 March unless a different period is determined), it must then certify the actual cost it has incurred. Under Lease 4, it may then make a demand to the Applicants for the sum which it itself is liable for;

o. In each year, Clarion may also make interim demands to itself on account of the service charge for that year (the Interim Maintenance Charge), which must be a fair and reasonable sum in the circumstances. Under Lease 4, it can then demand those sums from the Applicants. However, under Lease 3 the interim demands are

only on account demands, and their ultimate payability is dependent upon compliance by Clarion with the requirement to issue a certificate of the expenditure under Part II of the Fourth Schedule;

p. In practice, if different service charge years are adopted under Lease 3 and Lease 4 (as they provide), it will be difficult to be completely accurate when passing on service charges incurred by Clarion as lessee of Lease 3 to the leaseholders of the Lease 4 leases. Clarion could decide to vary the service charge year in Lease 3 so as to match Lease 4;

q. Our view of Lease 4 is that the Applicants (as tenants of dwellings) have the benefit of all the provisions, statutory and contractual, that Clarion as lessee of Lease 3 has which may control or affect the actions which Clarion as lessor of Lease 3 may take. This means that the Tribunal has to look to see whether the procedures set out in Leases 2 and 3 were complied with before it can conclude that Service Charges were payable under Lease 4;

r. If they were, Clarion is then entitled to demand payment of the sum it is to pay as lessee of Lease 3 from the Applicants plus the Management Charge it is entitled to add to that sum under clause 3 of Lease 4.

Evidence

49. The Tribunal heard oral evidence from:

a. The three Applicants

b. Ms Nicola Fagan – as Associate Director of KWB Property Management, Clarion's managing agent for Development

c. Mr Jonathan Tedstone – Group Financial Director of KWB

d. Mr Haroon Bashir – Head of Rents for Clarion, and

e. Ms Victoria Bateman – a rent and service charge officer for Clarion.

50. In addition, the Tribunal had been provided with seven bundles of documents comprising (inter alia), service charge demands, accounts prepared by KWB and by Clarion, invoices to support the expenditure incurred on service charge items, and leases. Various spreadsheets had been prepared which purported to explain the calculations of the end of year actual figures.

51. The bundles contained two separate sets of service charge accounts:

a. KWB produced annual accounts ("the KWB Accounts") using the accounting period 1 Jan to 31 December in each year for 2015 - 2019. The accounts were prepared by an external chartered accountant. They do not identify which property the accounts relate to, but the

Tribunal assumes it is the Development. They are addressed to Affinity Sutton Homes Ltd, Clarion's predecessor up to the end of 2017, and to Clarion thereafter. We do not have KWB produced accounts for any period after 31 December 2019.

b. In December 2021, Clarion provided some restated accounts based on actual invoices for the years in dispute ("the Restated Accounts") using 1 April to 31 March as the accounting year (as required in Lease 4). To the best of the Tribunal's knowledge, this was the first time those accounts had been seen by the Applicants or had been used for the purpose of explaining or justifying the service charges levied for the years in dispute.

52. The evidence focussed on three distinct issues, which will be considered below:

a. calculation and reasonableness of the charge payable by Clarion to LCP under Lease 2, described as the "Estate Charge" in a number of documents ("Issue 1");

b. calculation of the service charge demanded by Clarion as Lessor under Lease 3 and the adequacy of the demand for payment of this charge ("Issue 2");

c. service charges payable for each of the years in dispute (Issue 3").

53. Prior to starting to consider these issues, we start by identifying the service charges actually demanded by Clarion from the Applicants.

54. Table 1 below set out these demands. Clarion demanded payments in advance for each service charge year, which were to be paid in equal monthly instalments. In Table 1, we show only the annualised total of these payments. It then demanded an end of year actual service charge based upon a certificate of the actual expenditure in each service charge year. Those amounts are shown in Table 1 below also.

Table 1 – service charges demanded from the Applicants by Clarion

Ms Awan	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
Interim demand	1,022.40	1,969.56	2,042.40	1,979.04	2,679.96	2,500.92
End of year demand based on actuals	2,046.59	1,938.96	2,355.84	2,624.98	2,116.63	
(Shortfall) / Surplus	(1,024.19)	31.00	(313.44)	(645.94)	563.33	

Ms Akers	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
Interim demand	1,002.72	1,963.56	1,876.80	1,818.60	2,462.76	2,298.12
End of year demand based on actuals	1,887.27	1,781.76	2,183.97	2,412.15	1,954.06	
	(884.55)	181.80	(307.17)	(593.55)	508.70	

Ms Weetman	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
Interim demand	1,009.20	1,965.48	1,932.00	1,872.00	2,535.12	2,365.68
End of year demand based on actuals	1,940.36	1,834.16	2,170.87	2,483.09	2,002.27	
	(931.16)	131.32	(238.87)	(611.09)	532.85	

Issue 1 – the Estate Charges demanded by LCP

The evidence

55. The amounts demanded included within the certified actual expenditure a sum payable by Clarion to LCP under Lease 2. However, payment was not made direct; the sums were invoiced to and paid by KWB, its agent.

56. Table 2 below gives details of the invoices received by KWB from LCP for each service charge year. By way of reminder, the service charge year in Lease 2 is 25 March to the following 24 March. The invoices in Table 2 appear to relate to that service charge year. The page number references (for the benefit of the parties) are taken from Mr Tedstone's supplementary document provided for the October hearing, on which he answered questions in the November hearing.

Table 2

Row No.		Date of invoice	Page number	Description	Amount (£)	Total for year
1	**2015/16**	01/03/15	9	First half year 15/16	7,570.00	

2		01/09/15	10	Second half year 15/16	7,570.00	
3		19/04/18	19	Balancing charge for calendar year 2015	3,859.33	**18,999.33**
4	**2016/17**	12/03/18[1]	16	First half year 16/17	9,170.37	
5		12/03/18[2]	17	Second half year 16/17	9,170.37	
6		19/04/18	19	Balancing charge for calendar year 2016	2,552.69	
7		19/04/18	19	On account for last quarter of 16/17	18,672.57	
8		19/04/18	20	Credit for final quarter of 16/17	-4,522.37	**35,043.63**
9	**2017/18**	12/03/18	18	First half year 17/18	18,672.57	
10		12/03/18	15	Second half year 17/18	18,672.57	
11		19/04/18	20	Credit for last quarter of 17/18	-9,336.29	
12		undated	26	Credit following renegotiation	-25,679.57	**2,329.28**
13	**2018/19**	05/03/19	24	On account for last quarter of 18/19	1,584.54	
14		06/03/19	25	On account for first quarter 18/19	1,584.54	
15		10/06/19	27	Balancing charge for calendar year 2018	1,605.76	

[1] This sum was originally invoiced on 18 April 2016 (page 11) but with VAT. The invoice in this table is a corrected invoice without VAT.

[2] This sum was originally invoiced on 14 September 2016 (page 12) but with VAT. The invoice in this table is a corrected invoice without VAT.

16		30/06/19	30	Second invoice for balancing charge for calendar year 2018	2,250.17	**7,025.01**
17	**2019/20**	11/06/19	29	On account for second quarter 19/20	1,584.54	
18		01/09/19	32	On account third quarter 19/20	1,584.54	
19		27/01/20	33	On account for fourth quarter 19/20	1,563.54	
20		01/03/20	34	On account for first quarter 19/20	1,563.53	**6,296.15**
21	**2020/21**	01/06/20	35	On account for second quarter 20/21	1,563.53	
22		01/09/20	36	On account for third quarter 20/21	1,563.53	
23		18/12/20	37	On account for fourth quarter 20/21	1,563.53	**4,687.59**

57. There are a number of oddities about these invoices.

    a. Invoice 7 seems to cover a period that had already been invoiced in invoice 5;

    b. 2017/18 looks very odd. Why are the on account charges so high in comparison with other years?

    c. We were told the row 12 credit was a result of a renegotiation by KWB, but it is also possible that the on account charges are inflated as they are so high in comparison with other years.;

    d. 2018/19 has two balancing charges, but the second and third quarters are not invoiced.

    e. There would appear to be a missing invoice for the first quarter of 20/21.

58. As identified above, LCP are a party to this case, but took no part in it. They did provide some documents and copy invoices as follows:

a. A service charge reconciliation document for the 2016 calendar year listing costs of £37,231.65 in that year, with 56.12% (£20,893.43) being payable by Affinity Homes;

b. A bundle of 14 invoices all dated within 2016, totalling £16,454.55;

c. A service charge reconciliation document for the 2017 calendar year listing costs of £12,795.73 in that year, with 55.82% (£7,143.00) being payable by Affinity;

d. A bundle of 28 invoices all dated within 2017 totalling £19,323.75;

e. An email dated 22 March 2022 from an Associate Director at LCP asserting that in 2018 only one invoice was paid for the Development, being a payment to KWB as a recharge of electricity costs in the sum of £2,790.16;

f. An assertion that in the calendar years 2019 and 2020 there was no expenditure by LCP on the Development. Only management fees were claimed. The amount of these fees was not specified, unless they were the fees invoiced in rows 21, 22, and 23 above. Copy fee invoices were not supplied.

59. In the KWB Accounts, the Estate Charges, apportioned between Blocks A and C, were stated as appears in Table 3 below:

Table 3

Calendar year (1 Jan to 31 Dec)	Block A	Block C	Total
2015	8,655	10,160	18,815
2016	9,230	10,835	20,065
2017	8,219	17,809	26,028
2018	1,774	2,082	3,856
2019	2,916	3,423	6,338

60. It appears something has gone wrong with the 2017 figures as the apportionment between the Blocks is out of step with the other years.

61. In the Restated Accounts, the LCP charge is described as the Estate Charge. The amount included in the Restated Accounts for the Estate Charge is as shown in Table 4 below:

Table 4

Year	Estate Charge for Block A alone (£)	Total Estate Charge for Blocks A & C (£)
2015/16	10,610.00	22,991.00
2016/17	8,753.00	18,976.00
2017/18	5,384.00	11,666.00
2018/19	7,262.00	15,735.00
2019/20	4,692.00	10,173.00
2020/21	2,877.00	6,254.00

Discussion of Issue 1

62. It is entirely apparent that the evidence concerning the amount Clarion were to pay to LCP under Lease 2 is confusing:

    a. There is no consistency of accounting year.

    b. There appear to be late, duplicated, and missing invoices from LCP.

    c. The LCP evidence is entirely inconsistent with the invoices received by KWB;

    d. The KWB Accounts and the Restated Accounts are irreconcilable. The expenditure from 2017 onwards in the two sets of accounts, is so markedly different between them, that one of them must be wrong.

63. Probably even more seriously, Lease 2 requires that LCP provide a certificate of expenditure at the end of each accounting period. Our interpretation of Lease 2 was that the Third Schedule required this. It would determine the amount of the service charge payable for the Accounting Period. The service charge amount would not be finalised without it.

64. Neither Mr Tedstone nor Mr Bashir said they knew of any certificates or accounts from LCP relating to LCP's charges. None were provided in the bundle. Neither could identify what work had been carried out for the invoices which they had sanctioned, nor did either make any enquiry of LCP to establish whether the costs were reasonably incurred.

65. We remind ourselves that the Applicants need to show a prima facie case to question a service charge, and the Respondents then need to establish, on the balance of probabilities, that the charge is reasonably incurred.

66. The Second Respondent chose not to participate in the hearing, and the First Respondent chose not to seek their assistance in establishing the

reasonableness of the Estate Charges. The Tribunal was in the unenviable position of being unable to make sense of the figures, and nobody sought to explain to us exactly what LCP had done for its charges. Indeed, the First Respondent's evidence was that it made no enquiries into what services LCP had actually supplied. It simply paid the invoices when rendered, though at one point it thought the invoices were too high so it renegotiated them. It failed to take advantage of the Lease 2 provisions which required LCP to provide a Service Charge Account, and it took no interest in examining the invoices to support any service charges demanded.

67. The Tribunal has made an attempt to analyse the invoices provided by LCP, as it is apparent that some money has been spent on the Development. Our analysis raises more questions than it answers. For example, the evidence referred to in paragraph 58d above includes 12 invoices, each for £880.00 (total £10,560.00) for cleaning the front and back areas of the premises (which we assume is Blocks A and C). There is one similar invoice in 2016, but none in any of the other years. The Tribunal would question whether a service which was only provided for one of the six years we are considering and was felt to be dispensable in all other years was reasonably incurred at all. In addition, there is evidence that KWB engaged contractors to keep at least the rear of Block A clean and clear, so at least part of the work could well have been duplicated.

68. Unfortunately we were not provided with any evidence to support the reasonableness of any expenditure incurred by LCP. All the evidence that we did have suggested little attempt to monitor or control the expenditure on the part of KWB and/or Clarion. On Issue 1, we therefore determine that Clarion have failed to prove on the balance of probabilities that any of the Estate Charges were reasonably incurred.

69. We determine that the Estate Charges for all the years in dispute are not payable.

Issue 2 – the service charge demands and their calculation

70. By way of reminder, the context is that, under Lease 3, Clarion, as lessee, must pay their fair and reasonable proportion of the Service Costs incurred (i.e. actually spent) in each Maintenance Year as certified by themselves, as lessor. Under Lease 4, the Applicants then have to pay such sum as the lessee of Lease 3 has to pay by way of service charge plus a Management Charge.

71. In reality, no demands were made by Clarion to Clarion under Lease 3 (at least which have been seen by the Tribunal). The only service charge demands made are by Clarion as lessor of Lease 4 from the Applicants as lessees of Lease 4 leases.

72. The starting point of an enquiry into the reasonableness of service charges under the Act is to identify what service charges have in fact been demanded, and how they have been calculated.

73. The documents that provided the figures for the end of year demand based on actuals, as set out in Table 1, were headed:

"Certificate of Actual Service Charge Expenditure for [the relevant period]".

They were signed by Peter Dovon, Service Charge Manager (for 2015/16), and then for subsequent years by Haroon Bashir, Head of Rents and Service Charges, for Clarion. They were sent at the end of each accounting year to the Applicants. The demands contain a column headed:

"[year] Actual Property Cost".

There are normally three elements to the total at the bottom of this column, being any additions Clarion wished to include (presumably that had been missed from the accounting figures), the actual amount of the Managing Agents Services (i.e. the (alleged) KWB actual costs), and Clarion's management fee.

74. Every demand identified the accounting period as 1 April to the following 31 March.

75. By way of example, Ms Awan's certificate for 2016/17 demanding £1,938.96, was made up of a charge of £27.36 for day to day repairs, £1,658.69 for Managing Agent Services, and £252.91 for a Clarion Management Fee.

76. It is necessary therefore to identify and analyse the information provided to Clarion by KWB to ascertain how the Managing Agent Service figure is arrived at. There are two possible sources; the invoices to Clarion from KWB ("the KWB Invoices") and the KWB Accounts.

77. KWB are responsible for expenditure on service charge items at the Development on Clarion's behalf as they are the managing agent. However, they also collect service charge monies by invoicing Clarion, rather than invoicing the owners of the residential leasehold units at the Development. Clarion then handle the collection of service charges from their lessees (including the Applicants). In conventional terms, it is fair to think of the invoices from KWB to Clarion for payment of monies as service charge demands, even though strictly the demands are for payment of money by Clarion to Clarion.

78. The KWB Invoices have been provided to the Tribunal in the bundle. As a pattern, they are quarterly invoices for equal amounts, and the description on each invoice was "Service Charge in advance".

79. The KWB Accounts have also been provided. They show the expenditure split between Blocks A and C. Generally, the expenditure appears to have been apportioned between the blocks in the ratio of approximately 46/54% between Blocks A and C. This is not universally the case however. For example, in 2016, all expenditure on repairs and maintenance, totalling some £2,432.00 has been allocated to Block A. In 2018, cleaning

and M&E Maintenance have not been apportioned in the ratio identified, nor has the electricity cost in 2019. The Tribunal does not therefore find the sums allocated between the blocks to be an entirely reliable apportionment. The Tribunal also does not know who paid the service charge income that enabled KWB to calculate the surplus or deficit. Indeed, the calculation of the surplus/deficit should not be undertaken by deducting the expenditure from the global income for the development; the calculation should be of each individual service charge payers payments less their own individual service charge bill.

80. The KWB Accounts use the calendar year (1 Jan to 31 Dec) as the accounting year, contrary to the terms of Lease 3. Table 5 records the figures for each 1 Jan to 31 Dec year from the KWB Accounts.

Table 5

Accounting year	Block A expenditure (£)	Total expenditure	Surplus / (deficit) (all blocks) (£)
1/1/15 – 31/12/15	17,682.00	43,227.00	(5,611.00)
1/1/16 – 31/12/16	21,555.00	44,001.00	(2,597.00)
1/1/17 – 31/12/17	20,988.00	52,816.00	(15,204.00)
1/1/18 – 31/12/18	12,394.00	27,762.00	25,279.00
1/1/19 – 31/12/19	18,870.00	41,898.00	(4,001.00)

81. Apportionment to individual apartments in either Block A or C is then necessary. Clarion is responsible for this aspect of the service charge calculation. The Tribunal was told that the methodology used was to apportion on a floor area basis for each apartment. For years from 2013 – 2017 (whether this was the calendar year or a different accounting year was not clear), all costs for both blocks were added together and the Applicants were charged the percentage shown in Table 6 below. For later years, the costs for each Block were separately identified, and then the percentage charged to the Applicants was the percentage figure shown.

Table 6

Applicant	2015 to 2017	2018 onwards
Ms Awan	4.41%	9.45%
Ms Akers	4.05%	8.68%
Ms Weetman	4.17%	8.94%

82. If the Table 5 expenditure was charged to the Applicants in these proportions, (ignoring the service charge year issue for the moment), the service charges charged to the Applicants would have been as shown in Table 7 below.

Table 7

	Ms Awan	Ms Akers	Ms Weetman
2015	1,906.31	1,750.69	1,802.56
2016	1,940.44	1,782.04	1,834.84
2017	2329.18	2139.05	2,202.43
2018	1,171,23	1,075.80	1.108.02
2019	1,783.21	1,637.91	1,875.68

83. It is obvious that the Table 7 figures are not, and indeed they could not have been, the basis of the Actual Service Charge expenditure certified in the service charge demands set out in Table 1.

84. The KWB accounts are therefore not the source of the Actual Service Charge figures certified by Clarion in their demands for service charges from the Applicants identified in Table 1 above. What is the source of those figures? The answer to that question requires that we return to the KWB invoices.

85. In her witness statement, Ms Bateman had provided her suggested methodology for calculating those demands. She suggested that it would be appropriate, in order to deal with the accounting year discrepancy, to take, as an example, three quarters of the KWB budget for 2015 (representing 1 April to 31 December) and add one quarter of the budget for 2016 (representing 1 Jan to 31 March), add them together, add some additional costs that Clarion imposed, such as their management fee and insurance, and the resultant figure would be the actual cost incurred in that year.

86. This methodology (which was proposed in the Hearing Bundle produced for the abandoned hearing in June 2021) was obviously flawed. The reason the methodology is flawed is because the service charge accounts are meant to reflect <u>actual</u> rather than budgeted expenditure, so the use of budgets could never be satisfactory. It would also never be possible to use a proportion of a year's figures (whether a budget or actuals) for calculations covering a different year, for spending was vanishingly unlikely to be evenly spread throughout the year.

87. For that, and other reasons, the Tribunal had directed that a fuller explanation of the calculations of the certified Actual Service Charge Expenditure be provided, in Directions Order No 4.

88. A further bundle of documents was therefore provided by Clarion in October 2021. This contained schedules which we understand had also been prepared by Ms Bateman, (though we cannot be certain about that), that provide re-calculations of the service charges for each year. These are on pages 327 to 337 in Bundle C.

89. The methodology used in these schedules for calculating the individual service charges is to identify all KWB Invoices received in the accounting year and in the region of three months either side of it, and to apportion those invoices to the accounting year. By way of example, for 2016/17, KWB had rendered an invoice for service charges in advance on 18 February 2015 covering the period 25 March to 23 June 2015 (91 days) for £9,403.00. As this invoice included the period 25 March to 31 March 2015 (7 days), which was outside the accounting year 2015/16, only £8,679.69 had been included in the calculation, i.e. 84/91ths of the total. A similar exercise had been performed for the final invoice in the accounting year. The resultant figure had been used as the actual service charge expenditure for the year.

90. That methodology was also applied to service charge years 2015/16, 2016/17, and 2017/18. In 2018/19, four more KWB invoices appear in Ms Batemans analyses, these being described as "Balancing Service Charges". Each invoice is for a 1 Jan to 31 December year, and they cover the 2014, 2015, 2016, and 2017 years, but they are all included in the 2018/19 year. The Tribunal has not seen, or at the least has not had its attention drawn to, any accounts to support the balancing charges.

91. Ms Batemans service charge year 2019/20 analysis also includes a balancing charge for the calendar year 1 Jan to 31 December 2019 of £1,437.49. Again, the Tribunal is not aware of any accounts that explain that figure.

92. Applying that methodology, Ms Bateman justified the certified Actual Service Charge figures in the following way, using Ms Awan's 2016/17 charge as an example in Table 8 below:

Table 8

A. Invoices (quarterly demands of £9,403.00 each) from KWB for service charges in advance (i.e. on account) in their calendar year, apportioned to Clarions accounting year	£37,612.00
B. Percentage payable by Ms Awan	4.41%

Resultant Managing Agent Services for 2016/17 (A*B)	£1,658.69
Add an additional fee for day to day repairs	£27.36
Add Clarion Management Fee	£252.91
Actual Service Charge for 2016/17	£1,938.96

93. Keen readers will recall that this is the figure inserted into Ms Awan's certificate of her Actual Property Cost for 2016/17 referred to in Table 1 (see paragraph 54 above).

94. We find that this methodology is fundamentally flawed. It is not possible to identify actual expenditure from on account invoices for monies in advance of the expenditure. Copies of the actual invoices for the expenses of running the Development were not supplied to the Tribunal until December 2021 in response to Directions Order No 6, and it seems highly likely that Clarion were not in possession of them at the time they prepared the end of year service charge demands set out in Table 1. It is also not possible to identify accurately actual expenditure in one accounting period by analysing accounts produced for a different accounting period. We find that the end of year demands were not based upon actual expenditure.

95. We find that the certificates used to justify the end of year demands based on actuals set out in Table 1 (see paragraph 72 above) were simply not true. They were based on entirely flawed conceptions of how to calculate actual expenditure in any accounting period. We are at a loss to understand how they could have been signed off by Clarion's Head of Rents.

96. The demands for service charges were not valid demands under Lease 3, which requires that the Applicants pay a reasonable proportion of the costs incurred on the service charge expenditure. They therefore have to be based on that actual expenditure, and they were not. As they were not valid demands under Lease 3, they therefore could not be valid demands under Lease 4 either.

97. The only way service charges can actually be calculated in this case is by examining the actual expenditure. Invoices for actual expenditure were eventually provided by the First Respondent, and we now turn to consider whether the expenditure in the years in dispute was reasonably incurred.

Issue 3 – what service charges are payable by the Applicants

98. By the time of the hearing, and because Clarion's case was that the service charge demands were based on actual expenditure (although we found above that they were not), the case management directions issued had

resulted in the production of the 2021 Restated Accounts, covering the period certified by Clarion as being the service charge years, and the invoices in support of those accounts. The Applicants case was that the Restated Accounts were not accurate, as not all copy invoices were provided. The Tribunal, though, is satisfied that they have been prepared properly. There were some gaps in the supporting invoices, but the Tribunal has been assisted by the production of detailed schedules to the Restated Accounts in Bundle D which provide an analysis of the sources of the figures given, and the provision of additional clarification from page 100 and following in Bundle G.

99. The existence of the Restated Accounts enabled the Tribunal to conduct the hearing through its well established pattern of reviewing the actual expenditure with the benefit of evidence from Ms Nicola Fagan, the managing agent's employee actually managing the Development, and the identification of the Applicant's challenges to that expenditure as set out on a Scott Schedule.

100. Because of the Tribunals decision on Issue 1, none of the Estate Charges (i.e. the LCP charges under Lease 2) can be included in any service charge for the years under consideration.

101. Each service charge year in dispute will be considered below.

102. We firstly make some general observations about how we have tackled the task of determining what sums were reasonably incurred by the First Respondent.

103. Firstly, there is no doubt that as between Clarion and the Applicants, the appropriate service charge year is 1 April to 31 March. This is the period set in Lease 4 (with no provision for it to be changed), and it is also the period given by Clarion in their demands for service charges set out in Table 1, and it is the period used in the Restated Accounts. This leaves a slight dilemma in that Leases 2 & 3 use different service charge years. We have not seen any accounts from LCP. The first iteration of accounts from KWB used the accounting year 1 Jan to 31 December, but as we have found above we found those accounts to be unreliable and prepared on an incorrect basis. We have therefore simply worked as if the Restated Accounts constitute the only form of accounts on which we can base our determination.

104. Secondly, the apportionment between expenses incurred for Block A and for Block C has been a running sore throughout this case. We set out in paragraph 48(f) – (i) above the difficulties that are caused by the lease drafting on this question and the practical solution that the First Respondent eventually adopted. The practical impact of that solution for our determination is that where is it clear a cost was incurred in relation to a specific block, we have allocated that cost solely to the block in question (so we have not allowed costs that relate clearly to Block C alone). Where a cost seems to have benefitted both blocks, or where it is unclear which block the cost relates to, we have apportioned that cost between

both blocks in the ratio used by the First Respondent of 46.15% for Block A (and so 54.85% for Block C). This figure is derived from allocating expenditure equally between all 26 units, and calculating 12/26ths as a percentage. The parties should note that use of a split in the ratio 46/54% provides inaccurate results. A percentage to 2 decimal places needs to be used.

105. Thirdly, we provide an explanation of our approach to management fees. In our view, the law is that management fees should be no more than a sum that would be reasonably incurred. There are three points at which the Applicants can be charged management fees contractually:

    a. as part of the LCP service charge claimed from Clarion pursuant to Lease 2, and then passed on to the Applicants;

    b. by Clarion in its capacity as lessor of Lease 3, its management fee essentially being the fees it pays to KWB; and

    c. by Clarion as lessor of Lease 4 as a reasonable administration fee. We were informed by Ms Bateman that the standard charge is 15% of the service charge demanded, with a recently introduced cap of £200.00 per service charge payer.

106. In our view:

    a. the aggregate contractual charge for these three elements levied by Clarion is substantially more than a reasonable management fee in the market place. Even after removing the LCP management charge (Issue 1), the KWB charge has been at a rate of £185 per unit plus VAT, and the Clarion additional administration fee has been in the range of £250 - £350 per Applicant per year. The combined addition of these two fees is, in our view, excessive;

    b. The management fee charged by KWB is a reasonable sum for full management of a residential unit in Birmingham;

    c. The management work, unusually, is split between KWB and Clarion; KWB manage expenditure, and Clarion deal with invoicing and collecting the service charges;

    d. We can see no good reason why the Applicants should pay more than a market sum for management fees, which sum should in our view be apportioned between the managers. We have adopted an overall allowance of £195 plus VAT per apartment per annum for the first three years we are considering, rising to £205 plus VAT for the next three years;

    e. In our calculations below, we have apportioned that management fee, allowing £170 plus VAT per apartment for the KWB element, and £25 plus VAT per apartment for the Clarion element for the first three years, rising to £175 plus VAT and £30 plus VAT respectively for the next three years;

f. We accept that this apportionment is somewhat arbitrary and Clarion may wish to adjust it, as long as the principle is retained that the management fee should be no more that a fair market rate overall;

g. This approach will need to be reviewed if and when demands from LCP are made that are contractually valid and which actual reflect expenditure by it;

h. The figures allowed for the service charge years in dispute, as set out below, reflect our views as expressed in this paragraph.

107. Fourthly, we make a generic point concerning the Restated Accounts charges for Mechanical and Electrical Maintenance and for Fire Alarms. The distinction between these two headings is far from clear. The invoices in Bundle D for these items are from a company called IMS Security Service Ltd ("IMS").

108. The IMS invoices are for specific services, being annual maintenance contracts, and bespoke charges for specific callouts.

109. The annual maintenance contracts are for:

a. Access Control System for Block C;

b. Annual maintenance of Door Entry/ Access Control system for both blocks;

c. Annual maintenance for Emergency Light Testing for both blocks;

d. Annual maintenance for Dry Riser system for both blocks;

e. Annual maintenance for Fire Alarm System for both blocks;

f. Annual maintenance for Fire Extinguishers for both blocks;

g. Annual maintenance for Smoke Vents for both blocks;

h. (As from 2018/19) Annual maintenance for Fire Alarm Monitoring for both blocks.

110. We have analysed all IMS invoices and identified the total sums invoiced by IMS in each year, which are shown in each table below. We cannot identify specific charges for the fire alarm that amount to the sums inserted in the Restated Accounts for that item. We have therefore amalgamated these two items.

111. It is reasonable to enter into maintenance contracts for the mechanical and electrical installations in a block of flats, not least because these are often crucial systems to ensure resident's safety. The Applicants did not dispute the principle of entering into maintenance contracts. We have also allowed any extra charges arising from out of contract call outs to the installations.

112. We have allowed the Block A proportion (46.15%) of the annual sums invoiced by IMS for both blocks and have excluded sums invoiced exclusively for Block C, which principally relate to a new access control system installed in 2015/16.

113. Fifthly, all sums in the Restated Accounts relate to the whole of the development with an apportionment between blocks A and C. Strictly, there should be an individual account from Clarion to itself identifying the service charge payable by Clarion as lessee of Lease 3 for each apartment, which would then be passed on (with an administration fee) to each Applicant. We have ignored the technical non-compliance with this feature of the lease structure.

114. Sixthly, the source material we have used for determining the outcomes set out below is the evidence of the Applicants and Ms Nicola Fagan, the Scott Schedules contained in Bundle F, a summary of the Applicant's position on each service charge year provided in accordance with Direction 3a of the Directions Order no 11, and the Restated Accounts with supporting schedules.

115. The Restated Accounts set out the costs incurred in this service charge year, as shown in the tables below. The amount allowed by the Tribunal is also shown together with the reason for allowing that sum:

2015/16

Expenditure	Restated Accounts (£)	Tribunal (£)	Reason
Cleaning	1,799.00	643.34	We agree that the time spent on cleaning was excessive, a point accepted by Ms Fagan. We consider one hour per week is ample to clean Block A. We allow the direct labour cost at £10.31ph, as charged by KWB, for 52 weeks, plus VAT.
Electricity	2,193.00	650.00	In the light of pages 492 and 493 in Bundle D, we find that there is a sub-meter on the Block A electricity supply that is drawing power to an unknown source. We find that the electricity charge for light and power to two corridors and stairwells, even with additional power to emergency lighting, door entry, and fire protection systems, is excessive. We cannot rely upon the invoices submitted. Doing the best we can, we consider the sum allowed is a reasonable best assessment of the cost of electricity supplied for the communal areas of Block A
Repairs and maintenance	5,729.00	2,281.94	We allow the costs set out in the invoices on pages 286, 289, 290, 291, 294, 295, and 296 of Bundle D, using the methodology set out in paragraph 104 above.

Landscaping	585.00	288.00	We agree with the Applicants that the landscaping and grounds maintenance requirements for Block A are limited. A reasonable sum for landscaping would be labour for one person for 1 hour per month at a cost of £20 per hour plus VAT.
M&E maintenance	3,798.00	2,863.65	Total invoiced in the year by IMS was £8,386.58, of which £2,181.50 related to Block C alone. See paragraph 112 above. 46.15% of invoices on pages 286, 313, 321, 314, 324, 315, 320, 316, 322, 317, 325, 318, 323, 309, and 326 allowed.
Management fees	2,664.00	2448.00	See paragraph 106e above.
Accountancy fee	231.00	231.00	This is a reasonable accounting fee.
Fire alarm	638.00	0	See M & E Maintenance and paragraph 116 above.
Sub-total	17,637.00	9,378.93	
Add Clarion management fee		360.00	See paragraph 106e above.
Total		**9,738.93**	

2016/17

Expenditure	Accounts	Tribunal	Reason
Cleaning	1,989.00	732.57	As per 2015/16 but with an uplifted labour cost of £11.74ph (as per invoices)
Electricity	981.00	650.00	As per 2015/16
Repairs and maintenance	1,475.00	529.00	46.15% of invoices on pages 359, 363 plus 100% of invoices on pages 365 and 366
Landscaping	394.00	288.00	As per 2015/16
M&E maintenance	-729.00	0	See fire alarm entry
Management fees	2,664.00	2,448.00	See paragraph 106e above.
Accountancy fee	231.00	231.00	This is a reasonable accounting fee
Fire alarm	3,618.00	3,021.03	Source is pages 372, 373, 374. £278 plus VAT disallowed on p372 as exclusively for retail units. All entries on pp373 and 374 relating to a period outside 16/17 disallowed.
Health & Safety	615.00	615.00	Invoices support expenditure of £660 on Block A assessments of fire risk and health and safety risks. The Tribunal considers that a fire risk assessment is reasonably classified as a health and safety cost. Only Block A percentage charged in Restated Accounts. Considered reasonable. First Respondent could have justified whole cost.
Sinking fund	0	0	
Window cleaning	305.00	305.00	The Applicants challenged the quality of work. We are satisfied the work was

			undertaken and that it is reasonable to do so.
Sub-total	11,543.00	8,819.60	
Add Clarion management fee		360.00	See paragraph 106e above.
Total		**9,179.60**	

2017/18

Expenditure	Accounts	Tribunal	Reason
Cleaning	2,439.00	751.30	As per 2015/16 with labour cost increased to £12.04ph as per invoices
Electricity	1,102.00	675.00	As per 2015/16 with an uplift to reflect price rises
Repairs and maintenance	1,081.00	667.63	46.15% of invoices on pages 412, 414 & 415 (total £498.96) plus whole of invoices on pages 410, 411, 413 & 416.
Landscaping	601.00	288.00	As per 2015/16
M&E maintenance	2,248.00	2,102.16	p432 disallowed – relates to Block C only. Pages 443 – 445 disallowed – relate to 18/19 (but have been allowed in 18/19). Charges for Access Control System disallowed – relate to Block C. All other IMS invoices allowed.
Management fees	2,665.00	2,448.00	See paragraph 106e above.
Accountancy fee	369.00	369.00	This is a reasonable accounting fee.
Fire alarm	934.00	0	Within M&E maintenance
Health & Safety	325.00	325.00	See 2016/17. The invoice on page 456 supports this charge.
Sinking fund	0	0	
Window cleaning	314.00	314.00	Invoices on pages 398, 399, and 400 support this cost. Block A percentage of 46.15% allowed.
Sub-total	12.078	7,940.09	
Add Clarion management fee		360.00	See paragraph 106e above.
Total		**8,264.09**	

2018/19

Expenditure	Accounts	Tribunal	Reason
Cleaning	2,050.00	751.30	As per 2017/18 – labour rate same
Electricity	654.00	654.00	Sum claimed is allowed
Repairs and maintenance	5,727.00	1,055.00	46.15% of invoices on pages 483, 484, 487, 495, 498, and 499 plus 100% of invoice on page 489, and 497 (all Block A). On the balance of the evidence, we find that new banks of mailboxes were installed (see invoice 486) but the need to do so was not established. That invoice is not allowed. Invoices 482, 485, 488, 496, and 500 relate to Block C.

Landscaping	584.00	300.00	As per 2015/16 with a small uplift for inflation
M&E maintenance	2,221.00	2,217.10	Pages 527 – 529 are duplicates of pages 524 – 526. Access control system maintenance relates to Block C – disallowed. Page 513 also Block C – disallowed. 46.15% of all other IMS costs allowed.
Management fees	2,664.00	2,520.00	See paragraph 106e above.
Accountancy fee	277.00	277.00	This is a reasonable accounting fee.
Fire alarm	346.00	0	Within M&E maintenance
Health & Safety	306.00	306.00	An invoice for a health and safety report visit (which the Tribunal considers reasonable to contract for and for a reasonable sum) is on page 538. The Restated Accounts only charge the Block A proportion to the Applicants, rather than the whole invoice sum.
Sinking fund	0	0	
Window cleaning	304.00	304.00	Invoices on pages 471 & 472 support charge. As above, the Tribunal consider it reasonable to clean the windows and there is insufficient evidence for us to conclude the contract was not performed to a reasonable standard.
Sub-total	15,133.00	8,384.40	
Add Clarion management fee		432.00	See paragraph 106e above.
Total		**8,816.40**	

2019/20

Expenditure	Accounts	Tribunal	Reason
Cleaning	2,490.00	788.64	See 15/16 for principle. Labour rate allowed at £12.64ph.
Electricity	1,437.00	700.00	As per 2015/16 with an uplift to reflect price rises
Repairs and maintenance	1,237.00	930.01	46.15% of invoices on pages 586, 587, 588, 589, 590, 591, 593. Reduction of £100 plus VAT for excessive attendances on fixing stair treads, and £110 plus VAT for excessive call-out charge on invoice 589.
Landscaping	585.00	300.00	As per 2015/16 with a small uplift for inflation
M&E maintenance	518.00	3,247.09	Amalgamated with Fire Alarm charge. Charges on page 611 disallowed. They have already been invoiced on page 607. Charge on page 624 disallowed – Block C. 46.15% of all other IMS costs allowed.
Management fees	2,731.00	2,520.00	See paragraph 106e above.
Accountancy fee	277.00	277.00	This is a reasonable accounting fee.

Fire alarm	4,460.00	0.00	Within M&E maintenance.
Health & Safety	1,275.00	1,275.00	It is reasonable for annual reports to be commissioned. This cost is higher than in other years because the second report was commissioned some 11 months after the first, hence 2 charges in the year. That is not unreasonable.
Sinking fund	1,846.00	0	No rationale. Reversed in 2020/21
Window cleaning	305.00	305.00	Invoices on pages 554 and 555 support costs for Blocks A and C of £660. The Applicants have only been charged 46.15% of the total sum.
Sub-total	17,161.00	10,342.74	
Add Clarion management fee		432.00	See paragraph 106e above.
Total		**10,774.74**	

116. We make additional comments about the 2020/21 year. This case commenced before that year had ended. Interim service charge demands had been raised, as set out in Table 1. The 2021 Restated Accounts included accounts for the period 1 April 2020 to 31 March 2021. However, to the best of the Tribunal's knowledge, no final demand for payment of a service charge based on actual expenditure for that year as required by Lease 3 has been served on the Applicants.

117. Any demand for the 2020/21 service charge based on the actual expenditure, would have had to have been served by 30 September 2022 to be within the 18 month time limit imposed by section 20(B) of the Act (see discussion below).

118. The application before us for 2020/21 is therefore in fact an application under section 19(2) of the Act for a determination of the reasonable amount that the service charge would be.

119. As we do have the invoices and accounts for 2020/21, we set out below the sum which we would consider to be reasonable, but we can in fact base that determination on the full suite of evidence before us, so our determination is as near as makes no difference to a determination of the actual service charge this Tribunal considers would be determined under section 19(1).

2020/21

Expenditure	Accounts	Tribunal	Reason
Cleaning	2,310.00	829.92	Methodology as per previous years. Labour rate allowed at £13.30ph.
Electricity	752.00	750.00	As per 2015/16 with an uplift to reflect price rises
Repairs and maintenance	2,938.00	1,103.93	Page 722 & 729 disallowed. Not reasonable to charge service charge payers for removal of individuals personal items. Should be charged to the individual for breach of lease. Invoices

			720 & 723 disallowed. Tribunal not persuaded related to Block A.
Landscaping	573.00	300.00	As per 19/20
M&E maintenance	1,020.00	8,165.16	Item combined with Fire alarm as previously explained. Page 759 contains the same charges as p754 and has not been counted. Maintenance charges only included for 3 out of 4 quarters for some items. 46.15% of all other IMS costs allowed. The combined M&E and Fire Alarm costs include repairs and maintenance items to fire doors and firestopping on pages 756 and 757 in the total sum of £12,777.60, 46.15% of which has been added to the allowed IMS invoices totalling £2,268.30. See also paragraph 120 below
Management fees	2,927.00	2,520.00	See paragraph 106e above.
Accountancy fee	276.00	276.00	This is a reasonable accounting fee.
Fire alarm	9,034.00	0.00	See M&E Maintenance above.
Health & Safety	546.00	546.00	H&S reports reasonable. Appropriate share of total spend.
Sinking fund	-1,846.00	0	
Window cleaning	278.00	278.00	Reasonable to incur.
Sub-total	18,808.00	14,769.01	
Add Clarion management fee		432.00	See paragraph 106e above
Total		**15,201.01**	

120. A further adjustment is required to the 2020/21 figures arising from the remedial works to the fire stopping invoiced on page 757 of Bundle D. The Tribunal was given virtually no information about these works; the First Respondent's closing submissions merely stated that "consultation was not required in respect of the fire service works which were a series of invoices in respect of different works".

121. We do not accept that consultation was not required in respect of the fire stopping works. There is one invoice for those works. Despite the lack of detail, we consider it untenable to suggest that works identified in one invoice, described as "firestopping works" would not be considered to be works on a building to which the consultation requirements in section 20 of the Act apply. It has not been suggested that a consultation in fact took place before those works were undertaken, and the Applicants have the benefit of the statutory restriction on claiming those costs through the service charge to the extent that the cost exceeds £250 per applicant.

122. The total invoice for the fire stopping works was for £7,341.60. The Block A contribution is 46.15% of that sum - £3,388.15. Ms Awan's contribution will be £320.18, Ms Aker's will be £294.09, and Ms Weetman's will be

£302.90. They are respectively therefore entitled to reductions of £70.18, £44.09, and £52.90 from their 2020/21 service charge bill.

Statutory restrictions on the payability of service charges

Section 20B

123. The Tribunal's finding that none of the demands for Actual Service Charge Expenditure identified in Table 1 were valid contractual demands (see paragraph 95 above) leads us to consider whether section 20B of the Act has any application in this case.

124. Section 20B(1) of the Act provides that service charges are not payable if the demand for payment is more than 18 months after the costs were incurred. As no valid demand has yet been served, it follows that demands for a balancing payment for each service charge year (except possibly for 1 April 2020 to 31 March 2021) are now time barred and the Applicants are not liable to pay them. However, as identified in paragraphs 20 and 21 above, section 20B does not apply (in this case) to demands for payment on account.

125. Ms Evans conceded in her written closing submissions that the service charge accounts had been prepared using the incorrect service charge year, and she implies that she recognises the First Respondent may be in some difficulties in complying with section 20B(1). But her case is that the previous accounts (i.e. the KWB Accounts) and the certificates provided referred to in Table 1 satisfy the requirement in section 20B(2) that the Applicants be notified in writing that the costs had been incurred and the Applicants would be required to contribute towards them by way of service charge. She cited *Brent London Borough Council v Shulem B Association Ltd* (2011) EWHS 1663 ("*Shulem B*") in support.

126. In *Shulem B*, Mr Justice Morgan was considering whether an invoice based on an estimate of costs that had been incurred on buildings in Willesden by the Council were payable by the Respondent. The works were practically completed on 18 March 2005. On 23 February 2006, an invoice for an estimated sum was served on the Respondent notifying the Respondent that the actual costs had not yet been calculated, but an invoice for those costs would be served in due course. The final invoice was sent on 15 December 2006, more than 18 months after the date of practical completion.

127. For the purposes of this case, the first key aspect of *Shulem B* that requires consideration is Morgan J's comments on what makes a valid notification for the purposes of section 20B(2). He discussed the nature of the written notification required by that sub-section and noted that it must state that "the costs have been incurred".

128. The second issue discussed in *Shulem B* is the requirement for the written notification to also state that the service charge payer would be required under the terms of his lease to contribute to the costs by way of a service charge. A slightly more relaxed interpretation of this requirement is

offered, with a suggestion as to how a lessor may comply with section 20B(2) if the amount of the service charge is still not known. Morgan J's conclusions are summarised in paragraph 65 as follows:

> "65. Accordingly, my conclusion as to interpretation of section 20B(2) is that the written notification must state a figure for the costs which have been incurred by the lessor. A notice which so states will be valid for the purpose of subsection (2) even if the costs which the lessor later puts forward in a service charge demand are in a lesser amount. Secondly, the notice for the purposes of subsection (2) must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge. It is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee nor what the resulting service charge demand will be."

129. Unfortunately, Ms Evans did not identify the actual document she relied upon as satisfying section 20B(2), merely referring, somewhat optimistically, to "the previous accounts and certificates provided".

130. The Tribunal has not seen any document in these proceedings that comes anywhere close to being a section 20B(2) notification. The KWB Accounts certainly contain none of the statements required. The service charge demands cannot qualify, as they state the actual expenditure incurred (which we have found is stated in error), so a section 20B(2) notification would be entirely unnecessary.

131. We conclude that section 20B(2) does not assist the First Respondent in overcoming the failure to comply with section 20B(1).

132. We determine that by virtue of the provisions of section 20(B) of the Act, no balancing charges would have been payable for the service charge years 1 April to 31 March in 2015/16, 2017/18, and 2018/19, so the Applicants are not liable to pay the balancing charges demanded for those years set out in Table 1 by virtue of the operation of section 20B(1) of the Act. Section 20B(2) does not save the demand as there has been no written notification that complies with that sub-section.

133. As it happens, we have already determined above that the service charges actually payable by the Applicants are all less than the sums demanded on account as interim service charges. Section 20B therefore has no practical application to this case.

Sections 21B and section 47 of the Landlord and Tenant Act 1987

134. The Applicants have raised compliance with these statutory provisions. Were we to find that the provisions had been breached, the Applicants would be entitled to withhold payment and/or treat payment as not being due.

135. It is certainly the case that the copies of the service charge demands referred to in Table 1 did, in many instances, not appear to comply with these statutory provisions. But in fact, the law is that failure to comply merely suspends the obligation to pay, and the defect can then be cured by later service of a compliant demand.

136. Mr Bashir gave evidence that in fact Clarion do comply with these statutory provisions; it is just that the paperwork establishing that was not copied in the bundle. We see no value to either party in making a determination. The Applicants' were adamant that they did not receive the section 21B summaries. There is a straight forward conflict of evidence. The issue has no real practical impact upon the decision or the parties, and we have decided not to make a determination on it.

Apportionment of Block A costs between the lessees of the Block

137. This decision has focussed on determining the overall cost that Clarion may seek from the occupiers of Block A as service charges. The method used by Clarion to apportion those overall costs between the individual apartments is to apportion according to floor area. Clarion has provided a schedule of floor areas showing that the total floor area of the apartments in both blocks is 1,678 sqm, of which Block A is 783 sqm and Block C is 895 sqm. Mathematically, Block A is 46.66% of the total and Block C 53.33%. The Tribunal prefers the apportionment of 12/26ths and 14/26ths as described above.

138. Within Block A, Ms Awan's flat is 9.45% of the total floor area, Ms Akers flat is 8.68%, and Ms Weetmans is 8.94%.

Service charges paid

139. As section 27A of the Act brings the question of the amount that is payable by way of service charge into the Tribunal's jurisdiction, the Tribunal requested evidence on the amounts of service charge that each Applicant had in fact paid in each of the service charge years under challenge.

140. We find as fact that each Applicant paid the sums set out in Table 9 below in the service charge year referred to.

Table 9

Year (1 April to 31 March)	Ms Awan (£)	Ms Akers (£)	Ms Weetman (£)
2015/16	1,255.31	1,494.41	1,085.82
2016/17	844.10	1.029.14	1,794.04
2017/18	2,049.32	1,619.87	1,739.80
2018/19	3,582.66	1,880.10	1,448.47

2019/20	3,555.66	3,643.28	1,678.19
2020/21	3,429.43	1,779.76	2,210.39
Totals	14,716.80	11,446.56	9,956.91

Decision

141. The Tribunal determines that the service charges payable in total by each Applicant for the service charge years referred to are as set out in Table 10 below.

Table 10

	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
Total payable for Block A	9,738.93	9,179.60	8,264.09	8,816.40	10,774.74	15,201.01
Ms Awan's share 9.45%	920.33	867.47	780.96	833.14	1,018.21	1,436.50
Ms Akers share 8.68%	845.34	796.79	717.32	765.26	935.25	1,319.45
Ms Weetman share 8.94%	870.66	820.65	738.81	788.19	963.26	1,358.97

142. For the 2020/21 year, the sums in Table 10 must be further reduced by the sums referred to in paragraph 122 above.

143. The Applicants will be able to calculate from Tables 9 and 10 the excess payments they have made in the years in dispute, by working out the difference between the amount they have already paid on account (from Table 9) and the total sum they are liable for (from Table 10 and para 122). The calculation will show a significant overpayment of service charges by each of the Applicants. The Tribunal has no jurisdiction to order repayment of these sums. The Applicants should seek legal advice on whether they can require the First Respondent to repay any overpaid service charges.

Costs Applications

144. The Applicants have requested that the Tribunal make orders under section 20C of the Act and paragraph 5A of Schedule 11 to the 2002 Act.

145. If we make the orders requested, it will have the effect of preventing the First Respondent from charging any part of its costs of defending this case to the Applicants via the service charge, and preventing the First Respondent from seeking payment of its costs directly from the Applicants under any provision of the lease it believes may entitle it to do so.

146. The First Respondent, in fairness, has indicated it would not pursue any costs from the Applicants either directly or indirectly.

147. Even so, we willingly make the orders requested anyway. As the Tribunal understands it, the application was brought because the Applicants believed the service charges they were being asked to pay were too high, and their calculation opaque. They were right. It has been a long hard slog lasting over two years to extract adequate information from the First Respondent to allow the Tribunal to understand the charges that have been levied upon the Applicants. During that process, it has come to light that the service charge demands sent to them each year were misleading in that they stated a figure for actual costs incurred, when that sum was nothing of the sort. Why that was done, and whether it was a result of an innocent mistake, negligence, or worse, is not a matter for the Tribunal. But the First Respondent should not have behaved in that way, and it should not have any opportunity to recover any of its costs in this case. It would be wholly unjust and inequitable were it to have the chance of doing so.

148. We order that pursuant to section 20C of the Act, none of the First Respondent's costs of this application are to be regarded as relevant costs to be taken into account in determining any service charge payable by the Applicants. We further order that any administration charges levied by the First Respondent upon the Applicants and each of them for the litigation costs of this application are extinguished.

Fees

149. The Tribunal may make an order that any fees paid by the Applicants to HMCTS in order to bring this case must be reimbursed, on its own initiative. We have decided to do so in this case as in our view it would not be just for the Applicants to have to bear any fees in order to establish that the basis upon which demands for payment of service charges from them was entirely misconceived.

150. We order Clarion to repay all fees paid to HMCTS by the Applicants in relation to this case to the Applicants who paid them. Our understanding is that Ms Awan paid an application fee of £100, and Ms Awan and Ms Akers each paid half of the hearing fee of £200.

Appeal

151. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing

must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)