FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MR/LSC/2023/0077
Property	:	155 Oyster Quay, Port Solent, Portsmouth PO6 4TQ
Applicants	:	Craig and Wendy McGuinnes
Representative	:	----
Respondent	:	Qyster Quay Management Limited
Representative	:	Jason Nickless of counsel instructed by Warner Goodman LLP
Type of Application	:	Applications to determine service charges– section 27A Landlord and Tenant Act 1985 Applications that costs not be recoverable as charges- section 20C Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002
Tribunal Member(s)	:	Judge J Dobson Mr MJF Donaldson FRICS Mr D Ashby FRICS
Date of hearing	:	3rd, 4th and 20th December 2024
Dates of Re- convenes	:	10th and 24th January 2025 and 13th June 2025
Date of Decision	:	13th June 2025

DECISION

Summary of the Decision

1. **The Tribunal records that many of the challenges were withdrawn by the Applicants or conceded by the Respondent prior to the hearing, and in the case of previous legal costs of the Respondent during the hearing. There were numerous items in each of those categories.**

2. **The Tribunal has not altered any sums which the Applicants conceded or which the Respondents accepted were not service charge items, on the basis that items not in dispute fall outside of its jurisdiction. Many of the items originally disputed by the Applicants fall into one or other of the categories.**

3. **In respect of the service charges remaining in dispute, the Tribunal allows the majority of the types of costs on which the service charges were based and most of those in the sums demanded by the Respondent, subject to one matter. That is that in the absence of evidence of the required certification of actual service charges, any balance of actual service charges above the estimated on- account charges are not payable but whether that impacts cannot be determined at this juncture.**

4. **The Tribunal disallows service charges as follows:**

    1) In full the service charges in respect of replacement front doors to the flats and the waking watch;
    2) In part the managing agent fees for all years by 5% and the fees for the years up to March 2021 only by an additional 10% (so the full reduction for up to March 2021 is 15%);
    3) Most of the charges for bin bags related to rubbish collection;
    4) The items identified as company expenses but which the Respondent did not concede;
    5) Various other items reduced to £Nil on the Scott Schedules.

5. **Where the Tribunal disallows or reduces the specific entries on the Scott Schedules those are identified and there to the reduced sums (or nil) shown in red in the final column of those Schedules. Full details of the individual sums year on year are set out in the Scott Schedules forming part of this Decision.**

6. **The Tribunal grants in part the Applicants' applications pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of the Commonhold and Leasehold Reform Act 2002 such that 20% of the Respondent's legal and litigation costs of the applications may not be recovered as service charges or administration charges.**

7. **The Applicants shall bear the application and hearing fees of £300.00.**

The Background

8. The Applicants are the joint lessees of 155 Oyster Quay, Port Solent, Portsmouth PO6 4TQ ("the Property"), having been so since August 2003 or thereabouts. The Respondent is the immediate landlord of the Applicants and holds a superior lease [539], including a "marina lease" for a term of 150 years pursuant to a tri- partite lease in which the Respondent was originally the management company. The Respondent became the head- lessor on 26th September 2000 [575]. The freeholder is Portsmouth City Council. The Oyster Quay complex is referred to in this Decision as "the Estate".

9. The Respondent is a lessee- owned company with each leasehold property being allocated a share, including 155. The directors of the Respondent are lessees who have volunteered to be directors.

10. The flat is one of 167 situated in 9 blocks, each with lifts and mostly flat-roofed, within the Estate. One of the flats is not leased and was formerly used as staff accommodation but is now let by the Respondent and the rent provides income to the Respondent.

11. The Estate is in some ways similar to other large complexes but in others different to most. There are roadways, parking and other communal areas in addition to the residential blocks in the usual way. However, Port Solent, where the Estate is situated, includes a marina and commercial premises, the latter of which includes some shops and several bars and restaurants. The 9 blocks face the marina. The marina has berths for boats, as might be expected, and has walkways to enable access to the boats.

12. More particularly and in part different to the usual, the Estate includes 72 garages, 55 visitors' car parking spaces, 54 berths for boats at the marina, a leisure centre (with heated swimming pool, sauna, jacuzzi, changing rooms, showers and a fully equipped gym) and an estate office. Some berths are also rented out (the Applicants' case said 6) and provide income for the Respondent. So too, some of the car parking.

13. It merits identifying, given that some of the matters in dispute are affected by them, that the estate has security with what the Tribunal understands to be 63 CCTV cameras (according to a plan produced and otherwise thereabouts- the Applicants' referred to 65 and 66), and two access-controlled gates to the boardwalk in front of the marina. In addition, entrance doors to the blocks and the leisure centre are controlled by personal fobs or "cotags" as they are termed. There is a video entrance system.

14. There are Respondent company accounts and there are service charge accounts. The distinction between the two gave rise to some issues. The point to identify is that the Tribunal is concerned with service costs and service charges and not with other company income and expenditure.

15. The Respondent appointed managing agents to manage the Property and Estate on its behalf, currently. The agents were previously HML from (for these purposes) 1st January 2020 to 10th January 2021, Alexander Faulkner Partnership from 10th January 2022 to 2024 (referred to in some documents as "AFP") and was taken over by First Port Property Management on 22nd March 2023, and then PS and B from 1st February 2024. The Respondent itself employs permanent members of staff to manage and maintain the Estate. There are also contractors engaged by the managing agents on behalf of the Respondent.

16. In addition to the Lease of the Property, the Applicants hold a lease of a berth at the marina. Charges are levied on the Applicants because of that berth lease.

The Application and history of the case

17. The Applicants sought determination of payable service charges for 2017 to 2024 by way of an application dated 5th July 2023 pursuant to section 27A of the Landlord and Tenant Act 1985 ("the Act") and later expanded.

18. The Applicants also made an application for an order under section 20C of the Act that the costs of the proceedings should not be recoverable by the Applicants as service charges and an application pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the title of which will continue to be used in full), for an order that the liability to pay an administration charge in respect of contractual litigation costs be reduced or extinguished.

19. Directions were given on various dates, including in respect of case management applications. It is not considered useful to recount much of that in this Decision. However, it is worth identifying where the scope of the matters to be determined has been limited.

20. In Directions dated 28th March 2024, the Tribunal determined that any disputes in respect of service charges for 2019 and earlier were resolved by a Settlement Agreement entered into between the Applicants and the Respondent on 8th April 2021 which also compromised a set of proceedings in the County Court. Consequently, the Tribunal was required to determine service charges for the subsequent years, namely 2020, 2021, 2022, 2023 and 2024. In respect of the last of those, the service charges were unknown, even estimated ones, at the time of the application, although at least the estimated figures became apparent in the course of the application proceeding.

21. A repeated concern was the financial amount of the service charges payable by the Applicants as compared to the number of items for determination and the amount of time which it appeared the case would require and the apparent disproportionality. One of the points made was that the size of the service costs challenged on the one hand and the size of the service charges produced and demanded from the Applicants on the other hand were quite different, reflecting the number of flats- 167-

between which the costs were shared. Prior to various concessions made, the amount of the service costs challenged was understood to be £3,460,032.36 (although it was said at the start of the hearing £3,590,662.00), comprising in the various Scott Schedules some 1062 entries (assuming counted correctly on all relevant Schedules but including a modest element of duplication), although the Applicants' share of that was potentially £22,490.21 (or £23,339.30 if the total was higher) if none of the costs challenged were payable at all (subject to a dispute as to the applicable percentage).

22. A service cost would, for example, need to be £835.00 for it to produce £5.00 of service charges payable by the Applicants. No other lessee has sought to join into this application and so it is only the Applicants' portion of the service costs which are in issue. The Tribunal also refers to a point raised at various times on behalf of the Respondent, namely that the Applicants challenged the reasonable amounts of service costs without arguing that works or services should not have undertaken or provided at all but also without identifying the cost accepted by the Applicants as reasonable. Necessarily, there would have been some cost incurred for those items and some service charge payable, such that the amount in dispute ought not to be the full cost as incurred.

23. For various reasons, the case took a considerable time to be listed for final hearing. It is only right to say that it has then taken far longer than would usually be expected for this Decision to be reached. The Tribunal regrets that and any inconvenience which may have arisen.

24. In part, the delay arises from the need for the Tribunal to meet to consider the wealth of evidence and information provided to it. The Tribunal could not get close to addressing all matters in one meeting and so there were a series of re- convenes, the last of which was held on 24th January 2025. That said, there remained a need for some ongoing communication about some aspects of the case. There has also been a real difficulty in finding, amongst heavy other commitments, a sufficient block of time to produce the Decision. Some initial drafting took place on a rather piecemeal basis, much as that had not been the intention. However, it was swiftly confirmed that was neither efficient nor effective and so unfortunately the main part of the Decision was only able to be written up some weeks after the last re-convene when a number of working days were largely free of other hearings for various reasons. Even then, further communications were required and a further meting today to check through the many figures and to finalise.

25. The Applicants produced a PDF bundle amounting to some 1872 pages. 200 pages or so of that comprises Scott Schedules in respect of each year, comprising hundreds of individual items and including costs items ranging in size from £4.00 upwards.

26. The Scott Schedules showed that various items had been conceded by the Applicants or the Respondent in the course of the proceedings. So, in the first instance there were items which the Applicants no longer challenged

and in the second instance there were items where the Respondent conceded that the challenge had been a proper one.

27. The Respondent subsequently also provided an additional small bundle termed "Second Trial Bundle" of 47 pages, being additional documents on which the Applicants wished to refer and numbered following on from the last page of the main bundle.

The approach to the Decision and the writing of this Decision

28. Whilst the Tribunal makes it clear that it has read much of the bundle as considered proportionate and useful, the volume of the bundle precluded reading all of it in full. The Tribunal did consider in detail the principal documents, for example the statements of case, witness statements and lease, and also those documents to which the parties specifically referred to. However, many documents in the bundles were not mentioned at all. Where the Tribunal had not considered the documents in advance and no reason was identified for it to do so at the hearing, the Tribunal did not consider such documents. Even so, many of the documents which were read are not referred to in detail, or in many instances at all, in this Decision, it being unnecessary to so refer. Where the Tribunal does not refer to pages or documents in this Decision to which the parties did refer, it should not be mistakenly assumed that they have been ignored or left out of account.

29. Insofar as reference is made to any specific pages from the Tribunal bundle that is done by numbers in square brackets [ ], as occurs in the preceding paragraphs where appropriate, and with reference to PDF bundle page-numbering.

30. This is an imperfect, but perhaps as good as any, point at which to record that the Decision attempts to focus on the key issues and, not least given there are several different elements to this case, does not cover every last factual detail. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Many of the various matters mentioned in the bundle or at the hearing do not require any finding to be made for the purpose of deciding the relevant issues in the case. Findings have not been made about matters irrelevant to any of the determinations required. Findings of fact are made in the balance of probabilities.

31. Findings and at least narrative explanations of determinations have also not been made about what the Tribunal considers to be very small items which are either such small things that the Tribunal considers that it ought not to be concerned about them at all in any event or where the service charges are small to the extent that there is no proportionate way of addressing them. Equally, the Tribunal has been very much mindful that there is a range of approaches which a landlord may take and a range of amounts of expenditure on items which may all be reasonable, rather than there being any single answer, where the odds of small items falling

outside of that range, at least by any more than a nominal extent, is at best slim. The Tribunal has adopted the position that the requirement in *Enterprise Developments LLP v Adam* [2020] UKUT 151 (LC) discussed below has not been met in respect of such items. The Tribunal has allowed such items in the sums incurred by the Applicants.

32. The Tribunal has therefore limited its consideration of individual items of expenditure to ones where there is a sufficient potential impact on the service charges payable to merit the Tribunal considering them. In general, if not precisely, that has meant that the Tribunal has not, save exceptionally, considered reducing service costs which as incurred were below £835.00- so producing a service charge to the Applicants of at least £5.00. Hence those have been allowed, save where the Respondents have conceded the items where nothing has been allowed because of the concession. The Tribunal considers it at least arguable that the financial bar for the Tribunal to consider items amongst the many in issue should have been set higher.

33. It is also worth pausing to mention that the Decision is significantly longer than the Tribunal would wish it to be. The Upper Tribunal has sought to ensure that this Tribunal avoids overly long decisions. However, the Tribunal has both sought not to produce a decision longer than necessary and yet has produced one much longer than ideal in the course of addressing all of the issues determined. The Tribunal concluded that more issues than had been hoped for required some narrative, including to reduce the prospect of issues arising in subsequent years.

34. The Decision as to the service charges in dispute essentially divides into two parts. The first part starts with discussion and consideration of the elements which the Applicants explained in their Skeleton Argument (See below) were being pursued. In addition, and where relevant to specific other sums there is also discussion of various other themes of the cases and hearing and related principles. That appears within this narrative document.

35. The other part is the annotated Scott Schedules, which apply those determinations to the year- on- year items. It is right to say that the annotations do not all address precisely how the application of the determinations have led to the result in respect of the particular item, although it is trusted that by considering the determinations and where applicable noting any specific parts of the Decision referred to, the parties will be able to identify why matters were allowed or not allowed. It is also worth repeating that some of the items were not considered for reduction at all because of their modest size and for the reasons explained above. The Tribunal considers that it would be wholly disproportionate to provide a narrative explanation of each of the very large number of individual items in the very many pages of Scott Schedules.

36. The Tribunal is grateful in relation to the Scott Schedules to the Respondent's representatives for supplying Word versions capable of annotation. The Tribunal is grateful to the Applicants for further versions.

37. The Tribunal has used the versions last received, so from the Applicants, on the understanding those are based on the versions from the Respondent and with additional concessions. If the parties identify that any item is incorrect as compared to the Word versions sent by the Respondent, they will need to inform the Tribunal so that can be attended to.

38. The Tribunal accepts that there is a degree of imperfection in the approach taken. In the event that there had not been such a quantity of items, the Tribunal expects that it would have dealt with matters differently to one extent or another. However, the Tribunal considers that some realism is very much required on the part of the parties as to what can be produced item by item in this particular case. The Tribunal makes no apology for taking what it considers to be a pragmatic course where considered possible and with an eye to proportionality as far as practicable and hence the lack of any even longer narrative. The Tribunal has sought to strike a balance between the entitlement of the Applicants to challenge service charges demanded- some of which challenge has succeeded where the Respondent has not previously conceded the item- and the use of appropriate costs and resources for determination of amounts in dispute.

The Lease

39. The Underlease ("the Lease") of the Property was provided [633- 677] dated from 28th May 1993 between the Applicants, the Respondent and the then- landlord. The term of the Lease is 150 years from 1st January 1988 (also the commencement date of the head- lease). The Lease granted is of the Property a garage, numbered 38.

40. Reference is made in the definitions to the "Demised Premises", the Property as termed in this Decision, the garage having been sold off as referred to further below; the "Building", which is the block in which the Property is situated; and the "Estate", which is why the Tribunal has used that term.

41. The Property is defined in the First Schedule as shown red on the plan including:

> "1. The internal plastered coverings and plaster work of the walls bounding the Flat and doors and door frames and the glass fitted in window frames (but excluding the window frames) and
> 2. The plastered coverings and plaster work of the walls and partitions lying within the Flat and the doors and door frames fitted in such walls and partitions and
> .....
>
> 5.....But excluding
> 5.1 Any part or parts of the Building (other than any conduits expressly included in the demise) lying above the surface of the ceilings or below the floor surfaces
> 5.2 all of the steel and/ or concrete frame of the Building and all of the walls or partitions therein (whether internal; or external) except such of the plastered

surfaces thereof and the doors and door frames fitted therein as are expressly included in the demise

(It will be identified that the definition of the Property does not include the berth at the marina.)

42. The Applicants' share of the costs payable by the service charge for Flat 155 and the related garage included in the demise is stated in the "Particulars" section to be 0.65%.

43. Clause 2.7 of the Lease, which the Applicants state is included in each of the leases and on which they rely reads:

"Any covenant in this lease by the tenant not to do an act or thing shall be deemed to include an obligation not to agree or suffer such act or thing to be done and to use best endeavours to prevent such act or thing being done by another person."

44. Clause 5.7 relates to "Assignment, underletting etc" of which there is only one sub- clause 5.7.1, which says:

"Not at any time to assign transfer sublet charge or part with possession or occupation of part only of the Demised Premises or to permit or suffer the same to be done".

45. Clause 6 provides for the Tenant's Obligations generally and clauses 7 and 8 those of the landlord and the management company, now one and the same. The covenants include includes maintenance and repair of all parts of the Building and Estate, including balconies, terraces and patios and also the main structure of the Building to include the exterior walls and window frames. Insurance is required for reinstatement and four years non- payment of rent.

46. By clause 8.2.7.1 the employment of managing agents is permitted including payment of all proper fees, salaries, charges and expenses to the managing agents or other managers. That is supplemented in 8.2.7.2 by the ability to employ various other professionals and trades.

47. Clause 8.2.8.4 contains a covenant as follows:

"Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute interest discretion of the Management Company may be necessary or advisable for the proper maintenance benefit safety and administration of the Estate or for the benefit and safety of the Tenant including the provision of any further or additional facilities for the Flat Owners."

48. That somewhat general clause, which appears within a list of sub- clauses to clause 8.2.8 which is headed "Installations" finds itself at the centre of a number of the challenges in this case.

49. Matters related to the service charges are principally provided for in the Fifth Schedule. Matters such as payment dates are not relevant to the issues for determination in this case. The Fifth Schedule identifies that "Total Expenditure" means (paragraph 1.1):

> "all costs and expenses whatsoever incurred by the Management Company in any Accounting Period in carrying out its obligations under clause 8.2 including (without prejudice to the generality of the foregoing:
>
> 1.1.1 The cost of employing managing agents (if employed)
>
> .....
>
> 1.1.4 The cost of providing and carrying out such other or additional services and such other works in connection with the Estate as the Management Company in its absolute discretion may deem desirable or necessary
>
> .....
>
> 1.1.8 Any costs and expenses (not referred to above) which the Management Company may incur in providing such other services and in carrying out such other works as the Management Company in its absolute discretion may deem desirable or necessary for the benefit of the Building and/or the Estate".

50. There are the usual sorts of provisions for payments on account of service charges and for balancing payments. 1.1.5 permits setting aside sums for future costs.

51. Paragraph 5 of the Schedule reads as follows:

> "If the Service charge in respect of any Accounting Period exceeds the Interim Charge paid by the Tenant in respect of that Accounting Period together with any surplus from previous years accumulated as aforesaid then the Tenant shall pay the excess to the Management Company within fourteen days of service upon the Tenant of the Certificate referred to in the following paragraph ("the Certificate") ....."

52. Paragraph 6 then reads:

> "As soon as practicable after the expiration of each Accounting Period there shall be served upon the Tenant by the Management Company or such agents a certificate signed by the Management Company or such agents containing the following information:-
>
> 6.1 The amount of the Total Expenditure for that Accounting Period
> 6.2 The amount of the Interim Charge paid by the Tenant in respect of that Accounting Period together with any surplus accumulated from previous Accounting Periods
> 6.3 The amount of the Service Charge in respect of that Accounting Period and of any excess or deficiency of the Service Charge over the Interim Charge".

The relevant Law

53. Essentially, pursuant to section 18 of the Act, the Tribunal has the power to decide about all aspects of liability to pay service charges which vary year

to year and can interpret the Lease where necessary to resolve disputes or uncertainties. A party may apply pursuant to section 27A of the Act for determination of by whom, to whom, how much, when and how a service charge is payable.

54. Service charges are sums of money that are payable – or would be payable - by a lessee to a lessor for the costs of services, repairs, maintenance or insurance and the lessor's costs of management, under the terms of the Lease. The Tribunal has jurisdiction where the whole or part varies or may vary according to the costs incurred.

55. Section 19(1) in respect of costs incurred provides that a service cost is only to be had regard to insofar as it is reasonably incurred and works or services to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the costs which are to be met through the service charge.

56. The Tribunal takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties.

57. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account."

58. There are innumerable case authorities in respect of several and varied aspects of service charge disputes. Many have no direct relevance to this dispute. The Tribunal is well aware of the relevant law and has applied it in reaching this Decision. However, the Tribunal does touch upon the cases to which the Respondent's counsel made specific reference.

59. The first of those is *Forcelux Ltd v Sweetman* [2001] 2 EGLR 175, which identified the Tribunal should apply a two- stage process of i) was the decision-making process reasonable; and ii) is the sum charged reasonable in the light of market evidence?

60. The next is *Waaler v Hounslow LBC* [2017] EWCA Civ 45 in which it was identified, amongst other matters, that a choice can be a reasonable one even if there are other reasonable choices available that could have been taken. Further, the question is whether the choice is reasonable and not whether there are other options that might be considered to be more reasonable per *Haveling LBC v MacDonald* [2012] UKUT 154 (LC).

61. Finally, reference was made to *Kular and Prior Place Residents Association v Kingsoak Homes Ltd* [2013] UKUT 15 (LC) as to the principle that whether services have been completed to a reasonable standard is a matter for the Tribunal and if not, then the Tribunal will value the services as they were actually rendered.

62. In addition, the Applicants particularly relied upon the case of *Collingwood and Other v Carillion House Eastbourne Limited,* although the Respondent disputed the effect. The Upper Tribunal found that the FTT had considered the incorrect issue, referring to managing agents' fees in respect of external works instead of charges for running the landlord company, including submission of its accounts and annual return. The key point for present purposes is that the lessees were only required to pay fees and disbursements incurred in the management of the property, not the management of the landlord company. There are somewhat different circumstances between Carillion and the Estate but that does not alter the principle.

63. The Tribunal also specifically addresses the standard of challenge which a lessee must produce. That is that the lessee must establish a prima facie case of unreasonableness for service charges to be in issue as explained in, for example, *Enterprise Developments LLP v Adam* [2020] UKUT 151 (LC). It is not enough for a lessee to simply require the landlord to prove that service charges are payable, including in respect of the service costs: the lessee must advance a basis upon which they may not be such that the landlord then has to demonstrate reasonableness and payability. As to the approach taken to deciding small items referred to above, the Tribunal has applied this case in concluding that the Applicants has not sufficiently demonstrated such small items to potentially been unreasonable for any contrary case to be proved.

64. It is well- established law that the Leases are to be construed applying the basic principles of construction of such leases, and where the construction of a lease is not different from the construction of another contractual document, as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (paragraph 15):

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

65. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

> "the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

66. All of those authorities and propositions are regularly advanced before the Tribunal. The Tribunal does not consider any of them controversial or more detailed discussion of any of the cases to be required. There are other authorities referred to by the parties with regard to other specific points rather than with regard to wide principles regarding service charges but the Tribunal addresses those when considering the particular points.

The Hearing

67. The hearing was conducted at Havant Justice Centre in person across some three days, 3rd and 4th December 2024 and 20th December 2024. The gap reflects the Tribunal having hoped to conclude the cases in the first two days and other commitments having prevented an extra day convenient being identifiable at any earlier date.

68. The Applicants represented themselves. The Respondent was represented by Mr Jason Nickless of counsel. Both sides produced Skeleton Arguments.

69. That of the Applicants comprised some twenty pages. It suggested that a two- day hearing (as intended) meant that time was short. The Skeleton Argument listed certain specific challenges in respect of items of service costs the original total of which was £601,500.00 and hence a maximum of £3,909.75 of service charges- assuming none at all to be payable for any of the items- were challenged in that.

70. The Tribunal understood that document to effectively define and delineate the principal matters with which the Applicants took issue. To that extent it appeared very helpful and to an extent reduced the matters which this Decision may have needed to address. However, the Skeleton did not in terms withdraw other issues raised and Mr McGuinnes identified at the start of the hearing that the matters in the Skeleton had been taken from the Scott Schedules and that all arguments the Applicants wished to run were set out in those, so not just the Skeleton Argument items. Hence, the Tribunal has considered the individual items in the Scott Schedules, but bearing in mind the Skeleton Argument items and themes and the determinations the Tribunal has made about those and matters specifically raised in the hearing.

71. Mr Nickless' Skeleton Argument dated 28th November 20224 of nine pages, together with various case authorities, as referred to above. Amongst various submissions, it was identified that the Respondent had identified nineteen what it termed "key points" which it had addressed in the document termed "Responses to the Scott Schedule" [299]**.** Those pre-dated the Applicants' Skeleton Argument and so are considered in light of that Argument. That contained certain concessions about matters agreed to be company liability.

72. The Tribunal did not inspect the Property. The Tribunal was content that the nature of the Building and any matters in respect of which there was a need for visual evidence were demonstrated by photographs so that it was not necessary to inspect in order to the determine the matters remaining for determination. Neither side demurred.

73. The Tribunal addressed at the final hearing an application by the Respondent dated 26th November 2024 for what was in effect relief from sanction and/ or an extension of time in respect of the hearing bundle, which was provided later than directed. The Respondent essentially argued that it had experienced a number of technical difficulties and the documentation had been difficult and more time- consuming than expected to manage. The application was granted, the circumstances- and not least the fact that all concerned were utilising the bundle- rendering it appropriate to do so. As that was not controversial, the Tribunal does not consider it necessary to say more.

74. The Tribunal also dealt with general housekeeping, including the question of whether there had been duplication in challenges, in respect of which the Tribunal heard the parties' comments but could otherwise consider matters when reaching its decision.

75. The Tribunal received the written witness evidence from the Applicants Craig James McGuinnes [337- 408] and Wendy Susan McGuinnes [410-471] and also from Christopher Queen [474- 484], Christopher Broadbent [486- 493], John Collins [494- 514] and Anthony Tetchner [515- 517] for the Respondent. Oral evidence was also given by both Mr and Mrs McGuinnes in support of their case (the latter essentially covering the same ground as the former and hence referred to considerably less below simply for that reason) and by Mr Techner, then Mr McQueen, then Mr Collins and finally Mr Broadbent for the Respondent in support of its case.

76. Closing submissions were made by Mr Nickless followed by Mr McGuinnes, as added to by both as appropriate in response to questions from the Tribunal.

77. Prior to that, there was discussion about further Scott Schedules provided by the Applicants on 19th December 2024, so the day before the third day of hearing. The Respondent objected due to the late nature: the Applicants said that there had been an attempt to review matters and withdraw entries. The Respondent was content with any additional concessions, but the parties were not able to address the additional schedules in any detail.

The Tribunal considered it helpful to be aware of any challenges not pursued but it as difficult to know how to deal with the various schedules- see further above.

78. The Tribunal should say that it is grateful to all of the above for their assistance with these applications.

79. Various other documents were produced in the course of the hearing being firstly fire risk documents, namely a Fire Risk Appraisal report of Tri Fire Limited from 2021 (193 pages), a Fire Risk Assessment and Action Plan of Quantum Compliance from 2018 (36 pages) and other from 2020 (55 pages). In addition, management agreements with HLM Property from 2020 and Alexander Faulkner from 2021; a CCTV camera plan (from which the Tribunal took the number of cameras), board minutes of the meeting held 11th March 2019. Additionally, there was a further report of Quantum, this time in respect of External Cladding from 2020 (28 pages) and then a Façade Survey Assessment Report (including EWS1 Determination) from June 2021 (142 pages). Finally, another Fire Risk Assessment Report was provided from an assessment in December 2023 by Resi Safe UK (22 pages). The Applicants initially objected to the last of the above documents, disappointingly only provided on the third hearing date of 20th December 2024 and requiring the case to be stood down to enable the Applicants to consider it.

80. The Tribunal accepted all of the above in evidence and no objection was required to be dealt with. Insofar as those documents require reference, that can only be done by referring to the documents generally- the documents were not added to any PDF bundle. It should be recorded that the Tribunal sought to read pages that the parties had specifically mentioned but took the same approach as taken to the bundles to these additional 500 pages or so of documents.

81. For completeness, the Applicants also sent in additional documents in February 2025, but the Tribunal had by then completed its reconvenes and reached agreed decisions on all elements determined and it had done so on the documents produced and evidence and submissions received prior to and during the hearing days. The Tribunal did not consider that it could go back over that on the basis of additional documentation, not least where no application had been made for reliance upon that and the effect of any admission of the documents or any of them was unknown, but could require other additional evidence and/ or submissions, potentially causing even further delay and almost inevitably producing additional time and cost.

82. Finally, the Respondent made some further concessions at the end of the hearing about items not demonstrated to be payable, for example as to invoice 9 for year- end 2021, invoice 41 for that year related to a settlement sum and costs paid to a staff member.

Consideration of the Disputed Service Charge Issues

83. The Tribunal now reaches the actual consideration of the issues. In doing so, the Tribunal does not set out the parties' cases at length in advance of discussion of the relevant issues. The Tribunal refers to the relevant parts of the parties' cases in its consideration of the matters below.

84. The Tribunal has limited itself to the specific matters identified by the Applicants as being in dispute and has not sought to consider whether there may have been any issues with the demands or any other reasons why sums may not be payable. By that comment the Tribunal does not seek to imply at all that there might be such matters, merely the Tribunal simply did not consider issues which a party did not raise.

85. The Tribunal first deals with a preliminary matter as to the extent of its jurisdiction. The Tribunal then takes each of the points pursued in the Applicants' Skeleton Argument, described as "Specific Challenges", in turn, giving them the titles provided in the Applicants' Skeleton where practicable. The Tribunal then addresses some other areas of challenge or query which affect all or some years raised during the hearing and any other notable themes relevant to understanding sums in the Scott Schedules.

A- Preliminary matter- extent of jurisdiction

86. The Tribunal accepts that this aspect was not directly raised with or by a party. It may be that the answer appeared so obvious that nothing needed to be said about it. However, there are items in the Scott Schedules to which the determination immediately below is relevant and hence the Tribunal considers it appropriate to address the point for the avoidance of doubt.

87. The aspect is that charges to the Applicant related to the Marina berth are not, the Tribunal determines, residential service charges and so do not fall within its jurisdiction at all. Consequently, nothing said below relates to such charges and in the Tribunal's comments on the Scott Schedules (see further below), the Tribunal has simply identified the matters which relate to the berth and said nothing more about them. That is unless there is any relevant to the residential service charges, which is touched on where any relevance arises.

88. It is identified above that the Lease makes no reference to the berth forming part of the Property. Indeed, a separate title document exists creating rights and obligations which do not directly impact on those in respect of the Property. It may be that if the Lease had specifically included the berth the answer would have been different but there is no merit in discussion of a situation which does not arise.

B- Specific Challenges set out in the Applicants' Skeleton Argument

i) Service charge percentage

89. The Tribunal identifies this issue to be one of whether the percentage ought to be 0.65% or ought to have been altered from that. The Respondent's Skeleton Argument stated that the matter was agreed, although that of the Applicants did not and rather dealt with the matter at some length. In the event, both sides' case was that the percentage applicable is 0.65% and so there is no specific dispute as to the percentage to apply which requires determination. On a fine balance, the Tribunal sets out some of the Applicants' argument, although emphasising that there is no impact on the service charges to be determined.

90. The Applicants identified that the 0.65% was the service charge percentage for the Property provided for in the Lease with the garage included in the title, garage 38. However, in 1995, the garage was sold. The Applicants noted that there was no split of service charges between the Property and the garage. It is said that a Deed of Licence and a Variation of the (Under)Lease were entered into dated 20th November 1995. Subsequently, the lessee of Flat 155 purchased a different garage, garage number 67. A document described as a Supplemental Lease dated 26th June 1998 was entered into. The effect was that the lessee would pay an increased percentage of service costs for the Property and garage 67 of 0.7%, so 0.05% more than the share had previously been. That is, most notably, more than the Applicant has in fact been charged.

91. There was a good deal said more generally about garage sales and clause 5.7.1 of the Lease. The Applicants were critical of the Respondent for not ensuring compliance with the provisions of the leases and permitting garage sales and asserted a mis- use of power. Mr Collins referred to the creation of a Framework document for garage sales. The Applicants identified that Mr Collins said in his witness statement that it had been hit and miss as to whether service charge percentages had been adjusted when garages had been sold, which the Applicants criticised losing control of the service charge percentages and divisive but also referred to a "notional" 0.05% in respect of the garages themselves, which was said to sometimes have been applied to the garage where that had been sold off. The specifics were of other transactions not clear to the Tribunal, but nothing turned on those, the question being the service charges payable by the Applicants and not those payable by other lessees, whether of flats or garages or both.

92. The Tribunal observes that the Lease provided no breakdown in respect of the service charges applicable to the Property on the one hand and the garage then forming part of the premises leased on the other. Further, there was no hint that a 0.65% share of service costs had been reached originally by the contracting parties adding 0.6% for the Property to 0.05% for the garage. It was an odd feature of the history that the then- lessee of Flat 155 had not received any reduced liability for service charges on garage 38 being sold but the further then- lessee had on paper received an increased liability when a replacement garage was acquired. However, that had no impact in the event.

93. That is because the Applicants identified that in practice, the Respondent never had charged 0.7% and had continued to charge the 0.65%. That

0.65% is the share which the Applicants had paid when making payments. The Respondent accepted unequivocally that the percentage payable by the Applicants is 0.65% and so the Tribunal records that. Given the Respondent's acceptance of the percentage argued for by the Applicants, there is no dispute as to the share payable. Hence there is nothing for the Tribunal to determine. The Tribunal's only effective determination is that it does not have jurisdiction to determine this aspect, given that there is no dispute requiring determination. There is necessarily no impact on service charges the subject of these proceedings and that is the key point to make. The Respondent has demanded service charges at the level of 0.65% of the service costs.

94. Mr McGuinnes said that the Applicants wish the Lease to be varied to provide for the 0.65%. The Tribunal can understand that, given that it is less than wholly satisfactory that whilst the percentage is agreed in practice to be 0.65%, the paperwork suggests a higher percentage. It is at least possible that may cause issues for the Applicants on any sale of the flat and it is to be trusted the Respondent would wish to avoid that. Similarly, it may be problematic if at some stage in the future the agreement to 0.65% is forgotten and the Respondent or an agent attempts to charge 0.7%, with the apparently inevitable result of a dispute and the expenditure of time, and potentially costs, on both sides. It is beyond the remit of the Tribunal in this case to deal with any variation, but the Tribunal invites the parties to consider how the discrepancy between the paperwork and the reality might be addressed.

ii) <u>£54,298.00- Legal fees incurred by the Respondent</u>

95. The Applicants' case was that the legal fees incurred by the Respondent in relation to the previous proceedings between the parties ought not to be charged as service costs. It was common ground that the costs related to previous proceedings between the parties and those had been settled by the Settlement Agreement referred to above**.** The Applicants otherwise identified the sum for legal costs had been removed from the costs for the purpose of the 2022 accounts but added back for the purpose of the 2023 accounts.

96. In the course of the hearing, the Respondent conceded this item not to be chargeable as service charges and hence again no determination is required by the Tribunal. The Tribunal has included this item principally because it was a live one at the start of the hearing and the Applicant's Skeleton Argument numbering reflected that.

97. However, the Tribunal does note that in the 2021 figures there is a separate entry for the fee for a mediator in relation to the same case. The Tribunal has treated the matter as either being included in the concession or the Respondent otherwise failing to identify why it ought to be treated differently.

iii) <u>£146,348.18- Ground Rents x 2 & Port Solent Charge payments from Service Charge Account</u>

98. The Applicants contended that sums payable by the Respondent should not be billed to the lessees as service costs but rather asserted that they were company costs for the Respondent. The Skeleton Argument did not provide a reason. In closing Mr McGuinnes said that the Respondent had said to the lessees that it would not pay the sums, the Tribunal understands because of a lack of invoices. However, there was then a threat of forfeiture of the Respondent's lease and payment was made. Three individual sums of costs were referred to- £47,072.50 for 6 months Ground Rent 1/07/20 -31/12/20, £47,072.50 for 6 months Ground Rent 01/01/2022 - 30/06/22 and £62,203.18 for 01/04/2020 Port Solent Charge.

99. However, the Respondent said that whilst the three items appear in the Respondent's accounts, they are accepted not to be service costs and had not been charged as those. They were not included in the service charge year end accounts. The Applicant has not been charged any share of the cost. The Responses to Scott Schedule had also, the Tribunal notes, explained that.

100. The element, whilst at first blush a substantial one, is very simple to deal with in the event. The Tribunal was content on the evidence that no service cost has arisen and there no service charge has been demanded in respect of this item for it to determine. Hence the sum shown in the annotated Schedules as allowed is £Nil but not as a reduction.

iv) <u>£25,511.80- Construction of enclosed Bike store (and workshop)</u>

101. It should be noted that the Tribunal has reversed the order of dealing with this item (the sixth listed in the Applicant's Skeleton Argument, although the items were not given specific numbering) and the next two items because of the additional matters said in respect of the bike store with regard to the exercise of discretion, which the Tribunal agrees is relevant to this item but which also has relevance to the next items and indeed others. The principle of whether the Respondent was able to incur costs in respect of 'enhancement' impacts on a number of elements in the dispute. The Tribunal considers it better to deal with the discretion aspect most fully under this item as the Applicants did so but that it would not be effective to do so in the third item discussing that rather than the first.

102. The discretion aspect arises because this item was challenged as being an improvement and so not something for which service charges are payable. The particular question would be whether the store is an "installations …….. necessary or advisable for the proper maintenance benefit safety and administration of the Estate or for the benefit and safety of the Tenant including the provision of any further or additional facilities for the Flat Owners" within clause 8.2.8.4.

103. The Applicants' Skeleton Argument asserted that the Respondent relied on clause 1.1.4 and added to the general arguments about this item specific reference to two case authorities. Those are the now quite old and well-

known authority of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1K.B. 223 ("*Wednesbury*") and the somewhat newer authority of *Braganza v BP Shipping Ltd and another* [2015] UKSC 17.

104. *Wednesbury* provides the basis for consideration of reasonableness of a decision of a public body, or at least where a decision may not be reasonable- reference is made in other authorities to a decision being argued to be "Wednesbury unreasonable". *Braganza* essentially considered the exercise of a discretion by a party given the entitlement to so exercise under a contractual provision, the very particular facts not requiring recounting here. The Applicants also mentioned in their case, although specifically about the change to the service charge percentage discussed above, the case of *Aviva v Williams* [2021] UKSC 0059.

105. The bike store was agreed by the parties to have been newly constructed in 2020, the challenge to the cost therefore potentially impacting on service charges for the 2020 year. It was specifically identified by the Applicants that whilst the building is described as a bike store, one third of it is sectioned off for use by the Respondent as a workshop. That was not in dispute.

106. The Tribunal noted the cost of this item, although split between the 167 flats as with other costs. The store involved a capital cost to provide an additional building. The Tribunal considered this element to be a little unusual insofar as it results in an additional permanent building structure but that no specific issue of principle is created by that.

107. The Applicants asserted that on the basis that the Respondent relied on the building as being an 'improvement' to the Estate, the Lease did not use that particular word. The Applicants also complained that the store has limited capacity, so was not usable by everyone. They argued that the bike store was not necessary and that whether it was desirable is a matter of perspective.

108. The Respondent's case was that the Respondent was given as wide as possible a discretion, the Lease giving "absolute discretion" in clause 8.2.8.4 and again in paragraphs 1.1.4 and 1.1.8 of the Fifth Schedule. Mr Nickless argued that *Wednesbury* did not apply, the question being one of rationality- from *Braganza*- not 'Wednesbury unreasonableness'. Equally, any relevant other test such as any from *Williams* was easily passed. It was argued that the bike shed did add amenity and would add to the value of the properties.

109. The Tribunal determined that this item is covered by clause 8.2.8.4 and the ability within the wide terms of that for additional facilities to be provided. The store involved a capital cost to provide an additional facility. There is, the Tribunal finds, a benefit to the Estate and to residents by there being a bike store. The security of the bikes which are placed in the store is increased, the extent to which bikes may be left secured (or not secured) around and about the Estate is reduced. The ease for residents

with bikes of securing them and potentially the number of residents who might purchase bikes in the knowledge of there being a secure placed for them is increased. As to clause 1.1.4 and 1.1.8, there is nothing additional requiring adding.

110. Inevitably, not all residents will own bikes or will wish to do so. However, that will apply to any facility in situ or sought to be provided. The facility was not an unreasonable one whether by its nature or by any limit to its potential use by residents. That said, the Respondent's suggestion of increase to the value of flats on the Estate lacked any evidential basis and amounted to pure speculation.

111. The Tribunal determines that the exercise of the Respondent's discretion was reasonable. It was a reasonable decision to reach to provide for the bike store and there was nothing provided by the Applicants to impugn the process undertaken.

112. The Applicants did not challenge the amount of the expenditure by the Respondent arguing that the cost to build the bike store ought to have been a lower one or argue that if service charges were payable, those ought to have been lower. The Tribunal therefore determines the service charges for the bike store are payable as demanded.

113. It also follows from the above determination that where a challenge is brought on the basis of the Respondent lacking the ability to incur costs on any matters which may improve the Estate, that challenge also fails in respect of the broad entitlement of the Respondent, unless a particular improvement can falls outside of the wording of clause 8.2.8.4. Such challenge can only succeed if the Applicants demonstrate that the cost was not reasonable on an item by item basis, and then to the extent of the level beyond the amount reasonable, or there is some other particular reason why the charge for that item is not payable. The Tribunal does not repeat its determination about the construction of the Lease at the same length in relation to the other items in respect of which the same argument was run.

v) <u>£7,852.69- Marina Boardwalk Lighting</u>

114. The Applicants identified that board minutes recorded that 75% of the marina lights had, as at that date, been replaced. It was said that water had got into the fitting and so replacement had been with sealed units.

115. It was argued by the Applicants that the lighting amounted to an enhancement, if anything, of the Estate and that such costs, across the service charge years 2020, 2022 and 2022 fell outside of the matters chargeable as service charges. This was another challenge brought on the ground that the Respondent's obligations did not extend to making improvements and that the Respondent was not entitled to incur service costs, and hence demand service charges, on matters which amounted to improvements.

116. The Applicants argued that having lights did not prevent people falling into the marina, they would be of no help if someone did trip over, for example. The Applicants also contended that the lights were not the appropriate type, that they were too bright for yachtsmen approaching at night on the water and more widely that they were not desirable. The Applicants did not advance an argument that the cost for lighting fell outside of a reasonable level of costs and that the service charge payable by the Applicants of a little over £50.00 should be reduced to a lower figure.

117. The Respondent again relied upon clause 8.2.8.4. and contended that the lighting was something which the Respondent was entitled to put in place and to incur service costs for, the Tribunal understood as part of the "Total Expenditure" as defined above.

118. The Tribunal agreed. The Tribunal determined that the wording of the clause, most obviously (picking particular words) "advisable for the proper benefit safety ..... of the Estate or the benefit and safety of the Tenant" amply covered the provision of lighting.

119. The Tribunal determined that the boardwalk lighting was lighting was an addition to the Estate sensible to seek to reduce the scope for accidents to residents and visitors. There was plainly less risk if people could see where they were going, accepting the Respondent's case as to improved safety- the Respondent said an alternative would have been fencing but that would have been an eyesore. It was advisable in order to enhance safety. The Tribunal determined on the evidence provided, the cost to be reasonable and the consequent service charge to be payable.

vi) <u>£9,457.20- EV Car Park Charging Units</u>

120. There was a good deal of debate about this item charged as a service cost in 2023, although the service charge sum to the Applicants arising from it was £61.42, so whilst it was not the smallest of the items challenged in the case, it was also by no means a substantial sum in terms of charges.

121. It was common ground that the EV charging was another additional facility pursuant to clause 8.2.8.4. Much of the matters discussed above as to discretion were therefore relevant. The issue turned on whether it was for the benefit of the Estate and of the Tenant, and featured the question of whether the cost was justified by the level of benefit achieved. Whilst not directly relevant, the Tribunal noted that various matters were put to Mr McQueen about this element by Mr McGuinnes and it was said that the Respondent had originally been going to pay for the installation, the Tribunal understood from company funds, but then changed its mind to charging the cost to service charges.

122. The Applicants asserted that at the time of installation there were only 8 electric cars within the Estate. The Applicants argued that the installation was not necessary and there was no obligation for the Respondent to instal. The installation was for the benefit of the few and had caused the loss of other parking spaces. The Respondent argued that

amenity was enhanced and the use of electric vehicles encouraged. In closing Mr McGuinnes questioned whether electric vehicles were the future suggesting that to be a matter of ongoing debate.

123. The Tribunal found that the EV charging units are of benefit to the Estate and to the residents on the Estate. It is uncontroversial that there has been an increase in the number of electric vehicles and that is expected to continue. Whilst there are differing views about electric vehicles, it is government policy to prevent the sale of petrol or diesel engine vehicles by 2035, with only certain hybrid engines being permitted after 2030, and that follows something of a pattern in policy. It is also well-documented that the availability of charging for electric vehicles needs to increase as more electric vehicles are used. The Tribunal has encountered a number of other estates on which charging units have been installed and where that there have been disputes as to contributing to the cost.

124. The Tribunal agreed with the Applicants that the majority of vehicles remain petrol or diesel powered and so currently the percentage of vehicles for which EV charging is relevant is limited. The Tribunal accepted that there is ample scope for differing views as to whether a landlord should provide EV charging and also at what point it may be appropriate to do so.

125. However, the Tribunal determined that it is plainly of benefit to those residents with electric vehicles for there to be EV charging. The charging is also of benefit to any resident who buys an electric car at such time as they do so and similarly anyone considering doing that. The ability to charge is also likely to increase the prospect of a resident purchasing an electric car as opposed to one conventionally powered and that would generally be seen as a positive. The Tribunal determined that the Respondent exercising its absolute discretion was entitled to conclude that the charging is advisable for the benefit of the Estate. There is nothing irrational about reaching such a conclusion.

126. The Applicants' challenge was in respect of the principal rather than arguing that the cost fell outside of range reasonable for the works. Hence, having determined that the item is one for which service charges can be charged, the Tribunal determines the service charges demanded for this item to be payable as demanded.

vii) <u>£12,862.70- CCTV maintenance costs</u>

127. This challenge related to each of the service charge years challenged. The sums of costs varied year to year.

128. The Applicants argued that the Respondent was not able to operate a CCTV system and also that the system had been misused in seeking to track Mrs McGuinnes.

129. The first of those points was based on the Respondent not being registered with the Information Commissioner's Office in compliance with data protection requirements and also an argument that the number of

cameras was excessive. There had been no identified impact assessment and staff had not been appropriately trained. The Applicants argued that CCTV was very much a secondary solution to security concerns and Mr McGuinnes asserted in oral evidence that both the quantity was not necessary and should be reduced and that the image quality was poor. The second point was not clearly explained and the additional relevance to service charges was not identifiable.

130. The Respondent, in contrast, argued that CCTV is necessary for what is a large block of luxury apartments on an estate which it is possible for the public, including criminals, to access and indeed the estate could not be fully enclosed given water access. Further that the broadly horseshoe shape meant that to ensure coverage, a fair number of cameras are required.

131. The Tribunal finds that the Respondent was a data controller as the Respondent was or should have been aware (as one reason, it was raised with Mr McQueen that the agreement with Alexander Faulkner specifically referred to the Respondent being). The Tribunal considers that the Respondent ought to have had a nominated person responsible for data and an impact assessment ought to have been carried out. The management of data by the Respondent is not, the Tribunal considers on the evidence provided, satisfactory. Either the Respondent ought to have ensured it complied or it ought to have sought advice about any such potential obligations. It is arguable that the managing agent ought to have provided assistance in relation to the matter.

132. However, the fact that the Tribunal determines that the Respondent has not managed data as it ought, does not, the Tribunal determines, mean that it ought not to have CCTV cameras at all, nor fewer. Equally and of more immediate relevance, failings are not so egregious as to render unreasonable, the Tribunal determines, the Respondent incurring costs in maintaining CCTV cameras that are in situ.

133. The Tribunal considers that any dispute between the parties as to misuse of any of the CCTV- and it is plain that there is a dispute- does not impact on the determination as to maintenance cost. It is not, for example, said that Mrs McGuinness should have a defence of set- off against any service charges otherwise payable, nor on what basis. Hence the Tribunal considers the dispute to fall outside of the scope of this case and therefore seek to make no determination about any aspect of it.

134. The Tribunal notes that the Applicants' challenge is to the cameras and the data issue referred to above and not about whether maintenance of cameras which are in place is required nor was there a challenge to the cost incurred for that maintenance work. As the challenge which has been brought has been unsuccessful, the Tribunal determines that the service costs are reasonable and the consequent service charges are allowed in full.

viii) <u>£21,580- Fire Remediation works on Apartment front doors</u>

135. The Applicants contended that the Respondent had no entitlement to undertake this work, which consequently was not reasonable cost to incur. The challenge is to a 2024 item. The challenge is a more specific one than in relation to other fire safety matters.

136. The Respondent again relied upon clause 8.2.8.4. The Respondent accepted that replacement of front doors of flats to improve fire safety would be an improvement and not a repair. The Respondent's case was that improved fire safety was in the interests of all residents and that seeking to reduce fire risk was far from unreasonable and irrational. It was argued that a uniform approach ensuring the same standard for each helped to enhance safety. However, it was also implicit that the Respondent contended that the front doors were an item in respect of which it was entitled to undertake work.

137. The Applicants in contrast pointed to the definition of the Property in the Lease. The Tribunal raised that point with Mr Nickless. He argued that the improvements which the Respondent could make and charge for was not limited by the demise and that the Lease did not state that the Respondent could not attend to the doors, rather the Respondent could exert control over demised flats if that was for the benefit of the Estate and the residents. Mr Nickless then relied on consent by the lessees. It was said in response to clarification sought by the Tribunal that 41 doors had been replaced before it stopped being assumed that lessees agreed. Mr Nickless also argued that if the Respondent had not proceeded on that basis the work could have taken years and there would have been uncertainty when it might finish.

138. The Tribunal determined that the Applicants was correct in relation to this matter. The matter was quite simple and the various submissions made on behalf of the Respondent, without detracting from their creativity lacked substance. Any practical merits could not stand against the lack of legal entitlement.

139. The demise as stated in the Lease expressly includes "doors and door frames" and places no limit on those, that is to say there is no suggestion that the flat front door is not one of those doors. The responsibility of the Respondent is for items which fall outside of the demise. The front doors to the flats were not such an item. The exclusion from parts of the wider Building is of "all of the walls or partitions therein (whether internal or external) except such of the plastered surfaces thereof and the doors and door frames fitted therein as are expressly included in the demise". Hence, there is further emphasis on doors being included in the demise (save necessarily those only situated within the common parts). The Lease provided details as to what was contained in the demise and what was not, for example it distinguishes between window glass and window frames. That strongly indicates that if there had been any intention to include the flat front door as being an items outside of the demise that would have been stated.

140. The doors belong to the lessees. They are entitled to have that respected and for what is part of their property not to be interfered with. The

Respondent had no entitlement to undertake any work to the front doors of flats, which fell outside of matters the Respondent was responsible for and outside of matters the Respondent had any basis to be able to charge for work to as service charges.

141. The approach adopted that the Respondent informed the lessees that approach would be taken, as both Mr McQueen and Mr Collins explained, and undertook the work unless the lessee actively objected- which Mr McGuinnes put as being an approach of assuming permission by default- ignored to whom the doors belonged. Mr McQueen's contention that there was a right to undertake work for health and safety reasons was wrong. The newsletter which "explained" the Respondent had that power will therefore have misled lessees. Mr Collins said that the Respondent started with flat doors ahead of communal ones as it appeared easier to get on with those- and it may or may not have been, but equally that has no relevance- whereas the communal doorways varied as to what was wrong and required attention.

142. The Tribunal fully agrees that ensuring that the front doors to the flats were fire safe was important, not only because insurers may have required them to be attended to (and issue addressed at some length with Mr Techner) but more generally for safety. The Tribunal does not suggest that the condition of the doors should have been ignored by all concerned. The Tribunal noted that the Quantum Compliance report dated 6th August 2020 raised the fire risk rating to substantial with concern about cladding, fire stopping and fire doors, so plainly doors (including but not limited to flat front doors) played a part. However, there is difference between the need for the work and the question of who is able to and should undertake that work.

143. The conclusion of the Tribunal as to entitlement on the part of the Respondent to undertake the work and charge it as service charges should not be taken to diminish the need for fire safety in itself. It is added for completeness that as at the time of the hearing, Mr Collins said that the communal doors, so in hallways and corridors, had not been attended to. Given the ongoing hazard and in escape routes, one imagines that will be changing imminently if not already now dealt with.

144. The Tribunal further accepts the potential for cost saving by the Respondent instructing a contractor to replace all fire doors as compared to the cost if each lessee were to instruct their own contractor for their door alone. The high likelihood is that undertaking work on each door individually, with no economies of scale or bargaining position arising from the ability to offer a wide contract, would produce a markedly greater cost. In principle, the Respondent making arrangements for each individual leaseholder who wishes that and arranging a contractor to undertake replacement of all of those doors is eminently sensible. The point as to when the work might be completed if left to individual lessees or dealt with in another manner has some merit but again cannot override property ownership.

145. The Tribunal determines that arrangement made between the Respondent and any lessee- and any consent which the Respondent may have been given- would be a matter of contract separate to the individual leases. A lessee can agree for the Respondent to take organise a replacement door and agree to pay the Respondent. However, the charge rendered by the Respondent is not thereby a service charge. Rather it creates a separate liability on the lessee. No part of the sum may be recovered from any other lessee. Therefore, the cost incurred by the Respondent in respect of doors replaced is not a service cost payable by the lessees collectively, including the Applicants. It is not recoverable as service charges at all. Other matters referred to by the parties about contact and time spent have no relevance in the circumstances.

146. The Tribunal notes that this scenario is encountered with some regularity, somewhat unfortunately, where landlords seek to replace front doors for fire safety reasons, but the doors fall within the demise of the flats and nothing in the Lease entitles the landlord to undertake the work. Any fire safety obligation in respect of the front doors to the individual flats lies with the lessee of the given flat.

147. There are entries in the 2023 Scott Schedule where it is unclear whether the sums fall within the total given by the Applicant above. Additional comments are briefly noted.

ix) <u>£1895- Marina Wooden Gates Access to marina western end of Oyster Quay</u>

148. The Tribunal also takes this item out of the sequence in which items were raised in the Applicant's Scott Schedule, simply because the next items all relate to aspects of fire safety but do not turn on the construction of the Lease and address matters more widely (although specific matters where reports relevant are not referred to in chronological order and the overall position is imperfectly drawn out). The Tribunal highlights that the Applicants' share of this cost was £12.32. It is appropriate to deal with the item in brief terms.

149. The Applicants stated that there had previously been a wall and that was replaced with the double gates. It was said that was to allow access for cherry pickers and maintenance, but the works were an enhancement and so not chargeable. The Applicant suggested the gates benefitted the Respondent's staff rather than others.

150. The question of enhancements as termed by the Applicants and the ability of the Respondent to charge costs incurred in respect of such when calculating service charges has been dealt with above. There is no need to repeat the principles.

151. The Applicants did not discernibly dispute that the ability of cherry pickers to access through the gates was of benefit and it was difficult to understand how that might only benefit the Respondent's staff rather than the Estate as a whole. The Applicants did not dispute the amount of the

cost incurred in relation to this item. Whilst there is room for argument that provision for access should have been made when the development was carried out, there are various reasons why that would not render the installation of gates to be unreasonable and in the absence of any other point being taken, the Tribunal does not unnecessarily address those.

152. The Tribunal determines that the Applicants' challenge to this item fails.

x) £89,665.58- challenged G Hallet Invoices

153. This is a further significant challenge in money terms, the Applicants' service charge contribution demanded being in the region of £600.00 overall. There are again challenges to costs for each year, although the costs incurred year by year to be challenged vary significantly, from £840.00 in 2022 to £41,510.00 in 2024 and the size of the Applicants' share varying with that. The item is another on which a good deal of time was spent, particularly the work that relates to EPDM and rubber fitted to balconies of flats within the Estate.

154. It should be identified that there were a large number of different G Hallet invoices and some related to other work. It was not considered by the Tribunal that a sufficient case had been advanced about the latter category even to have required a response and so the Tribunal says no more about them.

155. The Tribunal carefully noted that there have been a number of fire safety reports commissioned in recent years, although the Tribunal does no find that unusual in itself, rather it reflects the high priority being given to fire risks, in respect of which the requirements and advice have altered from time to time (this is returned to below). As identified above, the reports arrived with the Tribunal somewhat piecemeal as issues were raised in oral evidence, which was less than ideal. Mr McGuinnes contended that the Respondent had not been forthcoming with reports and the Tribunal found there was some validity in that from the evidence it received. Various different reports are referred to in discussing this item and the next items. The one to which Mr McGuinnes referred had to be directed by the Tribunal to be produced.

156. The Respondent relied upon a report from a company called Tri- Fire [not in the bundles] which identified the balconies to be open- aired (one balcony is not above another) and adjacent to and/ or constructed the top and bottom layers of the balcony construction to be from non- combustible materials. The conclusion expressed was, "we believe the risk posed by the balconies is low and no remedial works are required". Mr Nickless' succinct closing on this item was that the EPDM is sufficiently encased as to be fire safe. He had put to Mr McGuinnes that the question was not about the membrane individually but rather the system as a whole.

157. The Applicants highlighted that one layer consisted of blue polystyrene foam insultation and there to be glass fibre capping. The Applicants cited

the Ark Sustainability Façade Survey Assessment Report dated 4th June 2021 [not in the PDF bundles as identified above] which identified a number of combustible elements within the balcony composition. The Applicants asserted that Tri- Fire assumed a lack of combustible elements and were incorrect and it was not reasonable for the Respondent to treat the report as correct. The Applicants did not accept there to be suitable fire resistance and so, implicitly, the products to be appropriate for use. Mr Collins was challenged in cross- examination for reliance on the Tri- Fire report. Mr McGuinnes contended that Ark had tested the construction, whereas Tri- Fire had not.

158. The Applicants separately referred to a February 2020 report of Quantum Compliance identifying issues, including as to the insulation and a lack of cavity barriers (see further below). Mr McGuinnes said in oral evidence that the EPDM ought not to have been used in light of other features of the buildings. However, Mr McGuinnes also accepted in oral evidence that if the EPDM was properly encased, the concern would go away.

159. The Tribunal agreed on the evidence that EPDM is indicated to be flammable in itself and hence is likely not be appropriate for use in various instances. There are other fire safety deficiencies to the buildings. The key point however, in the determination of the Tribunal is that the EPDM is encased in concrete and slabs. The specific construction as described and not challenged is that there is concrete, covered by the membrane (the EPDM), covered by insulation and then covered by another concrete slab. It was said that the roof are constructed in the same composition. The Tribunal carefully noted the reports and concluded that the overall composition is acceptable on the evidence presented.

160. The Applicants raised no other issue and in particular not about the specific costs incurred by the Respondent for the work from G Hallet coupled with an assertion and evidence that the maximum reasonable amount was lower. Hence the Tribunal allows the cost and related service charges in full.

161. The Tribunal mentions in passing that the Applicant had asserted an increase in insurance cost because of the cladding and other fire- risk matters being unresolved but that was not pursued and so the Tribunal does not address any such matters. Also, it was indicted the approval from the Building Safety Fund/ Homes England for funding for remediation works in 2025 (and that may indeed be progressing by the time of this decision).

xi) <u>£15,722.28- Waking Watch [4 weeks] by Vespasian Security</u>

162. The Applicants argued that the need for the waking watch was prompted by the failure of the Respondent to implement the recommendations of previous fire risk assessments and so in essence leaving more of a fire risk than avoidable and hence incurring cost to address that risk which was avoidable.

163. The argument effectively amounted to one of historic neglect on the part of the Respondent- the failure to take action sooner- and the increase in cost arising from that.

164. The Tribunal identifies that there are two strands to considering such arguments, as explained in a decision of the Lands Chamber, the predecessor to the Upper Tribunal (Lands Chamber) and the decisions of which are equally binding on this Tribunal. That is *Continental Property Ventures Inc. v White* [2007] L. & T.R. 4.

165. On the one hand, the reasonableness of service costs must be assessed at the time at which the costs are incurred. The question is whether the cost is a reasonable one to incur in the circumstances existing at that point. On the other, in terms of whether service charges are payable in respect of those costs and to what extent, the lessee is entitled to set off the damages which would be payable in consequence of the delay, including a sum for the additional cost. In an arguably somewhat roundabout way, that essentially would get the parties back to the position that they would have been in had work been undertaken at the time it ought.

166. The Tribunal does not identify any challenge from the Applicants to the arrangement of a waking watch for the period one was in place, whether as to the period or the week- by- week cost. Hence, there is no challenge to the reasonableness of the cost: the question is whether the service charges are payable at all applying the principle above.

167. The Applicants contended that the 2018 fire risk assessment had stated that the presence of Automatic Opening Vents and their connected smoke detectors was the only protection against fire in any of the blocks. It was subsequently identified that the vents were wired permanently closed and so would be of no assistance. Work had been recommended and Express Electrical [925] in a quote dated 12th August 2019 offered a discount if a batch of remedial work was authorised at the same time. However, the Applicants asserted that the Board minutes of 7th October 2019 [1231-1236] were said to demonstrated that the Respondent had disregarded the recommendations of the report. The Respondent had failed to follow the recommendations. Mr McGuinnes also suggested in oral evidence that other works had been delayed because of works to the fire doors.

168. The Tribunal noted the 2018 fire report from Quantum Compliance (there were also two 2020 reports, being the February one referred to above and an August one referred to below and the Tribunal is mindful that there have been a series of fire safety reports and that they are taken somewhat out of order in this Decision but where specific matters have been raised from particular ones of the reports). The Tribunal also noted the March 2019 board meeting minutes [provided after commencement of the hearing, not contained in the bundle and so for which there is no numbering], which record the following (the bold heading appearing on the original minutes):

"**7.3 AOV works needed from FRA**

It was agreed that OQML do not feel that these works are a full requirement or necessary for the development, so they will not approve the quote provided by Express Electrical."

169. The minutes of the October 2019 meeting the record the following:

"**4.4 AOV works**

.....
These works were not approved not deemed as required as Oyster Quay as Stay Put so this areas would only need to be used in an evacuation"

170. The Applicants also asserted that the vents are in any event required to be checked annually that they are working and protect the staircases. The fire alarms going off should activate them on all floors. The Applicants' written statements also identify that Hampshire Fire and Rescue Service was concerned at the stay- put policy in place, that being expressed for example in a February 2020 report. The buildings were not of limited combustibility.

171. The Tribunal noted the other fire safety issues at that time, including doors (which includes communal ones), cladding and other matters (and see the next item). The Tribunal considered that there was from reports a clear recommendation for works to the vents some while before the 6th August report from Quantum. It is not reasonable to fail to follow that report and substitute its own assessment. The Tribunal determines that the Respondent ought to have followed the recommendation, which was clear, and the Respondent should not have undertaken its own contrary assessment of whether to do so.

172. Mr Nickless argued that the waking watch was put in place because of a risk and taken away as the risk was satisfied. He argued it to be a positive that the Respondent had managed to go from a waking watch to satisfying the risk in 4 weeks and he submitted, correctly, that many waking watches have lasted for much longer (and hence at much greater cost). Whilst the Tribunal accepted those points as far as they went, that was not so far as to make the original need for a waking watch reasonable, whereas it was avoidable.

173. The Tribunal determines that the Respondent was negligent, in breach of its duties under the Lease and permitted a nuisance (and that all of the elements of the torts are made out) in failing to deal with the vents and thereby compounding other issues.

174. The Tribunal agrees with the Applicants that there ought to have been no need for a waking watch if the Respondent had followed the advice given to it, which it ought to have done, and so the cost ought to have been avoided. The Tribunal determines it appropriate to award the Applicants what is in effect a sum in damages for the failure by the Respondent and in

the sum of the share of the cost which would otherwise have been payable by the Applicants as service charges.

175. No service charges are payable by the Applicants in respect of this element.

176. The Tribunal should make clear that it well appreciates that there are other fire safety elements, the various fire risk assessments making reference to various matters of one type or another. One significant aspect is cladding, a feature of unavoidable note. However, that remained unresolved at the time of the waking watch ending and, in any event, there is insufficient evidence that the cladding could have been addressed any sooner, given the need for funding and where the usual funding process has been followed. It is hoped that the distinction in the Tribunal's approach between specific recommendations being received by the Respondent on the one hand and more general works on the other is apparent in this Decision.

177. The Tribunal notes that the Scott Schedule for 2021 has a figure of £16,800.00 and it is not clear why there is a difference in the amounts, but it is taken that the figure provided in the Applicants' Skeleton Argument is correct and the higher figure was a quote or similar.

xii)<u>£12,918.50 Obstructions in the common areas [Rubbish sacks]</u>

178. The Applicants' challenge is to the charge by the Respondent for the removal of rubbish and the provision of black bin bags in which rubbish can be placed, the amount being the cumulative total of various individual sums across the five years. The Applicants also challenged managing agent fees for allowing the practice.

179. The challenge arises in the context of an unusual provision in the Lease as to part of the Respondent's obligations (not already quoted above as not of wider relevance) which reads as follows:

"8.2.4.2 To procure daily collection and disposal of domestic refuse left immediately outside flat the entrance door to the demised premises"

180. The commonly accepted position is that the Respondent has provided black bin bags to the lessees for rubbish and that the Respondent's relevant employee in the morning collects any liners left outside any flat. That necessarily involves lessees placing black bin bags of rubbish outside the flats and hence in the corridors and those remaining in the corridors until collected. Mr Nickless queried with Mrs McGuinnes where else they could be put if not in the communal areas. There was no answer, but none was needed. The Respondent's position appeared to be that collection occurred every day, but Mrs McGuinnes said in oral evidence 6 days each week. That was not challenged so the Tribunal treats it as correct.

181. The Applicants contended that leaving any obstruction in communal areas breaches the Regulatory Reform (Fire Safety) Order 2005 (as

amended) and the Fire Safety Regulations 2022. Hence, the Respondent's costs incurred in facilitating such breaches should not be recoverable through service charges. The Applicants specifically quoted from the report of FRA Quantum Compliance August 2020, which states as follows:

"Residents currently place bagged rubbish outside flat entrance doors for daily collection by the site maintenance team this increases the fire loading in the common areas and potentially compromises the escape routes. Bag rubbish should not be positioned in the corridors. Review the site's policy and rubbish collection ensure bag rubbish isn't placed in the common areas."

182. The Applicants contended that the Respondent had failed to follow that recommendation. In effect, the Respondent ought to have ceased to collect the rubbish left in the corridor and ceased the arrangement for it doing so. It was said that the Respondent has no knowledge of the contents of the bags and whether any of the contents may be combustible. That in itself is plainly correct.

183. More generally, the report (which the Applicants summarised what they asserted to be the key features in the written statement of Mr McGuinnes [498]) rated the risk to the buildings to be "substantial" in consequence of various fire safety matters which needed to be addressed.

184. The Respondent specifically relied upon the 18th December 2023 fire risk assessment from Resi Safe, although provided very late, about this item, although all else aside it post-dated most of the invoices. Mr McGuinnes suggested it was not clear what that company had been told about the history. In any event, the Tribunal finds that the Respondent cannot justify an approach pre- dating the report on the basis of the later report in any event. The Tribunal returns to that report below.

185. The Respondent' case as presented more generally was that the practice was a very useful one as many of the residents were elderly and it benefitted them to have their rubbish collected and removed. Further, the refuse was only in situ in the corridors for short periods, given the daily collections. It was argued that the risk was "not terrible", the Respondent had been through a process of considering the matter as described in evidence by Mr Collins and what was described as a "balance" had been struck. He said the Respondent had accepted the risk.

186. The Tribunal identifies that the Respondent was placed in something of a difficult situation. The Lease provides it with a specific obligation. The fact that the placing of rubbish in the corridor is contrary to the recommendations in the particular fire risk assessment does not directly relieve it of its obligations under the Lease. In principle, a lessee would be entitled to require the Respondent to fulfil its stated obligation. If the Respondent is to continue with rubbish removal, the rubbish also has to get from the flats to the refuse collection point. It is more difficult for the Respondent to attend to that if the rubbish were not placed in communal areas- it will not have access to the flats themselves and access may not be possible at an appropriate time. The Respondent will equally be unaware

of whether rubbish needs to be collected unless that rubbish is visible to it in the corridor. The Respondent would have to knock on all doors in case there was rubbish to collect.

187. Alternatively, the Respondent was able to cease collection and explain why, seeking as best practicable to ensure that the lessees understood and so accepted that.

188. The notion of the Respondent itself seeking to assess the level of risk and to strike a balance is again a very difficult one. It is a mistake the Respondent has made in respect of other fire safety elements as set out above with regard to vents and it will be appreciated that the Tribunal has indicated concern as to lack of work to communal fire doors. However, the Tribunal is dealing with service charges and so concentrates on those.

189. The Respondent had received the report from Quantum, an expert. Both the potential for flammable materials and potential obstruction were referred to, so two fire risks. The Respondent is not an expert and so it was again sensible to obtain a report from an expert and it is again not reasonable to then fail to follow that report and substitute its own assessment, in particular adding to the scales matters not relevant to the fire risk. The Tribunal determines that the Respondent ought to have undertaken appropriate works and should not have undertaken its own contrary assessment of whether to do so.

190. The Tribunal considers that the Respondent ought to have discontinued the collection of bags from corridors, irrespective of the potential additional inconvenience in dealing with them in another manner, both inconvenience to the Respondent and to the lessees. The Respondent would ideally have obtained agreement from the lessees to an alternative approach with the aim of avoiding any potential action being taken against it. The Tribunal recognises that the Respondent may not have obtained complete agreement but considers that nevertheless, the Respondent ought to have ceased the practice. The potential effects of fire ought to have outweighed any concern about possible action by a disaffected lessee. Those were practical problems to manage but not a proper basis to fail to act in accordance with the report.

191. The Tribunal recognises that the change could not have been instant. Indeed, it may have taken some while for the Respondent to absorb the impact of the recommendation and seek to address matters with the lessees, so that something of a delay in ceasing the practice would have been reasonable. The Tribunal considers that could have been a few months and that overall, a period to 31st March 2021 was a reasonable timescale.

192. The Tribunal does not consider that there is foundation in the Applicants' criticism of the managing agent in respect of this item in light of the reason the Respondent gave for continuing the practice. It is apparent that the decision was one taken by the Respondent and not by its

agent. Given that an agent must necessarily act on the instructions given by its principal, the matter was not within the control of the agent.

193. Having worked through the above, the Tribunal turns to the actual service cost relevant, that is to say the cost of the black bin bags. The first question is whether the requirement on the Respondent to "procure" the rubbish collection means that the Respondent should pay for and supply the bags to be used as opposed to the lessees providing their own bags.

194. The Tribunal construes the Lease provision to mean that the Respondent has to collect or arrange for the collection of the rubbish. The Respondent would incur cost in doing so in terms of staff time or contractor time, and unavoidably. The obligation does not on its face extend to paying for the receptacle in which the rubbish which is to be collected is placed.

195. However, considering the situation overall, the Tribunal has concluded that it was a reasonable cost for the Respondent to incur to provide black bin bags whilst the collection could properly continue. Whilst the total cost over the course of the relevant period under consideration is not a negligible one, it is only a few £ per year per flat and rather less on the basis of collection ending as at 1st April 2021. There was merit in the Respondent providing something which it considered suitable and in avoiding as far as practicable bags which lessees might provide breaking and that causing mess and time being expended in seeking to clean up. Hence, on balance the Tribunal determined that it was pragmatic for the Respondent to supply the bags and one of a range of approaches that the Respondent could reasonably take up until 31st March 2021.

196. The next issue is whether it would have been reasonable for the Respondent to re- instate the leaving of rubbish bags in the corridors and the collection by the Respondent following receipt of the Resi- Safe report. The secondary question is whether it was reasonable to again bear the cost.

197. The Tribunal notes that the Resi- Safe report states "Refuse is collected from each floor daily by the site team" and that may be part of a comment about combustible items being well managed. In isolation that suggests an opinion that Quantum may be incorrect. It suggests that the Respondent could return to the practice of collections.

198. However, the Tribunal is troubled that there is no mention by Resi-Safe of the Quantum report. There is no statement that the Quantum report is disagreed with and why it is considered that the Quantum report is incorrect. The Tribunal considers that the obvious inference, which it draws, is that Resi- safe had not been supplied with the Quantum report. The Quantum report addresses the issue across a few lines with analysis, the Resi- Safe one across a few words. It is relatively implausible that Resi-Safe would have felt capable of making such a brief comment in the face of the earlier report. Alternatively, the Tribunal considers there would have a failure to fully consider the earlier report and an inadequate approach to assessment.

199. The Tribunal therefore prefers the Quantum report for its fuller analysis and then clear conclusion. It follows that the Tribunal determines that it would not have been appropriate to re-instate a collection process which ought to have ceased. It equally and necessarily follows that the cost of supplying refuse sacks for that collection has not been demonstrated to be a reasonable cost in the face of the Applicant's challenge. The Tribunal accepts that the Respondent might have devised an alternative method of collection and it might have been appropriate to supply refuse sacks to facilitate that. However, the Respondent has failed to demonstrate that.

200. The cost of refuse bags purchased from 1st April 2021 onwards are therefore disallowed. Whilst it may be that following receipt of the Resi-Safer report at the end of 2023, it may have been appropriate to consider re- instating the service and that may (although no decision is sought to be made) be relevant to service charges for later years, taking abroad approach the Tribunal determines no distinction is appropriate for any part of the years being determined.

xiii) £303,650.00- Management fees

201. The Applicants challenged such fees to the total sum across the 5 relevant service charge years. A series of different points- in the region of 20- were advanced as to asserted failure of the managing agents and therefore as to the reasonableness of the service provided. The exact number is unclear because some are in bold and underlined and others are in bold but not underlined and it is unclear to the Tribunal whether those were separate points or specific parts of the underlined points. The significance of this item to the Applicants was demonstrated by Mr McGuinnes taking this issue first in his closing. It is also the second-largest (behind staff costs) category of service costs challenged.

202. The Applicants sought a refund for all years, although the Tribunal understood not of all fees. Rather, the indication was that the Applicants considered that the fees should be reduced by 50%. The extent of the refund contended to be appropriate whether in relation to any individual criticism or any combination of them was not identified.

203. On the whole, the Tribunal did not agree with the Applicants' criticisms, although they are rather better founded against HML and there was some evidence in the later stages of employment of AFP. The Tribunal sets out below where it does agree and why. The Tribunal also addresses specifically the elements of criticisms which the Tribunal considers could have most significantly impacted upon the service charges payable had the challenges been made out or otherwise are more significant in the context of the dispute.

204. In addition, the Tribunal is compelled to consider management fees without the benefit of any copies of agreements between the managing agents and the Respondent. On balance, the Tribunal is content to adopt the approach that the agreements would probably have been discovered to

include the sort of terms usually included in such agreements, of which the Tribunal has ample experience. However, where there is an issue about the nature of the management undertaken and the fees, the Tribunal would have expected copies of the agreements demonstrating the tasks the agents were contracted to undertake and any relevant fee structure.

205. The Tribunal accepts the general observations made on behalf of the Respondent that the features of the Estate are such that the management of it might be expected to be more complex than would be the case for other developments of a simpler nature. In addition, there is criticism of the agents for matters which are within the province of the Respondent itself. The Tribunal agrees with the Respondent that asserted failings of the Respondent do not, even where made out, impact on the managing agent fees payable unless there was a clear and identifiable failing on the part of the agents which can be shown to have directly affected the approach of their principal, the Respondent. A particular point regarding Flat 19 is addressed below.

206. Mr Nickless also, however, argued that where the Respondent had identified that the managing agent at the given time had failed to meet the required standards, the agent has been replaced. That was, the Tribunal considered, something of a double- edged sword. It demonstrated that the Respondent took action where appropriate: it also demonstrated that the standard of management had been such that the Respondent felt that action was appropriate. The obvious inference, which the Tribunal draws, is that the Respondent regarded the standard as below the level contracted for and was sufficiently poor for termination of the contract. The Tribunal acknowledges Mr Nickless' submission that it does not follow from termination of a contract with a managing agent that there should be a reduction in the fees. It would unquestionably be too sweeping and imprecise to adopt such an approach whenever an agent is replaced. However, the Respondent's decisions in this instance are considered by the Tribunal a fair response to failings of the particular agents and that those do result in the reasonable level of costs being less than the full fees.

207. The Tribunal determined that it would be likely to follow even from that, that the standard had not been reasonable as compared to the level of fees and so the cost had not been reasonable. As to whether the Respondent sought a refund was a matter for it but if it chose not to do so, that did not mean that the lessees should meet the fees for a standard of service that the Respondent considered not to be adequate.

208. However, more generally, the Tribunal also considered that there had been a significant number of items charged as service charges which even the Respondent accepted, when challenged, should not have been for one reason or another. Numerous of those were either because there was an error by the managing agent in the item being charged to the Respondent at all or because it was a company expense not a service cost. The yellow highlighting on the Schedules presumably placed there by the Applicant but left in situ by the Tribunal reveals the frequency of such items, albeit amounts were generally modest.

209. The Tribunal accepts that the agents were obliged to follow the instructions of the Respondent but equally considers that if appropriate and robust advice had been given, the Respondent would have been likely to accept that at least some items should not be charged and so those would not have been. It is less appropriate to criticise the agents in relation to the matters which the Respondent continued to defend but on which it has failed even after legal advice. The Tribunal considers it likely that such items would still have been charged as service costs because the Respondent would have required that. The Applicants insufficiently distinguished between the Respondent and its agents when making some criticisms of the agents.

a) Level of management fees

210. The Applicants argued that the level of fees of PS and B was excessive at a rate of £441.00 per unit. It was established that and other fee figures were inclusive of VAT. They referred in paragraphs 222 to 237 of the witness statement of Wendy McGuinnes [443] to the tender process carried out and the fact that of 5 quotes obtained by the Respondent, the pricing of PS and B was the second most expensive. Reference was also made by the Applicants to what was said to be the £339.30 charge per unit by HML. The Tribunal notes that the lowest quote listed was £330.36 per unit.

211. In a similar vein, the paragraphs identified that in 2020 prior to the instruction of Alexander Faulkner, there had been a tendering process and their price was £398.30 per unit whereas the lowest quote was as little as £223.11 per unit. It was asserted the company with the lowest quote was said to have given an excellent presentation. The Applicants contended that no explanation was given as to the reason why quotes were accepted from managing agent companies where lower ones had been received. The Applicants queried why those agents were employed. The Applicants also relied on an alternative price of £280.00 per unit but in relation to a different development.

212. The Respondent did not identifiably address this point in specific terms, although as elsewhere identified, the Respondents' position in relation to levels of cost and similar was that the Respondent was entitled to take a reasonable approach and that an approach could be reasonable where other approaches were also reasonable.

213. The Tribunal accepted that the Applicants had something of a point but was mindful that obtaining prices does not seem to have been the full extent of the tender or similar process but rather that there were discussions with the potential agents- the Applicants' reference to presentations is a case in point. Save for the question of relative cost, the Applicants did not advance an argument as to why the Respondent's decision to instruct particular managing agents was an unreasonable one. The fact that other fees are charged by other agents for other developments is of very limited assistance. Specifically, whilst the Applicants asserted that the other development had a number of features, they accepted it did

not have a leisure complex and the Tribunal observes that it is relatively rare for there to be a marina, so it cannot be known what quote might have been given in respect of the Estate if the company managing the different estate had been managing this one- albeit even so that would not have been a complete answer.

214. The Tribunal determined that the Applicants had not been able to present enough to demonstrate that it was unreasonable for the Respondent to instruct the particular managing agents instructed from time to time or at the fees charged by those. The agents' fees were not unreasonable for that or any other demonstrated reason.

b) Failure to properly check invoices received

215. Errors in relation to invoices are asserted by the Applicants and more particularly the point mentioned above that the managing agents failed to pick up matters which were not chargeable to the Estate at all. The Tribunal considers that a degree of imperfection must be expected arising from human error and without that reducing the service beyond a reasonable standard.

216. Whilst 20 invoices, as identified by the Applicant, seems at first blush a more than modest number, in the context of the Estate and the number of invoices the parties' cases suggest there must have been over the years it is quite a small percentage. Nevertheless, there was not simply an isolated failure but rather a repeated one and it is unclear whether the lessees' money paid out can be recovered from the agents (although of course if not then it will have to be refunded to the service charges from the company and whichever way there be credit applied).

217. The more frequent one and continuing throughout the relevant years was charging as service costs for items which were company expenses. There is quite some overlap with the further reference to that below and more generally.

218. More specifically for present purposes, the Tribunal considers that the managing agents ought to have known what were properly service charge items and what were not. They should, unless specifically instructed otherwise and considering that professionally they could follow those instructions, have only charged the former. That said, on balance the Tribunal finds the failing as between the company expenses and the service costs for sums related to the Estate less significant than the paying of costs unrelated to the Estate and in respect of wholly different developments of greater relevance where it happened to the level of fees.

c) Bank account

219. The Applicants criticised a "failure to keep leaseholders' service charge in a trust account separate from other monies". It was argued that there being an account held by managing agents with what were described as sub-accounts ran contrary to section 42 of the Landlord and Tenant Act 1987

and RICS Guidance. Mr McGuinnes in closing contended the holding of different service charge sums in a single account facilitates mis- postings and was the cause of service charge money for the Estate being used to pay expenditure for other developments until those items were pointed out.

220. Section 42 requires that where two or more tenants of a given dwelling contribute to the same cost the sums shall be held in a single account, or may be held in two or more accounts. They shall be held on trust to pay expenses incurred for which service charges are payable but otherwise on trust for the payees reflective of their payments, subject essentially to any lease terms stating to the contrary. However, that single account may be an account separate to the account which holds services charges for any other development or may be an account which does also include service charge funds for a different development provided that there are appropriate accounting records showing the money held attributable to each individual development. The RICS Guidance also explains that.

221. The Respondent accepted in the witness statement of Mr Collins, for example, that "AFP did have a single sort code and account number" but asserted that an appropriate arrangement was in place because "their client bank account was in fact set up with their electronic sub accounts like every large managing agent. Those sub accounts then divided the funds between schedules, buildings, clients, ground rental and service charge". That said, when Alexander Faulkner was taken over by Firstport, it was said in oral evidence that Firstport had approximately 900 clients, and the Tribunal identifies that required a good deal of care. The Tribunal understood the position to be the same in relation to the other agents, although the oral evidence on behalf of the Respondent was rather unclear. At worst the witnesses were evasive, but the Tribunal considers it more likely that were simply unsure or unclear.

222. The Applicants argued that there had been a breach of trust. It is apparent that there were a series of payments out which were made but had nothing to do with the Estate. There were also a significant number of payments which the Respondent itself accepted when challenged should not have been paid from the service charge account but were rather company expenses and ought to have been paid from the company account. The Tribunal has no doubt that any lack of proper separation of funds for one development as compared to another increases the prospect of the first of the outcomes. More generally, there appears to have been a failure to properly consider what payments were properly ones to meet from the service charge funds. Whilst many items were identified by the Applicants and the Respondent is attending to those, that should not have been necessary.

223. The Tribunal determines that the care which ought to have been applied was lacking. There was inadequate attention to allocation of expenditure and checking invoices. For the avoidance of possible doubt, the Tribunal does not seek to go beyond the account(s) for service charges and does not seek to comment about the corporate account (which words should not be taken as implying anything).

d) Supervision of site management expenditure

224. There was considerable criticism of the managing agents for their asserted failure to more closely supervise the expenditure of the site team. That expenditure and payment for it is discussed in some detail below and so not rehearsed here. Mr McQueen confirmed in oral evidence that the board relied on the managing agent to supervise.

225. However, much of that asserted failure related to small items of expenditure and items which at first blush had obvious use. Much of it was in the nature of petty cash payments. Whilst the total sum was a significant one across the five years, that reflected a large number of un-notable individual transactions. The Tribunal considered that the Applicants desired an unrealistic and unnecessary level of management by the agents of the actions of the staff employed by the Respondent.

e) Failure to uphold the lease in respect of unlawful renting and Failure to uphold the Lease (re garages)- and other breaches

226. The Applicants are critical of the managing agents for involvement in Flat 19, the former sales office and then staff accommodation, being let by the Respondent without an underlease. The Applicants asserted that the Respondent must maintain a moral authority and that it did not do so by giving itself permission to rent out a flat. A further and similar case was advanced in respect of garage sales.

227. The Respondent argued there was not any basis for criticism of the agents by way of the managing agents not preventing the Respondent letting out Flat 19. That was, as Mr Nickless submitted, an example of situation in which the agents could advise their principal- which they may or may not have done and that was not sufficiently demonstrated either way but neither did anything turn on it- but were not then responsible for what the Respondent decided to do.

228. The Applicants has not demonstrated that the Respondent was unable as the head-lessee to rent out the flat. The flat was its own to let out. The Tribunal did not in any event agree with the Applicants that there was anything objectionable about the Respondent renting out a flat and receiving income from that, nor that any breach of a lease had been demonstrated. So there is nothing the agents can be criticised for about it.

229. The Tribunal notes that the Applicants have referred (e.g., [308]) to the rent being paid to the corporate account of the Respondent and used for the benefit of the Respondent generally. It is not clear whether the Applicants assert that the rent ought instead to have been set against service costs and so reduced service charges. However, for the avoidance of uncertainty about that point, the Tribunal indicates that it considers that no issue arises with the Respondent's approach, that is to say the Respondent is not required to set the rent received against service costs and is able to pay it into the corporate account and utilise it for other

company purposes. Hence, the Tribunal did not consider the service costs unreasonable for a failure to reduce them for this reason. The Tribunal takes it as read that the Respondent meets the share of the service costs attributable to that flat, the percentages payable by the lessees of the other flats remaining the same and there necessarily being a shortfall to the tune of the service charges which would otherwise have been paid by a lessee of Flat 19.

230. The garage sales were between lessees and the approach to that was also matter for the Respondent. The Respondent had chosen to waive enforcement of the covenant against sales of part and whatever else might be said about that approach, the agents were just that and could not dictate what their principal did, indeed they must follow the instructions of their principal. There is no demonstrated basis for criticism of the agents.

231. Whilst it involves going off at something of a tangent, given the matter was raised in the hearing and has not been addressed elsewhere in this Decision, the Tribunal also records its determination that it was reasonable to rent a garage for storage of materials. Whilst the Applicants are right to say that Flat 19 could have been used for storage, the Tribunal does not consider that would have been a reasonable use of residential accommodation when a garage was sufficient for the purpose and the garage rental modest in comparison to rent achievable for the flat. Arguably the rental for the garage ought not to be a service cost and should be paid for out of the rental income received for the flat but the Tribunal does not identify the Applicants as having raised that point in terms and so it is neither necessary or appropriate to seek to determine such a point. The Tribunal notes that the impact per year on the Applicants in financial terms would under £5.00.

f) CCTV

232. The Applicants criticised the agents for not providing advice to the Respondent about the need to register where it was collecting data. The point is discussed above in relation to maintenance costs and that is not repeated. The Tribunal only adds that Mr McQueen confirmed in oral evidence in response to a question from Mr McGuinnes as to why the Respondent was not registered from 2021 to 2024 that the Respondent had expected the managing agent to inform it and make arrangements.

233. The Tribunal agrees that the agents ought to have identified this matter and given advice to their principal, the Respondent. There is no evidence that any agent did so and indeed no suggestion was even made that any had. The matters is one of significance, one about which agents ought to be aware and which their clients may very well not be and one which the Tribunal considers agents should address in the course of their role. The Tribunal determines that there was a failure of service and one meriting a reduction in the fees of the managing agents for each of the service charge years within these proceedings.

g) Ground rent review and valuation

234. The Applicants accepted that ground rent itself falls outside of the jurisdiction of the Tribunal. However, it was argued specifically in closing that the review and valuation had been wrong and that should impact on managing agent fees, both in terms of the costs involved and because of the quality of the managing agent's work.

235. The Tribunal determined that this point was not well- developed and was not persuasive. The Tribunal did not consider any reduction in fees to be appropriate for this reason.

Overall

236. The Tribunal noted- and observed to Mr Nickless- that the Respondent accepted some deficiencies in the work of managing agent. He had referred Mrs McGuinnes to the decision to replace HML (e.g., mentioned in her witness statement and particularly quoting from a newsletter [436]). He accepted that one of the agents had been taken over- AFP- and there had then on been some unhappiness, which was towards the end of the year ending 2024. He conceded there was a point on behalf of the Applicant, without being instructed to agree any specific reduction. Indeed, he argued that things could go wrong without that requiring a reduction in fees. Whilst in principle that is correct, it is not the situation that the Tribunal finds in this instance.

237. Some of the criticisms are made out, as identified above, much as others are not. Taking the above matters overall, the Tribunal determines that the reasonable service costs for management fees for the standard of work, which the Tribunal finds largely but not entirely of a reasonable standard, is 5% lower than as incurred where no issue arose as to incorrect postings to the Estate. In other circumstances, the Tribunal might have concluded the figure should be higher: in this instance the Tribunal considers the reduction sufficient taking the tasks involved here as a whole. It follows that the payable service charges for management fees are also 5% lower than as demanded for each year under determination.

238. In addition, where there were incorrect postings- see the 2020 and 2021 Scott Schedules for example for several entries of a not insubstantial total sum- and the incorrect use of service charge funds, the Tribunal considers it appropriate to reduce the management fees by an additional 10% (so 15% total). That additional reduction relates to year ends 2020 and 2021, accepting in the last year a change of agent toward the end of the year but concluding that does not alter the appropriateness of the additional reduction for the year as a whole.

C- Other areas and themes addressed in the hearing

239. The Tribunal now turns to these elements not specifically the subject of individual comment in the Applicants' Skeleton Argument The matters are either essentially part and parcel of matters raised in the Skeleton Argument or sufficiently connected to it that the Tribunal was able to

consider such matters and regarded the Respondent as having broadly addressed them or having been able to or they are other issues which one or other party specifically raised during the course of the hearing. The Tribunal takes the points not accepted first and the ones accepted to at least some extent after.

xiv)- Staff Costs

240. There was a further theme of challenge by the Applicants to staff costs incurred by the Respondent and more particularly the approach taken of employing staff as opposed to contracting with external contractors for the undertaking of jobs required. Reference was made by the Applicants to a Staff Costs Matrix [854] in cross examination of Mrs McGuinnes by Mr McGuinnes. It was said that 48%of work was undertaken by staff and 52 % by contractors. There were queries about the time taken by staff and about tasks it was suggested the staff should not undertake. It was further suggested that a time and motion study would be necessary to identify whether it was effective to employ three staff.

241. The Applicants suggested that contracting would be a better guarantee of the standard of work. Implicitly the Applicants were dissatisfied with that standard. Mr McGuinnes in oral evidence conceded that he had no quotes or estimates indicating alternative cost. He suggested most of the work was steady and regular and the majority of more complex work was undertaken by contractors. Mr McGuinnes was not able to demonstrate issues with employment of staff and advantages of contractors in response to further questions.

242. The Respondent argued that the fact that there may be other ways of arguably reasonably attending to tasks and similar requiring performing around the Estate day- to- day, that did not mean that contracting with companies for that was the only reasonable approach and meant that the actual approach of the Respondent was one which was not reasonable. Further, Mr Nickless argued that there were benefits to direct engagement, for example avoiding call-out fees, avoiding an uplift for VAT and avoiding funding a contractor's profit margin. The standard of work could be controlled because of the ability, if necessary to take disciplinary action and to dismiss.

243. The Tribunal determined that the Applicants had failed to demonstrate the approach taken by the Respondent or the resultant cost incurred to be unreasonable.

244. The Tribunal accepted that the Respondent could have employed external contractors to undertake all tasks. Contracts would need to have been let and there would have needed to be an effective division of tasks between different contractors, including provision for miscellaneous and ad hoc tasks. It is possible that could have been achieved and it is possible that the end cost would have been lower.

245. However, as identified in the case authorities above, that was not the question to be determined because even the Respondent taking a reasonable approach and taking the cheapest one is not the same thing. Even if only contracting with external contractors would have been the cheapest option in fact, it does not follow that was the only relevant consideration and the only reasonable approach for the Respondent to take was that one.

246. In the event, the Tribunal agrees with the Respondent that the Applicants did not demonstrate what the cost would have been, more particularly that it would have been lower and so even make out that aspect. The Tribunal noted that whilst the Respondent was correct as to the costs avoided, there were other costs and matters arising from direct employment. However, there was no evidence before the Tribunal that if the Respondent had not employed any staff and had contracted with external providers to undertake the tasks undertaken by the staff there would have been any saving in cost.

247. More significantly, the Applicants failed in any other manner to demonstrate that the approach taken by the Respondent and the costs that it incurred in relation to the employment of staff was unreasonable. The Tribunal was entirely content that the approach taken by the Respondent was one of a number of approaches it could reasonably take.

248. Although this was not the decisive point in light of the above, the Tribunal agreed that there was specific logic to the Respondent's approach. Staff member's time could be spent on a number of different tasks as and when required creating greater adaptability. There was additionally greater control over staff employed by the Respondent. The Estate had a number of elements and features as noted above and including a significant number of flats all else aside. The Tribunal found the employment of staff by the Respondent not to be unusual in those circumstances and to be understandable.

249. There was a secondary point made by the Applicants that the Respondents contended an 80%- 20% split to the cost of staff as between the flats and the berths. However, the Applicants did not accept that and contended that the entirety of the costs were paid by the lessees of the flats. They asserted- arguably somewhat contrary to their case about employing staff generally- that the berth holders saved money by the relevant jobs being undertaken within the employees' salaries and so the cost should be added to the berth costs and away from the lessees' costs.

250. The Tribunal's understanding is that the cost of the staff to undertake works to the berths and for the benefit of the berths is taken account of in the fees for the berths and that as an accounting exercise the 80% of the staff costs is accounted for in calculating the service costs payable by the lessees from the service charges. Reference was made in Mr Broadbent's oral evidence and in written evidence to timesheets being completed by staff which showed the time spent on different tasks, including the share of time spent on matters related to the berths. If that understanding is

incorrect, nevertheless, the Applicants did not persuade the Tribunal that the service costs were greater than they ought to be for this reason and did not do enough to require the Respondent to provide a greater explanation.

251. It should be added that the Applicants briefly mentioned in Mr McGuinnes' closing the same issue in respect of an electric shed, the electricity supply to berths and water charges. However, the Tribunal regarded that as somewhat unexpected and contrary to the matters the Applicants had indicated remained in issue in their Skeleton Argument. Nevertheless, the same position in the previous paragraph arises and to the extent that the Tribunal has considered it appropriate to deal with the elements at all, it considers that the above comments suffice.

252. For completeness, the Tribunal also records that it determined that it reasonable for the Respondent to fund training courses and equipment for the employed staff to increase their skills and the range of work which they were able to undertake. There was nothing at all unreasonable or unusual about that.

xv)- BACS payments

253. This relates to an issue raised in respect of a large number of individual payments made to the site manager to refund expenditure incurred. The Applicants were dissatisfied that the expenditure was all appropriate and effectively contended that the site manager had charged for items he ought not have. It was asserted that the manager had been dishonest. It was also suggested that he might have received vouchers or other benefits in return for a given level of expenditure and so may have in that way received an advantage, although in oral evidence Mr McGuinnes could not advance anything more tangible than "mere suspicion". The Applicant criticised on a number of occasions in the case- and in cross- examination of witnesses the use of personal credit cards by the site manager (it was indicated by Mr Broadbent that had included the manager's mother's card when that had been necessary) until the rather more recent point at which a company card had been provided. It was specifically said that there was a lack of documentation. In closing Mr McGuinnes specifically referred to a lack of invoices and suggesting that there were a lot of questions to be answered. There was also criticism of a lack of supervision- also see further below.

254. Mr Nickless asserted the allegations made in respect of this element were of significance and indeed it is the first matter that he addressed beyond passing mention of the service charge percentage when closing. The Respondent's case was that there is and has been a system. The site manager did not have direct access to company funds, save insofar as the company card now provided allows that and so had to pay out himself and obtain re- imbursement- although Mr McGuiness said that he did not object to the basic principle itself. Receipts have been provided by the site manager for expenses incurred, which may not always be sufficient for say tax purposes but indicated expenditure was incurred, and in return payments are made to re-imburse. Mr Broadbent in written evidence stated that receipts were checked. Large items were referred to the

Respondent's board. That was also put to Mr McGuiness who said that he did not know as he was not on the board, but it necessarily followed that he could not gainsay the evidence of Mr Broadbent., which the Tribunal found no reason to disbelieve.

255. The Respondent denied that there was any evidence of dishonesty on the part of the manager or of other advantage to him much as the Applicants repeated the allegation on various occasions, indeed Mr Broadbent in his evidence referred to the allegation as "totally outrageous". In any event, Mr Nickless doubted that any vouchers which the site manager might have received in return for the level of expenditure amounted to anything dishonest on the manager's part even were there any.

256. The Applicants' query about ladders purchased was highlighted as an example of what was suggested to be an unreasonable approach. It was identified that the Applicants had failed to suggest any alternative reasonable cost for any item, although it should be noted that Mr McGuinnes accepted in evidence at least that some of the expenditure by staff should have been covered by the Respondent. Examples mentioned in the hearing were tools and paint, but it is right to say that there was no attempt to obtain a specific response in respect of every single item.

257. The Tribunal determines that there was no evidence at all that there had been anything dishonest or otherwise the site manager had received any benefit. The Applicants did not demonstrate either that there had been any actual receipt of vouchers or why any receipt should have been treated improper, where the manager used cards because he needed to and the Respondent lost nothing which might have in some manner reduced service costs. Still less was there any evidence the manager acted in any way dishonest. Whilst it was plain enough during the case that the Applicants was doubtful and suspicious of the Respondent's management of the Estate, they had allowed that to go too far and without any discernible foundation. The allegations of dishonesty regarding the manager, and indeed anyone else to whom they applied, ought not to have been made without proper evidence.

258. Whilst it is not uncommon for employees to have to pay out for travel costs and sustenance and then be re-imbursed, it is unusual and unsatisfactory for employees to have to pay out for equipment and similar for a company, although mostly for them. However, the Tribunal considers that point does not go further and affect any other element of the case.

259. The Tribunal also determined that the Applicants failed to demonstrate that any of the expenditure was unreasonable in itself or in amount. Whilst, for example, the number of ladders purchased was queried, there was no sufficient case raised for the Respondent to need to overcome such. An imprecise query went not nearly far enough. The level of documentation sought was not realistic or reasonable.

260. No service costs were therefore determined appropriate to be reduced for this reason.

xvi) The number of fire safety reports

261. It has been touched upon above that fire safety has quite properly been a matter of very great priority in recent years since the Grenfell Tower tragedy and has been the subject of changes to regulations and various Advice Notes and similar. Requirements on landlords have changed at various times and increased elements of buildings have come under scrutiny.

262. The Applicants was critical of the number of reports and it has not escaped the Tribunal- nor easily could it where 466 pages of fire safety reports were received as additional documents during the course of the hearing days- that a number of reports have been prepared within a few years. Mr Collins identified that the reports had been increasingly risk-averse, although the Tribunal identified that as widespread. Mr McGuinnes was also critical in closing of the Respondent not having completed the works recommended and otherwise complied with all of the recommendations.

263. However, in the Tribunal's considerable experience of fire safety matters and service charges, the situation with this Estate is not at all unusual in regard to there being a number of reports. Landlords have properly taken careful and cautious approaches. The Tribunal was unable to identify any basis for determining there to be an excess of reports or an excess of service costs.

264. As something of an aside in those circumstances but given that some questioning related to it, the Tribunal did not consider it unreasonable if the insurers sought additional fire reports to be obtained or that the Respondent then obtained those, but nothing turns on that.

265. No costs or service charges are therefore reduced on this basis.

xvii) Reserve fund

266. There was discussion as to the amount which had been required to be paid by service charges to be paid into the reserve fund for the Estate. That of course is from the lessees collectively. It appeared to be common ground that at the time of the hearing, the fund contained approximately £700,000.00.

267. More generally on behalf of the Respondent it was said that significant works had been required to the leisure centre and to flat roofs, although the works required to the lift shafts which were necessary had proved unexpected. Implicitly, the Respondent's case was that all of the sums and works were reasonable. Further, that regular works were required, the 30 year age of the Estate and features such as flat roofs, lifts and the pool being noted. It was identified that the Estate is situated in a marine

environment, as Mr McGuinnes accepted in oral evidence. The Respondent particularly relied upon a "Planned Maintenance Report" by Earl Kendrik Building Surveyors dated 10th July 2024 [841- 849], calculating a sum of £2.5 million over the course of 10 years.

268. The Applicants had contended that the size of the reserve fund and the service charges demanded to produce that were largely a consequence of the cladding to the blocks and the need to attend to that, at significant cost. However, it was indicated a large sum was understand to have been paid by Homes England. Reference was also made in oral evidence to the increase in size of the reserves to that formerly and an assertion about control of spending.

269. The Applicants were not able to demonstrate that any of the planned maintenance was not reasonable or the cost estimated was excessive, nor indeed what might be reduced to make the cost reasonable. The Applicants failed to show that the Respondent was unreasonable in seeking a report about expected future maintenance or seeking funds to facilitate the works identified, or indeed that there was any failing in the report.

270. The Tribunal was not persuaded that there was a reason to reduce any service charges during the relevant years on these bases. It was not clear to the Tribunal to what extent the Respondent had sought to possess funds to attend to cladding if it needed to do so. The Tribunal is mindful that protections about what could be charged to lessees as service charges may have been relevant, but such a general observation is of little purpose other than highlighting by use of the word "may" how little the Tribunal knows of the issue in respect of the Estate. It has not been demonstrated to the Tribunal that there is a reason for it to reduce previous service charges.

xviii) Certification of service charges

271. The Applicants further contended that irrespective of anything else, the service charges were required to be certified and for that to happen as soon as practicable. The Applicants contended the requirement is that 'shall' be done and that is designed to avoid arguments between lessees and landlord because in the absence of serious error the certificate account is taken as correct. Mrs McGuinnes in oral evidence stated that the Applicants had not seen certifications since 2019. That tied in with her concern about service charge funds being expended on company matters and items paid from the funds by managing agents which did not relate to the Estate at all.

272. Mr Nickless in the hearing and whilst cross-examining Mrs McGuinnes contended that issue had not been raised in documents and, in effect, he was unable to address it then. He suggested the issue had not been until the week before the hearing. On the following morning, the second day, Mr Nickless had been able to consider the matter and seek instructions. The Respondent's case was that the service charge accounts did not require certifying and that the accounts had been approved at the AGM and signed off.

273. The Tribunal considered carefully the point that the Applicants had raised this issue but very late in the day and not in their written case. There will be a good percentage of situations in which it is not appropriate to allow such a point to be advanced, perhaps the majority of them. However, the Tribunal has concluded in this instance that the point should be addressed.

274. In doing so, the Tribunal has borne in mind that the Applicants are not represented, the Respondents are represented; there was some time between the issue being raised and the hearing particularly the conclusion of it; the matter is a fairly simple one, the accounts were either certified or they were not and the Respondent would know the clear answer one way or the other; Mr Nickless was able to seek instructions and explain the Respondent's position(albeit that no witness gave specific evidence confirming that and further that the issue ties in with others in the case and has bearing on those, whilst they have some bearing on the relevance of this.

275. The Tribunal agrees that the provisions of paragraphs 5 and 6 of the Fifth Schedule are clear that there is a need for certification in the circumstances set out, namely where actual service charges exceed on account charges. The parties did not point to any requirement for any certificate for on account charges and there is none required by the above clauses where the actual charges are the same as or below the estimated on- account ones. The requirement applies when an extra payment is required and to the extent of that payment.

276. It follows that if there has been a balance of service charges over and above the estimated charges and based on the actual service costs for the given year- and that remains the case following the Respondent's concessions and items which the Tribunal has found not to be payable in the sums demanded or at all as set out in the Decision or the Schedules to it- then the balance is not payable unless the Respondent can demonstrate that the required certificate was provided "as soon as practicable". If that has not yet happened, the Tribunal determines that time has passed.

277. Given that compliance is a condition precedent, the Tribunal determines, for the balance to be demanded, any balance demanded in the absence of a certificate was not and is not due.

278. The Tribunal was not referred to specific on account demands and final additional demands year on year. The Tribunal does not know to what extent, if at all, the determination of this issue impacts on payable service charges. As the Tribunal lacks the information to identify which, if any, service charges fall within the above, the Tribunal makes no specific disallowance of any given sum but equally does not determine that all of the final service charges were payable.

279. If the parties cannot agree whether any sums are affected by this determination or the extent of such, a party will need to apply and any

appropriate additional directions could be given. The parties must of course first seek to agree the effect of the concessions and disallowances.

xix) Directors' and Officers' insurance

280. The Tribunal sought clarification during the hearing as to whether the Respondents contended the cost of such insurance was chargeable as a service cost, noting the Applicants had asserted not on the Scott Schedules and the issue arises before the Tribunal quite commonly. The Respondent contended the cost to be recoverable on the basis that it was an expense of carrying out its obligations and in reliance on paragraph 1.1 of the Fifth Schedule. Mr Nickless argued it was proper for such insurance to be taken out.

281. The Applicant argued this item should not be payable as not specifically referred to in the Lease, citing the determination in *Collingwood* that items cannot be claimed as service charges unless the lease permits that. Mr McGuinnes also cited a case of *Leslie v Wesley Place RTM* [??] UKUT 234 (LC). The Tribunal was aware of the former but not latter. Neither were provided, which was not an issue for *Collingwood* but has precluded consideration of *Leslie*.

282. In any event, the Tribunal had no hesitation in determining that the cost of Directors' and Officers' insurance is not chargeable as a service cost payable by service charges under the provisions of this Lease. The Tribunal understands why the directors and officers might themselves wish to have cover and why the Respondent may wish to pay for that on behalf of them. However, the expense is for the benefit of those individuals to protect them in the event of any claim covered by the policy. It is not a cost of the Respondent doing anything that the Respondent is required to do.

xx)- Company only expenses

283. There are various items which have been queried by the Applicants as being expenses to be borne by the Respondent company and recoverable as service charges. Expenditure to settle a claim is an obvious example of an expense which the Tribunal would have determined is not so recoverable, although in the event the Respondent conceded the particular items.

284. The Tribunal returns to the *Collingwood* case. The Respondent argued that the case is not comparable as there were only 7 flats in that instance and only 3 were leased, where the lessees were not company shareholders and so obtained no benefit from company expenditure. The Respondent argued that the lessees on the Estate are also shareholders in the company.

285. The Tribunal disagrees with the Respondent and considers that the relevant distinction is between lessor and lessee sums on the one hand and company ones on the other. The relationship between the company and its shareholders is a separate matter. It is no doubt the case that expenditure by the company which reduces any profits will affect the shareholders to that extent. That does not mean the distinction between service cost

matters and company cost matters falls away. The relationships are distinct. Mr Broadbent's reference in oral evidence to robbing one part to pay the other wholly missed the point of them being distinct.

286. Mr Broadbent in his First Witness Statement stated, "The Board accepts that some of the costs are outside the strict interpretation of the lease including accounting errors, mis- postings, managing agent's errors and which sums which in the normal course of business would be considered quite legitimate and reasonable".

287. The Tribunal does not suggest that the expenditure which Mr Broadbent refers to as legitimate in the course of business is not that. The Tribunal is not considering business expenses in response to a challenge to those say by a shareholder and so it is not for the Tribunal to say (which again does not seek to imply any given answer).

288. The Tribunal is somewhat disappointed by the reference to a "strict interpretation" of the lease. It is unclear how many levels of interpretation Mr Broadbent, and by extension, the Respondent, seeks to suggest there might be. In contrast quite simply an item is either covered by the service costs chargeable pursuant to the terms of the Lease or it is not. It is a definite distinction. The Tribunal does not have to determine those items which the Respondent has conceded, but records its concern that the distinction has not been identified and operated.

289. There remain items asserted by the Applicant to be company expenditure and not service costs and which the Respondent has not accepted. The Tribunal does not seek to refer to each item, given there are several, individually in this Decision but regards it as sufficient to say that where the Applicant has challenged items in the Schedules for that reason and the figure against the item as allowed is £Nil it is, perhaps unsurprisingly, because the Tribunal has agreed with the Applicant. In contrast if the amount stands, the Tribunal has not so agreed. The above principle has been applied.

290. The one item which appears repeatedly, and the Tribunal considers does merit reference, is the purchase of the smart entry cards referred to as "Cotags". Those are clearly purchase in bulk and then given out when required. However, the documents indicate that residents have to pay for those as and when they request them. Hence there is an initial cost to the Respondent but then an income.

291. No evidence has been provided that the Tribunal can identify that the 'sale' price is paid into the service charge account and reduced service costs and service charges. The Tribunal does not regard it as reasonable for the cost of purchase to be a service cost and the 'profit'- which may or may not be actual profit and could be described as sales revenue or a similar phrase- not go to be offset against that and other sums. The cost of purchase is simply an expense to which the Respondent is put in order to achieve the 'profit' on subsequent sales. It is in effect an expense of the

company only, if in a different manner to the other company expenses encountered.

292. Finally, the Tribunal notes that in the Additional Scott Schedule for 2024 there are greyed out items, which Mr Broadbent in oral evidence were so greyed out because the Respondent has a letter from Alexander Faulkner to say that they were not paid from service charges. Mr Broadbent said that the items were not concede but that reflect a misunderstanding of what was sought to be clarified because Mr Nickless was instructed that the items could be removed as relevant service charges. The letter referred to was accepted as not contained in the bundle but as the net effect was recoverable service charges for those items of £Nil, there was no need to dwell on that.

xxi)- Rossair Air Handling Unit and section 20 consultation

293. Another particular issue, and the final one to be specifically addressed in this Decision related to an air handling unit for the swimming pool, where the Applicants argued that there had been no section 20 consultation process and so the service charges were limited to £250.00. The Respondent accepted that the threshold for consultation fell below the overall cost, although made reference to different proportions payable by different flats. The Respondent cited the work involved in consulting, potential ongoing damage and asserted no less being financially disadvantaged. The Tribunal understands that the contributions of some lessees were less than £250.00 and so lack of consultation imposes no limit to their payments.

294. The Tribunal considers this a simple matter in respect of the Applicants, whose contribution would have been £269.08. The whole question of the limit of charges to £250.00 where there has been no consultation when that is not specifically raised by a lessee can be a little problematic, although even so the Tribunal considers that it can do no other than follow clear statute law. However, that point does no arise here- the relevant lessee does take the point- and so quite simply the service charge payable cannot exceed £250.00 because no consultation took place. The Respondent's arguments may well hold merit in an application for dispensation but there has been none. It is for the Respondent to decide whether to apply or not. Unless and until that happens and dispensation is granted, the payable service charges are limited to the £250.00.

xxii) Fire Door Inspection Reports

295. The Tribunal addresses this matter here rather than just in the Scott Schedules as there are not insignificant sums involved as service costs, although as with the other items, the service charges are the relevant proportion of those. Nothing directly related to the reports was said in the hearing by either side, although the matter ties in with the references to fire doors themselves.

296. The Applicants challenge the number of inspections and seek a refund. The Respondent asserts that ongoing inspections of fire doors are reasonable and implicitly so is the cost involved. No distinction is made between the front doors of flats and other doors.

297. However, it is apparent that many of the fire doors on the Estate are front doors to flats, for which it has been identified the Respondent was not responsible. The Tribunal can accept that the Respondent may have wished to understand the condition of those with a view to ensuring that the lessees took any relevant action and so there is some reasonableness inspection going beyond just the other fire doors but there must be a limit to that. Given the Tribunal's determination that the front doors to flats were not within the Respondent's responsibility, it would jar significantly to then allow the full cost of various inspections of fire doors.

298. The lack of precise information is such that the Tribunal can do no more than take what it accepts to a broad- brush approach. In doing so the best that it can, the Tribunal considers the reasonable service cost is no more than 2/3 of the cost incurred by the Respondent.

The annotated Scott Schedules

299. The Tribunal identifies in this Decision in the hope of that assisting with clarity that the figures shown within its column of the Scott Schedules are sums which have been allowed as reasonable service costs which are payable as service charges- as opposed to the amount of the deductions. They are also the costs allowed and not the service charge payable, which is the relevant percentage. There is specific treatment of the waking watch cost, identifying that to be both a reasonable service cost but resulting in no service charge, for the reasons explained above.

300. It will be seen that each item discussed above in this Decision falls within A) or B), that each has then been given a roman numeral and in some instances, there are also lower- case letters dividing matters within the roman numeral sections. The references in the Scott Schedules to combinations of letters and numbers are to those within this Decision. In the rare instances where an item is not shown and conceded or it is otherwise considered necessary to do so, the Tribunal has made an additional narrative comment in the Schedules. However, not otherwise. References to parts of the Decision are only made the first time an item is encountered in the Schedules: the references or any other comments are not repeated on subsequent occasions. Unsurprisingly, most references are therefore to be found in the 2020 Schedule or otherwise the earlier years.

301. There is, it should be explained no reference to the Schedule numbered 8 by the parties. It was checked by the Tribunal following closing comments whether that schedule- which related to BACS payments- was a repeat of other items. It was suggested by Mr Nickless that the particular schedule was not the most reliable and it was best put to one side. Mr McGuinnes indicated agreement. If on reflection the parties consider that any item of note has been omitted, they should inform the Tribunal and

that can be attended to. That said, given the Tribunal's comments above with regard to BACS payments, it may be that there is no merit in investigating any specific items further in any event.

302. There are consequently nine Schedules completed, one for each of 2020 to 2024 inclusive and the remainder are supplemental Schedules, of which there is another lengthy one for 2024 but the other 3 are short.

303. Where the Applicants have withdrawn the challenge to the item, it has been allowed as service cost in full. Where there the Respondent has conceded the item, the amount shown as allowed is stated as £nil. Items conceded by the Applicant or where no reduction is made have the figures in black. Where reductions have been made, the figures are shown in red.

304. There are also certain items shown as £Nil but in black. Those are not reductions as such but rather are items which the Respondents say were picked up by the Applicants from accounts but are not in the service charge accounts and treated as service costs charged as service charges. Hence, the amount payable by the Applicants has always been and remains £Nil, so there is nothing to be allowed and nothing need be reduced from the reasonable service costs as determined on which the payable service charges each year need to be calculated. In contrast, if the Respondent has identified in the Schedules an item to be company liability but has not stated that the item was never included in service costs in the first place, the Tribunal has taken it that the item was included, so the concession produces a reduction in service costs. Alternatively, the entries are other comments by the Applicants but without figures, some of which have been dealt with by stating £Nil in black and some by other brief comment.

305. Where the Tribunal understands there to be duplication of entries, the Tribunal has said so. No monetary amount is then shown within the Tribunal's column. As the Schedules include some sub- totals for types of items and then elsewhere refer to individual invoices, the Tribunal has sought to identify that. The Tribunal concedes that it may not always have managed to do so given the lay- outs of the Schedules and the treatment of items, which do not always make it clear whether there is or is not duplication. The Tribunal has done its best with the Schedules as presented.

306. Some entries have been attended to by brief additional comments where they appear to fall outside of the challenges and other themes in this Decision but the Tribunal considers they merit an observation rather than simply a figure. In the main those are intended to be larger items but the Tribunal accepts there is not complete consistency.

307. The Tribunal has not sought to tally the amount of challenged and allowed service costs in the Scott Schedules and add the amount of service costs demanded of the Applicants which the Applicants have not challenged and are included in the Scott Schedules. The Tribunal leaves accounting matters to the parties. The Tribunal is very much mindful that it does not therefore provide a total service cost, still less the total payable

service charge. However, the Tribunal does not consider it wise to seek to do so in the very particular circumstances of this case and so has limited itself to determining the matters in dispute (where within its jurisdiction).

Decision in respect of disputed items

308. The effect of the above findings and determinations is that the Tribunal finds that most of the service costs challenged by the Applicants were reasonable, in the sense of them being reasonably incurred, the amounts being reasonable and the work being of a reasonable standard. Hence, most of the service charges are payable as demanded. That should be identified.

309. However, there are exceptions, which the Tribunal considers is the most appropriate term to use albeit that there are a good number of such if mainly relatively modest rather than isolated examples, in respect of certain of the items as identified above and as represented by the reductions in the Scott Schedules. The Applicants have by no means entirely failed on contested items, to which can be added the sums conceded by the Respondent. Key examples of reductions have been set out in the Summary above and it will be appreciated others are identified elsewhere in this Decision.

310. It is anticipated that the parties can agree the appropriate reduction in service charge liability to reflect the items not allowed as service costs or where those costs have been reduced, both in this narrative Decision and in the related Scott Schedules and can agree the figures. In the event not in respect of any given matter, a party will need to apply and a specific determination of any particular element for which the contribution to the service charge payable by the Applicant for any given year can be given. So too if the lack of certification of actual service charges impacts as compared to estimated on- account ones.

Applications in respect of costs and fees

311. As referred to above, applications were made by the Applicants that any costs incurred by the Respondent in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable by the Applicants pursuant to section 20C(1) of the Landlord and Tenant Act 1985. In addition, an application was made pursuant to paragraph 5A of the Commonhold and Leasehold Reform Act that the costs of the Applicants' application should not be recoverable as administration charges. Strictly, the applications as made relate to all of the lessees of flats in the Estate. However, no authority was provided from any other lessee for the Applicants to pursue an application on their behalf and hence the application can only be made and considered in relation to the particular Applicants.

312. Section 20C (3) of the 1985 Act, provides "the … Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances". The Tribunal is given a wide

discretion. The provisions of paragraph 5A are equivalent and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable is the same.

313. The provisions of section 20C were considered in *Re: SMCLLA (Freehold) Ltd's Appeal* [2014] UKUT 58, where the Upper Tribunal held that:

> "although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at paragraph 25), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances" (at paragraph 27).

314. In *Conway v Jam Factory Freehold Ltd*, [2014] 1 EGLR 111 the Deputy President Martin Rodger QC suggested that it was:

> "essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make".

315. Whilst there is caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case.

316. It is apparent both from the quantity of challenges and documents and indeed from specific statements of the Applicants, that the case has been one of considerable personal importance to the Applicants, although not a position apparently shared by any other lessee on the Estate, at least not sufficient for them to have identifiably challenged any costs and charges. It is also apparent that the Respondent has incurred considerable cost in dealing with this case. Leaving aside the instruction of solicitors throughout, the Respondent has engaged counsel of significant years call.

317. Mr McGuinnes asserted in his closing comments that where an item was reasonable and payable, it was accepted but often the items were not service charge ones and so they were challenged. He accepted the documentation to be substantial but asserted that the Applicants were always open to dialogue, but the Respondent had failed to communicate despite having every opportunity to. Mr Nickless argued in closing that there was some way insufficient to interfere with the Respondent's contractual rights. He also referred to the level of costs and proportionality, although of course the Respondent chose to instruct legal representatives in a jurisdiction where parties are intended to be able to represent themselves and the basic costs regime is that if parties chose to instruct professional representatives, the cost is not recoverable from the other party, at least by way of a direct order between the parties.

318. The Tribunal identified that the Applicants had achieved some success in challenging service charges and whilst this is not to be dealt with as if the question were akin to an award of costs between parties, success or

failure is certainly not irrelevant. There are matters even which were contested to the final hearing in relation to which the Tribunal has agreed with the Applicants. It is also relevant in the course of that, that the Applicants achieved some of the success because the Respondent conceded that some of the challenges were well founded and accepted the service costs for items not to be payable- including the not insignificant number of items accepted in response to challenge to be matters which ought to have been charged to service charges at all.

319. In contrast, the Applicants conceded what was also not an insignificant number of items which they had challenged when the application was issued. They also failed to identify the sums which they accepted as reasonable where costs were challenged but it was not argued should be disallowed entirely and so did not assist to that extent in narrowing the dispute. Additionally, they failed with most, although as identified not all, of the challenges which remained by the final hearing. It also cannot be ignored that many of the challenges have been to items of very modest overall cost or of negligible difference to the 0.65% of the costs payable by the Applicants. There has been a failure to identify where the practical effect of success of failure for the Applicant was hardly anything in terms of the sums payable by them in service charges. Items were pursued where the Tribunal considers it was wholly disproportionate to the time and cost involved to pursue them and where a rather more realistic and pragmatic approach would have reduced the number of individual items considerably.

320. Mr Nickless contended that if enough mud is thrown, some will stick. That rather appeared to diminish the Tribunal process. The Tribunal considers the issues raised and arguments advanced carefully. The challenge ('the mud') will only succeed ('stick') if there is a sound basis for it doing so, which in part there was. Further, the fact that the landlord may be able to charge for some, even most, of what it has sought to, does not produce the result that it should be permitted for anything else it has sought to- if the landlord limits itself to service costs reasonable and service charges payable, no mud should stick.

321. The Tribunal further considers from what it understands of the Respondent's legal costs from matters mentioned about the work undertaken and the instruction of counsel, those are significantly disproportionate to the amount of service charges (as opposed to the underlying service costs) which were at stake in this dispute. The Applicants can be criticised for excessive challenge to items of negligible impact on them at 167th of the overall cost but so too can the Respondent for not dealing with the challenge at a proportionate cost- including by not making more pragmatic concessions either earlier or at all.

322. The Tribunal does not attempt to make findings as to who might have agreed to settle other items had there been other communication of a given nature or at a given time. There was insufficient on which to assess that and it was not considered appropriate to take the steps which would be necessary to determine that matter- which would require a further hearing

and further evidence, involving considerable and disproportionate time and resources.

323. All of that gives a number of competing considerations to weigh in the balance where they carry different weights, elements of success and failure as an example are in varying sums and the Tribunal has not sought to add the amount of either, and more generally identifying the correct balance to strike is not a simple task.

324. Taking matters in the round in light of the law, the Tribunal concluded that it is just and equitable to disallow recovery of 20% of legal and litigation costs pursuant to both section 20C and paragraph 5A. The section 20C and paragraph 5A applications are therefore granted to that extent.

325. It should be identified that the Tribunal accepts that recovery as service charges and recovery as administration charges are not the same and the approach taken to one need not be the approach taken to the other. However, in this instance and taking matters in the round, the Tribunal considers that applying the same outcome to both is on balance the appropriate one.

326. As a last observation as to such costs, the Tribunal makes clear that the parties should not take the above percentage as a short- hand for the level of success achieved by the Applicants with their challenges. It is not. As the Tribunal trusts has been explained above, the assessment when considering disallowance of recovery of costs is rather more nuanced and is directed at costs and not the substantive case.

327. It is also important to identify that the Tribunal has dealt with costs in percentage terms such that there would be an inability to recover a portion of whatever the reasonable costs are determined to be if costs are sought to be recovered as service charges or administration charges and the Tribunal is asked to determine the reasonable level. That is not a matter for these proceedings

328. In terms of fees for the application, the considerations are not exactly the same. For example, the contractual rights and obligations do not apply. In contrast, the outcome is all the more relevant. That produces an argument for allowing a portion of the fees. Nevertheless, the modest level of the application fees is also relevant and a blunter approach to the question is appropriate. Further, there is again a danger of any portion of the fees allowed being seen as an indicator of wider success or merit where the nature of the fees and the limited sums involved give significant scope to mislead.

329. Taking matters in the round, the Tribunal determined it not to be appropriate to require the Respondent to repay the fees incurred for the application to the Applicants.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case by email at rpsouthern@justice.ogv.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.