FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LSC/2018/0057**
Property	**:**	**402 Ashmore House North, 40 Violet Road, London E3 3QQ**
Applicant	**:**	**Ms Svetlana Prokhorova**
Representative	**:**	**In person**
Respondent	**:**	**Clarion Housing Association Limited (1)** **Berkeley Seventy-Seven Limited (2)**
Representative	**:**	**Ms Sian Evans (Solicitor) for the 1st Respondent** **Mr Simon Allison (Counsel) for the 2nd Respondent**
Type of application	**:**	**Liability to pay service charges**
Tribunal members	**:**	**Mr Jeremy Donegan (Tribunal Judge)** **Mr Luis Jarero BSc FRICS (Valuer Member)** **Mr Clifford Piarroux JP CQSW (Lay Member)**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**18 and 19 February 2019**
Date of corrected decision	**:**	**03 April 2019**

CORRECTED DECISION

The Tribunal exercises its powers under rule 50 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to correct a clerical mistake at paragraph 136 of its decision dated 27 March 2019. The correction is underlined.

Decision of the Tribunal

(A) The Tribunal makes the determinations set out at paragraphs 64, 75, 81, 94, 110, 111, 123 and 131 of this decision.

(B) The applicant is to notify the Tribunal by 24 April 2019 whether the service charges referred to in paragraphs 118, 127 and 134 have been agreed and, if not, shall identify the outstanding charges. The Tribunal will then give further directions for the determination of those charges.

(C) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 ('the 1985 Act') so that none of the respondents' costs of these proceedings may be passed to applicant through any service charge.

(D) The Tribunal makes an order under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') so that the applicant's liability to pay the respondents' costs of these proceedings is extinguished.

(E) The first respondent ('R1') shall pay the sum of £300 to the applicant by 24 April 2019, in reimbursement of the Tribunal fees.

Background and procedural history

(1) This application concerns the service charges for 402 Ashmore House North, 41 Violet Road, London E3 3QQ ('the Flat') for the years 2015/16 to 2017/18.

(2) The Flat is on the fourth floor of Ashmore House North ('AHN'), which is a part of a purpose-built block containing 44 flats ('the Building'). The Building is referred to as A4 and D1 Caspian Wharf and comprises 4 'houses'; Ashmore House North (10 flats), Ashmore House South (28 flats), Coulson House (2 flats) and Leonard House (4 flats).

(3) The applicant holds an underlease of the Flat. R1 is her immediate landlord and holds a superior lease of the Building. Its interest was registered at HM Land Registry on 20 March 2018, following a takeover of the previous landlord, Old Ford Housing Association ('OFHA'). As the name suggests, R1 is a registered housing association. Some of the flats in the Building have been let on long leases and some are held by R1 and sublet on short tenancies.

(4) The second respondent ('R2') is R1's immediate landlord and holds a superior lease of apartments within buildings at Site A Caspian Wharf, including the Building. This lease was granted by Berkeley Seventy-Six Limited on 06 March 2015, for a term of 999 years from that date. Caspian Wharf comprises both private and social housing. The 'private

side' comprises the blocks at A1, A2, A5 and A6, as well as Sites B and C. The 'social housing side' comprises the blocks at A3, A4, D1 and D2.

(5) The relevant lease provisions are set out at paragraphs 13-27, below.

(6) The applicant seeks a determination under section 27A of the 1985 Act, as to her liability to pay service charges for the Flat. She also seeks orders for the limitation of the respondents' costs in these proceedings under section 20C of that Act and paragraph 5A of schedule 11 to the 2002 Act. The relevant legal provisions can be found in the appendix to this decision.

(7) There have been previous First-tier Tribunal ('F-tT') proceedings concerning the service charges at Ashmore House North, pursued by the applicant and the leaseholders of Flats 301, 302, 401 and 502 under case reference LON/00BG/LSC/2015/0011 ('the 2015 Proceedings'). They were the subject of a decision dated 26 November 2015 ('the 2015 Decision') and the relevant parts are summarised at paragraphs 30-33, below.

(8) The applicant successfully appealed part of the 2015 Decision with the Upper Tribunal ('UT') remitting the case back to the F-tT in a decision dated 12 October 2016 (see paragraphs 34-35, below). The F-tT gave further directions on 13 April 2017 and the case was withdrawn on 12 September 2017, after the applicant and OFHA agreed settlement terms.

(9) The current application was received by the Tribunal on 12 February 2018 and referred to service charges for the years 2015-2019, inclusive. An oral case management hearing took place on 15 March 2018 and directions were issued the same day, which limited the years of dispute to 2015/16 to 2017/18, inclusive. The 2015/16 and 2016/17 dispute relates to actual service charge expenditure, whereas the 2017/18 dispute concerns advance service charges.

(10) Further directions were issued on 31 May (corrected on 01 June), 24 July, 09 August, 06 September and 08 November (all 2018). The applicant sought permission to appeal the directions dated 01 June in a letter dated 14 June. That application was refused by the F-tT on 27 June, with the refusal letter stating:

It is now tolerably clear that in issue are:

2015/16 and 2016/17

Management fees apparently charged by a 'superior landlord';

The 'administration fee' apparently levied by Clarion on all amounts invoiced by managing agents (Rendall & Ritner) at the rate of 5%;

The management fees of Clarion; and

The apportionment of service charges

2017/18

The budget

Implementation of the decision in LON/00BG/LSC/2015/0011.

(11) The directions dated 08 November 2018 were issued following a case management hearing where Judge Donegan refused the applicant's request for a barring order against the respondents. The applicant subsequently applied for permission to appeal the refusal and that application was refused on 12 December. The applicant then submitted an application for permission to appeal to the UT on 25 December, which had not been decided by the time of the Tribunal hearing on 18 and 19 February 2019. The UT subsequently dismissed the application on 25 February.

(12) During the course of the hearing, the parties and the Tribunal referred to paragraphs 1, 3 and 4 of the 08 November directions, which are recited below:

> *1. The issues to be decided at the final hearing of this application are limited to those identified in the Tribunal's letter dated 27 June 2018 (recited at paragraph (5) above).*
>
> *…*
>
> *3. If the applicant wishes to rely on witness evidence then she shall send copies of her witness statement/s to each respondent by **20 December 2018**.*
>
> *4. If the respondents wish to rely on witness evidence then they shall send copies of their witness statements to each other and the applicant by **17 January 2019**.*

The leases

(13) The head-lease of Blocks A4 and D1 Caspian Wharf was granted by Berkeley Homes (Capital) Plc ('Berkeley') to OFHA on 15 June 2009 for a term of 130 years from 01 January 2009 ('the Head-Lease'). R2 is the successor in title to Berkeley and R1 is the successor in title to OFHA.

(14) Various definitions are to be found at clause 1.1 of the Head-Lease including:

> *"**Building**"*
> *means that building on the Estate known as Blocks D1 and A4 the location of which is shown on Plan 2 and of which the Premises form part including all alterations extensions and variations to it and reference to the Building includes reference to any part of it;*
>
> *"**Building Expenditure**"*
> *means the aggregate of all reasonable costs fees and expenses contained or referred to in Part II of the Fourth Schedule reasonably and properly incurred by the Landlord and such sums as the Landlord shall in its reasonable discretion consider desirable to set aside from time to time and as is reasonable and proper for the purposes of providing for periodically recurring items of expenditure in*

connection with the Building whether recurring at regular or irregular intervals;

*"**Common Parts**"*
means the boundary walls fences and other structures refuse areas recycling units Accessways cycle parking areas landscaped areas and all Conduits and sub-stations plant rooms store compounds and bin areas serving the Estate or any part of it (if any) and all other external areas and amenities on the Estate which are provided or designated from time to time by the Landlord for common use and enjoyment by the tenants and occupiers of the Estate and which in each case are not maintainable by the Tenant or by any other owner or tenant of any other part or the Estate at their own cost or by any local or public body or authority (if any) excluding the Premises and any other Lettable Units now on the Estate or to be erected on the Estate;

*"**Estate**"*
means the land and any building on it constructed or to be constructed on the areas shown edged blue on Plan 2;

*"**Estate Expenditure**"*
means the aggregate of all reasonable costs fees and expenses contained or referred to in Part III of the Fourth Schedule reasonably and properly incurred by the Landlord and such sums as the Landlord shall in its reasonable discretion consider desirable to set aside from time to time and as is reasonable and proper for the purposes of providing for periodically recurring items of expenditure in connection with the Building whether recurring at regular or irregular intervals;

*"**Premises**"*
means the premises described in the First Schedule and each and every part of it together with all additions alterations and improvements which may be carried out during the Term to the Premises;

*"**Service Charge**"*
means such proportion of the Building Expenditure and the Estate Expenditure as the Landlord shall from time to time reasonably and properly determine as being an appropriate and fair proportion (based on the proportion the net internal area of the Premises bears to the net internal area of the Lettable Units of the Building or Estate as appropriate) in respect of the Premises PROVIDED that:

(1) the Landlord may from time to time equitably adjust the proportions of the Service Charge to be borne by tenants in the Building or on other parts of the Estate as a consequence of any alteration to or addition to the Estate or the Building or any alteration in the arrangement for the provision of the Services or to take account of the extent to which any tenant of the

Building or the remainder of the Estate may make use of the Common Parts or any other parts of the Estate and the Building or in any other relevant circumstances; and

(2) In calculating the Service Charge the Landlord shall be entitled to disregard the floor area of any Lettable Unit not benefitting from any of the Services;

*"**Services**"*
means the services to the Building and the Estate which the Landlord covenants to provide in clauses 6.1.1 and 6.1.2 and the other services listed in Part I of the Fourth Schedule which the Landlord covenants to provide in accordance with the terms of clause 6.1.3;

(15) The blue edging on Plan 2, delineating the Estate, extends around Blocks A1-A6 and D1-D3 at Caspian Wharf and the grounds between these blocks.

(16) Clause 2 obliges the first respondent to pay the following sums to the second respondent:

2.1 the Yearly Rent throughout the Term on each anniversary of the commencement of the Term;

2.2 such proportion of the reasonable and proper cost to the Landlord of insuring the Estate in accordance with clause 4.2.1 as is attributable to the Premises as properly determined by the Landlord's Surveyor based on the proportion the net internal area of the Premises bears to the net internal area of the Estate together with any reasonable and proper costs incurred in valuing the Estate and Premises for the purpose of assessing the amount for which the they should be insured (being on the basis of not occurring more than once every year and on the basis of the full rebuilding and reinstatement cost of the Estate) such sums to be payable within thirty days of demand;

2.3 all monies payable by the Tenant as Service Charge;

2.4 all interest payable by the Tenant under the terms of this Lease;

(17) Detailed service charge provisions are to be found at clause 6, which include:

6.1 The Landlord covenants with the Tenant (to the intent to bind itself and its successors in title) that the Landlord will from the Practical Completion Date:

6.1.1 keep the Common Parts and any plant machinery and equipment on the Common Parts provided for common use in good repair and condition and properly and regularly cleansed and lighted where appropriate throughout the Term;

6.1.2 keep the main structure and exterior of the Building including the foundation roof and load bearing walls

and joists and pillars together with the gutters and rain water pipes and all Conduits within the Estate intended for common use or which are not the responsibility of a tenant or occupier of a Lettable Unit in good repair and condition;

…

6.1.3.2 in supplying the Services the Landlord may employ managing agents contractors or such other suitably qualified persons as the Landlord may in accordance with the principles of good estate management from time to time reasonably think fit and whose reasonable fees salaries charges and expenses (including Value Added Tax) will form part of the Expenditure (but such fee shall not exceed the level of fee which a reasonable and competitive managing agent or contractor would charge at the time the lease is granted in the location of the Premises for supplying the Services).

(18) Clause 6.3 deal with preparation and service of the "Service Charge Accounts" and provides:

As soon as convenient and in any event not later than 3 months after the end of each Financial Year the Landlord will prepare accounts showing the Expenditure for that Financial Year and containing a fair summary of the various items comprising the Expenditure and a copy of such accounts will be supplied to the Tenant.

(19) The obligation to pay the Service Charge is at clause 6.4, which includes:

6.4.1 The Tenant covenants with the Landlord that from the Practical Completion Date on each of the usual quarter days in every year during the Term the Tenant will pay to the Landlord from the date of occupation, such a sum in advance and on account of the Service Charge for the Financial Year then current as the Landlord's Surveyor acting reasonably and properly shall from time to time specify as being a fair and reasonable assessment of one quarter the likely Service Charge for that particular Financial Year the first advance payment of which (apportioned if necessary on a daily basis) will be made on the date of this Lease for the period starting on the date of this Lease and ending on the day before the first quarter day after the date of this Lease.

(20) Further service charge provisions are detailed in the Fourth Schedule. The *Services* are listed in Part I and include maintaining and repairing the *Common Parts*. The costs making up *Building Expenditure* are listed in Part II and include:

2 The costs and expenses of any person, firm or company by the Landlord to manage the Estate.

The costs making up *Estate Expenditure* are listed in Part III and include:

> *7 The cost of employing auditors to audit the accounts of the Landlord and/or any managing agents in relation to the Service Charge or to carry out any other reasonable function of auditors in connection therewith.*

(21) The Land Registry entries reveal that the Head-Lease was varied by a deed dated 03 August 2011 made between Berkeley and OFHA. The deed was not included in the hearing bundles but R2's solicitors subsequently provided a copy at the Tribunal's request. It added provisions relating to 'Heating Services' and has no bearing on the issues in this case.

(22) The underlease of the Flat was granted by OFHA to the applicant on 30 November 2011 for a term of 130 years less 5 days from 01 January 2009 ('the Underlease').

(23) The Flat was originally purchased under a shared ownership scheme. The applicant's "*Initial Percentage*" was 25%, as stated in the Particulars. She now owns 100%, having purchased the remaining 75% under the "*Staircasing Provisions*" at Schedule 6 to the Under-Lease. The hearing bundles included a copy of the final memorandum of staircasing dated 23 May 2014.

(24) Schedule 9 defines various terms, including:

> *"**Account Year**" means a year ending on 31 March.*
>
> *"**Authorised Person**" means the individual nominated by the Landlord to estimate expenditure in relation to the Service Provision in accordance with Clause 7.3 (How calculated).*
>
> *"**Building**" means the building or that part of the building in which the premises demised by the Head Lease are located and any other areas within the Landlord's title the use and enjoyment of which is appurtenant to the Building, whether or not within the structure of the Building.*
>
> *"**Common Parts**" means those parts of the Building and/or the Estate (whether or not within the structure of the Building) to be used in common by any of the Leaseholder, other tenants and occupiers of the Building and/or the Estate, the Landlord and those properly authorised or permitted by them to do so, but excluding any such parts as may be within the Premises.*
>
> *"**Estate**" has the same meaning as is ascribed to the term in the Head Lease*
>
> *"**Head Lease**" means the lease of the Premises and other property dated 15/06/2009 made between (1) Berkeley Homes (Capital) PLC and (2) Old Ford Housing Association as varied by a deed of variation dated 03/08/2011*

*"**Internal Common Parts**" means those parts of the premised demised by the Head Lease to be used in common by any of the Leaseholder, other tenants and occupiers of the premises demised by the Head Lease, the Landlord, and those properly authorised or permitted by them to do so, but excluding any such parts as may be within the Premises.*

*"**Outgoings**" means (in relation to the Premises) all existing and future rates, taxes, charges, assessments, impositions and outgoings whatsoever (whether parliamentary or local) which are now or may at any time be payable, charged or assessed on property, or the owner or occupier of property.*

*"**Service Charge**" means the sum of (a) the Specified Proportion of the sums payable by the Landlord pursuant to Clauses 2.2, 2.3, 3.2.2, 3.2.3, 3.3.3, and 6.4 of the Head Lease and (b) the Specified Proportion of the Service Provision.*

"Service Provision" means the sum calculated in accordance with Clause 7.3 (How calculated), Clause 7.4 (Service Provision) and Clause 7.5 (Adjustment to actual expenditure).

(25) The "*Specified Proportion*" is defined in the Particulars as *A fair and reasonable proportion as the Landlord shall determine from time to time.*

(26) The applicant's covenants are at clauses 3 and 4 and include:

3.3 ***Outgoings***

3.3.1 *To pay Outgoings.*

3.3.2 *to refund to the Landlord on demand (where Outgoings relate to the whole or part of the Building or other property including the Premises) a fair and proper proportion of Outgoings attributable to the Premises, such proportion to be conclusively demanded by the Landlord (who shall act reasonably).*

3.3.3 *To pay the Landlord's reasonable per flat annual administration fee by equal monthly instalments in advance on the first day of each month during the Term.*

3.3.4 *On the assignment of this Lease to a person nominated pursuant to Clause 3.19.2(a) the Leaseholder shall pay to the Landlord a fee equivalent to 1% of the sale price.*

(27) The detailed service charge provisions are at clause 7 and include:

7.1 Covenant to pay

The Leaseholder covenants with the Landlord to pay the Service Charge during the Term by equal payments in advance at the same time and in the same manner in which the Specified Rent is payable under this Lease.

7.2 When Calculated

The Service Provision in respect of any Account Year shall be calculated before the beginning of the Account Year and shall be calculated in accordance with Clause 7.3 (How calculated).

7.3 How Calculated

The Service Provision shall consist of a sum comprising the expenditure estimated by the Authorised Person as likely to be incurred in the Account Year by the Landlord for the matters specified in Clause 7.4 (Service Provision) together with:

...

7.4 Service Provision

The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in connection with the repair, management, maintenance and provision of services for the premises demised by Head Lease and shall include (without prejudice to the generality of the foregoing):

...

(c) all reasonable fees, charges and expensed payable to the Authorised Person any solicitor, accountant, surveyor, valuer, architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the premises demised by the Head Lease including the computation and collection of rent (but not including fees, charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work;

...

7.5 Adjustment to actual expenditure

As soon as practicable after the end of each Account Year the Landlord shall determine and certify the amount by which the estimate referred to in Clause 7.3 (How calculated) shall have exceeded for fallen short of the actual expenditure in the Account Year and shall supply the Leaseholder with a copy of the certificate and the Leaseholder shall be allowed or (as the case may be) shall pay immediately following receipt of the certificate the Specified Proportion of the excess or the deficiency.

...

7.7 Declaration re Landlord and Tenant Act 1985

The parties agree that the provisions of sections 18 to 30B of the Landlord and Tenant Act 1985 and of Part V of the Landlord and Tenant Act 1987 all of which regulate service charges shall apply to the provisions of this Lease.

7.8 Variation of Specified Proportion

If in the reasonable opinion of the Landlord it shall at any time become necessary or equitable to do so the Landlord may increase or decrease by written notice to the Leaseholder the Specified Proportion so that the amount payable by the Leaseholder shall proportionate to the number and type of dwellings the owners or lessees of which are obliged to pay monies towards the Service Provision and the Specified Proportion increased or decreased as aforesaid shall be substituted for the Specified Proportion set out in the Particulars

The 2015 Decision and appeal

(28) The 2015 Proceedings concerned service charges for the years 2011/12 to 2014/15. They were heard by a differently constituted F-tT on 07 and 08 September 2015 and the 2015 Decision was issued on 26 November 2015. This ran to 17 pages, including the appendix and addressed a number of issues.

(29) The applicants in the 2015 Proceedings are referred to as the Leaseholders in this section of the decision, to avoid any confusion.

(30) At paragraph (2) of the 2015 Decision, the F-tT said:

The tribunal has decided the issues in principle and the respondent is required to determine the consequent figures as the respondent did not have the relevant figures available.

(31) Paragraphs 23-26 dealt with the concierge service provided by R2. At paragraph 26, the F-tT concluded:

In view of the evidence before the tribunal, from those providing the concierge service and confirming categorically that the applicants were not receiving the concierge service and were not being charged for the service, the tribunal determine that the cost of the concierge service is not recoverable from the applicants.

(32) Paragraphs 32-35 dealt with lift costs. The Leaseholders argued that they should only contribute to the costs of the two lifts in their block (Ashmore House North and South), based on the definitions of "*Building*" and "*Building Expenditure*" in their leases. "*they should each pay their respective proportion for the cost of the two lifts in their block, namely Ashmore House North and South.*" This was agreed by OFHA at the hearing and at paragraph 35, the F-tT found:

Given the agreement between the parties, the tribunal confirms that the applicants are liable to pay (their respective proportions under the terms of their individual leases) toward the cost of the two lifts in Ashmore House (North and South) only.

(33) The Leaseholders applied the same argument to the insurance costs, which OFHA also agreed at the hearing. At paragraph 28, the F-tT found:

Given the confusing evidence from the respondent and the subsequent agreement between the parties, the tribunal confirms that the applicants are liable to pay (their respective proportion under the terms of their individual leases) towards the building and lift insurance cost for Ashmore House (North and South) only.

(34) Only the applicant appealed the 2015 Decision. The one ground on which she was granted permission to appeal was the F-tT's failure to determine the amounts payable by the Leaseholders. The appeal was allowed with the UT saying, at paragraph 9 of its decision "*Until it has quantified the service charge payable the FTT has not yet fully determined the application. It cannot properly delegate its duty by directing one of the parties to determine the financial consequences of its decision.*"

(35) At paragraph 11 the UT went on to say:

We do not underestimate the practical difficulty of quantifying the sum payable in certain cases….Where the necessary information is not available at the hearing, or where it is not reasonable to expect the FTT to devote its own limited resources to the task of calculating what may be a large number of individual figures, the appropriate course is likely to be to direct the landlord or the management company to recalculate the service charge in light of the tribunal's decision and then to submit it to the leaseholder for agreement, giving both parties the right to apply to the tribunal if agreement cannot be reached. In all cases, however, the final responsibility for determining the sum payable lies with the FTT."

(36) There was no appeal against the determinations/findings at paragraphs 26, 35 and 38 of the 2015 Decision, as set out above, which are final.

The hearing

(37) The hearing took place on 18 and 19 February 2019. The applicant appeared in person. Ms Evans appeared on behalf R1 and Mr Allison appeared on behalf of R2.

(38) R1 produced hearing bundles (three volumes) in accordance with the 08 November directions. These included copies of the Tribunal application, the various directions and applications for permission to appeal, the parties' statements of case, documents from the 2015 Proceedings and the UT decision, the witness statements served by the respondents, the relevant service charge accounts and relevant

documents and correspondence. The bundles did not include any witness statement from the applicant. During the course of the hearing, the applicant handed up an annotated plan of the Estate and Ms Evans handed in photographs of the Building; all of which assisted the Tribunal in understanding the layout.

(39) On 13 February, shortly before the hearing, the applicant filed and served a witness statement of the same date. This dealt with the absence of written management agreements for the Building and the Estate; both of which are managed by Rendall & Rittner ('R&R'). The applicant alleged breaches of section 20 of the 1985 Act and regulation 5 of the Service Charges (Consultation Requirements) (England) Regulations 2002 ('the 2003 Regulations'). She submitted that both the Building and Estate are managed under qualifying long term agreements ('QLTAs'), as defined in section 20ZA(2) of the 1985 Act and the breaches meant:

(a) no management fees should be payable; and

(b) her service charges should be capped at £100,

for each of the years in question.

(40) The applicant's statement should have been served by 20 December 2018, pursuant to the 08 November directions. At the start of the hearing, the Tribunal dealt with its admissibility. The applicant said her statement had been served late due to the respondents' conduct. She had needed additional time to understand their case once she had seen their statements.

(41) Mr Allison did not object to the late service of the statement, explaining that R2 took a neutral stance. Ms Evans did object, pointing out that the respondents' statements had been served on time. She also suggested that the statement was largely irrelevant, as her client was willing to cap R&R's management fee (for the interior of the Building) to £100 per flat per annum.

(42) The Tribunal then spent some time clarifying the issues to be determined, which were:

(a) the payability of R&R's management fees for 2015/16 and 2016/17, as charged to R2, for managing the Estate;

(b) the payability of R&R's management fees for 2015/16 and 2016/17, for managing the internal communal areas in the Building, as charged to R1;

(c) the application of the QLTA cap of £100 per annum, if there was any breach of regulation 5 of 2003 Regulations;

(d) the payability of R1's management fees for 2015/16 and 2016/17;

(e) the payability of R1's administration fees for 2015/16 and 2016/17;

(f) the implementation of the 2015 Decision for 2015/16 and 2016/17, in respect of concierge fees and lift costs;

(g) the apportionment of the service charges for 2015/16 and 2016/17; and

(h) the payability of the advance service charges for 2017/18.

(43) After a short break the Tribunal informed the parties that it would admit the applicant's statement. Although served very late, there was no prejudice. The statement raised short points of law that could be addressed in closing submissions.

(44) Ms Evans then took the Tribunal through the relevant lease provisions, the service charge accounts for 2015/16 and 2016/17, the service charge budget for 2017/18, a management agreement between Berkeley and R&R dated 24 September 2012 and an unsigned and undated agreement from R&R.

(45) The Tribunal heard oral evidence from Ms Katie Shorey and Mr Adrian Shaw, for the respondents. Ms Shorey is a Senior Property Manager employed by R&R and spoke to a statement dated 17 January 2019. Mr Shaw is the Head of Service Charges for the Clarion Housing Group and spoke to a statement dated 21 January 2019. Both witnesses were cross-examined by the applicant at some length and also answered questions from the Tribunal.

(46) There was no oral evidence from the applicant, as her only statement was that dated 13 February 2019, addressing points of law. However, she was able to put her case via detailed cross-examination of the respondents' witnesses and in her closing submissions. The Tribunal also heard closing submissions from Mr Allison and Ms Evans.

(47) Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made the following determinations.

R&R's management fees for 2015/16 and 2016/17, as charged to R2

(48) R&R have managed the Estate, including the external fabric of the Building and other social housing blocks, since 2009. They also manage the internal communal areas of the social housing blocks, including the Building. Their fees for managing the Estate are billed to R2, which then passes on a proportion to R1. Their fees for managing the internal common-ways of the Building are billed direct to R1.

(49) R&R arrange the production of annual service charge accounts for the Estate, which are audited by UHY Hacker Young. Each set of accounts includes 7 different income and expenditure accounts; Estate (Residential), Estate (Commercial); Block A – Building Costs (Residential), Block A – Building Costs (Commercial), Block A – Private, Building D and Car Park. This makes it very difficult to identify the charges attributable to the Building or the Flat.

(50) R2's statement of case provided some clarification and Ms Shorey's statement included a table of the contributions payable by the Building and the Flat, which she corrected in her oral evidence. The contributions payable for each year were:

Year	Estate (Residential)	Building D
2015/16	£19,548/£45.55	£5,350/£48.56
2016/17	£20,414/£40.71	£5,619/£51.60

(51) The applicant disputed her liability to contribute to the Estate management fees, on two grounds:

(a) there was no written management agreement between R&R and R2; and

(b) any oral/implied agreement between R&R and R2 was a QLTA and there had been no section 20 consultation.

(52) R2 has no written agreement with R&R covering Blocks A4 or D1. There is a written agreement between Berkeley and R&R dated 24 September 2012 that refers on the first page to "*Block A1 A2 A3 A5 A6 Caspian Wharf, E3*". Various definitions appear in clause 1, including:

*"**Property**" means the freehold land and all Private Units/ Commercial Units/ other buildings on it or to be constructed on it and owned by the Owner and its successors in title known as Caspian Wharf Block A1 A2 A3 A5 & A6, E3 and registered at the Land Registry under title number 388962 and shown edged red on the plan attached and including any land subsequently acquired by the Owner and notified to the Managing Agents in writing and forming part of the Property"*

(53) The agreement makes no mention of A4 or D1. Two copies of the agreement were included in the hearing bundles; neither of which included a plan. Further, the bundles did not include official copies of the register or filed plan for title number 388962. Following the hearing the Tribunal requested copies of all three documents from R2's solicitors, who were unable to provide the same.

(54) Clause 2 of the agreement provides:

2.1 The Owner appoint the Managing Agent to be their agent for the management of the Property during the Management Period and the Managing Agent accepts such appointment on the terms and conditions of this agreement and acknowledges that it has a fiduciary duty to the Owner and Unit Owners in respect of its obligations under this agreement

2.2 The Management Period shall begin on the date of this agreement and (subject always to early termination in accordance with clause 8) continue for a period of 364 days and thereafter until terminated by not less than three months notice in writing given by the Owner to the Managing Agent at

any time or by three months notice given by the Managing Agent to the Owner at any time

(55) In its statement of case, R2 explained that the agreement should have included the social housing blocks but these were omitted due to a drafting oversight. However, R&R have always managed the social housing, as part of the Estate and this is "*on the same terms as otherwise set out within the Management Agreement*."

(56) In his closing submissions, Mr Allison stated that R&R had managed A4 and D1 since the inception of the development and must be managing under some form of agreement. The terms must be the same as those in the written agreement for the other blocks, given that the social housing blocks were omitted in error. Mr Allison accepted there had been no section 20 consultation.

(57) Whether the management of the Building is a QLTA turns on how long the agreement is for. Mr Allison submitted that the original term of the written agreement was 364 days, based on clause 2.2. It did not have a term of more than 12 months and does not satisfy the requirements of section 20ZA(b)(2) of the 1985 Act. It could be terminated on the 365th day by giving three months' written notice during the initial, as notice can be given at "*any time*". The agreement has continued past the original term but can still be terminated on giving three months' notice.

(58) Mr Allison's primary submission was that R&R manage the Building on the same terms as the written agreement and this is not a QLTA. Alternatively, they managing on a rolling 6-month contract, as that is the frequency of their invoices to R2. Again, this would not be a QLTA as the term is not more than 12 months.

(59) Mr Allison referred to the recent Court of Appeal's decision in ***Corvan (Properties) Ltd v Abdel-Mahmoud [2018] EWCA Civ 1102***, which concerned a written management agreement that provided "*The contract period will be for a period of one year from the date of signature hereof and will continue thereafter until terminated upon three months' notice by either party*". Lord Justice McFarlane concluded that the use of the word "*will*" meant the contract would continue beyond the initial 12 months (paragraph 28). This means the agreement was a QLTA as "*the term of the contract is for a period of one year plus an indefinite period which is subject to the three-month termination right*." (paragraph 31). Mr Allison distinguished the facts in this case, where clause 2.2 allows the parties to terminate the contract on the 365th day.

(60) Mr Allison drew attention to paragraph 39 of Corvan, where McFarlane LJ said "*The requirement that the contract be for a term of more than twelve months cannot be satisfied simply by the contract being indeterminate in length but terminable within the first year.*"

(61) Mr Allison pointed out that the Tribunal was not being asked to determine R&R's fees but these are perfectly reasonable. The sums

charged to the Flat are just under £100 per unit per annum (below the statutory cap) and this is a reasonable figure to pass on to the applicant. Mr Allison also pointed out that there was no comparator evidence from the applicant.

(62) The applicant's starting point was that she does not have to contribute to the management fee in absence of a written agreement. She submitted that R&R had no contractual relationship with the R2 and could not charge R2 for managing the Estate. She disputed there was a contract on the same terms as the written agreement. Blocks A4 and D1 are not mentioned in that agreement and are not covered by the it. Alternatively, the applicant relied on the duration of R&R's management, since 2009, as evidence of a contract term of more than 12 months. If there was a contract then it was a QLTA.

(63) The applicant also referred to ***Corvan***, particularly the reasoning at paragraph 35:

The respondent's skeleton argument fittingly captures the purpose of the statutory intervention ss.18-20ZA of the 1985 Act:

> *"to ensure that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, or (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The longer the term of any agreement entered into by the landlord, the more significant becomes the risk of a conflict with these two purposes. This is why consultation is required for all QLTA's and why the basic definition catches simply 'any agreement'."*

The Tribunal's decision

(64) R&R's management fees for 2015/16 and 2016/17, as charged to R2 and passed on to R1, are allowed in full. The sums payable by the applicant in each year are:

2015/16	£94.11 (£45.55 and £48.56 – see paragraph 50, above)
2016/17	£92.31 (£40.71 and £51.60 – see paragraph 50, above)

Reasons for the Tribunal's decision

(65) There was no dispute that R&R manage the entire Estate, including the external fabric of Building. The written management agreement does not mention the Building but R&R clearly manages it. There must be an implied or oral contract for this management. The Tribunal agrees with Mr Allison that the terms of that contract are the same as those in the written agreement for the other blocks.

(66) The Tribunal is satisfied there is a contractual relationship between R&R and R2. This is evidenced by the six-monthly invoices and payment of these invoices. R&R are entitled to charge for their management and R2 is entitled to pass on the charges to R1, pursuant

to clause 6.3 and paragraph 2 of Part II of the Fourth Schedule to the Head-Lease.

(67) The Tribunal finds that the management contract for the external fabric of the Building is not a QLTA, for the reasons advanced by Mr Allison. Clause 2.2 of the written agreement applies to the implied/oral agreement, which means the contract could be terminated on the 365th day. The initial fixed term was 364 days and the written notice could have been given during that term. The contract has continued but this does not make it a QLTA, as either party can terminate it on 3 months' written notice. The facts in ***Corvan***, where the contract had to continue past the initial 12 months, can be distinguished.

(68) In fact the QLTA point is academic as the Flat's contributions to R&R's fees were below the £100 cap in each year (see paragraph 64, above).

(69) The applicant did not seek a determination of R&R's fees under section 19 of the 1985 Act.

R&R's management fees for 2015/16 and 2016/17, as charged R1

(70) This item relates to R&R's fees for manging the internal common-ways in the Building. R&R also produce service charge accounts for the social housing site. Again, these are audited by UHY Hacker Young. Each set of accounts runs to 13 pages and include 7 different income and expenditure accounts; Ashmore House South (A4), Ashmore House North (D1), Maestro Apartments (A3), Coulson House (A4), Leonard House (D1), Levanter House (D2) and Gregale House (D3). Again, it is difficult to identify the charges attributable to the Building (A4 and D1) or the Flat.

(71) Again, there is no written management agreement for A4 or D1. In his witness statement, Mr Shaw explained that a management information pack and service level agreement were prepared at the inception of the Estate and a draft agreement management was prepared in September 2011 but never signed. The service level agreement was also unsigned. Copies of all three were included in the hearing bundles. The management information pack and service level agreement referred to Caspian Wharf but the draft management agreement did not identify the property being managed and only included R&R's name. There was no mention of OFHA or R2.

(72) Clause 2.2 of the draft management agreement provides:

The Management Period shall begin on the completion of the first unit (Private, affordable or commercial) and continue for a period of (x) year(s) and thereafter until terminated by not less than six months notice in writing to expire on or at any time after the end of the said period of (x) year(s) given by the Company to the Managing Agent or vice versa or in accordance with the provisions of Clause 6 of this agreement.

Clause 6 deals with termination arising from breaches of the agreement or insolvency.

(73) Ms Evans submitted that the terms in the unsigned service level agreement and management agreement apply to the management of the internal common-ways.

(74) Again, the applicant argued that she does not have to contribute to these management fees as there was no contractual relationship between R&R and the second respondent.

The Tribunal's decision

(75) The applicant is liable to pay the following sums for R&R's management of the internal common-ways in the Building:

2015/16	£100
2016/17	£100

Reasons for the Tribunal's decision

(76) The Tribunal is satisfied there is a contractual relationship between R&R and R1, as evidenced by the six-monthly invoices and payment of these invoices. Again this is an implied or oral contract. R&R clearly manage the internal common-ways. They are entitled to charge for this service and the applicant is liable to contribute to their reasonable fees, pursuant to clause 7.4(c) of the Underlease.

(77) The terms of the implied/oral contract are the same as those in the unsigned service level agreement and management agreement and the contract is a QLTA. Whilst clause 2.2 does not specify the duration, it is clearly for more than 12 months, as it refers to a "*period of (x) year(s)*" and notice can only be given so as to expire after the initial term. The lowest figure that could be inserted in place of "*(x)*" is one. As in ***Corvan***, the initial term was a minimum period of 12 months plus an indefinite period subject to the termination right, which in this case is six months.

(78) There was no suggestion that OFHA consulted the leaseholders before entering into this management contract. Given the contract is a QLTA, the failure to consult was a breach of regulation 5 of the 2003 Regulations and the statutory cap of £100 applies to R&R's management fees, as conceded by Ms Evans.

(79) The applicant did not seek a determination of R&R's fees under section 19 of the 1985 Act.

<u>The application of the QLTA cap of £100 per annum</u>

(80) The applicant argued that any breach of regulation 5 meant that her entire service charge liability should be capped at £100 per annum, pursuant to regulation 4(1). Ms Evans submitted that the cap only

applies to the sums due under the QLTA; rather than all service charges.

The Tribunal's decision

(81) The £100 cap only applies to R&R's fees for the management of the internal common-ways at the Building. It does not apply to the other service charges.

Reasons for the Tribunal's decision

(82) The Tribunal has found that the management contract between R&R and R1 is a QLTA and there has been a breach of regulation 5 (see paragraphs 77 and 78, above). The statutory cap only applies to the management fees payable under the QLTA by virtue of section 20(7) of the 1985 Act. This caps "*the relevant contribution*" and section 20(2) provides:

In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred in carrying out the works or under the agreement.

In this case, the applicant's "*relevant contribution*" is the amount which she may be required to pay under the management contract between R&R and R1.

The payability of R1's management fees for 2015/16 and 2016/17

The payability of R1's administration fees for 2015/16 and 2016/18

(83) It is convenient to deal these two issues together. In addition to R&R's fees, R1 charged the following in-house management fees to the applicant:

2015/16	£130
2016/17	£185

(84) R1 also charged administration fees of 5% of the service charges passed down by R2. This covers its costs for administering the service charges on the social housing side.

(85) The applicant disputed the in-house management fees on the basis that R1 does not manage the Building or the Estate, does not produce any service charge accounts that might evidence management activity and has not disclosed any management contract. During the hearing, she also pointed out that leaseholders on the social housing side pay more than those on the private side. They pay management fees to R&R and R1, whereas the private leaseholders just pay R&R. Taking all of these factors into account, the management fees should be disallowed in full.

(86) The applicant disputed the administration fees on similar grounds. R1 does not manage the Building or the Estate and there is no justification to charge a percentage of the service charges. The amount is both arbitrary and unreasonable and should be disallowed in full. The applicant pointed out that OFHA had previously charged a single fee of £75 per flat per annum, covering its administration and management fees and suggested that an administration fee was only really appropriate for R1's short term tenants; rather than long leaseholders. The administration fee had only been introduced when the F-tT directed OFHA to produce further documents on 13 April 2017, following the UT appeal.

(87) The applicant also disputed the administration fees on the basis of non-compliance with section 21 of the 1985 Act. This obliges a landlord to provide a written summary of service charge costs, upon written request by the tenant. The applicant accepted that she had not made such a request but argued that written summaries should have been produced by virtue of the declaration at clause 7.7 of the Underlease, acknowledging the application of sections 18 to 30B of the 1985 Act.

(88) R1 claims its management fees under clause 3.3.3 of the Underlease, which requires the applicant to "*pay the Landlord's reasonable per flat annual administration fee*". Mr Shaw addressed these fees in his witness statement and oral evidence. They cover "*managing the relationship*" between R1 and its leaseholders, dealing with issues and enquiries and liaising with R&R. R1 is the first point of contact for leaseholders on the social housing side.

(89) R1's normal management fee, where it undertakes all management duties, is £260 per flat per annum. This has been discounted because some of the duties are undertaken by R&R. At paragraph 11 of his statement, Mr Shaw said "*The management fee covers a range of activities; not all apply to every property and the level of the management fee reflects the extent of the service we provide.*" He then listed the following activities:

- *Arranging insurance and helping with insurance claims.*
- *Managing the obligations in the lease or freehold transfer.*
- *Collecting rent, service charges and/or freehold charges.*
- *Providing information such as handbooks and newsletters.*
- *Consulting leaseholders on repair work and long-term contracts.*
- *Investigating breaches of the terms of the lease or freehold transfer and taking action as needed.*
- *Undertaking inspections to ensure compliance with statutory requirements.*

(90) R1 claims its administration fees under clause 7.4(c) of the Under-Lease. In his witness statement, Mr Shaw explained that the 5% fee

covers "*Clarion's costs of administering the service charges…the costs of staff, IT equipment both hardware and software and support, accounts payable staff and office overheads.*"

(91) The Tribunal were also referred to a detailed letter from R1 to the applicant dated 06 April 2018, which addressed the service charges for 2015/16 to 2017/18 and the implementation of the 2015 Decision. This ran to 12 pages with various enclosures. It explained that management fees had risen from £75 to £130 in April 2015 and then to £185 in April 2016. It also referred to a leaflet that had been circulated to residents in November 2014. The leaflet was produced by Centra Living, which is part of the Clarion Group and explained "*Centra Living is part of Circle Housing and provides property management services on behalf of Circle Housing's leasehold, shared ownership, market and intermediate rented homes and commercial properties.*"

(92) The leaflet provided information on Centra's charges and fees, with the section on management fees stating:

We charge management fees to cover our costs of managing the relationship with you as set out in your lease or freehold transfer. We do this by setting different management charges for different properties depending on whether they are:

- *houses*
- *flats where we provide services*
- *flat where we hold a head lease (and another landlord owns the freehold and may provide some or all of the services).*

It went on to explain "*We have not increased these fees for several years and unfortunately they no longer cover the cost of providing management services.*

(93) The leaflet also addressed the administration fees, stating:

Our administration charge is a percentage charge added to the costs of the services we provide. It covers our costs for obtaining and managing the particular service and the cost of preparing and reconciling the service charge account. For example, the administration charge for repairs will help meet the costs of staff involved in ordering the repair, checking the repairs for quality and for paying contractor invoices.

The Tribunal's decision

(94) The applicant is liable to pay the following combined sums for R1's management and administration fees:

2015/16	£130
2016/17	£185

Reasons for the Tribunal's decision

(95) The Tribunal first looked at the service charge provisions in the Underlease. The applicant is liable "*To pay the Landlord's reasonable per flat annual administration fee by equal monthly instalments*" (clause 3.3.3). The "*Service Provision*" shall include "*all reasonable fees, charges and expenses payable to the Authorised Person any solicitor, accountant, surveyor, valuer, architect or other person whom the Landlord may from time to time reasonably employ in connection with the management of the management or maintenance of the premises demised by the Head Lease…and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work*" (clause 7.4(c)).

(96) Confusingly, R1 claims it management fees under 3.3.3 and its administration fees under 7.4(c), which appears the wrong way around. To add to the confusion, the administration fee payable under 3.3.3 is actually a service charge under section 18 of the 1985 Act; rather than an administration charge under schedule 11 of the 2002 Act.

(97) The applicant is liable to pay R1's administration fee and management fees, by virtue of clauses 3.3 and 7.4(c)). However, these fees have to be "*reasonable*", as this word appears in both clauses.

(98) The applicant's submission on the operation of section 21 of 1985 Act was misconceived. A written summary of service charge costs only has to be produced in response to a written request by a tenant. The applicant has not made such a request. The declaration at clause 7.7 of the Underlease does not alter the position, as it simply acknowledges the application of sections 18 to 30B. It does not go further and require the production of a written summary without a request. In any event, the applicant has been supplied with the audited service charge accounts produced by R&R.

(99) Having regard to Mr Shaw's evidence, the fee increase explanation in the Centra Living leaflet and the members' knowledge and experience of management fees, the Tribunal finds that fees of £135 (2015/16) and £185 (2016/17) are reasonable. However, these sums should cover both the management and administration fees. It is not reasonable for the applicant to pay administration fees on top, bearing in mind that she is already contributing to R&R's fees for managing the Estate and the Building. She should not have to pay two lots of fees to R1, in addition to R&R's fees.

(100) The Centra Living leaflet refers to the administration fee covering their "*costs for obtaining and managing the particular services and the cost of preparing and reconciling the service charge account*." In this case, the services are obtained and managed by R&R, who also produce the service charge accounts. On Mr Shaw's evidence, the administration fee simply covers "*administering the service charges*". An additional 5% fee for this service is wholly unreasonable, given R1 is also charging

a management fee. In the circumstances, the Tribunal caps the combined management and administration fees to the sums claimed for management fees.

The implementation of the Original Decision for 2015/16 and 2016/17

(101) There are two aspects to this part of the application. Firstly, the applicant contends that she is being charged for the concierge service, contrary to paragraph 26 of the 2015 Decision. Secondly, she says the apportionment of the lift costs is contrary to paragraph 35 of that decision.

(102) The R&R management information pack includes a job description for concierge, which described the purpose and aim of the post as "*To staff the estate office and assist residents with all concierge and building management activities. In addition providing any reasonable ad-hoc services as the occupiers may require.*" The concierge are based in Block A4 on the private side and they do not provide services to the social housing side. The applicant says she is being charged for these services, which the respondents dispute.

(103) The concierge form part of the building estate services team for the whole Estate, which provide a number of services including inspections of the internal and external common-ways, litter-picking and security. The Estate service charge accounts include staffing costs for this team. In her oral evidence, Ms Shorey explained the blocks on the social housing side receive a 50% discount in these staffing costs as they do not benefit from the concierge. She also referred to a letter sent to Centra Living on 21 March 2016, which distinguished between the duties performed by the building estate services team for the entire estate and those performed by the concierge, just for the private residents. The letter explained "*As discussed the Housing Association blocks receive a 50% reduction on the staffing costs and as such there are no concierge cost to be refunded as a result of the FTT. This is because housing association blocks do not pay for it.*"

(104) In his closing submissions, Mr Allison pointed out that R2 was not a party to the 2015 Proceedings and is not bound by the 2015 Decision. He described the staffing costs as "*one basket of costs*" and submitted it was reasonable to make a global reduction. If anything, R&R were overly generous in deducting 50%. Ms Evans endorsed these submissions.

(105) The applicant disputed R&R's approach. Rather than applying a global reduction, it should work out the actual cost of the concierge and remove this from the staffing costs. The applicant had been unable to undertake this exercise, as she did not have the relevant vouchers and could not give a figure for the appropriate reduction. However, she did point out that the concierge desk was manned 24 hours a day, by 4 members of staff.

(106) Turning now to the lifts; the applicant objects to R1's apportionment of these costs. There are two lifts in the Building; one in Ashmore House North and one Ashmore House South. At paragraph 34 of the 2015 Decision the F-tT confirmed that the applicant and her fellow leaseholders only had to contribute to the costs for these lifts. This meant the costs for both lifts were split between all 44 flats in the Building. This decision was implemented by OFHA for 2011/12 to 2014/15, in early 2016. However, different apportionments have been used for 2015/16 and 2016/17.

(107) In his statement, Mr Shaw explained there had been a review of "*the charging to various blocks including Ashmore House to reflect the layout by individual cores and the service provided to each core*." He expanded on this in his oral evidence and also tried to clarify the new apportionments with reference to the photographs handed in by Ms Evans. In brief, OFHA/R1 divided the Building into 'cores' based on entrances and access to the lifts. The layout of the Building and the entrances means that only some residents can access the lifts. Under the new apportionments; the 10 flats in Ashmore House North contribute to the lift they can access with their proportions based on floor areas. Mr Shaw said this decision was "*fairer*" but he had not been involved in the decision making.

(108) On questioning from the Tribunal, Mr Shaw suggested that the lift apportionments could be varied as the Specified Proportion payable by the Flat is "*A fair and reasonable proportion as the Landlord shall determine from time to time*". The 2015 Decision only covered the period 2011/12 to 2014/15 and different apportionments could be used for subsequent years. Mr Shaw accepted there had been no consultation with the leaseholders before the new apportionments were introduced.

(109) The applicant submitted that the 2011/12 to 2014/15 apportionments should also be used for 2015/16 and 2016/17, to reflect the 2015Decision. The variation was not fair or reasonable as it shifts more of the lift costs onto the long leaseholders and reduces the proportions for the flats let on short tenancies.

The Tribunal's decision

(110) The applicant's contributions to the staffing costs for 2015/16 and 2016/17 are payable in full, subject to the adjustment in the apportionments arising from the decision at paragraph 123, below.

(111) The applicant's contributions to the lift costs for 2015/16 and 2016/17 are not currently payable.

Reasons for the decision

(112) The Tribunal agrees with Mr Allison and Ms Evans that paragraph 26 of the 2015 Decision has been implemented and the concierge costs have been removed from the staffing costs. It follows that the staffing

costs are payable in full, subject to the adjustment in the apportionments arising from paragraph 123, below.

(113) R2's global reduction of 50% of the staffing costs was entirely pragmatic and reasonable. The alternative would be to try and work out the precise cost of the concierge and remove this from the staffing costs. This would involve a considerable amount of work and would probably result in a smaller reduction. Based on Ms Shorey's letter to Centra Living dated 21 April 2016, the duties performed by the concierge are relatively modest compared with those of the other members of the building estate services team. It is highly likely that the concierge account for less than 50% of the overall costs.

(114) It was open to the applicant to request the vouchers for the staffing costs during the course of these proceedings, to check if the global reduction was sufficient. Paragraph 4 of the 06 September directions gave her the opportunity to seek additional disclosure, by serving a list of required documents. She failed to comply with this direction and lost that opportunity.

(115) The applicant's contributions to the lift costs are not currently payable, as these costs have not been apportioned in accordance with the 2015 Decision or the Underlease. OFHA and the applicant agreed the apportionment of the lift costs, as confirmed at paragraphs 34 and 35 of that decision. As a consequence the cost of the two lifts in Ashmore House North and South should be split between all 44 flats in the Building. Arguably, R1 is not bound by this agreement or the 2015 Decision, as it was not a party to the 2016 Proceedings. However, it is a successor to OFHA having taken over that housing association. Further the correct apportionment was clearly established in the 2015 Decision.

(116) The applicant has to pay the Specified Proportion of the Service Charge, as defined in Schedule 9 to the Underlease. The Specified Proportion can be varied from time to time and there is specific provision for it to be increased or decreased by written notice (clause 7.8). However, there is no mechanism for differing proportions to be charged for differing services. The Specified Proportion must be the same for all Service Charge expenditure and must relate to expenditure for the Building, as a whole. R1 cannot use different apportionments for lift costs, based on 'cores'.

(117) It follows that the applicant's contributions to the 2015/16 and 2016/17 lift costs have been incorrectly calculated. The contributions will need to be recalculated so the costs of the two lifts are apportioned between all 44 flats in the Building, based on floor areas. It appears the appropriate proportion for the Flat is 1.69% (see paragraph 119, below) but this will need to be checked by the parties.

(118) The parties must now seek to agree the correct apportionment of the lift costs and the contributions payable by the Flat for 2015/16 and 2016/17. If they are unable to reach an agreement by 24 April 2019 the

Tribunal will give further directions for the determination of these contributions.

The apportionment of the service charges at the Building for 2015/16 and 2016/17

(119) In his statement, Mr Shaw explained that the 2015/16 Building costs had been apportioned between all 44 flats with the Flat's proportion being 1.69% (£808.30). This is uncontroversial and is consistent with the 2015 Decision and the Tribunal's decision on the lift costs. However, the Estate contribution was apportioned differently. OFHA/R1 received six-monthly invoices from R&R for the 8 flats at 201-502 Ashmore House North, which were then apportioned between those flats, based on their floor areas. This resulted in the Flat's proportion being 13.46% (£1,221.03).

(120) OFHA/R1 changed approach for 2016/17 by apportioning the Building costs and Estate contribution between the 10 flats in Ashmore House North, based on floor areas. This resulted in the Flat's proportion being 10.02% (£681.39 for the Building and £789.84 for the Estate). In his statement, Mr Shaw said "*We applied the LVT's determination on how we should charge for the lifts by billing residents for their proportion of all core costs (eg. Ashmore House north), not the whole building. We have continued this approach as it better represents the costs of services from which residents directly benefit.*" He then went on to say *"It is our view that both years' approaches reflect the lease requirements for service charges to represent "a fair and reasonable proportion as the Landlord shall determine from time to time"."*

(121) R1 also sought to explain the apportionments in its 12-page letter to the applicant of 06 April 2018. However, the letter was extremely difficult to follow with a bewildering array of figures and tables. Further it revealed disparities between R&R's invoices and reports, missing vouchers for Ashmore House South and errors in the calculation of the Flat's service charge for 2016/17, which had to be corrected with credits totalling £616.80.

(122) The applicant's case was that the Building costs and the Estate contribution should be apportioned between all 44 flats in the Building, based on floor areas. This would be consistent with the First Decision and comply with the Underlease.

The Tribunal's decision

(123) The Building costs and Estate contribution must be apportioned between all 44 flats in the Building, based on floor areas.

Reasons for the Tribunal's decision

(124) The Tribunal agrees with the applicant and reiterates the comments at paragraph 116, above. The Specified Proportion must be the same for all Service Charge expenditure and must relate to expenditure for the

Building as a whole. It cannot be reallocated for different parts of the Building. It appears the Building costs were correctly apportioned for 2015/16. It is a mystery why the Estate contribution was apportioned differently and why R&R raised invoices for the 8 flats at 201-502 Ashmore House. This is contrary to the Underlease and they should have invoiced for the Building as a whole, so OFHA/R1 could split the contribution between all 44 flats.

(125) Mr Shaw was wrong in stating that the previous determination on lift costs had been applied in the 2016/17 apportionments. There was nothing in the 2015 Decision to suggest that service charges should be apportioned based on 'cores' or that Ashmore House North should be treated separately to the rear of the Building. To the contrary, it made it clear the lift costs should be billed to the Building as a whole. The same principle applies to all Building costs and the Estate contribution.

(126) Based on the 2015/16 apportionment of Building costs, it appears that the appropriate proportion for the Flat is 1.69% but this will need to be checked by the parties.

(127) The parties must now seek to agree the correct apportionment of the Building costs and the Estate contributions and amounts payable by the Flat for 2015/16 and 2016/17. If they are unable to reach an agreement by 24 April 2019 the Tribunal will give further directions for the determination of these amounts.

Budget 2017/18

(128) By the time of the hearing, R&R had produced the service charge accounts for 2017/18 (both for the Building and the Estate). This meant the actual service charges were known for this year. However, the directions stated it was the budget that would be determined.

(129) The advance charges demanded for the Flat total £2,118.06, including R1's management fee of £185. In his oral evidence, Mr Shaw said he was the "*Authorised Person*" for the purposes of clause 7.3 of the Underlease and is responsible for setting the service charge budgets. These are based on actual service charge expenditure in previous years. A copy of the 2017/18 budget accompanied R1's 12-page letter of 06 April 2018. Confusingly, this also included the ground rent for the Flat. Total anticipated expenditure, excluding the rent and the management fee, was £14,356.46. However, this appears to relate solely to Ashmore House North; rather than the Building as a whole. To add to the confusion, the Flat's proportion is shown as 13.46%, which is different to any of the proportions demanded for 2015/16 and 2016/17.

(130) The applicant's case was that the budgeted service charge expenditure should be apportioned between all 44 flats in the Building, based on floor areas, to be consistent with the First Decision and comply with the Underlease. She did not dispute any specific items in the budget, which did not include any administration fees for R1.

The Tribunal's decision

(131) The budgeted service charge expenditure for 2017/18 must be apportioned between all 44 flats in the Building, based on floor areas.

Reasons for the Tribunal's decision

(132) The Tribunal agrees with the applicant and reiterates the comments at paragraphs 116 and 124, above. The budget must be based on anticipated service charge expenditure for the Building as a whole; rather than 'cores' or Ashmore House North.

(133) Again, it appears that the appropriate proportion for the Flat is 1.69% but this will need to be checked by the parties.

(134) The parties must now seek to agree the correct apportionment of the budgeted service charge expenditure and the amount payable by the Flat for 2017/18. If no agreement is reached by 24 April 2019 the Tribunal will give further directions for the determination of the amount. There is no need to adjust the budget to take account of the Tribunal's decision on management and administration fees (paragraph 94, above) as no administration fees were included in the budget.

Costs

(135) The Tribunal dealt with various costs applications at the end of the hearing. The Judge explained that any application for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 should await the Tribunal's decision. Rule 13(5) imposes a time limit for making such an application.

(136) The applicant sought orders under section 20C of the 1985 Act and paragraph 5A of schedule 11 to the 2002 Act. This was not opposed by Ms Evans who explained that R1 would not pass on any of its costs to the service charge account or the applicant, whatever the outcome. The applicant also sought a refund of the Tribunal fees she had paid in for the application and hearing[1], totalling £300.

(137) Having regard to the outcome of the case, with the applicant succeeding on a number of issues, it just and equitable to make section 20C and paragraph 5A orders and the Tribunal does so. The applicant was justified in pursuing these proceedings and should not have to bear any of the respondents' costs. Further, it is appropriate that R1 refunds the Tribunal fees paid by the applicant given its failure to fully implement the 2015 Decision. The sum of £300 is to be paid to the applicant within 28 days.

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

The next steps

(138) The parties must now try and agree the service charges for 2015/16 to 2017/18, in the light of this decision. They should make strenuous efforts to do so and actively engage with each other.

(139) These are the second set of proceedings, regarding service charges for the Flat, within the space of four years. They largely arise from R1's misconceived decision to apportion service charges based on 'cores', which was contrary to the Underlease. It was also unnecessarily complicated as evidenced by the 12-page explanatory letter. R1 must now apportion the service charges across the Building as a whole and should provide the applicant with a concise explanation, showing how the Flat's proportion has been calculated.

(140) The Tribunal is concerned by the absence of written management agreements for the Building or the Estate, which is contrary to part 3.2 of the RICS Service Charge Residential Management Code (3rd edition). The respondents should take urgent steps to rectify these omissions.

(141) The applicant has succeeded on a number of issues but some of her arguments were misconceived; particularly the alleged breach of section 21 of the 1985 Act. Further, she raised a number of matters at the hearing that were outside the Tribunal's jurisdiction, including allegations of fraud and breaches of the Companies Act 2006. With this in mind, she may wish to seek independent legal advice before embarking on any further proceedings.

Name: Tribunal Judge Donegan **Date:** 03 April 2019

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18 Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

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

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

Section 20ZA Consultation requirements: supplementary

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

(2) In section 20 and this section –

(a) "qualifying works" means works on a building or any other premises, and

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

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement –

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

...

Section 20C Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 21 Regular statements of account

(1) A tenant may require the landlord in writing to supply him with a written summary of the costs incurred –

(a) if the relevant accounts are made up for periods of twelve months, in the last such period ending not later than the day of the request, or

(b) if the accounts are not so made up, in the period of twelve months ending with the date of the request,

and which are relevant costs in relation to the service charges payable or demanded as payable in that or any other period.

(2) If the tenant is represented by a recognised tenants' association and he consents, the request may be made by the secretary of the association instead of by the tenant and may then be for the supply of the summary to the Secretary.

(3) A request is duly served on the landlord if it is served on –

(a) an agent of the landlord named as such in the rent book, or similar document, or

(b) the person who receives the rent on behalf of the landlord;

and a person on whom a request is so served shall forward it as soon as may be to the landlord.

(4) The landlord shall comply with the request within one month of the request or within six months of the end of the period referred to in subsection (1)(a) or (b) whichever is the later.

(5) The summary shall state whether any of the costs relate to works in respect of which a grant has been given or is to be paid under section 523 of the Housing Act 1985 (assistance for provision of separate service pipe for water supply) or any provision of Part I of the Housing Grants, Construction and Regeneration Act 1996 (grants, &c for renewal of private sector housing) or any corresponding earlier enactment and set out the costs in a way showing how they have been or will be reflected in demands for service charges and, in addition, shall summarise each of the following items, namely –

(a) an any of the costs in respect of which no demand for payment was received by the landlord within the period referred to in subsection (1)(a) or (b),

(b) any of the costs in respect of which –

(i) a demand for payment was so received, but

(ii) no payment was made by the landlord within that period,

(c) any of the costs in respect of which –

(i) a demand for payment was so received, but

(ii) payment was made by the landlord within that period,

and specify the aggregate of any amounts received by the landlord down to the end of that period on account of service charges in respect of relevant dwellings and still standing to the credit of the tenants of those dwellings at the end of that period.

(5A) In subsection (5) "relevant dwelling" means a dwelling whose tenant is either –

(a) the person by or with the consent of whom the request was made, or

(b) a person whose obligations under the terms of his lease as regards contributing to relevant costs relate to the same costs as the corresponding obligations of the person mentioned in paragraph (a) above relate to.

(5B) The summary shall state whether any of the costs relate to works which are included in the external works specified in a group repair scheme, within the meaning of Chapter II of Part I of the Housing Grants, Construction and Regeneration Act 1996 or any corresponding earlier enactment in which the landlord participated or is participating as an assisted participant.

(6) If the service charges in relation to which the costs are relevant costs as mentioned in subsection (1) are payable by the tenants or more than four dwellings, the summary shall be certified by a qualified accountant as –

(a) in his opinion a fair summary complying with the requirements of subsection (5), and

(b) being sufficiently supported by accounts, receipts and other documents which have been produced to him.

Section 27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Service Charges (Consultation etc) (England) Regulations 2003

Regulation 4 Application of section 20 to qualifying long term agreements

(1) Section 20 shall apply to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100.

(2) In paragraph (1), "accounting period" means the period –

(a) beginning with the relevant date, and

(b) ending with the date that falls twelve months after the relevant date.

(3) Subject to paragraph 3A, in the case of the first accounting period, the relevant date –

(a) if the relevant accounts are made up for periods of twelve months, the date on which the period that includes the date on which these Regulations come into force ends, or

(b) if the accounts are not so made up, the date on which these Regulations come into force.

(3A) Where –

(a) a landlord intends to enter into a qualifying long term agreement on or after 12th November 2004: and

(b) he has not at any time between 31st October 2003 and 12th November 2004 made up accounts relating to service charges referable to a qualifying long term agreement and payable in respect of the dwellings to which the intended agreement is to relate,

the relevant date is the date on which begins the first period for which service charges referable to that intended agreement are payable under the terms of the leases of those dwellings.

In the case of subsequent accounting periods, the relevant date is the date immediately following the end of the previous accounting period.

Regulation 5 The consultation requirements: qualifying long term agreements

(1) Subject to paragraphs (2) and (3), in relation to qualifying long term agreements to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA are the requirements specified in Schedule 1.

(2) Where public notice is required to be given of the relevant matters to which a qualifying long term agreement relates, the consultation requirements for the purposes of section 20 and 20ZA, as regards the agreement, are the requirements specified in Schedule 2.

(3) In relation to a RTB tenant and a particular qualifying long term agreement, nothing in paragraph (1) or (2) requires a landlord to comply with any of the consultation requirements that arise before the thirty-first day of the RTB tenancy.

<u>Commonhold and Leasehold Reform Act 2002</u>

Section 168 No forfeiture notice before determination of breach

Schedule 11

Part 1

Reasonableness of Administration Charges

Meaning of "administration charges"

1(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Reasonableness of administration charges

2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

...

Liability to pay administration charges

5(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).

Limitation of administration charges: costs of proceedings

5A(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph –

(a) "litigation costs means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate	***"The relevant court or tribunal"***
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.