FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Application One

Case Reference	:	CHI/29UC/LSC/2017/0041
Property	:	10 High Street, Herne Bay, Kent, CT6 5LH
Applicant	:	Hemant Patel (Flats 2 & 4) Alan Geoffrey Pennington and Jane Clare Pennington (Flat 3)
Representative	:	Rice-Jones & Smiths Solicitors
Respondent	:	SPG Holdings Limited
Representative	:	Sumit Gupta of WRML
Type of Application	:	Liability to pay service charges for the periods ending 24 June 2016 and 24 June 2017.

Application Two

Case Reference	:	CHI/29UC/LDC/2017/0033
Property	:	10 High Street, Herne Bay, Kent, CT6 5LH
Applicant	:	SPG Holdings Limited
Representative	:	Sumit Gupta of WRML
Respondent	:	Hemant Patel (Flats 2 & 4) Alan Geoffrey Pennington and Jane Clare Pennington (Flat 3)

Representative	:	Rice-Jones & Smiths Solicitors
Type of Application	:	To dispense with the requirement to consult lessees about major works.

Application Three

Case Reference	:	CHI/29UC/LRM/2017/0007
Property	:	10 High Street, Herne Bay, Kent, CT6 5LH
Applicant	:	10 High Street RTM Company Limited
Representative	:	Rice-Jones & Smiths Solicitors
Respondent	:	SPG Holdings Limited
Representative	:	Sumit Gupta of WRML
Type of Application	:	Application for Right to Manage
Tribunal Member(s)	:	Judge Tildesley OBE Mr Richard Athow FRICS
Date and venue of hearing	:	Margate Magistrates' Court 9 and 10 November 2017
Date of Decision	:	21 December 2017

DECISION

Decisions of the Tribunal

I. The Tribunal decides that the landlord's failure to attach the current *Summary of Tenants' Rights and Obligations* entitles the leaseholders to withhold payment of the service charges demanded for the periods ended 24 June 2016 and 24 June 2017 until the landlord complies with the statutory requirements.

II. The Tribunal finds that the provision of the auditor's certificate is a condition precedent for the demand of the balancing payment for the year ended 24 June 2016. This means that the leaseholders are not liable to pay the balancing charge £768.58 for the year ended 24 June 2016 until an auditor's certificate is provided. The actual amount payable depends on the Tribunal's determination on reasonableness of service charges for that year.

III. The Tribunal determines that each leaseholder of Flats 2, 3, 4, and 5 is liable to contribute one fourth of the service charge expenditure.

IV. The Tribunal determines that the sum of £5,172.65 is reasonable for the service charges the year ended 24 June 2016. The amount for each leaseholder is £1,293.16. This amount becomes payable once the landlord complies with the requirements regarding the *Summary of tenants' rights and obligations* and the auditor's certificate.

V. The Tribunal determines that the sum of £3,794.75 is reasonable for the service charges the year ended 24 June 2017. The amount for each leaseholder is £948.69. This amount becomes payable once the landlord complies with the requirements regarding the *Summary of tenants' rights and obligations* and the auditor's certificate.

VI. The Tribunal grants the landlord dispensation from the consultation requirements in connection with the replacement of the existing polycarbonate roof to the basement with a glazed unit.

VII. The Tribunal concludes that the building is not a building which has more than 25 per cent non-residential parts.

VIII. The Tribunal determines that 10 High Street RTM Company Limited is entitled to acquire the right to manage the building with effect from the date when the Tribunal's determination in favour of the RTM Company becomes final.

IX. The Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the leaseholders through any service charge.

X. The Tribunal determines that there should be no order requiring one party to reimburse the Tribunal application and hearing fees to the other party.

The Applications

1. There are four applications before the Tribunal.

2. The leaseholders for the purposes of these applications are Mr Patel of Flats 2 and 4, and Mr and Mrs Pennington of Flat 3.

3. The landlord for the purposes of these applications is SPG Holdings Ltd which is represented by Warwick Road Management Limited (WRML), the managing agent.

4. Mr Gupta is the Property Manager of WRML. His wife, Mrs Poonam Sumit Gupta, is the director and sole shareholder of WRML. Mr Gupta is a director of SPG Holdings Ltd, and has a 20 per cent shareholding in the company.

5. The leaseholders made three applications:

   a. They sought a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by them for the periods ending 24 June 2016 and 24 June 2017.

   b. They applied under section 20C of the 1985 Act preventing the landlord from recovering the costs in connection with these proceedings through the service charge.

   c. They also sought to acquire under Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 the right to manage the property from 16 October 2017.

6. The landlord made one application under section 20ZA of the 1985 Act seeking dispensation from consultation requirements in respect of the replacement of the polycarbonate sheet roof to the basement.

7. There are also ongoing proceedings in Canterbury County Court arising from the sale of the freehold to SPG Holdings Ltd which was effected without the requisite notice being given to the leaseholders under Part 1 of the Landlord and Tenant Act 1987. As part of those proceedings, the leaseholders are asking for the freehold to be transferred to them.

The Proceedings

8. The Tribunal on various dates issued directions to progress the application.

9. The service charge application and the request for dispensation were originally listed for hearing on 21 September 2017. The leaseholders, however, had not provided the documents bundle for the service charge application and their statement of case for the dispensation application

by the due date. A case management hearing was held on 15 September 2017 at which the Tribunal determined that the leaseholders were in breach of directions. The Tribunal, however, decided that the breach did not merit the sanctions of strike out and barring from taking a further part in the proceedings. In those circumstances the Tribunal gave the leaseholders one further opportunity to comply with the directions but required them to pay the costs of the landlord's legal representative incurred in connection with the case management hearing.

10. The service charge application and the application for dispensation were relisted for hearing on 9 and 10 November 2017.

11. The application to acquire the management of the property was made on 18 August 2017. Originally the Tribunal directed the application to be dealt with on the papers. Following receipt of the landlord's case challenging the right to manage the Tribunal decided to list it for hearing on 10 November 2017.

12. At the hearing on 9 and 10 November 2017 the leaseholders were represented by Miss Ciara Fairley counsel instructed by Mr Peter Burton of Rice-Jones and Smiths solicitors. Mr Patel, and Mr and Mrs Pennington were also in attendance. Mr Charles Oliver FRICS of Caxtons Commercial Limited, Chartered Surveyors, was called as an expert witness by the leaseholders in respect of the right to manage application. The landlord was represented by Mr Gupta.

13. The leaseholders' representative prepared the hearing bundles A and C for the service charge and the right to manage applications respectively. The landlord supplied bundle B for the dispensation application References to documents in the bundles are in [ ].

14. Bundle A had the witness statements of Mr Patel at [227 -229E], of Mr Pennington at [229F -229N], and of Mr Gupta [230-231]. Bundle B had a witness statement of Mr Gupta [38-58]. Bundle C contained the report of Mr Oliver [113-172; 172M-172Z] and a witness statement of Mr Gupta acting in the capacity of Senior Surveyor at GPC Surveying Firm [172D-172F].

15. During the hearing the parties handed in further documents to which no objections were raised.

16. On the first day the Tribunal inspected the property which was followed by hearing of the service charge dispute. On the second day the Tribunal heard evidence relating to all three applications. The Tribunal concluded the evidence by the end of the second day. The parties declined the offer to provide final submissions in writing.

Background

17. The property is arranged over four levels with a basement and is situated in the centre of Herne Bay. The property is an early 19th century terrace constructed of solid brick walls, suspended timber floors and sash windows. The roof is behind a parapet wall with a central valley. There is a two storey extension at the rear which was probably built towards the end of 19th century. This extension originally had an outhouse which has now been incorporated into the extension as a kitchen. There is a small concrete yard at the side of the extension. The skylight to the basement is located in the yard.

18. Prior to September 2015 the freehold interest in the property was owned by Sarwan Singh who had purchased the freehold interest together with the leasehold interest in Flat 5. The freehold interest was subject to four long leasehold interests being Flat 2 on the third floor, Flat 3 on the first floor, Flat 4 on the second floor and Flat 5 on the basement and ground floor. The leases for the four flats were in the same form and for a term of 125 years from 20 December 2007. The freehold interest also had the benefit of a periodic tenancy of the shop which ran for a term of 12 months from November 2014 at a rent of £4,620 per annum, and a small room at the rear of the first floor.

19. In September 2015 Mr and Mrs Gupta purchased the freehold interest and Flat 5 for £63,000 at auction. They were registered as the proprietors on 23 October 2015.

20. After the auction Mr and Mrs Gupta granted a lease of the small room at the rear of the first floor to Four Seasons Consultancy Ltd for a term of 125 years from 2 November 2015 at a peppercorn rent. The lease specified that no service charge was payable by the tenant [A162]. The small room was identified by the parties as Flat 1.

21. In March 2016 Mr and Mrs Gupta sold the freehold interest to SPG Holdings Ltd for £70,000.

22. On 19 July 2016 SPG Holdings granted a 999 year lease of the shop with peppercorn rent to Global Property Consulting Limited for consideration of £70,000 [A185]. The terms of the lease required the tenant to pay to the landlord a sum that was directly incurred to maintain the front elevation of the shop. The lease further stated that no other service charge contribution was payable by the tenant [A193].

23. On 19 October 2016 SPG Holdings executed a deed of surrender and lease in respect of Flat 5 in favour of Mr and Mrs Gupta in return for a premium of £300 [A31]. The term of the new lease was 999 years from 20 December 2007. The new Flat 5 Lease was made by reference to an earlier lease of the flat. The principal changes to the earlier lease were the extended term and the user of the flat which was altered to "only use the Flat within the Permitted use". Permitted use being defined as

"the use as of the whole or part of the Flat for residential or commercial uses".

24. On 19 October 2016 SPG Holdings executed a deed of surrender and lease in respect of Flat 1 in favour of Four Seasons Consultancy in return for a premium of £100 [A152]. The term of the new lease was 999 years from 2 November 2015. The new Flat 1 Lease was also made by reference to the earlier lease of 2 November 2015. As with Flat 5, the principal changes to the earlier lease were the extended term and the permitted use of the Flat.

25. Mr Gupta is a shareholder (20 per cent) and a director of the landlord, SPG Holdings Ltd, whose registered office is also the residential address of Mr and Mrs Gupta. The managing agents, WRML is wholly owned by Mrs Gupta. At the time of the grant of the leases to Flat 1 and the shop Mrs Gupta was the director of Four Seasons Consultancy Limited, whilst Mr Gupta was the director and owned 100 per cent shareholding of Global Property Consulting Limited.

26. The leaseholder's leases for Flats 2, 3 and 4 are identical (save for the demise). The relevant provisions for the purposes of calculating service charges are as follows:

- By Clause 1 (a): *"The Flat" means the Flat described in Part 1 of the First Schedule.*
- By Clause 1(b): *"The Building" means the building of which the Flat forms part known as 10 High Street Herne Bay Kent CT6 5LH as the same is registered at Her Majesty's Land Registry under title number K388714.*
- By Clause 1(c): *"Common Parts" means the foundations main structure roof and otherwise those parts of the Building and the curtilage thereof not comprised in this Lease or any other lease of a part of the Building granted or to be granted by the Landlord.*
- By Clause 1(d): *"The Service Obligations" means the obligations undertaken by the Landlord to provide the services and other things specified in Clause 6.*
- By Clause 1(e): *"The Service Charge" means the cost of the Service Obligations.*
- By Clause 1(f): *Subject to the provisions of Clause 13 the Tenant's Contribution" means a fair proportion of the Service Charge such proportion to be determined by the Landlord's surveyor whose determination shall be final and binding.*
- By Clause 4(c), the Tenant covenants with the Landlord: *To keep the Flat and all service conduits exclusively serving the Flat in*

good and substantial repair and condition and to keep the Flat itself (including window sashes and glazing but not the exterior surfaces of the window frames nor the external windowsills for the exterior of the external door or doors to the Flat) in good decorative condition and if any garden areas including the demise keep the same clean tidy and well tended.

- Clause 5 provides for payment of the Tenant's Contribution as follows:

    - *5(a)(i): in this Clause the accounting year of the Landlord means the year from the 25th day of March to the 24th day of March in the year next following or such other accounting year as may in future be adopted by the Landlord and that the due dates mean 25th March and 29th September year.*
    - *5(a)(ii): on the due dates to pay to the Landlord £100 on account of the Tenant's contribution or such other sum as the Landlord or its agents may reasonably consider sufficient (together with the contribution paid or payable by the other Tenants and by the Landlord under Clause 7C)) to meet the Service Charge for the period until the next due dates.*
    - *5(a)(iii): within 14 days of receipt of a copy of the auditors' certificate of the total expenditure on Service Obligations incurred by the Landlord for the previous accounting year to pay to the Landlord the Tenant's Contribution less any amount or amounts which the Tenant may already have paid in advance.*
    - *5(a)(iv): within 14 days of demand pay to the Landlord the same percentage at the Tenant's Contribution of any sum or sums actually expended by the Landlord of which it might be necessary to expend in performance of the Service Obligations which expenditure the Landlord cannot meet from funds in hand.*

- Clause 5 under the heading of *Regulations* sets out the method for calculating the Tenant's Contribution

    - *5(b)(i):The amount of the appropriate fraction in relation to any year shall be determined as soon as practicable after the end of each accounting year and within 7 days after the amount thereof has been determined the Tenant will pay to the Landlord a sum equal to the amount of the appropriate fraction in relation to such year less any sums already paid by the Tenant in respect thereof under sub-clause (b) of this Clause. If the sum so paid by the Tenant on account under sub-clause (b) exceed the amount of the appropriate fraction in relation to such year the excess shall be repaid by the Landlord to the Tenant*

- *5(b)(ii):The amount of the appropriate fraction in relation to any year shall be such amount as the Landlord may agree at the annual general meeting the Landlord or as in default of agreement may be determined in accordance with the provisions hereinafter contained by a chartered surveyor (hereinafter called "the Surveyor") to be appointed by the Landlord.*
- *5(b)(iii):In determining the amount of the appropriate fraction in relation to any year the Surveyor shall ascertain the total cost charges and expenses to the Landlord in that year of managing the affairs of the Landlord and complying with the Landlord's covenants and shall certify (i) which part (if any) of the said cost was the exclusive benefit of the Flat and (ii) which part of the said cost was for the benefit of all or the majority of the flats in or at the building (and so that the general expenses of the administration of the Landlord shall be deemed to be for the benefit of all the flats in the building and shall then determine the amount of the appropriate fraction by adding together (a) the said part certified under (i) above and (ii) one fourth of the said part certified under (ii) above.*

- Clause 6 sets out the Landlord's covenants relating to the Service Obligations and provides, in particular, that the Landlord is required to *"Keep the Common Parts and the Service Conduits in the Building in good and substantial repair".*

- Clause 7 sets out a number of additional covenants by the Landlord and includes, in particular, obligations:

  (b): "to ensure that any lease for a term in excess of three years entered into by the Landlord with other tenants in the Building is in substantially the same form as this lease"
  (c): "to pay a proper proportion of Service Charge in respect of such other parts of the Building is may not for the time being be let under the terms of a lease similar to this Lease".

- Clause 13 makes provision for adjusting the Service Charge contributions borne by each tenant.

The Issues

27. The leaseholders identified the following issues for determination:

- Whether the landlord had complied with the statutory requirements associated with demands for service charges?
- Whether the landlord had complied with the machinery under the leases for the recovery of service charges?

- Whether the leaseholders were paying the correct contribution towards the service charge?
- The payability and or reasonableness of particular charges for the years in dispute.

Service Charge Demands

28. The amount of service charge for the period ended 24 June 2016 was £23,910.30 [A206] with each leaseholder required to make a contribution of 25 per cent (£5,977.58)[1]. The landlord issued interim demands for £1,200 [A212] and £3,990.60 [A209] on 22 November 2015 and 14 December 2015 respectively. On 25 May 2016 the landlord issued a demand for the final service charge of £5,977.58.

29. The demands supplied details of the name and address of the landlord. The Summary of Rights and Obligations was printed on the back of the demands. The summary was exhibited at [A222], and it contained out of date information in respect of paragraphs 5 and 6, which referred to the previous Tribunal regime governing application fees and orders for costs.

30. The total expenditure for the period ended 24 June 2017 was £5,189.75 [A274A]. Each leaseholder was required to contribute 25 per cent (£1,297.44). The landlord had issued an interim demand in the sum of £1,200 on 30 June 2017 [A216]. It would appear that the landlord had not issued a demand for the balancing payment. The interim demand supplied details of the name and address of the landlord, and had the summary of rights, albeit out of date, printed on the reverse side of the document.

31. Counsel for the leaseholders argued that the landlord had not complied with the statutory requirements for the service of the demand because the summary of rights printed on the reverse of the demand was out of date.

32. Section 21B of the 1985 Act states that a demand for the payment of a service charge must be accompanied by a summary of rights and obligations. Under subsection 2 the Secretary of State may make Regulations prescribing the requirements as to the form and content of such summaries. The applicable regulations are The Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007, (2007 No. 1257) as amended. Regulation 3 specifies that the summary attached to the demand must be legible and must contain the title *"Service Charges-Summary of tenants' rights and obligations"* and the following statement of rights.

33. The Tribunal finds that the summary printed on the reverse of the demand was not the current one as prescribed by the Regulations. The

[1] Mr Patel is required to contribute 50 per cent because he was the leaseholder of two flats.

Tribunal is, therefore, satisfied that the landlord had not complied with the statutory requirements in respect of the *"Service Charges-Summary of tenants' rights and obligations"*.

34. The question for the Tribunal is whether the landlord's non-compliance with the statutory requirements for the summary of rights vitiates the demands for service charges. In this respect the Tribunal relies on the Court of Appeal decision in *Natt v Osman* [2014] EWCA Civ 1520 at [31]:

> "The Court of Appeal cases show a consistent approach in relation to statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute. In none of them has the court adopted the approach of "substantial compliance" as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the Court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid: see, for example, *Burman, Newbold v The Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288, *Keepers and Governors of John Lyon Grammar School v Secchi.*"

35. The Tribunal decides that the landlord's failure to attach the current *Summary of Tenants' Rights and Obligations* entitles the leaseholders to withhold payment of the service charges demanded for the periods ended 24 June 2016 and 24 June 2017 until the landlord complies with the statutory requirements.

Service Charge Machinery

36. The leaseholders' counsel contended that the landlord had failed to follow the machinery under the leases for the recovery of the service charge. Counsel argued that the landlord had not provided a copy of the auditor's certificate of total expenditure before demanding the balancing payment in respect of the period ended 24 June 2016 in accordance with clause 5(a)(iii) of the lease. Counsel referred to clause 6(h)(i) which required the landlord to procure the audit of the service charge by professional auditors.

37. Mr Gupta accepted that the landlord had not employed an auditor because of the additional expense. Mr Gupta, however, argued that the leaseholders had not been disadvantaged by the non-provision of the auditor's certificate because they had received accounts of the final service charge expenditure for the year ended 24 June 2016.

38. The question for the Tribunal is whether the provision of an auditor's certificate is a condition precedent for the demand for the balancing charge arising at the end of the accounting year. The Tribunal observes that the requirement of an auditor's certificate applies only to the balancing charge for the year ended 24 June 2016, and not to the interim demands for payments on account.

39. The Tribunal starts with the wording of the lease. Under clause 3(b) the tenant is required to pay the landlord by way of additional rent the Tenant's contribution payable as hereinafter provided. The Tenant's Contribution is defined as a fair proportion of the service charge. Clause 5(a)(iii) requires the tenant to pay to the landlord the Tenant's Contribution less any amount or amounts which the Tenant may already have paid in advance within 14 days of receipt of a copy of the auditors' certificate of the total expenditure on service obligations incurred by the landlord for the previous accounting year.

40. In the Tribunal's view, the tenant's covenant to pay the service charge under clause 3(b) does not stand alone because of the phrase "as hereinafter provided". The Tribunal is satisfied that the effect of this phrase is that the service charge is only payable if the other requirements in the lease with respect to service charges are met. It, therefore, follows that a balancing payment at year end is conditional on the prior provision of an auditor's certificate in accordance with clause 5(a)(iii) of the lease.

41. The Tribunal finds that the provision of the auditor's certificate is a condition precedent for the demand of the balancing payment for the year ended 24 June 2016. This means that the leaseholders are not liable to pay the balancing charge of £786.58 (£5,977.58 - £3,990.60 + £1,200[2]) for the year ended 24 June 2016 until an auditor's certificate is provided. The actual amount payable depends on the Tribunal's determination on reasonableness of service charges for that year.

Apportionment

42. The landlord has apportioned the service charge equally between the leaseholders of Flats 2, 3, 4 and 5 requiring a contribution of 25 per cent. The landlord does not collect a service charge from the leaseholders of Flat 1 and of the shop premises.

43. The landlord relied on the following clauses in the leases to justify the contribution of 25 per cent:

> 1(d):The service charge means the cost of the Service Obligations.
> 1(f): Subject to the provisions of Clause 13 the Tenant's contribution means a fair proportion of the Service Charge such proportion to be determined by the Landlords' surveyor whose determination shall be final and binding.
> 5(b)(iii):In determining the amount of the appropriate fraction in relation to any year the Surveyor shall ascertain the total cost charges and expenses to the Landlord in that year of managing the affairs of the Landlord and complying with the Landlord's covenants and shall

[2] £3,990.60 + £1,200 = the sum of the interim payments. See *Warrior Quay v Joachim* LRX/42/2006 for justification of the approach.

certify (i) which part (if any) of the said cost was the exclusive benefit of the Flat and (ii) which part of the said cost was for the benefit of all or the majority of the flats in or at the building (and so that the general expenses of the administration of the Landlord shall be deemed to be for the benefit of all the flats in the building) and shall then determine the amount of the appropriate fraction by adding together (a) the said part certified under (i) above and (ii) one fourth of the said part certified under (ii) above.

44. Counsel for the leaseholders contended that it would be unreasonable for the leaseholders to contribute in 25 per cent shares, where there were now five flats in the Building (rather than four) and commercial premises, which take up nearly an entire floor of the Building. Counsel relied on clause 7(c) of the leases under which the Landlord covenants *"to pay a proper proportion of service charge in respect of such other parts of the building as may not for the time being be let under the terms of a Lease similar to this Lease."* Counsel pointed out that the current leases for the shop and Flat 1 were not similar to the 2007 leases for the other Flats. Counsel referred in particular to the provision in the lease for Flat 1 which provided that no service charge was payable under the terms of that lease; and that for the Shop which said that no service charge contribution was payable by the Tenant other than in connection with the cost of maintaining the front elevation of the shop.

45. Counsel argued that given the landlord was required to pay under clause 7(c) *"a proper proportion"* of the service charge in respect of Flat 1 and the shop, the service charge should be apportioned six ways with the landlord making a 1/6 contribution on account of Flat 5 and a further 1/6 contribution on account of the shop, whilst the leaseholders should pay a 1/6 contribution for each of their flats.

46. The Tribunal's starting point is to make sense of the provisions in the lease dealing with apportionment. In so doing, the Tribunal is to have regard to the principles for interpreting a written contract beginning with the overarching premise, namely, *"identifying the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"*. As Lord Neuberger said in *Arnold v Britton and Others* [2015] UKSC 36 that meaning has to be assessed in the light of:

(i) the natural and ordinary meaning of the clause,

(ii) any other relevant provisions of the lease,

(iii) the overall purpose of the clause and the lease,

(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and

(v) commercial common sense, but

(vi) disregarding subjective evidence of any party's intentions.

47. Turning first to the clauses dealing with the apportionment of the service charge between the leaseholders of Flats 2, 3, 4 and 5, the Tribunal considers the power given to the landlord's surveyor to determine a fair proportion under clause 1(f) is clarified and constrained by the wording of clause 5(b)(iii). When viewed in this context, the surveyor's power of determination takes on a different meaning, and is limited to deciding in any given year which part of the landlord's costs was for the exclusive benefit of a particular flat, and which part of the costs was for the benefit of the majority of the flats. In respect of the second part which in effect represents the "true service charge" the leaseholder of each flat is required to bear one fourth of the costs. The landlord's power to adjust the service charge under clause 13 has no effect in relation to the proportion of one fourth as specified in clause 5(b)(iii). Only the power under clause 1(f) is subject to clause 13.

48. The next question for the Tribunal is where does clause 7(c) requiring the landlord to pay a proper proportion of the service charge fit in with the scheme of apportionment as described in clause 5(b)(iii).

49. At the time the 2007 leases were executed the only part of the building not subject to the same leases as the four flats would have been the shop. The Tribunal places weight on the fact that the leaseholders of the flats despite knowledge of the shop nevertheless agreed to an apportionment scheme which did not explicitly incorporate a contribution for the shop and required each leaseholder to pay one fourth of the landlord's costs incurred on the performance of the service obligations under the lease. In this context the Tribunal considers that the landlord's contribution under clause 7(c) is limited to those costs which are for the exclusive benefit of the shop.

50. The Tribunal considers its interpretation that the leaseholders agreed to pay one fourth of the costs is in line with the natural meaning of clause 5(b)(iii) even though it may have been imprudent to exclude from the apportionment scheme reference to the area occupied by the shop.

51. The Tribunal also relies on the separate clause governing the payment of insurance for the building which also refers to the one quarter contribution (see Clause 3(c)).

52. The Tribunal prefers its interpretation to the one advanced by counsel for the leaseholders. Essentially counsel contended as there were now six leases in existence for the building, the Tribunal should apportion the service charge six ways. Counsel's submission is derived from present circumstances rather than those that existed at the time of the execution of the 2007 leases. In this situation the leaseholders' remedy is to make application for variation of the leases under section 35 of the

Landlord and Tenant 1987 Act rather than relying on a stretched interpretation of the lease beyond its natural meaning. There is also the additional point that the Tribunal does not have jurisdiction under sections 19 or 27A of the 1985 Act to substitute a different apportionment if a method of apportionment is fixed in the lease, as in this case (*Jeanna Gater and Others v Wellington Real Estate Limited* [2014] UKUT 0561 (LC).

53. For the reasons advanced above, the Tribunal determines that each leaseholder of Flats 2, 3, 4, and 5 is liable to contribute one fourth of the service charge expenditure.

54. The final aspect of clause 5(b)(iii) which requires determination concerned the meaning of the phrase *which part (if any) of the total cost charges and expenses to the Landlord was for the exclusive benefit of the Flat.* The leaseholders interpreted this phrase as meaning that if the landlord carried out repairs to the Common Parts, and those repairs only had a direct benefit to a specific flat, the leaseholder of that flat was liable to pay the whole amount. The leaseholders applied this rationale to the replacement of the roof for the kitchen area at the rear of the extension.

55. The Tribunal disagrees with the leaseholders' construction. The Tribunal starts with Definitions which provides a clear distinction between those parts of the building that are comprised in the flat[3] and those that are not. Under clause 4 the tenant covenants to keep the flat and all service conduits exclusively serving the flat in good and substantial repair. Under clause 6 the landlord covenants to keep the common parts and the service conduits in the building.

56. Under clause 3(b) the tenant is liable to pay the Tenant's Contribution of the Service charge which is defined as the cost of the Service Obligations. This in turn is referred to as the Obligations under clause 6. The Tribunal construes the Obligations under clause 6 as benefitting the building as a whole, and subject to the one quarter apportionment.

57. The Tribunal notes that the definition of landlord's costs in clause 5(b)(iii) is wider than the costs of the Service Obligations by including the costs of managing the landlord's affairs as well as complying with the covenants under clause 6.

58. The Tribunal is satisfied that when entering the lease the parties intended that the tenants of the four flats should share equally the costs of the landlord's Service Obligation under clause 6. In the Tribunal's view, the phrase *costs for the exclusive benefit of the flat* is reserved to those costs which are payable solely by the tenant under clause 4 or those costs that can be attributed to the tenant's covenant to repair which may have been incorporated in works undertaken by the landlord, such as replacement of the plaster to the internal walls.

[3] By reference to Part 1 of the First Schedule

59. The Tribunal adds that the leaseholders' construction of *costs for the exclusive benefit of the flat* would result in significant uncertainty. It would mean that costs that have been properly identified as those incurred on the Service Obligations under clause 6 would be subject to another level of analysis based upon an elastic notion of benefit to individual tenants. In such circumstances the Tribunal is entitled to reject such a construction where the drafting lacks clarity and certainty.

Service Charges for the periods ended 24 June 2016 and 24 June 2017

60. The service charge for the year ended 24 June 2016 was £23,910.30 with a contribution of £5,977.58 for each leaseholder [A206].

61. The service charge for the year ended 24 June 2017 was £5,189.75 with a contribution of £1,297.44 for each leaseholder [A274A].

62. The leaseholders in their statement of case invited the Tribunal to note that they had already paid the sum of £1,842.84 in respect of the disputed service charges. According to the leaseholders this was to cover the costs of electricity to the common parts, buildings insurance, and the fire alarm none of which were in dispute. The amount paid included a sum towards the management fee which they calculated at a rate of £200 per Flat.

63. Counsel at the hearing attempted to re-open the question of the costs of insurance. The Tribunal ruled that the leaseholders were not entitled to go behind the admissions made in their statement of case.

64. The Tribunal has given its determination in respect of the individual charges in the Scott Schedules (Appendix 1).

65. The Tribunal's determination for the year ended 24 June 2016 is as follows:

Charge	Amount (£)	Determination (£)
Electricity	10.88	10.88
Buildings Insurance	577.67	577.67
General Maintenance	22,121.75	4,084.10
Management	1,200	500.00
Total	23,910.30	5,172.65
25% Contribution	5,977.58	1,293.16

66. The Tribunal's determination for the year ended 24 June 2017 is as follows:

Charge	Amount (£)	Determination (£)
Electricity	87.05	87.05
Buildings Insurance	912.22	912.22

General Maintenance	2,990.48	2,295.48
Management	1,200	500.00
Total	5,189.75	3,794.75
25% Contribution	1,297.44	948.69

67. The leaseholders are liable to pay the amounts determined once the landlord has complied with the obligations regarding the summary of rights and obligations, and the provision of the auditor's certification.

68. The Tribunal considered whether it should give the landlord an opportunity to apply for dispensation in respect of the two major works for the year ended 24 June 2016 where the Tribunal limited the costs to the maximum contribution (£250 per leaseholder) allowed under the legislation for failure to consult. In this regard the decision of the Lands Tribunal in *Warrior Quay Management Company Limited v Joachim* [2008] WL 168730 is relevant. Judge Huskinson said at [41]:

> "Where there is a hearing before an LVT and there is an absence of a formal application for dispensation from a landlord (or at least from a landlord not professionally represented) I consider that the LVT should ask the landlord whether it wishes to apply for dispensation, rather than not raising the point and omitting to consider at all whether dispensation should be granted under section 20ZA of the 1985 Act".

69. The Tribunal decided not to give the landlord the opportunity to apply for dispensation because

a. The landlord was represented by a solicitor in the proceedings prior to the actual hearing, and by its managing agent throughout.
b. The landlord knew about its right to make application for dispensation as was evident from its application in respect of the glazed roof for the basement.
c. The leaseholders put the landlord on notice that they were alleging the landlord had failed to consult in respect of the works to the roof carried out by RAK Roofers and Quodox. The landlord chose not to put in an application for dispensation for these works even though it knew of its right to make such an application.
d. The landlord had carried out the statutory consultation process in respect of the works undertaken by Topbuild and Avruka. The Tribunal accepts that the Landlord may not have applied for dispensation because it did not expect the Tribunal to rule that the process was defective. The Tribunal has nevertheless refused to give the landlord the opportunity to make it because it considers on the facts that such an application has no reasonable prospect of success.

Application for Dispensation

70. The landlord applied for dispensation from consultation requirements in respect of the replacement of the polycarbonate roof to the basement of Flat 5 (the rooflight).

71. The landlord contended that the works were urgent because of the service of an Order by Canterbury City Council on 21 November 2016 prohibiting the occupation of the kitchen and annex parts of Flat 5 for sleeping and living purposes until remedial action was carried out.

72. The remedial action required was to provide sufficient insulation to the roof to prevent heat loss. Further the Order stipulated that any works carried out must comply with current Building Regulations, and that they should not restrict ventilation and natural light. The Order became operative on 19 December 2016.

73. On 7 December 2016 WRML, on behalf of the landlord, wrote to Mr Patel and Mr and Mrs Pennington advising them that the Council had served a notice to replace the rear plastic roof with a proper roof for the basement. WRML further advised that the landlord had decided to take urgent action and would not have the time to adhere to the section 20 consultation process. WRML, however, explained that the landlord had obtained three quotations for the works and had planned to go ahead with the lowest quotation which was £2,200 from Sterling Windows [B35]. The other two quotations were £2,315.70 from Crackin Glass [B34], and £5,820 from IMAC Building Services Limited [B36].

74. The work was carried out around 7 December 2016 [A279], and involved the replacement of the existing polycarbonate roof with a glazed unit together with a course of bricks to reinforce the supporting structure.

75. The 1985 Act provides leaseholders with safeguards in respect of the recovery of the landlord's costs in connection with qualifying works. Section 19 ensures that the landlord can only recover those costs that are reasonably incurred on works that are carried out to a reasonable standard. Section 20 requires the landlord to consult with leaseholders in a prescribed manner about the qualifying works. If the landlord fails to do this, a leaseholder's contribution is limited to £250, unless the Tribunal dispenses with the requirement to consult.

76. This determination is concerned with the additional safeguard of section 20. The question for the Tribunal is whether the requirement to consult on the qualifying works should be dispensed with. Section 20ZA of the 1985 Act is the authority which enables the Tribunal to dispense with the requirement for the landlord to consult with the leaseholders on the costs on the qualifying works.

77. Section 20ZA does not elaborate on the circumstances in which it might be reasonable to dispense with the consultation requirements. On the face of the wording, the Tribunal is given a broad discretion on

whether to grant or refuse dispensation. The discretion, however, must be exercised in the context of the legal safeguards given to the Applicant under sections 19 and 20 of the 1985 Act. This was the conclusion of the Supreme Court in *Daejan Investments Ltd v Benson and Others* [2013] UKSC 14 & 54 which decided that the Tribunal should focus on the issue of prejudice to the tenant in respect of the statutory safeguards.

78. Lord Neuberger in *Daejan* said at paragraph 44

> "Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements".

79. Thus, the correct approach to an application for dispensation is for the Tribunal to decide whether and if so to what extent the leaseholders would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the leaseholders to identify any relevant prejudice which they claim they might have suffered. If the leaseholders show a credible case for prejudice, the Tribunal should look to the landlord to rebut it, failing which it should, in the absence of good reason to the contrary, require the landlord to reduce the amount claimed as service charges to compensate the leaseholders fully for that prejudice.

80. The leaseholders claimed prejudice on the following grounds:

a. They were not liable to pay for the works under the terms of the lease. They said that the roof was for the exclusive benefit of the tenant of Flat 5. Further the works were not repairs but improvements intended to enhance the insulating qualities of the roof.
b. The works were done in a hurry, and they were not given the opportunity to inspect the condition of the roof prior to its replacement.
c. The works were not completed to the required standard, and were expensive. Mr Patel obtained a quotation from his builder in the amount of £723. Mr Pennington who has worked in the building trade for 40 years and was a Craftsman with Ministry of Defence estimated that the works would have cost in the region of £960.

81. The Tribunal finds the following:

a. The roof to the basement was part of the main structure to the building, and was the landlord's responsibility to repair.
b. The roof was in a state of disrepair and its replacement to current Building Standards did not constitute an improvement.

c. The works were necessary because the basement flat could not be occupied until they were completed.
d. The time scale imposed by the prohibition order gave the works some urgency, particularly if it was intended for the flat to be occupied.
e. The cost of the works was £1,833 net of VAT and carried out by a FENSA registered company.
f. The landlord obtained quotations from three contractors and chose the contractor with the lowest quote.
g. The quotation supplied by Mr Patel's builder did not have the same specification. The builder proposed glazing the roof with polycarbonate. Also it was not clear from the quotation who was supplying the materials. The quotation referred to "Client Supply".
h. Mr Pennington's estimate of £960 for the works was significantly lower than the chosen contractor but arguably not an appropriate comparator because of vested interest as a leaseholder.

82. On balance, the Tribunal decides that the leaseholders have not established relevant prejudice. The Tribunal grants the landlord dispensation from consultation relating to the replacement of the existing polycarbonate roof to the basement with a glazed unit.

Application for Right to Manage

Background

83. The dispute in this application is whether the building is excluded from the right to manage provisions because the internal floor area of the non-residential part of the building exceeds 25 per cent of the internal floor area of the building taken as whole.

84. On 9 May 2017 the leaseholders of Flat 2, 3 and 4 set up a Right to Manage Company known as 10 High Street RTM Company Limited ("RTM Company") with a view to taking over the management of the Building. A copy of the certificate of incorporation was at [C83] and a copy of the articles of association was at [C84].

85. On 10 May 2017 the RTM Company served on the lessees of Flat 1 and 5 a Notice of Invitation to Participate in Right to Manage in accordance with Section 78 of the Commonhold and Leasehold Reform Act 2002 ("2002 Act"). A copy of the Notices was at [C100].

86. On 5 June 2017 the landlord was served with a Claim Notice under the 2002 Act on the grounds that the Building is a self-contained building, qualifying tenants hold two or more flats and that the total flats held by the qualifying tenants make up at least two-thirds of the flats in the building. A copy of the Notice was at [C77].

87. On 3 July 2017 the landlord served on the RTM Company a counter-notice denying the right to manage the Building without providing any specific reason for non-qualification other than that the Building did not comply with the requirements. A copy of the Counter-Notice was at [C81].

88. On 17 August 2017 the leaseholders applied to the Tribunal under section 84(3) of the 2002 Act for a determination that on the relevant date the RTM Company was entitled to acquire the Right to Manage.

The Evidence

89. The leaseholders called Mr Charles Oliver FRICS of Caxtons Commercial Limited, Chartered Surveyors, as an expert witness. Mr Oliver had originally been instructed by the County Court as a single joint expert in relation to the proceedings for the transfer of the freehold to the leaseholders under section 5 of the Landlord and Tenant act 1987.

90. Mr Oliver's instructions for the court proceedings were to provide an opinion on the floor areas of the building, and the value of the freehold interests. In order for the building to fall within the provisions of the Landlord and Tenant Act 1987 the non-residential floor area must not exceed 50 per cent as compared with 25 per cent for the right to manage.

91. Mr Oliver prepared a report for the Court dated 29 November 2016 [C114-128], and a supplemental report dated 22 May 2017 [C172M-172R]. Mr Oliver certified both statements as true and included an expert's declaration. Mr Oliver referred to both reports at the Tribunal hearing and was cross-examined by Mr Gupta.

92. The landlord did not consent to Mr Oliver as the single joint expert for these Tribunal proceedings. Instead the Landlord appointed Mr Gupta, in his capacity as Senior Surveyor at GPC Surveying Firm to carry out a measurement survey of the property.

93. Mr Gupta produced a witness statement dated 11 October 2017 [C172D] in which he said that he carried out the survey with his assistant Mr Jan Talaga who was not called to give evidence. Mr Gupta certified his statement as true but did not include an expert's declaration.

The Law

94. The relevant statutory provisions are to be found in section 72(6) and Schedule 6 of the Act. Part 2, Chapter 1 of the Act makes provision for the acquisition and exercise of rights to manage premises to which the chapter applies. Section 72 sets out the premises to which the Chapter applies. By section 72(6) "Schedule 6 (premises excepted from this Chapter) has effect." Para 1 of Schedule 6 provides as follows:

"(1) This Chapter does not apply to premises falling within section 72(1) if the internal floor area-

(a) of any non residential part, or

(b) (where there is more than one such part) of those parts (taken together), exceeds 25 per cent of the internal floor area of the premises taken as a whole).

(2) A part of premises is a non-residential part if it is neither-

(a) occupied, or intended to be occupied, for residential purposes, nor

(b) comprised in any common parts of the premises....

(4) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded".

The Issue

95. The question for the Tribunal is whether more than 25 per cent of the floor area as at 5 June 2017, the date of service of the claim to manage the premises, was non-residential.

96. For the purposes of the calculation, a comparison is made between that part of the premises which is occupied for residential purposes (A), and that part of the premises which is not occupied for residential purposes (B), excluding the common parts. If B is more than 25% of A + B, taken together, the premises will be excluded. Common parts constitute areas of a building that are available for shared use and benefit, such as common halls, stairs and landings.

97. Once the calculation is done, the first step is to identify all those parts of the premises, other than the common parts, which are not occupied for residential purposes, or intended to be so occupied. Whether part or parts of a property are occupied or intended to be occupied for residential purposes is a question of fact (*Connaught Court RTM Co Ltd v Abouzaki Holdings Ltd* [2008] 3 E.G.L.R. 175). Occupation for "residential purposes" is wider than occupation as a residence. It would appear to include a purpose ancillary to residence, and also for partial residential use. In *Gaingold Ltd v WHRA RTM Co Ltd* [2006] 1 E.G.L.R. 81, the Lands Tribunal held that residential accommodation used by staff employed by the occupier of commercial premises was nonetheless occupied for residential purposes. In *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 (Ch), the High Court held that no degree of permanence of residence is required, such that even very short term lets can be occupied for residential purposes.

98. The word "intended" is not defined. It is considered that a previously occupied flat, which is left vacant, even for a long time, would (on the face of it) be included as residential premises. In order to rebut the presumption, it would be necessary to prove that the intention had been formed to change to non-residential use in the future.

The Measurement of the Building

99. The table below sets out the measurements of the units of the accommodation comprising the building undertaken by Mr Oliver and Mr Gupta respectively.

Unit	Mr Oliver (sq metre)[4]	Mr Gupta (sq metre)[5]
Basement/Ground Floor (Flat 5)	59.353	94,524
Shop	34.908	35.350
First floor rear (Flat 1)	10.431	10.545
First floor front (Flat 3)	39.820	37.850
Second floor (Flat 4)	36.765	34,860
Third Floor (Flat 2)	45.939	43,730
Total	227.220	256.8593

100. Mr Oliver stated that he was able to measure the basement, ground, second and third floor plus the rear store room of the first floor (Flat 1). Mr Oliver was unable to gain access to Flat 3, the measurements of which he estimated, having regard to the floor plan for Flat 3 and the measurements of the other flats in the property. Mr Oliver said that he measured the gross internal area in accordance with the RICS Property Measurement 2015 edition and the International Property Measurement Standards.

101. Mr Oliver in his supplemental statement said that Mr Gupta had referred to three areas in the basement that were not included in the lease plan for the basement current on 9 September 2015[6]. These three areas were two small cellars and a store room. Mr Oliver said that if these areas were added the size of the basement and ground floor would increase to 71.895 square metres from 59.353 metres and the total floor area would become 239.76 square metres instead of the original floor area of 227.22 square metres.

102. Using the amended figures Mr Oliver said that the area of the shop would constitute 14.55 per cent of the internal area of the building taken as a whole. Mr Oliver stated that if the area of Flat 1 was added to the shop area the percentage of the internal area would increase to 18.91 per cent. Finally Mr Oliver said that if the basement was added the percentage of the internal area would then increase to 48.9 per cent.

[4] See [C121]
[5] See [C172F]
[6] The relevant date for the transfer of the freehold under section 5 of the Landlord and Tenant Act 1987.

103. Mr Gupta said that he had inspected the property twice with his assistant Mr Talaga in June 2017. Mr Gupta stated he was a qualified surveyor and had carried out the calculation in accordance with RICS Code of Measurement Practice 6th edition.

104. Mr Gupta said that they could not gain access to all parts of the building and had used the lease plans for flats 2, 3 and 4 to work out their areas. In addition Mr Gupta and his assistant had regard to the building floor plan, Mr Oliver's report and marketing particulars. Finally Mr Gupta stated that they measured the building externally to cross check the calculations for the internal areas.

105. Mr Gupta's measurements when compared with Mr Oliver's measurements resulted in higher figures for the square areas of the basement/ground floor, shop and Flat 1, and lower figures for the square areas of Flats 2, 3 and 4. According to Mr Gupta the total internal area of the building was 256.86 square metres somewhat larger than Mr Oliver's amended figure of 239.76 square metres.

106. Using the measurements supplied by Mr Gupta, the square area of the shop would constitute 13.76 per cent of the internal area of the building taken as a whole. If the area of Flat 1 was added to the shop area the percentage of the internal area would increase to 17.8 per cent. Finally if the basement was added the percentage of the internal area would then increase to 54.67 per cent.

107. The Tribunal prefers the measurements of Mr Oliver. Unlike Mr Oliver, Mr Gupta has a clear conflict of interest. Mr Gupta is a shareholder of the freeholder. Mr Gupta has not incorporated an experts declaration in his witness statement. Mr Caxton is a highly qualified surveyor with considerable experience, and a Member of the Expert Witness Institute. Mr Caxton's measurements have been available to the parties since November 2016, and he has supplied a number of detailed responses to the parties. In contrast Mr Gupta's measurements were revealed in his witness statement dated 11 October 2017.

Consideration

108. The contention between the parties is which parts of the building are occupied or intended to be occupied for residential purposes. The leaseholders contend that Flats 1, 2, 3, 4 and 5 are residential whereas the landlord states that the residential part is confined to Flats 2, 3 and 4.

109. If the leaseholders are correct that the non-residential part is confined to the shop, the internal area occupied by the shop would constitute 14.55 per cent of the internal area of the building taken as a whole, if Mr Oliver's measurements are used or 13.76 per cent on Mr Gupta's measurements.

110. Likewise if the landlord is correct that the non-residential part included the shop, Flat 1 and Flat 5, the internal area of those parts of the building would constitute 48.9 per cent of the internal area of the building taken as a whole, if Mr Oliver's measurements were used or 54.67 per cent on Mr Gupta's measurements.

111. Thus, although the Tribunal prefers the measurements of Mr Oliver, this case, as shown above, does not depend upon the correctness of the measurements as between those of Mr Oliver and those of Mr Gupta. The leaseholders' application for right to manage will be determined upon which parts of the building are residential and which parts are non-residential.

112. The parties are agreed that Flats 2, 3, and 4 are residential and the area occupied by the shop is non-residential. The dispute centres on Flat 1 and Flat 5 (Basement and Ground Floor).

113. The facts in relation to Flat 1 are as follows:

- The Flat was formerly a store room. Following their purchase of the freehold of the building, Mr and Mrs Gupta granted a lease of the Flat to Four Seasons Consultancy Limited dated 2 November 2015 for a term of 125 years. Under clause 4 of the the lease the tenant covenanted not to carry on any trade or business from the Flat and to use the Flat for the purpose of single private residence in the occupation of one family only [C232]. The lease also contained a restriction in the Second Schedule preventing the use of the Flat for business purposes without landlord's prior consent.

- On 12 October 2016 Canterbury City Council issued a prohibition order in respect of Flat 1 suspended for three months until 11 December 2016 to enable the existing tenant to leave [C33]. The Order was served on Mrs Gupta as director of Four Seasons Consultancy Limited. The reason given for the issue of the order was that the Flat was not large enough for use as a suitable unit of accommodation for one or more persons.

- On 28 October 2016 Mrs Gupta appealed against the prohibition order to the Tribunal. In the application to the Tribunal Mrs Gupta said that the property was a studio flat and had always been used as a dwelling since 1993 with a Council Tax band from that date. Mrs Gupta also said that the tenant had removed the heaters from the property and caused the damage on the window glass[7].

- The appeal was heard on the papers. An inspection was carried out on 13 March 2017 in the presence of Mr Gupta, the representative of Four Seasons Consultancy Limited, and officials from Canterbury City Council. The Tribunal decision

[7] The Notice of Appeal is taken from the Tribunal records and was not included in the hearing bundles.

(CHI/29UC/HPO/2016/0009) was enclosed in the papers [C46-63]. At [C56] the Tribunal recorded Mr Gupta's representations contending that the Council had made a mistake in connection with the measurement of the Flat and that the size of the Flat exceeded the Housing Act 1985 space standard. The Tribunal concluded that the space standards were met, and that the size of the Flat was adequate for living and sleeping. The Tribunal quashed the prohibition order, and substituted an improvement notice to remedy the hazard of excess cold [C63].

- On 28 October 2016 the landlord and Four Seasons Consultancy Limited agreed to a surrender of the existing lease and a grant of a new lease for 999 years. The new lease preserved the tenant's covenants under clause 4 not to carry on any trade or business from the flat, and to use the flat for the purpose of single private residence in the occupation of one family only. The new lease, however, amended the restriction in the Second Schedule by deleting the prohibition on business use, and replacing it with the phrase: "To only use the Flat within the Permitted Use" which was defined as the whole or part of the Flat for residential or commercial premises".

- Mr Pennington stated that Mr Gupta rented Flat 1 to a young man and his girlfriend around 2016. Mr Pennington reported the tenant to Mr Gupta on several occasions for smoking cannabis on the property. Mr Patel confirmed in his witness statement that the police had been called in relation to the drug activities of the tenant at Flat 1. The landlord in its statement of case accepted that the police had been summoned to the property. Mr Pennington stated that Flat 1 was occupied by a tenant on 30 June 2017.

- Mr Gupta in his witness statement said that Flat 1 as at 9 June 2017 was in non-residential use. The landlord produced a letter dated 18 October 2017 from Four Seasons Consultancy Limited stating that it was currently using Flat 1 for non-residential use [C354].

- Mr Oliver said that Flat 1 had an area of only 10.43 square metres. Further Canterbury City Council considered that a Flat must have a minimum area of 11 square metres, and on that basis Mr Oliver concluded that the room was too small to be considered a habitable flat. Mr Oliver's opinion was tempered by the observation that if the Court (Tribunal) decides that it was a flat then it would increase the residential content of the building [C172AE].

- As at 3 November 2017 Flat 1 was liable for Council Tax as residential property [A264A].

- When the Tribunal inspected the Flat in relation to the prohibition order on 13 March 2017 it noted that main entrance door to the

Flat opened into a small lobby area with a WC to the left. The WC had a separate door from the lobby and there was a stud partition wall separating the WC from the main living/bedroom. Beyond the lobby was a single living/ bed room which was regularly shaped with no restricted headroom. There was a shower cubicle in the corner of the living room on the left. Adjacent to the shower unit there was a space for a cooker unit after which there was a small worktop and single drainer unit with a cupboard below and a wall cupboard over. When the Tribunal inspected the property on 9 November 2017 it noted that the toilet and shower areas had been altered. The toilet was now accessed through a newly installed shower area having the effect of making it a small wet-room. A sofa bed occupied the main space of the room. The room overlooked the rear of the property with uPVC double glazed window.

- Between the two inspections of the Tribunal, 13 March 2017 and 9 November 2017 improvements had been carried out in Flat 1 to enlarge the living space.

114. Counsel for the leaseholder contended that the evidence in relation to Flat 1 was overwhelming in favour of it being regarded as a residential part of the building. Counsel argued that the landlord was estopped from denying that Flat 1 was residential in view of the admissions of Mr and Mrs Gupta made about the Flat in the Tribunal proceedings regarding the prohibition order. Mr Gupta asserted that the Flat 1 was being used for commercial purposes.

115. The question whether Flat 1 is occupied or intended to be occupied for residential purposes is a question of fact. The Tribunal finds that the purpose of granting a lease for the Flat 1 in November 2015 was to enable it to be used solely for residential purposes. In the 2015 lease the tenant was required to use the Flat as a single private residence in the occupation of one family only. Although the lease had been varied subsequently, the tenant's covenants on use remained in force.

116. The Tribunal holds there is compelling evidence that the Flat has been occupied for residential purposes since October 2015, and continued to be so occupied. In this respect the Tribunal relies on the evidence of Mr Pennington and Mr Patel which was not undermined by Mr Gupta. The Tribunal formed the view from its inspection that the Flat was arranged for some-one to live there. The Flat remains registered for Council Tax as a residential property. The landlord adduced no evidence that Flat 1 had been let for non-residential use.

117. The Tribunal considers the assertions of Mr Gupta and Four Seasons Consultancy that Flat 1 was being used for commercial purposes hollow. Mr and Mrs Gupta throughout the Tribunal proceedings in connection with the prohibition order maintained that the property was a studio flat, and that it had been let to a tenant. Mr and Mrs Gupta continued to make these assertions longer after the variation of the

lease on 28 October 2016 which purportedly widened the permitted use of the Flat. The Tribunal does not need to decide whether the principle of estoppel applied to Mr and Mrs Gupta's statement. The fact that Mr and Mrs Gupta has made these statements in previous Tribunal proceedings undermined the credibility of the current assertions made by Mr Gupta and Four Seasons Consultancy Limited about the commercial use of the Flat.

118. The Tribunal noted Mr Oliver's reservation about whether the Flat was habitable having regard to its size. Mr Oliver, however, acknowledged that if the Court decided it was a Flat then it would increase the residential content of the building. The Tribunal determined on 30 March 2017 in connection with the appeal against the prohibition order that Flat 1 was indeed a Flat with adequate space for living and sleeping. The Tribunal also notes that after the inspection on 13 March 2017 works were carried out on Flat 1 to increase the living space.

119. The Tribunal, therefore, finds that Flat 1 as at 5 June 2017 was occupied for residential purposes.

120. The facts in relation to flat 5 (basement and ground floor) are as follows:

- A lease was granted for this Flat on 20 December 2007 for a term of 125 years [C328-350]. Under clause 4 of the lease the tenant covenanted not to carry on any trade business or occupation from the Flat and to use the Flat at all times for the purpose of a single private residence in the occupation of one family only. Clause 1 to the Second Schedule prohibited the use of the Flat for business purposes. This prohibition was not subject to landlord's consent. Clause 7(b) obliged the landlord to ensure that all leases in excess of three years were substantially in the same form as this lease. The landlord entered the same covenant with the leaseholders of Flats 2, 3 and 4.

- The plan for the property attached to the 2007 lease [C349-350] showed four rooms in the basement described as bedroom, kitchen plus annex with a sink, store and one of the two vaulted cellars. The plan of the ground floor showed a living room and a bathroom together with the rear yard which was accessed through a door with a small lobby leading to the bathroom and living room. Under the 2007 lease the stairs from the ground floor to the basement were part of the common parts to enable the landlord to gain access to a store in the basement.

- The 2007 lease plan for the basement did not include:

  (a) one of the vaulted cellars at the rear,

  (b) the store which was located between the kitchen and bedroom and

(c) an area under the pavement which had been opened up by Mr Gupta.

Mr Oliver marked these areas orange on the plan at [172T].

- On 19 October 2016 the Landlord agreed with Mr and Mrs Gupta the surrender of the existing lease and a grant of new lease. The term of this "new" lease was 999 years from 20 December 2007. The new lease incorporated the same tenant's covenants in clause 4 as in the 2007 lease. Clause 4 prohibited the tenant from using the Flat for business purposes, and also required the tenant to use the Flat for the purpose of single private residence in the occupation of a single family. The new lease preserved the obligation upon the landlord to ensure that all leases over three years in the building were substantially in the same form. The landlord's obligation was owed to the leaseholders of Flats 2, 3, 4 and 5.

- The principal change in the new lease from the 2007 lease was that the prohibition on business use in Schedule 2 was replaced with a new clause allowing the property to be used for residential or commercial purposes. The new lease also incorporated a plan which annexed a lobby area in front of the ground floor area and included the whole of the basement within the demise.

- On 3 October 2016 Canterbury County Court issued directions requiring the appointment of a single joint expert for the court proceedings between the parties over the transfer of the freehold under section 5 of the 1987 Act.

- Mr Oliver inspected the property mid November 2016. At the time of his inspection Mr Oliver was of the view that the basement was not habitable as a dwelling but he understood that the basement had been dry-lined and work was underway to make it habitable which included the installation of a new shower-room with toilet and sink in the former store. Mr Oliver took a photograph of the new shower-room which showed an open packet of toilet rolls and a towel [C163].

- At his inspection Mr Oliver recorded that the bathroom in the ground floor area had been converted to a kitchen/breakfast room. Mr Oliver's photograph of the ground floor area [C163] showed that the area was being used for residential purposes. There was a bed which was made up, a settee and a fold up chair with what appeared to be clothes on the bed and settee. There was a teddy bear together with photographs on the window sill, and a series of pictures including a map affixed to the walls. The kitchen appeared to have items of food and bottles of spices on various shelves fitted to the wall.

- At the hearing on 10 November 2017 Mr Oliver opined that the basement was intended to be used as a Flat. Mr Oliver placed weight on the fact that Mr and Mrs Gupta had installed a fully equipped shower room and kitchen.

- On 21 November 2016 Canterbury City Council issued a prohibition order preventing the kitchen area and annex in the basement from being used for residential and sleeping purposes. The prohibition order did not affect the areas in the basement referred to as the bedroom and the bathroom, and had no application to the ground floor area of Flat 5. The order became operative on 19 December 2016.

- The landlord's response to the prohibition order was to instruct WRML to write to Mr Patel and Mr and Mrs Pennington (the leaseholders) on 7 December 2016 advising them that the Council had served a notice to replace the rear plastic roof with a proper roof for the basement. WRML further advised that the landlord had decided to take urgent action and would not have the time to adhere to the section 20 consultation process. WRML, however, explained that the landlord had obtained three quotations for the works and had planned to go ahead with the lowest quotation which was £2,200 from Sterling Windows [B35]. It would appear that the works were carried out the 7 December 2016.

- The landlord on 30 May 2017 subsequently put in an application for dispensation of the consultation requirements in respect of the replacement of the roof. In the application the landlord described the building as comprising five flats and a ground floor shop.
- Mr Pennington gave evidence that Mr Gupta had rented Flat 5 out to a group of young men and women. Mr Pennington said that people were living in Flat 5 in June 2017.
- As at 3 November 2017 Flat 5 was liable for Council Tax as residential property [A264A].
- The Tribunal noted on its inspection on 9 November 2017 that the kitchen area of the basement appeared to be set up as an office. The Tribunal also observed a bed and a mattress upended on the wall in the bedroom part of the basement. Mr Gupta said that a local trader had been storing beds in this area.
- Mr Gupta in his witness statement said that Flat 5 as at 9 June 2017 was in non-residential use. The landlord produced a letter dated 16 October 2017 from Mrs Gupta stating that she was currently using Flat 5 for non-residential use [C355]. The landlord also supplied a copy of an account on the internet with Instant Offices which supplied details of enquiries from agents looking for commercial spaces for their clients [C362-364].

121. The question whether Flat 5 is occupied or intended to be occupied for residential purposes is a question of fact.

122. The Tribunal finds that the purpose of granting a lease for Flat 5 in December 2007 was to enable the Flat to be used solely for residential

purposes. Under clause 4 the tenant was required to use the flat as a single private residence in the occupation of one family only.

123. The Tribunal observes that the surrender and the grant of the new lease for Flat 5 on 19 October 2016 did not alter the position in respect of the tenant's covenants on permitted use under clause 4 of the 2007 lease. Although the new lease purportedly enabled the Flat to be used for commercial purposes as well as residential ones, the Tribunal is satisfied that the landlord would be in breach of his obligations under clause 7(b) to the leaseholders of Flats 2, 3 and 4, if Flat 5 was let on a business tenancy.

124. Mr Gupta argued the landlord's breach of his obligations under the lease arising from the potential letting of the Flat for commercial purposes was not a relevant consideration for the identification of the residential and non residential parts of the building. In this respect Mr Gupta relied on the decision in *Gaingold Ltd* 1 E.G.L.R. 81 where the Lands Tribunal held that residential accommodation used by staff employed by the occupier of commercial premises was nonetheless occupied for residential purposes even though it may be in breach of the user clause in the lease.

125. The Tribunal doubts whether *Gaingold* assists the landlord on two fronts. First the decision may be questionable in law in the light of the later Court of Appeal decision in *Henley v Cohen* [2013] EWCA Civ 480; [2013] H.L.R. 28, in which it was held that the lessees could not rely on their own breaches of covenant so as to bring their property within the definition of "house" for the purpose of the Leasehold Reform Act 1967. Second the facts of this case have no similarity with the facts in *Gaingold.*

126. The Tribunal considers the landlord and Mr and Mrs Gupta got themselves into muddle over the wording on the new lease because they were attempting to exaggerate the size of the non-residential part of the building so as to frustrate the leaseholders' application before the court for the transfer of the freehold. The Tribunal believes the timing of the new lease which was shortly after the directions for the appointment of an expert was no coincidence. In short the Tribunal finds the grant of a new lease was not indicative of a settled intention to let the Flat for commercial purposes but simply a means to muddy the waters as regards the court proceedings.

127. The Tribunal is satisfied on the evidence of Mr Pennington that Flat 5 had been let in 2016 and 2017 for residential purposes. Further Mr Oliver's inspection of the Flat in November 2016 showed that the ground floor of Flat 5 was being used as living and sleeping accommodation.

128. The Tribunal finds that the improvements made by Mr and Mrs Gupta to the Flat, in particular to the basement were for the purpose of enhancing its rental potential in the residential market. The Tribunal

relies on Mr Oliver's expert testimony when he stated that the dry lining of the basement and the installation of a fully equipped shower room were to make the Flat habitable as living accommodation.

129. The Tribunal places weight on the fact that the landlord acted with great speed and urgency to remedy the hazard of excess cold so as to avoid the effects of the prohibition order. If the intention was to let the property for commercial use, there was no necessity for the landlord to respond in such a way because the prohibition order had no application to non-residential property. Likewise the landlord's description of the building containing five flats and a ground floor shop in the application for dispensation was, in the Tribunal's view, significant because the statement was made on 30 May 2017 which was very close to the operative date of the 5 June 2017.

130. The Tribunal did not find the statements of Mr Gupta and of Mrs Gupta about the commercial use of Flat 5 persuasive. Mrs Gupta in her letter of 16 October 2017 supplied no details of the length and type of the commercial use of Flat 5. The landlord adduced no evidence about the identity of the commercial tenants for Flat 5. Finally Mr Gupta acknowledged that no steps had been taken to alter the listing of Flat 5 for Council Tax or to make application to the planning authority for change of use.

131. The Tribunal, therefore, finds that Flat 5 as at 5 June 2017 was occupied for residential purposes.

Decision

132. The Tribunal decides that as at 5 June 2017 the non-residential part of the building was confined to the ground floor shop. Further the Tribunal is satisfied that the internal area occupied by the shop constituted 14.55 per cent of the internal area of the building taken as a whole.

133. The Tribunal concludes that the building is not a building which has more than 25 per cent non-residential parts.

134. The Tribunal determines that 10 High Street RTM Company Limited is entitled to acquire the right to manage the building with effect from the date when the Tribunal's determination in favour of the RTM Company becomes final.

Application under S20C and refund of fees

135. In the application form, the lease holders applied for an order under Section 20C of the 1985 Act preventing the landlord from recovering its costs in connection with these proceedings through the service charge. The landlord relied on the wording of clause 6(i) as authority for

recovering its solicitors and managing agent's costs incurred in these proceedings. Clause 6(i) states as follows:

> "Employ and or retain managing agents surveyors solicitors and accountants and such staff as may be necessary for the reasonable supervision and performance of the Landlord's covenant hereunder and for the collection and recovery of the rents and service charge in respect of the building".

136. The Tribunal is not convinced that the landlord is entitled to recover its costs under Clause 6(i) because it does not specifically mention costs incurred in Tribunal proceedings. The Tribunal, however, determines for the avoidance of doubt that it is just and equitable to make an order under section 20C of the 1985 Act so that the landlord may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge. The Tribunal considers it just and equitable because the leaseholders have largely been successful with their applications.

137. The Tribunal determines that there should be no order requiring one party to reimburse the Tribunal application and hearing fees to the other party.

APPENDIX ONE: SCOTT SCHEDULE

DISPUTED SERVICE CHARGES S/C YEAR ENDED 24 June 2016

Case Reference: CHI/29UC/LSC/2017/0041	Premises: 10 High Street, Herne Bay, Kent CT6 5LH

Date	Item	Cost (£)	Leaseholders	Landlord	TRIBUNAL'S DETERMINATION
30/09/15	Insurance	726.74		This is payable pursuant to clause 2(c) of the lease.	Determines £577.67 which is the amount as stated in the landlord's final account at [A206]. The leaseholders admitted liability in the statement of case.
29/10/15	Petty cash	25.00	Leaseholders state that there is no verified Invoice from Maid 2 Cleaning Services. According to Mr Pennington who lives at the premises, they have cleaned the common parts during the last three years . Mr Gupta engaged Mr and Mrs Pennington to clean the common parts in 2017.	This is payable pursuant to clause 6(a) of the lease. The costs are reasonable. According to Mr Gupta this was a one-off clean in October 2015. Produced a Petty Cash Voucher dated 29 October 2015 made out to Maid 2 Cleaning [A321].	Allow £25 Tribunal satisfied on balance that the one-off cleaning took place. The amount claimed is reasonable
02/11/15	WRML set up fee	480.00	Dispute the reasonableness of the amount. Mr Patel had been in contact with Oakfield PM which manages a large number of blocks in Hastings. Their	This is payable pursuant to clause 6(i) and (j) of the lease. The payment represented the managing agent's fee for setting up block management operations for the property.	Tribunal considers £480 excessive, for a small block comprising essentially two leaseholders. The relationship between WRML and Mr and Mrs Gupta not arms

			set up fee was £200 plus VAT [A 229E2].	Evidenced by an invoice in the name of Warwick Road Management Ltd addressed to Mr and Mrs Gupta in the sum of £480 [A320]. According to Mr Gupta this was a standard charge for a service. Mr Gupta obtained an e-mail from Oakfield which said that it did not operate in Herne Bay [A324/11].	length. Mrs Gupta 100 per cent shareholder of WRML. Agree with leaseholders' evidence that £200 is reasonable for the set up fee of a small block. Tribunal finds that the set up arrangements put in place by WRML were not to the required standard. The evidence indicated that WRML had not organised the banking arrangements in accordance with RICS requirements for service charge accounts. It was not clear to the Tribunal whether the service charge monies were being held in Mrs Gupta's bank account or a Trust account. Also WRML did not have a proper invoicing system which was evident from the large number of payments from petty case. The Tribunal determines a set up fee of £100.
02/11/15	Roof renewal (flat 5)	1,000.00	This was for the renewal of the felt roof at the rear serving only Flat 5 above the open plan kitchen area. The renewal was according to Mr Patel done over three stages and completed on 27 May 2016 in order to get round the consultation requirements. The invoices	This is payable pursuant to clause 6 of the lease. Under the lease, the roof is defined as being a part of the Common Parts. Mr Gupta produced photographs showing the state of the old roof which comprised concrete tiles and corrugated sheets, and the state of the new roof [A324/22 & 24). Mr Gupta also supplied photographs of the work	Tribunal finds that the old roof was in disrepair, and the works done to replace it were necessary. Replacement to modern building standards did not constitute an improvement. The roof is part of the main structure, the costs of which are recoverable through the service charge.

			in the name of RAK Roofer are £1,000 dated 2 November 2015 [A319]; and £100 dated 7 March 2016 [311]. There is an invoice for the sum of £590 in the name of Quodox dated 27 May 2016 [A311]. Mr Patel states there was no evidence that this was necessary work. The Applicants have also made enquiries about the RAK roofer and found that he does not exist at the address on the invoice.	done to the inside of the roof [A324/25]. Mr Gupta said that the roofer operated locally, and that it was difficult to find suitable contractors in Herne Bay. Mr Gupta acknowledged that the roofer had probably left the area.	The Tribunal, however, is satisfied that this work was part of a wider project which included the invoice of £100 dated 7 March 2016 [311] and the invoice for the sum of £590 in the name of Quodox dated 27 May 2016 [A301]. The invoice [A311] involved re-fixing lead and ventilation on the roof, and was carried out by the same contractor (RAK roofer). The invoice [A301] involved completing work on the same roof to comply with building regulations but by a different contractor. The costs of these works were £1,690. The landlord did not consult. No application for dispensation. The costs of these works limited to £250 per leaseholder, making a total of £1,000.
03/11/15	Petty cash	180.00	Not a proper receipt for drainage work. Petty cash payment. No proper invoice. According to Mr Pennington, there was no problem with the drainage until Mr Gupta commenced the building	This is payable pursuant to clause 6(b) of the lease. Evidence of payment a petty cash voucher in the sum of £180.00 dated 3 November 2015 which described the work as drainage un-blockage at 10 High Street [A 318]. Mr Gupta asserted that this was the only receipt for the works. Mr Gupta	The Tribunal is satisfied that the work was carried out. The leaseholders supplied no alternative quotation to suggest the cost was unreasonable. The Tribunal, however, notes that there are four other receipts for cleaning the drains over a period of five months, 15 January 2016, 6

			works. Mr Pennington saw that the courtyard below was stacked with rubble, plaster, plasterboard, timbers, household and food waste which was over the drains. The leaseholders considered that Mr Gupta was responsible for the blocked drains, and that he should pay for the work done to unblock them.	maintained that the work was witnessed by leaseholder and neighbours.	April 2016, 20 April 2016, 22 April 2016 . The leaseholders have accepted the last two invoices. The Tribunal takes the view that the landlord should not be recover the cost of the five invoices because he should have realised that there was a problem with the drains, and brought in the professionals earlier. The Tribunal will allow this invoice because it was the first time the problem arose but will disallow the next two invoices. Allow £180.
09/11/15	Waste clearance	250.00	Not a proper receipt not verified or proved that the waste clearance was anything to do with common parts. Mr Gupta was carrying out building works to his flats at this time.	This is payable pursuant to clause 6(b) of the lease. Mr Gupta explained that the payment was for the removal of building waste (plaster) from the walls of the Flat. The invoice took the form of a receipt issued by Budget Man Van [317] This work was related to major work. Flat refurbishment did not start until major work was done.	Plaster work of all walls belong to the flat see Part 1 First Schedule to the lease. Mr Gupta stated that the waste was plaster from the walls of Flat 5. Not recoverable as service charge under the lease. Disallow.
15/01/16	Petty cash	120.00	Not a proper receipt for drainage work. Sums disputed as not properly incurred and validated.	This is payable pursuant to clause 6(b) of the lease. The petty cash slip was addressed to CHAD, for unblocking the drains [A316]. Mr Gupta said this was the only receipt from the supplier. According to Mr Gupta the work was witnessed by a leaseholder and neighbours.	Disallow see entry for 3.11.2015.

15/11/15	Petty cash	150.00	Not a proper receipt for guttering work. Sums disputed as not properly incurred and validated.	This is payable pursuant to clause 6(b) of the lease. Petty cash voucher naming RAK roofer for guttering job [A316]. Mr Gupta said the work was witnessed by leaseholder and neighbours.	Tribunal finds that the work was done. No alternative quotation from the leaseholders to suggest that the amount was unreasonable Allow £150
02/11/15	Petty cash	440.00	Not a proper receipt. Leaseholders contend that the work related to Flat 5. The costs were not recoverable through the service charge. Mr Patel raised concerns about whether this work was done by a licensed contractor in accordance with the Control of Asbestos Regulations. In Mr Patel's view, this was a perfect example of the unprofessional way in which the building has been managed.	This is payable pursuant to clause 6 of the lease. Petty Cash Voucher for the removal of asbestos and hacking of plaster. According to Mr Gupta the work was carried out by Daniel. Mr Gupta did not know whether Daniel was licensed to deal with asbestos waste. Although access was through Flat 5 Mr Gupta said the wok done related to the building.	The Tribunal is satisfied that the work was not done to the required standard. The landlord completely disregarded the legal requirements involving asbestos. The Tribunal is also concerned about such a large sum being paid from petty cash. Disallow
18/01/16	Topbuild	8400.00	Mr Patel made representations on 22 December 2015 disputing the works on the ground that they did not relate to the common parts [A273a]. According to Mr Patel, the works related to Flat 5. Also Mr Patel said that he had only received details of	On 10 November 2015 WRML issued a Notice of Intention to carry out major work of cyclical repair including drainage, rain water goods, walls pointing, treating wood and applying DPC course [A267]. A brief specification of the works was exhibited at [A 271]: • Repair and renew drainage system, repair where necessary	The works actually carried out were the invoice for £8,400 from Topbuild, the invoice of £3,500 for replacing RSJ and other lintels (2 February 2016), and the invoice of Avruka Limited 5 February 2016 (£3,000) for the damp proofing. The replacement of the RSJ and other lintels were not the subject

			one quotation which was from All Tie Up Limited. Finally Mr Patel pointed out that he had asked several times to have a site inspection and bring his builder and surveyor to view the proposals. Mr Patel stated that Mr Gupta had not responded to his request and that Mr Patel had not been given access to the area of the building where the proposed works were taking place. Mr Pennington said he had never seen a specification for the works carried out by Top Build. Further Mr Pennington stated that he was not given access to inspect the works carried out. Mr Pennington pointed out that the builders had cut the drain pipe from their flat with the result that the water from the shower was draining directly into the courtyard. The leaseholders maintained that there was no proof of payment to Top	• At ground floor and basement (inside of flat 5, hacking of affected walls plasters to reach the walls brick and replacing the affected plumbing for the building as necessary. • Carry out rising damp treatment, timber, treatment, spray suitable fungicide and replace the affected joist timber and ceiling. • Make the walls, ceiling and other area good after treatment • External pointing and rendering where necessary Stage 2 Notice dated 14 December 2015 giving details of three quotations for the cyclical work. Top Build Construction supplied the lowest tender of £8,400. In addition there were three quotations for the damp proof work. All Tied Up limited supplied the lowest quotation [A269]. Top Build supplied an invoice dated 18 January 2016 in the sum of £8,400 [A315]. Mr Gupta said this was payable pursuant to clause 6 of the lease. Mr Gupta included bank statements as proof of payment. However, the statements did not specify the recipients.	of Consultation. Avruka was not one of the contractors which tendered for the damp proofing. The leaseholders raised serious concerns about the status of Avruka to which Mr Gupta did not provide a satisfactory response. There was no evidence that Avruka was a recognised damp proof contractor. The address given on the invoice was that of a newsagent. Mr Gupta accepted that Avruka did not provide a long term guarantee in respect of the damp proofing work which was a key part of the quotation by the preferred tender, All Tied Up Limited. The brief specification for works included refurbishment of Flat 5, the costs of which were not recoverable through the service charge. In this respect Mr Gupta adduced no evidence that the landlord applied its mind to the representations of Mr Patel about the scope of works. Also Mr Gupta provided no satisfactory explanation as to why the landlord did not agree to a site inspection with Mr Patel and his advisers prior to the works being carried out.

			Build. The leaseholders stated that the works carried out were significantly different from the proposals in the consultation see entries for 2 February 2016 and 5 February 2016.		The Tribunal is satisfied that the consultation process was fundamentally flawed. The scope of works changed significantly from what was originally proposed. No explanation was given for using an unqualified contractor for the damp proofing work except that it was cheaper. The tender price given in the stage 2 documentation for damp proofing did not correspond with the quote given by All Tied Up. The landlord did not have regard to the views of Mr Patel. The works were completed by 5 February 2016 which was within 3 weeks of the close of the consultation to Stage 2 on 13 January 2016. The consultation period was also over the Christmas period. The speed of the works suggests that the landlord had known about the change of specification at an early stage. The Tribunal finds that the consultation process was not complied with in respect of this invoice for £8,400; invoice of £3,500 (2 February 2016), and the invoice of £3,000 (Avruka Limited 5 February 2016)

					The Tribunal restricts the costs to £250 per leaseholder (£1000 in total).
01/02/16	New Lock for Front door by RAK roofer	85.00	Mr Pennington stated that the front door lock was repeatedly broken by Mr Gupta's builders and tenants. Mr Pennington has repaired the lock on several occasions including fitting a new back-set at a cost of £13. Mr Pennington's view was that Mr Gupta should be responsible for paying these repairs. Mr Pennington said the matter had been reported to Mr. Gupta. Further RAK roofer did not exist at the address on the invoice.	This is payable pursuant to clause 6 of the lease. Invoice dated 1 February 2016 [A314] Work described as Call Out to fix new front door latch. This change of lock cover was done on a separate occasion. Mr Gupta said that a new and different lock can be seen at the building.	The Tribunal finds that the job was completed. Having regard to Mr Pennington's evidence, the Tribunal considers the cost excessive. Allow 50 per cent: £42.50
02/02/16	Topbuild construction	3500.00	See entry for the invoice 18/1/16. The leaseholders also stated Mr Botting, Council's building Control Officer was not aware of that a new RSJ had been installed in the basement area [A 328].	This is payable pursuant to clause 6(b) of the lease. The definition of Common Parts in the lease includes the structure of the building. Invoice [A313] Work described as securing the building structure and replacing the RSJ and all other lintels to concrete lintel. Price included structural engineers visit. Mr Gupta said the work related to the installation of the RSJ in the	The Tribunal finds that this was part of the major works referred to in the invoice for 18/1/16. No consultation amount limited for the whole works to £1,000 (£250 for each leaseholder).

				basement that support the full structure. Mr Gupta asserted that Mr Botting was aware of the works. He required 60 minute fire resistant on RSJ steel beam [A326]. Mr Gupta exhibited a photograph of the RSJ with a fire rated covering [A324/25]	
12/02/16	Avruka limited	95.00	The leaseholders challenged whether any meaningful work had been done in relation to this charge. They also pointed out the address in West London on the invoice is a shop called AKSHAR News.	This is payable pursuant to clause 6 of the lease. A bill dated 12 February 2016: Visiting the site for fire risk assessment and fixing the fire action plan [A312] Bank statement attached, as proof of payment. Mr Gupta said that Avruka had an office at the rear of the shop.	The Tribunal finds that the landlord produced no evidence of a fire risk assessment being carried out. The fire plan appeared simply to consist of a notice regarding evacuation. The Tribunal also considers highly unlikely that a contractor from West London would travel to Herne bay for £95. Disallow
07/03/16	RAK roofer roofing work flat 5	100.00	This is part of the major works which should have been consulted upon. See entry for 2/11/15 Rak Roofers.	Invoice [A311]. The works are described as re-fixing lead along with ventilation at 10 High Street.	Disallow part of the major works (2/11/15).
02/03/16	Able group	102.60	Accepted	Sales Receipt [A309]	£102.60 agreed
6/04/16	Active drainage	60.00	Not a proper receipt for drainage work.	This is payable pursuant to clause 6(b) of the lease. Invoice [A309] Work described as jet to clear the main drain. Mr Gupta understood the leaseholders had phoned all the traders and found all was okay. The leaseholder called Chad to verify the works.	Tribunal satisfied that the works took place but they were part of five sets of work to remedy the problem with the drains. The overall cost of the works was excessive and unnecessary. The landlord should have found a solution earlier. Disallow see

					entry for 30.11.2015
14/12/15	WRML fee consultation Major works	768.00	Not a reasonable amount to be charged. Essentially this fee was for sending out the section 20 letters to two leaseholders.	This is payable pursuant to clause 6(i) and (j) of the lease. The sum claimed represented the administration fee for the major works which was calculated at £192 per flat. In addition there was also a separate supervisor's fee of 10 per cent [A266], [A308]. Mr Gupta contended that the duties involved in the fee were much wider than sending out letters. The fee included time spent with contractors and examining the leases.	The Tribunal finds that the relationship between WRML and Landlord not arms length which questioned whether the charges represented the market rate. The Tribunal also considers the work involved in the administration of this consultation exercise involving effectively two leaseholders and one form of lease straightforward. Applying its own expertise and general knowledge the Tribunal decides a fee of £150 is reasonable.
25/04/16	HEC-Alarm	385.00	Accepted	Invoice [A306]	£385 agreed
20/04/16	Jetting services Direct Ltd	156.00	Accepted	Invoice [A305]	£156 agreed
22/04/16	Jetting services Direct Ltd	198.00	Accepted	Invoice [A304]	£198 Agreed
05/02/16	Avruka Ltd	3000.00	See entry for Topbuild invoice (18.1.16). In addition Mr Patel referred to the survey prepared by All Tied Up Limited dated 4/11/15 [A229E2]. All Tied Up Limited was the nominated contractor to	The landlord produced a letter not an invoice from Avruka Limited for injecting a DPC course, damp and timber treatment dated 5 February 2016 [A303] This is payable pursuant to clause 6(b) and (d) of the lease. Mr Gupta produced photographs of	The Tribunal finds that this was part of the major works referred to in the invoice for 18/1/16. Flawed consultation. Amount limited for the whole works to £1,000 (£250 for each leaseholder). The Tribunal also have grave concerns about the

			carry out the damp proofing and timber treatment. All Tied Up' quotation was £3,672 which included VAT of £612. This quotation was lower than the price given in the section 20 consultation of £4,504.40. Also in the Stage 2 Notice WRML stated that *Damp Proof Work needs to be done by specialised companies with insurance warranties.* The leaseholders asserted that Avruka was not a damp proofing company. According to the Applicants the address on the invoice was a shop called AKSHAR News. Also this was qualifying work which had not been subject to statutory consultation.	the work done [A247]. Mr Gupta explained that he asked Avruka to undertake the work in order to save money to enable the additional work carried out by Topbuild.	bona fides of Avruka Limited, and whether it was competent to carry out these works.
27/05/16	Azeem's General Maintenance & Repairs	95 .00	Accepted	This is payable pursuant to clause 6 of the lease. Invoice [A302]	Admitted £95.
27/05/16	Quodox (roofing work flat	590.00	See comments in respect of roof works for 2/11/15. The leaseholders also deny	A bill in the name of Quodox Energy dated 27 May 2016 [A301] The work done applied insulation,	This is part of the major works which should have been consulted upon. See entry for 2/11/15 Rak

	5)		liability because the works were for the exlcusive beneift of flat 5. Argues that if it was coveredby the lease, the works were improvement not repair.	ventilation strip and completing the roof work as per building regulations. This is payable pursuant to clause 6(b) of the lease. The roof is part of the building structure. This has nothing to do with any one flat.	Roofers.
01/03/16	WRML fee for block management	1200.00	Leaseholders contend not a reasonable amount. The leaseholders consider a fee of £200 per flat making a total of £800 reasonable. The leaseholders referred to three Tribunal decisions where the management fees quoted were £180, £250 and £220 per flat.	Invoice in the name WRML dated 1 March 2016 [A300]. This is payable pursuant to clause 6(i) and (j) of the lease. Mr Gupta supplied quotations of £4,000 plus VAT and £1,750 plus VAT per annum for block management fees from Premier Block Management, Elstree, Herts, and Caxtons, Gravesend respectively [324/12 & 324/13].	The Tribunal finds that the relationship between WRML and Landlord not arms length which questioned whether the charges represented the market rate. The Tribunal holds that £250 plus VAT per flat would be a reasonable fee for managing a small block of flats. The Tribunal, however, finds that the Agent did not perform to the required standards: • Making excessive payments from petty cash. • Not setting up trust accounts. • Not responding to leaseholder's concerns. • No cleaning arranged. • No evidence of fire risk and health and safety assessments. Fee reduced to £125 per flat (£500).

22/01/16 25/01/16 26/01/16	Daniel Daniel Daniel	100.00 80.00 140.00	No receipt or invoice or any details provided	Mr Gupta said that these payments were for removing building waste from the site. Mr Gupta had tried to contact Daniel on his phone number but was told that Daniel now lived in Essex and no forwarding number had been given [A324/21]. This was payable pursuant to clause 6 of the lease. Mr Gupta produced bank statements to show that payments had been made.	Disallow No satisfactory evidence of work done and payment.
11/04/16	Fee for supervising major works	1000.00	Leaseholders contend that no receipt or any other details as to the identity of the company or professional individual who carried out the supervision.	This is payable pursuant to clause 6(b) and (d) of the lease. WRML supervised the work. The fee was quoted in the Stage 2 Notices. The amount mentioned was £1,290. Mr Gupta said the fee was for inspecting the works on a regular basis.	The Tribunal accepts that WRML entitled to a fee for supervising works. The Tribunal, however, considers the fee excessive (not arms length). Reduce by 50 per cent. Allow £500.
30/05/16	Building regulation fee	622.15	Disputed on the grounds it related to the building works to Flat 5	Mr Gupta states that the fee related to works to the common parts and payable through the service charge pursuant to clause 6(b) of the lease. Mr Gupta supplied a detail of a payment to Canterbury Council in the sum of £612.96 which he said represented the payment of the building regulation fee. The transaction record showed that the money had been drawn on a bank account in the name of Gupta [A337]	The e-mail from Mr Botting, the Building Control Office dated 10 February 2016 [A325] indicated that he inspected works to the basement and ground floor flat and to the roof over the kitchen of Flat 5. Disallow as the majority of the works referred to in the e-mail relate to the refurbishment of the basement flat.
17/06/16	Electricity	10.88	Accepted	Noted	£10.88 agreed

	bill				
Total		23,910.30	[redacted]	[redacted]	£5,172.65

DISPUTED SERVICE CHARGES: S/C YEAR ENDED 24 June 2017

Date	Item	Cost (£)	Leaseholders	Landlord	TRIBUNAL'S DETERMINATION
29/07/16 till 27/02/17	Electricity	110.71	Accepted all monthly Invoices as per statement and paid to the landlord.	Noted	Limit to £87.05 as in the statement of expenditure [A274A].
28/06/16 till 24/6/07	Insurance	652.58	Accepted all monthly payment schedule at per statement. Query about the rental cover of £20,000 and £97,500alternative accommodation. There is a discrepancy in the amount of the invoice which is £631.06 and the sum charged at £652.58	This is payable pursuant to clause 6(c) of the lease. Alternative accommodation was to do with all the units in the building. Invoice showed the annual insurance price whereas money charged every year was based on the number of instalment goes out from the bank in that year. See the break down in year and accounts.	Allow £912.22 which was the amount in the Statement of Total Expenditure for year ended 24 June 2017 [A274A]. The Tribunal rules that this amount has been admitted by the leaseholders in statement of case.
24/12/16	WRML block management fee	1200.00	Not a reasonable amount.	Invoice in the name of WRML dated 24 December 2016 [A280]. This is payable pursuant to clause 6(i) and (j) of the lease. Mr Gupta states this was well below the fee against the time spent on	The Tribunal finds that the relationship between WRML and Landlord not arms length which questioned whether the charges represented the market rate. The Tribunal holds that £250 plus VAT per flat would be a reasonable fee for managing a

				management.	small block of flats. The Tribunal, however, finds that the Agent did not perform to the required standards: • Making excessive payments from petty cash. • Not setting up trust accounts. • Not responding to leaseholder's concerns. • No cleaning arranged. • No evidence of fire risk and health and safety assessments. Fee reduced to £125 per flat (£500).
07/12/16	Sterling Window Glass roof, flat 5	2200.00	See decision re dispensation CHI/29UC/LDC/2017/0033	See decision re dispensation CHI/29UC/LDC/2017/0033	Dispensation granted (see decision above). Tribunal finds sum reasonable. Works carried out by a FENSA recognised trader. The landlord adopted the lowest tender from the three contractors. The alternative quotes given by the leaseholders were not comparable. Allow £2,200
26/01/17	External wall paint	95.48	Non qualifying please refer to the lease -Relates to glass roof work for flat 5	This is payable pursuant to clause 6(e) of the lease. Receipts [A276] This was the paint work on	Tribunal finds. Painting to exterior walls, part of structure Allow £95.48

RIGHTS OF APPEAL

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

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

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

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

				the walls where pointing were done. This has nothing to do with glass roof.	
16/02/17	Replacement of pavement glass	305.00	The work was defective and dangerous. The wooden surround is a trip hazard in the pavement.	This is payable pursuant to clause 6 of the lease. Invoice from Mark Harris [A 261].	Not convinced this is within the freehold title. See Official Copy of Title Plan boundary does not extend beyond the building line [A24] Disallow
30/05/2017	Tribunal fee for dispensation application	100.00			Disallow See order on reimbursement of fees.
26/06/2017	WRML supervision fee balance	290.00			Disallow Dealt with in year ended 24 June 2016 see entry for 11/04/16
Total		5,189.75			£3,794.75

Appendix Two of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(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 20C

(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.