9611

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AM/LSC/2013/0558 and 0661**
Property	:	**Flats 1, 3, 4 and 6, 91 Upper Clapton Road, London E5 9BU**
Applicant	:	**Mr Naseer Ahmed Malik (1) and Mr Zahid Gulrez (2)**
Representative	:	**Ms Angela Louis (Counsel)**
Respondent	:	**Solas Education Limited (Flat 1)** **Mr Moses Meisels (Flat 3)** **Mr Judah Grunhut (Flat 4)** **Ms Esther Frankel (Flat 6)**
Representative	:	**Mr Abe Berger**
Type of Application	:	**Liability to pay service charges and administration charges**
Tribunal Members	:	**Mr Jeremy Donegan (Tribunal Judge)** **Mr Christopher Gowman (Professional Member)** **Mr Alan Ring (Lay Member)**
Date and venue of Hearing	:	**09 and 10 January 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**25 February 2014**

DECISION

© CROWN COPYRIGHT 2014

Decisions of the tribunal

(1) The tribunal determines that the amount payable for surveyor's fees in 2010/11 is £1,080 and the amount payable for the estimated cost of general maintenance and repairs in 2013/14 is £675.

(2) The tribunal determines that the amount payable for rubbish clearance in 2013/14 is £155.

(3) The tribunal determines that the amount payable for estimated communal cleaning charges in 2013/14 is £699.

(4) The tribunal determines that the amount of the reserve fund contributions for 2013/14 shall be £50 per flat.

(5) The tribunal refuses the application for reimbursement of the tribunal fees paid by the Applicants.

(6) 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 lessees through any service charge

(7) The tribunal refuses the Respondents' application for an order for costs.

(8) Since the tribunal has no jurisdiction over County Court costs and fees, ground rent and interest the proceedings being taken against Mr Meisels should now be referred back to the Clerkenwell and Shoreditch County Court

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of interim service charges and administration charges payable by the Respondents in respect of the service charge years 2010/11, 2011/12 and 2013/14.

2. Proceedings were originally issued against Mr Meisels in the Northampton County Court under claim number 2YN80302. He filed a Defence dated 18 July 2013 and the claim was transferred to the Clerkenwell and Shoreditch County Court. The case was then transferred to this tribunal, by an order of District Judge Sterlini dated 29 July 2013, where it was given the case reference LON/00AM/LSC/2013/0558 ("the First Case").

3. Directions were given on the First Case by the tribunal at a pre-trial review on 17 September 2013.

4. The Applicants submitted a separate application to the tribunal on 16 September 2013, naming Solas Education Limited, Mr Grunhut and Ms Frankel as Respondents, which was given the case reference LON/00AM/LSC/2013/0661 ("the Second Case").

5. Directions were given by the tribunal on the Second Case on 30 September 2013. These provided that both cases should be dealt with at the same time.

6. The full hearing of the First and Second Cases took place on 09 and 10 January 2014.

7. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

8. The Applicants were represented by Ms Angela Louis (Counsel). Mr Qalab Ali, who is a director of the managing agents, Hexagon Property Company Limited (Hexagon), also appeared at the hearing and gave oral evidence. The Respondents were represented by Mr Abe Berger of Feldgate Property Management, who is a managing agent.

9. The tribunal was supplied with a bundle of copy documents that included a case summary and statement of issues, the statements of case and directions, documents from the County Court proceedings, the leases, relevant correspondence, consultation notices and service charge accounts, budgets and demands.

The background

10. The property which is the subject of this application is 91 Upper Clapton Road, London E5 9BU ("the Property"), which is an end of terrace building with accommodation over four storeys (basement, ground, first and second floors). There are six leasehold flats on the ground, first and second floors (two flats per floor). The entrance to the flats is in a side passage, running down the right hand side of the Property (looking from Upper Clapton Road). There is a gate in the side passage, which leads to a large rear yard. The front of the Property has been extended forward at ground floor level with a flat roof above. This extension houses two commercial units. One or both of the commercial leaseholders also occupy the basement.

11. The tribunal inspected the Property on the morning of 09 January 2014, prior to the hearing, in the presence of Mr Ali and Mr Berger. The inspection was limited to the exterior of the Property, the rear yard and the internal common-ways, as access could not be obtained to any of the flats. The tribunal did not inspect the commercial units. The areas that were inspected were all in poor condition and appear to have been neglected for a number of years. Water was leaking onto the path from a blocked hopper in the side passage.

12. The Applicants are the joint freeholders of the Property. The Respondents are the leaseholders of 4 out of the 6 flats.

13. The Respondents each hold a long lease of their flats which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The ground floor commercial units are also subject to leases, which contain repairing obligations that are relevant to these cases. The specific provisions of the leases are referred to below, where appropriate.

The flat leases

14. The hearing bundle contained a sample lease for one of the flats (Flat 3). The tribunal understands that the flat leases are all in substantially the same form.

15. The lease of Flat 3 was granted by Heronmere Limited ("Lessors") to Susan Adams ("Lessee") on 24 July 1985 for a term of 99 years commencing on 25 December 1984. The lease is tripartite and contains various obligations on the part of Birchkim Management Company Limited ("Management Company").

16. The Lessee's covenants are contained in the fifth schedule and include an obligation:

    (2) To pay the Lessees Contribution and the Interim Charge to The Management Company at the times and in the manner provided in the Tenth Schedule hereto both charges recoverable in default as rent in arrears

17. The service charge provisions are to be found in the tenth schedule and are in standard form. They require the Lessee to pay an interim (advance) service charge to the Management Company on the usual quarter days with an end of year balancing adjustment following production of the service charge accounts.

18. The Management Company's covenants are to be found in the seventh schedule and include an obligation to insure the Estate and:

2(iii) To maintain and keep in good and substantial repair and condition and (where necessary) renew

(a) The main structure of the buildings on the Estate including the principal internal timbers and the exterior walls and balconies (if any) and the foundations and basement and the roofs thereof with their main water tanks main drains gutters and rainwater pipes (other than those included in this demise or in the demise of any of the other Flats

....

(f) all other parts of the Estate not included in the foregoing paragraphs (a) to (e) and not included in the demise of any of the Other flats PROVIDED ALWAYS and it is hereby agreed and declared that "repair" for the purposes of this sub-clause includes the rectification or making good any defect in the foundations or structure of the buildings on the Estate notwithstanding that it is inherent or due to the original design of the Estate

19. At the start of the hearing the tribunal queried the position of Management Company. The hearing was adjourned briefly to enable the parties to deal with this point. Mr Berger advised that the company had been dissolved in 1988 and referred the tribunal to clause 5(c) of the flat leases, which provides:

If at any time the Management Company shall fail to perform and observe any of the covenants on their behalf in this lease and such default shall continue for two months after The Lessor shall have given it two months notice specifying the then the Lessor may by notice in writing to The Management Company determine the rights thereunder and henceforth this Lease shall be read as if for the future The Lessor had assumed the rights and obligations of the Management Company hereunder and had become entitled to the service and other payments therefor but without prejudice to all rights of action of any antecedent breach of its covenants

20. Mr Berger and Ms Louis were unable to verify whether notice had been given to the Management Company under clause 5(c). They both accepted that this must have happened in the past, given that the company had been dissolved and Applicants collect the service charges for the flats and deal with the insurance and repair of the Estate. The tribunal proceeded upon this basis. It follows that the Applicants are bound by the insuring and repairing covenants in the seventh schedule to the leases and the Respondents are liable to pay their service charges to the Applicant, rather than the Management Company.

The commercial leases

21. The two commercial units are let on separate leases.

22. The lease of the lock up shop and store at 91 Upper Clapton Road was granted by Rectory Estates Limited ("the Landlord") to Raif Shekerzade ("the Tenant") on 06 May 1983 for a term of 99 years from 25 March 1983.

23. The Tenant's covenants are at clause 3 of the lease and include the following obligations:

3.3 To keep the Demised Premises and all additions thereto and the Landlord's fixtures thereon and the boundary walls and fences thereof and the drains soil and other pipes and sanitary and water apparatus thereof in good and substantial repair and condition and in particular (and without prejudice to the generality of the foregoing covenants) to paint with two coats of good oil paint and in a workmanlike manner all the wood iron and other parts of the Demised Premises heretofore or usually painted as to the external work in every third year the painting to be done in the last year of the tenancy (whether determined by effluxion of time or under the provision for re-entry hereinafter contained or otherwise) as well

3.4 To pay a fair proportion (to be conclusively determined by the surveyor or surveyors for the time being of the Landlord) of the expenses payable in respect of constructing repairing renewing rebuilding and cleansing all party walls fences sewers drains roads pavements and other things the use of which is common to the Demised Premises and to the Landlord's premises

24. The lease of the lock up shop known as 91B Upper Clapton Road was granted by Naseer Ahmed Malik and Zahid Gulrez ("the Landlord") to Mohammed Ashraf ("the Tenant") on 13 December 2002 for a term of 15 years.

25. Again the Tenant's covenants are to be found at clause 3 of the lease and include:

3.3.1 At all times during the said term to keep the Demised Premises and every part thereof and all additions thereto (including the roof of the demised premses (sic), main walls main drains and all windows window frames doors door frames plate glass and the pipes sanitary and water apparatus thereof) in good and substantial and decorative repair and condition and (to the extent necessary to fully comply with the aforementioned obligations) to renew or rebuild the same

3.4 To paint with two coats of good quality pain in a proper and workmanlike manner all the wood iron and other parts of the Demised Premises heretofore or usually painted as to the external work in every third year and in the last year or on sooner determination (howsoever determined) of the said term and as to the internal work in every fifth year and in the last year or on sooner determination (howsoever determined) of the said term and after every such painting to treat as appropriate all internal and external parts of the Demised Premises usually so treated and to wash down all tiles glazed bricks and similar washable surfaces and to repaint brick and similar washable surfaces and to repaint brick and faience (sic) work as and when necessary and to repaper the parts usually papered with suitable paper of good quality

3.5 To pay a fair and reasonable proportion (to be determined by the Surveyor for the time being of the Landlord such determination to be final and binding on the parties hereto) of any expenses payable in respect of constructing repairing rebuilding lighting and cleaning and in all ways whatsoever maintaining all party walls fences sewers drains channels sanitary apparatus pipes wires passageways stairways roofs roads pavements land and other things the use of which is common to the Demised Premises and to any adjoining or neighbouring premises and to indemnify the Landlord against all such expenses

The issues

26. The First Case concerned the payability and/or reasonableness of the following, disputed service and administration charges:

Year ended 31 March 2011 (Flat 3 only)

Insurance contribution (19/03/10-18/03/11)	£181.35
Maintenance contribution (paint, plaster, flooring)	£241.66
Management contribution	£90.00
Administration charge	£10.00
Administration charges	£48.00

Year ended 31 March 2012 (all flats)

Site survey fees	£1,440.00
Accountancy fees	£660.00

Administration charge (Flats 4 & 6 only)	£96.00 per flat

27. The Second Case concerned the payability and/or reasonableness of the following disputed service charges:

Year ending 31 March 2014 (all flats)

General maintenance & repairs	£900.00
Rubbish clearance removal	£650.00
Communal cleaning	£1,165.00
Accountancy fees	£720.00
Reserve fund contribution	£50.00 (per flat)

28. The tribunal has no jurisdiction to deal with County Court costs and fees, ground rent and interest, as claimed from Mr Meisels within the Court proceedings.

29. The other service charge expenditure shown in the 2011/12 accounts and 2013/14 budget was all agreed. At the start of the hearing, Mr Berger agreed the insurance contribution (£181.35) and management contribution (£90) for 2010/11. During the course of the hearing he also agreed the maintenance contribution for 2010/11 (£241.66) and the accountancy fees for 2011/12 (£660 including VAT) and 2013/14 (£720 including VAT). During the course of the hearing Ms Louis advised that the Applicants were waiving their claims for administration charges for 2010/11 (£10 and £48) and 2011/12 (£96 per flat for Flats 4 and 6). The tribunal makes no determination in respect of the conceded items.

30. Ms Louis and Mr Berger invited the tribunal to determine the actual service charge expenditure for the year ended 31 March 2013. The tribunal declined this request upon the basis that there was no application to determine these charges. However the tribunal hopes that the parties will be able to agree these charges in the light of the findings made in this decision.

31. The Respondents' statement of case, served by Mr Grunhut and Ms Frankel and dated 23 October 2013, included allegations that the Applicant had breached the repairing obligations in the flat leases and a request that "*..the freeholder contributes towards the proposed works by way of compensation to the leaseholders*" (paragraph 19). The allegations, if proved, could give rise to a set-off claim. However the tribunal felt unable to deal with such a claim as the statement of

case did not provide details of the alleged breaches. Further the Respondents did not provide any expert evidence to substantiate the allegations. It is also worth pointing out that the statement of case was only served by two of the Respondents and that Mr Meisels did not file any Counterclaim with his Defence to the County Court proceedings. It remains open to the Respondents to pursue the allegations of disrepair through a separate action in the County Court, should they wish to do so.

32. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various disputed issues as follows.

Site Survey (2011/12) and General Maintenance & Repairs (2013/14)

33. The Applicants are seeking to recover the sum of £1,440 for a site survey undertaken by Mr A U Rahman BSc of GH Chartered Surveyors, on 14 March 2012. A copy of Mr Rahman's undated condition survey report was included in the bundle.

34. The service charge budget for 2013/14 includes a sum of £900 for the anticipated cost of general maintenance and repairs to the Property. It is convenient to deal with this item and the surveyor's fees together. Although the sums involved are relatively modest, there is an important point of principle here in that the Respondents contend that these costs should be apportioned between the commercial and residential units.

35. The report from Mr Rahman identified the need for substantial works to the exterior of the Property, including render repairs to the front and rear elevations, renewal works to the window units and the renewal of the rainwater goods. The works have not been undertaken to date. Hexagon served consultation notices under section 20 of the 1985 Act in 2013 and selected Tibuu Construction Limited ("Tibuu") to undertake the works. Tibuu's tender for the works amounted to £91,940 excluding VAT. In addition Hexagon will be charging a supervision fee of 10% of the contract price plus VAT. This means that the total anticipated cost of the works is £120,964.80 (including VAT).

36. On 06 June 2013 Hexagon sent demands to each of the residential leaseholders, seeking contributions to the cost of the proposed works of £20,164.83 per flat (1/6th of £120,964.80). Hexagon was seeking to recover the full cost of the works from the residential flats and was not seeking any contribution from the commercial units. The Respondents contend that the cost of the works should be apportioned between the residential and commercial units. Bizarrely the anticipated cost of the proposed works was not included in the service charge budget for 2013/14. It follows that the tribunal has no

jurisdiction to determine the amount of the Respondents' contributions to these works. However the tribunal can determine the Respondents' contributions to the surveyor's fee and the general maintenance and repairs and does so below. This apportionment should be followed when calculating the contributions to the proposed works.

37. In their case summary and statement of issues, dated 04 December 2013, the Applicants conceded that the commercial units should contribute to the proposed works. They rely on a letter from Mr Paul Madden BSc MRCIS of SM Surveyors, dated 15 November 2013, in which he suggested that these units should contribute to the work to the right hand flank and the lower level/basement rear wall, the main roof and the rainwater goods that serve this roof. He also raised the possibility of excluding the right hand flank and the lower level/basement rear wall from the works, leaving just the residential areas.

38. The case summary and statement of issues suggested that the commercial units should contribute a total of 1/7th of the cost of the works identified by Mr Madden. During the hearing, Mr Ali proposed a higher contribution of 25% upon the basis that the commercial units account for 2 out of the 8 units at the Estate. He also stated that the proportions payable by the commercial leaseholders had not been determined by the Applicants' surveyors in accordance with clauses 3.4 and 3.5 of the commercial leases.

39. Applying the same logic, the Applicants propose that the residential flats should contribute 75% of the surveyor's fees in 2011/12 and the estimated cost of general maintenance and repairs for 2013/14. This is upon the basis that the commercial units should pay the remaining 25%.

40. The Respondents' case is that they should only contribute 66.66% of the cost of the proposed works to all external elevations, the ventilation pipes attached to the side elevation, the main roof and the rainwater goods. They also contend that they should only pay 66.66% of the scaffold costs. The Respondents say that the commercial units should pay the remaining 33.33% of all of these costs upon the basis that these units account for approximately 1/3rd of the total floor area of the Estate. The floor area of the different units has not been accurately measured but the Respondents rely on the fact that the commercial units account for all of the basement and part of the ground floor.

41. Again applying the same logic, the Respondents propose that they should contribute 66.66% of the surveyor's fees and the estimated cost of general maintenance and repairs for 2013/14.

The tribunal's decision

42. The tribunal determines that the amount payable for surveyor's fees in 2010/11 is £1,080 and the amount payable for the the estimated cost of general maintenance and repairs in 2013/14 is £675.

Reasons for the tribunal's decision

43. The commercial lease of 91B Upper Clapton Road obliges the leaseholder to maintain the roof and main walls of the demised premises. It follows that the leaseholder of this unit is solely responsible for the flank wall of this property, adjacent to the front part of the side passage.

44. The leaseholders of the two commercial units are each responsible for the front of their shop premises and the flat roof above their premises, under the terms of their leases. One or both of the commercial leaseholders is also responsible for the rear wall at basement level.

45. The Applicants are responsible for all other external walls, the main roof and the rainwater goods.

46. The Applicants should not be undertaking any works to the exterior of the commercial units or the flat roof above the ground floor extension, as these areas are the responsibility of the commercial leaseholders. It follows that the Respondents do not have to contribute to the cost of any works to these areas.

47. The effect of clause 3.4 in the lease of 91 Upper Clapton Road and clause 3.5 in the lease of 91B Upper Clapton Road is that the commercial leaseholders have to contribute a fair and reasonable proportion of the cost of maintaining the main flat roof and the rainwater goods and service media that are used in common with adjoining or neighbouring premises. The amount of this contribution has not been determined by the Applicant's surveyor.

48. Based on the original footprint of the building, excluding the ground floor extension, the commercial units occupy one out of the four storeys (the basement). Of course they also occupy the ground floor extension but the maintenance of this area is their responsibility.

49. Working upon the basis that the commercial units occupy approximately 25% of the original footprint of the building, the tribunal conclude that it would be fair and reasonable for the commercial leaseholders to pay 25% of the cost of maintaining the main flat roof and the rainwater goods and service media in communal use. It follows that the Respondents should pay the remaining 75%.

50. The site survey undertaken in March 2012 dealt with the Estate as a whole and identified various external repairs, some of which are the responsibility of the Applicants and some of which are down to the commercial leaseholders. Doing the best that it can on the information available, the tribunal concluded that it is reasonable for the Respondents to pay 75% of the surveyor's fees, via the service charge account, namely £1,080. The tribunal reached the same conclusion in relation to the estimated cost of general maintenance and repairs for the current financial year. The Respondents should pay 75% of the budgeted cost of routine maintenance and repairs, namely £675. Once the actual cost of any maintenance/repairs is known, at the end of the service charge year, the Applicants can then apportion this cost between the commercial and residential units taking into account the tribunal's findings above.

51. The tribunal makes no determination in respect of the proposed cost of the major works, as this was not included in the service charge budget for the current financial year. However the findings and observations set out above should assist the parties in agreeing the contributions to be paid by the Respondents.

52. It is also worth mentioning that the Respondents are unhappy with the Applicants' choice of contractor for the proposed external works, Tibuu. They would prefer that the contract is award to their nominated contractor, Cranescot Limited. The Respondents also made the point that the statement of estimates served by Hexagon incorrectly referred to Tibuu as "*Tibbu Construction Limited*".

53. At the hearing the tribunal explained that it could not interfere with the appointment of Tibuu and it was up to the Applicants and their managing agents to award the contract, having regard to all observations made during the section 20 consultation procedure. However it is worth pointing out that the statement of estimates was served back on 08 April 2013. Given the passage of time, the tribunal considers it would be advisable for there to be a further section 20 consultation and that up to date tenders are obtained before the contract is awarded. Realistically the proposed works will not be undertaken until next summer, which will give Hexagon sufficient time to undertake these steps. The tribunal recommends that Hexagon include the anticipated cost of the proposed works in the service charge budget for 2014/15.

<u>Rubbish Clearance and Removal (2013/14)</u>

54. The Applicants are seeking to recover the sum of £650 in respect of rubbish clearance at the Property during the current service charge year. These charges have already been incurred. £155 relates to general rubbish clearance and £495 relates to the removal of a wooden/metal structure that had been erected in the rear yard,

without the Applicants' consent. Mr Ali advised the tribunal that he had no information about the structure and did not know who had erected it. The rear yard is exclusively used by the residential leaseholders and so the full cost of removing the structure had been charged to the Respondents.

55. Mr Berger advised the tribunal that the Respondents agree the £155 charge for general rubbish clearance. They contend that the £495 charge for the removal of the wooden/metal structure should be disallowed in its entirety, upon the basis that this cost should be borne by the leaseholder/s who erected the structure. Mr Berger made the point that Hexagon should have been able to discover who had erected the structure by making enquiries of the residents.

The tribunal's decision

56. The tribunal determines that the amount payable for rubbish clearance in 2013/14 is £155.

Reasons for the tribunal's decision

57. The tribunal accepts Mr Berger's submission that the leaseholder/s that erected the structure should pay for its removal. It is unreasonable to charge the removal costs to all of the residential leaseholders. It may be that the structure was erected by one of the commercial leaseholders. The rear yard can be easily accessed from the side passage or from the basement area. The Applicants did not produce any evidence, as to Hexagon's attempts to identify the person responsible for the structure. It appears that the structure was substantial, given that the removal costs were £495. It is likely that Hexagon could have discovered who erected the structure by making enquiries of the residents.

Communal Cleaning (2013/14)

58. The Applicants are seeking recover £1,398 for estimated communal cleaning charges in the current service charge year.

59. Mr Ali informed the tribunal that a company called Nadeem Ullah Consultancy Limited ("NUCL") had originally been cleaning the internal common-ways. They charged £97.08 plus VAT (total £116.50) per month. NUCL were replaced by Bishop & Baron Contractors Limited ("BBCL"). BBCL's contract was terminated in December 2013. A new cleaning company was due to start work in January, as recommended by one of the Respondents (Mr Grunhut). Mr Ali acknowledged that state of the common-ways suggested that the new company had not started work and said that he would chase this up.

60. Mr Ali stated that there was a cleaning specification that required the cleaners to visit once a month. They are responsible for sweeping/vacuuming and dusting the internal common-ways including the windows. They are also responsible for keeping the common-ways and the side passage (up to the gate to the rear yard) clear of rubbish. The estimated cleaning charges of £1,398 per annum equate to £116.50 per month.

61. The Respondents complain that the communal areas are never cleaned. They also point out that NUCL is a building contracting company and not a cleaning company. Mr Grunhut had supplied Hexagon with a quote from a specialist cleaning company, who would charge £80 per month to clean the communal areas. Mr Berger submits that the cleaning charges should be disallowed in full, given the poor condition of the communal areas. On being cross-examined by Ms Louis, he acknowledged that none of the Respondents live at the Property so had limited knowledge of the cleaning of the communal area. Ms Louis also pointed out that there was no documentary evidence of problems with the cleaning, in the form of written complaints, in the hearing bundle. Mr Berger explained that the Respondents all live locally to the Property so visited from time to time. Further they had been made aware of problems with the cleaning by their respective sub-tenants.

The tribunal's decision

62. The tribunal determines that the amount payable for estimated communal cleaning charges in 2013/14 is £699.

Reasons for the tribunal's decision

63. It was apparent from the tribunal's inspection that the internal common-ways had not been cleaned for some considerable time. The carpets on the stairs were very dirty, as was the wooden flooring on the landings. The walls and windows were dusty and this area looked sorely neglected.

64. The tribunal formed the view that the common-ways had not been cleaned for several months. Upon this basis it is clearly unreasonable that the Respondents are charged for 12 monthly cleans. The tribunal accepts that there may have been cleaning during the early part of the service charge year and that there may have been some rubbish clearance from the communal areas. The tribunal also accepts that the new cleaning company will charge for the monthly cleaning, once it starts. The tribunal concluded that it is reasonable for the Respondents to pay half of the estimated cleaning charges, namely £699. It will still be open to the Respondents to challenge the actual cleaning charges, once the end of year accounts are produced.

Reserve Fund Contribution (2013/14)

65. The Applicants have included a reserve fund contribution of £50 per flat in the current service charge year.

66. The Applicants contend that a reserve fund contribution of £50 is reasonable. The Respondents say that this is unreasonable given that they have also been asked to contribute to the proposed external works. At the hearing Mr Berger suggested that there should be no need for further repairs to the Property in the foreseeable future that would justify a reserve fund, once the external works have been undertaken.

The tribunal's decision

67. The tribunal determines that the amount of the reserve fund contributions for 2013/14 shall be £50 per flat.

Reasons for the tribunal's decision

68. The residential leases specifically contemplate the provision of a reserve fund in that the definition of "*The Total Service Cost*" at clause (xii) of the first schedule includes "*..the amount of such reserves (if any) as may be reasonably required in respect of its liability for maintenance and repairs..*".

69. It is good management practice to operate a reserve fund, to cover major or unexpected expenditure. Mr Berger's suggestion that no further repairs will be required in the foreseeable future, following completion of the external works, is unrealistic given the nature of the Property. The reserve fund contributions of £50 per flat are entirely reasonable.

Refund of fee, section 20C and costs

70. At the end of the hearing, Ms Louis made an application for a refund of the application fee paid on the second claim (£440) and the hearing fee for both claims (£190)[1]. Mr Berger resisted this application, applied for an order under section 20C of the 1985 Act and also sought an order for costs against the Applicants[1].

71. Mr Berger submitted that the Applicants had acted unreasonably in bringing the proceedings without first trying to resolve the issues in correspondence. He also alleged that the Applicants' conduct of the proceedings had been unreasonable in that they should have conceded

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

that the commercial leaseholders were liable to contribute to the proposed, external works much earlier on. Mr Berger suggested that the parties could have agreed settlement terms without the need for proceedings had the Applicants initially claimed 75% (rather than 100%) of the cost of the works that benefitted all leaseholders. He produced an invoice from Feldgate Property Management, dated 06 January 2014, covering his work in connection with the tribunal proceedings. This was addressed to Mr Grunhut and was for a sum of £3,426.25 plus VAT.

72. In response, Ms Louis submitted the final hearing would have been necessary to determine the apportionment of the proposed works, even if the 75% concession had been made earlier on. The Respondents were arguing that their liability should be capped at 66.66%. Given that the anticipated cost of the work exceeds £100,000, the sum in dispute was substantial and it is unlikely that settlement terms could have been agreed. Ms Louis pointed out that Mr Meisels had specifically asked the County Court to transfer the proceedings to the tribunal, for a determination of the disputed service charges. She also suggested that the outcome of the proceedings would be a draw in the sense that both parties had made concessions during the course of the hearing, so that neither side would be completely successful.

73. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the Respondents to refund the tribunal fees paid by the Applicant. The tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicants may not pass any of their costs incurred in connection with the proceedings before the tribunal through the service charge. The tribunal refuses the Respondents' application for an order for costs.

74. At the start of the hearing there were a number of issues in dispute. By the end of the hearing, many of these issues had been agreed. Both parties made concessions during the course of the hearing that could and should have been made much earlier on. Had these concessions been made at the outset then this would have reduced the scope of the proceedings. However it is unlikely that the proceedings could have been avoided altogether.

75. The tribunal accepts Ms Louis' submission that the final hearing would have been necessary in any event, given the disputed apportionment for the major works. Further it is reasonable to classify the outcome of the case as a draw, given that both parties have succeeded on some items and failed on others. Upon this basis it is reasonable that each party should bear their own costs (including tribunal fees) and that the Applicants should not be allowed to recover their costs from the Respondents, via the service charge account. The

tribunal rejects the suggestion that the Applicants' have acted unreasonably in bringing and conducting the proceedings.

The next steps

76. The tribunal has no jurisdiction over County Court costs and fees, ground rent, interest. The proceedings against Mr Meisels should now be returned to the Clerkenwell and Shoreditch County Court for a determination of these issues. The tribunal has not made any determination in relation to the actual service charge expenditure claimed in the accounts for the year ended 31 March 13. It is open to the parties to seek a determination of this expenditure via a separate application to the tribunal under section 27A of the 1985 Act, if it cannot be agreed. Hopefully this will not prove necessary. It also remains open to the Respondents to pursue their complaints about disrepair at the Property and it is recommended that they seek independent legal advice upon this issue.

Name: Jeremy Donegan **Date:** 25 February 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

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

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

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

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

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

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

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
    (a) specified in his lease, nor
    (b) calculated in accordance with a formula specified in his lease.

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
    (a) the person by whom it is payable,
    (b) the person to whom it is payable,
    (c) the amount which is payable,
    (d) the date at or by which it is payable, and
    (e) the manner in which it is payable.

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

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

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or
  (b) on particular evidence,
  of any question which may be the subject matter of an application under sub-paragraph (1).