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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/45UB/LIS/2014/0049
Property	:	First and Second Floor Maisonette 37 Buckingham Road, Shoreham by Sea, BN43 5UA
Applicant	:	Ms L Whitnall
Representative	:	In Person
Respondent	:	Mr J Williams & Mr P Meredith
Representative	:	Tom Restall, counsel, instructed by Dean Wilson LLP, solicitors
Type of Application	:	Liability to pay service charges section 27 Landlord and Tenant Act 1985 ("1985 Act"). Breach of Covenant section 168 of Commonhold and Leasehold Reform Act ("2002 Act").
Tribunal Members	:	Judge Tildesley OBE Mrs HC Bowers MRICS
Date and venue of Hearing	:	12 August 2015, at Citygate House, 185 Dyke Road, Hove BN3 1TL 17 September 2015 reconvened in the absence of parties
Date of Decision	:	30 November 2015

DECISION

Summary of the Decisions of the Tribunal

(1) The Tribunal is of the view that its jurisdiction in respect of the service charge dispute between the parties is confined to the one defined by Ms Whitnall's application, the case management hearing and the Respondents' disclosure on 20 February 2015.

(2) The Tribunal determines the actual service charge for the year ending 24 December 2013 at £2,571.58. The lessees of the First and Second Floor Maisonettes were liable to pay 50 per cent which was £1,285.79.

(3) The Tribunal determines that the actual service charge for the year ending 24 December 2014 at £2,951.40. The expenditure of £3,201.40 was reduced by £190 (Company Expenses) and £60 (reduction re David Smith's report). The liability of Ms Whitnall and Ms Bean comprised 50 per cent of £2,951.40 which was £1,475.70. The accounts included no item of expenditure on reserves which means that Ms Whitnall and Ms Bean had no liability to pay any contribution to reserves demanded in the year ending 24 December 2014.

(4) The Tribunal determines that the budget for year ended 24 December 2015 of £2,996.00 for service charges and a contribution of £20,000 towards reserves were reasonable. The liability of Ms Whitnall and Ms Bean comprised 50 per cent of £2,996 and of £20,000 which were £1,498 and £10,000 respectively.

(5) The Tribunal determines that the total estimated cost including fees and VAT of the proposed works was £155,452.48 which was allocated between service charge and Respondents' costs (as leaseholders of the Basement Flat) as £72,795.60 and £82,656.88 respectively. The Tribunal, therefore, decides that the liability of Ms Whitnall and Ms Bean for the estimated costs would be 50 per cent of £72,795.60 which was £36,397.80.

(6) The Tribunal determines that no breach of covenant has occurred. The Application for breach of covenant was misconceived. The Respondents' statement of case went beyond the terms upon which the Application was accepted by the Tribunal.

(7) The Tribunal determines that the administration charges imposed on 12 and 17 February 2014 in separate amounts of £30 were unreasonable.

(8) The Tribunal's preliminary view is that the parties should bear their own costs. Further it would be just and equitable for an order to be made under section 20C of the 1985 Act preventing the Respondents from passing their costs through the service charge. Finally the

Tribunal considers the Respondents have no authority to recover their costs through clauses 2.4.1 and 2.4.3 of the lease because they were not successful with their application for breach of covenant. The parties are given 14 days to make representations in writing on the Tribunal's preliminary views on costs. The parties must serve a copy of their representations on each other. After receipt of the representations the Tribunal will either confirm its preliminary view or issue directions to progress the question of costs.

The Application

1. This case relates to applications made under sections 27A and 20C of the Landlord and Tenant Act 1985 (the 1985 Act). The Tribunal received the applications on 29 September 2014. There was a subsequent application made by the Respondents, dated 30 April 2015 under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act).

2. The Applicant, Ms Whitnall and Miss Bean, are the lessees of the First and Second floor maisonette located in 37 Buckingham Road, Shoreham by Sea, BN43 5UA (the subject property). The Respondents in this matter hold the freehold interest in the property. They also hold the lease for the Basement flat situated at the property. The property is divided into three flats, the Basement Flat, the Ground Floor Flat and the First and Second Floor Maisonette.

3. The issues to be determined are as follows:

   - The actual service charge for the years ending 31 December 2013 and 2014.
   - The estimated service charge for the year ending 31 December 2015.
   - The contributions to the reserve fund from December 2013 to December 2015.
   - Whether the works were within the landlord's obligations under the lease / whether the cost of works were payable by the leaseholder under the lease.
   - Whether the costs of the works were reasonable, in particular in relation to the nature of the works, the contract price and the supervision and management fee.
   - Whether the Applicant had breached the covenants in the lease in relation to the payment of service charges.
   - Whether the administration charges in connection with the issue of late payment letters were payable.
   - Whether orders for costs should be made including an order under Section 20C of the 1985 Act.

4. The chronology of the proceedings is set out in Appendix one.

5. The relevant legal provisions are set out in Appendix two.

The Hearing

6. The hearing was held on Wednesday 12 August 2015 at Citygate House, 185 Dyke Road, Hove BN3 1TL. The hearing was attended by the Applicant, Miss Whitnall, who was accompanied and supported by Mr

Wright. Mr Restall attended as counsel for the Respondents, together with Mr Williams, Mr Meredith and Mr Dobbs of Messrs Parsons Son & Basley. Miss Khan, paralegal of Dean Wilson LLP solicitors, acted as note-taker. Mrs Backhouse of Messrs Parsons Son & Basley attended as an observer.

7. A bundle of documents was admitted in evidence. References to the bundle are in [ ].

8. Mr Dobbs and Mr Williams provided signed witness statements [245-253] & [255-257] upon which they were cross-examined by Miss Whitnall.

9. Ms Whitnall also supplied a signed witness statement [368-374] together with legal submissions regarding reasonableness of the service charges [145-147]. Mr Restall cross-examined Ms Whitnall on her evidence.

10. The bundle included the report of Mr P A Hall BSc FRICS single joint expert witness dated 8 May 2015 [31-72].

11. The instructions of Mr Hall were set out in an e-mail dated 31 March 2015 from Parsons Son Basley:

> " In response to a direction of the First-tier Tribunal (Property Chamber) dated 9 February 2015 whereby the Respondents were granted dispensation from the consultation requirements under section 20ZA of the 1985 Act in respect of proposed works to the basement and the external structure of the property at 37 Buckingham Road. In addition the FTT directed the Respondent to pay the costs of an independent surveyor jointly instructed by the parties with a view to producing a report evaluating and forming a view on the viability of the Respondents' proposals for major works, the apportionment of the proposed charges between freeholder's own cost and service charge, and the reasonableness of the proposed costs. The report was to be made available to both parties".

12. At the Respondents' request Mr Hall carried out another inspection of the property on 27 May 2015, which did not change the conclusions of his report. Mr Hall communicated the substance of his inspection in an email dated 29 May 2015 to Mr Dobbs. Mr Hall said in the email:

> "Whilst writing however I would like to express my extreme concerns which related specifically to my conversation on site at the time of my re-inspection with your client Mr Meredith in connection with his extremely aggressive insulting and threatening behaviour toward myself in connection with his

obvious disagreement to the opinions I expressed in my report and his comment that unless I changed the contents of my report that he would not under any circumstances pay me and if necessary see me in court".

13. At the case management hearing on 6 July 2015 the Respondents applied for permission to call their own expert because they disagreed with parts of Mr Hall's report. The Respondents also pointed out that they would not be able to cross-examine Mr Hall on his report because he would not attend the Tribunal.

14. The Tribunal on 6 July 2015 did not give the Respondents permission to call an expert witness because:

    (a) The Respondents did not challenge Mr Hall's expertise and his understanding of his duty as an expert witness.

    (b) The Tribunal adopted Mr Williams' suggestion (a Respondent) of directing the appointment of an independent surveyor jointly instructed by the parties.

    (c) The Tribunal held a legitimate expectation of both parties, particularly the Respondents that they would accept the findings of an independent expert jointly instructed.

    (d) Expert shopping was undesirable and, wherever possible, the Tribunal should use its powers to prevent it.

    (e) Mr Hall's unwillingness to attend the Tribunal would appear to be due solely to Mr Meredith's conduct, (a Respondent), at the site re-inspection on 27 May 2015.

    (f) The Respondents can apply to the Tribunal for a summons requiring Mr Hall's attendance at the hearing. The costs of Mr Hall's attendance including fees would be payable by the Respondents.

15. At the case management hearing the Tribunal admitted in evidence Mr Hall's reports at [31–72] and [183-184]. The Tribunal indicated Mr Hall's opinion on the construction of the terms of the lease was not conclusive. This was a legal issue upon which the parties were entitled to make their own submissions.

16. The Applicant accepted the contents of Mr Hall's reports.

17. The Respondents did not require Mr Hall to give oral evidence at the hearing on 12 August 2015.

18. The Respondents were unable to complete their final submissions at the hearing on 12 August 2015 despite the Tribunal sitting until 1745 hours. The Tribunal, therefore, decided to give the parties an opportunity to send submissions in writing dealing with specific issues. The Tribunal made it clear that the submissions were to be restricted to issues of law and procedure and evaluation of the evidence before the Tribunal.

19. The Tribunal adjourned the hearing part-heard, and indicated that it would reconvene in the absence of the parties, after receipt of further submissions.

20. The Tribunal directed Respondents' counsel to make submissions on the following matters by 9 September 2015:

- At the hearing counsel argued the Applicant had not raised issues in the Scott schedule and her statement of case regarding service charge demands including construction of the lease. The Tribunal observed the Applicant's statement of case was in response to the Respondent's disclosure made in accordance with the direction dated 23 February 2015. The Respondent subsequently issued a cross application for breach of covenant dated 30 April 2015. At the case management hearing on 6 July 2015 the Tribunal issued directions limiting the scope of the Applicant's case in respect of the reasonableness of the service charges. The Tribunal, however, considers the question of the validity of demands, the dates of those demands, and the construction of the various clauses in the lease dealing with demands and reserve funds are part of the Respondent's case to establish whether a breach of covenant has occurred. Does counsel agree, and if not please explain?

- The scope of the Tribunal's jurisdiction on breach of covenant under section 168(4) of the 2002 Act making reference to the decisions of the Lands Tribunal and Upper Tribunal in *Glass* (LRX 153/2007), *Eileen Langley-Essen* (LRX/12/2007) and *Al Harti* (LRX 148/2012), and the inter-relationship of section 168(4) with section 169 (7) of 2002 Act. Counsel is at liberty to refer to additional authorities.

- Counsel is invited to put in writing and if need be build upon his oral submissions on the various clauses in the lease dealing with demands for service charges and reserves including his representations on why the original demands for 2014 were valid despite the Respondent issuing new demands.

- Any further submissions regarding the nature of the major works.

- Counsel is invited to put in writing his proposals in respect of the various applications for costs. The Tribunal understands that

counsel has in his possession a schedule of the Respondents' costs which are to be served on the Tribunal and the Applicant with these submissions.

21. The Tribunal gave permission to the Applicant to comment in writing by 9 September 2015 on the authorities cited in counsel's skeleton argument dated 11 August 2015 and provided at the hearing.

22. Both parties were allowed a right of reply to be received by the Tribunal on 16 September 2015. The Tribunal indicated that no departure from the directions would be permitted without its express approval.

23. The Tribunal refused the Respondents' request for an extension of time to the directions, pointing out that the date of 9 September 2015 had been agreed with counsel at the hearing. The Applicant asked for an extension of time in respect of her right of reply, which was also refused by the Tribunal.

24. The Tribunal reconvened in the absence of the parties on 17 September 2015.

Inspection

25. Judge Tildesley and Mrs Bowers had previously inspected the property on separate occasions in connection with other applications.

26. The Tribunal had not intended to carry out another inspection but changed its mind following the case management hearing on 6 July 2015. The Tribunal said that it would inspect the property prior to the hearing on 12 August 2015 to look at areas of the basement flat which had been uncovered by the Respondents following the last site visit by Mr Hall, the jointly instructed surveyor. The Tribunal stated that it would record what it saw but would not form an expert opinion on its observations.

27. The property is a semi-detached house, dating from the nineteenth century and has at some stage been converted into three flats. The property is of rendered brick construction with a pitched, tiled roof over the main part of the building. The property has accommodation on a semi basement floor, raised ground, first and second floors. There is a single storey projection to the side, again of rendered construction and a shallow-pitched, tiled roof.

28. The Tribunal made a brief inspection of the front entrance doorway providing access to the Ground Floor and the First and Second Floor Flats. It was noted that there was some foam infilling to the ceiling area. Signage and a disabled Chubb lock were also observed.

29. Next the Tribunal made an internal inspection of the Basement Flat. The Flat is approached from a small flight of external steps into a rear walkway, bounded by a retaining wall. The Flat originally comprised a kitchen, living room, a double bedroom, a bathroom and a storage area beneath an external stairway to the raised ground floor entrance area. It had been emptied and many of the services, internal surfaces and floor coverings had been removed.

30. In the rear room there were areas where the plaster covering had been hacked off and it was possible to see black mastic covering that appeared to be an applied damp proof membrane. Also in the former kitchen there were signs of an applied covering to the walls beneath the plaster covering which appeared to be more powdery than the black mastic covering in the rear room.

31. There were, however, other areas of wall including an external wall at the rear where there was no evidence of any applied membrane. Also in the front room around the bay window there was no evidence of a membrane covering. Finally the coating material which was found on the concrete floors was consistent with Mr Hall's description of bitumen adhesive for thermoplastic floor tiles.

32. Externally it was noted that there was scaffolding to the exterior of the building. Around the access wells to the Basement Flat it was noted that there was temporary scaffolding in place to provide some protection against falls into the access wells. It was noted that some works had already been carried out and these works included concrete repairs to the retaining wall of the rear access area. It was not possible to have a clear view of the rear of the main roof and the dormer window at the second floor level.

The Lease

33. The Applicant and Miss Bean hold the leasehold interest of the First and Second Floor Maisonette under a lease dated 21 June 2002. The lease is for a term of 125 years from 25 March 2002. The lease was drafted by Dean Wilson Laing solicitors.

34. The original parties to the lease were Ian John Mackenzie as the Lessor and Claire Louise Hatcher as the Lessee. The Land Registry copy indicates that Ms Whitnall and Ms Bean's interest was registered on 22 May 2013.

35. In the definitions section of the lease the freehold property at 37 Buckingham Road, Shoreham by Sea is called "the Block" and reference is made to a Building Plan with the Block delineated by a blue line.

36. "The Common Parts" are defined as "*all the main entrances stairways passages entrances access roads paths electronic door answering system or any replacement (if any) and other areas provided by the Lessor from time to time for the common use of the residents in the Building AND not subject to any Lease or tenancy to which the Lessor is entitled to the reversion*". The "Flat" is described as the first and second floor flat situated in the Block and identified as being edged red on the Plan.

37. Clause 2.1 of the lease requires the lessee to pay the ground rent in the manner provided without any deductions. The ground rent is £150 per annum which shall double on each 25th anniversary of the term[1]. Clause 1 states the rent shall be paid by equal half yearly instalments on 24 June and 25 December[2].

38. Clauses 2.4.1 and 2.4.3 require the lessee to pay all expenses including solicitors costs and surveyors fees incurred by the lessor either for the purpose of service of a notice under section 146 of the Law of Property Act 1925 or in connection with the recovery of any monies due from the lessee to the lessor.

39. Clause 3 of the lease sets out the lessee's covenants and in particular clause 3.1.1 which makes the lessee responsible for the repair, maintenance and renewal of the interior of the Flat,

40. Clause 3.2 sets out the arrangements for the payment of the service charge. Under 3.2 the lessee is required to pay 50 per cent of all monies expended by the Lessor in complying with its covenants in relation to the Block as set forth in Clauses 5.2 and 5.3 to 5.9[3].

41. Clause 3.2.1 requires the lessee to pay the service charge in advance:

> "Pay to the lessor or its agents for the time being on 24 June and 25 December in advance in every year £500 or such greater sym as the Lessor or its Agents shall in their absolute discretion deem appropriate (hereinafter called the Estimated Sums). The Estimated Sums shall be two half yearly payments on account of the Lessee's liability for the

[1] See D6 of the Definitions Section of the lease.
[2] See D10 of the Definitions Section.
[3] See D7 of the Definitions Section.

Maintenance year (25 December to 24 December) due on 24 June and 25 December ....."[4].

42. Under clause 3.2.2 the lessee shall pay or be entitled to receive from the lessor the balance by which the actual amount of the lessee's liability for the previous year falls short of or exceeds the estimated sums paid by the lessee.

43. Clause 3.2.3 enables the lessor to demand further sums if the estimated sums are not sufficient to cover the expenditure:

> "Pay to the lessor or its agents within 21 days after the same shall have been demanded such further sums on account of the Lessees Proportion as the Lessor or its agents may reasonably demand at any time to meet expenditure incurred or to be incurred by the Lessor in carrying out its covenants in the event that sums demanded and paid under 3.2.1 and 3.2.2 above have not provided sufficient funds to cover such expenditure".

44. Clause 3.2.4 states that any sums which are not paid by the lessee within 21 days after becoming demanded shall forthwith be recoverable by action and shall bear interest from the due date.

45. Clause 5 sets out the Lessor's covenants and in particular clause 5.4.1 states that the Lessor covenants to

> "Repair renew and replace as necessary and keep in repair throughout the term hereby created all parts of the Block which are not part of the interiors of the Flats including but without prejudice to the generality of the foregoing the roofs foundations external walls Common Parts and floor structures and ceiling timbers gutters rainwater and soil pipes drains main water tank gas and water pipes electric cable and conduits serving more than one Flat in the Block and all other parts of the Block not included within the foregoing other than those parts included within the Flat or any Flat and including the exterior of all the moveable and opening parts of the windows and the doors in the exterior walls of the Flats."

46. The lessor's covenant to repair operates independently of and is not dependent upon the lessee meeting her obligation to pay a contribution of the charges incurred by the lessor in repairing the property.

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[4] The Tribunal has inserted the payment dates as defined in D10.

47. Clause 5.9.1 headed Statutory Requirements states:

> "Comply at all times with any requirements or orders now or hereafter made by any local or other authority in relation to the Block or any part thereof pursuant to any statutory power or authority except in so far as the obligation of complying with the same falls on the lessee under the Lessee's covenants herein contained in particular but without prejudice to generality of the foregoing to comply with any statutory notice reasonably delivered by any local authority or statutory body whether or not compliance with such a notice would constitute an improvement to the Block or Common Parts and all costs associated with such compliance shall be a recoverable expenses for the purpose of Clause 5.6."

48. Clause 5.6.1 requires the lessor to keep proper books of account of all costs, charges and expenses incurred in carrying out its obligations under the lease together with the details of all contributions made by the lessee to those costs.

49. Clauses 5.6.2, 5.6.2.1 and 5.6.2.2 deal with the lessor's obligations to deliver a copy of the service charge accounts to the lessee as soon as practicable after the 24 December. The accounts are to contain a fair summary of the costs incurred by the lessor during the year immediately prior the said 24 December including notice of the balancing payment or credit due from the lessee. The accounts are to be certified by a qualified accountant.

50. Clause 5.6.3 set out the requirements for a reserve fund:

> "The Lessor shall carry forward any excess sums paid or due to a reserve fund or provide a reserve fund for subsequent years for expending such sums as it considers reasonable for depreciation or for future expenses or liabilities whether certain or contingent as the Lessee shall reasonably expect to incur for the costs of complying with clauses 5.2 and 5.4 to 5.9 at any time during the Term. The reserve fund shall be an item of expenditure for the purpose of clause 5.6.2".

51. Of particular relevance in this case are the terms of the lease of the Basement Flat. The lease is dated 4th April 2005 and was originally between Ian John Mackenzie as Lessor and HR Investments (South East) as the Lessee. The "Flat" is described as the Lower Ground Floor Flat situated in the Block and identified as being edged red on the Plan. Further reference to the extent of the Basement Flat is in the Fourth Schedule. The Fourth Schedule states:

"The Flat is situated on the lower ground floor of the Block. The Interior of the Flat consists of (a) the internal partition walls including any doors therein (b) the window frames glass and the doors in the perimeter walls of the Flat (including the entrance door and fixed fames) and all locks fastenings and hinges other than those moveable and opening parts referred to in Clause 5.4.1(c) the ceiling but nor the concrete or beams to which they are attached (d) all the floorboards including the timbers to which they are attached (but not structural timbers)(e) the interior faces of the external walls (f) all cisterns tanks sewers drains sanitary and water apparatus pipes cables and wires belonging to and used exclusively by the occupants of the Flat (g) every internal wall separating the Flat from an adjoining Flat or other premises (landing/common parts) shall be a party wall.".

Consideration on Service Charge Dispute

52. The Tribunal starts its consideration with the actual service charges for years ending 2013 and 2014, and the estimated service charge for the year ending 2015.

53. The parties' respective cases are set out in the "Scott" schedule at [129-144].

54. The Applicant's comments in the "Scott" schedule were based on the Respondents' disclosure as at 20 February 2015 [617].

The Year Ended 24 December 2013

55. The statement of accounts [523] showed income (service charges receivable from lessees) at £3,770 and expenditure at £2,571.58 which produced a surplus of £1,198.42.

56. Ms Whitnall disputed one item in the 2013 accounts which was the sum of £95 for repairs and maintenance because there was no documentary evidence substantiating the expenditure.

57. Mr Dobbs subsequently found the invoice dated 8 March 2013 which was admitted into evidence with leave of the Tribunal [470].

58. The invoice revealed that the expenditure was incurred on the affixing of a no smoking sign, insertion of expandable foam to pipe recess and the disablement of the Chub lock to the front door. The works were carried out in the common parts, and were pointed out to the Tribunal during its inspection.

59. The Tribunal is satisfied that the costs of £95 were reasonably incurred on repairs and maintenance.

The Year Ended 24 December 2014

60. The statement of accounts [591] showed income (service charges receivable from lessees) at £6,520.00 and expenditure at £3,01.40 which produced a surplus of £3,318.60. Ms Whitnall's comments in the "Scott" schedule were based on this set of accounts which were subsequently certified by Friend James Limited, Chartered Accountants, on 27 February 2015.

61. The Respondents subsequently produced another set of certified accounts for the year ended 24 December 2014 dated 21 May 2015 [579]. This included the sum of £23,000.00 as a transfer to reserves.

62. Ms Whitnall originally disputed the sum of £817.97 for repairs and maintenance, £190 company expenses, and £300 for the insurance revaluation fee [130-131] as recorded in the certified accounts dated 27 February 2015.

63. At the hearing Ms Whitnall indicated that she was not objecting to the expenditure on the erection of the handrail (£192), on the re-routing of the rainwater pipes (£233.57), and the repairs to the rear steps (£212.40). Equally the Respondents stated that it was not seeking the recovery of £190 (company expenses). This represented the fee for the application for dispensation from consultation which the Tribunal had said was not to be recovered from Ms Whitnall and Ms Finzel (the lessee of the ground floor flat).

64. Following the parties' concessions the two remaining issues in dispute were the £180 fee payable to Mr David Smith, Chartered Building Surveyor, and the £300 for the insurance revaluation.

65. Mr Smith prepared a brief report on the foundations to the building, internal concrete floors to the basement Flat and proposed alterations to the lower ground front bay window. The report was dated 21 July 2014 and at [484-485].

66. Ms Whitnall objected to the fee on the ground that the matters reported on related to the Basement Flat and did not fall within the lessor's repairing covenant. The Respondents acknowledged that Ms Whitnall's objection had some merit in relation to the lower ground front bay

window, and offered to reduce the costs recoverable through the service charge to £120.

67. The Tribunal decided that part of Mr Smith's report related to works that fell within the lessor's repairing covenant. The Tribunal is satisfied that a charge of £120 is reasonable for the services of Mr Smith which directly related to the matters covered by the lessor's repairing covenant.

68. Ms Whitnall argued that the fee for the insurance revaluation was unnecessary because the material state of the building had remained unchanged.

69. Parsons Son & Basley had carried out the inspection and provided a valuation of the cost of building reinstatement. Their fee was evidenced by an invoice [629].

70. The Respondents contended they had purchased the property at auction with no information about rebuild cost. The Respondents pointed out that insurance companies normally required the value of a building to be re-assessed every three years by a RICS surveyor. The Respondents maintained they were acting reasonably in the circumstances in checking whether the property was under-insured.

71. The Tribunal agrees with the Respondents about the necessity for a valuation of the property. Ms Whitnall has produced no evidence to suggest that the fee of £300 was excessive. In those circumstances the Tribunal decides that costs of £300 for an insurance revaluation had been reasonably incurred.

Estimated Service Charge for year to 24 December 2015.

72. The budget for year ended 24 December 2015 [576] was £2,996 for service charges comprising £846 building insurance, £1,000 maintenance and repairs, £900 management fees, and £250 accountancy fees. The budget also included a contribution of £20,000 towards reserves.

73. Ms Whitnall made no specific challenge to the £2,996 for service charges. Her objections related to the proposed cost of the major works and the fees to the surveyors supervising the works. Ms Whitnall's objections will be considered in the next section relating to reserve funds.

The Contributions to the Reserve fund from December 2013 to December 2015

74. The Respondents demanded the following contributions from the Applicant to the reserve fund:

(a) £750 on 14 November 2013 due date 25 December 2013 [611]
(b) £750 on 15 May 2014 due date 24 June 2014 [613]
(c) £10,000 on 15 May 2014 due date 24 June 2014 [613]
(d) £5,000 on 3 December 2014 due date 3 January 2015 [614]
(e) £24,466 on 25 February 2015 due date 18 March 2015 [615]

75. In the "Scott Schedule" [132] Ms Whitnall challenged the demands for the 2014 service charge, arguing that she had been billed for the total charges for the property rather than 50 per cent of those charges in accordance with the lease.

76. The Respondents in its statement of case at paragraphs 9 and 10 [118] said as follows:

> "Following recent advice from its solicitors the Landlords accept half yearly reserve fund contributions (£750 14 November 2013, £750 and £10,000, 15 May 2014) cannot be demanded in the way that they have been. Having said that the Landlord maintains the actual funds are payable".
>
> "The Tenant's lease clearly provides at clause 5.6.3 that a reserve fund shall be an item of expenditure for the purpose of clause 5.6.2, and as such any reserve fund contribution should have been included as an expenditure item in the 2014 accounts. The Landlords have therefore amended the 2014 accounts and those amended accounts are included within the bundle. A balancing demand has been prepared ..... The actual sum due from the Tenants is however unaffected. The Landlords have amended the accounts and produced a balancing demand simply to ensure that the accounts and demands reflect the way in which a reserve fund should be dealt with according to the Tenant's lease".

77. On 21 May 2015 the Respondents issued a new demand for the sum of £39,401.50 which comprised a balance brought forward of £41,695.00, and a balancing charge of £9,146.50 against which credit was given for the reserve fund contributions of (£750 [14 November 2013 demand] & £750 and £10,000, [15 May 2014 demand]).

The Major Works

78. The Respondents argued that the demands for contributions to the reserve fund were necessary because they expected to incur the costs of major works on the property following the service of the improvement notices in respect of the Basement Flat on 12 May 2014.

79. On 28 May 2014 the Respondents appealed the improvement notices. On 11 November 2014 the Tribunal varied the notices by extending the date for completion of the works until 30 April 2015.

80. On 17 November 2014 BLB surveyors provided the Respondents with a specification for the works to the Basement Flat and to the exterior of the property which was used for the tendering process. BLB surveyors supplied a report on the tenders which gave an apportionment of the costs of the proposed works between those costs that could be recovered through the service charge and those costs which were the liability of the long leaseholder of the Basement Flat.

81. BLB surveyors said that the total costs including fees and VAT for the works was £160,776.90 (Total costs) which BLB apportioned: £92,681.76 (Service charge costs) and £68,095.14 (Long leaseholder costs) [57].

82. Ms Whitnall said that BLB surveyors had made mistakes with the apportionment of the costs. According to Ms Whitnall, in some instances the costs should have been allocated to the long leaseholders rather than to the service charge. Further Ms Whitnall said that some of the works amounted to improvements which were not caught by the lessors' repairing covenant at clause 5.4.1 , and, therefore, the costs for improvements could not be recovered through the service charge.

83. At the February 2015 hearing the Tribunal directed the appointment of a single joint expert witness with the expectation that the parties would accept the recommendations of the expert witness. The Tribunal also noted that no progress had been made in connection with the schedule of works to the improvement notices, and that the Basement Flat was still occupied by the tenant.

84. Mr Hall was appointed as the single joint expert. He inspected the property on 23 April 2015 and produced his report on 8 May 2015 [31-57]. On 27 May 2015 Mr Hall re-inspected the property at the Respondents' request, following which he confirmed the contents of his report.

85. Mr Hall reported that the works specified by BLB surveyors included cyclical external repair and redecoration of the property, and specific works of internal repair, refurbishment and upgrading to the Basement Flat. Mr Hall considered that the specific works of cyclical external repair and redecoration were overdue but that the delay in implementing the works by the Respondents was not unreasonable.

86. Mr Hall also gave his opinion on reasonableness of the proposed costs for the works. Mr Hall confirmed that the lowest tendered costs from Luke and Luke Construction Limited seemed reasonable in the circumstances. Mr Hall, however, had reservations about the preliminaries.

87. Mr Hall gave his opinion on the apportionment of the total costs for the proposed works which he said was £63,535.59 (Service charge costs) as against £88,462.41 (Long leaseholder costs) [57].

88. Mr Hall recorded his findings on the proposed works and costs in a "Scott" schedule attached to his report. Mr Hall on the whole agreed with the recommendations of BLB surveyors on the apportionment of costs for the proposed works. Mr Hall disagreed with the apportionment of BLB surveyors in ten specific instances, three of which were against the Respondents' interests whilst the remaining seven were against Ms Whitnall's interests.

89. Mr Hall also disagreed with BLB surveyors on the appropriate level of fees for the proposed works. Mr Hall considered a rate of 10 per cent was appropriate as against the rate of 12.5 per cent charged by BLB surveyors.

90. Ms Whitnall accepted the findings of Mr Hall's report.

91. The Respondents accepted Mr Hall's report except his findings on tanking (damp proofing) to all external walls, floors and internal partitions (2/3/B [42]) and on the appropriate rate for professional fees in connection with the works. The estimated costs for the damp proofing works were significant (£21,375.00).

Damp Proofing to the Basement Flat

92. The Tribunal starts with the damp proofing works which took the form of tanking[5]. Mr Hall's initial view was that the main external, party and load bearing masonry constructed walls would not have incorporated any form of damp proofing measures. It would appear that Mr Hall arrived at his view because of the significant problems with damp ingress affecting the Basement Flat. Mr Hall considered the tanking of the Basement Flat would constitute an improvement because the original structure for the property did not have an integral damp proof membrane. Mr Hall concluded that tanking was outside the lessor's repairing covenant, and, therefore, the funding of the tanking works was the responsibility of the long leaseholders for the Basement Flat.

93. At the Respondents' request, Mr Hall re-inspected the property on 27 May 2015 for the purpose of examining walls which had been exposed. Mr Hall noted the exposed wall in the bedroom had a coating of Synthaproof or similar cold applied bitumen coating. According to Mr Hall, the application of a bitumen coating was a common method used about 20 years ago to prevent inherent dampness in solid wall structures [183]. Mr Hall explained that the process involved hacking off the original plaster and affixing the bitumen cold to the surface of the wall structure, throwing sand at the tacky bitumen surface so as to

[5] Tanking is the design and application of a barrier to protect the property against water from the ground.

provide a mechanical key and then re-plastering the wall. Despite the existence of a cold bitumen coating, Mr Hall remained of the view that the tanking of the Basement Flat was an improvement. Mr Hall considered the bitumen coating did not constitute evidence of inherent damp proofing measures within the main wall.

94. Mr Hall recorded that the core sample of a specific area of the concrete floor consisted of sand cement screed over some form of clinker base which did not incorporate any damp-proofing membrane apart from a bitumen adhesive for the thermoplastic floor tiles [183].

95. The Tribunal turned down the Respondents' request to call another expert for the reasons set out in paragraph 14 above. The Tribunal advised the Respondents that it was open to them to require Mr Hall's attendance at the hearing for the purposes of cross-examination. The Respondents did not take up the Tribunal's suggestion.

96. At the case management hearing on 6 July 2015 the Tribunal admitted in evidence Mr Hall's report and e-mail of the re-inspection. The parties did not require the attendance of Mr Hall to give his evidence in person. In those circumstances the Tribunal adopted Mr Hall's evidence as correct in respect of the facts found. The Tribunal, however, accepted that the Respondents were entitled to make submissions challenging Mr Hall's construction of the lease.

97. The Tribunal is satisfied on the basis of Mr Hall's reports that

(a) There was evidence of black mastic covering on some of the walls to the Basement Flat, which would have operated as a damp proofing measure at sometime in the past.

(b) There was no evidence of the existence of a damp-proof membrane in the concrete floors. The Tribunal was satisfied that the coating on the surface of the concrete floors was the remains of the adhesive to fix the thermoplastic tiles[6].

98. Ms Whitnall challenged the Respondents' authority under the lease to recover through the service charge the costs of the proposed tanking to the Basement Flat. According to Mr Hall's report, the Respondents intended that tanking be applied to all external walls, floors and internal partitions in accordance with the report of Sovereign Chemicals dated 7 May 2014 [342-353]. The Tribunal notes that the specification from Sovereign included in the bundle was not accompanied with a quotation and had expired on 7 August 2014.

[6] The Respondents' written submissions dated 8 September 2015 said they had uncovered a further bitumen coating underneath the floor screed since the hearing on 12 August 2015. The Respondents attached colour photographs of their findings. The Respondents invited the Tribunal to take this evidence into account. The Tribunal made it clear when it issued directions that the submissions should not introduce new facts and new issues. The Tribunal, therefore, declined the Respondents' invitation.

99. Ms Whitnall said the installation of tanking in the Basement Flat was an improvement which was not part of the Respondents' repairing obligation under clause 5.4.1. Ms Whitnall pointed out that the obligation under 5.4.1 "to repair renew and replace as necessary" did not enable the Respondents to install a new form of damp proofing in the Flat.

100. Mr Restall disagreed. He argued the Respondents were replacing a pre-existing damp proof membrane with its modern equivalent. Thus the proposed works for tanking the Basement Flat did not amount to an improvement but to a repair within the lessor's repairing covenant in clause 5.4.1 of the lease.

101. Ms Whitnall's second argument was that the tanking formed part of the interior face of the exterior walls of the Basement Flat, which was within the lessee's repairing obligation under the leases (clause 3.1.1). According to Ms Whitnall, this meant that the Respondents in their capacity of long leaseholders of the Basement Flat would be responsible for the entirety of the costs of installing the tanking.

102. Mr Restall noted that the Respondents' repairing covenant in their capacity of lessor, in clause 5.4.1 extended to all parts of the block which were not part of the interiors of the Flats. The Fourth Schedule to the leases contained the definition for interiors of the Flats which included, amongst other matters, the internal partition walls, all floorboards but not structural timbers and the interior faces of the external walls.

103. Mr Restall considered the second argument turned upon the meaning of interior faces of external walls. Mr Restall submitted that "interior faces" connoted something superficial and decorative. Mr Restall argued that a damp proof coating applied beneath the plaster should be treated as structural rather than superficial or decorative. In this respect Mr Restall relied on the Court of Appeal decision in *Fincar SRL v 109/113 Mount Street Management Co Limited* [1998] EWCA Civ 1851 and the Leasehold Valuation Tribunal decision for 18 Chesham Road (LON/00ML/LSC/2007) which held that waterproof rendering to the inside surfaces of the brickwork was structural.

104. Mr Restall pointed out that the reference to floorboards in schedule 4 to the lease was not helpful in deciding whether the concrete floors were part of the interior of the Flat. Mr Restall expressed the view that the concrete floors were part of the structure of the building, and, therefore, within the lessor's repairing covenant.

105. Mr Sinnatt[7] contended that Mr Restall's argument was based on a false premise. According to Mr Sinnatt, the question is not whether the

[7] Simon Sinnatt of Counsel made the written submission on behalf of Ms Whitnall under Direct Public Access

plasterwork and the damp proof coating beneath were structural, but whether they were part of the surface of the wall.

106. The Tribunal is required to decide on two separate issues in relation to the tanking in order to determine whether the proposed costs can be recovered through the service charge:

(a) Is the damp proof membrane part of the interior of the Flat?
(b) Whether the installation of the tanking in Basement Flat is an improvement or a repair?

107. The Tribunal starts with question (a). Schedule 4 to the lease defines the interior of Flat as follows:

> "The Interior of the Flat consists of (a) the internal partition walls including any doors therein (b) the window frames glass and the doors in the perimeter walls of the Flat (including the entrance door and fixed frames) and all locks fastenings and hinges other than those moveable and opening parts referred to in Clause 5.4.1(c) the ceiling but nor the concrete or beams to which they are attached (d) all the floorboards including the timbers to which they are attached (but not structural timbers)(e) the interior faces of the external walls (f) all cisterns tanks sewers drains sanitary and water apparatus pipes cables and wires belonging to and used exclusively by the occupants of the Flat (g) every internal wall separating the Flat from an adjoining Flat or other premises (landing/common parts) shall be a party wall".

108. In respect of the wall the Tribunal understands that the damp proof membrane is applied to the inside of the external brick work. After application of the damp proof membrane the internal walls are then plastered. The walls would, therefore, consist of three layers: external brickwork, damp proof membrane, and plaster. The Tribunal construes interior faces as referring to the internal surfaces of the wall, which in the Tribunal's view extends only to the plasterwork and not to the damp proof membrane.

109. The definition in Schedule 4 in respect of the floors is not helpful because the Basement Flat has a solid concrete floor rather than a timber framed one. Clause 5.4.1, however, states that the lessor's repairing covenant applies to the floor structures. In those circumstances the Tribunal is satisfied that any damp proof membrane in the concrete floor would not be part of the interior of the Flat.

110. Question (b) is dependent on the facts. At paragraph 97 the Tribunal found the presence of an existing damp proof membrane in some parts of the external wall but not in the concrete floor. The Tribunal is satisfied that the Synthaproof coating seen by Mr Hall was evidence of a pre-

existing damp proof membrane which had been installed prior to the commencement of the relevant leases in 2002.

111. The Tribunal prefers Mr Restall's construction that where the tanking replaced an existing damp proof membrane it would fall within the lessor's repairing covenant. Conversely, it would follow that where there was no damp proof membrane, the tanking would constitute an improvement.

112. The estimated cost for tanking to all external walls, floors and internal partitions of Basement Flat was £21,375.00, which Mr Hall allocated as an expense of the long leaseholder rather than as a service charge cost. In this case the Tribunal finds that the tanking can be categorised as a repair where it replaced a pre-existing damp proof membrane and as an improvement where there was no membrane. Where this set of circumstances applies, the appropriate course of action is to allocate the costs for tanking between service charge and leaseholder to reflect the dual character of the tanking in the property. The Court of Appeal in *Fincar* appeared to endorse this approach.[8]

113. The Tribunal finds there was no evidence of a damp proof membrane in the concrete floors and in parts of the external walls, which suggested that a large proportion of the Basement Flat did not have an existing damp proof membrane. In those circumstances the Tribunal determines that 25 per cent of the estimated costs for tanking (£5,343.75) should be allocated as a service charge cost with 75 per cent as a long leaseholder cost (£16,031.25).

Improvement Notice

114. The Respondents argued in the alternative that they were entitled to recover the full costs of the tanking by virtue of clause 5.9.1 of the lease. Under this clause the costs of improvements are recoverable through the service charge where the improvements are required as a result of a requirement or order made by a local authority.

115. The Respondents said the majority of the major works including the tanking were the subject of the improvement notices served upon them by Adur and Worthing Council dated 12 May 2014. According to the Respondents, an improvement notice was exactly the sort of orders envisaged by clause 5.9.1 of the lease.

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[8] See page 7 of the decision supplied by Mr Restall, paragraph starting : As previously stated, after Judge Newmans decision

116. The Respondents pointed out that under the improvement notice they were required to arrange for the investigation of penetrating damp in the kitchen, living room, bedrooms, hallway and bathroom of the Basement Flat by a suitably qualified and experienced surveyor [379][9]. In addition the Respondents were required to provide a written report and arrange for such works of mitigation as may be recommended in the report to be agreed by the Local Authority prior to the commencement of said works.

117. In their statement of case dated 22 May 2015 the Respondents said that the report prepared by Sovereign dated 7 May 2014 [342][10] constituted the damp survey in accordance with the requirements of the improvement notice. The Respondents acknowledged that the Sovereign report pre-dated the improvement notice but the Respondents said they had commissioned the report because they were already aware of the issues that would be covered by the improvement notice.

118. At the hearing on 12 August 2015 the Tribunal admitted in evidence a chain of emails between Mr Dobbs and Mr Reynolds of the Local Authority starting 17 June 2015 to 16 July 2015. Under the e-mails Mr Dobbs had requested Mr Reynolds' permission to the proposed works as set out in the Sovereign report. On 16 July 2015 Mr Reynolds confirmed to Mr Dobbs that the works met the requirements of the improvement notice after having further consulted with Building Control colleagues.

119. Ms Whitnall in her legal submissions dated 17 June 2015 submitted that the Respondents had introduced for the first time in their statement of case the suggestion that if the major works amounted to improvements then the cost of such improvements could be charged to the service charge by virtue of clause 5.9.1 of the lease.

120. Ms Whitnall argued that clause 5.9.1 did not apply because the improvement notices had been addressed to Mr Meredith and Mr Williams as persons having control of the residential premises known as the Basement Flat, 37 Buckingham Road, Shoreham-by-Sea, West Sussex [378]. According to Ms Whitnall, the use of the expression "persons in control" suggested the notices were sent to Mr Meredith and Mr Williams in their capacities as long leaseholders of the Basement Flat not as freeholders of 37 Buckingham Road. Ms Whitnall, therefore, concluded that clause 5.9.1 would have no effect where the improvement notices had been served on Mr Meredith and Mr Williams in their capacities as long leaseholders of the Basement Flat.

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[9] See paragraph 1 of schedule 3 of the improvement notice.

[10] The terms of reference of the Sovereign Report were to assess the Basement Flat for evidence of dampness to the walls and recommend suitable remediation.

121. At the hearing on 12 August 2015 the Tribunal invited oral representations from Mr Restall on Ms Whitnall's submissions regarding the service of the improvement notice. Mr Restall did not address the substance of Ms Whitnall's submissions but simply referred the Tribunal back to the wording of clause 5.9.1 of the lease.

122. The Tribunal considers that, on the face of it, Ms Whitnall's submission has merit. The improvement notice concerned the residential premises at the Basement Flat not the whole property at 37 Buckingham Road. Mr Meredith and Mr Williams hold the long leasehold of Basement Flat which was let to a Mr Church under a secure tenancy. Section 263 of the Housing Act 2004 defines "person having control" as the person who receives the rack rent of the premises or who would receive it if the premises were let at a rack-rent.

123. The provisions dealing with service of improvement notices are found in paragraph 1-5, part 1 of schedule 1 of the Housing Act 2004. The provisions are complex and have been the subject of two recent decisions of the Upper Tribunal: *Hastings Borough Council and Braear Developments Limited* [2015] UKUT 0145 (LC) and *Mr David Wood and Kingston Upon Hull City Council* [2015] UKUT 0165 (LC)[11].

124. The Respondents have not provided the Tribunal with legal analysis countering Ms Whitnall's submission. Further the Tribunal on the Respondents' application removed the statement of Mr Reynolds of Adur and Worthing Council from the hearing bundle, which meant that it was not possible to ask questions of Mr Reynolds about the service of the improvement notices.

125. Mr Restall's failure to deal with the question regarding service of improvement notices was symptomatic of a wider concern with the manner in which the Respondents prepared and presented their case. The Respondents' proposition on clause 5.9.1 was a new issue which was not raised in the disclosure of their case on 20 February 2015 and in the supporting papers before the Tribunal dealing with the application to dispense with the consultation requirements. The Respondents did not seek the leave of the Tribunal to include the proposition on clause 5.9.1 to their statement of case.

[11] The decisions are cited to illustrate the complexity of the legal provisions dealing with service of improvement notices. The decisions are based upon facts which are materially different from this application.

126. The last minute character of the Respondents' preparation was highlighted by the e-mail exchange between Mr Dobbs and Mr Reynolds dated 17 June 2015 to 16 July 2015. The Tribunal does not understand why the Respondents waited until 17 June 2015 to seek the approval of the Council to the proposed works remedying the penetrating damp to the Basement Flat. The Sovereign Report had been available since May 2014. The improvement notices were issued on 12 May 2014. Also the Respondents did not have the evidence to substantiate its proposition on clause 5.9.1 until Mr Reynolds gave his approval on 16 July 2015. The irony is that if the Tribunal had kept to the original hearing date of 6 July 2015 the Respondents would not have had a case on clause 5.9.1.

127. The Tribunal also considers that the Respondents' late introduction of their reliance on clause 5.9.1 prejudiced Ms Whitnall's preparation of her case. The recent Upper Tribunal decision in *Miss C Waaler v The London Borough of Hounslow* [2015] UKUT 0017 (LC)[12] decided that different considerations applied to the assessment of the reasonableness of incurring costs of repairs from that assessment in respect of improvements. In respect of the latter the financial impact on leaseholders was a relevant consideration.

128. The Tribunal decides that it would be contrary to the overriding objective of dealing with cases fairly and justly to make a determination on the application of clause 5.9.1 to the circumstances of the case. The Respondents' preparation in support of their proposition on 5.9.1 was inadequate. Counsel did not deal with Ms Whitnall's submission on service of the improvement notices. It is not the Tribunal's job to make out the case for the Respondents. Equally the Respondents' late introduction of their reliance on clause 5.9.1 meant that the significance of Ms Whitnall's representations on the financial impact of the proposals was overlooked.

129. The effect of this decision is that the Tribunal would not be examining the relevance of clause 5.9.1 when deciding the reasonableness of the estimated service charge for the year ending 31 December 2015. The Respondents are at liberty to argue for clause 5.9.1 if the actual service charge for the year ended 31 December 2015 is challenged.

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[12] Permission to appeal to the Court of Appeal has been granted in respect of this decision.

Professional Fees

130. The Respondents engaged BLB Chartered Surveyors (BLB) to oversee the major works project. The Respondents agreed to pay BLB a fee of 12.5 per cent of the net contract value of the works.

131. On 26 November 2014 and 16 December 2014 BLB submitted two invoices [641 and 642] for interim payment in respect of the works done prior to contract which included the preparation of the tender documentation and evaluation of the tenders. The interim payment comprised 7.5 per cent of the net contract value, which the Respondents paid on 22 January 2015 and 5 February 2015.

132. BLB would invoice the remaining 5 per cent at the conclusion of the works. The 5 per cent represented the project management fee and BLB's responsibility for ensuring compliance with the Construction (Design and Management) Regulations 2015 (CDM) which are concerned with the management of health risks connected with the construction of buildings.

133. Mr Dobbs gave evidence that Parsons Son and Basley had obtained quotations from other surveyors for overseeing the major works contract on the property. Mr Dobbs said that one local firm of surveyors had also quoted a fixed fee of 12.5 per cent of the net contract price but had required an additional fee for overseeing compliance with the CDM Regulations. Mr Dobbs said another local firm had just given a price for project management which was at 6 per cent (one per cent higher than the fee charged by BLB surveyors) plus a separate fee for the CDM Regulations.

134. Mr Dobbs stated that BLB's practice of charging a fixed percentage of the net contract price of the major works was the industry norm for surveyors overseeing major works.

135. Ms Whitnall objected to the charges on two grounds. First, she considered a rate of 12.5 per cent excessive. Ms Whitnall referred to Mr Hall's report who recommended a rate of no more than 10 per cent. Second, Ms Whitnall requested a breakdown of the charge against the services provided.

136. The Tribunal accepts Mr Dobbs' evidence that BLB surveyors' charging practice followed the industry norm for surveyors overseeing major works. Further the Tribunal is satisfied on the evidence provided that the rate of 12.5 per cent charged by BLB surveyors was competitive,

particularly having regard to the range of tasks involved which included specification of the works, evaluation of tenders, project management and CDM regulations. It appeared that Mr Hall's recommendation of 10 per cent was restricted to project management.

137. The Tribunal is, therefore, satisfied that the charges of BLB fixed at 12.5 per cent of the net contract value were reasonable.

Summary of the Tribunal's Decisions on the Service Charge Disputes

138. This was an application brought by Ms Whitnall on 29 September 2014. Ms Whitnall listed the services charges in dispute as follows:

- 25 December 2013 Half yearly service charge: £1,630
- 25 December 2013 Half yearly reserve charge: £750
- 24 June 2014 Half yearly service charge: £1,630
- 24 June 2014 Half yearly reserve charge: £750
- 24 June 2014 Additional reserve charge: £10,000

139. Ms Whitnall also identified as in dispute two administration charges of £30 each imposed on 12 and 17 February 2014.

140. Finally in her application form Ms Whitnall expressed concern that she had not been informed of the proposed works to the Basement Flat.

141. On 9 February 2015 the Tribunal held a case management hearing which immediately followed the hearing of the Respondents' application to dispense with the consultation requirements for the major works.

142. The directions identified the matters in dispute and required the Respondents to disclose to Ms Whitnall copies of the service charge accounts for 2013 and 2014 with a breakdown of the budget heads and an analysis of the repairs and maintenance budget, a copy of the estimated service charge for 2015 and details of the reserve accompanied by a narrative explaining the contributions to the reserve.

143. On 20 February 2015 the Respondents disclosed the following to Ms Whitnall [617]:
- A copy of the service charge accounts for 2013 [519-525]
- A copy of the service charge accounts for 2014 currently in draft form [589-593]. Tribunal was supplied with a certified copy dated 27 February 2014.
- An analysis of the repairs and maintenance budget cost head for 2013 and 2014 [626].
- A copy of the estimated service charge budget for 2015 [617].
- Details of the reserve accompanied by a narrative [202 -204].

144. The Respondents also disclosed to Ms Whitnall details of the major works as part of its application for dispensation from consultation requirements which was heard by the Tribunal on 9 February 2015. The Respondents included documentation to support its assertion that the costs of the major works should be apportioned 57.6 per cent to service charge, and 42.4 per cent to the Respondents in their capacity of long leaseholders of the Basement Flat. The documentation comprised the specification and the schedule of works costs analysis drawn up by BLB surveyors, and the emails of Paul Rawlinson (BLB) and Paul Holder (PS&B) dated 18 and 19 December 2014 on apportionment of service charge.

145. Ms Whitnall's statement of case in the form of a "Scott" schedule was based on the Respondents' disclosure on 20 February 2015 and was sent to the Respondents on 7 April 2015.

146. On 30 April 2015 the Respondents instructed Dean Wilson solicitors to act for them. On 22 May 2015 Dean Wilson submitted the Respondents' statement of case to Ms Whitnall.

147. The Respondents' statement of case was materially different in several respects from the case that was disclosed on 20 February 2015. The case introduced for the first time the Respondents' reliance on clause 5.9.1 of the lease as their authority for recovering part of the costs for the major works through the service charge. The Tribunal has already dealt with this under paragraphs 114 -129.

148. At paragraph 9 of the statement of case the Respondents accepted on advice of their solicitors that the half yearly reserve contributions of £750 due on 25 December 2013, and of £750 and £10,000 due on 24 June 2014 could not be demanded in the way that they have been. According to the Respondents, any reserve fund contribution should have been included as an expenditure item in the 2014 accounts. The Respondents, therefore, amended the 2014 accounts [580] and issued a new demand on 21 May 2015 [587] for a balancing charge which also gave a credit for the reserves "wrongly" demanded in 2014. The new service charge accounts showed a deficit of £19,491.40.

149. The Respondents, however, had already issued a certified set of service charge accounts for 2014 [589][13]. This was the set of accounts disclosed to Ms Whitnall and upon which she made her statement of case. Those set of accounts did not include any reserve fund contributions as expenditure items and showed a surplus of £3,318.60.

150. The Respondents did not mention in their statement of case the existence of the earlier certified set of accounts. Further the amended accounts did not include any reference to the fact that it was amending

[13] The uncertified copy was included in the bundle. Mr Dobbs supplied the Tribunal with the certified copy which was dated 27 February 2015.

or replacing the accounts dated 27 February 2015. Finally the Respondent's explanation for amending the accounts appeared to be that they did not know that contributions to the reserve account should have been recorded as an expense item in the accounts. Their explanation, however, was undermined by the fact that the 2013 accounts [523] included a contribution to the reserves as an expense item. The 2013 accounts were signed off on 24 October 2014 which was before the sign off of the 2014 accounts. Also the same firm of Chartered Accountants provided the report for each set of accounts.

151. The Respondents made no application to the Tribunal to substitute the amended set of accounts dated 21 May 2015 for those accounts dated 27 February 2015 which were disclosed by the Respondents on 20 February 2015. The Tribunal takes the view the amended accounts represented a significant departure from the Respondents' disclosed case. In the circumstances the Tribunal considers the Respondents should have sought the Tribunal's permission for the admission of the amended accounts into evidence.

152. The Respondents in their statement of case said at paragraph 4 that the tenants had applied for a determination of liability to pay all demands raised by the Parsons Son & Basley from December 2013 onwards. At paragraph 15 the Respondents stated the tenants seek to challenge their contribution towards monies demanded on account of the major works which they had demanded by way of reserve fund contributions in the 2014 accounts and by way of ad hoc service charge demands during 2015. The Respondents' statements at paragraphs 4 and 15 were incorrect because:

a) At the time Ms Whitnall made her application, the ad hoc 2015 demands for reserve fund contributions had not been issued.
b) The case management hearing on 9 February 2015 limited the Tribunal's jurisdiction in respect of the year ending 31 December 2015 to determining the reasonableness of the estimated service charge budget for 2015 as disclosed at [617].
c) Ms Whitnall's challenge to the major works was about the reasonableness of the costs and whether the works were within the landlord's obligations under the lease. This challenge was not the same as an examination of the various demands for reserve fund contributions.

153. The Tribunal is of the view that its jurisdiction in respect of the service charge dispute between the parties is confined to the one defined by Ms Whitnall's application, the case management hearing and the Respondents' disclosure on 20 February 2015.

154. The Tribunal has demonstrated that the Respondents' statement of case 22 May 2015 on the service charge dispute differed materially in several respects from their case disclosed on 20 February 2015. The

Tribunal is of view that the Respondents were under a duty to highlight the material differences and apply for the Tribunal's permission to introduce new evidence. The Respondents' solicitors were fully aware of their responsibilities in respect of new matters. They had highlighted Ms Whitnall's departure from her original case upon which the Tribunal had ruled on 6 July 2015.

155. The Tribunal considers the Respondents had a positive duty to draw the attention of Ms Whitnall and the Tribunal to the changes, and did not have to await an objection from Ms Whitnall before making an application to admit the new evidence. In fact, the Respondents ignored Ms Whitnall's objection to the introduction of clause 5.9.1 which she had identified in her legal submissions as a new argument. The Respondents also rebuffed the Tribunal's enquiries about the changes in their statement of case. Mr Restall said the Tribunal was not entitled to make such enquiries because of the Upper Tribunal decision in *Birmingham City Council v Keddie* [2012] UKUT 323 (LC). The Tribunal disagrees. The *Keddie* case was not relevant to the circumstances of this service charge dispute because it was the Respondents not the Tribunal who were attempting to change the dispute from the one originally disclosed without making the necessary application. As there were no applications from the Respondents to amend their statement of case and to introduce new evidence, the Tribunal, therefore, proceeded to determine the service charge dispute on the case that existed on 20 February 2015.

156. The Tribunal determines the actual service charge for the year ending 24 December 2013 at £2,571.58 [523]. The lessees of the First and Second Floor Maisonettes were liable to pay 50 per cent which was £1,285.79.

157. The Tribunal determines the actual service charge for the year ending 24 December 2014 at £2,951.40. The expenditure of £3,201.40 [591] was reduced by £190 (Company Expenses) and £60 (reduction re David Smith's report). The liability of Ms Whitnall and Ms Bean comprised 50 per cent of £2,951.40 which was £1,475.70. The accounts included no item of expenditure on reserves which meant that Ms Whitnall and Ms Bean had no liability to pay any contribution to reserves demanded in the year ending 24 December 2014. The Tribunal finds the Respondents had not progressed the major works in 2014. The Respondents' application for dispensation from the consultation requirements was granted in the following service charge year on 9 February 2015.

158. The Tribunal determines that the budget for year ended 24 December 2015 of £2,996.00 for service charges and a contribution of £20,000 towards reserves [576] were reasonable. The liability of Ms Whitnall and Ms Bean comprised 50 per cent of £2,996 and of £20,000 which were £1,498 and £10,000 respectively. The Tribunal considers the

contribution of £20,000 towards reserves reasonable in view of the likely costs of the proposed major works to the property which are set out in the next paragraph.

159. In respect of the major works the Tribunal adopted the evidence of Mr Hall except his findings on tanking (damp proofing) to all external walls, floors and internal partitions (2/3/B [42]) and on the appropriate rate for professional fees in connection with the works. In the case of tanking the Tribunal determines that 25 per cent of the estimated costs for tanking (£5,343.75) should be allocated as a service charge cost. In respect of professional fees the Tribunal determined that the charges of BLB surveyors fixed at 12.5 per cent of the net contract value were reasonable.

160. The Tribunal decides that Mr Hall's estimated cost of £115,150 net for the building contract for the major works was reasonable. Further, the Tribunal decides that the allocation of £115,150 between service charge and Respondents' costs (as leaseholders of the Basement Flat) was £53,926.75 and £61,223.25[14]. Finally the surveyors' fee of £14,393.74 was allocated between service charge and Respondents' costs (as leaseholders of the Basement Flat) as £6,736.28 and £7,657.46 respectively[15].

161. The Tribunal determines that the total estimated cost including fees and VAT of the proposed works was £155,452.48[16] which was allocated between service charge and Respondents' costs (as leaseholders of the Basement Flat) as £72,795.60 and £82,656.88 respectively. The Tribunal, therefore, decides that the liability of Ms Whitnall and Ms Bean for the estimated costs would be 50 per cent of £72,795.60 which was £36,397.80.

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[14] The Tribunal refers to [57]. Mr Hall's figures are shaded. The net cost excluding preliminaries is £106,150 (£44,371 + £61,779). Mr Hall's figures between service charge and Respondent's costs were required to be adjusted in respect of the Tribunal's findings on the damp proof. Thus £44,371 + £5,343.75 = £49,714.75; £61,779 - £5,343.75 = £56,435.25. The preliminaries were then added to these costs. The preliminaries were calculated in the same proportion as the service charge and Respondent's costs bore to the total net costs, which was 46.8% to 53.2% of £9,000. Thus £49,714.75 + £4,212 = £53,926.75 and £56,435.25 + £4,788 =£61,223.25.

[15] The allocation was on the same basis as the preliminaries 46.8% to 53.2% of £14,393.74.

[16] £155,452.48 =£115,150 (net cost) + £14,393.74 (surveyors' fee) + 20%VAT.

Whether the Applicant had breached the covenants in the lease in relation to the payment of service charges?

Background

162. On 30 April 2015 Dean Wilson on behalf of the Respondents made a cross application that the Applicant was in breach of her covenant under the lease to pay service charges and administration charges. Dean Wilson in their letter to the Tribunal[17] said that the breach that our client complains of is the failure on the part of the lessee to pay service charge and administration charges which the landlord says are properly due. The service charges and administration charges in question are essentially the same service charges and administration charges that are being challenged by the Applicant.

163. The Respondents in their Application for breach of covenant [97-103] said they sought an order pursuant to section 168(4) of the 2002 Act that the Applicant was in breach of clauses 2.1 and 3.2 of the lease, because she had failed to pay ground rent and service charges at the times and in the manner specified therein.

164. On 6 May 2015 the Tribunal gave the Respondents leave to file a cross application for Breach of Covenant to be heard at the same time as the application to determine service charges. The leave was granted on the basis that the issues in respect of the Applicant's application and the Respondents' cross application were exactly the same and it was, therefore, cost effective for the Tribunal to deal with both applications together.

165. The Respondents in their statement of case said that the Applicants had failed to pay:

a) The ground rent due on 25 December 2013 and 24 June 2014 in the sum of £75 each in accordance with clause 2.1 of the lease.

b) The service charges due on 25 December 2013 (half yearly £1,630), 24 June 2014 (half yearly £1,630), 3 January 2015 (half yearly £749 and £5,000 toward reserve), 18 March 2015 (£24,446 reserve fund), and 21 May 2015 balancing charge for 2014 (£9,146)[18]. The Respondents alleged that the Applicants were in breach of covenant 3.2.

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[17] A full version of the letter is set out in Appendix one which deals with the chronology of the proceedings.

[18] The dates given in the Respondents' statement of case at paragraph 26 are inaccurate. The dates cited above are the ones on the demand.

c) Administration charges of £30 each due on 12 and 17 February 2014, and 19 and 25 March 2014 in accordance with 2.4.1 of the lease.

166. Ms Whitnall in her witness statement denied that she had refused to meet her legal liability to pay service charge or reserve fund. According to Ms Whitnall, she had made payments totalling £7,709.29 which she said had sufficiently met the demands for service charges and ground rent, and included an amount for the reserve fund.

167. Ms Whitnall said she had questioned the service charge and asked for an explanation from the time she moved into the property. Ms Whitnall stated that she did not understand the service charge demands for the year ending 24 December 2014 which were almost the double the amount of the previous year. Ms Whitnall maintained that from June 2014 and on many occasions thereafter she made repeated requests for clarification querying the rapidity of the demands, their affordability and reasonableness. Ms Whitnall asserted the Respondents refused to address her requests for information and instead just threatened her with a section 146 notice seeking possession of her flat.

168. Ms Whitnall pointed out that she had agreed with Parsons Son and Basley a standing order of £175 a month from June 2014 towards her service charge. Parsons Son and Basley accepted the payments. In May 2015 Parsons Son and Basley decided to return £1,015 to Ms Whitnall which represented six months of payments from December 2014.

169. Ms Whitnall stated in evidence she could not understand how she could be in breach of her covenant to pay the service charge when the reasonableness of those charges were being challenged by her. Ms Whitnall had made her application in respect of the service charges on 29 September 2014.

Consideration

170. The Tribunal starts with the following observations:

a) The ground for the Respondents' application for breach of covenant was that the Applicant failed to pay service charges, administration charges and ground rent in accordance with specific terms of the lease.

b) The Applicant has not admitted the breach of covenant.

c) Leave was granted for the hearing of the application on the strict understanding that it was based upon the same facts as for the service charge application brought by the Applicant.

171. During the hearing the Tribunal raised with Mr Restall various matters appertaining to the Respondents' cross application for breach of covenant, which in the Tribunal's view went to the scope of its

jurisdiction to determine the application. At the conclusion of the hearing the Tribunal directed Mr Restall to put his representations in writing on the various matters mentioned by the Tribunal[19].

172. Mr Restall submitted that the Tribunal was not entitled to consider the various matters cited in the directions and articulated at the hearing because they were not issues that had been expressly raised by the Applicant in its statement of case.

173. Mr Restall relied on the Upper Tribunal case in *Birmingham City Council v Keddie* [2012] UKUT 323 (LC) which allowed an appeal from a decision of Leasehold Valuation Tribunal (LVT). The facts of this decision were that the tenants (who were unrepresented) had made a s27A application in respect of service charges including the cost of replacement windows. The tenants argued the amount of the service charge for those works was unreasonable because of poor workmanship. The (LVT) held that it was not reasonable to replace the windows at all. The City Council appealed the decision because the LVT had reached it on grounds that were not raised in the tenants' application. Further the Council said there was no evidence to support the decision and the LVT had not given the Council an opportunity to make representations. The tenants did not oppose the Appeal and they reached an agreement with the Council on the amount of service charge that was reasonably recoverable.

174. In allowing the Appeal the Upper Tribunal said as follows:

> "13. It is regrettable that it appears to be a developing practice within some leasehold valuation tribunals to take it upon itself to identify issues which are of no concern to the parties and then reach a decision on issues they have not been asked to which then results in an appeal and all the waste of time and money and attendant general aggravation. It may therefore be helpful to set out the legislative framework and general principles applicable...
>
> 15. Applications are commenced by landlord or tenant issuing a pro forma application form prescribed by the Residential Property Tribunal Service, which requires that details of the questions relating to service charge expenditure requiring resolution by the LVT be set out. If they are not sufficiently set out, as is often the case, the LVT will at the pretrial review order that the applicant serve a statement of case giving full particulars of precisely what is in issue and why. The respondent will be ordered to serve a statement of case setting out its case to which the applicant will usually be given an opportunity to respond if he so wishes by serving a statement of case in reply.
>
> 16. Those documents, whether they be described as pleadings or statements of case or whatever, set out the nature and scope of the issues in dispute. They operate to limit the issues in respect of which the parties must adduce evidence in support of their respective cases. They also operate to define the issues in respect of which they seek

[19] See paragraph 20 above.

resolution by the LVT. They therefore serve five functions. First, to identify the issues. Secondly, to enable the parties to know what issues they must address their evidence to. Thirdly, to vest the LVT with jurisdiction, and focus the LVT's attention on what needs to be resolved. Fourthly, setting the parameters of, and providing the tools within which, the LVT may case manage the application. Fifthly, by confining the issues requiring resolution to what is actually (as distinct from what might theoretically be) in dispute between the parties they will be assured economical and expeditious disposal of their dispute whilst also promoting efficient and economical use of judicial resources at first instance and appellate levels.

17. In this respect, it is important to bear in mind not just that the jurisdiction of the LVT is a creature of statute but that it is also a function of what the applicant and, by his response, the respondent wish the LVT to resolve. It is the jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve, and neither does it have the jurisdiction to do so. To do so would be inimical to the party–and–party nature of applications to the LVT and would greatly increase the costs (frequently recoverable from the tenant through the service charge) and difficulties attendant to service charge disputes which by their nature are frequently fractious, involving relatively small sums within a complex matrix of divers items of expenditure.

18. It follows from the above that the LVT does not have jurisdiction under section 27A "to determine the entire service charge not only the matters in dispute, pleaded or otherwise specifically identified in the service charge application" as stated in the refusal decision. It is not an inquisitorial tribunal. It is there to resolve issues it is asked to resolve, not uncover ones which do not exist or which the parties are not concerned about.

19. That said, there may of course be rare cases in which it is appropriate or necessary for the LVT to raise issues not expressly raised by the parties but which fall within the broad scope of the application in order to properly determine the issues expressly in dispute. But even then, the issues must fall within the scope of the application, not something which arises outside of it.

20. In those rare cases where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submission and if appropriate adducing further evidence in respect of the new issue before reaching its decision. Failure to do so is not only unfair but may give the unfortunate impression that the LVT has descended into the fray and adopted a partisan position which may well serve to undermine the confidence of the parties in the impartiality of the LVT".

175. Mr Restall submitted that the Tribunal was only entitled to resolve those issues that were expressly in dispute between the parties. In relation to the breach of covenant application, Mr Restall said that Ms Whitnall was required to set out her grounds of opposition to the breach of covenant application in accordance with rule 30(4)(e) of the Tribunal Procedure Rules 2013. According to Mr Restall, the proper approach was for the Tribunal to look at the specific grounds of opposition put forward by Ms Whitnall and then determine whether the grounds were made out. Mr Restall stated that if grounds of opposition failed, the application for breach of covenant should succeed.

176. Mr Restall contended that it was not open to the Tribunal to raise new arguments and to consider whether the Respondents' application should fail for any reasons other than those raised by Ms Whitnall. According to Mr Restall, if the Tribunal was entitled to raise new arguments the Respondents would be put in an impossible position not knowing what issues and arguments they would need to adduce at the hearing. Mr Restall said a line must be drawn somewhere between those issues on which the parties must call evidence and make submissions and those where they need not. Mr Restall said that the *Keddie* decision made it clear that the line was drawn by the issues which were expressly put in dispute in the parties' statements of case.

177. Mr Restall pointed out the order of the statements of case was slightly unusual because the section 168(4) application was made part way through the case management of the s27A application. According to Mr Restall, the Tribunal had permitted this and Ms Whitnall had not objected. Mr Restall said Ms Whitnall's reply post-dated the Respondents' cross-application under s168(4), so Ms Whitnall had the opportunity to raise in the pleadings any grounds of opposition to the cross-application that she wished to. Mr Restall said that Ms Whitnall's reply [148 -151] was virtually identical to her earlier statement of case [145-148]. Mr Restall stated that the only grounds of opposition to the s168(4) application were those issues which Ms Whitnall had already put in dispute on the s27A application (e.g. whether the damp proof treatment falls within the landlord's repairing covenant, etc.).

178. Mr Restall asserted that the Respondents' application for breach of covenant must succeed save to the extent that Ms Whitnall succeeded on any relevant issue in the s27A application. Finally Mr Restall argued there was no dispute between the parties concerning the validity of the demands, dates of the demands or construction of the lease, and, therefore, it would be outside the Tribunal's jurisdiction to refuse the application for reasons related to them.

179. The Tribunal disagrees with Mr Restall's application of the *Keddie's* decision to the facts of this case. The Tribunal also considers that Mr Restall has misconstrued the Tribunal's intervention and disregarded the circumstances of the Respondents' cross application for breach of covenant.

180. The Upper Tribunal in *Keddie* preserved the principle that there would be rare cases in which it is appropriate or necessary for the Tribunal to raise matters of its own volition. The Upper Tribunal cited with approval the dictum of HH Judge Mole QC in *Regent Management Ltd v Jones* [2012] UKUT 369 (LC) at paragraph 29:

> "The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the tribunal raise, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it".

181. Sir Keith Lindblom, the President of the Upper Tribunal, confirmed the right of the Tribunal to raise matter of its own volition in *Fairhold (Yorkshire) Ltd v Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT 0502 (LC) at paragraph 36:

> "I would add that, in my view, a Tribunal may consider the procedural integrity of the right to manage process, whether or not this has been raised by any of the parties active in the process. There is nothing in the statutory provisions to suggest that a Tribunal may not act on its own initiative in that way, provided of course, that its procedure is fair throughout and, therefore, that the parties are given a reasonable opportunity to present any relevant evidence or submissions".

182. In this case the Tribunal had been diligent in articulating its concerns at the hearing and inviting submissions from the parties on those concerns. The Tribunal also issued directions giving the parties an opportunity to make representations in writing. These circumstances were very different from those that prevailed in *Keddie* where it appeared the LVT had issued its decision on the basis of its own interpretation of the lease upon which the parties had not been given an opportunity to make representations.

183. The Tribunal is satisfied that the issues it identified in connection with the Respondents' application for breach of covenant fell within the scope of the application and were firmly derived from the parties' representations. Mr Restall gives the impression in his submission that the Tribunal was generating issues out of the blue which he said put the Respondents in an impossible position not knowing what issues and arguments they would need to adduce at the hearing. The Tribunal disagrees. The issues raised were basic points of law or stemmed directly from contradictions in the Respondent's case or developments on the Applicant's defence.

184. The Tribunal's first issue concerned the burden of proof. This was the Respondents' application who sought an order pursuant to section 168(4) of 2002 Act that the Applicant was in breach of clauses 2.1 (ground rent) and 3.2 (service charge) of the lease.

185. Mr Restall argued the Tribunal's proper approach in dealing with an application for breach of covenant was that it should determine whether the grounds of opposition put forward by Ms Whitnall in the rule 30 (4)(e) notice were made out. If the Tribunal found that none of grounds were made out then the application for breach should succeed. Mr Restall submitted that this approach was consistent with the decision in *Keddie* in that the Tribunal should only be concerned with those issues expressly disputed by the parties.

186. The Tribunal considers that Mr Restall failed to give sufficient attention to the legislative structure of section 168 and its implications for burden of proof. Further the Tribunal believes that Mr Restall has made an unwarranted extension of the *Keddie* principles with the result that the tenant has been placed with the burden of proving whether a breach had occurred. Finally Mr Restall's reliance on rule 30(4)(e) of the Tribunal Procedure Rules was misplaced because a Respondent's notice was only required to be served in appeals under the Housing Act 2004. Rule 30(4)(e) did not apply to applications under section 168(4) of the 2002 Act.

187. Under section 168 a landlord may not serve a section 146 forfeiture notice for breach of covenant unless the tenant has admitted the breach or a breach has been finally determined under section 168(4) or a court in any proceedings has finally determined the occurrence of a breach. It follows that a landlord would only make an application under section 168 (4) for a determination that a breach of covenant has occurred where there has been no admission of breach on the part of the tenant. It also follows that the landlord as applicant has the burden of proving the occurrence of a breach.

188. In this application the Respondents said the Applicant had breached clauses 2.1 and 3.2 of the lease which related to the payment of ground rent and service charge. Ms Whitnall opposed the application principally on the ground that she had paid the amounts due.

189. In the Tribunal's view, it was incumbent upon the Respondents to adduce evidence of their compliance with clauses 2.1 and 3 of the lease as well as the Applicant's non payment of the various monies under the lease in order to discharge their burden of proof under section 168(4). In short, the Respondents' compliance or otherwise with clauses 2.1 and 3 was a necessary ingredient in establishing whether the Applicant had breached the terms of the lease. Thus if the Respondent had not served the service charge demand in accordance with clause 3 of the lease, the Applicant would not be in breach of the terms of the lease even if she had not paid the service charges due.

190. The Tribunal considers the *Keddie* decision gave no assistance to the Respondents because it did not engage the issue of burden of proof. The facts of *Keddie* concerned reasonableness of service charges which are decided upon the entirety of the evidence with the burden of proof playing little or no part in the decision (see *Yorkbook Investments Ltd v Batten* [1985] 2EGLR 100).

191. Given that the Applicant had made no admissions on the breach of the covenant, the Tribunal's preferred view is that the Respondents were required to prove on the balance of probabilities that the ground rent and service charges had been demanded in accordance with the lease as well as the non-payment of the monies due in order to establish whether the Applicant had breached clauses 2.1 and 3.2 of the lease. Further the Tribunal is of the view that it was entitled to ask questions of the Respondents to satisfy itself that they had discharged the burden of proof even though the Applicant had not specifically raised questions about the Respondents' compliance with those terms of the lease.

192. The Tribunal would add that there was another feature of this case, which meant that the Tribunal had a duty to satisfy itself there were no procedural flaws with the Respondents' demands for service charge. At paragraph 8 of their statement of case [118], the Respondents accepted they had made a mistake with their demands for half yearly reserve contributions in the year ending 24 December 2014. Thus the Respondents had put the Tribunal on notice that there were problems with the demands, which in the Tribunal's view fitted the circumstances where it was right for the Tribunal to intervene as described by Judge Mole QC in *Regent Management Ltd.*

193. The Tribunal's second issue is with the scope of the section 168(4) application. The Tribunal received the Respondents' cross application on the 5 May 2015 which requested an order to be made that the Applicant was in breach of clauses 2.1 and 3.2 of the lease. The Respondents alleged that the Applicant had failed or refused to pay service charges and ground rent. The application referred to a breakdown of charges as prepared by Parsley Son and Basley, which was not enclosed with the application form. The Tribunal accepted the application on the basis that that the issues in respect of both the Applicant's service charge application and the cross-application for breach of covenant were the same. Dean Wilson in its accompanying letter dated 30 April 2015 said the applications involved the same facts, same matters and same legal issues.

194. The Respondents' statement of case dated 22 May 2015 for breach of covenant went further than the grounds set out in the cross-application form, and in the Applicant's service charge application. The statement of case added the Applicant's alleged failure to pay administration charges to the alleged breaches in respect of service charges and ground rent. The statement of case included details of the demand dated 25

February 2015[20] for on account payment of £24,466, and details of a balancing charge for the year end 2014 in the sum of £9,146.50 notified on 21 May 2015, which were not part of the Applicant's service charge application.

195. The Respondents did not apply for the Tribunal's permission to extend their case in respect of the breach of covenant. The Tribunal granted leave to bring the cross application on the strict understanding that it shared the same issues as the Applicant's service charge application. The Tribunal, therefore, intends to restrict its consideration to those matters that were the subject of the Applicant's service charge application, namely, the actual service charges for the year ending 24 December 2013 and 2014, and the estimated service charge for the year ending 24 December 2015. The facts will be those at 20 February 2015 (the date of the Respondents' disclosure). Finally the Tribunal will not be considering the alleged breach of the covenant to pay administration charges because it was not included in the application.

196. The Tribunal's final issue concerns the extent of its jurisdiction under section 168(4) of the 2002 Act. In this regard the Tribunal raised two matters with Mr Restall, namely, whether the Respondents had agreed an instalment plan with Ms Whitnall which amounted to a waiver or promissory estoppel; and whether section 168(4) applied to an alleged breach of covenant to pay service charge.

197. Mr Restall said that the Tribunal did not have jurisdiction to entertain these two issues because they had not been argued by Ms Whitnall. Mr Restall in his written submissions mistakenly relied on two versions of the same document produced by Ms Whitnall entitled "Legal Submissions on Reasonableness of Service Charges", and neglected Ms Whitnall's witness statement dated 11 June 2015 [368-374]. Ms Whitnall's defence to the breach of covenant was set out in her witness statement which she expanded upon at the hearing. Ms Whitnall said that she had paid the outstanding charges and had also reached agreement with Parsons Son and Basley to pay by instalments until the Tribunal determined the amount owing. Further at the case management hearing on 6 July 2015 and at the substantive hearing on 12 August 2015 Ms Whitnall stated that she could not understand why she would be in breach of the covenant to pay the service charge whilst her application to determine the service charges was still being considered.

198. The Tribunal did not consider it was exceeding its jurisdiction by raising the questions of waiver or promissory estoppel, and whether section 168(4) applied to covenants to pay service charge because these issues formed part of Ms Whitnall's defence. The *Keddie* decision does not require Ms Whitnall to identify the correct legal labels for her defence. The Tribunal can raise matters provided Ms Whitnall has given sufficient information to identify the nature of her dispute. For

[20] The statement of case mistakenly refers to 26 February 2014 rather than 25 February 2015.

example Ms Whitnall said she was not in breach because Parsley Son and Basley had accepted an instalment plan. In the Tribunal's view, Ms Whitnall's statement is posing questions on waiver/promissory estoppel. In respect of its interpretation of the *Keddie* decision the Tribunal relies on the Upper Tribunal decisions of *Triplerose v Bishun and others* [2013] UKUT 0257 (LC) at para. 50 and *Trafford Housing Trust Ltd v Rubinstein and others* [2013] UKUT 581 (LC) at paragraph 12.

199. Turning now to the facts of the alleged breaches of covenant. The Tribunal starts with the year ending 24 December 2013. The Respondents accepted that the Applicant had paid her share of the service charge and ground rent for the year ending 24 December 2013. The Respondents had recorded an entry of £1,885 as cash received on 24 December 2013 in the service charge account for the Applicant's property. Mr Dobbs of Parsons Son and Basley also produced an invoice dated 22 May 2013 in the sum of £1,017.50 comprising £942.50 service charge in advance and £75 ground rent in advance addressed to Ms Whitnall and Ms Bean.

200. Ms Whitnall asserted that she had paid the £1,017.50 as stated in the invoice and the £1,885 as recorded in the statement of account. Ms Whitnall believed there had been problems with the transfer of the accounting records for the maisonette from the Bognor Office to the Brighton Office at the end of 2013 which had caused the anomalies in the accounting records. Ms Whitnall, however, was unable to provide proof of payment of these two amounts. Equally Mr Dobbs failed to give a satisfactory explanation for the two separate amounts.

201. After examining the documents the Tribunal is satisfied that the £1,885 represented the service charge for the First and Second floor maisonette for the whole of the year, and included the payment of two half yearly instalments of £942.50 with the first one paid by Ms Weston, the previous owner of the maisonette, and the second one paid by Ms Whitnall. Ms Whitnall also paid £75 ground rent which meant that she paid £1,017.50 in the year ending 24 December 2013. Ms Whitnall did not pay a separate amount of £1,885.

202. The service charge accounts for the year ending 24 December 2013 showed a surplus in the service charge account of £1,198. Under clause 3.2.2 of the lease the Respondents were required to return £599 (50 per cent of £1,198) to Ms Whitnall within 21 days of the accounts. The sum can also be applied towards the reserve fund or the estimated service charge for the following year, but there was no indication that any sum was transferred into the reserve. The Tribunal notes that the accounts were signed off by the auditors on 24 October 2014. The Respondents credited Ms Whitnall's service charge account with the £599 on 21 May 2015 [594].

203. The original position for the year ending 24 December 2014 was as follows:

a) On 14 November 2013 with a due date of 25 December 2013 [611], the Respondents demanded from the Applicant ground rent of £75, £1,630 service charge, and £750 reserve contribution in advance for the six month period 25 December 2013 to 23 June 2014. The Respondents also served a section 166 Notice in connection with the ground rent [609]. On 19 May 2014 the Applicant paid the Respondents £2,515 to discharge the debt which included £60 for two administration charges imposed 12 February and 17 February 2014.

b) On 15 May 2014 with a due date of 24 June 2014 [613], the Respondents demanded from the Applicant ground rent of £75, £1,630 service charge, and £750 and £10,000 reserve contributions in advance for the six month period 24 June 2014 to 24 December 2014. The Respondents also served a section 166 Notice in connection with the ground rent [608]. On 25 June 2014 Ms Whitnall arranged with the Respondents to pay the service charge by standing order with monthly instalments of £175 which the Respondents continued to accept until May 2015, when they were advised by their solicitors to return the payments equating to six months. The amount paid by Ms Whitnall in instalments for the year ending 24 December 2014 was £1,225.

c) On 20 February 2015 the Respondents disclosed to the Applicant the un-audited service charge accounts for the year ended 24 December 2014 which were signed off by the accountants on 27 February 2015. The accounts revealed there were no transfers to reserves and a surplus of £3,318.60 for the year.

204. The Respondents' statement of case altered the facts for the year ended 24 December 2014 as set out in above paragraph. The Respondents said the contribution to the reserve funds had been wrongly demanded. Further the Respondents stated that the contributions should have been included as an expenditure item in the service charge accounts. Next, the Respondents said they had amended the 2014 accounts to include the reserve contributions demanded during the year which had resulted in a balancing charge of £9,146.50. The Respondents did not disclose in their statement of case the existence of the set of accounts signed off by the accountants on 27 February 2015. Finally Mr Restall in his closing submissions contradicted the Respondents' position by maintaining that the demands of reserve fund contributions prior to May 2015 were valid.

205. The Respondents have not presented a coherent case in respect of the alleged breach of covenant by the Applicant to pay service charges and ground rent in the year ended 24 December 2014. In the Tribunal's view, the Respondents have not been transparent as evidenced by their failure to explain the inconsistency between the two sets of accounts for the year ended 24 December 2014.

206. The Tribunal intends to deal with the year ended 2014 on the basis of the facts as at the date of the application for breach of covenant. The year end accounts showed that the Applicant was required to pay £1,600.70 (50 per cent of £3,201.40) in service charges. Further the Applicant was obliged to pay £150 in ground rent making a total liability of £1,750.70 for the year. The Applicant had paid the Respondents £3,710[21] in the year in respect of service charges and ground rent. The Tribunal, therefore, finds that the Respondents have failed to prove the Applicant has breached the covenant to pay service charges and ground rent for the year ended 24 December 2014.

207. The Respondent sought to include the service charge and rent charge demands for the year ended 2015 in its application for breach of covenant, which ran contrary to the basis upon which the application was accepted by the Tribunal. The Tribunal's interest in the year ended 24 December 2015 was with the proposed budget and not with the actual service charge demands. The Tribunal considers the Respondents should have requested the Tribunal's permission to add the 2015 service charge demands to its application. In those circumstances the Tribunal considers it does not have the jurisdiction to determine the alleged breaches of covenant in respect of non-payment of service charges and ground rent for the year ended 24 December 2015.

208. The Tribunal would add that the demand issued on 3 December 2014 [625] for payment of service charge (£749), reserve contribution (£5,000) and ground rent (£75) in advance for the period 25 December 2014 to 23 June 2015 gave a due date of 3 January 2015 which was contrary to the terms of the lease (3.2.1) and to the section 166 notice for the ground rent [607]. Clause 3.2.1 of the lease required a due date of 25 December 2014, which would suggest that the demand was invalid.

209. The Tribunal having considered the application for breach of covenant on its facts turns now to legal issues of waiver or promissory estoppel, and the scope of section 168(4).

210. The Tribunal refers to the facts that on 25 June 2014 Ms Whitnall arranged with the Respondents to pay the service charge by standing order of monthly instalments of £175 which the Respondents continued to accept until May 2015.

[21] £3,710 = £2,515 (-£60) +£1,225

211. During the hearing the Tribunal asked Mr Restall whether the Tribunal was entitled to make a finding that the payments had been made by Ms Whitnall and accepted by the Respondent in discharge of her liability to pay service charges. Mr Restall argued the Tribunal was not entitled to make findings of fact on the payments, and that this was a matter best left to the Court if forfeiture proceedings were taken. The Respondents gave no evidence about the payments.

212. At the end of the hearing the Tribunal invited representations from the Respondents about the extent of the Tribunal's jurisdiction in dealing with section 168(4) applications. The Tribunal referred the Respondents to three authorities including *Swanston Grange (Luton) Management Ltd v Langley-Essen* [LRX/12/2007].

213. The *Langley-Essen* case states that the Tribunal's jurisdiction under section 168(4) extends to considering whether the landlord is prevented by waiver of covenant or promissory estoppel from relying on a covenant of which he complains there has been a breach. His Honour Judge Huskinson explained what this meant at paragraphs 17 and 19:

> 17 The purpose of a determination under section 168(2)(a) is in my judgment to bring the parties to the same position as would be reached if section 168(2)(b) was engaged by reason that "the tenant has admitted the breach". This contemplates an admission by a tenant that it has committed an actionable breach of covenant. Paragraph (b) does not contemplate an admission by a tenant that it has done an act which, judged strictly, would be a breach of covenant but which the tenant asserts the landlord is not entitled to complain about for reasons of waiver/estoppel.

> 19. These passages show that if a landlord has waived or become estopped in the foregoing sense from relying as against a tenant upon a covenant, then for so long as this waiver or estoppel operates the obligation is suspended. It is wrong to conclude that a tenant who performs acts which strictly would be a breach of the suspended covenant has breached this covenant. Accordingly in answering the question posed by section 168(2)(a) as to whether the breach has occurred the LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of a waiver or estoppel (in which case a breach will not have occurred) or whether at the relevant date the covenant was not suspended (in which case a breach will have occurred if the facts show non-compliance with the terms of the covenant)".

214. The Tribunal finds the following facts in relation to the monthly payments of £175 paid by Ms Whitnall to Parsons Son and Basley, the managing agents for the Respondents:

a) The first payment was made on 25 June 2014, the day immediately following the due date of the demand for the second half yearly service charge and ground rent payment for the year ended 24 December 2014.

b) The payments were for the same amount for each month payable by standing order.

c) Parsons Son and Basley allocated the payments to the service charge account for the property.

d) Under clause 3.2.4 of the lease the Respondents were entitled to take action to recover unpaid service charges or ground rents after the expiry of 21 days from the payment date. The Respondents took no action after the expiry date to enforce the demands for payment issued on 15 May 2014 (due date 24 June 2014), 3 December 2014 (due date 3 January 2015), and 25 February 2015 (due date 18 March 2015).

e) On 19 May 2015 Dean Wilson on behalf of the Respondents sent a cheque in the sum of £875 by a way of a return of all sums tendered by Ms Whitnall since 25 December 2014. The Respondents did this because they wished to be in a position to forfeit the Applicant's lease for non-payment.

215. The Tribunal is satisfied that the above findings demonstrate the existence of an agreement between Ms Whitnall and Parsley Son and Basley that no action would be taken to enforce the covenant to pay the service charge provided she continued to pay monthly instalments of £175. The Tribunal determines that in the period from 24 June 2014 to 5 May 2015[22] the Respondents were estopped from enforcing the covenant to pay ground rent and service charge against the Applicant. The Tribunal concludes that there was no actionable breach of covenant in respect of the demands for service charges issued on 15 May 2014 (due date 24 June 2014), 3 December 2014 (due date 3 January 2015), and 25 February 2015 (due date 18 March 2015).

216. The Respondents made no representations on the effect of their decision to return six months payments to Ms Whitnall on 19 May 2015. In the absence of representations, the Tribunal finds that the Respondents were in effect giving notice from the 19 May 2015 that they would no longer be bound in the future by the agreement not to enforce the covenant to pay ground rent and service charge.

217. The final issue is whether the Tribunal should entertain an application under section 168(4) of the 2002 Act for alleged breaches of covenant to pay ground rent and service charge.

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[22] The date when the Respondent's application for breach of covenant was received by the Tribunal.

218. If a landlord under a long lease of a dwelling wishes to serve a notice of forfeiture under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease, the landlord must obtain a determination from the Tribunal that a breach has occurred unless the tenant admits the breach. The purpose, therefore, of obtaining an order under section 168(4) is to enable the landlord to serve a section 146 notice of forfeiture .

219. There is no requirement to serve a section 146 Notice in the case of non-payment of rent (section 146(11) of the 1925 Act). The landlord's right to forfeit the lease for non-payment of rent arises under the terms of the lease. In this case clause 6.1 of the lease gives the Respondents the right to re-enter the flat on non-payment of rent. Normally the landlord would also have to make a formal demand of rent before re-entry. However, in this case it would appear the Respondents attempted to avoid the necessity of a formal demand by returning six months of payments to Ms Whitnall. The Tribunal, therefore, concludes that section 168(4) does not apply to alleged breaches of covenant to pay ground rent.

220. Before a landlord can forfeit a long lease of a dwelling for non-payment of service charge or administration charge the landlord must satisfy two legal requirements. First under section 81 of the Housing Act 1996, a landlord may not exercise his right to forfeit unless the amount of charge payable is admitted by the tenant or finally determined by a Tribunal or Court. Second the landlord must serve a section 146 Notice setting out the applicability and effect of the restrictions under section 81 of the 1996 Act.

221. Section 169(7) of the 2002 Act provides that

> "Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—
>
> (a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
> (b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act)".

222. The effect of section 169(7) would appear to exclude the requirement for a landlord to obtain an order under section 168(4) before issuing a section 146 Notice for failure to pay service and or administration charge.

223. Mr Restall for the Respondents took a different view submitting that that while s169(7) may mean it was not necessary for a landlord to obtain a determination before service of a s146 notice relating to service charges or administration charges, s168(4) still gave the Tribunal jurisdiction to determine whether a breach of covenant had occurred in respect of covenants to pay service charges and administration charges. According to Mr Restall, this was because s168(4) was drafted in broad terms and there was nothing in s168 or s169 which restricted the type

of covenant to which s168(4) applied. Mr Restall maintained that s169(7) did not prevent the Tribunal from hearing the Respondents' application which was based on the Applicant's alleged failure to pay service charges.

224. His Honour Judge Huskinson in *Barbara Helen Glass v Claire McCready* [2009] UKUT 136 (LC)[23] considered whether the Tribunal had jurisdiction to hear an application under section 168(4) for breach of covenant to pay service charges.

225. The facts of the case involved a landlord seeking the order of the Tribunal that the tenant had breached his covenant to insure the building. The Tribunal struck out the application on the ground that the sum claimed was a service charge which could not be the subject of an application under section 168(4) by virtue of section 169(7).

226. His Honour Judge Huskinson allowed the appeal of the landlord principally on the ground that the landlord's application for breach of covenant went beyond the tenant's failure to pay money and included the tenant's failure to take out the insurance.

227. His Honour Judge Huskinson, however, went on to consider the situation of an application under s168(4) for a mere failure to pay money:

> "16. If, contrary to my conclusion given above, this case should be treated as an application under section 168(4) by the Appellant merely in respect of an alleged breach of covenant constituted by the Respondent failing to pay this money sum of £239.01 in respect of insurance premium, then even in those circumstances I do not consider that the LVT would have lacked jurisdiction. It may be arguable that the jurisdiction should in those circumstances have been exercised under section 81(1) of the Housing Act 1996 as amended. It is not appropriate in this decision made on the written representation procedure, in circumstances where representation has only been made on behalf of one party, to make any findings as to whether the application should have been under section 81 or under section 168(4). However even if the application should have been made under section 81 rather than section 168(4), I conclude that the LVT should have entertained the application and treated it as made under section 81 rather than declining jurisdiction because the wrong section (if it was the wrong section) had been referred to in the application."

228. In this case the Respondents relied on a breach of covenant which comprised solely of a failure to pay service charge. The facts of this case differed from those of *Glass v McCready* in that an application to

[23] The Tribunal only became aware of this authority whilst writing up the decision. The Tribunal decided not to invite comments upon it from the Respondents because it gave support to the Respondents' position.

determine service charge liability[24] was already before the Tribunal. Given those circumstances the Tribunal considers that it did not have jurisdiction to entertain the Respondents' application under section 168(4) because it was in effect a duplication of the Applicant's application under section 27A of the 1985 Act. The Tribunal considers its determination consistent with the reasoning of Judge Huskinson in *Glass v McCready.*

229. Mr Restall contended the Tribunal was not entitled to make a decision on jurisdiction because it was not raised by Ms Whitnall. The Tribunal disagrees, and has given its reasons in preceding paragraphs for its view that it formed part of Ms Whitnall's defence (see paragraphs 197 &198). The Tribunal has also acted fairly in giving the Respondents an opportunity to make written representations on the inter-relationship between sections 168(4) and 169(7) of the 2002 Act.

Summary of Findings on the Respondents' Application for Breach of Covenant.

230. The Tribunal determines the following in respect of the Respondents' application for breach of covenant under section 168(4) of the 2002 Act and received on 5 June 2015:

a) The application was misconceived with the Respondents' statement of case going beyond the basis upon which the application was accepted by the Tribunal.

b) On the facts the Tribunal is satisfied the Respondents have failed to prove a breach of covenant on the Applicant's part to pay service charge and ground rent. The findings in relation to specific years are as follows:

- The Applicant paid £75 ground rent and £942.50 service charge a total of £1,017.50 in the year ended 24 December 2013. The Applicant was entitled to a balancing payment of £599.

- The Respondents did not present a coherent case in respect of the alleged breach of covenant by the Applicant to pay service charges and ground rent in the year ended 24 December 2014. In the Tribunal's view, the Respondents have not been transparent as evidenced by their failure to explain the inconsistency between the two sets of accounts for the year ended 24 December 2014. The Tribunal dealt with the year ended 2014 on the basis of the facts as at the date of the application for breach of

[24] This is the type of action contemplated under section 81 (1)(a) of the Housing Act 1996. This was Ms Whitnall's application. The breach of covenant application was accepted on the basis that it comprised the same facts as in Ms Whitnall's application.

covenant. The year end accounts showed that the Applicant was required to pay £1,600.70 (50 per cent of £3,201.40) in service charges. Further the Applicant was obliged to pay £150 in ground rent making a total liability of £1,750.70 for the year. The Applicant had paid the Respondents £3,710 in the year in respect of service charges and ground rent. The Tribunal, therefore, finds that the Respondents have failed to prove the Applicant has breached the covenant to pay service charges and ground rent for the year ended 24 December 2014.

- The Tribunal considers it does not have the jurisdiction to determine the alleged breaches of covenant in respect of non-payment of service charges and ground rent for the year ended 24 December 2015.

c) **In the alternative** the Tribunal determines that in the period from 24 June 2014 to 5 May 2015 the Respondents were estopped from enforcing the covenant to pay ground rent and service charge against the Applicant. The Tribunal concludes there was no actionable breach of covenant in respect of the demands for service charges issued on 15 May 2014 (due date 24 June 2014), 3 December 2014 (due date 3 January 2015), and 25 February 2015 (due date 18 March 2015).

d) **In the alternative** the Tribunal considers that it did not have jurisdiction to entertain the Respondents' application under section 168(4) because it was in effect a duplication of the Applicant's application under section 27A of the 1985 Act.

Whether the administration charges in connection with the issue of late payment letters were payable?

231. The administration charges in dispute were those imposed on 12 and 17 February 2014 in separate amounts of £30 [612].

232. Mr Dobbs stated that the administration charges had been imposed because of the Applicant's failure to pay the demand issued on 14 November 2013 with a due date of 25 December 2014 in the sum of £2,455. The demand was for payment in advance of the half yearly service charge and ground rent (£1,630 and £75) and half yearly reserve contribution of £750 for the period 25 December 2013 to 23 June 2014.

233. Mr Dobbs explained that the administration charges were issued in accordance with Parsons Son and Basley credit control procedures [441]. According to Mr Dobbs, Parsons Son and Basley agree with the landlord that the first chasing letter would be sent to the tenant three to four weeks after the demand at no cost to the parties. This would then be followed by a phone-call and an email chaser seven days later. If there had been no response, Parsons Son and Basley would send another letter seven days later demanding payment coupled with an administration charge of £30. A final demand would then be sent after a further seven days together with another administration charge of £30. After which the file would be passed to the solicitors for action if there was no response from the tenant.

234. Mr Dobbs stated in this case the administration charges of £30 had been levied in respect of the final demand [473], and the letter before the final demand [471].

235. Mr Dobbs asserted the sums involved of £30 each were reasonable and reflected the time spent by Parsons Son and Basley in checking the account, and preparing the letter, and the cost of postage.

236. Ms Whitnall argued the charges were excessive and should be disallowed.

237. Ms Whitnall said that as soon as she received the demand from Parsons Son and Basley in December 2013, she sought clarification and explanation of what she perceived to be an unreasonable increase in the service charge (73 per cent). At the time Ms Whitnall was hospitalised undergoing lung surgery. Ms Whitnall maintained that she received no constructive response to her enquiries. Further Ms Whitnall asserted that she had clearly over-paid in 2012/13 and that the service charges had been demanded incorrectly. Finally Ms Whitnall said that she paid the demand plus the administration charges after being threatened with legal action and the ultimate sanction of forfeiture of the lease.

238. Clause 2.4.3 of the lease enables the Respondents to charge the Applicant their expenses incurred with the recovery and or the attempted recovery of monies due under the lease, which in the Tribunal's view would include the £30 charge for the default letters issued by Parsons Son and Basley.

239. The Tribunal is satisfied that the £30 charge meets the definition of administration charge as set out in paragraph 1(1)(c) of Schedule 11 of the 2002 Act. Further the charge is a variable charge because the amount of the charge is not fixed by the terms of the lease.

240. The Applicant paid the charges on 19 May 2015. The Respondents have not relied upon the Applicant's payment as a defence to the application.

241. The question, therefore, for the Tribunal is whether the amount of the charges is reasonable.

242. The Tribunal finds the following:

(a) Parsons Son & Basley did not follow its credit control procedures. The final demand of 17 February 2015 was issued five days after the warning letter rather than the seven days as set out in the procedures. The Tribunal also considers problematical whether the warning letter of 12 February 2015 was issued in compliance with the procedures having regard to the fact that the due date for the service charge demand was Christmas day.

(b) The Respondents accepted in their statement of case that they had wrongly demanded the reserve contribution of £750 for the period 25 December 2013 to 23 June 2014 which supported Ms Whitnall's assertion about the invalidity of the demand.

(c) The Applicant was entitled to a balancing payment of £599 from the previous service charge year ending 24 December 2013 which again supported Ms Whitnall's assertion about being overcharged in respect of the service charge demand for the half year ended 23 June 2014.

243. The Tribunal, therefore, determines that the administration charges imposed on 12 and 17 February 2014 in separate amounts of £30 were unreasonable.

244. The Tribunal notes that the Scott schedule at [144] refers to an administration charge of £30 in 2015 which was not part of the Applicant's application. It would appear the Applicant obtained the information from a statement of account sent by Parson Son & Basley.

245. The Tribunal notes from the statement of account [606] that two administration charges of £30 were imposed on 19 and 26 March 2015. The Respondents' statement of case refers to administration charges of 19 and 26 March 2014 [124] which would appear to be a typographical mistake.

246. The Tribunal observes that the administration charges were imposed after the Applicant's service charge application dated 29 September 2014. They were also imposed during the period when the Tribunal has found that the Respondents were estopped from enforcing the covenant to pay ground rent and service charge.

247. The Tribunal declines to deal with the administration charges imposed on 19 and 26 March 2015 because they were not part of the Application dated 29 September 2014, and no application was made to include them for determination.

Costs

248. The Applicant applied for an order under section 20C of the 1985 Act preventing the Respondents from passing any of its costs incurred in connection with the proceedings before the tribunal through the service charge. The Applicant also applied for a refund of fees paid in respect of the application and hearing.

249. The Respondents sought an order for costs under clauses 2.4.1 and 2.4.3 of the lease. The Respondents filed with its written submissions a summary assessment of costs which amounted to legal fees of £18,426 VAT inclusive and management fees of £1,710 VAT inclusive.

250. The Tribunal indicated that it would invite representations on costs following release of its decision. Any decision on costs is highly dependent upon the Tribunal's determinations on the substantive applications. In those circumstances the Tribunal intends to give its preliminary view on the costs applications and summarising the supporting facts. The Tribunal reserves the right to expand upon its preliminary view.

251. The Tribunal considers that Ms Whitnall acted reasonably in bringing the Application to determine the level of service charges for the years in question. The proposed service charges were considerably more than what the Applicant was informed by the Respondents' managing agents when she purchased the property May 2013. Ms Whitnall's concerns about the allocation of costs in respect of the proposed works to the Basement Flat were justified. The Tribunal hearing the Respondents' appeal against the improvement notice expressed the view that the costs of the majority of the works in basement would not fall within the service charge regime.

252. Ms Whitnall conducted the proceedings on the whole responsibly. Ms Whitnall was selective with her challenges to the service charges which she narrowed down after receiving the Respondents' representations. Ms Whitnall accepted the report of the jointly instructed expert, Mr Hall, in its entirety, even though Mr Hall's findings did not endorse her original view in twelve instances. On 10 June 2015 Ms Whitnall informed Dean Wilson that she accepted Mr Hall's report and as a result the issues had narrowed to the fees and charges of BRB and Parsons Son & Basley, and a couple of points on the 2013 and 2014 accounts.

253. The Tribunal put a process in place which answered Ms Whitnall's questions on the service charges with the result that Ms Whitnall had moved significantly from her original position of challenging everything to a position where she would have significant liability for service charges which would have to be found so as to avoid the Respondents from taking action to forfeit the lease.

254. The Tribunal remains baffled by the Respondents' delay in implementing the required works under the improvement notices issued in May 2014. These works were due to be completed by 30 April 2015. Had they been completed in accordance with the order it would have simplified the dispute and rebuffed Ms Whitnall's concerns about the use of service charge funds. The Tribunal notes the Respondents' liability to comply with the requirements of the improvement notice was separate and apart from their legal duties as landlord under the 1985 Act. Further their covenant to repair the property was not dependent upon the leaseholders making their service charge contributions.

255. The Tribunal considers the Respondents' cross application for breach of covenant misconceived. The Respondents' rationale for making the application was suspect. The Respondents said that it would be cost effective for the Tribunal to deal with both applications together rather than the parties appearing before the Tribunal on two separate applications dealing with the same facts, same matters and same legal issues.

256. The flaw with the Respondents' position is that there was no need to make an application for breach of covenant in order to issue a section 146 Notice. The Respondents would have been entitled to exercise a right of re-entry within 14 days after the final determination of the service charge application if the Applicant did not meet her liabilities. If the Respondents had been successful with their application for breach of covenant they would have still have had to wait for the expiry of 14 days from the final determination of the Tribunal's adjudication.

257. The above analysis brings into question the Respondents' motivation for making the application for breach of covenant. On the face of it, the application elongated the proceedings and expanded the dispute unnecessarily. It would appear the application was responsible for the majority of legal costs incurred by the Respondents which could have been put to better use on the property. The Respondents were ultimately unsuccessful with the application for breach of covenant.

258. The Tribunal was not impressed with aspects of the Respondents' conduct of the proceedings. The Respondents offered no explanation for Mr Meredith's aggressive conduct towards Mr Hall, the jointly instructed expert witness. The Respondents were not transparent with the changes in their statement of case from the original case disclosed to the Applicant. The Respondents did not request the Tribunal's permission to alter their case. The Respondents' grounds for breach of covenant went beyond the terms upon which the application was accepted by the Tribunal. The Respondents appeared to be more intent on controlling Ms Whitnall's case rather than ensuring their own case was up to scratch.

259. The Tribunal's preliminary view is that the parties should bear their own costs. Further the Tribunal considers it would be just and equitable for an order to be made under section 20C of the 1985 Act preventing the Respondents from passing their costs through the service charge. In reaching this decision the Tribunal places weight on the respective parties' conduct of the proceedings and the outcome of the Respondents' application for breach of covenant. Finally the Tribunal considers the Respondents have no authority to recover their costs through clauses 2.4.1 and 2.4.3 of the lease because they were not successful with their application for breach of covenant.

260. The parties are given 14 days to make representations in writing on the Tribunal's preliminary views on costs. The parties must serve a copy of their representations on each other. After receipt of the representations the Tribunal will either confirm its preliminary view or issue directions to progress the question of costs.

Appendix One: The Chronology of Proceedings

1. The Tribunal when compiling part of the chronology refers to the previous decisions of the Tribunal in connection with the property which were included in the bundle. The decisions were Appeal against Improvement Notice (CHI/45UB/HIN/2014/0006) released 11 November 2014 [217-223], and Dispensation from Consultation Requirements (CHI/45UB/LDC/2014/0056) released 16 February 2015 [11-30]

2. The Respondents purchased the property in March 2012. Their title to the freehold was registered on 8 March 2012. They commissioned a Building Inspection Report dated October 2012 [234-243] from Parsons Son and Basley on the repairs/decorations required with approximate costs in order for the Respondents to comply with their obligations as a freeholder under the leases for the property. Parsons Son and Basley estimated that the Respondents would need to spend £24,605 and identified three time streams, immediate work; work to be carried out between 1-3 years and work that could be carried out from three years plus.

3. The Applicant's title to the First and Second floor Maisonette was registered on 22 May 2013. As part of enquiries before the contract, Parsons Son & Basley advised the Applicant that the overall service charge for the year ending 24 December 2013 was £1,885. Further Parsons Son & Basley informed the Applicant that it would carry out the works identified in the Building Inspection Report over the next couple of years starting with the gutters, down pipes and roof tidy works to a value of around £650 to be taken from the £1000 maintenance and repair budget [232-233].

4. In January 2014 the Respondents served on the Applicant a Notice of Intention under section 20 of the 1985 Act to carry out works in respect of repairs to the roof, rainwater goods and redecoration of all external joinery and painted surfaces and internal communal areas.

5. The Respondents, however, did not progress the works because of the involvement of Adur District Council which after carrying out inspections of the Basement Flat in February 2014 and in March 2014 served improvement notices dated 13 May 2014 on the Respondents for works required to the Basement Flat [378-383].

6. The improvement notices were served on Mr Meredith and Mr Williams as the person having control of the residential premises known as the Basement Flat, 37 Buckingham Road, Shoreham-by-Sea , West Sussex.

7. The notices identified both Category 1 and Category 2 hazards. The Category 1 hazards were damp and mould growth; excess cold; falling on level surfaces; falling on stairs; electrical hazards and fire. The Category 2 hazards were food safety; personal hygiene, sanitation &

drainage; falling between levels and structural collapse & falling elements. The Second Schedule to the notices provided a statement of reasons why the District Council considered that the improvement notice was the appropriate action to pursue. The Third Schedule to the notice set out 25 remedial actions that were required to be completed by 15 September 2014.

8. In May 2014 the Respondents appealed the improvement notices. The sole issue in dispute was the date by which the required works should be completed. The Respondents did not contest the existence of category 1 and 2 hazards in the basement flat. The HHSRS hazard scores for the property revealed that the basement flat posed serious risks to the health and safety of occupants with a high likelihood of harm from a range of hazards including excess cold, damp, fire and falls. The hazard score of 32,470 for excess cold was exceptionally high.

9. On 29 September 2014 Ms Whitnall applied for a determination of liability to pay service charges for the years 2013/14 and 2014/15, and two administration charges of £30 each imposed on 12 and 17 February 2014 respectively.

10. In the grounds for the Application Ms Whitnall said that she could not afford the charges which had increased significantly from the charges that were in place when she bought the property. Ms Whitnall considered the hike in charges unreasonable. Ms Whitnall stated that the charges did not match the schedule of costs in the Building Inspection Report prepared by Parsons Son and Basley. Ms Whitnall questioned why she had not been informed of the works to the Basement Flat. Finally Ms Whitnall said that she felt as if the freeholder wants to drive her from her home.

11. On 27 October 2014 the Tribunal heard the Respondents' appeal against the improvement notices. On 11 November 2014 the Tribunal (CHI/45UB/HIN/2014/0006) decided to extend the time limit for completing the works under the improvement notices until 30 April 2015. The Tribunal found the delays by the Respondents were unfortunate and indicative of the absence of clear strategic direction on the part of their professional advisers.

12. At the October hearing Mr Holder for the Respondents explained there was a conflict between two sets of statutory requirements, those under the Housing Act 2004 and those under the 1985 Act relating to consultation. He was asked by the Tribunal whether there had been any consideration of an application under section 20ZA of the 1985 Act. Mr Holder said that this had not been contemplated but he acknowledged it was a possibility. The Tribunal also put to him that the majority of the work in respect of the basement would not fall within the service charge regime (see paragraph 20 of CHI/45UB/LDC/2014/0056).

13. The Tribunal stated that although it may be desirable for the Respondents to undertake a formal consultation process and to secure funds beforehand to undertake the work to the basement and the exterior of the property in one major contract, this in itself was not a reason to delay the necessary works to ensure compliance with the improvement notice. The Tribunal referred the Respondents to the provisions of section 20ZA of the 1985 Act which allowed for dispensation of the consultation process in circumstances such as this.

14. Following the October 2014 hearing the Respondents went out to tender on the works required to the basement flat and the property. The specification for those works was drawn up by BLB surveyors dated 17 November 2014 [259 -340].

15. On 3 December 2014 the Respondents applied for the dispensation of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of proposed works to the Basement Flat and the external structure of 37 Buckingham Road. Ms Whitnall and Ms C Finzel the leaseholder of the Ground Floor Flat objected to the application and requested a hearing of the mater which took place on 9 February 2015.

16. BLB surveyors provided a Report on the Tenders dated 16 December 2014 to the Respondents. Three firms supplied tenders in accordance with the specification ranging from £119,000 to £132,000 [526-573]. The firms were selected from a list of approved contractors held by Parsons Son and Basley.

17. On 19 December 2014 the Respondents issued a fresh Notice of Intention under section 20 of the 1985 Act to carry out the following works:

- Demolition, removal and replacement of floor within the basement flat
- Tanking of the walls within the basement flat
- Roof and rainwater goods repairs including dormer windows
- Damage and pathway repairs
- Repairs to external rendering to main elevations
- Repairs to render any masonry to boundary walls and external entrance steps
- Installation of an inter-linked fire detection and alarm system
- Redecoration to all external joinery and painted surfaces, redecoration and re-flooring of internal common ways.

18. On 22 December 2014 Ms Whitnall objected to the Notice of Intention pointing out that the works beyond strict compliance with the improvement notice were not urgent. Also Ms Whitnall asserted that the Respondents' delay in implementing the recommendations of the Building Inspection Report dated October 2012 had increased the cost of those works. Ms Whitnall stated that the opinion of a surveyor would be necessary to ascertain how much of the works required were now due to the neglect of the first survey, and how much of the costs to the basement were attributable to the freeholders in respect of their covenant to repair the property. Finally Ms Whitnall enquired of the Respondents about whether they were offering any terms upon which dispensation should be granted including her costs of instructing a solicitor and a surveyor.

19. On 9 February 2015 the Tribunal granted the Respondents dispensation from the consultation requirements on terms which were as follows:

(a) The Respondents to pay their costs including the application fee and the costs of their representative and professional witness in connection with the application. For the avoidance of doubt, the Tribunal makes an order under section 20C of the 1985 preventing the Respondents from recovering their costs in connection with the Tribunal proceedings through the service charge.

(b) The Respondents to pay the reasonable costs of Ms Whitnall and Ms Finzel including loss of earnings incurred in connection with the application.

(c) The Respondents to pay the costs of an independent surveyor jointly instructed by the parties with a view to producing a report evaluating and forming a view on the viability of the Respondents' proposals for major works, the apportionment of the proposed charges between freeholder's own cost and service charge, and the reasonableness of the proposed costs. The report to be made available to both parties.

(d) Mr Dobbs would supply the independent surveyor with copies of the reports and schedule of works in respect of the property. Mr Dobbs would supply Ms Whitnall with a list of surveyors.

20. At paragraphs 57 and 58 of the decision the Tribunal said:

> "The Tribunal was baffled by the Respondents' delay in implementing the required works under the improvement notices issued in May 2014. Although the Respondents appealed the improvement notices, they were not challenging the scope of the required works, simply the date by which the works were to be completed. The Respondents'

liability to comply with the requirements of the improvement notice was separate and apart from their legal duties as landlord under the 1985 Act. Further their covenant to repair the property was not dependent upon the leaseholders making their service charge contributions. Thus the obligation to consult was not an impediment to the Respondents' compliance with the requirements of the improvement notice. The obligation to consult was about protecting the Respondents' position when recovering the leaseholders' contribution to the costs of the major works. Leaving aside the question of the relevance of section 20 to compliance with the 2004 Act, the Respondents, in any event, had more than enough time from May 2014 to carry out a consultation on the works required in accordance with section 20 of the 1985 Act.

Given the above findings the Tribunal's immediate reaction was to refuse the application for dispensation and allow for the continuance and completion of the present consultation process. The Tribunal on reflection, however, did not adopt this route and decided to grant dispensation on terms".

21. Also on 9 February 2015 the Tribunal held a case management hearing to progress Ms Whitnall's application to determine liability to pay service charges. The Tribunal fixed 6 July 2015 as the hearing date.

22. The Tribunal directed the Respondents to disclose copies of the service charge accounts for 2013 and 2014 with a breakdown of the budget heads, an analysis of the repairs and maintenance budget, a copy of the estimated service charge for 2015 and details of the reserve accompanied by a narrative explaining the contributions to the reserve.

23. On 25 March 2015 following an application from Ms Whitnall the Tribunal extended the time until 7 April 2015 for her to submit a "Scott schedule" setting out the charges in dispute, any signed witness statements relied upon together with legal submissions.

24. On 7 April 2015 Ms Whitnall applied to set aside the appointment of Mr Hall as the surveyor [647-651]. On 10 April 2015 the Tribunal refused Ms Whitnall's application [669].

25. On 30 April 2015 Dean Wilson informed the Tribunal that the Respondents had instructed them in connection with Ms Whitnall's application [93-95]. Further Dean Wilson advised the Respondents wished to make a cross application for a determination of breach of covenant under section 168 of the Commonhold and Leasehold Reform Act 2002 .

26. Dean Wilson in its letter to the Tribunal said the following:

"The Tribunal will be aware that section 168 of the 2002 Act provides that a landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) of section 168 is satisfied. Section 168(2) provides that the subsection is satisfied only in three circumstances one of which is that the breach has been finally determined following a landlord's application to a *FTT* for a determination that a breach of covenant or condition in the lease has occurred (underlining emphasis added)".

"It is appropriate to make this application in these proceedings, in the interests of justice and costs. The breach that our Client complains of is the failure on the part of the lessee to pay service charge and administration charges which the landlord says are properly due. The service charges and administration charges in question are essentially the same service charges and administration charges that are being challenged by the Applicant. It would not therefore be appropriate for the landlord to wait until the Tribunal makes a determination in the current application, only then to have to re-apply back to the Tribunal in a separate application for a determination of breach. The issues in respect of both the Applicant's application and the Respondent's cross application are exactly the same, and it therefore cost effective for the Tribunal to deal with both applications together, so neither party has to incur the costs of having to appear before the Tribunal on two separate applications, which involve exactly the same facts, matters and legal points".

27. The Respondents in its Application for breach of covenant [97-103] said they sought an order pursuant to section 168(4) of the 2002 Act that the Applicant was in breach of clauses 2.1 and 3.2 of the lease, because she had failed to pay ground rent and service charges at the times and in the manner specified therein. The Respondents confirmed that the Application was made incidental to and in contemplation of the preparation and service of a Notice under section 146 of the 1925 Act.

28. On 6 May 2015 the Tribunal gave the Respondents leave to file a cross application for Breach of Covenant to be heard at the same time as the application to determine service charges. The leave was granted on the basis that the issues in respect of the Applicant's application and the Respondents' cross application were exactly the same and it was, therefore, cost effective for the Tribunal to deal with both applications together. The Tribunal's permission was subject to the Applicant's right to make representations.

29. On 6 May 2015 the Tribunal also extended the time until 22 May 2015 for the Respondents to serve their statement of case because they required further time to consider the report of the expert witness, Mr

liability to comply with the requirements of the improvement notice was separate and apart from their legal duties as landlord under the 1985 Act. Further their covenant to repair the property was not dependent upon the leaseholders making their service charge contributions. Thus the obligation to consult was not an impediment to the Respondents' compliance with the requirements of the improvement notice. The obligation to consult was about protecting the Respondents' position when recovering the leaseholders' contribution to the costs of the major works. Leaving aside the question of the relevance of section 20 to compliance with the 2004 Act, the Respondents, in any event, had more than enough time from May 2014 to carry out a consultation on the works required in accordance with section 20 of the 1985 Act.

Given the above findings the Tribunal's immediate reaction was to refuse the application for dispensation and allow for the continuance and completion of the present consultation process. The Tribunal on reflection, however, did not adopt this route and decided to grant dispensation on terms".

21. Also on 9 February 2015 the Tribunal held a case management hearing to progress Ms Whitnall's application to determine liability to pay service charges. The Tribunal fixed 6 July 2015 as the hearing date.

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"The Tribunal will be aware that section 168 of the 2002 Act provides that a landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) of section 168 is satisfied. Section 168(2) provides that the subsection is satisfied only in three circumstances one of which is that the breach has been finally determined following a landlord's application to a *FTT* for a determination that a breach of covenant or condition in the lease has occurred (underlining emphasis added)".

"It is appropriate to make this application in these proceedings, in the interests of justice and costs. The breach that our Client complains of is the failure on the part of the lessee to pay service charge and administration charges which the landlord says are properly due. The service charges and administration charges in question are essentially the same service charges and administration charges that are being challenged by the Applicant. It would not therefore be appropriate for the landlord to wait until the Tribunal makes a determination in the current application, only then to have to re-apply back to the Tribunal in a separate application for a determination of breach. The issues in respect of both the Applicant's application and the Respondent's cross application are exactly the same, and it therefore cost effective for the Tribunal to deal with both applications together, so neither party has to incur the costs of having to appear before the Tribunal on two separate applications, which involve exactly the same facts, matters and legal points".

27. The Respondents in its Application for breach of covenant [97-103] said they sought an order pursuant to section 168(4) of the 2002 Act that the Applicant was in breach of clauses 2.1 and 3.2 of the lease, because she had failed to pay ground rent and service charges at the times and in the manner specified therein. The Respondents confirmed that the Application was made incidental to and in contemplation of the preparation and service of a Notice under section 146 of the 1925 Act.

28. On 6 May 2015 the Tribunal gave the Respondents leave to file a cross application for Breach of Covenant to be heard at the same time as the application to determine service charges. The leave was granted on the basis that the issues in respect of the Applicant's application and the Respondents' cross application were exactly the same and it was, therefore, cost effective for the Tribunal to deal with both applications together. The Tribunal's permission was subject to the Applicant's right to make representations.

29. On 6 May 2015 the Tribunal also extended the time until 22 May 2015 for the Respondents to serve their statement of case because they required further time to consider the report of the expert witness, Mr

Hall. The Tribunal also gave the Applicant until 5 June 2015 to send a brief supplementary reply.

30. On 22 May 2015 the Respondents sent their statement of case to the Applicant. In the statement the Respondents acknowledged on advice from their solicitors that the half yearly reserve fund could not be demanded in the way that they have been. Further the Respondents reserved its position on Mr Hall's report pointing out that it was unclear whether the Applicant accepted all of Mr Hall's opinions. Finally the Respondents highlighted clause 5.9.1 of the lease which they said entitled them to recover from the Applicant the costs of improvements which are required by a local authority.

31. On 8 June 2015 Dean Wilson informed the Tribunal that Ms Whitnall had not sent her reply to the Respondent's statement of case.

32. On 10 June 2015 Ms Whitnall wrote to Dean Wilson requesting their agreement for service of her witness statement and legal submissions on 12 June 2015. Ms Whitnall explained that she was awaiting the outcome of Mr Hall's re-inspection of the basement flat which took place on 29 May 2015. Ms Whitnall also pointed out that she accepted Mr Hall's report and as a result the issues had narrowed to the fees and charges of BRB surveyors and Parsons Son & Basley, and a couple of points on the 2013 and 2014 accounts.

33. On 17 June 2015 Dean Wilson advised the Tribunal that it had now received Ms Whitnall's legal submissions with a witness statement dated 11 June 2015. According to Dean Wilson, the documents lodged by Ms Whitnall did not amount to a reply to the Respondents' statement of case but advance a new and different case on Ms Whitnall's behalf. Dean Wilson said that Ms Whitnall's claim that the cost of the works had increased because of the Respondents' delay, and her contention that the works should be phased constituted new arguments Finally Dean Wilson pointed out that Ms Whitnall had submitted witness statements of Mr Knowles and Mr Reynolds which had not been previously served on the Respondents. Also the Tribunal had not given Ms Whitnall permission to adduce the expert evidence of Mr Knowles.

34. On 18 June 2015 Dean Wilson requested an adjournment of the hearing on 6 July 2015, and for directions which included exclusion of evidence, the right to call rebuttal evidence, and an order for costs.

35. The Tribunal decided to cancel the substantive hearing on 6 July 2015 and hold a case management conference instead. The purpose of the conference was to make decisions on the various matters raised by

Dean Wilson and issue fresh directions for the substantive hearing. For the purpose of the case management hearing the Tribunal required Dean Wilson to complete the bundle of documents and serve it in accordance with the directions and to issue a formal notice of application to the Tribunal and to the Applicant setting out details of the orders and directions requested by the Respondent.

36. The notice was dated 2 July 2015 and received on 6 July 2015. The Respondents requested the Tribunal to make the following directions and orders:

(a) Whether the Applicant was permitted to amend her case to include the submission that the works should be phased?
(b) Whether the Applicant was permitted to amend her case based on her assertion that the cost of the works have increased as a result of alleged delay on the Respondents' part?
(c) Whether leave should be granted to the Respondents to rely on their own expert witness?
(d) Whether an order should be made against the Applicant for costs arising from the adjournment of the substantive hearing in accordance with rule 13 of the Tribunal Procedures Rules 2013?
(e) Further directions consequent on the decisions made in respect of the above Applications.

37. In respect of (a) above the Applicant acknowledged the question of phasing had been considered by the Tribunal in its earlier decision on dispensation from consultation. The Tribunal determined that it made sense to complete the required works in one project Given those circumstances the Applicant indicated she was no longer arguing that the cost of the works should be phased in over a period of five years.

38. In respect of (b) the Tribunal decided the Applicant's claim for set off was not relevant to the challenge against the demand for estimated costs in respect of the major works. The Tribunal, therefore, excluded from the bundle of documents the invoice of ACS Electrical exhibited at [168] and the witness statement of Mr Reynolds at [375-377 & 384-387] in so far as it related to the circumstances surrounding the abatement notice. Mr Reynolds statement in respect of the improvement notice and accompanying exhibits at [378–383] were relevant to the disputed issues and remained in the hearing bundle.

39. The Tribunal did not give the Respondents permission to call an expert witness (see paragraph 14 in the substantive decision).

40. The Tribunal made no order for costs against the Applicant. The Tribunal was not convinced that the Applicant's actions were the principal reasons for the adjournment. The Tribunal considered the circumstances surrounding Mr Hall's report and the Respondents' disagreement with aspects of the report would have, in any event,

necessitated an adjournment of the substantive hearing and the convening of a case management conference in its place. Also the Applicant's legal submission and witness statement were not unduly long, and on the whole were responding to the points made in the Respondents' statement of case. In short the Applicant's conduct of her case did not cross the high threshold of unreasonableness.

41. The Tribunal directed that the hearing of the substantive matters be held on 12 August 2015. The Tribunal further directed that the parties were not permitted to adduce further documentary evidence unless express permission was granted by the Tribunal on application.

Appendix 2 : 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 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.

Commonhold and Leasehold Reform Act 2002

Section 168

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—
(a) it has been finally determined on an application under subsection (4) that the breach has occurred,
(b) the tenant has admitted the breach, or
(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to [the appropriate tribunal] for a determination that a breach of a covenant or condition in the lease has occurred.

Section 169

(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

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).

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