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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AJ/LSC/2015/0493**
Property	:	**Flat 57 Ealing Village, Hanger Lane, London W5 2NB**
Applicant	:	**Mr Peter Thorneloe**
Representative	:	**In person**
Respondent	:	**Ealing Village Freehold Limited**
Representative	:	**Ms Harriet Holmes (Counsel)**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay service charges and an administration charge**
Tribunal Members	:	**Mr Jeremy Donegan (Tribunal Judge)** **Mr Stephen Mason FRICS FCIArb (Professional Member)**
Date and venue of Hearing	:	**12 and 13 April 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**29 May 2016**

DECISION

Decisions of the tribunal

(1) The Tribunal determines that the following sinking fund contributions are payable by the Applicant, in relation to the service charge demand dated 01 July 2015:

- **Major Works (External Repair & Redecoration) in Advance - £4,908.69**

- **Major Works in Advance for Communal Windows and External Repair & Decoration to Windows at the Estate - £5,953.29**

(2) The tribunal determines that the sum of £60 is payable by the Applicant in respect of the administration charge demanded on 04 December 2014.

(3) The application for a refund of tribunal fees paid by the Applicant is refused.

(4) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ('the 1985 Act') and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act'), as to the amount of sinking fund contributions for the period 24 June to 24 December 2015 and an administration charge demanded on 04 December 2014.

2. The application relates to Flat 57 Ealing Village, Hanger Lane, London W5 2NB ('the Flat') and was submitted to the tribunal on 23 November 2015. Directions were issued at an oral case management hearing on 15 December 2015.

3. The directions included provision for each party to serve statements of case. Paragraph 14 dealt with service of witness statements and read:

*"By 4pm on **15 March 2016** both parties shall serve on the other copies (sic) any witness statements of fact upon which they will seek to rely upon at the hearing. The author of any such witness statement shall attend the hearing to give oral evidence unless there good reasons for not going so."*

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

The background

5. The Applicant is the long leaseholder of the Flat, which is on the ground floor of Block 3 at Ealing Village, Hanger Lane, London ('the Estate'). It comprises 3 bedrooms, a kitchen, living room, hallway, bathroom and patio area.

6. The Estate comprises 5 blocks of flats, two gatehouses and other outbuildings and amenities (including a club house and tennis court). There are a total of 132 flats, of which 128 are in the blocks and four in the gatehouses. The blocks are Grade II listed.

7. The Respondent company is the freeholder of the estate and is a wholly owned subsidiary of Ealing Village Limited ('EVL'). The shareholders of EVL are all leaseholders at the Estate. It follows that the Respondent company is controlled by the leaseholders. The Applicant is a shareholder in EVL but is not a director.

8. The lease of the Flat requires the Respondent to provide services and the Applicant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease are referred to below, where appropriate.

The lease

9. The lease was granted by Aymer Square Investments Limited ('Lessors') to Edna Chrystal Madelaine Coelho ('Tenant') on 30 April 1982 for a term of 999 years from 25 March 1982. Paragraph 3 of the particulars refers to the Flat as "*FLAT 57 ON THE GROUND FLOOR*". Paragraph 7 of the particulars specifies that the Tenant's share of total expenditure is:

"(a) (General): 0.75%

(b) (Central Heating + Hot Water): 0.77%"

10. Various definitions are to be found at clause 1 of the lease, including:

""the Demised Premises" means the flat referred to in Paragraph 3 of the Particulars and more fully described in the First Schedule hereto"

11. The first schedule provides a detailed description of the Flat, which includes:

"(a) The internal plaster coverings and plaster work of the walls bounding the Flat and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such doors door frames and window frames) and the glass fitted in such window frames"

12. The Tenant's covenants are to be found at clauses 3 and 4 and include the following obligations:

3(9) *"To pay to the Lessors as arrears of rent all costs charges and expenses including Solicitors' Counsels' and Surveyors' costs and fees at any time during the said term incurred by the Lessors in or in contemplation of any proceedings in respect of this Lease under Sections 146 and 147 of the Law of Property Act 1925 or any re-enactment or modification thereof including in particular all such costs charges and expenses or and incidental to the preparation and service of a notice under the said Sections and of and incidental to the inspection of the Demised Premises and the drawing up of Schedules of Dilapidations such costs charges and expenses as aforesaid to be payable notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court"*

4(1) *"Repair maintain renew uphold and keep the Demised Premises and all parts thereof including so far as the same form part of or are within the Demised Premises all windows glass and doors (including the entrance door to the Demised Premises) locks fastenings and hinges sanitary water gas and electrical apparatus and walls and ceilings drains pipes wires and cables and all fixtures and additions in good and substantial repair and condition save as to damage in respect of which the Lessors are entitled to claim under any policy of insurance maintained by the Lessors in accordance with their covenant in that behalf hereinafter contained except in so far as such policy may have been vitiated by the act or default of the Tenant or any person claiming through the Tenant or his or their servants agents licensees or visitors"*

4(4) *"Pay the Interim Charge and the Further Interim Charge (as appropriate) and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto all such Charges to be recoverable in default as rent in arrear"*

13. The Lessors' covenants are to be found at clause 5 and include the following obligations

5(4)(a) *"To maintain and keep in good and substantial repair and condition;*

(i) *the main structure of the buildings and other structures comprised in the Estate including the principal internal timbers and the exterior walls and the foundations and the roofs thereof with their respective main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other residential units in the Estate)"*

5(4)(j)(i) *"To employ at the Lessor's discretion a firm of Managing Agents and Chartered Accountants to manage the Estate and discharge all proper fees salaries and charges and expenses payable to such agents or such other person who may be managing the Estate including the cost of computing and collecting the rents and service charge in respect of Estate or any part thereof"*

5(4)(o) *"Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Estate"*

5(4)(p) *"To set aside (which setting aside shall for the purposes of the Fifth Schedule hereto be deemed an item of expenditure incurred by the Lessors) such sums of money (hereinafter called "the Fund") as the Lessors shall reasonably require to meet such future costs as the Lessors shall reasonably expect to incur of replacing repairing and maintaining and renewing those items which the Lessors have hereby covenanted to replace repair maintain or renew PROVIDED THAT any such sum so set aside shall be placed on deposit to accrue interest for the benefit of the Fund"*

14. The detailed service charge provisions are contained in the fifth schedule. Paragraph 1 contains various definitions, including:

"(1) (a) "Principal Total Expenditure" means the total expenditure incurred by the Lessors in any Accounting Period (less the Secondary Total Expenditure incurred in the same Accounting Period) in carrying out their obligations under Clause 5(4) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Estate including without prejudice to the generality of the foregoing (a) the cost of employing Managing agents (b) the cost of any Accountant or surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder and (c) an annual sum equivalent to the fair rent of any accommodation owned by the Lessors and provided by them rent free to any of the persons referred to in Clause 5(f) of this Lease and (d) interest charged upon Bank Accounts maintained for the purposes of the Management of the Building".

15. "*Secondary Total Expenditure*" relates to the communal heating and hot water system at the Estate. The service charge proportions for this

expenditure are slightly higher, as the flats in the gatehouses are not connected to the communal heating system.

16. There is a standard provision for the payment of an advance "*Interim Charge*", by two equal instalments, on 24 June and 25 December in each year. There is also provision for the Lessors to demand a "*Further Interim Charge*", if the Interim Charge is insufficient. The "*Accounting Period*" runs from 01 January to 31 December and a reconciliation takes place once the end of year accounts are produced. Paragraph 5 provides that any surplus "*...shall be carried forward by the Lessors and credited to the account of the Tenant in computing the Service Charge in succeeding Accounting Periods as hereinafter provided*".

The inspection and hearing

17. The full hearing took place on 12 and 13 April 2016. Prior to the hearing, on the morning of 12 April, the Tribunal inspected the Estate in the presence of the Applicant, Mrs Penny Mason (Flat 106), Ms Farha Paracha (Flat 14), Ms Harriet Holmes (counsel for the Respondent) and Mr Andrew Kafkaris of Bruton Street (Management) Limited ('BSML'), who manages the Estate.

18. The Tribunal walked around the Estate and inspected the exterior of the various blocks. External work was being undertaken to Block 2, which was scaffolded. The Tribunal did not inspect the interior of the Flat, which is sublet to tenants. The Applicant pointed out the external surfaces of the windows, which had been repaired in 2015.

19. The Applicant appeared in person at the hearing and was assisted by Mrs Mason and Ms Paracha. He was also accompanied by Mr Odin Hogsbro (Flat 87). The Respondent was represented by Ms Holmes, who was accompanied by Mr Kafakaris and Ms Holly King (trainee solicitor of Pemberton Greenish LLP).

20. The tribunal was supplied with a substantial hearing bundle that contained copies of the application, directions, lease, witness statements and relevant correspondence and documents. Immediately prior to the hearing the tribunal was supplied with a helpful skeleton argument from Ms Holmes. The start of the hearing was delayed to give the Applicant and the Tribunal an opportunity to consider this document.

21. At the start of the hearing, the Tribunal dealt with a preliminary issue raised in a letter from the Respondent's solicitors dated 07 April 2016. The Applicant had served witness statements for Mrs Mason and Ms Paracha but not for himself. The statements were served on 24 March 2016, approximately 3 weeks before the hearing and included various matters that were not raised in the Applicant's statement of case. The

Respondent's solicitors sought a direction that the Applicant's evidence be limited to those matters raised in his statement of case, pursuant to Rules 6 and 18 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ('the 2013 Rules'). Alternatively they sought an adjournment of the hearing, to consider the new matters raised in these statements.

22. The Applicant objected to the proposed restriction of his evidence in a letter to the Tribunal dated 11 April 2016. He pointed out that he was unrepresented and suggested that the Respondent's approach to the litigation was unreasonable. The Applicant also stated that he was unaware that he could be a witness. Had been made aware then he would have filed a statement that would have been along similar lines to those of his two witnesses. The Applicant also made the point that the statement served for the Respondent's witness, Mr Kafkaris, covered matters outside the Respondent's statement of case.

23. The Tribunal informed the parties that it would only determine the issues raised in the Applicant's statement of case and would not consider the new matters raised in the statements from Mrs Mason and Ms Paracha. However it did not feel it necessary to make a formal direction to this effect.

24. The purpose of statements of case is to identify the issues and to enable each party to understand the case being put by the opposing party. The witness statements should only address the issues in the statements of case. Paragraph 14 of the directions made express provision for service of witness statements. Although the Applicant was unrepresented, it should have been clear to him that he would need to produce a statement if he wished to give oral evidence at the hearing. If he was uncertain as to the meaning of paragraph 14 then he could have queried this with the Tribunal, either at the case management hearing or subsequently.

25. Had the Tribunal allowed the Applicant to rely on the new matters in the statements from Mrs Mason and Ms Paracha then this would have extended the scope of the dispute and necessitated an adjournment of the hearing. An adjournment would have delayed the hearing by several weeks, if not months. This would have been wholly contrary to the overriding objective, as set out in Rule 3 of the 2013 Rules.

26. Whilst addressing the Tribunal on the preliminary issue, the Applicant indicated that he wished to rely on an additional document. This was headed "THE REASONS WHY I BELIEVE MY SERVICE CHARGE DEMANDS ARE UNREASONABLE OVER THE PERIOD 2013-2015" and had not been disclosed prior to the hearing. The Tribunal directed the Applicant to provide a copy to Respondent's advisers at the end of the first day, so they could consider it overnight. The Tribunal would then consider its admissibility the following morning.

27. When the hearing resumed, Ms Holmes stated that there were only 9 lines in the document that were directly relevant to the issues to be determined. The tribunal decided to admit the document on the basis it would only consider those parts that relate to the Applicant's statement of case.

The issues

28. The Applicant's statement of case identified the following issues for determination by the Tribunal:

    (a) the payability and/or reasonableness of the sinking fund contribution for external repairs and redecoration at the Estate (£4,908.69);

    (b) the payability and/or reasonableness of the sinking fund contribution for the replacement of the communal windows at the Estate (£5,953.29);

    (c) the amount of the credit for the anticipated cost of replacing windows in the various flats at the Estate (-£5,281.30); and

    (d) the payability and/or reasonableness of a £60 administration charge, being a late payment fee.

    Items (a)-(c) were all included in an interim service charge demand dated 01 July 2015, covering the period 24 June to 24 December 2015. Item (d) was included in an interim service charge demand dated 04 December 2014, covering the period 24 December 2014 to 23 June 2015.

29. In his closing submissions, the Applicant withdrew his challenge to issue (c), being the window credit. This meant that the Tribunal were only required to determine issues (a), (b) and (d).

Facts

30. Mrs Mason, Ms Paracha and Mr Kafkaris all gave oral evidence and verified the contents of their witness statements. Mrs Mason and Ms Paracha were cross-examined at some length and there was also some questioning of Mr Kafkaris. It is unnecessary to recite the oral evidence in great detail, as the facts of the case are largely uncontentious. These are summarised below.

31. The Respondent purchased the freehold of the Estate in December 2001.

32. Until 2015, there had been no major works at the Estate for several years. Mrs Mason stated that the last decorative and cyclical maintenance was completed in 2004. Due to the lack of maintenance and repairs the condition of the blocks deteriorated. Various reports were obtained on the works required to the blocks, with a significant aspect being the repair or replacement of the original, single glazed, Crittall windows.

33. In 2007, Landers & Co Chartered Surveyors ('LCCS') undertook a general survey and found rusting, broken window panes and rotting wood on sills and top floor dormers. They recommended a programme of repairs with an estimated cost of approximately £1,000,000.

34. In 2010 Finnegans Associates Limited ('FAL') carried out a more detailed assessment, with a different emphasis. They looked at restoring the Estate to its former glory and concluded that the majority of windows and doors were at the end of their useful life. They recommended the wholesale replacement of the existing single glazed windows with new double glazed units. The total cost of the work recommended by FAL was approximately £5,000,000.

35. Some of the leaseholders opposed the extensive works recommended by FAL, particularly the replacement of the windows. In 2010, correspondence was sent to the Respondent addressing liability for the maintenance and repair of the flat windows. This pointed out that the Respondent is only responsible for the external surfaces of these windows.

36. In 2012, the Respondent obtained a report on the condition of the windows in Block 2 from Hunter Price Limited ('HPL'). They concluded that almost all the windows were in such poor condition that they had to be replaced with new double glazed units.

37. As a result of the challenges from some of the leaseholders, the Respondent commissioned a separate window survey from Johal Regan Chartered Surveyors ('JRCS') (also in 2012). JRCS assessed the windows in Block 2 and produced a schedule of dilapidations. They found that only 8% of the windows were in good condition and required no work. However 78% of the windows did not need replacing and could be repaired.

38. In 2013/14, the Applicant and other leaseholders corresponded with the Respondent's board of directors regarding contractual liability for the maintenance flat windows. The Applicant contends that the windows in the Flat are his sole responsibility, pursuant to clause 4(1) of his lease. The board indicated they had legal advice that they could proceed with replacing all windows. They also indicated an intention to seek a determination from the tribunal that the cost of replacing the flat windows could be recovered via the service charge account. The

Respondent did not proceed with that application and the board did not disclose the legal advice, despite requests from some of the leaseholders.

39. BSML took over the management of the Estate on 01 October 2013. It then reviewed the various professional reports and produced a booklet headed "*Ealing Village Windows*", which was circulated to all leaseholders. This summarised the findings of the original HPL report, which suggested that only 8% of the windows in Block 2 were in good working order. It also considered various options for repairing or replacing the windows, setting out the benefits and disadvantages of each. The window report itself, was not disclosed to leaseholders.

40. On 29 November 2013, the Applicant wrote to BSML reiterating that the leaseholders were responsible for the maintenance of the flat windows. This referred to a meeting with leaseholders that had taken place on 26 November 2013. The Applicant challenged the Respondent's contractual entitlement to establish a sinking fund for the replacement of the flat windows.

41. In 2014, BSML produced a 10-year business plan and strategy document, which was circulated to all leaseholders. This set out proposals to restore the Estate to good condition. This involved a programme of major works, with work being undertaken on a block by block basis. The plan was to start with Block 2 and to complete all five blocks within five years. The proposed major works included the external redecoration of the blocks, various structural repairs and the replacement of all 1,400 windows at the Estate, including the windows in each flat. The document also identified cyclical works to be undertaken each year.

42. The Respondent submitted a planning application to replace all windows in Block 2 in early 2014. At that stage, its professional advisers believed that any planning consent would be conditional on all windows being replaced at the same time, for uniformity of appearance. Planning consent was granted on 16 January 2015 but did not include any condition for the complete replacement of the windows. Rather the conservation officer preferred to retain the existing windows where possible to show the 'evolution' of the building and materials.

43. BSML served notice of intention on all leaseholders, for the proposed works to Block 2, on 06 January 2015. This was part of the statutory consultation procedure under section 20 of the 1985 Act. The notice gave brief details of the proposed works, which included recovering the main roof, repairs to the masonry and other external parts of the building, replacement, repairs and external decoration of the fenestration and external decoration to the building. At that stage the intention was to replace all of the windows in Block 2; both those in the common parts and those in the various flats.

44. The Applicant responded to the notice of intention in a letter dated 10 February 2015. He made numerous observations; many of which are not relevant to these proceedings. One relevant point is the contractual liability for the maintenance and repair of the flat windows. The Applicant argued that this is the responsibility of the individual leaseholders, rather than the Respondent. He also queried whether the Applicant had considered refurbishing the existing window frames; rather than replacing them.

45. BSML served statements of estimates on 21 April 2015. These were accompanied by a summary of the observations on the notices of intention, with responses. In relation to the observations on window replacement, BSML explained that this issue was under review by the Respondent's professional team and that a revised strategy was being planned.

46. The revised scheme for the windows was devised over a number of months and reflected the absence of any condition on the planning consent for complete replacement of the windows. No doubt it also reflected the repairing covenants in the leases.

47. The revised window scheme was circulated in March 2015. The replacement of the flat windows was taken out of the major works. Leaseholders could opt for the replacement or repair of their windows by the Respondent's contractors, depending on their condition. In that event, they would enter into a short written agreement with the Respondent to pay the replacement/repair costs. If leaseholders did not opt in then the Respondent could serve a repair notice on them, requiring them to replace/repair their windows (again depending on the condition).

48. The replacement of the windows in the common-ways is still part of the major works. There is no dispute that the Respondent is responsible for the maintenance and repair of these communal windows.

49. The works to Block 2 commenced in October 2015 and are well underway. The leaseholders were offered the opportunity to opt into the revised window scheme and many have accepted this offer. Approximately 50% of the flat windows are being replaced, 25% are being repaired by the Respondent's contractors with the leaseholders arranging their own repairs for the remaining 25%.

50. BSML wrote to the leaseholders of Blocks 1, 3, 4 and 5 on 21 December 2015, enclosing various documents. These included a brief window survey for each flat and a fact sheet providing full details of the revised window schemes and the options available to the leaseholders. The window surveys were prepared by property and construction consultants, Tuffin Ferraby Taylor ('TFT'), who also assessed the communal windows. The survey for the Flat revealed that all six

windows and the glazed door are in very poor condition. The anticipated cost of replacing the windows and door was £14,925 and the anticipated cost of repairing and redecorating these items was £8,942.

51. The windows in the Flat were repaired by the Applicant's contractors, Metali Windows, in 2015. It is not clear if this was before or after the TFT surveys. In any event, the exterior of window frames were in poor condition at the time of the tribunal's inspection.

52. BSML first started collecting contributions to the major works in December 2013. They sent interim service charge demands to the leaseholders covering the period 25 December 2013 to 23 June 2014 that included a separate sinking fund contribution headed "*Major Works*". The demand for the Flat was dated 19 December 2013 and sought an advance service charge of £1,429.51 and a sinking fund contribution of £5,539.52. At the hearing, Mr Kafkaris explained that the latter was to be applied towards the external works and window replacement.

53. Similar demands were issued to leaseholders in June and December 2014. The June demand for the Flat included another sinking fund contribution of £5,539.52, headed "*Major Works in Advance*". The December demand used the same heading but sought a lower contribution of £4,908.69.

54. The interim service charges, including the sinking fund contributions, were based on annual budgets that were circulated to leaseholders in December of each year. These were prepared by BSML and included figures for capital expenses ('CAPEX').

55. The total CAPEX figure in the original budget for the year commencing 01 January 2014 was £1,496,550. This covered various proposed repairs, including major works for Block 2. A sum of £150,000 was allocated for window replacement. The CAPEX figures were based on advice from a Quantity Surveyor and Crittall and were used to calculate the sinking fund contributions. The plan was to complete the works to all five blocks between 2014 and 2018, with the costs being spread across all five years. The work to Block 2 did not start until 2015 due to delay in obtaining the planning consent. BSML still hope to complete all 5 blocks by the end of 2018.

56. A revised 2014 budget was produced in June 2014. The total CAPEX figure had reduced to £1,325,284 but the window replacement figure remained at £150,000.

57. The budget for the year commencing 01 January 2015 included a total CAPEX figure of £1,326,134.05; of which £442,800 was allocated to

window replacement. The CAPEX section refers to "*Block X*", as the Respondent had not yet selected the next block for the major works. However the figures were based on the budget for Block 2.

58. A revised 2015 budget was subsequently produced with a reduced total CAPEX figure of £1,196,334.05. This included a credit of £934,800 for window replacement in Block 2 and Block X, arising from the revised scheme for window replacement/repairs. However there was an additional item in the CAPEX section being £805,000 for "*Works to Communal Windows and decorations*". The purpose of this item was to establish a sinking fund for the replacement of the communal windows in all five blocks. However, rather than starting afresh and collecting contributions over several years the Respondent notionally transferred the bulk of the sums already demanded (for the original window scheme) to a fund for the communal windows.

59. The budget for the year commencing 01 January 2016 included a total CAPEX figure of £775,000, with nothing allocated for window replacement.

60. When the revised window scheme was finalised BSLM issued credits for that element of the sinking fund contributions relating to window replacement. These were included in the June 2015 interim service charge demands. The demand for the Flat was dated 01 July 2015 and the credit was for £5,281.30. This was headed "*Credit for Windows Demanded to Date for Block 2 & Block x*". The credit related to the full replacement of windows in Block 2 and one other block that had not been identified at that time. This explains the reference to "*Block x*". The credit reduced the sum due for the June 2015 demand by £5,281.30.

61. The Applicant queried the amount of the credit in a letter dated 29 May 2015. His particular concern was that costs associated with scaffolding were not included in the credit and produced his own calculations, suggesting that the total credit should have been £6,262.17. BSML did not respond to these calculations but maintain that their figure is correct. They accept there was no credit for scaffolding costs but contend that scaffolding will still be required for the repair and decorative work to the exterior of the flat windows. In addition it is required for other elements of the external works.

Determination

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

Sinking fund contribution for external repairs and redecoration - £4,908.69

63. The Applicant contends that he should not have to pay this item in full. Rather his contribution should be limited to 20% of the contribution claimed (£981.74). He is opposed to the establishment of a sinking fund and argues that the leaseholders should pay for the major works in the year the works are undertaken; rather than spreading the cost over five years. The Applicant's concern is that he is being asked to pay a contribution now for future works to Blocks 1, 3, 4 and 5 that might not take place for five years, or at all. He contends that he should only pay 1/5th of the sum demanded i.e he should only pay for the current works to Block 2.

64. In brief, the Respondent's case is that major works are required at the Estate, the lease entitles it to establish a sinking fund and the contributions are reasonable, being based on a carefully prepared five-year plan and professional advice from a Quantity Surveyor. Ms Holmes referred the tribunal to section 19(2) of the 1985 Act. This concerns advance service charges and provides that *"...no greater amount than is reasonable is so payable,..."*. Ms Holmes also referred to the Upper Tribunal's decision in ***Carey-Morgan v De Walden [2013] UKUT 134(LC)***, which contemplated a two –stage 'test'; (a) is the landlord entitled to recover the disputed sums through the service charge; and (b) it is unreasonable to include those sums in the estimated on account service charges.

65. Ms Holmes made the following points on reasonableness:

(a) the external works are clearly necessary;

(b) the leaseholders benefit from spreading the cost of the works over five years, rather than facing one-off high bills;

(c) the Respondent cannot reasonably carry out the works without having accumulated some of the required funds and the sinking fund achieves this on a staged basis;

(d) the Respondent can explain the calculation of the sinking fund contributions; and

(e) the sums demanded are estimates based on professional advice, which is the best that can reasonably be done pre-tendering.

The tribunal's decision

66. The tribunal determines that the amount payable in respect of the sinking fund contribution for external repairs and redecoration is £4,908.69.

Reasons for the tribunal's decision

67. Clause 5(4)(p) of the lease specifically entitles the Respondent to establish a sinking fund. The purpose of such a fund is to spread the cost of capital expenditure, such as major works, over several years. It is entirely reasonable to fund the major works via the sinking fund and to spread the cost over five years. This is good estate management and balances the need for the works against the financial impact on the leaseholders. There is no basis for reducing the contribution by 80%, as this would defeat the purpose of the sinking fund.

68. There is no dispute that major external repairs and redecoration are required at the Estate. The Applicant did not challenge the scope of this work in his statement of case and there was no evidence to suggest that the scope is unreasonable. The works have already started and are programmed to finish in 2018.

69. The sinking fund contributions are advance service charges. They have been reasonably calculated, based on the estimated cost of the external works. The costings were based on professional advice and there was no evidence to suggest they were unreasonable.

70. The tribunal is satisfied that the sinking fund contributions are reasonable for all of the reasons advanced by Ms Holmes, which it adopts. The tribunal therefore determines that the contributions are payable in full. However, this does not prevent the Applicant from challenging the actual cost of the external works once completed. It would be open to him to make a further application to the tribunal at that time, if he felt it appropriate.

Sinking fund contribution for replacement of communal windows - £5,953.29

71. The Applicant contends that these contributions are unreasonable and should be disallowed in full, for the following reasons:

    (a) BSML failed to disclose the communal window survey from TFT;

    (b) BSML failed to obtain a second communal window survey, to check the figures put forward by TFT;

(c) the communal windows might not require replacement; and

(d) the leaseholders are being asked to pay for works that might not take place for 5 years, or at all; and

72. The Applicant was also unhappy that the Respondent had "*diverted*" sums demanded for the replacement of the flat windows into a sinking fund for the communal windows. In his oral submissions, he also suggested that the contributions should have been collected over several years.

73. In his statement of case, the Applicant alleged that "*No Section 20 Notice was issued for the charge for Communal Windows*". This point was not pursued at the hearing. In any event, the notice of intention for Block 2 included "*Replacement, repairs and external redecoration of fenestration*". At that stage it was intended to replace all windows in Block 2, including those in the common parts and the tenders were obtained on this basis. The scope of the fenestration works was reduced after the notice of intention was served but the notice (and the subsequent statement of estimates) covers the replacement of the communal windows in Block 2. The communal windows have not yet been replaced in the other blocks.

74. The Respondent contends that the contributions should be allowed in full. The submissions made by Ms Holmes, relating to the sinking fund for the external works, apply equally to the sinking fund for the replacement windows. Her responses to the specific points raised by the Applicant were:

(a) the Applicant has been supplied with a copy of the TFT window survey for the Flat and will be supplied with the survey for the communal windows, as part of the further section 20 consultation;

(b) the sinking fund contributions have been demanded based on professional advice, including the TFT window survey;

(c) there is no evidence to suggest the replacement of the communal windows is not required and there is clear evidence that the Respondent took professional advice in designing the programme of works and costings; and

(d) It appears the Applicant wants the works undertaken sooner rather than later. The Respondent has timetabled the works and balanced the need for speed against the financial impact on the leaseholders.

The tribunal's decision

75. The tribunal determines that the amount payable in respect of the sinking fund contribution for replacement of communal windows is £5,953.29.

Reasons for the tribunal's decision

76. The tribunal allows these contributions for the same reason it allowed the contributions for the external works. The Respondent is liable for the maintenance and repair of the communal windows. The lease entitles to it establish a sinking fund and it is reasonable to fund these works via the sinking fund.

77. Again the tribunal is satisfied that the contributions are reasonable for all of the reasons advanced by Ms Holmes, which it adopts. It is surprising that the communal window survey has not been disclosed thus far but this does not mean the contributions are unreasonable.

78. It is worth briefly commenting on responsibility for the flat windows and the notional transfer into the sinking fund for the communal windows. At the hearing, the tribunal made it clear that it would not determine liability for the maintenance of the flat windows. This did not form part of the Applicant's statement of case and the sums demanded for the flat windows have already been credited to his service charge account.

79. It appears from the lease that the Applicant is responsible for the internal surfaces of the windows and frames in the Flat together with the glass and the freeholder is responsible for the external surfaces. However the tribunal heard no legal argument on this issue and is not deciding liability. There may be arguments for saying that the replacement of all flat windows would be covered by the sweeping up clause (clause 5(4)(o)), or other clauses within the lease.

80. Having demanded funds for replacing the flat windows and then changed its plans, was it reasonable for the Respondent to notionally transfer the bulk of these funds into the communal window sinking fund? The answer is a resounding yes. Paragraph 5 of the fifth schedule to the lease provides that service charge surpluses should be carried forward and credited against future charges. It follows that the flat window credits could be applied to the service charges for 2015, including the sinking fund. The alternative was to build up the fund over several years to spread costs. This was unnecessary, given that funds had already been demanded for the flat windows. Reallocating the bulk of these funds to the communal windows was a sensible solution. It avoided the need to collect funds over several years and simplified the accounting.

81. Again, this determination does not prevent the Applicant from challenging the actual cost of the window replacement once completed. It would be open to him to make a further application to the tribunal at that time, if he felt it appropriate.

Administration charge/late payment fee - £60

82. This charge was demanded on 04 December 2014 and arises from the Applicant's failure to pay earlier service charges. He says he is not liable for this charge, as he was entitled to withhold his contributions to the replacement of the flat windows.

83. The Respondent's case is that the Applicant had been in arrears for some time and BSML were entitled to charge a fee for pursuing these arrears. The bundle included a service charge statement for the Flat dated 14 March 2016. As at that date the arrears stood at £13,839.77. The statement reveals that the Applicant had been in arrears since December 2013. The Applicant paid the sum of £10,911.11 to BSML on 11 April 2016, the day before the hearing started. This payment was made on a without prejudice basis and his covering letter stated that it did *"...not constitute an admission or acceptance that these sums are properly due"*.

84. Ms Holmes submitted that the administration charges was contractually recoverable under clause 3(9) of the lease, as it was incurred in contemplation of proceedings under section 146 of the Law of Property Act 1925.

The tribunal's decision

85. The tribunal determines that the amount payable in respect of the administration charge is £60.

Reasons for the tribunal's decision

86. The tribunal has not decided liability for the flat windows, for the reasons set out at paragraphs 78 and 79. This means it is unable to say whether the Applicant was entitled to withhold his contributions to the replacement of these windows. However there were other service charge arrears and it was reasonable for BSML to pursue these arrears. They are entitled to charge a fee for this and sum claimed is reasonable. Further the tribunal accepts that the charge is recoverable under clause 3(9) of the lease.

Application under s.20C and refund of fees

87. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application and hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal refuses this application.

88. In the application form the Applicant applied for an order under section 20C of the 1985 Act, which he repeated at the end of the hearing. Having heard the submissions from the parties and taking into account the determinations above, the tribunal refuses this application.

89. The Applicant has been wholly unsuccessful and the disputed service charges have been allowed in full, as has the disputed administration charge. The Respondent was entirely justified in contesting the application, which appeared to stem from the Applicant's misunderstanding of his lease. It would not be just or equitable for the Respondent to pay any part of the tribunal fees. Further it would not be just or equitable for the Respondent, which is a company is controlled by the leaseholders, to bear its own legal costs of these proceedings. Rather it should be able to recover these costs from the service charge account, provided there is contractual provision for this in the leases.

Name: Tribunal Judge Donegan **Date:** 29 May 2016

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

RIGHTS OF APPEAL

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

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

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

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

(3) For this purpose -

(a) "costs" includes overheads, and

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

Section 19

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

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

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

and the amount payable shall be limited accordingly.

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

Section 27A

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

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

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

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

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

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

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

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

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

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

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

Section 20C

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

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

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

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

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

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

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

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

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes –

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it –

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.