FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AJ/LBC/2015/0124** **LON/00AJ/LSC/2015/0492**
Property	:	**Flat 1, 27 Blakesley Avenue, Ealing, London, W5 2DN**
Applicant	:	**Blakesley Property Management Ltd**
Representative	:	**Mr David Marshall**
Respondents	:	**Mr Kazi Shahid and Ms Mariam Ali**
Representative	:	**Mr Kazi Shahid**
Type of application	:	**1. Breach of Covenant** **2. Determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Robert Latham** **Mr Michael Taylor FRICS**
Date and Venue	:	**7 April 2016 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**9 May 2016**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, no breach of the lease has occurred.

(2) The Tribunal determines that the sum of £509.36 is payable by the Respondents in respect of the service charges for the service charge years 2013 and 2015.

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

The Applications

1. The Tribunal has been required to determine two applications issued by Blakesley Property Management Limited ("BPML"):

(i) LON/00AJ/LBC/2015/0124: This application was issued on 12 November 2015. BPML seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent tenants are in breach of their lease in respect of Flat 1, 27 Blakesley Avenue, Ealing, London W5 2DN ("the flat") in that they have (i) constructed an unauthorised extension or failed to pay the costs of a licence; (ii) failed to keep an area adjacent to the communal entrance in a good state of repair and condition; and (iii) failed to provide evidence of insurance in joint names of lessor and lessee.

(ii) LON/00AJ/LSC/2015/0492: This application was issued on 24 November 2015. BPML seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondent in respect of the service charge years 2013 and 2015. The sums in dispute are modest, namely £714.56. However, there is a further issue as to whether the landlord is entitled to levy a monthly contribution of £63 towards a reserve fund for future planned maintenance.

2. 27 Blakesley Avenue ("the property") consists of four flats. There are two parties to this application, namely BPML ("the Applicant") and Mr Kazi Shahid and Ms Mariam Ali ("the Respondents"). BPML is the landlord. The Respondents are the lessees of Flat 1, the ground floor flat.

3. There are three other flats directly affected by this dispute, namely Flat 4, in which the lease is held by the Respondents and Flats 2 and 3 in which the leases are held by Ms Mary McFadden. Mr Shahid and Ms Ali, his partner, live in Flat 1. They sublet Flat 4. This application does not relate to Flat 4. Mr Shahid works in the City and has qualifications in both accountancy and the law.

4. BPML is a limited company with three shares. Ms McFadden holds the two shares linked to Flats 2 and 3, whilst Mr Shahid and Ms Ali jointly hold one share in respect of Flat 4. No share has been held in respect of Flat 1. This has been the seed of the dispute that we are asked to determine. We remind ourselves that BPML is a separate legal entity from Ms McFadden, its controlling shareholder and sole director.

5. Ms McFadden sublets both her flats. She has not been willing to provide her address to the Respondents. We were told that she lives in Fulham. Mr David Marshall, her partner, lives in Reading. He is a surveyor who has assisted Ms McFadden to manage the property.

6. Ms McFadden has required the Respondents to communicate with BPML at an address in Cheshire, namely 11 Annis Road, Alderley Edge, SK9 7PE. The records relating to the Applicant Company suggest that the proposed registered office for the Company was Flat D, 27 Blakesley Avenue (see p.186). Ms McFadden has also used Flat 2, 27 Blakesley Avenue as the address for the Company (see p.240), albeit that this does not seem to have been either the registered address for the Company or an address at which she has resided. This is the address given for the Applicant in the two application forms.

7. On 12 January 2016, the Tribunal gave Directions. As before us, Mr Shahid appeared on behalf of himself and Ms Ali. Ms McFadden appeared on behalf of BPML assisted by Mr Marshall.

8. At the Case Management Conference, Mr Shahid indicated a willingness to resort to mediation. Mr Marshall and Ms McFadden did not agree to this on behalf of BPML. The Procedural Judge referred the parties to the "somewhat loose service charge provisions" in the lease. A mediator is able to explore much wider outcomes for the parties than this Tribunal which can only determine the issues raised in the two applications. Parts of the property are in a state of substantial disrepair. The lease does not provide a satisfactory framework for the landlord to repair, maintain and insure the property. The lease does not make provision for the employment of managing agents. The Respondent tenants do not believe that the Ms McFadden has acted in the best interests of the Company. Constant complaints have been about the lack of transparency in the administration of the service charge account and the refusal of the Applicant to agree to the appointment of an independent surveyor or accountant to determine the issues in dispute between the parties. Both parties have a common interest in ensuring that the property is put into a proper state of repair and that a mechanism is then in place to ensure that the property is maintained in that condition.

9. The procedural judge gave directions to enable this Tribunal to determine the limited issues raised in these two applications. Pursuant to these Directions,

(i) The Applicant has disclosed documents relevant to the service charge dispute (see p.302).

(ii) Respondents have filed their Statement of Case (at p.51-60 of the Bundle). There is a Chronology at p.56-61 which does not seem to be seriously in dispute. The Respondents have provided a schedule responding to the service charges in dispute (at p.62). In the light of the documents which have been disclosed, the Respondents now concede that a number of the service charges are payable.

(iii) The Applicant has served their Statement in Response (at p.64-75).

(iv) The Respondents have filed Supplementary Submissions (at p.76-83).

(v) The Applicant filed a Response to the Respondents' Supplementary Submissions (at p.84-5).

(vi) The Applicant has filed a Bundle of Documents which extends to 334 pages.

(vii) At the hearing, Mr Shahid provided a Bundle of the Documents, totalling 104 pages, which includes a number of the documents which are summarised in the Chronology. References in this decision to the Respondents' Bundle are pre-fixed by the letter "E.___").

10. At the hearing, both parties elaborated upon their statements of case. The Respondents adduced evidence from Mr Parviz Ghahramani the former tenant of Flat 4, and a former shareholder and director. No witness statement had been served. We were told that this was because Mr Ghahramani, a doctor, now resides in the USA. We required the Respondents to provide a brief summary of his evidence. We found Mr Ghahramani to be a helpful and independent witness who has provided us with a firm basis against which to assess the background to this dispute.

11. We have considered both Bundles of Documents filed, having particular regard to the documents to which we were referred by the parties. The bundles are not in chronological order and do not include a number of relevant documents.

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

The Inspection

13. We inspected the property prior to the hearing. Mr Marshall, Ms McFadden and Mr Shahid were present.

14. The property is a substantial three storey detached Edwardian property in a conservation area. Blakesley Avenue runs north to south, descending the hill from St Benedict's Church. This is a very attractive and desirable area, the properties being situated on a wide road with large front and rear gardens. The properties have red brick elevations at the front with bold stucco trimmings and classic decorative patterns. Roofs are covered in tiles and incorporate dormer windows. Some of the properties remain in single occupation, whilst others have been converted into flats. The subject property is in a significantly worse condition than the other properties in the street which are well maintained. This reflects a lack of maintenance over many years.

15. There are four flats. Flat 1 is on the ground floor, Flats 2 and 3 on the first floor and Flat 4 on the second floor. Repointing works are required to the walls and the chimney stacks. The guttering was in a poor condition. The external decorations at the first floor level are in extremely poor condition. The windows are rotting and the paint work is badly flaking. Flats 2 and 3 are on this floor. Internally the inspection involved the common entrance hall and staircase leading to Flats 2, 3 and 4, the rear extension to Flat 1 and the bedroom ceiling in Flat 3.

16. Flat 1 has sole use of front and rear gardens and of the original entrance door at the front of the property. The pathway and part of the forecourt shaded green on the lease plan are included in the demise of Flat 1. The other flats have a right of passage over this green shaded area which leads to the communal entrance to Flats 2, 3 and 4 located at ground floor level within the flank wall. A dustbin area is also marked on the lease plan. There are paving stones leading to the side entrance door (see photo at p.315). There are wooden planks leading on to the dustbin area. All tenants are able to wheel their bins to the front pavement for collection of waste by the local authority. This area has been more cluttered than when we inspected (see photos at p.313-317 and 318-320 which were taken in December 2015 and February 2016). There are gas meters on the exterior wall which serve all the flats (see photos at p.315).

17. The ground floor entrance hall serving Flats 2, 3 and 4 which is edged in blue on the lease plan is also included in the demise of Flat 1. The electrical meters are situated in this area. There were a number of cupboards in which the Respondents store tins of paint.

18. The Respondents have erected a substantial extension to the rear of their ground floor flat. Planning permission was obtained for this development which has been well constructed. In evidence, Mr Shahid

told us that he had spent some £235,000 upgrading and maintaining his flat. We were shown the modifications which the Respondents had made at the request of Ms McFadden. The height had been reduced to below the underside of the floor joists for Flats 2 and 3. A maintenance walkway had been introduced. Modifications had also been made widening the door from the original rear extension onto the garden.

19. There is an outhouse at the rear of the property which is part of the demise of Flat 1. This has been affected by subsidence, the cause being a tree which has recently been cut down. Part of the garden wall was in a poor condition. We were told that this wall belonged to the demise of the neighbour. The Respondents were responsible for the wall on the opposite side of the garden which was in a much better condition.

20. We were shown the rear room in Flat 3 and the ceiling where there had been a problem of water penetration apparently caused by a leak from the dormer window within Flat 4. Externally it was apparent that the condition of Flats 2 and 3 were in a substantially poorer condition than Flats 1 and 4. The external decorations to Flats 1 and 4 were in good condition; those to Flats 2 and 3 were badly neglected. They contrasted badly with the other properties in this attractive and desirable location.

The Lease

21. The lease for the flat is at p.28-50. The Procedural Judge suggested that the lease plan (at p.44) did not appear to coincide with the parties' understanding of the demise. The Land Registry plan is at p.155. The extent of the demise is described in the Schedule to the lease. It includes the ground floor entrance area. It also includes the front and the rear gardens. The lease reserves to the landlord and other parties for the time being entitled thereto, a right of way along the communal hallway and the strip along the side of the property shaded green. The lease plan includes an area marked "dustbin area". The easement giving the right of way extends beyond the side entrance door to the area where the dustbins are kept. There is no reference in the lease to the landlord reserving the right for other tenants to store dustbins in this area.

22. The demise includes the internal and external walls of the flat. By Clause 3(c), the tenant covenants to keep in substantial repair and condition the flat and all other demised premises including pathways and passageways. By Clause 3(d), the tenant covenants to paint the external woodwork of the flat every three years. Thus the tenant is obliged to keep in repair and decorate the windows to the flat. By Clause 3(c), the tenant covenants to keep the forecourt properly maintained.

23. By Clause 4(d), the landlord covenants to maintain and keep in substantial repair and condition the front path and forecourt so far as

they are not included in the demise of any of the flats. In the current case, the front garden and pathway is included in the demise of Flat 1. The obligation to keep it in substantial repair and condition therefore falls on the Respondents.

24. By Clause 3(j), the tenant covenants not to construct or erect any new buildings without the prior written consent of the lessor. Section 19(2) of the Landlord and Tenant Act 1927 makes this covenant in respect of improvements subject to the proviso that such licence or consent is not to be unreasonably withheld. An unreasonable refusal of consent will entitle the tenant either to proceed with the improvement without further asking for consent or seeking a declaration from the court that the landlord has unreasonably withheld his consent (see [11.263] of Woodfall "Landlord and Tenant").

25. By Clause 3(l), the tenant covenants to insure the flat in the joint names of the tenant and the landlord. The tenant further covenants to produce on demand to the landlord the insurance policy.

26. By Clause 4(d), the landlord covenants to maintain and repair the main structure of the property including the foundations, roof, gutters and rainwater pipes.

27. The lease does not provide any proper mechanism for the maintenance of service charge accounts, for the payment of an advance service charge or for a reserve fund. By Clause 3(g), the tenant covenants to contribute 31.5% of the service charge expenditure.

28. The landlord's covenant to repair in Clause 4(d) is "subject to the prior payment by the Lessee of the appropriate contribution as specified in Clause 3(g)". The Tribunal cannot accept the Applicant's argument that this gives it the right to collect an advance service charge or establish a reserve fund. It is not necessary for this Tribunal to determine whether payment by the tenant is a condition precedent to the performance by the landlord of his obligation to repair, or whether the two covenants are independent. If estimates have been obtained for major works, it is arguable that the landlord may be entitled to insist on advance payment by the tenant of his 31.5% contribution. However, in normal circumstances, the tenant's contribution can only be determined after the expenditure has been incurred. This is not a satisfactory situation for the landlord.

29. The Respondent refers us to Clause 5(b) of the lease whereby the landlord's surveyor may determine any dispute. However, this relates to disputes between two tenants of the landlord. It does not extend to a dispute between the tenant and the landlord. It is a pre-condition that both tenants agree to be bound by the determination.

30. We cannot complete our consideration of the lease without highlighting its failure to make adequate provision for the repair, maintenance and insurance of the subject property:

(i) The insurance provisions are not satisfactory. The landlord should be responsible for insuring the whole property, passing the cost of the same to the tenants.

(ii) External decorations of this fine Edwardian property should be the responsibility of the landlord, rather than that of individual tenants.

(iii) There is no provision for the payment of an advance service charge.

(iv) There is no ability to collect a reserve fund.

(v) There is no express provision permitting the landlord to employ managing agents.

(vi) There is no express machinery for the maintenance of service charge accounts. This should include budgeting estimate expenditure, the collection of an advance service charge, the maintenance and certification of service charge accounts; the reconciliation between estimated and actual expenditure in any service charge year.

(vii) The lease makes no adequate provision for the other lessees to store their rubbish bins in the area demised to the Respondents.

31. Were all the tenants of the four flats to have shares in the Applicant Company, they would have a common interest in agreeing to a variation in the lease to ensure that it does make adequate provision for the repair, maintenance and insurance of the property. The current lease is unsatisfactory for all parties. However, it seems to this Tribunal that it is the landlord who is in the most invidious position.

The Background

32. The Respondents derive their leasehold interest in the flat from a lease dated 12 July 1979 (at p.28). The lease is for a term of 99 years from 24 June 1979. On 30 July 2004, the lease was extended to a term of 158 years from 24 June 1979 (p.46). On 14 January 2005, the Respondents acquired the lease for £460,000. Their interest was registered on 3 February 2005 (see p.153).

33. Ms McFadden acquired the leasehold interests in Flat 2 in 2003, and Flat 3 in 2004. Shortly thereafter, Mr Ghahramani acquired Flat 4.

34. In about 2005, the original landlords decided to sell their freehold interest. The tenants exercised their right to first refusal. BPML was established to enable the tenants to achieve this objective. The original intention was that each tenant should have one share in the company. The tenants were unable to reach agreement as to their respective contributions towards the purchase of the freehold. The Respondents argued that their share should be substantially less than 25% as they had extended their lease

35. BPML was established on 22 September 2005 (see p.184). Because the tenants could not reach agreement, Ms McFadden and Mr Ghahramani were each registered as holding two shares. On 1 November 2015, Mr Shahid wrote to Mr Ghahramani proposing an escrow account mechanism or an independent valuer to resolve the dispute about the Respondent's contribution to the purchase price (p.219). Mr Ghahramani wanted a prompt resolution and the purchase proceeded without the involvement of the Respondents. On 8 December 2006, BPML was registered as the freehold owner, having acquired it for £23,500 (p.149). On 18 July 2011, BPML granted Ms McFadden and Mr Ghahramani 999 year leases in respect of their flats (p.150).

36. On 28 February 2006, Mr Shahid sent his plans for the extension to Mr Ghahramani and Ms McFadden (see E95). On 22 January 2007, he left details for them at the property (see E93). Neither of them was living at the property. On 16 February, Mr Ghahramani insisted that Mr Shahid serve the application on the Applicant Company in Cheshire. The plans for the extension, drawn up by an architect, are at E5 to E9.

37. On 21 February 2007, Mr Shahid submitted a planning application to the local authority. He had previously given notice of his application to Ms McFadden and Mr Ghahramani (see E93). On 16 July 2007, Ealing LBC granted planning permission (see E1).

38. In about February 2007, Mr Shahid applied to the Applicant for consent to construct the extension. Not all the relevant papers are before the Tribunal. However, it is apparent that on 20 March 2007, the Applicant raised a number of queries which Mr Shahid addressed on 27 March 2007 (see E61). Thereafter, there were a number of meetings. It is apparent that the issue was not whether consent should be granted, but the size of a one off payment that should be made to the Applicant Company. The Applicant also required Mr Shahid to make various modifications to his plans which he agreed to accommodate. On 21 May 2017, Mr Shahid agreed to make a one off payment to the Applicant (see E47). In December 2007, Mr Ghahramani and Mr Shahid met in a pub and a figure of £5,000 was agreed. In 2008, works started on the extension.

39. On 7 May 2008, Hodders, Mr Shahid's Solicitors, wrote to the Applicant seeking confirmation of what had been agreed, namely the

payment of £5,000 and a number of further conditions (see p.230). However, it would seem that Ms McFadden was unwilling to accept this (see E12). On 26 June 2008, Ms McFadden wrote a letter on behalf of the Applicant (at p.232). She was only willing to "provisionally agree to the extension". The Applicant was now looking for a payment of £10,000, rather than £5,000. On 8 August 2008, Mr Shahid complained that the Ms McFadden was "moving the goal posts yet again". By this stage the works were well in hand.

40. Mr Ghahramani was finding his position increasingly difficult. On 7 March 2011, he resigned as a director (see p.188). On 12 August 2011, Ms McFadden required him to surrender one of his shares, namely the share that related to Flat 1 (p.190). Thereafter. Ms McFadden held two of the three shares and was the sole director. On 1 April 2014, Mr Ghahramani sold his leasehold interest to the Respondents for £450,000. On 8 April, their interest was registered. There was subsequent litigation between the Applicant and Mr Ghahramani in the Central London County Court which was settled by a Consent Order under which Mr Ghahramani agreed to pay the modest sum of £200.

41. Mr Shahid has suggested that the Applicant should have transferred the fourth share to him as lessee of Flat 1. We are satisfied that the Applicant was not obliged to do so. Whilst it is a requirement of the Articles of Association that any shareholder should be a lessee (see Article 1(b) at p.165), it is not a requirement that all lessees should be shareholders. Were the Respondents to be granted a share in respect of Flat 1, they would be obliged to make some financial contribution for the share of the freehold interest that they would be acquiring.

42. The practical situation has become the more difficult. The Respondents hold just one of the three shares in a Company controlled and run by Ms McFadden. They live in the Flat 1 and let out Flat 4. Ms McFadden owns Flats 2 and 3 both of which are let out. Mr Shahid does not consider that Ms McFadden is managing the Applicant Company in the best interest of the shareholders. That is not a matter for this Tribunal.

43. Mr Shahid has suggested on a number of occasions that an independent surveyor should be appointed to determine the issues between the parties. He is wrong in suggesting that the lease makes provision for this. Clause 5(b) rather relates to the resolution of disputes between two tenants.

44. On 7th September 2015, Ms McFadden sent a pre-action letter to the Respondents on behalf of the Applicant (p.287-8). She alleges seven breaches of covenant. This includes a complaint relating to the construction of the single storey extension without consent.

LON/00AJ/LBC/2015/0124: Breach of Covenant

45. Strictly, all this Tribunal is asked to determine by Section 168 of the 2002 Act is whether the Respondents have breached a term of their lease. It is not for this Tribunal to consider whether another Court might grant relief from forfeiture or whether there has been any waiver of a breach.

46. Neither is it not necessary for this Tribunal to decide whether its jurisdiction to make a determination that a breach of covenant has occurred is discretionary, in that we may refuse a determination if satisfied that a breach has been remedied by the date of the hearing or is being pursued by the landlord for ulterior motives. We understand that this issue is pending before the Upper Tribunal.

(i) Construction of unauthorised extension or failure to pay costs of a licence

47. It is common ground that the Respondents have erected the extension without the written consent of the landlord as required by Clause 3(j) of their lease. However, the Tribunal is satisfied that the Respondents sought the landlord's consent in about February 2007. This was confirmed by Mr Ghahramani. We are further satisfied that the Applicant has unreasonably withheld its consent. That unreasonable refusal of consent has entitled the Respondents to proceed with the improvement. There is thus no breach of covenant.

48. The Respondents instructed competent architects to design the extension. They sought and obtained planning permission. They made a number of modifications to address concerns raised by the Applicant. The extension has been constructed to a high standard. It was completed in about 2008.

49. In his evidence, Mr Marshall suggested that the Applicant was entitled to charge a premium in respect of the extension to distribute to its shareholders. The Tribunal cannot accept this. The purpose of the covenant is to protect the landlord from the tenant affecting alterations that damage the property interest of the landlord. Where there is such pecuniary loss, the proper course is for the landlord to seek a compensatory payment. There is no evidence that this extension has caused any pecuniary loss to the landlord. Alternatively, it is open to a landlord to seek to be reimbursed for their reasonable cost of processing the request for written consent. However, in this case, there is no evidence that the Applicant incurred any costs in failing to either grant or refuse consent. The Applicant signally failed to put the matter in the hands of competent professionals. Mr Ghahramani described how the process seemed to go on forever.

(ii) Failure to keep an area adjacent to the communal area in a good state of repair and condition

50. The Applicant complains that the Respondents failed to keep the communal areas in a good state of repair and condition and relies on Clauses 3(c) and 3(s) of the lease. The Applicant notes that Mr Shahid had complained about the state of the dustbin area in his e-mail dated 30 July 2015 (at p.277).

51. The Tribunal is satisfied that the front and rear gardens and the area to the side of the property are all demised to the Respondents and it is their responsibility to keep it in a good state of repair and condition. We are further satisfied that the Respondents have kept the pathway leading to the side entrance hall in an adequate condition. We have regard to the general condition of the property. The Respondents have maintained Flats 1 and 4 in a much better condition, than either Ms McFadden in respect of Flats 2 and 3, or the Applicant in respect of the structure, roof, and rainwater pipes.

52. The situation in respect of dustbin area is more complex. Normally, this would be a common part in the possession of the landlord in respect of which the landlord would be entitled to pass on the cost of maintaining the same through the service charge. In the current case, this area is demised to the Respondents and they are obliged by Clauses 3(c) and 3(s) to maintain it. However, the lease does not reserve the right to the landlord for an easement in respect of the storage and disposal of rubbish. The Respondents have granted a licence for the tenants to use this area for that purpose; it would be open to them to withdraw this licence at any time. We are not prepared to imply any obligation on the Respondents to clean and maintain this dustbin area.

53. The Tribunal therefore finds that there is no breach. However, it is apparent that the parties have been unclear as to how the lease should be interpreted. We hope that we have now provided that clarification. The responsibility for the cleansing and maintenance of the bin storage area is an issue that the parties need to resolve. If the standard of maintenance of the property improves, the Tribunal would expect to see a similar improvement in the maintenance of the strip of land to the side of the property.

(iii) Failure to provide evidence of insurance in joint names of lessor and lessee

54. It is common ground that Clause 3(l) requires the Respondents to insure to insure the flat in the joint names of the tenant and the landlord. The tenant further covenants to produce on demand to the landlord the insurance policy. The Respondents have produced the current policy which is at p.63. Mr Shahid stated that he has always taken out an insurance policy in these terms. We accept his evidence.

55. The Applicant further alleges that the Respondents failed to produce a copy of the policy on demand. They rely on requests dated 13 January 2013 and 2 February 2015 (at p.266). The Tribunal were not referred to the first demand made more than three years ago. Mr Shahid said that he did not respond to the 2015 e-mail as he thought that the Applicant wanted to make a claim under the policy. Given the lack of transparency in the dealings between landlord and tenant in this case, we are not willing to find that this constituted a breach of covenant. If it was a breach, it would be at the lowest end of the scale.

56. The parties have recognised that it would be more sensible for the landlord to insure the whole building and pass on the cost to the four tenants (see p.196). We regret that the parties have been unable to agree a mechanism for implementing this.

LON/00AJ/LSC/2015/0492: Service Charge Demands

57. The service charges levied by the landlord have been low, reflecting the low level of services that have been provided. The Respondents set out their case in respect of the service charge demands in a schedule (at p.62). The Tribunal is satisfied that there has been a lack of transparency in the manner in which the service charge account has been operated. The Respondents have readily conceded that a number of the service charge items are payable, now that the relevant documentation has been disclosed.

(i) Invoice 5 (10.6.13 at p.89): Repairs to Entrance Porch Roof - £220.50 claimed; £173.25 allowed.

58. This invoice relates to replacement works to the porch to the communal side door. It relates to work which was executed in 2010. A breakdown of the invoice at p.126. This includes travelling time of £300 and access equipment of £100. Further particulars are provided at p.115. The work was carried out by Mr Marshall. He did not charge for his time. However he required "£100 for access equipment and a £300 contribution for his travelling costs and replacement tools". The initial demand which was issued on 10 June 2013 had no summary of Rights and Obligations. The Applicant therefore re-issued it on 16 December 2013 with the appropriate Summary of Rights and Obligations a copy of which is to be found at p.111-2.

59. The Tribunal consider the claim for travelling costs and replacement tools to be excessive. We therefore reduce the charge from £700 to £550. The Respondents' 31.5% share is reduced from £220.50 to £173.25.

(ii) Invoice 10 (22.7.13 at p.91): Repairs to communal hall lights - £64.58 claimed; £64.58 allowed.

60. The Respondents initially disputed this because no invoice had been provided. This is now admitted by the Respondents. We note that on 23 July 2013, the Respondents had offered to pay (see p.242). We find that the sum of £64.58 is payable.

(iii) Sample Invoice 8 (1.7.13 at p.90) Monthly service charge towards future maintenance: £63pm claimed; Nil allowed.

61. The Applicant has sought to demand a monthly charge of £63 towards future maintenance. There is much merit in a landlord seeking to establish such a reserve fund. However, there is no provision for this in the lease. We must therefore disallow this item. We note that on 15 August 2013, Mr Shahid notified the Applicant that the lease makes no provision for a sinking fund (p.243).

(iv) Invoice 27 (21.1.15 at p.98): Roof tiling - £157.50 claimed; £157.50 allowed.

62. This invoice relates to the replacement of damaged and missing tiles to the dormer window. Mr Shahid disputed it on the ground that no invoices had previously been provided, inflated costs and no additional quotes provided. An invoice from L.Doe & Sons, dated 14 January 2015, is at p.140. On 11 January 2015, Mr Shahid had suggested the appointment of an independent person to resolve this (at p.264).

63. The Tribunal is satisfied that the charge is reasonable, particularly given the practical difficulties of gaining access to the dormer window. We allow this sum in full; £157.50 is payable.

(v) Invoice 34 (2.7.15 at p.104): Alter rainwater pipe from dormer window roof - £60.48 claimed; £60.48 allowed.

64. The Respondents initially disputed this on the basis that they did not know to what this related. Having seen the invoice, this is now admitted. £60.48 is payable.

(vi) Invoice 36 (2.7.15 at p.105): maintenance to entrance hall ceiling: £31.50 claimed; £31.50 allowed.

65. At the hearing, the Respondents indicated that that this is no longer disputed. £31.50 payable.

(vii) Invoice 44 (8.9.15 at p.109): Repair to ceiling after leak: £157.50 claimed; Nil allowed.

66. This was repair to the ceiling in Flat 3 caused by a leak from the dormer window outside Flat 4. The obligation to repair the ceiling would normally be the obligation of the tenant of Flat 3. The landlord would only be liable if this was consequential damages arising from her failure to keep the dormer window in a proper state of repair. If the landlord was at fault, in failing to keep the roof in a proper state of repair, this is

not a repair that should be passed on through the service charge. Alternatively, if this was an unforeseeable flood, this was a matter for an insurance claim. This would normally be a claim under the tenant's household contents insurance policy. This charge is therefore disallowed.

(viii) Invoice 47 (8.9.15 at p.110): Replacement of communal light fitting - £22.05 claimed; £22.05 allowed.

67. This was a pre-payment of estimated costs for replacing the communal ground floor hall light fitting, for works in respect of which a quotation had been obtained. The Respondents dispute this on grounds that this should have been subject to an insurance claim. Mr Shahid complained that this was caused by the tenant in Flat 2 who had allowed their bath to overflow. The work was completed some 4-5 weeks before the hearing.

68. The Tribunal accepts that the landlord was entitled to demand payment before the works were executed. This work fell within the landlord's obligation to repair. The total cost of £70 was too small for an insurance claim. It was not cost effective to pursue the tenant for any alleged negligence. We determine that this charge is allowable in full. £22.05 is payable.

(xi) Conclusion on Service Charges

69. The sums in dispute total £714.11 together with the monthly contribution of £63 towards future maintenance. We reduce the sum claimed from £714 to £509.36. We disallow the monthly contribution towards the service charge.

Application under s.20C and refund of fees

70. 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 hearing pursuant to Rule 13(2) of the The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). The Applicant has paid a total of £180. Having regard to our findings, we might have been minded to order a refund of 50% of the fees. We have found that a number of service charges are payable. However, we are concerned that BPML declined the opportunity of mediation. This is a case where both parties could have achieved much more through mediation than though a determination by this Tribunal. This is a case which could and should have settled. In these circumstances we do not make any order for the refund of fees.

71. The Respondents applied for an order under section 20C of the 1985 Act. Mr Marshall indicated that the landlord accepted that the lease made no provision for it to pass on the costs of the proceedings through the service charge. Nonetheless, taking into account the determinations

above, the Tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

72. Both parties sought to make their opponent liable for the legal costs and other expenses that they have incurred in connection with these applications. We reminded the parties that this tribunal remains a no costs jurisdiction. There is a very high threshold that a party must meet before a tribunal will make an order under Rule 13(1)(b) of the Tribunal Rules on grounds of the unreasonable behaviour of a party in bringing, defending or conduction proceedings. In the light of this indication, neither party proceeded with their applications.

The Next Steps

73. This Tribunal only has jurisdiction to determine the limited issues raised in these applications. Parts of the property are in a state of substantial disrepair. The lease does not provide a satisfactory framework for landlord to repair, maintain and insurance the property. The Respondents do not have confidence in the manner in which the property is being managed. The lease does not make provision for the employment of managing agents. Both parties have a common interest in ensuring that the property is managed by professional agents and is put in a proper state of repair reflecting its very attractive and desirable location.

74. This Tribunal has no jurisdiction in respect of the manner in which the Applicant Company is structured or how the shares are allocated. Mr Shahid would like to be allocated a share in respect of Flat 1 as was contemplated when BPML was established. This is a matter for Ms McFadden. We note that the current arrangements may not be in her interests. We have noted that the defects in the lease are likely to cause the greater difficulties for BPML. The landlord must comply with its obligations under the lease. In so far as it is unable to pass on the costs of complying with these obligations through the service charge, it must bear the costs itself.

75. Both parties are advised to seek legal advice on the options open to them. It is still open to them to make use of the mediation services offered by the Tribunal. A mediator is in the best position to assist the parties to identify the points on which all parties can agree and on outcomes that are acceptable to all concerned.

Judge Robert Latham

9 May 2016

Appendix of relevant legislation

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.

Landlord and Tenant Act 1985

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.

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

13. (1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b)if a person has acted unreasonably in bringing, defending or conducting proceedings in ... a residential property case.....

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.