12035

**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | CHI/29UM/LSC/2015/0074<br>CHI/29UM/LDC/2015/0054<br>CHI/29UM/LAC/2016/0004<br>CHI/29UM/LSC/2016/0017<br>CHI/29UM/LBC/2016/0003<br>( last 4 cross applications by the Respondent) |
| **Property** | : | Flat B, 301 High Street,<br>Sheerness, Kent ME12 1UT |
| **Applicant** | : | Catherine Mary Willens |
| **Respondent** | : | Influential Consultants Limited |
| **Representative** | : | Mr J F Thompson |
| **Type of Application** | : | Service charges, Dispensation from Consultation, Administration Charges, Breach of Covenant |
| **Tribunal Member(s)** | : | Judge Tildesley OBE<br>Mr R Athow FRICS MIRPM<br>Mrs L Farrier |
| **Date and Venue of Hearing** | : | 12 September 2016 The Courthouse, The Brook, Chatham<br>13 September 2016 Inspection & Deliberations |
| **Date of Decision** | : | 17 November 2016 |

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DECISION

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## Decisions of the Tribunal

1. The sum of £1,754.87 is payable by Mrs Willens in respect of the service charge for the year ended 30 November 2015.

2. The sum of £1,171.44 is payable by Mrs Willens in respect of the estimated service charge for the year ended 30 November 2016.

3. A contribution of £590.70 to the reserve fund for the year ending 30 November 2016 is unreasonable and not payable by Mrs Willens.

4. The Respondent has met the consultation requirements in respect of the Notice of Intention and the Notice of Estimates for the proposed damp remediation works. It is for the Respondent to decide whether it should enter into contract with one of the named contractors and if it does so the Respondent should comply with the requirements of paragraphs 12 and 13 of part 2 of schedule 4 of the 2003 Regulation. The Respondent should be mindful if there is a change in the quotations it may be necessary to go through the consultation process again.

5. The estimated sum of £3,421.44 for the damp remediation works is reasonable and payable by Mrs Willens.

6. Mrs Willens was not in breach of the various covenants alleged (Clauses 3(8) & 12(a) and paragraph 1 schedule 3) in connection with the works carried out to the loft.

7. Mrs Willens was not in breach of paragraph 3 to the Third schedule in connection with the keeping of her dogs.

8. Mrs Willens is not liable to pay the administration charge of £60 issued on 5 January 2016 in respect of costs incurred by SLC solicitors in connection with the notice dated 13 May 2015.

9. Mrs Willens is not liable to pay the administration charge of £243 dated 5 January 2016 in respect of costs incurred by SLC solicitors in connection with the letter for breach of covenant (dogs) dated 25 March 2015.

10. Mrs Willens is not liable to pay the administration charges of £276 dated 5 January 2016, £500 dated 11 December 2015, and £300 also dated 11 December 2015.

11. No costs order against Mrs Willens and the parties to bear their own costs in terms of application and hearing fees.

## The Applications

12. Mrs Willens made two applications requiring a determination of the actual service charge for the year ended 30 November 2015, and a determination of the estimated service charge for the year ended 30 November 2016.

13. Mr Thompson on behalf of Influential Consultants made four types of applications, which included dispensation with consultation requirements, determination of the reasonableness of the costs for proposed damp remediation works, multiple alleged breaches of covenants, and a determination of whether administration charges were payable.

## Background

14. Since 9 December 2008 there have been eight previous set of proceedings before this Tribunal and one set of proceedings before the Upper Tribunal involving the same parties and the same property. During the space of those eight years the Tribunal has determined the service charges for each year starting 1 December 2007, and in turn made rulings on the correct interpretation of the lease. The Tribunal at the hearing on 18 June 2014 consolidated the previous rulings on the construction of the lease and provided a baseline in respect of the annual charges payable by Mrs Willens with the hope that the parties might move forward.

15. At the previous hearing on 20 July 2015 the Tribunal stated that it was satisfied that as a result of decisions taken by the Tribunal at various times the parties should now be aware of what items of expenditure could be recovered through the service charge and of the boundaries of reasonableness.

16. The Tribunal also said that it might take a dim view if a party brought an application in the future which related to a matter that had already been the subject of a previous determination. The Tribunal encouraged the parties to use the legal process as a last resort.

17. In connection with the current proceedings the Tribunal issued directions on various dates to progress the parties' applications. On 5 February 2016 Judge Tildesley expressed a preliminary view on Mrs Willens' applications in an attempt to bring an end to the proceedings. The Tribunal invited the parties to consent to the Tribunal determining Mrs Willens' application on the terms of Judge Tildesley's preliminary view. Mrs Willens did not consent to this means of disposal. Following which the Respondent made three new applications.

18. On 4 March 2016 the Tribunal recognised that it was not possible to reconcile the differences between the parties, and directed that all matters be dealt with together at a hearing listed for two days. The Tribunal agreed to put together the hearing bundle comprising the papers exchanged between the parties. The Tribunal circulated the hearing bundles on 12 August 2016. References to the hearing bundle are in [ ].

19. The hearing took place on 12 September 2016 at Chatham Courthouse and was attended by Mrs Willens and Mr and Mrs Thompson. The Tribunal started at 10.30am and went through each application in turn asking the parties to present their respective cases with reference to the documents in the bundle. Once they had completed their respective submissions on each application each party was given an opportunity to ask questions of each other. They had no questions.

20. Mrs Willens expressed her concern that she may not have covered all aspects of her case. The Tribunal gave Mrs Willens time to reflect on whether she wished to say anything further. Mrs Willens made further reference to Mr Thompson's letter regarding the estimated service charge for 2016 [331]. She also asked the Tribunal to read again her statements of case. The Tribunal completed the hearing around 4.30pm, having had a lunch break of around 50 minutes.

21. Mr Thompson indicated that he had no objections to the admission of further documents from Mrs Willens which she had submitted on 19 August 2016 [409-412]. The parties also produced additional documents on the day which were admitted in evidence. The documents included Richard Baker's letter dated 13 November on "Fire Damage Reinstatement Valuation" [415], Mr Baker's sign off of Roof/Gutter repairs dated 12 January 2015 [416], A copy of the lease plan [417], A Licence to Carry Out Alterations [418] and a letter from Mr G Thomas dated 6 May 1998 [419].

22. Mr Thompson had requested the Tribunal to inspect Mrs Willens' flat in connection with the applications for breach of covenant. On 11 August 2016 the Tribunal requested Mr Thompson by 5 September 2016 to specify which areas of Mrs Willens' home he wished the Tribunal to see. The Tribunal indicated that it would consider Mr Thompson's request at the hearing after taking the parties' representations. Mr Thompson supplied details of his request on 31 August 2016 [413].

23. At the end of the hearing on 12 September 2016 the Tribunal indicated to the parties that it would inspect the property the following day including Mrs Willens' home. Mr Thompson requested that he and his wife, Mrs Thompson, accompany the Tribunal on its inspection of Mrs Willens' home. The Tribunal sought Mrs Willens' permission for Mr and Mrs Thompson to attend the inspection. The Tribunal pointed out the she could restrict permission to Mr Thompson alone.

24. The Tribunal also referred Mrs Willens to the recent judgment of Martyn Rodgers QC Deputy President of the Upper Tribunal in connection with an appeal against a fair rent determination for the property known as Tixley, Hookstone Lane, West End, Woking [2016] UKUT 0060 (LC) where he said:

> "Before the hearing on 27 July 2015 the F-tT inspected the property. Mrs Ledger *(the tenant)* naturally attended the inspection and was accompanied by a friend. I was informed that Mrs Ledger had objected to allowing access to the appellant's *(landlord)* representative who, for that reason, was not present. If that did occur, I do not know if the F-tT was informed (no reason for the appellant's absence is given in the decision) and it was not mentioned until the hearing of the appeal. If true, I would regard a denial of access as a serious procedural irregularity. The F-tT's inspection is an important part of its determination of a fair rent, which is a public process, and it should be open to a representative of both parties to attend the inspection. The F-tT cannot insist that access be permitted to a landlord or its representative, but if access is refused the tribunal should carefully consider whether it can fairly proceed with its own inspection. It may take the view that it would be more appropriate not to do so and instead to draw adverse inferences against the person refusing access on any contentious issues concerning the condition of the premises".

25. The Tribunal advised Mrs Willens that she did not have to give her decision at the hearing but she could wait until the following day. Mrs Willens decided not to wait and gave her permission for Mr and Mrs Thompson to accompany the Tribunal on its inspection of her home.

26. The Tribunal inspected the property on the following morning of 13 September. The Tribunal saw the common parts, the front and rear gardens and the inside of Mrs Willens' home including the loft area. The parties were fractious at the time of the inspection.

## The Property

27. The property, 301 High Street Sheerness, is an end terrace two storey house having a frontage to High Street and a return frontage to Maple Street to which the house has vehicular access.

28. The property is built on marshland in the 1890's, a short mile from the sea, and about 50 yards from the old military canal. The property was converted in the mid-twentieth century to a vet's surgery with a residential flat on the first floor. On or around 1990 a further conversion of the property took place which created three one bedroom flats.

29. The construction of the property is traditional with solid brick walls, partially rendered and all colour washed, beneath a main pitched and gabled roof, and a mono-pitched roof over a rear two storey projection. The main roof is clad with historic profiled metal sheeting to resemble

interlocking tiling. The rear roof over Flat C had recently been replaced. The Respondent had also carried out decoration of the exterior of the property.

30. The accommodation comprised two self contained flats (Flats A and B) and a self-contained maisonette (Flat C). There is a communal ground floor entrance hall with access to the rear garden via a rear door and a staircase and landing to the first floor. There is a small front garden and a fenced rear garden with double vehicular gates to Maple Street. The subject flat, Flat B, is on the first floor.

31. At the inspection the Tribunal saw the recent decoration and plastering to the wall adjoining Flat A in the communal entrance. The Tribunal also noted that part of the back wall to Flat A located in the rear lobby had been re-plastered which had not yet dried out. The Tribunal was shown evidence of damp and paint peeling on the interior of the outside wall in the communal entrance. Mr Thompson pointed out the changes to the guttering and downpipes at the rear of the building, and also where he believed a chemical damp course had been injected. The Tribunal observed that the rear garden was tidy and the lawn had been recently cut.

32. The Tribunal inspected the loft area of Mrs Willens' flat which was accessed by means of an aluminium sliding loft ladder. The Tribunal noted that the loft area had flooring over the ceiling joists, ashlar walls and tongue and groove boarding to the underside of the existing rafters. There were light fittings and electric points in the loft area with a window in the gable end. It gave the appearance that these finishes had been in place for many years. At the time of the Tribunal's inspection an assortment of items were being stored in the loft.

33. Inside Mrs Willens home, Mr Thompson drew the Tribunal's attention to marks on the ceiling which he said indicated the prior existence of a stud wall between the living room and kitchen. Mr Thompson directed the Tribunal's attention to the cupboard adjoining the entrance door which he said extended beyond the demise into the common area.

34. The Tribunal observed the floor covering which comprised strong vinyl with a variety of rugs on top. The Tribunal noted there was a dog in the bedroom which did not bark during the inspection. Finally Mr Thompson referred to a copy of the plans submitted to Swale Borough Council for Building Regulations approval dated 14 April 1989 which he said showed that the original access to the loft was via the ceiling above the kitchen area. The Tribunal came to a different conclusion from Mr Thompson. The hatching marked on the plan for Flat B also appeared in a similar area in Flat A and in the kitchen of Flat C. The Tribunal considers the most probable explanation for the hatching was to mark a space for a fridge in the kitchen areas for the respective Flats.

## The Lease

35. Influential Consultants Limited acquired the freehold of the property known as 301 High Street Sheerness around 1 June 2007, and was registered with absolute title (K142905) at the Land Registry. Mr and Mrs Thompson, the Respondent's directors, held the leasehold to the rear maisonette (Flat C), whilst Featurekey Properties Limited, a company owned by Mr and Mrs Thompson, held the leasehold to the ground floor flat (Flat A).

36. The Applicant's title to the leasehold was registered under title number K686361 at the Land Registry on 9 January 1997.

37. The bundle contained an Office Copy of the lease for Flat B which was made between Daniel Gerarde O'Grady of the one part and Michael Anthony Freeley and Valerie Freeley of the other part and dated 23 February 1990 for a term of 99 years from 1 December 1989. The Office Copy had a missing page (page number 16) [79-102].

38. At the previous hearing, the Tribunal with the assistance of the parties and the leases for Flats A and C reconstructed the missing page which comprised:

- Clause 7: last word: posting.
- Clause 8: "In this lease where the context so admits: -

  > (1) the expressions "the Landlord" and "the Tenant" include their respective successors in title and where the Tenant ....."

39. Clause 1(2) of the lease sets out the Mrs Willens' liability to pay a service charge as an amount by way of further or additional rent:

> "There shall also be paid by way of further or additional rent a fair and reasonable proportion (as hereinafter defined) of the amount which the landlord may from time to time expend and as may reasonably be required on account of anticipated expenditure:
>
> a. in performing the landlord's obligations as to repair maintenance and insurance hereinafter contained.
>
> b. in payment of the proper fees of the surveyor or agent appointed by the landlord in connection with the carrying out or prospective carrying out of any of the repairs and maintenance hereinafter referred and the apportionment of the costs of such repairs maintenance and collection between the several parties liable to reimburse the landlord for the same and such fees for collection of rents hereby reserved and any other payments to be paid by the tenant under this clause.

c. in payment of the rents rates taxes water gas electricity and other service charges or outgoings whatsoever in respect of any part of the building not included or intended to be included in this demise or in a demise of any part of the building but excluding all charges or outgoings whatsoever relating to the office on the ground floor of the building and the storage areas in the basement of the building (which are shown green on the plan).

d in providing such services facilities and amenities or in carrying out works or otherwise incurring expenditure as the landlord shall in the landlords absolute discretion deem necessary for the general benefit of the building excluding the area shown green on the plan and its tenants whether or not the landlord has covenanted to incur such expenditure or provide such services facilities and amenities or carry out such works.

e in complying with any of the covenants entered into by the landlord or with any obligations imposed by the operation of law which are not covered by the preceding sub-clause.

f for the purpose of the clause a fair and reasonable proportion shall mean the proportion that the square footage of floor area within the flat hereby demised bears in relation to the total square footage of floor space within the building as a whole".

Provided that all sums shall from time to time be assessed by the surveyor or agent for the time being of the landlord and such sums shall be paid by the tenant within 28 days of being demanded".

40. Up to now the parties have adopted the following proportions to allocate the service charge between the three Flats in accordance with Clause 1(2)(f) of the lease:

Flat A: 22.54 per cent
Flat B: 39.38 per cent
Flat C: 38.08 per cent

41. Mr Thompson in his statement of case [171] indicated that Influential Consultants had obtained independent professional determination pf the sizes of the various areas within the building. Further he had put Mrs Willens on notice of a proposed variation in service charge proportions for the actual expenditure for the 2016 service charge period. Mr Thompson said that this matter was not before the Tribunal at this time.

42. Mrs Willens asked for the Tribunal to determine Influential Consultant's proposed variation in service charge proportions for the 2016 estimate. Mrs Willens opposed the proposed change in proportions on the ground of estoppel [293].

43. Mr Thompson indicated that if the Tribunal accepted the revised proportions it would take effect with the actual service charge for 2016.

44. The Tribunal declined to deal with the question of whether the service charge proportions should be changed because it was not part of the applications before the Tribunal. The Tribunal proceeded to deal with the current applications using the existing proportions which have been applied by the Tribunal since 2008.

45. The Tribunal would also caution Mr Thompson against making a unilateral change to the proportions. At present Mr Thompson's justification for the change is weak. Mr Thompson has not supported his position by an analysis of the meaning of clause 1(2)(f). Mr Baker has not indicated the basis of his measurement and whether it complied with the RICS Code of Measuring Practice. Mr Thompson has not addressed the issue of estoppel which has been raised by Mrs Willens.

46. Under clause 2 of the lease the tenant covenants with the landlord and the tenants of the other Flats that the tenant will at all times observe the regulations set forth in Third Schedule. Regulation 3 states that "*no bird animal or reptile which may cause annoyance to any owner tenant or occupier of any other flat comprised in the building shall be kept in the Flat*". Regulation 7 states that "*no person shall reside in the Flat unless the floor thereof is covered with carpet rugs or other suitable materials with sound damping qualities*".

47. Clauses 3 (1) and 3(2) of the lease require the tenant to make payments of rent and service charge without deduction, and if the payment is not made within 28 days of being demanded to be liable to pay interest on such sums with the accrual of interest until the payment is made. Clause 8(3) specifies the rate of interest which is five per cent above the base rate of Bank PLC from time to time or 12 per cent per annum whichever shall be the greater. The Respondent has applied the base rate for Barclays PLC, which is where the service charge accounts are held.

48. Clause 3(5) of the lease requires the tenant to permit the landlord and persons authorised by the landlord at reasonable times and on giving reasonable prior notice (except in the case of emergency) to enter the Flat and examine the state of repair and condition thereof and to repair and make good all defects decay and want of repair for which the Tenant is responsible hereunder and of which notice in writing shall be given by the landlord within two calendar months after the giving of such notice.

49. Clause 3(7) is in similar terms to 3(5) allowing the Landlord on reasonable notice to enter the Flat for the purpose of executing repairs and decorations and alterations additions or improvements to or upon the Building all such work being done with the maximum reasonable despatch and all damage thereby occasioned to the Flat.

50. Clause 3(8) requires the tenant *"not to cut maim or injure any of the structural parts or walls of the Flat or make any structural alterations or additions to the Flat".*

51. Clause 3(12)(a) prohibits the tenant from doing anything which may render any increased premium for building insurance.

52. Under clause 3 (13) the tenant is liable personally to pay all expenses including solicitors' costs and disbursements and surveyors' costs incurred by the landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under sections 146 or 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court.

53. Clause 3(14) prohibits the tenant from doing anything which may contravene planning legislation. Whilst clause 3(19) requires the tenant not to do anything which may expose the landlord to pay any penalty damages or compensation.

54. The landlord's covenants in respect of repair maintenance and insurance are set out in clause 4. The covenants are subject to the tenant making the required contribution to the charge.

55. Clause 4(1) provides that the landlord shall at all times during the said term to take reasonable care and to keep in good and substantial repair and in clean and proper order and condition the exterior roof and foundations and those parts and appurtenances of the building which are not included in this demise or in a demise of any part of the building but excluding those parts and appurtenances of the building shown edged yellow on the Plan.

56. Clause 4(2) states that the Landlord as often as reasonably necessary to decorate the external and internal communal parts of the building in a proper and workmanlike manner and to keep all internal communal parts of the building cleaned and lighted.

57. Clause 4(3) provides that the Landlord shall keep in good order the grounds of the building not included in this demise or in a demise of any part of building.

58. Clause 4(4)(a) requires the landlord to keep the building insured against loss or damage by fire storm tempest explosion and such other risks (subject to normal excesses) in the full replacement value including all professional fees debris removal and site clearance and the cost of any work which might be required by or by virtue of any Act of Parliament and three years loss of rent.

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59. The lease contains no comprehensive definition of building. Recital (i) states that the building includes the grounds thereof and the extent of which is for identification only outlined in blue on the site plan drawn on the plan annexed to the lease.

60. Clause 1(1) includes the loft area but excluding the roof structure in the demise of Flat B.

## Consideration

61. The Tribunal deals with each application in turn. The relevant legal provisions are set out in the Appendix to this decision.

### Actual Service charge for year ending 30 November 2015

62. The Tribunal has power under Section 27A of the 1985 Act to decide all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when a service charge is payable. However, no application can be made in respect of a matter which has been admitted or agreed by a tenant or determined by a Court.

63. By section 19 of the 1985 Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

64. On 20 July 2015 the Tribunal determined Mrs Willens' contribution to the estimated service charge for the year ending 30 November 2015 as £1,800.30.

65. The actual expenditure for the year was lower than the estimated expenditure. The actual expenditure for the year was £4,456 [142]. The items of expenditure were identified in the spreadsheet prepared by Mr Thompson [114].

66. Mr Thompson calculated Mrs Willens' contribution to the actual expenditure as £1,754.87. Mr Thompson issued a credit note of £45.43 [211] to Mrs Willens which represented the difference between the estimated service charge and the actual spend.

67. Mrs Willens challenged items of the actual expenditure which were listed at [151]. At the hearing Mrs Willens agreed that she was liable to pay the following items: Office supplies. £161.71; Maintenance £240, Gardening £90, Roof Repair, £380, Maintenance £90, Making good £50, Structural Report £300, and Accountancy £500.

68. Mrs Willens disputed the expenditure on the following items: fee balance of £100 [195], Communal Hall of £620 [203] and Fire Revaluation of £500 [205]. Mrs Willens case is set out at [293]

69. The fee balance of £100 related to the outstanding money owed to Mr Baker for preparing specifications of works to the roof and guttering and for approving completion of the works. Mr Thompson had withheld payment of £100 until he received from Mr Baker written confirmation that the temporary repairs to the roof and guttering had been done to the required standard. Mr Baker provided this written confirmation on 12 January 2015 [416]. Mrs Willens raised no substantive objection to the payment of the balancing sum of £100. The Tribunal determines that the £100 balancing payment had been reasonably incurred.

70. The expenditure on the hall in the sum of £620 was incurred on repairs and decoration to the internal walls adjoining Flat A. The work involved removing all damp affected plaster up to a height of 2.5 metres and replacing it with waterproof plaster followed by a coat of moisture resistant magnolia paint.

71. Mrs Willens accepted that the costs had been incurred and they were reasonable in amount. Her objections were two fold. First there were funds allocated in the reserves for the redecoration of the communal entrance and hall. Second she considered that Influential Consultants Ltd was in breach of section 42(3) of the Landlord and Tenant Act 1987 in that service charge funds had been allocated to an expenditure which formed no part of the original demand for the estimated service charge.

72. Mr Thompson explained these works to the communal entrance were additional to those earmarked from the reserve fund. Mr Thompson said the fund was to be used for periodic internal decoration and replacement of the staircase floor covering. According to Mr Thompson, this would be carried out after completion of the scheduled damp remediation and roof works and most probably in the 2017 service charge period.

73. Mr Thompson said the costs were legitimate expenses under the repairs and maintenance budget head which had been incurred in the 2015 service charge period. Given those circumstances Mr Thompson did not understand Mrs Willens' objection to the charge.

74. The Tribunal finds the expenditure on the communal entrance had been incurred and that the works were authorised under the terms of lease. Mrs Willens adduced no evidence to suggest the costs were excessive and the works were not to the required standard. The Tribunal is satisfied the costs have been reasonably incurred and have properly been allocated to the 2014/15 service charge.

75. The Fire Revaluation Fee of £500 concerned the work done by Mr Baker to provide a current valuation for reinstatement of the property

following a fire for the purposes of insurance. The invoice [205] described the work done as "visiting site and carrying out an inspection, preparing a report of findings, plans as existing and fire damage reinstatement valuation". Mr Baker's report was dated 13 November 2015 and gave a full reinstatement value of £357,000.

76. Mr Thompson explained that it was good management practice to carry out regular reviews of the level of insurance and reinstatement value. According to Mr Thompson, he personally carried out the last review some five years ago. Mr Thompson no longer did the review because he was not up-to-date with current practice.

77. The Tribunal notes that Mr Thompson's view on good management practice is supported by the RICS Code of Practice: *Service Charge residential management Code and additional advice to landlords, leaseholders and agents 3rd Edition* ("RICS Code"). Paragraph 12.4 states that

> "There is need for regular reviews of the level of insurance and reinstatement value, which should be advised to your client. You should ensure that there is adequate insurance and that the leaseholders are not paying for excessive or unnecessary coverage".

78. Mr Thompson said that he had obtained quotations from other practitioners to conduct a reinstatement valuation which had come in significantly higher than the quotation provided by Mr Baker.

79. Mrs Willens sought re-assurance that the revaluation was not part of the fire risk assessment which had been carried out in the year ended 30 November 2014. Mrs Willens offered no evidence regarding the reasonableness of the amount charged.

80. The Tribunal notes that the previous Tribunal had determined as reasonable the sum of £600 for a fire re-instatement valuation in the estimated budget for the year ended 30 November 2015.

81. The Tribunal is satisfied that the work done by Mr Baker in providing a fire damage reinstatement valuation was necessary and in line with good practice. The Tribunal decides that the costs had been reasonably incurred and was lower than the estimated budget figure.

82. Mrs Willens' principal objection to the actual service charge was that certain items of expenditure were not included in the estimated budget. Mrs Willens considered the non-inclusion of these items contravened the statutory provisions dealing with the trust status of service charge funds. The Tribunal disagrees with Mrs Willens' assessment. The actual expenditure in 2014/15 has been incurred on matters for which service charges are payable under the lease.

83. The Tribunal considers that Mrs Willens' concern is more a question of transparency and good practice. Paragraph 7.3 of the RICS Code

requires a manager to exercise due diligence and professional expertise to make an assessment of expenditure required to maintain the development and services for the forthcoming period. The Code emphasises that the manager must use the best information available to inform the budget estimate and that the estimated budget should always be as close to the subsequent final accounts as possible. A manager should always notify leaseholders of significant departures from the budget and should be willing to explain the reasons for them.

84. The Tribunal is satisfied that Mr Thompson in his position as surveyor and manager does his best to comply with the standards in the RICS Code. In the year in question Mr Thompson did not exceed the estimated budget and has issued a credit note for the balance to Mrs Willens. The Tribunal considers in year departures from an estimated budget are inevitable especially when unforeseen matters arise during the year

85. Mr Thompson's spending plans for the property have been thrown into disarray in the past by Mrs Willens' unwillingness to pay the services charges demanded until all avenues of challenge have been exhausted. The Tribunal recognises that the level of distrust between the parties is so high the situation is unlikely to improve in the future. However, it may help to avoid future challenges if Mr Thompson informs Mrs Willens of changes to estimated expenditure during the year, such as the works to the communal hall.

86. The Tribunal determines the actual service charge expenditure for the year ended 30 November 2015 is £4,456 , and that Mrs Willens is liable to pay a contribution of £1,754.87. The Tribunal notes that Mrs Willens has already received a credit of £45.43 to her service charge account of the balance owing from the estimated service charge.

87. The Tribunal's determination is subject to the following caveat. Mr Thompson fairly identified an element of double counting in the statement of case relating to the reports of Mr Baker and Mr Duncan [173 & 177] which were prepared in connection with the application for breach of covenant. Mr Thompson has claimed the costs incurred on these reports as administration charges payable by Mrs Willens. It would also appear that Mr Thompson has in the alternative treated the expenditure on the reports as service charge costs. The Tribunal notes that Mr Duncan's charges appeared in the spreadsheet for actual expenditure for the year ended 30 November 2015, and have been included in the £900 for professional fees in the service charge account [142]. The Tribunal can find no entry in the service charge account for Mr Baker's report.

88. Mr Thompson has made no specific representations on whether the fees for reports can be regarded as service charges. Mr Thompson requested the Tribunal to deal with this aspect in the manner considered appropriate [177].

89. The relevant clause in the lease is 1(2)(b) which provides that surveyor fees are recoverable as service charge if they are incurred in connection with the carrying out or prospective carrying out of repairs and maintenance. Clause 3(13) deals with the recovery of surveyors fees as administration charges.

90. The Tribunal considers that Mr Duncan's report was primarily directed at potential repairs and maintenance to the roof and the chimney stack, and would fall within the provisions of clause 1(2)(b) if the Tribunal decides that it is not an administration charge.

91. The Tribunal takes a different view with Mr Baker's report which is entitled a "Report on the Condition of Flat B". The report was descriptive and clearly had been commissioned for the purpose of supporting the Respondent's allegation of breach of covenant. The Tribunal does not consider that Mr Baker's report falls within the ambit of clause 1(2)(b) and would not be recoverable as a service charge.

92. The final matter under the Actual Service Charge for the year ended 30 November 2015 is the status of invoice 443 which related to legal expenses of £865.10 incurred by SLC solicitors in connection with the issue of a section 146 Notice dated 24 October 2010. On 11 June 2015 the Tribunal (CHI/29UM/LIS/2014/0074) considered whether Mrs Willens was liable to pay this sum as an administration charge. The Tribunal determined that Mrs Willens' liability was limited to £510 [118-142]. On advice of his solicitors Mr Thompson sought to recover the sum disallowed, £355.10 (£865.10 - £510) as a service charge with Mrs Willens being charged £139.84 calculated in accordance with the proportion of 39.38 per cent. The Tribunal confirms the view of Judge Tildesley expressed in the directions issued 5 February 2016 [58] that the sum disallowed cannot be recovered through the service charge for the reasons given by the Tribunal (CHI/29UM/LSC/2013/0115/0118) at [49-51]. The Tribunal directs that this amount if not already been done so is struck out from Mrs Willens' statement of account. At the moment it appears in the statement in the bundle [120] but the Tribunal notes that this statement was issued on 20 January 2016 before Judge Tildesley gave his view on 5 February 2016.

## Estimated Service Charge for 30 November 2016

93. The estimated service charge was £2,974 [125] of which Mrs Willens was required to contribute £1,171.44.

94. The demand was for £1,762.14 which included an amount of £590.70 for the to the reserve fund [189]. The demand had a tax date of 1 December 2015.

95. The letter accompanying the demand was sent 17 October 2015 [331 & 332]. Mr Thompson said in the letter the period of grace allowed in the

lease for payment would expire on 1 December 2015, the date of the demand.

96. Mr Thompson also advised Mrs Willens in the letter dated 17 October 2015 of the planned programme of works and warned her that in the event of non-payment of the service charge on 1 December 2015 the Respondent would instruct solicitors with a view of commencement of legal proceedings leading to the service of a section 146 Notice.

97. Mrs Willens argued that Mr Thompson's statement regarding the period of grace in his letter was contrary to the terms of lease. According to Mrs Willens, the proviso to clause 1(2) gave her 28 days from the date of the demand in which to make payment. Mrs Willens pointed out that a previous Tribunal had determined that the service charge should be demanded as at 1 December each year (CHI/29UM/LIS/2012/0069 paragraph 20). Mrs Willens said she had until 28 December 2015 in which to pay the estimated service charge. Finally Mrs Willens asserted that the demand issued by the Respondent for the estimated service charge for the year ended 30 November 2015 was defective because of Mr Thompson's error in insisting that the period of grace for payment expired on 1 December 2015.

98. Mr Thompson made no submissions on the correct construction of the lease with respect to the period of grace for payment. Mr Thompson asserted that it was necessary to issue the demand in advance because of Mrs Willens' persistent failures in the past to pay service charges by the due date. Mr Thompson said that by sending the demand on 17 October 2015 it allowed Mrs Willens to pay the estimated charge in good time.

99. The proviso to clause 1(2) states that

> "Provided that all such sums shall from time to time be assessed by the surveyor or agent for the time being of the landlord and such sums shall be paid by the Tenant within 28 days of being demanded".

100. The Tribunal agrees with Mrs Willens' interpretation that the 28 period for payment starts from the date of the demand which was 1 December 2015. However, it does not follow that the error in the accompanying letter invalidated the demand.

101. The demand [189] was in the sum of £1,762.14 which comprised £1,171.44 estimated service charge for year ended 30 November 2016 and £590.70 reserve fund proportion. The demand was issued in the name of Influential Consultants with an address at 5 London Road, Rainham, Gillingham, Kent ME8 7RG which is the registered office for Influential Consultants. The demand was dated 1 December 2015 and signed by Mr Thompson as surveyor and manager. Finally, the demand stated that a "Summary of Tenant's rights and obligations" was enclosed. The Tribunal understands that details of the Estimated

service charge for the year ended 30 November 2015 accompanied the demand.

102. The Tribunal is satisfied that the demand met the requirements of the lease, namely giving the correct date for payment (1 December), and signed by Mr Thompson in his capacity as agent and surveyor for the Respondent. The demand by stating the name of the Landlord and its registered address fulfilled the obligations under section 47 of the Landlord and Tenant Act 1987. The sending of the summary of rights and obligations with the demand complied with section 21B of the Landlord and Tenant Act 1985. Finally the Tribunal finds that the demand met the specification laid down in the Service Charge Residential Management Code of being clear, understandable and relating to available budget estimates. The Tribunal, therefore, holds that the demand dated 1 December 2015 was valid.

103. The estimated service charge for the year ended 30 November 2016 comprised buildings insurance (£1,274), accountancy (£500), maintenance & repair (£700) and management (£500).

104. Mrs Willens originally disputed the estimated expenditure on all items except management [335]. During the course of the proceedings Mrs Willens narrowed her challenge to the charge for insurance [293].

105. At the hearing Mrs Willens re-instated her dissatisfaction with the estimated charge of £600 for the common parts gardening and cleaning which formed part of the £700 for repairs and maintenance.

106. The position at the hearing was complicated by the inclusion in the bundle of details of actual expenditure for the year end 30 November 2016 [351], which referred to costs of £568.21 (building insurance), £190 (Tribunal's section 20 application fee) and £90 (Mr Baker's fee in carrying out a floor area calculation). The question of the reasonableness of the actual expenditure for the year ended 30 November 2016 is not before the Tribunal., although the Tribunal will deal with application and hearing fees at the end of the determination.

107. Returning to the issue of the estimated expenditure Mrs Willens argued that the estimated amount of £1,274 for insurance was unreasonable because the actual amount expended on insurance was £568.21. Mrs Willens also pointed out that Mr Thompson had refused to provide her with a copy of the policy in order for her to check that the insurance cover complied with the requirements of the lease. Mrs Willens considered that the £600 estimate for cleaning and gardening was reasonable if the work had been done. Her objection to the charge was that it could not be justified because in the previous year the gardening had only been carried out on two occasions and the cleaning of common parts once.

108. Mr Thompson stated that he had been able to secure a significant reduction in the premium for the building insurance for the 12 months

commencing 6 February 2016. The premium charged was £499.99, and the policy was issued on 21 January 2016. Mr Thompson, however argued that this was not relevant to the determination of the estimated charge for insurance. Mr Thompson said that the relevant consideration for the estimated charge was whether it was consistent with the previous actual insurance costs for the building and with previous Tribunal decisions. Mr Thompson contended that the charge was consistent with what had happened before, and that the estimated sum of £1,274 represented a five per cent uplift on the previous year's charge of £1,214. Mr Thompson said that the actual cost for insurance will be brought to account at the end of the service charge period when all other costs are known.

109. Mr Thompson accepted that he had not supplied Mrs Willens with a copy of the insurance policy on the ground that she had not met the demand for the estimated service charge for the year ended 30 November 2015. Mr Thompson had included the invoice, a summary of the cover and the statement of fact in connection with the insurance in the bundle [213-218].

110. Mr Thompson pointed out that the sum of £700 set aside in the estimated budget was for repairs and maintenance which included cleaning and gardening. According to Mr Thompson, the £700 was in line with past expenditure on repairs and maintenance. Mr Thompson said that the cleaning and gardening had not been undertaken at regular intervals in the past because of Mrs Willens' reluctance to pay the service charges on demand.

111. The Tribunal is concerned with the estimated service charge budget for the year ended 30 November 2016, not with the actual service charge for that period. When examining a budget the Tribunal has regard to section 19(2) of the 1985 act which provides that

> "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 charge or otherwise".

112. The Tribunal considers the correct approach for determining the budget for the year ended 30 November 2016 is to assess the reasonableness of the costs at the time the budget is demanded (1 December 2015) having regard to expenditure in previous years. Applying these criteria the Tribunal is satisfied that the estimated charges for insurance and repairs and maintenance are reasonable and payable by Mrs Willens. In this regard the Tribunal finds that the substantial reduction in the insurance charge was not foreseeable at 1 December 2015, and that Mr Thompson's assumption of a 5 per uplift on the previous year charge was reasonable in the circumstances known at the time. The Tribunal notes that Mr Thompson will make the necessary adjustment at the end of the service charge year in accordance with section 19(2) of the 1985 Act.

113. The Tribunal, therefore, determines that the budget £2,974 for the year ended 30 November 2016 is reasonable of which Mrs Willens is liable to pay £1,171.44.

114. The Tribunal draws the parties' attention to section 30A of the 1985 Act and the accompanying schedule which deals with Mrs Willens' rights in connection with information on insurance including the provision of the policy document.

115. Mrs Willens contended that the contribution of £590.70 to the reserve fund was not payable for the reasons given by the previous Tribunal (CHI/29UM/LIS/2014/0074) which said at paragraph 98:

> "The Tribunal is of the view that the Respondent should put in train the remaining works for which the reserve fund had been allocated before demanding further sums of money to be added to the reserves. The Tribunal believes that the current fund was sufficient to carry out the outstanding major works, and that once those works were completed the Respondent would be then in a position to draw up a long term plan for expenditure on future major works and identify the required contribution from each lessee to the reserve fund".

116. Mr Thompson pointed out that the Respondent intends to draw on reserves to carry out the damp remediation works. This, in Mr Thompson's view, would seriously deplete the amount held in reserves which was why an additional contribution was required.

117. A previous Tribunal (CHI/29UM/LSC/2009/0168) decided at paragraph 17 that the opening words of clause 2 to the lease authorised the Respondent to hold reserves (the previous Tribunal highlighted words in bold):

> "...... the amount which the Landlord may from time to time expend and **as may reasonably be required on account of anticipated expenditure".**

118. The reserve fund is held in trust and should only be used for the purposes approved of in the lease, which in this case is for repair and maintenance of the building.

119. Mr Thompson on behalf of the Respondent set up a reserve fund in 2008 to carry out carry out external decoration and repairs, internal decoration and repairs, repairs to the main roof and fencing. The estimated expenditure for the proposed works was £17,500 [188]. Since 2008 there have been disbursements from the fund of £9,381 for the roof and external decorations [2012], and £350 for fencing [2014].

120. The Tribunal notes that the amount for reserves recorded in the 30 November 2015 accounts was £12,370 [185] with £12,375.79 held in the bank account [405].

121. This Tribunal remains of the view that it is not reasonable to require further contributions to the reserve fund. The Tribunal considers the present amount held in reserves is sufficient to complete the outstanding works. The Tribunal is of the view that the lease does not permit the Respondent to top up the reserve fund in order to maintain the current balance.

122. The repair and maintenance programme for which the reserve fund was set up has stalled since 2012. The Respondent considers that Mrs Willens is responsible for the delay and as a result has been deflected by Mrs Willens' opposition rather than getting on with the consultation and implementing the programme. The Tribunal understands Mr Thompson's frustrations but the Respondent is obliged to consult Mrs Willens on the individual projects and have regard to her views. Ultimately Mrs Willens has the right to challenge the reasonableness of the costs for the individual projects.

123. This Tribunal maintains its previous position once the current programme has been completed, the Respondent should stand back and draw up a long term plan of what is required for the property. It may be having regard to the age and size of the building and the fact that Mr and Mrs Thompson effectively own two of the three long leaseholds in the property that the completed works would be sufficient to keep the building in a reasonable state of maintenance and repair for the foreseeable future.

124. For the reasons given above the Tribunal determines that a contribution of £590.70 to the reserve fund for the year ending 30 November 2016 is unreasonable and not payable by Mrs Willens.

**Dispensation with Consultation Requirements**

125. Mr Thompson indicated that the Respondent had consulted with Mrs Willens regarding the proposed damp remediation works to the ground floor of the building.

126. Mr Thompson said the Respondent had made this application in order for the Tribunal to confirm there has been no breach of the requirements or if there has, to make an order dispensing with all or part of the consultation requirements.

127. Mr Thompson explained there had been two independent specialist reports which confirmed that damp was an issue to the external walls of the property. Mr Thompson said that a damp course had been injected in the property probably at the time of the conversion of the building into flats which had become ineffective due to effluxion of time.

128. Mrs Willens produced a copy of a specification for damp remedial works from Swale Property Preservation Limited dated 10 July 1982 [300] which gave a 30 year guarantee for the works. This confirmed Mr

Thompson's statement on the existence of a previous chemical damp course for which the guarantee had expired.

129. On the 9 October 2015 the Respondent sent Mrs Willens and the other leaseholders a Notice of Intention to carry out works [225]. The Notice explained the works to be carried out as follows:

> "Remediation of damp to the ground floor of the building (including the common parts) as specified by specialist contractor".

130. The Notice explained that

> "the Respondent consider it necessary to carry out the works as the inspection has confirmed that unacceptable moisture levels are present throughout the ground floor of the building probably due to a combination of rising damp and condensation. Humidity was found by inspection to be unacceptably high throughout the building".

131. The Notice invited the leaseholders to make written representations to the Respondent at its address in Rainham. The notice pointed out that observations must be made within the consultation period of 30 days from the date of the notice (9 October 2015) and that the consultation would end at 1600 on 11 November 2015.

132. The Notice also invited the leaseholders to provide the name of a person from whom the Respondent should try to obtain an estimate for the carrying out of the proposed works.

133. On 15 October 2015 Mrs Willens sought clarification of the contents of the Notice but received no reply [330].

134. On 9 November 2015 Mrs Willens responded to the Notice observing that it did not contain an adequate description of the intended works, and that the reasons given for the works were not comprehensive in that there could be other causes than rising damp for the high condensation and humidity readings [230 & 231]. Mrs Willens did not nominate the name of a contractor.

135. On 12 November 2015 the Respondent sent to the leaseholders a "Statement of Estimates in relation to the Proposed Works" [227-248]. The Notice stated that the Respondent had obtained two estimates, and gave the names of the two contractors with their estimates. Abbey Timber and Damp: £4,815 including VAT but excluding client works, and Schrijver Damp Proofing UK Limited £3,421.44 including VAT.

136. The Notice also enclosed full copies of both estimates together with the specifications for the works drawn up by the respective contractors. The Notice invited the leaseholders to make written observations in relation to any of the estimates within 30 days from the date of the notice by the sending them to the Respondent at its address in

Rainham. The Notice said that the consultation period would end at 1600 hours on 15 December 2015.

137. The Notice recorded the written observations of the lessees to the Notice of Intention and the Respondent's response.

138. The Notice of Estimates set out the views of the lessees of Flats A and C (Mr and Mrs Thompson and Featurekeys Property Limited) which were that the works should be carried out as soon as possible and funded from the reserve fund.

139. Mr Thompson in the Notice acknowledged Mrs Willens' observation about the brief description of the works but pointed out that the brief description was all that was available to the specialist contractors at the time. Mr Thompson went onto to state that the provision of the full estimate details to the leaseholders would enable them to make their own enquiries and carry out their own research on the extent of the problem and on the contractors' remediation proposals. Mr Thompson drew attention to the guarantees offered by both contractors. Finally Mr Thompson in the Notice disagreed giving reasons with Mrs Willens' comments on the potential causes of the damp problem within the building.

140. On 30 November 2015 Mrs Willens sent her observations comprising four pages on the Notice of Estimates [337-340]. Mrs Willens said that she disputed the validity of the consultation process on various grounds. Mrs Willens contended the proposed works included repairs to the walls of individual flats, the costs of which could not be recovered through the service charge. Mrs Willens repeated her observation that the Notice of Intention did not give an adequate description of the proposed works. Mrs Willens argued that the Notice of Estimates did not contain a summary of her observations to the first stage. Mrs Willens reiterated her view that the proposed works did not address the causes of the damp ingress identified in the report prepared by Richard Baker on 13 May 2014 [320-323]. Mrs Willens suggested that the guarantees offered by the two contractors would be rendered worthless because they were conditional on the property being maintained in a dry and weatherproof condition. Mrs Willens concluded her observations by stating that a reasonable person would view the proposed works as an attempt by the Respondent to introduce relevant costs which were not provided for by the lease, and to withhold information which put the tenant at a disadvantage.

141. On 8 December 2015 Mr Thompson decided in view of Mrs Willens' observations to apply on the Respondent's behalf to the Tribunal for dispensation of consultation requirements [343].

142. Mr Thompson indicated that the Respondent was intending to give the contract to Schrijver Damp Proofing UK Limited because they provided the lowest tender. On 11 April 2016 Mr Thompson confirmed with Schrijver that it would hold to its quotation until the end of September [238].

143. Mr Thompson submitted that Mrs Willens sought to complicate the consultation process incessantly by her unrealistic demands for information and questioning every aspect of the consultation process.

144. Mr Thompson said that Mrs Willens' had not provided a clear response about the alleged breach of the consultation procedures. Mr Thompson was of the view that the description of the works in the Notice of Intention was adequate.

145. Mr Thompson argued that if the Respondent had failed to comply with the correct procedures for consultation, the burden was upon Mrs Willens to demonstrate real prejudice from the failure in that she was paying for inappropriate work or paying more for the works than would be appropriate.

146. Mr Thompson said the works were to the external structural walls of the building which clearly fell within the landlord's repairing responsibilities. Further Mr Thompson maintained that the costs of the works were recoverable under the lease as service charges.

147. Mr Thompson stated the two independent contractors had identified the extensive presence of rising damp in the external walls of the building which were solid. Also Mr Thompson indicated that a damp injection course had been installed in the building which had now become ineffective.

148. Mr Thompson pointed out that the contractors were proposing different types of remedial works.

149. Abbey Timber and Damp proposed the injection of a chemical damp proof course in the external walls of the property except at the front. Abbey indicated that damp affected plaster should also be replaced. The cost of those works together with decoration was not included in Abbey's quotation. Abbey provided a 20 year guarantee.

150. Schrijver used a patented system developed in the Netherlands which relied on existing natural airflows to dry out walls and control interior humidity levels. All the work was done from the outside and involved no re-plastering and no use of chemicals. Schrijver offered a life-time guarantee.

151. Mr Thompson explained that Abbey appeared to have the monopoly on the Isle of Sheppey in connection with the installation of chemical damp courses. Mr Thompson said that Schrivjer Damp Proofing UK Limited seemed to be the only body in Kent providing the patented technology. Mr Thompson pointed out that Mrs Willens had not supplied the name of a contractor nor provided alternative quotations for the work.

152. Mr Thompson disputed Mrs Willens' claims regarding the causes of the damp. Mr Thompson said that the pipe-work in Flat 301A had been replaced and the shower had been re-positioned. Mr Thompson stated he had also re-aligned the guttering which had stopped the discharge of rainwater onto the building by a poorly fitted rain water pipe.

153. Mrs Willens argued the Respondent had breached the legal requirements regarding the consultation process in a number of respects. First the Respondent failed to give an adequate description of the works in the Notice of Invitation. According to Mrs Willens, the Respondent left it to the contractors to give their description of the works in the form of the specification in their respective tenders. Second Mrs Willens submitted that the specifications were materially different which meant that the Respondent had in reality one estimate for each type of work proposed by the respective contractor. Given those circumstances Mrs Willens argued that the requirement for providing at least two estimates at Stage 2 of the consultation process had not been met. Third Mrs Willens said that the Respondent was not entitled to ask for observations on the estimates because the two estimates were not comparable because they related to different types of work.

154. Mrs Willens submitted that she had been prejudiced by the Respondent's non-compliance with the consultation requirements by withholding a description of the intended works at Stage 1 which made it impossible for her to contribute properly to the process by suggesting a contractor. Further Mrs Willens said she would suffer a clear financial disadvantage because in reality the Respondent submitted only one estimate and because of the high likelihood that the Respondent's preferred method for dealing with the rising damp would fail. In respect of the latter Mrs Willens asserted that the property could not be maintained in a dry and weatherproof condition which was a requirement of the guarantees offered by both contractors.

155. Turning to the law under section 20 of the 1985 Act a tenant is not liable to pay more than £250 as her contribution under the service charge to the costs of qualifying works undertaken by a landlord unless the consultation requirements have been complied with or dispensed with by the Tribunal.

156. The consultation requirements in relation to the proposed damp remediation works to this building are found in Service Charge (Consultation Requirements) (England) Regulations 2003 Schedule 4 Part 2 (Qualifying Works for which public notice is not required)[1].

157. Essentially the requirements are that the landlord must give notice in writing of his intention to carry out qualifying works to each tenant and to any recognised tenants' association. The notice must comply with the requirements set out in the 2003 Regulations. The notice must, amongst other things, describe the proposed works or specify when and where a description of them may be inspected, state the landlord's reasons for considering it necessary to carry out the proposed works, invite observations and specify the time within which and address at which such observations should be made. The notice must also invite each tenant and any association to nominate other persons from whom the landlord should try to obtain estimates.

[1] Hereinafter referred to as the 2003 Regulations

158. If observations in relation to the proposed works are made within the relevant period the landlord must have regard to those observations. If any nominations are made the landlord must try to obtain an estimate from the nominated person.

159. The landlord, following this initial consultation process, must obtain estimates for the carrying out of the proposed works and supply, free of charge, a statement setting out:

    (a) as regards at least two of the estimates the amount specified in the estimate as the estimated cost of the proposed works; and
    (b) where the landlord has received observations to which he is required to have regard, a summary of the observations and his response to them.

160. The landlord must make all of the estimates available for inspection and at least one of the estimates must be that of a person wholly unconnected with the landlord. Where the landlord has obtained an estimate from a nominated person, that estimate must be dealt with in the statement. The statement must be supplied to (and the estimates made available for inspection by) each tenant and the secretary of any recognised tenant's association.

161. The landlord is also required to give a notice to each tenant and the secretary of any recognised tenants' association specifying the place and hours at which the estimates may be inspected and invite written observations in relation to them. In this regard the landlord must specify an address and time limit for the delivery of such observations[2]. The landlord is under a duty to have regard to any observations made in accordance with the regulations.

162. Where the landlord enters into a contract with a person for the qualifying works (other than a nominated person or the person who submitted the lowest estimate) he must, within 21 days of entering into the contract, give notice in writing of entering into the contract to each tenant and any recognised tenants' association.

163. Turning now to the facts. The Tribunal is satisfied that Respondent has gone through the various stages of the consultation process as set in the Regulations except for the final stage of entering into a contract. The Tribunal finds the Respondent issued the tenants with a Notice of Intention to Carry Out the Works and a Notice of Estimates together with copies of the estimates from two contractors. Further the Tribunal holds the Respondent gave the tenants the opportunity to make observations within the time period laid down by the regulations, and that the Respondent had regard to the tenants' observations on the proposed works.

164. The Tribunal is satisfied that the Respondent's response in its Notice of Estimates [228] demonstrated that it had considered Mrs Willens' representations on the proposed works. In the Notice Mr Thompson expanded upon the reasons for the works and the nature of them.

165. The Tribunal considers Mrs Willens' objections to the consultation conducted by the Respondent turns first upon whether the description of the works given in the first Notice met the requirements of paragraph 8(2) of Part 2 of Schedule 4 to the 2003 Regulations.

166. Paragraph 8(2) stipulates that *"the notice shall describe, in general terms, the works proposed to be carried out"*. Whether the Notice in this case complies with paragraph 8(2) is a question of fact and degree to be determined on its own specific circumstances. The Tribunal also places weight on the words *"in general terms"*.

167. The Tribunal is concerned with an end terraced property housing three flats which followed a typical design for buildings constructed in the 1890's of brick with a slate roof. The conversion of the building into flats was confined largely to a re-alignment of the internal areas with no major alterations to the external structure. The repair and maintenance issues associated with such a building are standard and within the general knowledge of informed leaseholders.

168. The Tribunal considers the description given in the Notice dated 9 October 2015 [225] of *"remediation of damp to the ground floor of the Building including the common parts as specified by specialist contractor"* tells an informed leaseholder the type of works involved, the location of those works and that they would be carried out by a specialist contractor.

169. The Tribunal also considers the description should be read in conjunction with the problem identified in the Notice of *"unacceptable moisture levels throughout the ground floor probably due to a combination of rising damp and condensation"* which tells an informed leaseholder that the works were necessary to curb rising damp, which in turn gave a clear indication of the type of specialist contractor a leaseholder should be putting forward to give a quotation.

170. For the reasons given above, the Tribunal is satisfied that the description of the works in the Notice dated 9 October 2015 met the requirements of paragraph 8(2) of part 2 of schedule 4 to the 2003 Regulations. The Tribunal has dealt with the other requirements of the Notice in the paragraphs above. The Tribunal, therefore, finds that the Notice of Intention served by the Respondent is valid and in accordance with the 2003 Regulations.

171. Mrs Willens' other principal objection was that the Respondent obtained two estimates which were not comparable because they related to different specifications of work. The Tribunal accepts that it would appear from the drawings in the quotations that the application of the Schrijver damp proof treatment was to all the external walls. In contrast the proposal from Abbey Timber and Damp did not involve the injection of the chemical damp course in the front wall of the building and in the exterior wall to the kitchen of Flat 301C but

included part of the internal wall of Flat 301 A fronting the hallway and rear lobby.

172. The Tribunal considers the differences identified by Mrs Willens in the specifications were matters of detail rather than substance. In the Tribunal's view, the critical issue is whether the estimates provided by the Respondent concerned works to remedy the problem of rising damp. In this respect the two contractors chosen by the Respondent were proposing to address the same problem albeit by different methods.

173. The Tribunal is satisfied that the estimates supplied by the Respondent fulfilled the requirement of the provision of two estimates free of charge in paragraph 11(5) of part 2 of schedule 4 to the 2003 Regulations. The evidence indicated that the contractors which supplied the estimates were not connected with the Respondent. The concerns identified by Mrs Willens were proper matters to be included in her observations to the Notice of Estimates but did not invalidate the Notice issued by the Respondent on 12 November 2015.

174. The Tribunal, therefore, finds that the Respondent fulfilled the requirements of paragraph 11 of part 2 of schedule 4 to the 2003 Regulations in connection with the Notice of estimates.

175. The Tribunal has decided that the Respondent has fulfilled its obligations in connection with the first two stages of the consultation process laid down by the 2003 Regulations. In the Tribunal's view, the Respondent would have been entitled to move onto the final stage of entering the contract with its preferred contractor provided it gave due regard to the observations of the leaseholders on the Notice of Estimates. The Tribunal understands the Respondent would have chosen Schrijver to carry out the damp treatment in which case there would have been no requirement to give written notice of entering the contract in accordance with paragraph 13(1) because Schrijver submitted the lowest estimate.

176. Mr Thompson decided on the Respondent's behalf not to go ahead with the contract but instead make application to the Tribunal for a determination on whether the Respondent had complied with the requirements and if not for the Tribunal to dispense with all or part of the consultation requirements. The Tribunal understands the reasons for Mr Thompson's reticence having regard to the history of extensive litigation between the parties. The consequence, however, of Mr Thompson's decision is that it has delayed the implementation of the works which may mean that the consultation process already undertaken may come to naught if Schrijver is unable to maintain its quotation.

177. The Tribunal is placed in a conundrum by Mr Thompson's decision not to go ahead with the contract. The question for the Tribunal is whether Mr Thompson's decision means that the Respondent has not complied

with the consultation requirements. Arguably Mr Thompson has left the Tribunal to determine the final part of the requirements, namely the duty to have regard to observations in relation to estimates, (paragraph 12). In an application for dispensation, the Tribunal is examining whether the landlord has had regard to observations not whether the Tribunal would go ahead with the contract after receiving the observations. In other words, Mr Thompson is not entitled to expect the Tribunal to decide whether the Respondent should enter into a contract with its preferred contractor.

178. The Tribunal decides that the Respondent has met the consultation requirements in respect of the Notice of Intention and of the Notice of Estimates for the proposed damp remediation works. It is for the Respondent to decide whether it should enter into contract with one of the named contractors and if it does so the Respondent should comply with the requirements of paragraphs 12 and 13 of part 2 of schedule 4 of the 2003 Regulation. The Respondent should be mindful if there is a change in the quotations it may be necessary to go through the consultation process again.

**Service Charge for Damp Remediation Works**

179. The Respondent applied for a determination of whether the estimated charges for the damp remediation works were reasonable and payable. The Respondent indicated that the costs of the works would be funded from the reserve.

180. The Respondent's application concerned the tender of Schrijver in the sum of £3,421.44 [237]. The facts for the application are set out in the preceding section dealing with the dispensation issue.

181. Mrs Willens contended that the estimated costs were not reasonable and that the works were not necessary. Mrs Willens repeated her objection that the quotations from the two contractors were for different specifications. According to Mrs Willens, Schrijver's tender should be viewed separately from Abbey's tender and as such it would be wrong to describe it as the lowest tender.

182. Mrs Willens said the proposed works were not appropriate because they posed a high risk of failure with subsequent prejudice to the leaseholders in the form of financial loss.

183. Mrs Willens relied on the findings of Mr Baker's survey [320-323] of Flat 301A which recorded high readings of water penetration. Mr Baker said that a potential cause of the penetration was deteriorating waterproof paint finish and poorly detailed external rendering. Mrs Willens named other potential causes no underfloor ventilation, no heating in the common areas and recurrent rough Island weather.

184. The Tribunal makes the following findings of facts which are derived from the circumstances outlined in the previous section dealing with dispensation:

a) A chemical damp proof course was injected in the property in 1982. The guarantee in respect of the damp course has now expired.

b) The Tribunal accepts Mr Thompson's evidence that damp course was initially successful but its effectiveness has deteriorated over time.

c) Mr Baker and the two contractors which provided quotations identified a significant problem of rising damp within the building.

d) Mr Baker recommended a package of measures to tackle the issue of water penetration in the building. One of those measures included the injection of a chemical damp course.

e) Mr Thompson had arranged for the downpipe to be repaired together with cleaning of the gutters at the rear of the building [192] , the fixing back of loose metal tiles [194] and repairs to damaged brickwork above the rear door which addressed some of the other causes of water penetration as identified by Mr Baker in his report [320-323].

f) Mr Thompson had also replaced the pipe-work and repositioned the shower in Flat 301A so as to eliminate another potential source of water penetration.

g) Mr Thompson had obtained two quotations from different contractors for the installation of a damp course in the building. Although the contractors used contrasting technologies, the Tribunal is satisfied that the contractors were addressing the same problem of rising damp, and in that respect the quotations supplied were comparable.

h) Mr Thompson for the Respondent was proposing to give the contract to Schrijver which provided a lower tender than the one supplied by Abbey, the other contractor. Schrijver also offered a lifetime guarantee as opposed to the 20 year guarantee from Abbey. Finally the Schrijver option did not require the additional cost of re-plastering which would be incurred if a chemical damp course was injected in the building.

i) The damp proof system installed by Schrijver was restricted to the external walls of the property.

j) Mrs Willens supplied no alternative quotations for the work.

185. Having regard to the above findings the Tribunal is satisfied that the proposed works fall within the Respondent's covenant to keep the building in good and substantial repair as set out in clause 4(1) of the lease. Further the Tribunal finds that the proposed works are not improvements because they are in effect a replacement of what is now an ineffective damp course which was installed in the property prior to the grant of the long leases for the Flats within the building.

186. The Tribunal holds that the works are necessary. The building suffers from water penetration arising from a range of sources. Mr Thompson has arranged repairs to address some of the causes of water penetration. The Tribunal finds that the installation of a damp proof system is part of a package of measures to deal with water penetration and is primarily aimed at tackling the problem of rising damp.

187. The Tribunal finds that the Schrijver option is cheaper and has a number of advantages over the competing tender from Abbey. Mrs Willens produced no alternative quotations for the works.

188. The Tribunal determines that the estimated sum of £3,421.44 for the damp remediation works is reasonable and payable by Mrs Willens.

189. If the works are not completed to a reasonable standard Mrs Willens may be entitled to make an application challenging the reasonableness of the costs actually incurred on the damp remediation.

**Breach of Covenant**

190. The Respondent's application for breach of covenant on the part of Mrs Willens was received by the Tribunal on 8 March 2016.

191. The Application did not specify the alleged breaches but instead referred to copies of two letters before action and to alleged non-payment of service charges and administration charges by Mrs Willens.

192. The first letter before action was from SLC solicitors dated 25 March 2015. SLC solicitors on behalf of the Respondent alleged that Mrs Willens had breached paragraph 3 of Third schedule by keeping dogs in the property which the Respondent said were causing annoyance to other occupiers. The Respondent also alleged that Mrs Willens had carried out unauthorised alterations to the loft area and had failed to co-operate with the installation of a linked mains powered smoke detectors. SLC on behalf of the Respondent requested Mrs Willens to remove her dogs within 14 days and lay suitable sound proofing and carpet in her property. SLC indicated that the Respondent would make application under section 168 of the 2002 Act to the Tribunal for breach of covenant if she failed to comply with the request.

193. The second letter before action was from Leo Abse & Cohen solicitors dated 7 January 2016. Leo Abse & Cohen on behalf of the Respondent alleged that Mrs Willens was in breach of clause 3(8) and paragraph 1 of the Third schedule by undertaking works to convert the loft area. Leo Abse & Cohen advised Mrs Willens that if works had not begun within 21 days from date of the letter an application would be made under section 168 of the 2002 Act to the Tribunal for breach of covenant.

194. Mr Thompson in the Respondent's statement of case [176 & 177] alleged the following breaches of covenants under the lease:

- Non-payment of ground rent (clause 1(1)).
- Non-payment of service charges in a timely manner Clause 1(2).
- Obstructing reasonable access by the landlord and its agents to the flat (Clause 3(5).
- Maiming or injuring any of the structural parts of the Flat (Clause 3(8)).
- To yield up the flat in a state of repair decoration and condition (Clause 3(11).
- Not to do to render any increased premium for insurance (Clause 3(12(a)).
- To comply with any notices forthwith (Clause 3(18)).
- Not to do anything which may expose the landlord to any penalty (Clause 3 (19)).
- The right of support and protection for all other parts of the building from the Flat (Paragraph 2 Second schedule).
- No act or thing which shall become a nuisance (Paragraph 1 Third schedule).
- No animal which may cause annoyance (Paragraph 3 Third schedule).
- No person shall reside in the flat unless the floor thereof is covered with carpet (Paragraph 7 Third schedule).

195. Mrs Willens denied the breaches of covenant alleged by the Respondent.

196. Before considering the merits of the Application the Tribunal makes the following observations on proceedings under section 168(4) of the 2002 Act and the Respondent's approach to them.

197. The purpose of bringing proceedings under section 168(4) is to enable a landlord under a long lease of a dwelling to serve a section 146 notice to forfeit the lease for breaches of covenant by the tenant other than non-payment of rent. If proceedings are brought the Tribunal is required to determine whether the tenant has committed an actionable breach of covenant. A finding against a tenant potentially could result in the tenant losing a valuable asset and in this case her home.

198. The term actionable breach was considered by Judge Huskinson in *Swanston Grange (Luton) Management Limited v Eileen Langley Essen* LRX 12/2007. Essentially the Tribunal's jurisdiction under section 168(4) is limited to a finding of fact on whether a breach has occurred. Judge Huskinson added that the Tribunal can decide whether the landlord is estopped from asserting the facts on which the breach of covenant is based. The Tribunal's jurisdiction, however, does not extend to determining whether the breach has been remedied. This is a question for the court in an action for forfeiture.

199. The structure of section 168 is such that an action under section 168 (4) should only be brought if the tenant does not admit the breach. In the Tribunal's view, it follows from the structure of section 168 and the

potential severe consequences for the tenant, the landlord is responsible for proving the breach on the balance of probabilities. It also follows the landlord should give the tenant an opportunity to admit the breach and put matters right before bringing proceedings under section 168(4) of the 2002 Act.

200. Mr Thompson in the Respondent's statement of case went beyond the allegations relied on in the Application and introduced new allegations which were general and not specific. In addition, Mr Thompson raised matters in the statement that were either premature or had already been dealt with by the Tribunal.

201. The Tribunal intends first to give its view on various aspects of the Respondent's statement of case at E.1 to E.11 [176-177]. The Tribunal will then make its determination on the alleged breaches outlined in the letters before action on which Mrs Willens has been given an opportunity to admit or deny.

202. At E.1 Mr Thompson alleges that Mrs Willens had failed to pay the ground rent on 1 December annually in advance and had missed the last two periods. Non-payment of ground rent is not a matter that falls within the purview of section 168 because it is not necessary to serve a section 146 Notice to forfeit a lease for non-payment of ground rent.

203. In any event Mrs Willens denies that she was in breach. Mrs Willens tendered payments of ground rent due on 1 December 2014 and 1 December 2015 on 29 November 2015 [410]. On 23 December 2015Mr Thompson returned the cheques to Mrs Willens. On 30 December 2015 Mrs Willens requested an explanation from Mr Thompson for sending back the two cheques unpresented. Mr Thompson did not respond.

204. At the hearing Mr Thompson informed the Tribunal that the cheques were returned on solicitors' advice so as to avoid the suggestion that the Respondent had waived the alleged breaches of covenant by Mrs Willens.

205. At E.2 Mr Thompson said that Mrs Willens' determined stance not to pay the service charges and administration charges in a timely manner comprised a continual and determined breach by Mrs Willens. Mr Thompson referred to the past applications challenging the service charges made by Mrs Willens and the two applications before the Tribunal in these proceedings.

206. In connection with the past applications Mrs Willens with the assistance of her mortgagee has paid the amounts due and any potential actions for forfeiture for non payment of service charges and administration charges have been compromised by the settlements reached between the parties.

207. In terms of the current applications for determination of service charges and administration charges no application for forfeiture can be

made until the Tribunal or on appeal from has finally determined the amount of service charge or administration charge payable by Mrs Willens (see section 81 of the Housing Act 1996). In other words, the Respondent has to await the outcome of these proceedings and any potential appeal and Mrs Willens' response to them before contemplating the bringing of forfeiture proceedings in connection with Mrs Willens' lease.

208. At E3.3 Mr Thompson referred to clause 3(2) of lease which requires the payment of interest on late payments of rent and service charges. Mr Thompson did not allege in the Respondent's statement of case that Mrs Willens had broken the clause. Mr Thompson simply made the observation that the Upper Tribunal had previously advised Mrs Willens of the desirability of making payments on time in order to avoid the imposition of interest.

209. At E3.4 Mr Thompson stated that Mrs Willens appeared determined to prevent the Respondent and its agents from entering the Flat for the purpose of examining the state of repair and condition of the Flat in accordance with clause 3(5) of the lease. The Tribunal observes this has been the subject of previous proceedings before the Tribunal on 19 March 2010 (Tribunal found no breach), and on 28 July 2010 (Tribunal determined that clause 3(5) had been broken). There was an application before the previous Tribunal in July 2015 which was subsequently withdrawn.

210. The Tribunal also notes that Mrs Willens allowed Mr Baker and Mr Duncan who were instructed by the Respondent access to her home on 11 August 2015 in order to inspect the condition of her Flat and to investigate the roof and chimney structures.

211. At E3.9 Mr Thompson invited the Tribunal to consider whether Mrs Willens had breached clauses 3(11), 3(12)(a), 3(18), 3(19), paragraph 2 to the Second schedule and paragraph 1 to the Third schedule of the lease. The Tribunal declines Mr Thompson's invitation. The Respondent is responsible for setting out clearly its case against Mrs Willens. The Tribunal would be acting contrary to its overriding duty to act fairly and justly if it attempted to identify the facts for Mr Thompson's unsubstantiated allegations of potential breaches of covenant on the part of Mrs Willens.

212. The Tribunal now turns to the specific allegations set out in the letters before action written on behalf of the Respondent by SLC solicitors on 25 March 2015 and Leo Abse and Cohen on 7 January 2016.

213. Both firms of solicitors referred to the alleged unauthorised works in the loft area forming part of Mrs Willens' Flat. The allegation in the letter of SLC solicitors was not particularised and failed to state clearly which clause of the lease had been broken by these works.

214. The letter from Leo Abse and Cohen was more specific stating that the alleged unauthorised works to the loft area had put Mrs Willens in breach of clause 3(8) of not to cut, maim or injure any of the structural parts of the walls of the Flat or make any structural alterations or additions to the Flat; in breach of paragraph 1 schedule 3 of the lease to do no act or thing which shall or may become a nuisance, damage or annoyance or inconvenience to the Landlord or any occupier of the building, and in breach of clause 12(a) of not to or permit or suffer to be done anything which may render any increased or extra premium payable for the insurance of the building.

215. On 25 January 2016 Mrs Willens responded to the letter from Leo Abse and Cohen stating that she denied the allegations. Further Mrs Willens said there was no evidence cited in support of the allegations and the alleged breach was not fully specified. Mrs Willens also suggested that the Respondent may wish to look back at a previous Tribunal decision (CHI/29UM/LSC/2011/0120) which had dealt with a similar section 168 application concerning the removal of purlins.

216. Leo Abse and Cohen relied on the reports of Mr Baker and Mr Duncan for the factual circumstances supporting the allegations of breach of covenant. Mr Baker said that the central part of the roof void directly above the Flat had been converted at some time in the past to form a habitable room accessed from the entrance hall via an extending ladder.

217. Mr Duncan did not refer to the loft area as a habitable room. Instead Mr Duncan gave a description of the conversion which he said was not to a reasonable standard. According to Mr Duncan, the works appeared to consist of the addition of flooring over the existing ceiling joists, the construction of ashlar walls and tongue and groove boarding fixed to the underside of the existing rafters. Mr Duncan noted that props which would have provided intermediate support to the purlins together with the ceiling binders had been removed. Mr Duncan recorded the rafter had sagged; there was no evidence of damp or staining to suggest the roof weathering was failing or had failed, and that the gable brickwork appeared to be in good condition with little to suggest any bulging or outward movement of the gable triangle. Mr Duncan also observed that at first floor level all ceilings appeared to be in good condition with no significant cracks and little that could be attributed to excessive deflection of the supporting joists.

218. Mr Baker and Mr Thompson contended that the loft alterations took place after conversion of the building into three Flats. Mr Baker pointed out that the present loft access was on the landing at the top of the staircase, which on the original drawings was outside the door to Flat 301B although still within the demise.

219. Mr Thompson was of the view that the approved drawings for Flat 301B showed that access to the loft area was via a hatch in the ceiling above the kitchen area. Mr Thompson asked the Tribunal to draw an

inference that the loft access had been relocated to the landing at the top of the stairs sometime after the creation of Flat 301B.

220. Mr Baker and Mr Thompson then argued that the loft alterations took place at the same time as the works done to enclose the staircase ascending to Flat 301B. In respect of the latter Mrs Willens had a licence to carry out the said works which was granted by the previous landlord on 29 July 2008. The licence was signed as a deed and exhibited at [418]. The enclosure has subsequently been taken down.

221. According to Mr Thompson, the method of construction in the loft of the single skin largely unsupported board walls without insulation was identical to the construction of the enclosure on the stairway. Mr Thompson concluded the enclosure on the staircase and the loft alterations were carried out by the same contractor instructed by Mrs Willens.

222. There is no dispute between the parties that at some time in the past alterations had been carried out to the loft space above Flat 301B. The dispute concerned the timing of the works and the identity of the person responsible for them.

223. Mrs Willens was adamant that the alterations to the loft were done before she purchased the property in 1997. Mrs Willens denied responsibility for them.

224. The Tribunal is not convinced by Mr Thompson's rationale for attributing responsibility for the loft conversion to Mrs Willens. Mr Thompson's case against Mrs Willens rested on an interpretation of the drawings that the access to the loft had been relocated from the ceiling above the kitchen to that above the landing at the top of the stairs, and on his assessment that the construction of the stair enclosure and that of the loft conversion bore the hallmarks of the same contractor.

225. The Tribunal has offered a contrary view on the hatchings showed in the drawings. In the Tribunal's view the hatching in the kitchen area in all probability represented the space for a fridge and not the trap door for the loft. The Tribunal finds Mr Thompson's assumption about a common contractor for the loft and stair enclosure works speculative. The Tribunal notes that the lease for 301B makes specific mention of the loft area which suggests that it existed well before Mrs Willens acquired the leasehold to the Flat, indeed before the commencement of the lease.

226. The Tribunal is satisfied that the Respondent has failed to prove on the balance of probabilities that Mrs Willens was responsible for conversion of the loft area above her Flat.

227. The Tribunal also finds that the works complained of in the loft, namely the removal of props to the purlins did not contravene clause 3(8) to

the lease which was concerned with structural parts to the Flat, and not with the structure of the roof which was part of the building.

228. Mr Thompson adduced no evidence that the insurance premium had been increased as a result of the loft conversion.

229. The Tribunal finds that Mrs Willens was not in breach of the various covenants alleged (Clauses 3(8) & 12(a) and paragraph 1 schedule 3) in connection with the works carried out to the loft.

230. The Tribunal also notes that on 1 February 2012 a previous Tribunal (CHI/29UM/LSC/2011/0120) had determined that Mrs Willens was not in breach of clause 3(8) in connection with the removal of purlins in the roof. The previous Tribunal decided that Mr Thompson's case was based on assertions and that there was no evidence that Mrs Willens had removed the purlins as alleged. Further the previous Tribunal decided that even if Mr Thompson's assertions were correct the removal of purlins did not fall within the terms of clause 3(8) which was concerned with the structure of the demise, and not of the building.

231. Arguably this Tribunal should not have entertained the Respondent's present application for breach of covenant in connection with the loft conversion. It appears to the Tribunal that the issues before it were identical to the ones before the Tribunal sitting on 1 February 2012. They involved the same parties and the same subject matter. Given those circumstances the Respondent was estopped from raising the alleged breach again under clause 3(8) unless the Respondent could demonstrate fraud or collusion at the earlier hearing[2].

232. This Tribunal went ahead with the current application for breach of covenant in connection with the loft conversion because the parties did not raise the previous determination at the hearing and their views were not sought on the question of estoppel.

233. Mr Thompson in evidence mentioned other alterations to the Flat which included the repositioning of the entrance door to the top of the stairs, the incorporation of the landing into the interior of the flat and the removal of stub walls in the lounge/kitchen area. Mr Thompson, however, did not establish whether these alterations constituted contraventions of the terms of the lease.

234. The Tribunal turns now to the allegation that Mrs Willens by keeping her dogs in the Flat was in breach of paragraph 3 schedule 3, which provides that "no bird animal or reptile which may cause annoyance to

[2] See Upper Tribunal decision in *Hemmise and another v Tower Hamlets London Borough* [2016] UKUT 109 (LC) which gives a comprehensive overview of the law relating to estoppel and whether the Tribunal is bound by a previous decision.

any owner, tenant or occupier of any other Flat comprised in the building shall be kept in the Flat".

235. The Third schedule to the lease sets out The Regulations of which paragraph 3 is one. Under clause 2 the tenant covenants with the landlord and the tenants of the other Flats in the building to observe at all times the Regulations set out in the Third Schedule.

236. SLC solicitors set out the Respondent's allegations in connection with the dogs in its letter of 25 March 2015 to Mrs Willens, which were keeping more than one dog, using a shopping trolley to remove the dog excrement which caused an appalling smell in the building and the excessive noise generated by barking dogs.

237. SLC solicitors requested the removal of dogs, the disposing of the shopping trolley, and the laying of suitable sound proofing and carpet in the Flat within 14 days of the date of the letter. SLC solicitors said the Respondent would make application to the Tribunal for a declaration that a breach has occurred if the requests were not complied with.

238. Mrs Willens responded on 7 April 2015 stating that she denied the allegations and requested the Respondent to drop the allegations, including any demand for payment of related fees, and to apologise for the inconvenience and hurt caused.

239. The Respondent's evidence in support of its allegations comprised a letter dated 3 December 2014 [279] from a Mr Rogers who occupied Flat 301A which was immediately below Mrs Willens' Flat. The letter was addressed to Joanne Pavitt of Megadale Estates, which the Tribunal understands manages the short-term lettings of Flats A and C on behalf of Mr and Mrs Thompson. Mr Rogers complained about Mrs Willens keeping three dogs in the Flat, one of which was a puppy. According to Mr Rogers the introduction of a new animal had created tensions with the other dogs which had resulted in more barking and fighting. Mr Rogers said the noise from the upstairs Flat was amplified by the wooden floors. Finally Mr Rogers stated the noise was happening day and night and that on 3 December 2014 he was woken up at 2.45 am by a dog thumping its toy on the floor.

240. On 5 December 2014 Ms Pavitt wrote to Mrs Willens informing her of Mr Rogers' complaint and requesting her to show consideration to her neighbour [395].

241. On 14 January 2016 Mr Rogers provided an email to Ms Pavitt in response to her questions about Mrs Willens[280]. A copy of Ms Pavitt's questions was not supplied in the bundle. Mr Roger confirmed that Mrs Willens kept two dogs in the Flat and that the noise of the dogs charging around the hallway was as loud as ever. Mr Rogers also believed the dogs were contributing to the unpleasant odour that prevailed in the hallway.

242. Mr Rogers did not attend the Tribunal to give evidence and did not supply a witness statement with a statement of truth. Mr Thompson said there had been a complaint about the dogs from another tenant who was not prepared to put it in writing. Mr Thompson explained that Mr Rogers had relocated to Flat 301C. There was a new tenant in Flat 301A who was behind with his rent.

243. Mrs Willens said one of the reasons for purchasing the Flat was that there was no absolute prohibition on the keeping of pets. Mrs Willens has had two terrier dogs with her for most of the time that she has lived at the Flat. There was a period around 2006 when she had one dog following the death of the other.

244. Mrs Willens strongly challenged the truth of Mr Rogers' assertions. Mrs Willens stated that Mr Rogers had never been in her Flat. The floors of the Flat were covered by underlay and various carpets. Mrs Willens denied that her dogs caused excessive noise from barking. The Tribunal noted that the dog in the property had not barked throughout the time of the inspection. Mrs Willens stated that she had looked after her daughter's dog for three days in addition to her own two dogs whilst building works were being carried out to her daughter's home. Mrs Willens said this was the only time that she had looked after three dogs in the flat.

245. The covenant under scrutiny is that Mrs Willens will at all times observe the regulations which include no animal that may cause annoyance to any owner tenant or occupier of any other Flat comprised in the building shall be kept in the Flat.

246. The Tribunal observes that under the covenant Mrs Willens is able to keep two dogs in the Flat. The covenant does not impose an absolute prohibition on the keeping of dogs and there is no express limit to the number of dogs that may be kept in the Flat.

247. The covenant requires Mrs Willens to observe the regulations which in this case means she cannot keep a dog that may cause annoyance to the owners and occupiers of the other flats. The structure of the covenant is such that it is directed at the actions of Mrs Willens in managing the dogs rather than the behaviour of the individual dogs.

248. Annoyance is defined as "anything which raises an objection in the minds of reasonable persons"[3]. The fact that an owner or an occupier of another Flat may be annoyed by the presence of a dog in Mrs Willens' flat is not sufficient in itself to justify a finding of breach. The question of annoyance has to be examined from the perspective of the reasonable person. In the Tribunal's view, a reasonable person would tolerate some noise from the dogs but not excessive or incessant.

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3 Hills & Redman's Law of Landlord & Tenant A [3050 -3060].

249. The Tribunal finds that Mrs Willens since 1997 has kept one dog and for most of the time two dogs in her Flat as pets. Further the Respondent's case comprised effectively of a single complaint made by the tenant of Flat 301A back in December 2014. The Respondent did not call the tenant as a witness which meant that his evidence was not tested. Mr Thompson cited no other complainant to substantiate the Respondent's allegations.

250. The Tribunal considers the Respondent's case extremely weak and fell far short of the threshold to establish on the balance of probabilities that Mrs Willens kept dogs which caused annoyance to other tenants. The Tribunal, therefore, determines that Mrs Willens was not in breach of paragraph 3 to the Third schedule in connection with her dogs.

## Administration Charges

251. The Respondent requested determinations on whether the following charges were payable by Mrs Willens as administration charges:

    a) A charge of £243 issued on 5 January 2016 in respect of costs incurred by SLC solicitors in connection with the letter for breach of covenant (dogs) dated 25 March 2015 [29].
    b) A charge of £60 issued on 5 January 2016 in respect of costs incurred by SLC solicitors in connection with the notice dated 13 May 2015[30].
    c) A charge of £276 issued on 5 January 2016 in respect of costs incurred by Leo Abse and Cohen solicitors in connection with the letter for breach of covenant (loft) [31].
    d) A charge of £500 issued on 11 December 2015 in respect of costs incurred by Richard Baker in preparation of his report in connection with the breach of covenant (loft) [32].
    e) A charge of £300 issued on 11 December 2015 in respect of costs incurred by Ian Duncan in preparation of his report in connection with the breach of covenant (loft) [32].

252. The Respondent's position in respect of the administration charges was that they remained unpaid, and in the event of continuing non-payment it is the Respondent's intention to seek recourse via section 146 of the 1925 Act and subsequent forfeiture as was clearly indicated in the correspondence.

253. Mrs Willens saw no case for the demands and it was not for her to second-guess the Respondent's case. Mrs Willens considered it was very early for costs to be demanded prior to a decision. Mrs Willens pointed out that the Respondent had retained £800 of the charges ( Mr Baker £500 and Mr Duncan's report £300) as service charges.

254. The Respondent relied on the provisions of clause 3.13 to recover the costs as administration charge:

> "To pay all expenses including solicitor's costs and disbursements and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under sections 146 or 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court..."

255. The Upper Tribunal in *Barrett v Robinson* [2014] UKUT 0322 (LC) considered the circumstances in which costs incurred in proceedings would be recoverable under a covenant such as clause 3(13). At paragraph 52, the Tribunal said this

> "Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146 if, at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure. A landlord which does not in fact contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause such as clause 4(14) as providing a contractual right to recover its costs."

256. Mrs Willens appealed to the Upper Tribunal against an imposition of a previous administration charge of £2,427 representing legal fees incurred by solicitors between 22 January and 12 June 2013 in contemplation of proceedings before the County Court (*Willens v Influential Consultants Ltd* [2015] UKUT 362 (LC)). The legal costs concerned non-payment of service charges by Mrs Willens.

257. In the Appeal Martin Rodger QC, the Deputy President, found that service of a notice under section 146 and, if necessary, proceedings for the forfeiture of Mrs Willens lease, were clearly in the contemplation of the Respondent at the time it incurred the expenditure on legal fees which the FT Tribunal found was recoverable as an administration charge under clause 3(13).

258. The Deputy President placed weight on Mr Thompson's evidence of the Respondent's preferred approach to the recovery of service charge arrears which was to commence proceedings in the county court for forfeiture. In this regard Mr Thompson produced copies of correspondence with the solicitors describing a sequence of anticipated events beginning with the issuing of a letter of claim, then progressing either to a decision of the LVT or the county court, followed by service of a section 146 notice, before finally culminating in the issuing of county court proceedings for forfeiture. By this route Mr Thompson anticipated that the full sum due would be recovered from Mrs Willens' mortgagee.

259. The administration charges claimed in this Application did not involve the non-payment of service charges. The administration charges fall into three separate categories of action.

260. A charge of £60 for costs incurred by SLC solicitors in connection with the notice dated 13 May 2015. This notice informed Mrs Willens that the Respondent had instructed Mr Baker to carry out a survey of Mrs Willens' Flat. The notice requested Mrs Willens to give Mr Baker access to her property on 3 June 2015 in accordance with paragraph 1 to Second schedule. SLC solicitors advised Mrs Willens that the Respondent had incurred costs of £50 plus VAT for arranging a further appointment which represented SLC's costs in drafting and sending the notice.

261. The Tribunal observes there was no mention in the notice that it had been prepared incidental to and or in contemplation of section 146 proceedings. SLC indicated in the notice that it had been sent in connection with proposed works to Mrs Willens' Flat.

262. In order for the Respondent to recover the costs of £50 plus VAT for the notice as an administration charge the Respondent must demonstrate that the charge meets the requirements of clause 3.13. The requirements are that the charge was incurred incidental to the preparation and service of a section 146 notice or incurred in or in contemplation of proceedings under sections 146. The Respondent has adduced no evidence to connect this charge with forfeiture proceedings. On the contrary the evidence suggests that the charge was related to proposed works to the property.

263. The Tribunal, therefore, determines that Mrs Willens is not liable to pay the administration charge of £60 issued on 5 January 2016 in respect of costs incurred by SLC solicitors in connection with the notice dated 13 May 2015.

264. The next category of administration charge is the charge of £243 dated 5 January 2016 for the costs incurred by SLC solicitors in connection with their letter before action for various breaches of covenant dated 25 March 2015.

265. The contents of this letter are set out in more detail in the preceding section dealing with alleged breaches of covenant. Essentially the letter comprised various allegations regarding Mrs Willens' handling of her dogs and required Mrs Willens to remedy the alleged breaches otherwise proceedings would be commenced before the Tribunal under section 168 of the 2002 Act.

266. SLC solicitors in the letter stated

> "Failure to rectify the breaches within the next 14 days will mean that our client will be making an application to the First Tier Tribunal under section 168 of the Commonhold and Leasehold Reform Act

2002 and seek a declaration that there has been a breach of the Lease and will be seeking to recover their full legal costs on an indemnity basis. As a result our client will be seeking to forfeit your lease and you will lose your interest in the property and will still remain liable to your mortgage advisor".

267. Finally SLC explained that the charge of £201 plus VAT had been incurred in drafting the letter, taking client's instructions and reviewing the lease.

268. The Tribunal would have had no hesitation in finding that these costs had been incurred in contemplation of section 146 proceedings if the subject matter had involved non-payment of service charge. The subject matter, however, involved various allegations of breaches of covenant, primarily involving Mrs Willens' dogs which were not admitted and required prior determination by the Tribunal that a breach had occurred.

269. The Tribunal considers the fact that the Respondent has said in the letter that it would be seeking to forfeit the lease if the breach was not remedied is not in itself sufficient to engage the wording of clause 3.13. In the Tribunal's view, there has to be something more than a mere statement of intention to come within the purview of clause 3.13. The allegations of breach have to have substance in order for there to be a real possibility of forfeiture procedures. This was the case in respect of the previous administration charge for legal costs incurred in the collection of for services charges which was considered by the Upper Tribunal in *Willens* [2015] UKUT 362 (LC).

270. The Tribunal considers the Upper Tribunal decision in *Barrett v Robinson* [2014] UKUT 0322 (LC) gives support for its view that the facts must support the existence of a real possibility of forfeiture proceedings. The Deputy President at paragraph 49 said

> "Clause 4(14) must therefore be understood as applying only to costs incurred in proceedings for the forfeiture of a lease, or in steps taken in contemplation of such proceedings. Moreover, even where a landlord takes steps with the intention of forfeiting a lease, a clause such as clause 4(14) will only be engaged (so as to give the landlord the right to recover its costs) if a forfeiture has truly been *avoided*. If the tenant was not in breach, or if the right to forfeit had previously been waived by the landlord, it would not be possible to say that forfeiture had been avoided - there would never have been an opportunity to forfeit, or that opportunity would have been lost before the relevant costs were incurred. In those circumstances I do not consider that a clause such as clause 4(14) would oblige a tenant to pay the costs incurred by their landlord in taking steps preparatory to the service of a section 146 notice".

271. The Tribunal has found in the preceding section on "Breaches of Covenant" that the allegations regarding unauthorised works to the loft in the SLC letter were not particularised and failed to state clearly

which clause of the lease had been broken. Further the Tribunal found that the alleged breach in connection with the keeping of Mrs Willens' dogs which formed the principal breach named in the letter had no substance. The Tribunal decided that Mrs Willens had not contravened the particular covenant relating to the dogs.

272. Given the above findings the Tribunal is satisfied that forfeiture was not a real possibility at the time the Respondent incurred the costs on the services of SLC solicitors with the result that clause 3.13 of the lease was not engaged in respect of those costs.

273. The Tribunal, therefore, determines that Mrs Willens is not liable to pay the administration charge of £243 dated 5 January 2016 in respect of costs incurred by SLC solicitors in connection with the letter for breach of covenant (dogs) dated 25 March 2015.

274. The final category of charges is those dealing with the alleged breach of covenants connected with the works to the loft. The costs included a charge of £230 plus VAT by Leo Abse and Cohen (Slater Gordon) solicitors for professional services advising on alleged breaches of covenants in connection with the work to the loft above Mrs Willens' Flat. The solicitors provided an itemised bill which showed that 2.7 hours at the hourly rate of £110.74 (discount of £69 given) were spent advising the Respondent and drafting the letter.

275. The letter before action of 7 January 2016 recounted the Respondent's allegations regarding unauthorised works to the loft and identified the covenants in the lease which the Respondents said had been breached.

276. Leo Abse & Cohen stated in the letter that

> "If the work necessary to correct the defects described has not begun within 21 days of the date of this letter, an application will be made to the First Tier Tribunal (Property Chamber- Residential Property) for a declaration that the above places you in breach of your lease. We anticipate on the evidence available that we will be successful in this application, and in light of the same our client intends to issue a notice in accordance with section 146 of the Law of Property Act 1925 and shall seek forfeiture of your lease"

277. Leo Abse & Cohen also advised that the Respondent was seeking to recover the costs of £500 incurred on Mr Baker's Report on the Condition of Flat 301B and the costs of £300 incurred on Mr Duncan's investigation of the roof.

278. Clause 3.13 to the lease enables the Respondent to recover all expenses including solicitor's costs and surveyors' fees which would include the fees charged by Mr Baker and Mr Duncan provided the expenses have been incurred in contemplation of proceedings under section 146 of the 1925 Act.

279. The Tribunal repeats its rationale expressed in connection with the previous administration charge, namely, that the allegation of breach has to have substance in order for clause 3.13 to be engaged. In this particular instance when engaging the services of Leo Abse & Cohen the Respondent would have known of the previous Tribunal determination that Mrs Willens was not responsible for the loft alterations and that the chances of establishing a breach involving the same tenant and effectively the same facts would have been remote. Further there would have been no realistic possibility of forfeiture proceedings when the legal and surveyors' costs were incurred This Tribunal in any event found that Mrs Willens was not in breach of the various covenants cited in the letter of Leo Abse & Cohen. The Tribunal, therefore, finds that that the costs claimed did not fall within the purview of clause 3.13.

280. The Tribunal determines that Mrs Willens is not liable to pay the administration charges of £276 dated 5 January 2016, £500 dated 11 December 2015, and £300 also dated 11 December 2015.

281. The Tribunal has already indicated that the £300 incurred on Mr Duncan's report can be recovered through the service charge. The £500 incurred on Mr Baker's report is not recoverable through the service charge.

## Costs and refund of fees

282. The Respondent suggested that the Tribunal might consider it appropriate to order costs against Mrs Willens in connection with the service charge applications. The Tribunal as a rule operates as a no costs forum and would only order costs if a party had acted unreasonably in the conduct of the proceedings. The threshold of unreasonableness is a high barrier to cross (see *Willow Court Management Company (1985) Limited* [2016] UKUT 0290 (LC)*)*.

283. The Tribunal may have been more sympathetic to the Respondent's suggestion had it just been dealing with Mrs Willens' applications, but the position was muddied by the Respondent's cross applications particularly in relation to the alleged breaches of covenant.

284. Given all the circumstances the Tribunal does not consider that the threshold of unreasonableness has been crossed. The Tribunal is minded not to make a costs order against Mrs Willens and require the parties to bear their own costs in terms of application and hearing fees.

## Conclusion

285. Each previous Tribunal has encouraged the parties to use legal proceedings as a last resort. The Tribunal at the hearing in 2015 advised that it may take a dim view if a party brings an application in the future which related to a matter that had already been the subject of a previous determination by the Tribunal.

286. The Tribunal takes the view that the estimated service charge budget issued on 1 December each year has now been established in respect of anticipated expenditure and allocated heads of budget. The estimated budget for the coming year starting 1 December 2016 should be lower because of reduced insurance charges secured by Mr Thompson. The Tribunal gives notice that if a challenge is made to the estimated service charge budget which does not depart from the parameters set by previous Tribunal decisions, the Tribunal is likely to strike out the challenge under rule 9(3)(c) of the Procedure Rules 2013.

287. The Tribunal cautions Mr Thompson against making a unilateral change to the service charge proportions. The Tribunal in the body of its decision has explained its concerns. The Tribunal also notes the Respondent increased the proportion paid by Mrs Willens in 2008 [310].

288. The Tribunal found Mr Duncan's report helpful in identifying the current structural condition of the property. Although Mr Duncan recommended various works, his overall findings suggested the building was structurally sound, which, in the Tribunal's view, has a bearing on the programme for future works, and the use of reserves.

289. The Tribunal urges Mrs Willens to pay the service charge by due date. The payment of service charge does not in itself constitute an admission of liability to pay the charge, so Mrs Willens would still have the right to challenge the charge if it is not justified.

290. Likewise the Tribunal asks Mr Thompson to think twice before incurring expense on steps to forfeit the lease. The likelihood of forfeiture is remote. Ultimately Mr Thompson's focus should be on communication with Mrs Willens in her capacity of leaseholder about expenditure plans, however, difficult that may be.

291. The Tribunal is aware that the reserve is more than sufficient to enable the works to commence. It is in all the parties interests to progress with this work at the earliest opportunity subject to weather conditions and compliance with consultation requirements. This will prevent the structure from deteriorating into disrepair.

## RIGHTS OF APPEAL

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

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

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

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

## 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.]

**Service Charge (Consultation Requirements) (England) Regulations 2003**

**Schedule 4 Part 11**
NOTICE OF INTENTION

**1**

(1) The landlord shall give notice in writing of his intention to carry out qualifying works--

(*a*) to each tenant; and

(*b*) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall--

(*a*) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(*b*) state the landlord's reasons for considering it necessary to carry out the proposed works;

(*c*) invite the making, in writing, of observations in relation to the proposed works; and

(*d*) specify--

(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

INSPECTION OF DESCRIPTION OF PROPOSED WORKS

**2**(1) Where a notice under paragraph 1 specifies a place and hours for inspection--

(*a*) the place and hours so specified must be reasonable; and
(*b*) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

DUTY TO HAVE REGARD TO OBSERVATIONS IN RELATION TO PROPOSED WORKS

**3**Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

ESTIMATES AND RESPONSE TO OBSERVATIONS

**4**(1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.
(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.
(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate--

(*a*) from the person who received the most nominations; or

(*b*) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or
(*c*) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate--

(*a*) from at least one person nominated by a tenant; and
(*b*) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (*a*).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)--

(*a*) obtain estimates for the carrying out of the proposed works;
(*b*) supply, free of charge, a statement ("the paragraph (*b*) statement") setting out--

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(*c*) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.
(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord--

(*a*) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
(*b*) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;
(*c*) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;
(*d*) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(*e*) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (*b*) statement relates.
(9) The paragraph (*b*) statement shall be supplied to, and the estimates made available for inspection by--

(*a*) each tenant; and
(*b*) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)--

(*a*) specify the place and hours at which the estimates may be inspected;
(*b*) invite the making, in writing, of observations in relation to those estimates;
(*c*) specify--

(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

DUTY TO HAVE REGARD TO OBSERVATIONS IN RELATION TO ESTIMATES

**5**Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

DUTY ON ENTERING INTO CONTRACT

**6**(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)--

(*a*) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and
(*b*) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

## Commonhold and Leasehold Reform Act 2002

### Section 168

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

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

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

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

### Section 169

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

**Schedule 11, paragraph 1**

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

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

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

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

**Schedule 11, paragraph 2**

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

**Schedule 11, paragraph 5**

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

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

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

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or
  (b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).