11984

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AT/LSC/2015/0403**
Property	:	**Flat 3, 124 Barrowgate Road, London W4 4QP**
Applicants	:	**Dr C Hakim (First Applicant) and Mr W Hawes (Second Applicant)**
Representative	:	**In person**
Respondent	:	**Mr A Nijmeh**
Representative	:	**Ms C Fairley, Counsel**
Type of Application	:	**Application for determination as to (a) breaches of covenant in lease and (b) reasonableness of service charges**
Tribunal Members	:	**Judge P Korn** **Mr C Gowman MCIEH MCMI** **Mrs R Turner JP**
Date and venue of Hearing	:	**15th – 17th August and 16th & 17th November 2016 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16th January 2017**

DECISION

Decisions of the Tribunal

(1) No breach of covenant or condition in the lease has occurred.

(2) The £450.00 charge for the employment of Second Applicant for works requiring access to the Property in November 2014 is not payable.

(3) The following service charge items are reduced as stated below:-

- Block insurance 2014/2015 – total amount reduced from £3,109.53 to £3,009.53.
- Block insurance 2015/2016 - total amount reduced from £2,114.85 to £1,803.37.
- Cleaning: August 2014 – total amount reduced from £720.00 to £600.00.
- Cleaning: July 2015 - total amount reduced from £840.00 to £600.00.
- Works to replace central water pipes – total amount reduced from £2,760.00 to £1,380.00.
- Replacement of staircase Critall windows – Respondent's share of this cost reduced to £250.00.

(4) The First Applicant is to pay the Respondent's summarily assessed costs of £250 + VAT incurred in dealing with the First Applicant's section 20ZA application for dispensation.

(5) The remainder of the service charge items forming the basis of the service charge application are payable in full.

(6) We hereby make an order under section 20C of the Landlord and Tenant Act 1985 order that the First Applicant may not include in the service charge any costs incurred by her in connection with these proceedings. We make no cost orders under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 nor any further cost orders.

The applications

1. The Applicants seek a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") that one or more breaches of covenant have occurred under the lease of the Property ("**the Lease**").

2. The Applicants also seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the reasonableness and payability of certain service charges in relation to the Property.

3. The relevant statutory provisions are set out in the Appendix to this decision.

4. The First Applicant is the freehold owner of the building ("**the Building**") of which the Property forms part and is also the occupier of Flat 1. The Second Applicant is the leaseholder of Flat 2, is married to the First Applicant and is involved with the management of the Building on the First Applicant's behalf. The Respondent is the current leasehold owner of the Property. The lease ("**the Lease**") is dated 12th May 1970 and was originally made between Melanie Anne Griffiths Veal (1) and Louisa Mary Constance Houseman (2).

5. In their application for a determination that there have been breaches of covenant, the Applicants allege that – in addition to non-payment of disputed service charges – the Respondent is in breach of covenants contained in clauses 3(c), 3(g), 4(a), 4(b), 4(d) and 4(e) of the Lease and in the Second and Fourth Schedules to the Lease (albeit that clause 3(c) is not mentioned in the application form itself). In relation to the Second and Fourth Schedules, it is clear from the details of the application that reference is being made specifically to paragraph 1 of the Second Schedule and to paragraph 3 of the Fourth Schedule. Clause 4(a) of the Lease and the Fourth Schedule, as noted by the Applicants in their application, are linked and therefore need to be read together.

6. In their service charge application, the Applicants seek a determination in respect of a long list of items for the 2014/15 service charge year and a shorter list of items for the 2015/16 service charge year.

General preliminary point

7. The hearing bundles contain a very large quantity of information, including very detailed comments on the day to day dealings between the parties. It is neither practical nor desirable to make reference to all of this information, and the summary below is intended to be illustrative rather than exhaustive and is intended to focus on the pertinent points and issues.

Details of the relevant covenants

8. The wording of the covenants alleged to have been breached is as follows:-

Clause 3(c)

Not to make any structural alterations or structural additions to the flat without the previous consent in writing of the Lessor

Clause 3(g)

To permit the Lessor and her surveyor or agents with or without workmen and others at all reasonable times on notice to enter into and upon the flat or any part thereof to view and examine the state and condition thereof and make good all defects decays and wants of repair of which notice in writing has been given by the Lessor to the Lessee and for which the Lessee is liable hereunder

Clause 4(a)

Observe the restrictions set forth in the Fourth Schedule hereto

Clause 4(b)

Keep the said flat (other than the common parts) and all walls party walls sewers drains pipes cables wires and appurtenances thereto belonging in good and tenantable repair and condition and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the parts of the block not hereby demised

Clause 4(d)

Not do or permit to be done any act or thing which may render void or voidable the policy or policies of insurance of the said building or in respect of the contents of any of the other flats in the block or which may cause any increased premium to be payable in respect of any such policy

Clause 4(e)

At all reasonable times during the said term on notice permit the Lessor and her lessees with workmen and others to enter into and upon the demised premises or any part thereof for the purpose of repairing any parts of the block not hereby demised and for the purpose of making repairing maintaining rebuilding cleansing lighting and keeping in order and good condition all sewers drains pipes cables watercourses gutters wires party structures or other conveniences belonging to or serving or used for such parts of the block not hereby demised the Lessor or her lessees (as the case may be) making good all damage occasioned thereby to the demised premises

Paragraph 1 of Second Schedule

Full right and liberty for the Lessee and all persons authorised by her (in common with all other persons entitled to the like right) at all times by day or night and for all purposes to go pass and repass over and along the front path the main entrance hall stairs and landings of the block

Paragraph 3 of Fourth Schedule

Not to throw dirt rubbish rags or other refuse or permit the same to be thrown into the sinks baths lavatories cisterns or waste or soil pipes in the flat

Parties' respective cases on breach of covenant application

General background from First Applicant

At the hearing the First Applicant said that in their very first conversation the Respondent told her that it would be bad for her if she did not let him do whatever he wanted to do. She also said that the Respondent has always refused to accept a female landlord, is jealous of her extension and tried to blackmail her into buying his flat.

Clause 3(c)

Applicants' case

9. The Respondent has, without seeking landlord's consent, put a hole in the ceiling in order to connect to equipment within the loft.

Respondent's case

10. There is no evidence of this, and in any event the claim is time-barred given when the First Applicant seems to be claiming that the works took place.

Clauses 3(g) and 4(e) – access

Applicants' case

11. The Respondent has refused to comply with the terms of the Lease insofar as it requires him to allow the landlord access to the Property. The Property is built into the roof space of the Building, and access to the loft above the Property, which contains the communal water tanks, is through a ceiling hatch in the hall of the Property. Access to the flat

roof is through another hatch in the loft. Regular maintenance work requires twice-yearly access to the loft.

12. The Respondent systematically obstructed the 2007 repair works and refused permission for the First Applicant and her workmen to access the roof to carry out works despite numerous written requests. In his email of 21st July 2013, the Respondent made threats to the Second Applicant's safety during routine maintenance works in the loft. From 2004 onwards the Respondent has refused absolutely to give access to the First Applicant on notice. He has not once since January 2004 given her access to the Property or to the loft above it. He refuses to speak to the First Applicant but is willing to speak to the Second Applicant "as he is a man".

13. The Respondent also sought to coerce the Applicants into paying the whole of his share of the 2014 service charges as a condition for giving access. He has also regularly gone to the police claiming harassment and assault due to the First Applicant continuing to insist on the need for repairs requiring loft access. The Respondent has continuously refused access from January 2013 onwards and he has actively obstructed planned repair works to the common parts. Between 27th March and 8th May 2013, for example, there were eight written requests for access, all of which the Respondent either ignored or refused.

14. The Applicants have provided further details of the alleged refusals to give access and have cross-referenced this with relevant correspondence. The Applicants state that the refusal to grant access has had material consequences such as contractors declining to give quotes.

Respondent's case

15. The Respondent notes that the issue of access formed the primary basis of the First Applicant's claim against him in the West London County Court in 2013, a point not denied by the Applicants. He states that in her Particulars of Claim in that County Court case the First Applicant made the same allegations in respect of access as the Applicants are now making in the present case. At a hearing on 11th October 2013 District Judge Ryan ordered that the First Applicant's claim be struck out, and in the Respondent's submission the Applicants are not now entitled to re-open and re-litigate allegations previously disposed of by the County Court.

16. The Respondent also submits that the application itself is disingenuous. He states that he has never refused access to any of the First Applicant's agents, including the Second Applicant, and he submits that it is apparent from the transcript of the County Court case that the First Applicant did not even want access. In this regard, the Respondent quotes District Judge Ryan as saying, following a series of questions to

Dr Hakim: *"It is surprising in this case that, given that the Claimant states that she is at the end of her tether (my phrase and not hers) as a result of the Defendant's refusal to allow her access that now, given the suggested undertaking to this Court on the part of the Defendant, that the Claimant does not want access to the property at all"*. In any event, District Judge Ryan found as a fact that the documents to which he had been referred by the First Applicant did not indicate an outright refusal by the Respondent to allow access to the Property.

17. The Respondent does not accept that the documents provided by the Applicants and which post-date the County Court hearing constitute evidence of a blanket refusal to allow access, and still less do they evidence a continuous or systematic refusal.

18. The Respondent states that he has on many occasions agreed a time with the Second Applicant for him to gain access to the Property, and he asserts that there has not been a single instance of his refusing to allow the First Applicant's agents to gain access to the Property. He also states that there have been numerous instances when the First Applicant has trespassed into the Property on the basis that she considers herself to have a blanket right of access to the Property at any time and for whatever reason, and he cross-refers to relevant correspondence.

19. The Respondent submits that the Applicants' allegations are spurious and that the Applicants simply want to try and force the Respondent and his family out of the Property. The Respondent's written submissions also contain other assertions as regards the Applicants' attempts to pressurise him into selling the Property and the First Applicant's own alleged breach of the landlord's covenant for quiet enjoyment. In particular, the Respondent states that he and his family have had their lives disrupted by the First Applicant's irrational, aggressive and sometimes violent behaviour. He gives some examples of alleged harassment, including incidents where the police were required to attend, an incident where the First Applicant allegedly assaulted his wife and vandalised his daughter's pram and instances of racist and sexist comments by the First Applicant to him and/or his wife. The Respondent describes the alleged harassment as systematic and states that the First Applicant has repeatedly demonstrated aggressive behaviour in front of his children.

Clause 4(b) – maintenance of the Property

Applicants' case

20. There is a history of leaks from the Property into the upper walls of the Building staircase and into Flat 2 immediately below. The First Applicant wrote to the Respondent about the leak problem in 2004 and in 2007.

21. In June 2014, there was a new leak from the Property into the ceiling of Flat 2, and investigation of Flat 2's wet ceiling confirmed that the leak came from either the kitchen or bathroom of the Property. The Respondent denied any leak and refused access to a plumber to investigate. The leak persisted for over 3 months and required substantial repairs to the Flat 2 ceiling and coving.

Respondent's case

22. The Respondent describes as a fabrication the Applicants' claim that there has been a leak from inside the Property. If there had been such a leak, then this would primarily have affected Flat 2 and yet he has never received notice of a leak from any tenant of Flat 2. On each occasion a leak is alleged the Respondent thoroughly checks the Property and/or calls in a professional plumber, and on each occasion no leak is discovered and he informs the Applicants of this.

23. Even if there were evidence of leaks, the cause of any such leaks would need to be the subject of independent expert evidence, and the Applicants have not provided any such evidence. In particular, there is no evidence that any alleged leaks have been caused by something which the Respondent is obliged to repair, as distinct from their being caused by (for example) something within the common parts which it is the First Applicant's responsibility to maintain or caused by the First Applicant's own extensive refurbishment works.

Clause 4(d) – rendering insurance policy void or voidable

Applicants' case

24. The Applicants submit that the block insurance policy has been endangered by the Respondent preventing the First Applicant from gaining access to the Property to carry out repairs and by the Respondent's failings in connection with the periodic leaks. Therefore, these breaches also constitute breaches of the covenant contained in clause 4(d) of the Lease.

Respondent's case

25. The Respondent does not accept that he did prevent the First Applicant from carrying out repairs or that there were any failings on his part in connection with any leaks. In any event, the Applicants have not explained how the insurance policy has been 'endangered' nor provided any supporting evidence.

Clause 4(a) and paragraph 3 of Fourth Schedule – throwing refuse into sinks etc

Applicants' case

26. The Applicants state that the Respondent and his wife regularly threw nappies down the toilet, causing blockages to the main drain.

Respondent's case

27. The Respondent states that neither he nor his wife has ever disposed of nappies or anything similar down the toilet. Instead, these items are disposed of in refuse bags taken out by the Council bin men. No dates have been provided for this alleged breach, and no evidence has been provided.

Paragraph 1 of Second Schedule – basis of tenant's right to use common parts

Applicants' case

28. The Applicants state that this paragraph gives the Respondent a right of access over the block staircase but does not give him any other rights. However, the Respondent and his wife have treated the staircase as part of the Property, including using it as a rubbish dump, burning incense and keeping the windows open.

Respondent's case

29. The Applicants' allegations in relation to misuse of the staircase by the Respondent are denied, and the Respondent asserts that it is he who has had cause to complain about the state of the staircase and that he has complained about it to the First Applicant in writing on more than one occasion.

30. The Applicants' allegation lacks any detail and there is no supporting evidence.

Parties' respective cases on service charge issues

Applicants' general comments

31. The Applicants state that the service charge application is made by the majority of leaseholders and all the permanent residents as well as by the landlord. They are all agreed that all repairs that have been carried out were necessary, that the works done were of a good standard, that the service charges are compliant with the terms of the Lease and that the costs incurred are reasonable.

32. The Respondent is the only one refusing to pay his one-third share, and he did not give any reason for his refusal to pay until the Tribunal Case Management Conference on 20th October 2015. He has generally ignored the First Applicant's letters and left them piled up on the stairs and the window-sills. More recently, he has alternated between ignoring the First Applicant's emails and sending her abusive responses. The First Applicant sees this as a repeat of the situation in 2007 and 2008 when a previous tribunal "endorsed every penny of expenditure".

Respondent's general comment

33. The version of the summary of tenants' rights and obligations accompanying the service charge demand dated 31st July 2015 is out of date.

Block insurance – 2014/15

Respondent's objections

34. The block insurance was arranged pursuant to a qualifying long term agreement on which the First Applicant has not consulted. Also, the cost is too high as (a) the First Applicant has included items for which the Respondent is not liable, in particular the garages, and (b) it is more expensive than the following year. In addition, there seems to be a mismatch between the reinstatement value and the amount insured.

Applicants' response

35. It was not a qualifying long term agreement and the policy correctly covered the entire site including outbuilding, garages, the front path, walls and fences. Number 124 Barrowgate Road is a double plot which includes the garages and there is no separate title deed for 122; the plot has always been insured as a single property. The First Applicant was pleasantly surprised that the cost of insurance went down the following year.

Block insurance 2015/16

Respondent's objections

36. The First Applicant included items which are solely attributable to her private residence. The First Applicant has repeatedly refused to provide a schedule of insurance to enable the Respondent to verify the true position but a Reinstatement Valuation reveals that areas such as the garages and pond have been insured and the Respondent cannot access these areas. In addition, the "block" is coloured blue on the

Lease plan and this does not include the garages or the grounds. The rear extension should also be excluded as it was created subsequently, and the insurance of the triple-glazing was not recoverable. Taking everything together, in the Respondent's submission the cost should be reduced by 25%. The same principle applies to 2014/15, although in addition the premium for 2014/15 should be reduced to make it competitive.

Applicants' response

37. The policy correctly covers the whole site, as stated in relation to 2014/15.

Block reinstatement valuation – 2015/16

Respondent's objections

38. It is solely because of works carried out to the First Applicant's flat that a block reinstatement valuation was required.

Applicants' response

39. The Respondent's assertion is denied. The then current insurers were happy to renew the building insurance unconditionally but an alternative insurer came up with a substantially lower quote which required a recent valuation. The last insurance valuation was carried out in 1989, and the First Applicant was entitled to carry out periodic valuations by virtue of clause 5(b) of the Lease.

Cleaning – August 2014 and July 2015

Respondent's objections

40. The work was done by the Second Applicant whose hourly rate is excessive, particularly as he does not have any overheads. A fairer rate would be £10 per hour. In addition, the cleaning service was inadequate; for example, the debris and dust resulting from the First Applicant's own works was not dealt with satisfactorily over a long period. Furthermore, some of the cleaning was only necessary because of works carried out to the First Applicant's own flat and therefore the cost of this element of the cleaning is not recoverable. There was no cleaning at all between May and August 2014 and therefore the charges for that year should be reduced for that reason alone.

41. The Respondent also submits that the First Applicant was obliged to go through the statutory consultation process in relation to the cleaning but failed to do so.

Applicants' response

42. The Respondent offers no evidence of poor cleaning nor of the assertion that works on the south side created dust in the staircase on the north side. Such dust as was created was only there for a couple of days. The hourly rate is "a bargain for Chiswick" as per the Applicants' evidence in their statement of case. The Second Applicant's charges were endorsed by a different tribunal in 2008. It is difficult to find cleaners for such a small block because it is not worth their while, and therefore it was logical to ask the Second Applicant to take on the cleaning. He carries out cleaning, sweeping, washing of stairwells and walls, cleaning of brass on doors and cleaning of internal windows and the front door and porch. In addition, he does not need to be supervised, he brings his own materials and he is available to do bits and pieces at different times of the week.

43. It is not accepted that the cleaning was subject to statutory consultation.

Repair of exterior main drain – August 2014

Respondent's objections

44. The First Applicant failed to carry out the full consultation procedure in the correct manner. She also refused to provide the Respondent with the further information requested in relation to the charges. The work was done by Hammerhead General Contractors, and whilst the Respondent accepts that some consultation took place none of the quotes supplied by the First Applicant to the Respondent as part of the consultation process were from the firm to whom the contract was actually awarded. There was also no proper explanation as to why a firm which provided a cheaper quote was not chosen.

45. The Respondent added that he had also written to the First Applicant querying whether the works were actually necessary and that at the very least there was no evidence that they were urgent.

Applicants' response

46. The First Applicant's initial position was that she carried out a full consultation and that the Respondent ignored the process until the statutory deadline had passed. She noted the reply from the Respondent purportedly within the deadline but said that the Respondent had invented this letter. She added that Hammerhead did the work because they were onsite anyway for other reasons and that other contractors were not available.

47. The First Applicant later conceded that there was at least a partial failure to follow the full statutory consultation process and she made an application for dispensation under section 20ZA of the 1985 Act. In that application, she stated that for practical and security reasons it was not feasible to have two different contractors working side by side in the same place leaving expensive tools lying around and so the work on the common parts was carried out by the contractor on site on a price-match basis. There was no prejudice to leaseholders and the First Applicant did not realise until recently that she was obliged to consult or to obtain dispensation in these circumstances. The First Applicant also referred to the Supreme Court decision in *Daejan Investments Ltd v Benson and others (2013) UKSC 14*, arguing that the Supreme Court's decision underlined that consultation is not an end in itself and that the primary purpose of the requirement to consult is to ensure that tenants do not pay unreasonable charges for works.

Respondent's reply

48. There was a complete failure to consult on the chosen contractor. The First Applicant appointed a contractor about whom she already knew the Respondent had concerns based on works previously carried out. His concerns regarding damage to his door, possible damage to Mr Blumenthal's (his tenant's) personal property and the failure to clear up dust and debris were well-founded. He also had concerns about the quality of Hammerhead's workmanship and their lack of independence given the amount of work that they got from the First Applicant. The First Applicant also did not consider firms proposed by the Respondent.

Partial works to replace rusting central water pipes – November 2014

Respondent's objections

49. The First Applicant failed to carry out the full consultation procedure in the correct manner, in particular by not consulting regarding the use of Hammerhead General Contractors. She also refused to provide the Respondent with the further information requested. The sum billed is high compared to other quotes received.

50. As regards the need for the works, the works were necessitated by the installation of the First Applicant's own new pipe system in her flat. There was no evidence of rust in the water system.

Applicants' response

51. The First Applicant carried out a full consultation. The Respondent ignored the process until the statutory deadline had passed and has invented some new letters which he claims to have sent to the First

Applicant raising various questions. The explanation of the need for the works is contained in the Second Applicant's email of 8th April 2013 in which he stated that the pipes were 65 years old, corroded and rusting. It was obvious to the Applicants what was wrong with the pipes and therefore there was no need for them to seek professional advice.

52. Notwithstanding her primary position that she consulted fully the First Applicant has also applied for dispensation. The Respondent's refusal of access has resulted in some contractors refusing to prepare quotes and others refusing to do any work unless and until the access problems have been resolved. The First Applicant was therefore obliged at short notice to turn to Hammerhead to do the works on a price-match basis. There was no prejudice to leaseholders and the First Applicant did not realise until recently that she was obliged to consult or to obtain dispensation in these circumstances.

Respondent's reply

53. There was a complete failure to consult on the chosen contractor. The First Applicant appointed a contractor about whom she already knew the Respondent had concerns based on works previously carried out. His concerns regarding damage to his door, possible damage to Mr Blumenthal's property and the failure to clear up dust and debris were well-founded. He also had concerns about the quality of Hammerhead's workmanship, the fact that they were not specialist plumbers and their lack of independence given the amount of work that they got from the First Applicant. The First Applicant also did not consider firms proposed by the Respondent.

Refurbishment of staircase and front porch – November 2014

Respondent's objections

54. The First Applicant failed to carry out the full consultation procedure in the correct manner, again in particular by not consulting regarding the use of Hammerhead General Contractors. She also refused to provide the Respondent with the further information requested in relation to the charges. In addition, the works were not carried out to a reasonable standard.

Applicants' response

55. The First Applicant carried out a full consultation. The Respondent ignored the process until the statutory deadline had passed. The First Applicant has no record of the Respondent requesting further information, and there is no evidence of the works being of a poor

standard. In reality the argument about poor workmanship was a trivial one about a spot of missing paint.

Replacement of staircase Critall windows – November 2014

Respondent's objections

56. The First Applicant failed to carry out the full consultation procedure in the correct manner. In particular, it was unclear what the contractors had been invited to quote for and the estimates obtained were for triple-glazing which was an improvement and not recoverable under the Lease. The First Applicant also refused to provide the Respondent with the further information requested in relation to the charges. In addition, the selection criteria were anti-competitive, the charge included items for which the Respondent was not liable and the First Applicant failed to complete the final stage as there was no award of contract. As regards the choice of contractor, the contractor (Everest) went into administration in 2012 and the Respondent emailed the First Applicant reminding her that there had been problems with Everest's windows previously.

57. The Respondent also submits that it was always the First Applicant's intention to go for triple-glazing and that it was not the case that the chosen triple-glazing option was no more expensive than double-glazing. In any event, double-glazing would have been perfectly sufficient.

58. The Respondent accepts that he provided the First Applicant with alternative estimates outside the statutory consultation deadline but questions whether it was prudent for her simply to ignore what were clearly vastly cheaper quotes.

Applicants' response

59. The First Applicant carried out a full consultation, answered all of the Respondent's queries and explained why the Respondent's preferred contractor could not be chosen. The First Applicant obtained quotes from three reputable firms.

60. Regarding the Respondent's alternative quotes, the Respondent never sent these to the Applicants. Regarding the award of contract, the First Applicant's email of 23rd May 20124 to the Respondent explaining the decision to choose Everest was effectively an award of contract. As regards whether triple-glazing is an improvement, the First Applicant felt that the choice of triple-glazing was reasonable in all the circumstances. As for Everest going into administration, the company was very profitable when the decision was taken to award them the contract.

Employment of Second Applicant for works requiring access to the Property – November 2014

Respondent's objections

61. The First Applicant is not entitled to charge for this item, as the sole purpose of employing the Second Applicant in this regard was to harass the Respondent and his family.

Applicants' response

62. The First Applicant's initial response was that the Respondent was refusing to speak to the First Applicant and so she had no choice but to communicate via the Second Applicant in order to arrange access for works. However, at the hearing the First Applicant conceded that this charge was not recoverable under the Lease.

Witness evidence and cross-examination

Ms Balis

63. Ms Balis lives in Flat 126A Barrowgate Road, which is located in the building next to 124 Barrowgate Road. She has known the Respondent and his family for 12 years and they have been exemplary neighbours, and she states that during the period that she has known them they have suffered harassment from the First Applicant over many issues. For example, the First Applicant refused to allow the Respondent's wife to leave her baby's pram in the downstairs stairwell. She was also told by the previous owner of the Property, Mrs Jolivet, that the First Applicant constantly harassed and attempted to intimidate her and would continuously demand access to the loft through the Property.

64. Ms Balis also states that she was once, several years ago, on the receiving end of the First Applicant's aggressive and manipulative behaviour when she suddenly demanded that Ms Balis remove a small tree immediately or she would take her to court.

65. In relation to the extension works to the First Applicant's works, this caused thick red brick dust to spread from the flat into the communal areas of the block and onto her property which took months to remove.

66. Ms Balis was not available to be cross-examined on her evidence at the hearing.

67. The First Applicant accepted at the hearing that she had not filed any evidence in response to Ms Balis's claims that the First Applicant had been harassing the Respondent and his family and Mrs Jolivet, but she said that this was because she did not regard Ms Balis's evidence as credible. As to the question of why Ms Balis would lie to the Tribunal on the Respondent's behalf, the First Applicant said that Ms Balis had a grudge against her.

Mr Blumenthal

68. Mr Blumenthal is the current resident of the Property and is renting from the Respondent. He states that he has found the Respondent to be professional, courteous, helpful and available at all times. The Property is in very good condition and decorative order. On moving in to the Property he noticed problems with toilet flushing and hot water pressure, so he raised these issues with the Respondent who immediately arranged for a plumber to inspect, adjust the toilet and check the plumbing.

69. Mr Blumenthal was approached by the First Applicant in May 2016 and subsequently received a letter from her purporting to summarise his concerns about the plumbing but which he states was not an accurate record of his conversations with her. At a later stage, he was pressured by the First Applicant into handing over a set of keys whilst on his way to catch a flight for a holiday, and then on his return he found that the water filter device on his bathroom shower head had been removed without his permission. It also appeared to be the case that the shower pipes had been tampered with in his absence by the First Applicant or her builders and that she had taken photographs for use in connection with this application. He regards the First Applicant's actions as a violation of trust.

70. Mr Blumenthal was not available to be cross-examined on his evidence at the hearing.

71. At the hearing, the First Applicant said that most of Mr Blumenthal's witness statement was inaccurate and added that someone must have leant on him. As to the question of why Mr Blumenthal would lie to the Tribunal on the Respondent's behalf, the First Applicant said that he was dependent on the Respondent's goodwill as he wanted to stay in his flat.

First Applicant

72. In cross-examination, the First Applicant accepted that she had not told the Respondent himself that she was changing the locks to the entrance to the block or given him a new key as he was not resident at the time, but she did later hand him a key having taken legal advice on the point.

73. As regards the Respondent's complaints that she had loudly and persistently knocked on his door and rung on his doorbell and yelled at his wife, in cross-examination she said that this had not happened. As to why the Respondent would fabricate this and other complaints, the First Applicant said that perhaps it was partly because she was a woman and partly because she was not prepared to allow him to do whatever he wants.

74. As regards the fact that the police had been called in response to allegations of assault, the First Applicant said that the allegations themselves were completely unfounded and that the Respondent's wife was a fantasist. There was much discussion at the hearing as to what could be inferred from a letter from the Metropolitan Police to the Respondent's wife dated 24th January 2008 and a police report dated on actions taken between September and December 2014 and an email from the Metropolitan Police to the Respondent's solicitor dated 10th November 2016.

75. There was much discussion at the hearing as to the extent to which the First Applicant and others on her behalf had been allowed or refused access to the Property.

Respondent

76. In cross-examination, the Respondent said that the reason why he had been refusing to pay the service charge bill is that the First Applicant had repeatedly refused to supply him with a breakdown or, in the case of the staircase works, had not provided evidence of receipt of payment by the contractor. The First Applicant said that she had provided all information requested by the Respondent.

77. In response to a question from the First Applicant, the Respondent accepted that he tried to sell the Property as far back as 2008, but he said that he did not receive any suitable offers and therefore decided to stay despite the harassment of his family by the First Applicant.

78. In relation to the loft above the Property, the Respondent accepted that he has no rights of access to, or use of, the loft. As to how often he had allowed the First Applicant access to the loft via the Property, he said that access had only been requested within the last 2 or 3 years but he accepted that whilst he has given the Second Applicant access he has not allowed the First Applicant access.

79. As regards access generally, the Respondent was cross-examined at length by the First Applicant and he accepted that there was an occasion on which he gave very little notice as to his availability and that there were occasions on which he was prepared for the Second Applicant and/or others to access the Property but was not happy for

the First Applicant to do so. He did not accept that it was necessary or helpful for the First Applicant to accompany her workmen.

80. The Respondent accepted that not only had he raised planning objections in respect of the First Applicant's proposed building works but he had also distributed about 10 copies of the planning application to neighbours.

81. As to why the First Applicant would harass the Respondent and his family, the Respondent speculated that she wanted to force him to sell so that she could gain control if the whole building.

Dr Alafouzo

82. Dr Alafouzo rented Flat 2 (the flat below the Property) from July 2013 to April 2014. In her view the block was well-maintained and clean.

83. Dr Alafouzo notes that the Respondent describes the First Applicant in his witness statement as aggressive and violent, as engaging in harassment and intimidation and as having racist and sexist attitudes. She also notes that according to the Respondent the Second Applicant was often drunk. In her opinion all of this seems highly unlikely, and she found the Applicants to be civilised people who treated her with courtesy and never referred to the Respondent or his wife in a defamatory manner. She was not aware of them going up to the Property except on one occasion, on 20th January 2014. On that occasion, she heard the Respondent's wife screaming and then slamming her front door shut, and Dr Alafouzo saw that the First Applicant was visibly upset and shocked. Dr Alafouzo worked from home and therefore would have noticed if there had been a campaign of intimidation of the Respondent and his family by the First Applicant.

84. In cross-examination, she conceded that it was possible that when working inside her flat she might not have heard the First Applicant going up to the Property on other occasions.

Mr Waszkiewicz

85. Mr Waszkiewicz is the managing director of Hammerhead General Contractors Ltd and in May 2014 was contracted to build an extension to the First Applicant's flat (Flat 1) and to refurbish the flat. During 2014 the First Applicant also wanted to replace the rusting central iron water pipes, and in his view it was essential for this work to be completed as soon as possible as the rusting was so advanced that the valves cutting off the water supply to each flat were no longer operational. This made it impossible to isolate the Flat 1 plumbing in order to carry out the refurbishment works.

86. Throughout 2014 the Respondent refused to give access to the First Applicant and to Mr Waszkiewicz's company for plumbing works. He was also obstructive regarding access for works to replace the antiquated electrical system in the block staircase.

87. On the issue of leaks, there was a leak from the Property into the ceiling of Flat 2 during 2014 and there was no doubt in Mr Waszkiewicz's mind that the leak came from the Property.

88. At the hearing, Mr Waszkiewicz said that he disagreed with the assessment of the state of the valves and the pipes by Britannia Building Construction & Services Ltd, the Respondent's expert, which was dated 10th November 2016. Britannia's report state that the valves have stiffened due to a combination of lack of use and the hard water but could be made operational again if required and that the central iron pipes are fit for purpose and in good condition. Mr Waszkiewicz's disagreement with their report was based on what his plumber had told him, and he regarded Britannia's conclusions as ridiculous. He also said that it was untrue that the First Applicant was continually ringing the Respondent's doorbell.

89. In cross-examination, he accepted that his firm was not a specialist plumbing firm and that he was not personally a plumber. He accepted that he had not inspected the plumbing himself and that there was no report in the hearing bundle from the person who did inspect on behalf of Hammerhead nor any written notes of that person's findings. Mr Waszkiewicz, in giving his opinion, was just relying on what he had been told in 2014 by the person who inspected the plumbing.

90. Also in cross-examination, Ms Fairley noted that Mr Waszkiewicz had done a lot of work for the First Applicant and was waiting to hear from her in response to his tender for another job for her. Mr Waszkiewicz acknowledged that the First Applicant had written his statement but confirmed that it was accurate, although he conceded that his evidence regarding the First Applicant being refused access to the Property was based on what he had been told by the First Applicant. He does not remember the details of what happened in 2014.

91. Ms Fairley also put it to Mr Waszkiewicz that he had no evidence to support his claim that the valves could not be turned and that he was overstating how much he could tell just from looking at photographs. She also put it to him that it was unlikely that the Property was the source of the leak to which he had referred as the plumbing in the Property had recently been re-done.

92. In relation to the dust and debris of which the Respondent had complained, Mr Waszkiewicz accepted that there will have been dust but said that his firm deep-cleaned at the end of each day. He did not

accept Mr Blumenthal's evidence that his plumbers had caused damage to the Property.

Parties' further comments

As noted above, it is neither practical nor desirable to summarise all comments made on behalf of the parties, but the following points are worth recording.

Applicants' further comments

93. The First Applicant said that the Respondent has been using the loft without permission and has barred the Applicants from accessing it. The First Applicant has had good relations with Mr Blumenthal and he provided a witness statement in return for the Respondent replacing his windows.

94. The First Applicant did not accept the validity of the Respondent's assertion that she did not need to accompany her contractors when they were accessing the Property, as the ultimate responsibility was hers.

95. Regarding the insurance, she said that she had been told by the brokers that if the garages were to be excluded from the policy this would only reduce the premium by £60.00 at most.

96. Regarding the last minute non-availability of the Respondent's witnesses for cross-examination, she found this very odd and suggested that it was because they knew their witness statements to be untrue.

97. The First Applicant referred the Tribunal to the case of *Vine Housing Co-operative v Smith (2015) UKUT 0501* as authority for the proposition that if there is a breach of covenant then motive is irrelevant.

98. The First Applicant also referred the Tribunal to certain other cases but did not identify in any meaningful way how these cases supported her case.

Respondent's further comments

99. Ms Fairley made lengthy submissions, together with examples, in support of her contention that the First Applicant was an unreliable witness, that her way of looking at things has been unreasonable and idiosyncratic, and that she has frequently back-tracked and changed her case when it has suited her.

100. The Applicants' case on breach of covenant is unclear. The main issue seems to be access, but the pre-2013 complaints about refusal of access have already been considered and rejected by the County Court and it was not accepted that the Respondent's actions since 2013 have amounted to a refusal to grant access in a manner which constitutes a breach of the Lease. Access rights are not unqualified and according to *Gale on Easements* have to be exercised "civiliter". In other words, the landlord has to act reasonably. The Respondent has regularly allowed access to the First Applicant's contractors and has allowed access twice a year to the Second Applicant.

101. It is true that access has sometimes been denied for non-urgent works when the date has not been convenient, but this does not constitute a breach of the relevant Lease covenant. It is also true that the First Applicant has herself been excluded, but this is due to her harassment as evidenced by the police warning. In addition, her own contractors (for example, her electrician) have said that her presence was unnecessary. Her requests for access have been oppressive – 36 requests even on her own evidence in a single year in the context of this being a 999 year lease.

102. Regarding the alleged leak, there was no evidence on this from any occupier of Flat 2 and the Respondent's factual evidence went unchallenged. Nobody can even identify which pipe is alleged to be responsible for any such leak, and even the Second Applicant concedes that the system is complex. It could be, for example, that that the First Applicant herself caused the alleged leak through her own works in 2014.

Tribunal's analysis

ALLEGED BREACHES OF COVENANT

Clauses 3(c) of the Lease

103. This covenant relates to the making of structural alterations or additions without the landlord's consent. The Applicants allege that the Respondent has, without seeking landlord's consent, put a hole in the ceiling in order to connect to equipment within the loft.

104. In our view the Applicants' evidence is very weak on this point. They have produced no evidence on the issue, in particular no compelling or independent evidence that the hole exists or – if it does – that it was created (or permitted to be created) by the leaseholder of the Property. In addition, this alleged breach was not even mentioned in the initial application and it only emerged later, thereby further weakening the Applicants' case. It is also not mentioned in Mr Waszkiewicz's witness

statement despite the fact that he refers to the loft on more than one occasion.

105. We are therefore not persuaded that a breach of this covenant has occurred.

Clauses 3(g) and 4(e) of the Lease

106. The allegation here is that the Respondent refused access to the First Applicant and/or to her agents and/or workmen in breach of the covenants contained in these clauses. Whilst these clauses are different from each other, neither party has made any points based on those differences, and the key issue for both of them is the extent to which (if at all) access has been denied.

107. As noted in submissions, this issue came before the County Court in 2013. The First Applicant's claim was struck out in that case and, in our view, it is clear from District Judge Ryan's judgment that he found as a matter of fact that the evidence on which the First Applicant had relied did not indicate an outright refusal by the Respondent to allow access to the Property. Under section 168(5)(b) of the 2002 Act a landlord may not make an application for a determination that a breach of covenant has occurred in respect of a matter which has been the subject of determination by a court, and therefore the Applicants cannot rely in the present case on anything which was the subject of that case.

108. The Applicants can therefore only rely on events which post-date the County Court case. Those events have been the subject of very detailed submissions by each party, and we have considered those submissions carefully. The Respondent was cross-examined by the First Applicant on this issue, and his evidence indicated a preference for focusing on the access granted to persons other than the First Applicant. On the issue of access for persons other than the First Applicant, a picture emerges of the Respondent generally allowing access but not always doing so graciously or in a timely manner. As regards access for the First Applicant herself, at times in cross-examination the Respondent seemed to suggest that it was unnecessary to allow her personally to gain access, but then he switched focus to his belief that it was reasonable for him to refuse her access. For the sake of completeness, it should be added that the basis for this belief did already form part of the Respondent's written evidence.

109. As for the First Applicant, it appeared at times that she considered herself to have almost an absolute right of access to the Property, and this approach to property management seems to have coloured her views on the issue.

110. In addition, the friction and the animosity between the Applicants and the Respondent were clear to see, both at the hearing and in written submissions. As a result of this animosity, which goes back several years, it seems to us that it has been difficult for any of them to approach this application and dispute with much objectivity. In consequence, both the First Applicant and the Respondent seem to us to have overstated their case at various points – whether inadvertently or not – in order to present the other as the party who is solely at fault.

111. As regards the evidence itself, in our view it does not demonstrate a breach of either of the covenants to allow access to persons other than the First Applicant. The Respondent has allowed people to gain access to the Property on the First Applicant's behalf on several occasions. Sometimes the proposed time or date has been inconvenient and he has proposed an alternative time or date. Sometimes he has given short notice as to what would be a convenient time or has not responded as promptly as he might, and some of his responses have been quite rude, but this all needs to be seen in the context of the relationship with the First Applicant and the reasonableness or otherwise of her own behaviour.

112. In our view, the evidence as a whole indicates a disproportionate and an unreasonable approach by the First Applicant to the issue of access, which itself needs to be seen in the context of the County Court case in which District Judge Ryan questioned whether she was even actually seeking access. In this regard, we note and accept the proposition in *Gale on Easements* that access rights of this nature need to be exercised "civiliter", i.e. reasonably and in a manner least burdensome to the servient tenement. This point emerges out of the case of *Alvis v Harrison (1990) 62 P. & C.R. 10*, which was decided by the House of Lords (as it then was), albeit on appeal from a Scottish court.

113. As regards the refusal to allow the First Applicant herself access to the Property, this raises a more delicate point as, in principle, a leaseholder cannot simply decide to exclude a landlord but to allow access for her agents or workmen instead. The issue, in our view, turns on quite how unreasonable the First Applicant's behaviour has been and whether the nature of that behaviour justified her exclusion from the Property. There have been claims of intimidation and harassment by both the First Applicant and the Respondent against each other, but having carefully considered the parties' respective positions we prefer the Respondent's evidence on this point. That does not mean that we consider the Respondent to have behaved faultlessly, but rather that the First Applicant's own actions have been such that we do not consider the Respondent's exclusion of the First Applicant from the Property in the circumstances described in evidence to constitute a breach of either of the covenants relating to access.

114. Ms Balis has given evidence in support of the Respondent's position that the Respondent and his family have suffered harassment from the First Applicant over many issues over many years. She also states that she was told by the previous owner of the Property, Mrs Jolivet, that the First Applicant had constantly harassed and attempted to intimidate her. It might be that much of her evidence is merely hearsay, and we note that she did not make herself available to be cross-examined, which weakens the force of her evidence. However, it is also the case that the First Applicant did not file any evidence in response to Ms Balis's claims when she could easily have done so.

115. Mr Blumenthal has given evidence stating that he has found the Respondent to be professional, courteous, helpful and available at all times. It does not follow from this that the Respondent was reasonable in his dealings with the First Applicant, and he also did not make himself available to be cross-examined. It is also arguable that he had good reason not to want to antagonise the Respondent. Nevertheless, his evidence is of some value, and it is interesting that he (and Ms Balis) should have taken the trouble to file witness statements. In addition, there has to be a presumption that people do not lie in sworn statements unless proven to have done so or at least proven to have had a very compelling reason to do so. Furthermore, we do not consider that the First Applicant dealt convincingly in cross-examination with the episode described in Mr Blumenthal's witness statement when he handed her the keys to the Property at her request immediately prior to going on holiday.

116. Dr Alafouzo has given evidence which does not sit comfortably with that of Ms Balis and to some extent that of Mr Blumenthal, although it does not directly contradict their evidence and it is possible for all of them to be accurately describing their experiences and perceptions. She has stated that she found the Applicants to be civilised people who treated her with courtesy and never referred to the Respondent or his wife in a defamatory manner. She also made herself available for cross-examination and came across credibly. However, her evidence focuses primarily on her own relationship with the First Applicant, and it is perfectly possible that she simply had a much better relationship with the First Applicant than did the Respondent. Indeed, one of the few things on which the parties are agreed is that the relationship between them is very poor and has been so for a considerable period of time. There is also no particular reason why Dr Alafouzo should have witnessed or even heard the major arguments between the parties.

117. The Respondent's own evidence on the dealings between the First Applicant and himself and his wife was, in our view, more persuasive than the First Applicant's evidence. He came across better in cross-examination and his account was more plausible. In addition, the evidence submitted in relation to the involvement of the police was in our view more consistent with his account than with the First Applicant's account.

118. The First Applicant came across relatively poorly in cross-examination, and her interpretation of key documents was in our view questionable. Just as an example, the Respondent emailed the First Applicant on 21st July 2013 stating the following (amongst other things): *"Can I also remind you of your responsibility as a landlord to ensure Mr Hawes, your husband, is fit enough and sober when he accesses the loft through the ceiling of my apartment so he does not endanger in any way anybody around him or cause any structural damage to my apartment or the loft above it"*, and the First Applicant has interpreted this as a threat. Whilst of course any words can in theory have a subtext and whilst this was not a kind thing to say, it is not a credible interpretation of these words to describe them as a threat, especially as the First Applicant's implication appears to be the very serious one that the Respondent was threatening to cause the Second Applicant to fall and/or to suffer physical injury.

119. It is not practical for us to try to summarise all of the evidence, but having considered it all in the light of the various cross-examinations our conclusion is that the First Applicant did not during the relevant time act reasonably in seeking access. She was aggressive towards the Respondent's wife such that the Respondent had a well-founded fear of letting the First Applicant into the Property. There is also some evidence based on the judgment in the County Court case that the First Applicant's motives for requiring access with such frequency and vehemence are questionable. In addition, the matters for which access was genuinely needed could have been accomplished well enough in the circumstances by others being afforded access on the First Applicant's behalf, particularly as the evidence suggests that the First Applicant's presence in the Property only served to exacerbate tensions between the parties and was therefore unlikely to lead to a constructive engagement.

120. Therefore, in conclusion, we are not persuaded that the Respondent has been in breach of these covenants during the period covered by this application.

Clause 4(b) of the Lease

121. This covenant relates to the keeping of the Property in good condition, and the allegation here is that there has been a history of leaks from the Property into the upper walls of the Building staircase and into Flat 2 immediately below. However, the Applicants' evidence in support of this allegation is very thin. There is no evidence of any complaints from any tenants or other occupiers of Flat 2. The Applicants have provided no dates, nor any credible expert evidence on this point.

122. Mr Waszkiewicz, who purported to give expert evidence on this issue, stated that there was a leak from the Property into the ceiling of Flat 2 during 2014 and that there was no doubt in his mind that the leak came

from the Property, but by his own admission Mr Waszkiewicz is not a plumber, his allegation is very vague and there is no proper basis on which to conclude that the leak – if there was one – was caused by a failure of repair on the part of the Respondent. Even if there was a failure of repair, we would still need to be persuaded that a one-off leak constitutes a breach of covenant for the purposes of section 168 of the 2002 Act. In addition, there were other problems with Mr Waszkiewicz's evidence; it was clear that he had not written his witness statement himself, that it had been prepared by the First Applicant and that Mr Waszkiewicz did not even understand certain words contained within the witness statement. He also stood to gain from supporting the First Applicant's version of events as he had been given a lot of work by her in the past and was currently waiting to hear from her on a tender, and whilst this does not prove that the witness statement was unreliable it does in our view go to reduce its credibility further.

123. Therefore, in conclusion, we are not persuaded that the Respondent has been in breach of this covenant during the period covered by this application.

Clause 4(d) of the Lease

124. This covenant relates to actions (or inaction) which could make the building insurance policy void or increase building insurance premiums, and the Applicants submit that the leaks from the Property and the refusal of access endangered the insurance policy.

125. For the reasons already stated above, we are not satisfied that the Respondent either caused or failed to remedy leaks from his Property in breach of covenant, and therefore it follows that his actions in this regard did not constitute a breach of the covenant in clause 4(d). Similarly, again for the reasons stated above, we do not accept that the Respondent was in breach of the covenants relating to access, and again it follows that his actions in this regard did not constitute a breach of the covenant in clause 4(d). Whilst in theory it is possible that the Applicants are trying to run a separate argument in relation to clause 4(d) which is independent of any breach of any other covenant, they have not articulated any such argument and have not made a persuasive case as to how the Respondent has endangered the insurance policy.

126. Therefore, in conclusion, we are not persuaded that the Respondent has been in breach of this covenant during the period covered by this application.

Clause 4(a) of the Lease and paragraph 3 of the Fourth Schedule

127. This covenant relates to not throw rags or other refuse into the sinks, baths, lavatories etc within the Property, and the Applicants submit that the Respondent and his wife regularly threw nappies down the toilet, causing blockages to the main drain. This allegation is not particularised as to dates and there is no credible evidence to support the allegation which is barely more than a simple assertion.

128. Therefore, we are not persuaded that the Respondent has been in breach of this covenant during the period covered by this application.

Paragraph 1 of the Second Schedule

129. This is not a covenant but is rather a right for the tenant to use the common parts. The Applicants submit that in breach of the terms of this right the Respondent has misused the common parts by using them as a rubbish dump, burning incense and keeping the windows open, although they later dropped the point about the windows.

130. As the paragraph of the Lease on which the Applicants rely grants rights, it is hard to see on what the Respondent's actions could constitute a breach of covenant (or condition) contained within this paragraph. In any event, the points about the incense and the windows came across as very petty, and there is no credible evidence that the Respondent has misused the common parts in the way being suggested. On the contrary, the manner in which the First Applicant has raised these allegations if anything casts doubt on her motivation for making the allegations.

131. Therefore, we are not persuaded that the Respondent has been in breach of covenant in connection with this paragraph.

SERVICE CHARGE DISPUTE

Block insurance – 2014/15

132. The Respondent has provided no hard evidence (such as comparable evidence) that the amount itself is unreasonable. The fact that it was lower the following year could have been for a number of reasons, such as changes in the insurance market, and does not in itself demonstrate that the 2014/15 figure was unreasonable. He has also not provided any credible evidence to demonstrate that the insurance has been arranged pursuant to a qualifying long term agreement. We are also not persuaded that any slight mismatch between the reinstatement value and the amount insured will have had a material impact on the premium.

133. However, the insurance policy included some structures and areas which in our view do not form part of the building itself and over which the Respondent has no rights. Therefore, it is appropriate to deduct an amount to reflect this. The First Applicant suggested that at most the deduction should be £60.00, but she provided no supporting evidence for this figure. Having said that, there is no objective way to assess with any certainty what would be an appropriate reduction, and no expert evidence has been offered by either party on this point. We are therefore forced to make our own broad-brush assessment based on our knowledge and experience and on this basis we reduce the insurance premium by £100.00 from £3,109.53 to £3,009.53.

Block insurance 2015/16

134. For the same reason as for 2014/15, the insurance premium should be reduced by £100.00 to reflect the fact that the insurance policy included structures and areas which in our view do not form part of the building itself and over which the Respondent has no rights. In relation to the triple-glazing, whilst we accept that there are issues as to consultation and as to whether it constitutes an improvement, it does not follow that the cost of insuring the windows as part of the Building is irrecoverable.

135. However, there is also the issue of the extension. The Lease was granted a long time prior to the building of the extension and it was not within the contemplation of the parties when the Lease was granted, nor when the Lease was assigned to the Respondent. The evidence indicates that the extension has increased the total area of the Building by 10% and therefore in our view the most equitable approach would be to apply a corresponding 10% reduction in the insurance premium. The 10% reduction should be applied first, and then the £100.00 reduction referred to above. The insurance premium is accordingly reduced from £2,114.85 to £1,803.37.

Block reinstatement valuation – 2015/16

136. Clause 5(b) of the Lease requires the landlord to insure the block in its full value. It is implicit that the landlord can and should commission periodic valuations to establish the full value, and there is no evidence that valuations have been carried out too frequently. Therefore, this item is payable in full.

Cleaning – August 2014

137. The Respondent has not provided persuasive evidence to show that the cleaning has been sub-standard or that the Second Applicant has been appointed pursuant to a qualifying long term agreement. However, we do accept that £12.00 an hour is above the market norm, even in

Chiswick. In addition, the cleaner is the First Applicant's husband and there is no evidence that the First Applicant genuinely tested the market before deciding to pay her husband £12.00 an hour (rising to £14.00 per hour the following year). In our view an appropriate hourly rate is £10.00 per hour and therefore the hourly rate is accordingly reduced to £10.00. Accordingly, the total cleaning cost is reduced from £720.00 to £600.00.

Cleaning – July 2015

138. Again, the Respondent has not provided persuasive evidence to show that the cleaning has been sub-standard or that the Second Applicant has been appointed pursuant to a qualifying long term agreement. The hourly rate of £14.00 is well above the market norm, and again it is reduced to £10.00 per hour. Accordingly, the total cleaning cost is reduced from £840.00 to £600.00.

Repair of exterior main drain – August 2014

139. The issue on this item boils down to whether to grant dispensation from those aspects of the consultation requirements not complied with. The First Applicant is not a professional landlord and in our view she genuinely believed that she did not need to consult the Respondent regarding the decision to use Hammerhead in the particular circumstances. When she realised that there had been a breach of the consultation requirements she then had the good sense to apply for dispensation.

140. The classic case justifying dispensation is a case of emergency works, but since the Supreme Court decision in *Daejan* the approach to dispensation has become more landlord-friendly. Whilst the Respondent has expressed concerns about mess created by Hammerhead in another context, there is no real evidence that the Respondent was prejudiced either as regards cost or standard of work in relation to the repair of the exterior main drain.

141. Therefore we consider, in the light of *Daejan*, that it is appropriate to grant dispensation. However, as the Respondent has suffered the small prejudice of the extra legal costs involved in opposing the application, it is appropriate that the First Applicant pay the Respondent's legal fees in connection with the dispensation application to the extent that they can be ascertained. The Respondent has submitted a schedule of costs incurred in connection with these proceedings but, despite having been invited to do so, has not separated out the costs relating to the dispensation application. In the circumstances the Respondent's additional costs in dealing with the combined dispensation application are summarily assessed at £250 + VAT.

Partial works to replace rusting central water pipes – November 2014

142. To the extent that this is a consultation issue, in our view the position is the same as for the repair of the external main drain. Dispensation is granted on the terms that the First Applicant pay the Respondent's legal fees in connection with the combined dispensation application, which as noted above we have summarily assessed at £250 + VAT.

143. However, in our view the evidence indicates that these works did not need to be carried out for quite a while and that therefore the First Applicant was in fact carrying out these works at this stage for her own benefit, perhaps to facilitate the building of her new extension. It does not follow that there was no benefit to the Respondent, but the benefit was less given that the works were not at all urgent. As to how to quantify that benefit, we are forced to use a broad-brush approach and consider in the circumstances that the Respondent's contribution should be reduced by 50%. Accordingly, the total amount (for the purposes of determining the Respondent's contribution) is reduced from £2,760.00 to £1,380.00.

Refurbishment of staircase and front porch – November 2014

144. As with the repair of the external main drain, the issue boils down to whether to grant dispensation from those aspects of the consultation requirements not complied with. For the same reasons as given in connection with the repair of the external main drain, we consider that it is appropriate to grant dispensation on the terms that the First Applicant pay the Respondent's legal fees in connection with the combined dispensation application, which as noted above we have summarily assessed at £250 + VAT.

Replacement of staircase Critall windows – November 2014

145. In our view triple-glazing constitutes an improvement. Whilst it is arguable that double-glazing is now sufficiently standard so as not to constitute an improvement, that is simply not the case with triple-glazing.

146. In addition, in our view the consultation process was seriously flawed and there has been no application for dispensation in relation to the window replacement. It was unclear what the contractors had been invited to quote for, and the problem was compounded by the fact that the estimates obtained were for triple-glazing

147. We consider that the consultation failings caused the Respondent real prejudice, as it was sufficiently muddled for it to be very difficult for him to be able to follow, and he then ended up with an improvement which he did not ask for and which may have been considerably more

expensive than serviceable double-glazing installed by an alternative contractor. Accordingly, the Respondent's share of the cost is reduced to £250.00.

Employment of Second Applicant for works requiring access to the Property – November 2014

148. During the course of the hearing the First Applicant conceded that this was not payable.

Summary of rights and obligations

149. There is some evidence that on one (or possibly more than one) occasion the First Applicant sent the Respondent a slightly out of date summary of rights and obligations. In our view, it would be harsh to penalise the First Applicant on this basis, particularly as she is not a professional landlord. There is no evidence that the Respondent suffered any prejudice and even if there has been a technical breach it can be cured by serving a fresh summary of rights and obligations. Therefore, we do not accept that this is a basis for determining the relevant service charges not to be payable.

Costs

150. The Respondent has made an application for a section 20C order (pursuant to section 20C of the 1985 Act). This is an order that the First Applicant as landlord may not include in the service charge any costs, or a proportion of the costs, incurred in connection with these proceedings.

151. In our judgment it would be just and equitable in all the circumstances to make the section 20C order and to order that the First Applicant may not include in the service charge any costs incurred by her in connection with these proceedings. She has lost her breach of covenant case and a number of service charge items have been determined not to be recoverable in full. It was not the Respondent's choice for the case to be brought, and it would be inequitable for him to have to pay towards the First Applicant's costs of bringing the case through the service charge. Accordingly, we therefore order pursuant to section 20C that the First Applicant may not include in the service charge any costs incurred by her in connection with these proceedings.

152. Both parties have also applied for an order that the other party reimburse its costs in connection with this application pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The relevant part of Rule 13(1)(b) states that *"the Tribunal may make an order in respect of costs only - ... (b) if a*

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

153. In the case of *Ridehalgh v Horsfield (1994) 3 All ER 848* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct admits of a reasonable explanation. This formulation was adopted by the Upper Tribunal (Lands Chamber) in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007.* It was also considered recently by the Upper Tribunal (Lands Chamber) in *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander (2016) UKUT 0290.* Costs are not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings.

154. The Respondent has presented many examples to support his contention that the First Applicant's conduct has been unreasonable. First of all, though, a distinction needs to be drawn between conduct prior to these proceedings and conduct during the course of these proceedings, as Rule 13(1)(b) is only concerned with conduct in relation to the proceedings themselves.

155. As regards the First Applicant's conduct of the proceedings themselves, she has presented a poor case on the breach of covenant application and on aspects of the service charge application. She has at times contradicted herself, come across as petty and shown poor judgment. She has also demonstrated an impatience with legal procedures which she has deemed unnecessary. Her statement that the service charge application has been made by the majority of leaseholders and all the permanent residents as well as by the landlord is somewhat disingenuous given that it has simply been made by her and her husband.

156. However, the animosity between the parties is clearly mutual and genuine, and we do not consider the Respondent to be totally blameless. For example, many of his emails are very aggressive and will have stoked tensions further. In addition, in our view the Applicants seem genuinely to believe that they are broadly in the right. Whilst it is not possible to know how much stronger the Applicants' case would have been if they had been legally represented, it seems to us that they would have benefited hugely from professional assistance. This could have helped them to structure their case better, to collate better evidence on their strongest points and to drop the weakest points. Therefore, seen in context and given that the bar is set quite high, we are not persuaded that the First Applicant's conduct was sufficiently unreasonable to justify a cost award against her under Rule 13(1)(b).

157. The Respondent's conduct, perhaps in part due to the benefit of his having had detailed legal advice, was more reasonable than that of the

First Applicant during the course of these proceedings and therefore there is no question of a Rule 13(1)(b) cost award against him.

158. There were no other cost applications.

Name: Judge P Korn **Date:** 16th January 2017

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

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

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

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

Appendix of relevant legislation

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 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.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which –
(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(b) has been the subject of determination by a court, or
(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), "appropriate tribunal" means –
(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited ... 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.

Section 20ZA

(1) where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

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.