18099

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LSC/2017/0178**
Property	:	**12 Bellamy's Court, Abbotshade Road, Rotherhithe, London SE16 5RF**
Applicant	:	**Holding & Management (Solitaire) Limited**
Representative	:	**Paul Sweeney-Counsel for and on behalf of JB Leitch**
Respondent	:	**Ms Kris Seo Bee Tay**
Representative	:	**In person**
Also in attendance	:	**Lee Mc Govern Property Manager of Maunder Taylor**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Daley** **Mrs Redmond BSC(Econ) MRICS**
Date of hearing and Venue	:	**17 September 2018 & 10 October 2018 also at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**30 November 2018**

DECISION

Decisions of the tribunal

(1) The tribunal determination is set out at paragraphs 53 onwards.

(2) The Tribunal makes no order under section 20 of the Landlord and Tenant Act 1985.

The application

1. Proceedings were originally issued in the County Court Money Claims Centre under claim no E21YX071. The claim was transferred to the First Tier Property Tribunal by order of District Judge Wright on 24 April 2018.

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

The hearing

3. At the hearing, the Applicant was represented by Counsel Mr Sweeney. Also in attendance on behalf of the Applicant was Mr Lee Mc Govern, property manager.

4. The Respondent appeared in person.

Preliminary Matters

5. The Tribunal was provided with a Skeleton Argument on behalf of the Applicant and a Skeleton Argument prepared by the Respondent, together with legal authorities.

6. The service charges related to unpaid service charges in the sum of £7,034.26 for the period 1 January 2016 to 30 June 2018.

The background

7. The property which is the subject of this application is a flat situated in, Bellamy Court, a purpose built block, one of five blocks on an estate comprising 141 units. The estate was built in the 1990s by Barrett's (home builders). The Respondent's flat is situated on the third/fourth floor.

8. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

9. The Tribunal held a case management hearing on 29 May 2018. At the hearing the Parties agreed that the issues were as set out in paragraph 5 of the Applicant's Skeleton Argument which stated as follows-:

> *5. The issues that R raises for the reasons that the payment is not due can be outlined as follows-:*
>
> *a. A is not entitled to incur reserve fund expenditure in respect of the replacement of the door, door frames, windows, window frames and glass at Flat 12 Bellamys Court.*
>
> *b. That the replacement of the door, windows, frames and glass do not fall within the remit of Part 1 of the Fifth Schedule to the Lease by virtue of either paragraphs 19b) and/or paragraph 12.*
>
> *c. And/or that the costs incurred for the replacements were unreasonably incurred contrary to s19 Landlord and Tenant Act 1995 ('the 1985 Act')*

The applicant's case

10. The Tribunal was informed by counsel for the Applicant, Mr Sweeney, that the lease contained a description of the demise in the First Schedule of the lease which stated as follows-: "1. The Flat comprises of all those rooms on the third floor of the Block and edged red on the Plan annexed hereto. 2. The flat includes (for the purpose of obligation as well as grant): (i) the internal plastered coverings and plaster work of the walls bounding the Flats and the doors and the door frames and glass but not the window and frames fitted in such walls and (ii) the plastered coverings and plaster works and partitions lying within the Flat and the doors and door frames fitted in such walls and partitions..."

11. Counsel referred to the covenants in the lease in clause 3.2 which states-: "... In respect of every Maintenance year to pay the Service Charge and the Estate Charge to the Company by two equal instalments in advance on the half-yearly days." In respect of the covenants of the Company clause 4.1 stated-: 'The Company will during the term carry out the repairs and provide the services specified in the Fifth Schedule provided always that (a) The Lessee shall have paid the Service Charge the Estate Charge and any adjustments thereof due.'

12. Clause 1(a) of the Fifth Schedule, Part 1 provided for the decoration and repair of the structure. 1(a) stated-: "... As often as may in the opinion of the Company be necessary to prepare and decorate in appropriate colours with good quality materials and in a workmanlike manner all the outside rendering wood and metalwork the entrance halls staircases and passages of the Block usually decorated." "(b) To keep the interior and exterior walls and ceilings and floors of the Block and the whole of the structure roof foundations and main drains boundary walls and fences of the Block (but excluding such parts thereof as are included in the Flat by virtue of the definition contained in Part 1 of the First

Schedule and the corresponding parts of all other flats in the Block) in good repair and condition."

13. Mr Sweeney stated that Ms Tay, in her Statement of Case, says that the provisions of the lease only allow the Applicant to rub down the windows and paint them, and that the clause is not wide enough to allow for replacement. This in his view "*would be nonsense.*" In a 999 year lease it would be unthinkable that the windows would last for 999 years. He submitted that it was the applicant's case that that the windows and frames are caught by clause 1 (b) and form part of the structure.

14. In paragraph 16 of his Skeleton Argument, Counsel stated-: "When considering whether or not the windows and frames form part of the structure one must consider the wording in the Lease and the context of the building that is the subject matter of the clause..."

15. Counsel referred the Tribunal to two decisions in which the question of whether the windows were part of the structure of the building was considered. In *Sheffield City Council and Hazel St Clare Oliver LRX/146/2007* at paragraph 20, in commenting on earlier cases on the question of whether the windows were to be considered part *of the structure, George Bartlett President of the Tribunal stated-: "The decision in Irvine v Morgan in relation to the windows was consistent with an earlier decision of the Court of Appeal in Quick v Taff Ely Borough Council ... The house in that case suffered from severe condensation and the question was whether the council were required under the implied covenant to carry out works including the replacement of windows, in order to alleviate condensation. The council accepted the findings of the judge at first instance that the windows formed part of the exterior and probably part of the structure of the house...21...22 Each of the cases... concerned different provisions from those in the present case, in one instance external repairs and in the other structural alterations...but it seems to me that the concept of windows as part of the skin of the house and the concept of the structure as the fabric of the building are illuminating and, I think, supportive of the conclusion in Irvine –v- Morgan. In principle, therefore, in my judgment, for the purposes of paragraph 14(2) external windows will constitute both part of the structure and part of the exterior of the building or the dwelling house to which they belong..."*

16. Counsel also referred to the contrasting decision in *Patrick & Anr and Marley Estates Management Case No B5/2006/2658* in which in considering the terms of the lease the Court of Appeal concluded that the windows were not to be considered as part of the structure. (This case is considered further below) Counsel stated that this case was fact specific. He also stated that the applicant placed reliance upon clause 12, which contained a broader sweeping provision. He stated that the provisions of clause 12 were broad enough to include the windows, it was not within the contemplation of the freeholder that the repairs of the window would not be provided for, it was also important to refer to clauses 4 (a) of the lease which specifically provided that the lessee will not paint

the window frame, the obligation to repair and maintain were specifically reserved to the landlord.

17. Counsel concluded that in accordance with the terms of the lease, the windows ought not to be considered part of the tenant's demise and the landlord was entitled to replace them.

18. Mr Sweeney then contended that the doors were also covered by the terms of the lease and that as such the landlord was entitled to replace them. He stated that although Ms Tay argued that the doors were part of the tenant's demise, in considering the photographs of the doors, it was clear that they were factually and in reality French windows. Counsel referred to clause2 (1) of the lease.

19. Counsel submitted that if the Tribunal did not accept that they were French windows, then they were to be considered to be in the common parts of the building. The fact that the doors have windows attached to them and form one unit meant that it was impossible to replace the windows without replacing the doors. In paragraph 20 of his Skeleton Argument, he stated -: "... *It is not disputed that the doors and door frames form part of R's demise and the responsibility for replacing and repairing rests with R. However, the doors form part of a wider frame that is integral to the windows and window frames either side of the doors and it is impossible to renew the windows without the renewal of the doors and they can be treated as part of the same element and thus part of the structure...*'

20. This was accepted in ***Nogueira and Ors –v- The Lord Mayor and Citizens of Westminster LON/00BK/LSC/2012/0095.*** Paragraph 40 of that decision stated that-: "*The repair obligations in the lease, includes an obligation on the part of the Council to be responsible for the windows and all the doors save those giving access to the individual flats. We find that insofar as the balcony doors are concerned they form part of the main structure of the property with the windows and are the responsibility of the Council to repair or in this case to replace. It would lead to an unfortunate anomaly if the Council were only obliged to deal with the windows facing onto the balcony but could leave the balcony door in a somewhat decrepit state...*"

The Respondent's Reply

21. The Respondent, Ms Kris Seo Bee Tay, had prepared a Skeleton Argument in reply. She referred to an email sent by Mr Chris Browne on behalf of the managing agent Maunder Taylor dated 3 December 2015 in which he stated-: "*Under the terms of your lease as lessees you have the following obligation At all times during the said term to maintain and keep the Flat clean and in good repair and in particular as occasion requires thoroughly clean all windows and all cisterns serving the flat As glass is demised under the terms of the lease we would advise that you have a responsibility to keep the glass of the windows serving your flat clean.*"

22. Ms Tay noted that in the email, the managing agent claimed that the leaseholder was responsible for the windows, she stated that it was accepted that the landlord was responsible for redecoration. She referred to the specific obligation in the lease in Clause 5 of the fifth Schedule.

23. Ms Tay also referred the Tribunal to the adjudicator's report on the major works. She noted that the adjudicator's report/plan, he had made a distinction, between the windows, which were marked on the plan as 'W' and the doors which were marked as 'P'. This accorded with the Respondent's interpretation of the lease. Ms Tay submitted that the doors and door frames were part of the demise, and that as a result it was specifically excluded from the landlord's repairing covenant.

24. The Respondent invited the Tribunal to reject the *Sheffield Case* and also *Patrick and Marley* as this was *not* a case were the windows were not included in the lease, and of necessity the case concerns the definition of structure and whether it included the windows and doors. The terms in the lease before this Tribunal were very specific.

25. In paragraph 3 of her Skeleton Argument she stated that-: *"...The Applicant is only under a covenant to prepare and decorate their outside wood surfaces, pursuant to 1(a) of the Part 1 of the Fifth Schedule. That covenant demonstrates an intention on the part of the parties to the Lease that in respect of the windows the service charge should be used only to achieve a uniform external appearance. That intention would be consistent with the prohibition on lessees from painting their exterior surfaces (para 4(a) of the Third Schedule)... and that service charges being in equal shares is intended to be applied in an equitable manner (otherwise there would be no purpose in conferring the Applicant with a power... (para 2, Part II Fourth Schedule)..to vary the service charge fraction proportions on an equitable basis) The Lease makes no provisions for the Applicant to repair defective glazing(which falls to the Lessee to repair...)...Redecoration of the windows is not in itself a work of repair, and a need for redecoration cannot be satisfied by replacing windows with units that do not need to be painted: Tedworth North Management Limited-v- Miller..."*

26. The Respondent referred to *Tedworth North Management Limited* at paragraph 35 which stated-: *"...The windows clearly required redecoration, but it was not submitted by Mr Harrison that the replacement programme was triggered by the obligation to paint in appropriate colours and in a workmanlike manner all the outside wood iron and cement work of the building usually painted. His submission was that the redecoration required was itself work of repair and the need for redecoration could be satisfied not by painting the original units but by replacing them with new units which did not require to be painted. The FTT did not accept that submission and I am satisfied that it was entitled to reject it. Amongst the factors to which it had regard were the nature, extent and cost of the proposed remedial works and it was open to it to conclude that those works were not an appropriate response to the need for redecoration."*

27. Ms Tay submitted that her first issue was that the Applicant had no power to apply Bellamy Court service charges to replace the window if they were capable of being prepared and decorated, and her submission was that they were capable of repair. She submitted that the windows could only be replaced when they had deteriorated beyond repair. She referred to the specification and the fact that the minority of the windows were in need of repair.

28. In respect of clause 12, the so called Sweep up clause, that provided the landlord with a wide discretion, Ms Tay referred the Tribunal to *Holding & Mangement Ltd –v- Property Holding & Investment plc and others [1990] 1 EGLR 65*. Ms Tay referred to the views of the court of the use of a so called "sweep up clause" In this case where the lease provided *" ...such... works as the Maintenance Trustee shall consider necessary to maintain the Building as a block of first class residential flats..."* In which Lord Justice Nicholls stated-: *"... I agree... that this paragraph may embrace works which are not strictly repair. Where I have to part company with him, is that I cannot read this paragraph as giving the plaintiff a free hand to require the resident to pay for all works, whatever they might be which the plaintiff may consider necessary to maintain the building as a block of first class residential flats. In my view it is necessarily implicit in this paragraph that the plaintiff will act reasonably..."*

Landlord's submissions on Reasonableness

29. Mr Sweeney stated that the glass in the window was retained by the landlord; this was separate from the issue of the window cleaning as this was in the leaseholders' covenant.

30. Mr Sweeney stated that where the landlord is unable to 'prepare and decorate' the landlord was able to replace the windows. Counsel referred to *Patrick & Ans and Marley Estates [2007]EWCA Civ .1176*. In that case Lord Mummery conceded that in some contexts windows and window frames would be part of the structure, however in this case the existence of clause 6 (d) (i) which covenanted as follows-: *"... That the Landlord will maintain repair decorate and renew (i) the main structure (including the roof chimney stacks gutters rainwater pipes and foundations) of the houses and the building..."* In this case his view was the windows were not part of the structure.

31. Mr Sweeney referred to clause 1(b) of the lease which referred to *"keep in good repair and condition"*, this clause referred to *"the whole of the structure."* Counsel submitted that this clause went significantly further than just repair. "Keep in repair" meant that as soon as part of the building failed to be in repair the landlord was in breach. He referred to earlier, decided cases which establishes this principle; *British Telecommunication PLC and Sun life Assurance Society PLC [1996] Ch. 69* and *Welsh and Greenwich LBC [2000] ALL ER 880*. Both cases considered the meaning of keep in repair, and established that the obligation extended beyond carrying out repairs to the structure.

32. Counsel referred to the cases of Weston and Hudson and Sutton Hastoe Housing Association and Williams, he referred to these cases as interpreting the covenant to *keep in good repair*, and the fact that it allowed for improvements, where repairs were no longer viable. He stated that where the costs of repairing were no longer economic a 'keep in repair' lease enabled the landlord carry out a replacement.

33. Counsel referred to a report from AHR Building Consultancy Ltd, who were the consultants tasked with evaluating the tenders. In their letter dated 22 November 2015, sent to Mr C Browne of Maunder Taylor Managing agents, Andrew Dickinson (of AHB) referred to two options; Option A which included redecoration of previously painted surfaces and replacing defective sealants to the perimeter of doors and windows. This option was said to include for the full external redecoration and any necessary repairs to Bellamy's Court and Option B which included the replacement of the existing windows and leaseholder doors with double glazed polyester powder coated units.

34. The lowest tender for repairing and redecorating the windows was £129,940.00, (MC Property Maintenance Ltd) Option A, whereas the lowest tender for option B replacement of the windows was £296,890.00 (Everglade Insulations Ltd). In the report Mr Dickinson stated-: 'Following the original tendering of the scheme, it is understood the replacement of all double glazed window units which have condensation in should be included as part of the scope of works. In addition to the original tenders received, at this stage we have made an allowance to replace 160 units..."

35. The report noted that the difference between the costs of the two options was £123,759.14 (inclusive of professional fees and VAT). He further states that although an allowance has been made for the costs of repair, it was a provisional figure as "... when the contractor has undertaken the preparation of the windows and doors... the true condition of the timberwork will be established..."

36. He stated that the life expectancy of the replacement windows and doors was 25 years accordingly the capital costs for replacing the windows was £195,000.00 (excluding VAT and professional fees) Whereas the cyclical redecoration every 5 years with an allowance for repairs was £322,000 (excluding professional fees and VAT). This did not include for the replacement of windows and doors which had failed over the 25 year period. He concluded that-: ' *Due to the defects noted and there being no guarantee the repair works will resolve the draughts being experienced, the overall life cycle costs over a twenty year period it is recommended the windows and doors are replaced if the capital investment can be afforded at this time. The replacement with polyester powder coated aluminium units will provide a maintenance free draught proof solution...'*

37. The Tribunal was referred to the summary of comments received from the leaseholders of concerning the windows in their property. Of the comments received a number of the comments concerned 'draughts experienced through balcony door.' (flat 5) Large gap between opening casement and window frame

(flat 6) and flat 11 'To the French window-the door part-has some damage at floor level and only needs repairing...'

38. Ms Tay's comment was that-: 'Windows and doors are generally in reasonable condition for their age and I don't think they would need more than normal rubbing down and repainting etc. not replacement, except for one double glazed unit that has blown...' This was a general theme.

39. Counsel Mr Sweeney stated that he was also aware from Mr McGovern that he had attended at another block in the development and had almost fallen out of the window because of a problem with the hinge.

40. Counsel referred to London Borough of *Hounslow –v- Waaler [2017] EWCA Civ 45*. 'The UT held that the FTT were entitled to find that the replacement of the flat roof with a pitched roof gave rise to a recoverable service charge; but were wrong to have held that the replacement of the windows and cladding did likewise. In essence, the UT held that the replacement of the windows and cladding was an improvement. Although the lease gave Hounslow the right to make improvements and obliged the lessee to contribute to their cost, Hounslow ought to have taken particular account of the extent of the interests of the lessees, their views on the proposals and the financial impact of proceeding. The UT therefore decided that only part of the amount claimed under this head was recoverable...'

41. Mr Sweeney submitted that the landlord had acted reasonably; he referred to the fact that the costs included the scaffolding which would have had to have been in situ regardless of the work undertaken, accordingly it made sense to replace the windows and doors it was also clear that the windows and doors were in disrepair. The landlord had taken the representations of the leaseholders into account in reaching its decision to replace the windows and doors. He also cited the cost of replacement versus repair.

The Respondent's reply

42. In reply Ms Tay stated that she was aware of the comments made by AHR Building Consultancy Ltd. However there had been no independent verification of the report, she stated that the view in the report was a subjective view. Ms Tay stated that a lot of the comments referred to the door frames and glass within the demise, in her view this was within the obligation of the leaseholders.

43. Ms Tay stated that the costing which set out the capital expenditure over the 25 year period, there was no information as to where the numbers/figures set out came from, she considered the costs of option A had been overstated. She referred the Tribunal to the Life Cycle of Window Report of Dr G Menzies's. In the executive summary of the report it was stated that timber frames have an expected service life of between 56 and 65 years.

44. The report also stated-: "...In a mild scenario representing sheltered or part-sheltered locations with a non-coastal climate, timber windows are consistently least expensive, while in moderate and severe scenarios aluminium-clad timber windows are seen as the lowest cost option. This is largely reflective of their reduced maintenance period 20-30 years compared to 5-7 years)> Modified timber remains consistently less expensive than PVC-U alternatives due to the significantly longer service life afforded by the acetylation of the timber. Despite the appeal of "zero" maintenance on PVC-U windows, they are consistently most expensive in all three climate/construction scenarios due to their shorter 25-35 year life span."

45. The Respondent also referred to *London Borough of Hounslow –v- Waaler,* she stated that the Applicant had not appropriately applied the three stage test which had been suggested by the upper tribunal when considering carrying out works of improvements. This involved considering (i) the extent of the interest of the lessees, (ii) their views on the proposal, (iii) and the financial impact of proceeding.

46. The Tribunal asked Mr Sweeney how the Leaseholder's had been consulted. Mr Sweeney stated that there was a vote on the issue and the landlord had taken account of the majority opinion. Ms Tay stated that the decision had been made without considering the facts in this case. She referred to the tender specification which showed 33 windows in need of repair and 34 doors, this was approximately 15%, of 230 windows. Given this, replacement was not reasonable, when from the tender report it was clear that option A, demonstrated that it was feasible for the windows to be repaired.

47. Ms Tay also referred to the reserve account she stated that she had made two payments under protest. She however accepted that there was a reserve account provision within the lease which meant that if the expenditure was payable by reference to the service charge clause then the cost of it could be claimed from the reserve account.

Closing submissions of the Applicant and Respondent

48. In his closing submissions, Mr Sweeney submitted that the windows and the French doors were to be considered part of the structure, he stated that the case law supported the applicant's interpretation of their lease obligations; He did not accept that the applicant had to wait until the end of the windows nature life cycle of the windows. Mr Sweeney submitted that the patio/French windows were part of the structure. However he stated that if the Tribunal did not accept this then the Tribunal should consider the obligation in the lease to keep in repair.

49. He stated that the landlord had consulted the tenants and overwhelmingly they had chosen option B. He Referred the Tribunal to the Report of Mr Dickinson, He noted Ms Tay's reliance on the *Waaler* three stage test, however he submitted that this was only applicable for clause 12, the discretionary clause but not however clause 1(b), this meant that if the Tribunal found that the

windows and the French doors were not demised to the respondent the test was not applicable.

50. In response, Ms Tay she did not accept that the case law supported the windows as being part of the structure of the building. She also stated that there were a different number of windows and doors within each flat and yet the percentage contribution was the same. In her submission this supported the factual situation that is that the doors and glazing were demised to the tenant. In respect of clause 12, she stated that this improvement clause was designed to enable the landlord to make improvements to the common parts for example the installation of a bike shed or CCTV not the installation of windows and doors.

51. Ms Tay referred to *Arnold and Britain* in respect of interpretation. She submitted that the lease provisions were clear in this case.

52. She stated that if the Tribunal considered that the work could be undertaken in accordance with clause 12, then the Tribunal should find that the landlord had not considered the financial impact on the leaseholders. The cost of the window and door replacement was seven thousand five hundred pounds and there was nothing to suggest that the landlord had considered the impact of these costs.

The tribunal's decision

53. The tribunal determines that the amount payable in respect of [service charge item] is the sum of £7,034.26 for the period 1 January 2016 to 30 June 2016.

The reason for the tribunal's decision

54. The issues which were identified in the Directions dated 29/05/2018 at paragraph 3, which were amplified in the Applicant's Skeleton Argument in paragraph 5 as-: (I) Whether the applicant/landlord is entitled to incur reserve fund expenditure in respect of the replacement of the door, door frames, window frames and glass (II) Whether the above frames and doors fall within the remit of part 1 of the fifth schedule to the lease either by virtue of paragraph 19b and or paragraph 12(iii) Whether the costs incurred for the replacement was reasonable.

55. The Tribunal in reaching its decision decided that the second question/issue was the central issue which must be decided prior to deciding point 1 as the landlord's entitlement to carry out repairs was predicated on whether the landlord was permitted to carry out the repair by virtue of the terms of the lease.

Whether the frames and doors fall within the landlord's repairing remit under the provisions of the lease

56. In reaching its decision, the Tribunal had regard to the following provisions of the lease: the First Schedule which provides a description and definition of the flat 2. (i) and (ii) the Tribunal noted that 2(i) expressly stated, in the definition of the demise to the leaseholder "**but not the windows and window frames"** similarly, 2(ii) of the lease referred to partitions lying **within the Flat** and the doors and door frames fitted in such walls. In respect of the exclusions, 2 (b) stated that "... and of the walls or partitions therein except such of the plastered surfaces thereof and doors and door frames fitted therein as are expressly included. The Tribunal considered that the doors and door frames fitted in such walls included all *internal doors*; arguably the front door was fitted within a wall which was lying within the flat. However although this was arguable, the Tribunal rejected this interpretation as the front door was located within the common parts and as such formed a structural boundary for the flat.

57. The Tribunal determined that the patio doors were not within the flat, and also considered that an interpretation which enabled the landlord to be responsible for the glass but not the frame of the patio doors was not intended by the draftsman and such an interpretation would be wholly illogical and absurd.

58. **Accordingly the Tribunal found that the landlord was responsible for the patio doors and the windows.** Clause 4 (a) supported this interpretation as it stated that the lessee will not paint or otherwise interfere with the outside surfaces of the front door of the flat or of the windows and window frames. This was also supported by the fifth schedule part 1, 1(a) which obliged the landlord to "repair and prepare and decorate the frames". The Tribunal noted that the effect of the clause was to enable uniformity of appearance. The block itself had large arears of patio glass/ French windows. If the landlord had intended to demise the doors to the leaseholders, this would have potentially had the effect that the character and appearance of the building would have been within the control of individual leaseholders.

59. In considering the second issue, that is the reasonableness of the work undertaken, the Tribunal consider that the Landlord was entitled to take into account the fact that a number of windows and glazing in the door in the building had failed or were in the process of failing. In the Tribunal's view the landlord was entitled to consider the building as a whole and the fact that the windows were liable to deteriorate during the period between cyclical maintenance which would mean that although the landlord had carried out its obligation to repair and redecorate, it was likely that this would be largely cosmetic and before the next cyclical redecoration, a further number of windows would have failed. The Tribunal refer to the report of Mr Dickinson which it prefers over the Report provided by Ms Tay, which does not consider the windows within the building and instead considers the environmental impact of wooden framed windows over UPVC.

60. The Tribunal noted the wording of the lease which requires the landlord to *keep in good repair and condition*" and that this clause referred to "*the whole of the structure.*" This obligation requires the landlord to be forward looking and to anticipate and plan for future repairs such as the windows before they become obsolete.

61. If the Tribunal is wrong about this, then it considers that clause 12, is sufficiently widely drafted so as to enable the landlord to "carry out such repairs and such improvements works additions etc. as the company considers necessary." The Tribunal accepts that this is not an absolute right and that the landlord has an obligation to consult with the tenants, the right to be consulted is a statutory right under section 20 of the landlord and tenant act 1985, as supplemented by the service charge consultation regulations 2003. However this duty was somewhat amplified in the decision of the Upper Lands Tribunal in Waaler, as considered and confirmed by the Court of Appeal.

62. In paragraph 43 of the Judgement, Lord Justice Lewiston, (in the Court of Appeal) stated-: "...In principle, therefore I agree with the UT, There are however, a number of points that need to be made. First, as I have said there is no bright line difference between repairs and improvements. Although Mr Beglan suggested that the UT had drawn such a line, I did not think that on a fair reading of the decision as a whole it did... A number of examples of discretionary improvements were discussed...At one end...improvements were carried out in order to eradicate the future possible failure of the windows...And at the other extreme might be something purely aesthetic interest such as the installation of a water feature to beautify the estate. The relevance of the lessees' views and the financial impact on them may be given greater weight the further along the scale one goes..."

63. In answer to whether the windows were in need of maintenance the Tribunal finds that they were in need of repair on the basis of the Tender Adjudication report (at pages 1112-1122 of the hearing bundle). Accordingly, the Tribunal considers that the replacement of the windows and doors cannot be purely characterised as an improvement, If the Tribunal is wrong, about this, then it finds that the consultation by the Landlord with the leaseholders was appropriate and that the landlord carried out the work with the majority of the leaseholders' approval.

64. The Tribunal determines that the decision by the landlord to carry out the replacement of the windows rather than a piecemeal repairs was within the realms of reasonable responses by the landlord. Accordingly the Tribunal finds that the costs of replacement of the windows, and doors was reasonable and payable.

65. In her submission, Ms Tay, pointed out the fact that all lessees contribute the same, and that this points to the fact that the landlord did not intend the patio doors to be included, as that would mean that those who had more glazing (as is the case with some of the flats) would be subsidised by others. However clause 34, part ii: *variation of percentage proportions* enables the landlord by virtue

of clause 34 (2) to vary the percentage contributions if it is considered inequitable.

66. Part 111 of clause 34 provides that the tenant should pay an appropriate amount as a reserve for or towards those matters mentioned in part 1 of the fifth schedule. So the landlord may collect a sum for the reserve.

67. At the hearing the Tribunal was referred to an additional sum of £673.71 in respect of service charges, however no information was provided by the applicant, neither was the Respondent's objection to this sum clearly set out in her statement of case or skeleton argument accordingly the Tribunal makes no findings in respect of this sum.

Application under s.20C and cost payable under clause 3 d of the lease refund of fees

68. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal makes no order.

The next steps

69. The tribunal has no jurisdiction over the county court costs and has remitted the issue of costs and if necessary enforcement to the county court. This matter should now be returned to the County Court.

Name: Judge Daley **Date:** 30 November 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

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

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

  and the amount payable shall be limited accordingly.

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

Section 27A

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

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

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

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

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

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

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

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

Section 20C

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

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

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

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

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

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

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

(4) No application under sub-paragraph (1) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

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

(a) in a particular manner, or

(b) on particular evidence,

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