FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/LSC/2018/0233**
Property	**:**	**21 Bodley Manor Way, London SW2 2QH**
Applicant	**:**	**Ms Gerlinde Gniewosz**
Representative	**:**	**In Person**
Respondent	**:**	**London Borough of Lambeth**
Representative	**:**	**Mr R Ahmed, Enforcement Officer, Home Ownership Department**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mr H Geddes RIBA** **Mr L Jarero BSc, FRICS**
Date and venue of Hearing	**:**	**5 November 2018 and 7 January 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**18 June 2019**

DECISION

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the applicant in respect of the service charge years 2013/14 to 2016/17 and 2018/19.

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

The property

3. The property is a one bedroomed flat in a purpose built block. The property is located on a broader estate known as the Cressingham Gardens Estate, the freehold of which is owned by the respondent.

The lease

4. The lease was granted in 2004 for a term of 125 years from 12 February 1990, under the Right to Buy legislation.

5. Clause 2, commencing on page 1 of the lease, provides definitions of terms used in the lease. The definition of "the Building" at clause 2.6 on page 3 refers to the First Schedule, which describes the Building as "1-51 Bodley Manor Way".

6. At clause 2.2 on page 3 (there are two clauses numbered 2), the tenant covenants to pay "a rateable and proportionate part of the reasonable expenses and outgoings incurred by the Council in the repair maintenance improvement renewal and insurance of the Building and the provision of services therein" as set out in the Fourth Schedule.

7. Clause 3.2 of the lease contains the landlord's repairing and maintenance covenants. These include the structure of the Building (clause 3.2.1), the sewers and the supply of other services (clause 3.2.2), boilers (clause 3.2.3), lifts (clause 3.2.4) and boundary walls etc (clause 3.2.5).

8. The Fourth Schedule sets out the landlord's repairing responsibilities under Part 1, which relates to the Building, and part 2, relating to the estate.

9. The Fifth Schedule makes detailed provision for the service charge.

10. Other provisions of the lease are set out hereunder where relevant.

The hearing and the issues

Preliminary matters

11. The hearing commenced on 5 November 2018. The original time estimate had indicated a hearing of one day. In the event, it was necessary to reconvene on 7 January 2019 to complete the evidence and submissions.

12. After the hearing, on 8 January 2019, the Tribunal issued further directions. Those directions recorded that the Tribunal considered that it would be assisted by further submissions on one argument in relation to one issue which arises for its decision, to wit, the reasonableness of the respondent's decision to roof the property with GRP, rather than zinc, raised in the Scott schedule in relation to the advance service charge for 2018/19 at item 1 (see below, paragraph 77 and following). The Tribunal asked specifically for assistance as to whether

    (i) the decision to use GRP rather than zinc does, or is capable of, breaching the respondent's covenant to maintain etc the roof; and

    (ii) if it were the case that the decision did breach that covenant, whether the Tribunal should find, or would be entitled to find, that for that reason alone the service charge relating to expenditure on the GRP roof was unreasonably incurred.

13. The directions provided that both parties could provide written submissions in relation to this issue, to reach the Tribunal by 30 January 2019, and each party thereafter respond to the other, by 8 February 2019.

14. The further directions were sent to the parties by post. However, after the time limits mentioned in paragraph 13 above had elapsed, it eventually became clear that neither party had received the further directions. Accordingly, the Tribunal varied the deadlines in paragraph 13 to 18 and 25 March 2019.

15. Both parties provided additional representations.

16. At the hearing, the applicant represented herself. Mr Ahmed represented the respondent local authority. We heard live evidence from Mr Boroughs and Mr O'Flaherty for the respondent, and from the applicant, and took account of the witness statements and other documents submitted by the parties.

The issues

17. During the course of the hearing and during adjournments, the parties came to agreements on a number of issues. The contested matters with which we deal substantively in this decision were as follows:

(i) The proper construction of the term "the Building" in the lease;

(ii) The payability and/or reasonableness of service charges for each of the service charge years in dispute, as set out in the Scott schedule, in particular service charges in respect of (brackets indicate service charge year and item number on the Scott schedule):

(a) estate communal electricity (2013/14, 1);

(b) the canopy roof repairs (2013/14, 4, 5);

(c) Block repair identified by mobile telephone number (2013/14, 6);

(d) Roof repairs, flats 21 and 23 (2016/17, 5);

(e) Roof repairs or renewal (2018/19, 1);

(f) Block cleaning (2016/17, 1)

18. Before and during the course of the hearings, the parties withdrew, conceded or settled a number of issues.

19. At the commencement of the first day of the hearing, the applicant indicated that she had withdrawn a number of heads of her application. It is unnecessary to identify these by reference to the Scott schedule.

20. The applicant also requested that we record the respondent's agreement to credit the applicant in relation to a number of items. This we do by reference to the relevant entries in the Scott schedule in the following table:

Service charge year	Scott schedule items agreed credited to applicant
2013/14	12-14, 24,26, 30, 39.
2014/15	10, 15-18, 20, 23, 25-27, 29, 32-40, 43, 44, 46, 48-50, 52, 53, 55, 56.
2015/16	2, 10-13, 16, 17, 19, 21-23, 32, 34, 35, 37, 46, 49, 52, 54, 58, 60,64, 66, 67, 72, 73.
2016/17	3, 4, 10-12, 19, 22-24.

21. During the course of the first day's hearing, the parties settled their dispute in relation to repairs to the drainage system. The terms of the agreements, which we record here, were that the respondent would credit to the applicant all charges of over £70, and the applicant would accept all charges under that sum.

22. At the commencement of the second hearing day, the applicant helpfully provided a new schedule which extracted the remaining the Scott schedule items in issue after the first hearing day, and grouped them conveniently for discussion. On that schedule, the parties recorded that they had come to agreements in relation to 2014/15, Scott schedule items 7 and 9 (block repairs, roof); 2016/17, item 17 (estate repairs, works to entrance); 2015/16, items 7 and 8 (estate repairs, lighting); and 2016/17 item 16 (estate repair, pot holes).

23. During the course of the second hearing day, the parties came to an agreement in respect of what were described as the weathertight repairs (2016/17, items 7-9).

24. The parties came to an agreement in respect of item 9. The terms of that agreement are best set out by reference to the numbered list of service charge items provided by the applicant in her additional bundle, which particularise the constituent parts of the service charge demand represented by item 9. In respect of that schedule, the first itemised charge (scaffolding) will be reduced by one half, the second (guttering system) by two thirds. There is no change to the third (balcony repairs to flat 11). In respect of the fourth, the quantity column (relating to the overhaul of windows) will be reduced from 7 to 6. The respondent conceded that there should be no charge in respect of the sixth to tenth particularised service charge elements in the list, which will be credited to the applicant.

25. The respondent conceded that the service charge in respect of Scott Schedule 2016/17 items 7 and 8 would be credited to the applicant.

26. Over the lunch adjournment, further concessions were made by the respondent, as a result of which issues relating to the roofs to flats 17 and 19 (2014/15, item 11 and 2016/17, item 6) and various minor repairs (2016/17, item 9; 2016/17, items 2, 18, 20 and 21) were settled.

27. The Tribunal's overriding objective includes "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal" (Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 3(2)(a)). We emphasised the importance of proportionality at both the close of the first day's hearing and during the course of the hearing on the second day. We are grateful to both parties for taking account of the

proportionality principle in making concessions and coming to agreements on these items.

The proper construction of "the Building"

28. The definition of the Building given in the lease is set out at paragraph 5 above. The proper identification of what constitutes the building for the purposes of the lease is necessary in determining the service charge obligations of the applicant.

29. It is helpful to start with a physical description of the Buildings on Bodley Manor Way. There are three physically separate structures. To the north of Bodley Manor Way, there are two structures. That on the west comprises numbers 1 to 23, odd numbers, and includes the property. The structure adjacent to it, on the north east, comprises numbers 25 to 51, odd. To the south is a single block, numbered 2 to 26, even numbers.

30. The two northern structures comprise identical one bedroomed flats, on two floors. The southern structure is a terrace of houses.

31. The applicant contends that "the Building" comprises all three distinct structures. This follows from the simple designation of "the Building" in clause 2.6 as "1-51 Bodley Manor Way".

32. The respondent contends that "the Building" should be construed as the structure in which the property is situate, that is the north western structure comprising numbers 1 to 23, odd.

33. Mr Ahmed conceded that the definition in clause 2.6 did not distinguish between odd and even numbered properties. He said, however, that the respondent currently charged service charge as if "the Building" was numbers 1 to 23, odd; and consultations on major works were conducted on the basis of numbers 1 to 51 odd (ie the two northern structures).

34. Mr Ahmed submitted that the lease was "incorrect". While no other leases were before the Tribunal, Mr Ahmed referred us to the witness statement of Mr Robert Mowatt, currently an interim service charge manager employed by the respondent. The majority (Mr Ahmed said all but two) of the leases in the two northern structures define "the Building" by reference to each of the two northern structures. The consequence of this is that there would be a danger of over- or under-collection of service charge if the respondent accepted the express definition contained in the lease of the instant property.

35. Mr Ahmed submitted that the Tribunal should treat the lease as if it defined "the Building" as the structure including numbers 1 to 23, odd. He accepted that he could cite no authority for this approach, but did

refer us to a Tribunal decision involving the respondent which did, he said, adopt this approach, *9 Deuville Court*, LON/00AY/LSC/2016/0242.

36. That decision of the Tribunal concerned different leases on a different estate, also in Lambeth. Mr Ahmed submitted that paragraphs 13 and 14 indicated that the terms of the lease were not being complied with, but that the Tribunal went on to make a determination.

37. To the extent that there was a dispute as to how different elements of the service charge should be allocated between Building and estate in that case, it seems it was initially raised not by the applicant leaseholder, but by the respondent, who nonetheless defended their existing practice. It appears to us that the Tribunal in that case did, in fact, draw conclusions contrary to the respondent's submissions, in that in it drew a distinction between service charge liabilities in relation to the Building and the estate (at paragraph 22). But even if we are wrong in that conclusion, we do not consider that anything in this case is of assistance to us.

38. We asked Mr Ahmed if he was inviting us to imply the substitution of a clause for that in the lease, and if so, what. He said that he was, and it should specify that "the Building" meant "numbers 1 to 23, odd". We have no hesitation in rejecting the submission, entirely unsupported by any argument from authority, that we should "rectify" a clear and unambiguous clause in this lease, on an application under section 27A of the 1985 Act.

39. *Decision*: The lease definition of "the Building" is clear, and relates to all three structures described in paragraph 29 above.

40. It was evident that the determination of this issue could have knock-on effects on other matters before the Tribunal, and as we felt able to do so following a brief adjournment, we indicated to the parties at this point that we found for the applicant on this issue.

Estate communal electricity

41. The applicant argued that the increase in overall costs charged in relation to communal electricity used on the estate, from which her service charge relating to estate electricity was derived, from 2012/2013 (£1,628.77) to 2013/14 (£2,784.09) was not reasonable.

42. The respondent relied on the explanation of the system contained in the respondent's statement of case, without objection from the applicant. At paragraphs 23 to 29, the statement set out the system used by the respondent. Electricity was purchased aggregated via a Professional Buying Organisation and their appointed framework energy suppliers. Energy was bought on the wholesale market in six month procurement

windows. The statement sets out various general arguments in favour of this system of procurement.

43. The figure for 2012/13 reflected actual use. The charge for 2013/14 was based on an estimated invoice from the provider, which involved an assessment of future costs. The respondent was obliged to pay the invoice, which was therefore an incurred cost for service charge purposes. Once final metered actual charges were known, there would be a reconciliation of the charges passed on to leaseholders. The respondent noted that the increase to the applicant amounted to a charge of £3.61.

44. The applicant had undertaken an analysis of wholesale costs which, she said, indicated that the highest percentage increase that the respondent could reasonably have charged was 17%, rather than the increase of 71% actually charged. Her analysis is detailed in paragraphs 126 to 135 of her response to the respondent's statement of case. Such an increase, she argued, could not be reasonable.

45. The respondent, in its statement of case, argued that the disparity was explained by the difference between the 2012/13 outturn figure and the estimate for 2013/14, but did not contest in technical terms the applicant's calculation.

46. In the absence of a technical argument addressed at the applicant's assessment of the wholesale market, the Tribunal accepts that there was an increase of unexplained size between the figures for the two years.

47. That does not, however, conclude the assessment of reasonableness. The applicant did not contest that the 2013/14 charge was derived from an invoice paid, and required to be paid, by the respondent. Nor did she contest that an eventual reconciliation would take place (although in fairness, Mr Ahmed was not able, when asked by her, to indicate where the reconciliation appeared in the papers before the Tribunal).

48. In these circumstances, we do not consider that the applicant has demonstrated that the charge, albeit the increase was unexplained, was unreasonable. A very large unexplained charge to an individual might, in some circumstances, give rise to a finding of unreasonableness even if a local authority freeholder could point to an incurred cost, if, for instance, it raised a presumption that the system had failed or that at least enquiries should have been made. But where, as here, the cost of the increase to the applicant (and therefore, we assume, other leaseholders) was very moderate – the respondent states it amounted to £3.61 – and the reconciliation process is not contested, we do not consider that that threshold is anywhere near reached.

49. *Decision*: The service charge attributable to the incurred costs to the respondent of estate electricity in 2013/14 was reasonable and payable (item 1 of 2013/14 on the Scott Schedule).

Canopy roof repairs

50. There is a small canopy roof over the external stairs that provide access to flats 19 and 21. A flat roof, it projects out from the line of the building to cover the stairs. There is a plasterboard ceiling on the underside of the roof. An electric light was originally fixed to the ceiling.

51. The two items on the Scott Schedule to which this relates are the moving of the light from the ceiling of the canopy roof to the wall at the side of the staircase and the repair of the canopy roof itself.

52. The applicant's case was that in May 2013, she requested through the respondent's responsive repairs system a repair to the canopy roof and the plasterboard ceiling. The roof leaked and the plasterboard was damaged. The ceiling was removed shortly thereafter, but without replacement. The applicant's response to the respondent's statement of case includes a detailed account of a large number of contacts with the respondent in relation to the repair, or lack of it, including complaints and the involvement of a local councillor.

53. Some repair to the roof appears to have been made in November 2013, but, on the applicant's evidence, supported by a photograph, the ceiling was not replaced until some time in December 2013. In January 2014, the light fitting was removed from the ceiling and relocated to a wall on the side of the stairwell.

54. A photograph produced by the applicant dated 3 February 2017 shows the underside of the ceiling with a hole where the light fitting had originally been located, and what the applicant says is evidence of leaking at that time. Her evidence was that the roof was still leaking at the date of the hearing.

55. For the respondent, Mr Ahmed told us that it was not practicable for the respondent to review the specific issues involved in this repair, and so the respondent relied instead on evidence of its system of responsive repairs. We note that at the time that the respondent decided to take this approach to this application, there were a number of contested issues relating to responsive repairs, which were largely subsequently settled between the parties.

56. The respondent relied on the evidence of Mr Nick O'Flaherty, who is the Area Asset Manager in the respondent's Housing Services Division. His witness statement states that he has held this position for over 17 years. In oral evidence, he clarified that he had been employed by the

respondent for 17 years, but not all in his current position. He is now in overall charge of the respondent's responsive repairs.

57. Mr O'Flaherty explained that the system dealt with about 100,000 repairs (over the Borough as a whole), using a management system called Northgate, which takes and processes repair requests, and communicates them to the respondent's contractors. The contractor in respect to the part of the Borough in which the estate is located is called Morrison Facility Services. In his witness statement, Mr O'Flaherty says that it is not possible to check each repair, nor to require contractors to photograph each repair. Rather, the respondent relies on periodic inspections. Morrison have been working with the respondent for 12 years and Mr O'Flaherty considers them to have "consistently evidenced satisfactory quality measures" (witness statement, paragraph 11).

58. We heard considerable oral evidence from Mr O'Flaherty, including in cross-examination by the applicant and in questions from the Tribunal. His evidence was that there was a distinction within the system in terms of oversight based on the value of the works undertaken. The repair with which we are concerned fell into the low value category. In respect of this category, the overall force of his evidence was that the conduct of repairs was almost wholly handed over to the main contractor, Morrison, which in turn effectuated repairs by means of a number of sub-contractors. It was the contractor (or, it appeared, the sub-contractor) who specified the work, subject to a desk check by an employee of the resondent. The contractor then carried out the work, and it was approved by the respondent. Mr O'Flaherty referred in his oral evidence to the use of photographs in approvals for specifications and at the conclusion of works. It was not wholly clear to the Tribunal, however, whether photographs were required from contractors for all jobs at this level, or not. His witness statement unequivocally states that not all repairs were required to be photographed.

59. There was now a system ("recall orders") when complaints were received about repairs which allowed for contractors to return. Mr O'Flaherty did not know if this system was in place in 2013.

60. In oral evidence, Mr O'Flaherty outlined the system for inspecting repair jobs. The contractor inspects 10% of its own jobs, and provides photographic evidence to the respondent. Of those, the respondent then independently inspects 10%. Asked by the Tribunal how it was possible to properly inspect a job only at the end, Mr O'Flaherty said that they undertook such inspections on the basis of the works orders.

61. Mr O'Flaherty's evidence was that the respondent did not seek to monitor sub-contractors.

62. As will be clear from this summary, the applicant relies on documentary evidence in relation to her contacts with the respondent in respect of the repair, on photographs, and on her own oral evidence of the current state of the canopy roof. On this basis, she argues that the repair was never properly conducted, and any expenditure on it is unreasonable.

63. The respondent provides evidence of the system used by the respondent to handle repairs, and on that basis invites us to find that the repair would have been, or must have been, carried out satisfactorily.

64. The applicant's evidence is compelling and we accept it. To the extent that she relied on her own oral evidence, we found her to be an honest, thoughtful and careful, even fastidious, witness. The respondent was not in a position to contradict her evidence in relation to the repair itself, choosing instead to rely on the quality of its responsive repairs system. Even if that system (which deals with 100,000 repairs a year), was demonstrably consistently robust, it would be difficult to see how reliance on it could displace clear and cogent direct evidence about the one specific repair under consideration. It may be doubted (although we are not required to so find) that a system which very largely devolves decision making to the contractor, subject only to desk-based approvals and the inspection of 1% of repairs, can properly be described as demonstrably consistently robust.

65. Mr Ahmed did not argue before us that the two repairs fell to be treated differently, although there is a suggestion to that effect in the Scott Schedule. We do not think separate treatment is sustainable. The moving of the light was undertaken as part and parcel of dealing with the leak to the roof. There was no suggestion that the motive for moving it was independent of the effect of the leak.

66. We accordingly agree with the applicant's account of the repair. If she is right, then we must inevitably conclude that the ineffective repair did not amount to reasonable expenditure.

67. *Decision*: The two items described as block repairs at items 4 and 5 of the Scott Schedule, that is, repairs to the canopy roof and the moving of the electric light previously in the ceiling of the canopy roof, to a value of £214.82 and £31.47, were not reasonably incurred and the service charge attributable to them is not payable.

Block repair identified by mobile telephone number

68. A "repair" request was recorded by the respondent for the cost of £18.79. The respondent's case was that the person making the request, in July 2013, gave the applicant's mobile telephone number, and therefore the request was raised by the applicant. The "repair", which

appeared to be a roof inspection involving no recommendations, was noted as referring to 17 to 23 Bodley Manor Way.

69. The applicant says that her telephone number is frequently attributed to repair requests. She has also made numerous such requests in her role as a committee member of the estate's Tenants and Residents Association. She was not aware of any independent repair request at this time.

70. However, on cross checking the job reference number, the applicant noted that it related to a job raised in connection with the canopy roof repairs, which had then subsequently, and it appeared erroneously, been closed. This connection appears in the applicant's response to the respondent's statement of case at attachment 1 (page 32), paragraphs 3 and 8.

71. Mr Ahmed conceded that he could not contradict the link between this repair with those dealt with above, given the cross-reference identified by the applicant.

72. Accordingly, it appears that this item is merely an additional incident in the sequence of events covered under the heading of canopy roof dealt with above. We therefore find for the applicant on the same basis as under the heading of canopy roof above.

73. *Decision*: The item described as block repairs at item 6 of the Scott Schedule, a charge of £18.79, was not reasonably incurred and the service charge attributable to it is not payable.

Roof repairs: 2016/17

74. We heard evidence and submissions in relation this item, which related to what the applicant said were inadequate repairs to a roof over her property (and flat 23). Mr Ahmed helpfully noted, as the hearing progressed, that the amount charged to the service charge in respect of this repair was in any event moderate, and in the light of our determination in relation to the construction of the lease at paragraph 39 above, it would be further reduced, so that it would be of the order of £4.00.

75. In the light of this, and having already heard some evidence and submissions from the respondent, and having read material relevant to the issue in the bundles, we declined to continue to take up further time in considering it. Suffice it to say that the broad structure of the evidence was direct evidence from the applicant and evidence of systems from the respondent. We found summarily for the applicant at that point.

76. *Decision*: The amount claimed for block repairs in 2016/17 in respect of repairs to the northern roof of the property (Scott schedule 2016/17, item 5) was not reasonably incurred.

Roof repair or renewal 2018/19

77. We heard and read a substantial amount of evidence in relation to the dispute between the parties as to proposed works to the front, southern roof of the property.

78. In addition to the written material already supplied by the parties, and as noted in paragraph 12 above, we received additional submissions from both parties in relation to the issue following the hearing. During the hearing on 7 January 2013, we heard Mr O'Flaherty's oral evidence and, at least in effect, oral evidence from the applicant.

79. Rather than rehearse the evidence *in extenso* in advance, it is more efficient to order this part of our decision by setting out first the matters agreed by the parties, and secondly the competing submissions, bringing in such evidence as is necessary for us to come to conclusions on those submissions. The implication of this approach is that we do not expressly refer to a considerable body of evidence, and indeed to some submissions made by the parties. The reason is that on the basis upon which we have decided the issue, these matters ceased to be relevant. We have, of course, considered all of the evidence before us in coming to our conclusions.

80. Both parties agree that this roof is seriously defective. There was substantial water ingress, currently prevented by a temporary tarpaulin.

81. Both parties accept that a new roof is necessary. The current roof is formed of zinc. The dispute was, in its shortest form, whether the new roof should be made of zinc, as the applicant contended, or whether it could be formed of a plastic, GRP, as contended for by the respondent. It was agreed that a zinc roof would be more expensive than a GRP roof. There were disputes between the parties as to the extent of the difference, the applicant arguing that on a true like-for-like basis it was less than the respondent's quotations suggested, but for reasons that will become clear we do not think it necessary to go into this issue.

82. Thus the applicant was arguing that the proper course was to provide the more expensive manner of rectifying the problem.

83. It was further agreed that the anticipated life-span of a GRP roof would be about 20 years, and that of a zinc roof about 40 years.

84. By way of background, the evidence was that GRP had been used for roofing since the 1950s, but only on residential properties more

recently – in evidence, Mr O'Flaherty said in the last 20 years or so. The GRP is prepared in liquid form on site and applied by a qualified contractor.

85. By clause 3.2 of the lease, the respondent covenants

> "…to maintain repair redecorate renew amend clean repoint and paint as applicable and at the Council's absolute discretion to improve
> 3.2.1 the structure of the Building and in particular but without prejudice to the generality hereof the roofs …"

86. The applicant's submission, most succinctly put in her further submissions following the hearing, is that the works to the roof must come under one of the three headings of "repair", "renewal" or "improvement".

87. The applicant argues that none of these descriptions is apt to describe the works proposed. She argues that "repair" means the replacement of minor elements or the patching of small areas. Rather, the appropriate heading is "renewal", which would import an obligation to replace with like-for-like materials. A GRP roof, she contends, is not such a replacement, but rather a lower quality, less attractive alternative. For similar reasons, the GRP roof cannot be an "improvement". Her conclusion is that the erection of a GRP roof is not within the repairing covenant and accordingly the cost of it is not payable. On the other hand, she accepts that the (more expensive) installation of a zinc roof would be allowable.

88. The respondent argues that a GRP roof would be a repair, citing *Wandsworth London Borough Council v Griffin* LRX/40/1999, [2000] 2 EGLR 105 for the proposition that, in a lease without an improvement clause, a repair did not cease to be a repair if it also effected an improvement. In the instant case, the respondent argues, even if the GRP alternative is not a repair, it is an improvement, and accordingly within the covenant.

89. The respondent argues that the lease contains no requirement for like-for-like replacement. The obligation is "to carry out any work required to the roof and the respondent has the discretion to decide what materials it uses to comply with its repairing obligations."

90. In our view, it is more helpful to consider, first, whether given the circumstances of disrepair, the replacement of the roof comes in principle within the terms of the covenant.

91. So put, it is evident that replacing the roof per se must be within the covenant, assuming, (as both parties agree) that further patch repairs are not appropriate. Further, it must be one of repair, renewal or

improvement, and, given the breadth of the clause, it is immaterial which it is (subject to a caveat). The respondent is, then, obliged by the lease to replace the roof.

92. The caveat mentioned above is that improvement is a discretion and not an obligation under the lease. It is not, however, helpful to pursue this distinction in the light of our conclusions below, which imply that improvement is not in fact the relevant head.

93. The question then becomes: is *this specific proposed replacement* one that the respondent is entitled to effect in satisfaction of its obligation under the lease? If it is, then, on the face of it, the applicant is entitled to charge the cost of it to the service charge, unless for separate reasons it fails to pass the reasonableness test in section 19 of the 1985 Act. If it is not, then doing so is a breach of the respondent's covenant.

94. The applicant's argument becomes, once the question is posed in this way, that the replacement of a zinc roof with a GRP roof is a breach of the covenant, because it is less attractive, shorter lived and less in keeping with the building.

95. The respondent makes the contrary argument, that a GRP roof is an adequate replacement in aesthetic terms, and that its shorter life is not relevant given the plans of the respondent for the future of the estate, as a result of regeneration plans approved by the respondent local authority. We will come on to the question of the future of the estate at the next stage in the argument.

96. As to the aesthetic argument, in the hearing our attention was drawn to a photograph of two GRP roofs which had been installed in another part of the estate (a colour photograph to replace the black and white one in the bundle was handed up). Mr O'Flaherty acknowledged that these roofs looked markedly different to a zinc roof (one zinc roof is just visible in the photograph, by way of comparison). However, he said that when these roofs were laid, he had not known that it was possible to replicate visually an element of a zinc roof, that is, upstanding seams between sheets of the metal, on a GRP roof. He also said (and this is repeated in his witness statement) that the colour of the GRP could be adjusted to more nearly match that of a zinc roof.

97. In the respondent's further submissions, in a paragraph which at least starts with a rehearsal of Mr O'Flaherty's evidence, it is stated that "GRP will provide an almost identical aesthetic outcome as that of zinc …". We do not think that Mr O'Flaherty's oral evidence before us went anywhere near this far.

98. We should record our impression of the photograph of the roofs. Each of us considered that they looked like what they were – nearly flat roofs

with a plastic finish. They could not be said to enhance the appearance of the buildings. In forming this impression, we nonetheless take account of the difficulty of coming to such conclusions based on photographs.

99. Finally, in his evidence, Mr O'Flaherty said that he had initially recommended a zinc replacement roof, and had amended that because of the regeneration plans. If regeneration was not going ahead, he said, they would be using zinc. The stated reason for initially preferring a zinc roof was that it was more in keeping with the building.

100. We conclude at this stage that, if one ignores the regeneration plans, the use of GRP rather than zinc to replace the roof would amount to a breach of the covenant contained in clause 3.2/3.2.1. We accept the applicant's argument in terms of the aesthetic quality of a zinc roof, both per se and in terms of it being more in keeping with the character and age of the building. The possible improvements to the appearance of the roof by the creation of false "seams" does not dissuade us from this conclusion. We consider that Mr O'Flaherty would have been right to have recommended a zinc roof, as he told us he initially did, and that would have been justifiable as the only method that would have met the obligation on the respondent in the lease (in addition to zinc and GRP, the respondent considered felt, an option dismissed as inappropriate).

101. We confirmed this conclusion by asking ourselves a common sense question, standing back from the detail. What would a reasonable leaseholder who had bought a leasehold of a flat with a zinc roof, think about the substitution of a GRP roof? We think a reasonable leaseholder would be entitled to take the view that they had bought a property with a zinc roof, and a GRP roof was a diminution of that purchase.

102. We turn now to the effect, if any, on this conclusion of the regeneration plans for the estate.

103. In 2016, the respondent's cabinet took an in-principle decision that the estate should be demolished and re-developed. In her further submissions, the applicant sets out a detailed history of the regeneration proposals in support of her contention that it was "at a stage that is so nascent and subject to change or cancellation that it cannot be allowed to have an impact on the carrying out of the lease covenants."

104. The respondent's further submissions states that the estate is "earmarked for re-development", and assumes that there is little or no doubt as to progress of the proposals: it says that "the estate will be re-developed" and that it was "highly unlikely" that either a GRP or zinc roof would reach the end of its life before demolition. This is, however, all assumption – the respondent does not present evidence or argument

that the decision of the local authority is nearly certain to be carried out.

105. The respondent nonetheless relies on the argument from regeneration to support its claim that the admitted longer-term greater economic value of a zinc roof should be discounted.

106. In addition to her own account, the applicant supplies via a link the officers' report relating to the Council's cabinet decision. In her argument for uncertainty, she prays in aid that the contract for managing the process (with an international management consultancy) has multiple no penalty break points, that a funding allocation from the Greater London Authority was dependent on securing planning permission by August 2018, which has not been done, that there is (she says) majority opposition on the estate and a ballot, or more than one ballot, may be necessary, that the process has already been litigious, with two applications for judicial review being heard already (one found against the local authority, the other for), that the earliest, preparatory stage of the process has only just been completed, and that no notice of an intention to demolish has been served under Housing Act 1985, schedule 5A, which she says is required seven years before any demolition. She also claims that some reconsideration may be taking place associated with the establishment of development subsidiaries by the local authority, and that a "hybrid" scheme, which we understand to mean partial demolition, partial refurbishment of the estate, may be back under consideration.

107. None of these claims have been tested before us. But equally, the respondent has had the opportunity to do so and has not taken it, either at the hearing itself, when the applicant argued to similar effect, or in the subsequent further submissions.

108. The applicant relies on these considerations for her submission that potential regeneration should be ignored. We think her submissions go too far. We are not in a position to quantify the likelihood of the regeneration going ahead, and with respect to her submissions, we do not think the applicant is either. However, we consider that the considerations to which she directs us – and general knowledge of the uncertain prospects for any public spending – do demonstrate that there must be *some* uncertainty as to whether regeneration, and the demolition of this property, will come to pass.

109. We conclude that the possible or likely future regeneration of the estate is not a sufficient factor to negative what would otherwise be, as we have found, a breach of covenant.

110. Our starting point is that the covenant is a persisting obligation of the respondent. The question is to what extent future events can negatively impact on what is required to discharge that obligation today.

111. There may be an argument that even certain regeneration at a point some years from now would not be sufficient to dislodge a persisting obligation. But we do not have to go that far. We have found that regeneration is not a certainty, and we cannot accurately calibrate its likelihood. That a future event of uncertain likelihood should negative an existing persisting obligation is a much harder claim to make out.

112. But even if we were to accept that the indeterminate prospect of regeneration should have an impact on what was necessary to discharge the respondent's obligation, it would still be necessary to isolate the nature of that impact. The respondent's argument in this respect is directed at the argument from the longer life of the zinc roof, which is certainly part of the assessment. But, as we have found, the GRP alternative breaches the covenant not only on that basis, but also on grounds of aesthetic quality and the extent to which it is in keeping with the building.

113. If it were necessary to do so, we would be inclined to find that even if the advantages of a longer life-span were wholly discounted because of the regeneration argument, it was still the case that a GRP roof was not an adequate replacement for a zinc roof. We do not, however, consider that we do have to so find. It is sufficient that, even if it is right that the possibility of regeneration should weigh in the scales in respect of the life-span argument, we do not think it wholly obliterates it, precisely because of the uncertain possibility that regeneration will not take place.

114. The final stage in the argument is whether breach is determinative of reasonableness. This was the second question in respect of which we asked for submissions.

115. The applicant's submissions on this question went to substantive reasonableness. She argued, applying *Waaler v Hounslow London Borough Council* [2017] EWCA Civ 45, [2017] 1 WLR 2817, that the expenditure would be unreasonably incurred.

116. Although the respondent posed the question initially on the basis we had asked, the substance of the submission likewise went to the substantive question of reasonableness.

117. Our conclusion is that it can never be reasonable to incur expenditure in breach of a landlord's covenant.

118. It must be the case that section 19 reasonableness only becomes an issue if the expenditure is otherwise properly incurred under the lease. In *Waaler v Hounslow*, the Court of Appeal said, at [25], that "[t]he Landlord and Tenant Act 1985 must have been intended to provide protection against costs which, but for its operation, would have been

contractually recoverable". The corollary to that must be that if costs are *not* contractually recoverable, they cannot nonetheless be "reasonably incurred" in section 19 terms. *Waaler v Hounslow* presupposes that before the section 19 reasonableness question can be asked, the contractual recoverability question must have been positively answered. The consideration of the test, and of the relationship of rationality to reasonableness, presupposes this conclusion. Conceptually, expenditure incurred in breach of a covenant can no more be reasonable although not payable than expenditure incurred outwith any provision of the lease.

119. *Decision*: replacement of the zinc roof over the property with a GRP roof would be a breach of the respondent's covenants and would therefore not be payable (2018/19, item 1).

Block cleaning

120. The applicant argued that a total cost of £3,328.83 for block cleaning, that is, cleaning relating to numbers 1 to 23, was excessive in 2016/17. She initially argued that there was no block cleaning at all. In previous years, charges for block cleaning had been removed on the applicant's complaint. She notes that the cleaning schedule produced by the respondent as an attachment to its statement in response is a generic one, referring to internal communal areas, of which there are none in the block. She states that the only areas that could be cleaned were the three sets of stairs, of 13 steps each, and the associated small landings.

121. The applicant's evidence at the hearing was that the stairs and landings were only irregularly swept, and large cobwebs remained undisturbed for significant periods.

122. Before the second day of the hearing, the respondent produced witness statements from the current and previous team leaders (employed by the respondent's contractors, Pinnacle Group), which stated that the stairs and landings were swept twice a week, and on the other three days subject to a visual inspection, and swept if necessary.

123. The witness statement of the current team leader, Marco Freitas, said that the area was inspected on a monthly basis by the "performance manager" with the team leader. Appended to his witness statement was a series of inspection reports in paper form, which showed generally "good" results. From August 2016, a computerised system was introduced, based on hand held devices. According to Mr Freitas, "Under the current system, each monthly visit has 6 tasks to be carried out. The performance manager individually inspects the different areas along with the relevant team leader and scores the area" on a three star system. Attached to the witness statement was a summary of the inspection visits, as the system did not allow individual reports to be printed out. The overall score was two stars.

124. At the hearing, the applicant pointed out that the summary of inspection reports produced by Mr Freitas showed very short periods to accomplish the tasks identified by Mr Freitas. The summary shows a start and finish time for each inspection. The longest was two minutes 43 seconds; the shortest three seconds. Four of the nine inspections lasted for five seconds or less.

125. Whatever the standard of cleaning, £3,328 a year for sweeping three staircases twice a week appears to the Tribunal to be high. The inspection system is elaborate in theory. But the applicant's observation as to the time taken suggests that inspections in practice were between perfunctory and non-existent. Insofar as it relates to the quality of cleaning, we prefer the evidence of the applicant to the evidence provided by the inspections.

126. As we indicate above, the figure for cleaning is high. The new information provided by the respondent for the second day of the hearing if anything undermined rather than supported the reasonableness of the charge. We conclude that the charge should be reduced by half.

127. *Decision*: The charge for block cleaning for 2016/17, £3,328.83, should be reduced by half (2016/17, item 1).

Application under section 20C of the 1985 Act

128. In the application form the applicant applied for an order under section 20C of the 1985 Act. Mr Ahmed said that the respondent did not intend to seek to add the costs of the proceedings to the service charge account. In order to secure this assurance, and without opposition, we made the order.

129. *Decision*: It is ordered under section 20C of the 1985 Act that the respondent may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Name: Tribunal Judge Professor Richard Percival **Date:** 18 June 2019

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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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).