9836

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CW/LSC/2013/0013 and 20**
Property	:	**76 Warstones Gardens, Penn, Wolverhampton WV4 4PE**
Applicant	:	**Ms Alison Baynham**
Representation	:	**None**
Respondent	:	**Wolverhampton City Council**
Representation	:	**Mr Richard Phillips (Solicitor)**
Type of Application	:	**Under sections 19 20B and 27A of the Landlord and Tenant Act 1985 for a determination as to the payability and reasonableness of service charges**
Tribunal Members	:	**Judge W J Martin** **Mr J Turner F.R.I.C.S** **Judge S McClure**
Date and venue of Hearing:		**Wolverhampton Magistrates Court on 13th January 2014**
Date of Decision	:	08 APR 2014

DECISION

Preliminary

1 On 11th July 2013 Alison Baynham ('the Applicant') made two applications ('the Applications') to the Tribunal under section 27A of the Landlord and Tenant Act 1985 ('the Act') for a determination as to whether service charges were payable and if so as to their reasonableness in respect of 76 Warstones Gardens, Penn, Wolverhampton WV4 4PF ('the Applicant's flat'). The Respondent in respect of both of the Applications is Wolverhampton City Council. One of the Applications requested a determination as to whether a service charge was payable five years after remedial work was carried out to the balcony at the Applicant's flat, and is stated to relate to the year 2005, when the work was carried out. The other Application also relates to the work on the balcony, which the Applicant says is not to standard, and is stated to relate to the years 2010, 2011, 2012 and 2013.

2 The Applicant stated that she agreed to a paper determination. However, the Respondent requested an oral hearing. The Tribunal may only deal with an application on paper with the consent of both parties, and accordingly directions were issued appropriate to an oral hearing. The Tribunal also directed that the Applications would be consolidated, and that, in view of the Applicant's suggestion that she should not have to pay service charges in respect of works which were not charged through the service charge more than eighteen months after the works were completed, the Applications would be treated as including an application under section 20B of the Act.

The Lease provisions

6 The lease under which the Applicant's flat is held ('the Lease') is dated 24th January 2005 and is made between the Respondent (1) and the Applicant (2). The Lease was granted under the 'Right to Buy' provisions of the Housing Act 1985 and is for a term of 125 years from 24th January 2005. The provisions of the Lease relevant to the Applications are enumerated below.

7 *Definitions:*

1.02 The "Building' shall mean the Building shown for the purposes of identification only edged blue on the Plan

1.03 The "Property" shall mean the residential flat known as 76 Warstones Gardens Warstones Wolverhampton forming part of and situate on the second floor of the Building including the ceiling of the said flat and extending to a horizontal plane midway between the floor of the said flat and the ceiling of the part of the Building below the said flat Together with the external store shown coloured orange on the Plan Together with the balcony at the second floor level shown coloured green on the plan (but excluding the space below the said balcony)....

1.04 The "Estate" shall mean the land and premises within the curtilage of a three storey block consisting of six flats numbered 71 - 76 Warstones Gardens

1.14 The "Services" shall mean those works of repair maintenance and improvement which the Council shall from time to time carry out or procure to be carried out to the Property the Building the Estate and any

other property over which the Tenant has a right pursuant to the provisions of Schedule 1 hereof AND shall also include the provision from time to time by the council of:

(a) insurance pursuant to paragraph 4.00 of Schedule IV here to, and

(b) insurance against the risks involved in carrying out the aforesaid works of repair maintenance and improvement

(c) management and administration

(d) such other facilities works or amenities as the Chief Landlord Services Officer shall deem necessary or desirable at any time throughout the Term

1.15 The "Service Charge" shall mean a reasonable part of all the costs directly or indirectly incurred or to be incurred by the Council in providing the Services and shall also include:-

(a) all overheads and

(b) a reasonable sum in lieu of the cost of insurance referred to in Clause 1.14(b) above if the Council does not take out such insurance and

(c) where all or any part of the cost of providing the Services is based upon an estimate the amount of the shortfall should the estimate have been an under estimate

AND Service Charge will comprise all of the above mentioned costs 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

SCHEDULE 111
"THE TENANT'S COVENANTS"

PREMIUM/RENT

2.00 The Tenant covenants with the Council to pay the Service Charge on demand (and in advance of all or any part of the component costs of the Service Charge being incurred if the Council so requires) PROVIDED that during the Initial Period of this Lease the Tenant will not be required to pay in respect of Repair Service Charges and Improvement Charges a sum exceeding the estimated charges for the same set out in the Landlords Offer Notice together with an allowance for inflation calculated in accordance with the provisions of the Order

REPAIR

4.00 To keep the interior of the Property in good and tenantable repair

4.01 To keep clean and tidy and properly tended any garden balcony communal landings passages or other external area forming part of or adjacent to the Property

SCHEDULE IV
"THE COUNCIL'S COVENANTS"

PROVISION OF SERVICES
AND OBLIGATION TO REPAIR

2.01 To provide the following services :-

(a) to keep in repair the Building and the Estate and any other property over which the Tenant has any right by virtue of Schedule 6 of the Act (except such parts thereof as the Tenant covenants in this Lease to repair) in accordance with Part 111 of Schedule 6 of the Act

(b) To paint all parts of the exterior of the Building and to paint or otherwise suitably treat the other parts of the Building used in common with the Council or its tenants in accordance with the Council's repair policy in force from time to time during the Term

MANAGEMENT

6.01 In the management of the Estate and the performance of the obligations of the Council hereunder to employ or retain the services of any employee agent or consultant contractor engineer and professional adviser that the Council may reasonably require so as to enable them to carry out or maintain the Services and for the general conduct management and security of the Building

SERVICE CHARGE DEMAND

7.00 At its absolute discretion to make a demand for Service Charge at least once in each year of the Term

The relevant legal provisions

8 *LANDLORD AND TENANT ACT 1985*

18 Meaning of "service charge" and "relevant costs"

(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' cost of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose-

(a) "costs" includes overheads

(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.

19 Limitation of service charges: reasonableness

(a) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

i. only to the extent that they are reasonably incurred, and

ii. 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;

(b) and the amount payable shall be limited accordingly.

(c) 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 of subsequent charges or otherwise.

20B Limitation of service charges: time limit on making demands

(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 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 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.

20C Limitation of service charges: costs of proceedings

(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 .. the appropriate tribunal... 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 person specified in the application.

27A Liability to pay service charges: jurisdiction

(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 be 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 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

(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 a determination by the 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) [not relevant to this application]

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of the court in respect of the matter

Inspection

9 The members of the Tribunal inspected the Applicant's flat on 13th January 2014. Present at the inspection were the Applicant's occupational tenant, Ms Durrance, and, on behalf of the Respondent, Mr Ian McGann (Property Supervisor) and Mr Darren Read (Principal Homes Sales and Leases Officer). The Applicant's Flat is situated on the second floor of a Block containing 6 similar flats in three stories. The balcony in the Applicant's Flat is cantilevered and is approached via a door from the inside of the flat. The front of the balcony comprises a series of metal panels supported by a metal framework. The 'floor' is covered with a synthetic material. There is a drain situated adjacent to the main structural wall of the Block. The members of the Tribunal were told that there are 94 flats in total on the Warstones Gardens Estate and

for completeness were shown the exterior of a flat which had not had the work done, showing the brick parapets and illustrating the structural issues which caused the Respondent to undertake the balcony refurbishment programme.

The Applicant's written submissions

10 The Tribunal's Directions invited written submissions from both parties. However, the Applicant said that she had nothing further to add to the submissions that she made in the Applications themselves.

11 The Applicant stated in the Applications that in 2005 the balconies at Warstones Gardens were replaced. However, the replaced balconies were not fit for purpose. They are smaller than the original balconies that were replaced and there were a lot of snags, such as paint peeling off, the panels getting very hot in summer and rusting to the metal frame. Additionally the balconies hold water, so that when it rains the water is left on the balcony, making it slippery. The respondent has been made aware of the problems but no action has been taken.

12 The Applicant states that she and other leaseholders should not have been charged for the balcony replacement, as the company that built the balconies has gone bankrupt. The leaseholders were billed five years after the work was done and it is therefore suggested that payment is barred by virtue of section 20B of the Act. It also appears that some leaseholders have not been made to have the balcony refurbished, whereas the Applicant was told that all leaseholders were required to have the works done.

13 The Respondent wanted to charge £3,000 or more for the work, but following objections from the leaseholders this was eventually reduced to £1,226.31 which sum was paid by instalments. The Applicant now considers that the monies should be refunded for the above reasons.

The Respondent's submissions

14 In accordance with the Tribunal's Directions, the Respondent produced submissions and a hearing bundle. The Respondent's written submissions are summarised as follows:

01. There is no allegation that there was a failure to carry out the statutory consultation, and so the submissions do not deal with this issue. However, the right is reserved to respond or provide further submission should consultation become an issue.
02. A breakdown of the service charges for all of the years 2011 to 2014 was provided, presumably because the Applications can be read as requiring a determination in respect of them. The Respondent maintains that in respect of all of the invoices forming the service charge demands (copies of which were also supplied) were reasonably incurred and invoiced appropriately in accordance with the Lease.
03. It is in respect of the major works to the balcony that the Applicant's main challenge appears to relate. The Invoice under which the Applicant has been charged is regrettably not available, as the Council's

system automatically deletes invoices once they have been paid. (A copy of this invoice was eventually retrieved and supplied to the Tribunal).

04. The balcony works were already planned at the date of the Lease. The section 125 (of the Housing Act 1985) Notice, a copy of which was exhibited with the statement states that "A Service Charge in respect of the following works of repair (including the making good of any structural defect) will be made. Such charge is estimated as follows:" Included within the list of items is "Balconies - essential repairs - building". The amount for the whole building is shown as £48,000, of which the Applicant's likely contribution was stated to be £4,000.

05. All leaseholders were given the option to either opt in or out of the balcony works and the Applicant chose to have the work done. At some point during the works the main contractor Rok Stonecare Limited went into liquidation, before snagging could be completed. The Respondent sought to address the concerns of the leaseholders by procuring its own contractors to remedy any snags. These were completed as quickly as practicable. Those leaseholders that did not opt into the scheme were advised in writing to commission their own independent structural survey and were warned in writing that they would be responsible for upgrading their balconies independently.

06. Because of the collapse of Rok Stonecare Limited, the works were incomplete. The Respondent obtained quotations from other contractors to complete the works, but the cheapest quotes were £463 +VAT for the small balconies and £748 + VAT for the larger balconies. This information was given to the leaseholders at their Forum, when their views were canvassed. These proposals were rejected out of hand by the leaseholders, and so no consultation process was undertaken in this respect.

07. Instead the Respondent negotiated a large reduction in the costs of the initial works to compensate the leaseholders for the inconvenience and the time taken for the snagging to be rectified. The initial invoice price was £3,065.77 but this was significantly reduced to £1,226.31. This offer was made in full and final settlement on the basis that if there were a challenge to the Tribunal, the Respondent would seek the full cost of the work.

08. The actual works to the balconies were necessary following an inspection by the Respondent. Photographs were supplied which it is alleged show that cracks were forming under the balconies. It was the weight of the bricks that was causing the damage and remedial works were required to stop the problem getting worse.

09. The photographs show that the replaced balconies are of a much lighter construction, with metal panels between handrails replacing the original brick fronts to the balconies.

10. The Respondent does not believe the pooling of water is a result of the works undertaken to the balconies. The drains and the floor level have never been flush throughout the whole Estate. In order for the water to drain away, the gradient would need to be inconveniently steep, resulting in the leaseholders being unable to use chairs etc on the balcony.

11. On the issue of rusting, there is no record of the Applicant complaining, although remedial works have taken place at other leaseholder's flats. The photographs supplied by the Applicant do not show any rust.
12. On the section 20B question, the Respondent maintains that the invoices for the works were not issued until the invoices for the balcony works were actually incurred by the Respondent. The invoices to the leaseholders were issued within 18 months of this date.

The Tribunal's further Directions prior to the Hearing

15 As part of its review of the Application prior to the Hearing, the Tribunal, by letter dated 6th January 2014, directed that the Applicant should inform the Tribunal in writing no later than 9th January 2014 if she intended to challenge any of the 'routine' service charges or whether her challenge was limited to the service charge relating to the balcony refurbishment. The Applicant confirmed that her challenge was limited to the balcony works.

16 By the same letter the Tribunal (inter alia) issued directions to the Respondent in the following terms:

'A. The Applicant has clearly made a challenge under section 20B of the Landlord and Tenant Act 1985. The Respondent refers to this in its Statement of Case paragraph 18 (page A4 Respondent's bundle). The Tribunal is aware of the case of London Borough of Brent v Shulem B Association Limited [2011] EWHC 1663 Ch. It would appear from this case that (a) the demand for the service charge, apparently issued on 19th March 2009, must comply with the provisions of the Lease i.e. be issued as a Service Charge demand under paragraph 7 of Schedule IV to the Lease, and (b) where interim or stage payments have been made to the contractor, that part of the service charge applicable to any stage payments that became due more than 18 months prior to the service charge will be irrecoverable under section 20B (1) unless a notice has been issued under section 20B (2).

B. The Respondent has not provided a copy of the contract with Rok Stonecare Limited and says that it cannot provide a copy of the invoice to the Applicant dated 19th March 2009 (because it has been paid, although copies of the Service Charge Invoices between A 23 and A33 in the Respondent's bundle, which have also been paid, are clearly available). It is also clear from the evidence provided that there may have been another contractor involved after the liquidation of Rok Stonecare Limited.'

C. The Respondent is directed to provide the following to the Applicant and the Tribunal by no later than 16.00 on Thursday 9th January 2014:
C1. Details of the amounts of all payments (if any), and the dates upon which they became due, to either Rok Stonecare Limited or to any other contractor in respect of the works to the balconies at Warstones Gardens.
C2. The date of the 'final payment to the contractor' referred to in Helen Bellingham's statement (C2 Respondent's bundle) and a copy of that final invoice.

C.3 If it is impossible to obtain a copy of the actual invoice issued to the Applicant, a suitably redacted copy of an invoice to one of the other leaseholders should be provided.
C3. If the Respondent wishes to make further submissions at the Hearing specifically relating to the Brent case, or generally on the question of section 20B, a brief summary or skeleton should be provided with the above.

17 In compliance with the above, the Respondent provided a copy of the invoice issued to Mrs Baynham on 19th March 2009, which had been retrieved from the Respondent's computer system. With regard to the case law and the question of the stage payments (if any), the Respondent would require further time to make submissions. The relevant parts of the invoice are reproduced below:

COPY INVOICE
SUNDRY DEBTOR INVOICE

MISS A BAYNHAM
76 WARSTONES GARDENS
WOLVERHAMPTON
WV4 4PE

INVOICE DATE: 19/03/2009
TAX POINT: 19/03/2009
PAYMENT REF 60129660

In case of query please contact H. BELLINGHAM 01902 556789
SCH/REPAIRS & IMPROVEMENTS TO FLAT

DETAILS	COST	VAT RATE	VAT AMOUNT
Improvement works (see attached letter)	£3065.77		

TOTAL COST £3065.77
TOTAL VAT 0.00
TOTAL PAYABLE £3065.77

The Hearing

18 Following the inspection, a Hearing was held at Wolverhampton Magistrates Court. This was attended by the Applicant in person, and on behalf of the

Respondent by Mr Richard Phillips (solicitor), Mr Frank Dalton (Principal Contracts Supervisor for Wolverhampton Homes) and Ms Helen Bellingham (Head of Home Sales and Leases for Wolverhampton Homes). Also present were two observers from the Respondent.

18 Mrs Baynham, presenting her case first, said that the first the Leaseholders were aware that the balconies were to be replaced was shortly after she purchased the flat in 2005. The Respondent had said that some of the balconies were unsafe. The work was completed by October 2005. Mrs Baynham said that there are problems with the new balcony in that the handrail is rusting, the panels get very hot in the summer and the balcony does not drain properly.

19 When the leaseholders were told that the cost would be in excess of £3,000 per flat, they approached their local councillor (Mr Paske) who took over the case. Following his intervention, the Council reduced the cost to £1,200. However, in view of the problems with the balcony the Applicant considers that this is too much. She was also very upset that some people were able to elect not to have their balconies repaired, whereas it was presented to her as a matter over which she had no choice.

20 Although the work was completed in 2005, the final invoice was not received until March 2009. The Applicant considers that it is unreasonable to produce an invoice so long after the work was finished, and she believes that it should be barred under section 20B of the Act.

21 For the Respondent, Mr Phillips opened by stating that in order to deal with the section 20B argument, it would be necessary to retrieve the evidence relating to the contract for the balconies. He had read the *Brent* case referred to in the Tribunal's letter, but none of the officers now present were able to assist as to whether there were stage payments. It was agreed that the Respondent would have the period of 28 days following the Hearing to obtain the information and make submissions. The Applicant would have a further period of 28 days after that for any submissions she wished to make.

22 Mr Dalton told the Tribunal that the works were identified as being necessary following a report commissioned from Jacobs Babtie in November 2004. There are two types of balconies at the development, those cantilevered like Mrs Baynham's and also some that are recessed. The problems were common to both. In short, the weight of the brickwork forming the parapets was too great for the concrete floors of the balconies. This had caused cracking to the concrete, which was also porous and thus not sufficiently protective of the steel reinforcing to the concrete.

23 Of the 94 flats, about 25% have been purchased by leaseholders. The remainder are occupied by secure tenants of the Respondent. Eventually the contractor identified was Rok Stonecare Limited from Exeter at a final tender price of £231,709. The works was carried out in 2005 with Jacobs Babtie supervising.

24 Ms Bellingham told the Tribunal that as the balconies were private, it was decided that instead of completing the works for tenanted properties only the Council would afford the Leaseholders the opportunity to 'buy into' the project as it was felt that the majority of the balconies required attention. The costs varied between the Leaseholders as there are three different types of balcony. Of the 17 leaseholders with affected balconies, 14 decided they wished to proceed, whilst three opted out.

25 A number of complaints were received after the work was completed in 2005 or 2006. The Council worked with the contractors and structural engineers to remedy these snagging issues, which were mainly concerned with water pooling, drains, ill-fitting panels and gaps under the panels. In March 2009, Ms Bellingham was advised that all snagging issues had been completed and that the final invoice had been paid to the contractor. Therefore on 19th March 2009 the invoices were issued to the leaseholders, including the Applicant.

The further submissions of the parties

25 The Respondent complied with the Directions given at the Hearing by written submission dated 10th February 2014. A Schedule of the payments made to Rok Stonecare Ltd was provided as were copies of the Payment Certificates. The Schedule is reproduced below:

Date of Payment Certificate	Final Date for Payment	Amount
22 August 2005	23 September 2005	£59,795.87
16 September 2005	27 October 2005	£50,939.27
20 October 2005	17 November 2005	£61,572.97
24 January 2006	21 February 2006	£17,298.64
19 May 2006	16 June 2006	£13,633.37
8 March 2007	5 April 2007	£14,134.66
17 November 2008	16 December 2008	£5,573.59

26 The Respondent referred to the letter sent to the Applicant on 9th May 2005 a copy of which was attached to the submission. This letter refers to the awarding of the contract to Rok Stonecare Limited, and that the cost for flats with a cantilever balcony was £3065.77. The letter went on to say that the cost could be spread over a three year period on an interest free basis.

27 If the Tribunal is not minded to allow recovery by the Respondent of the full 'reduced' payment (£1,226.31) because of the operation of section 20B of the Act, then it is clear that the seventh payment to the contractor in November 2008 falls within 18 months of the invoice. Works were carried out to 14 Leaseholder properties of which only 8 Leaseholders complained. Consequently the Council put on hold their accounts and did not invoice until March 2009.

28 If the full amounts billed are to be reduced, this should only be to the extent that the invoicing of the 8 Leaseholders that complained was completed in

March 2009 for the remaining sum of £5,573.59, which would equate to a leaseholder contribution of £696.70 each.

29 As to the application of section 20B, the Respondent did not intend to make any further points other than to confirm that at all stages the Leaseholders were aware of the cost to them and that the works were carried out to a good standard using an internationally accepted balustrade solution. The Council considers the Leaseholders as extensions of the secure tenants and tries to deal with them fairly. The Council runs a vast property portfolio, which often requires work to be provided through strategic partners.

30 The Respondent averred that the Tribunal should consider the lack of any prejudice suffered by the Applicant as a result of any failure to comply with section 20B of the Act. She was kept informed of the costs, negotiations were held over a long period and the Respondent took into account Leaseholders' unhappiness with the work. To prevent recovery would, in the Respondent's respectful submission, amount to an affront to natural justice.

31 As to the form of the invoice, the Respondent averred that it was a compliant demand within the terms of the Lease. Paragraph 2 of Schedule II makes no specific reference to the form of the demand. The invoice has the name and address of the Landlord and details of the total amount payable and what it was for. This was accompanied by a covering letter, which the Respondent no longer holds on file. (Despite this assertion, the Respondent did in fact provide a copy of this letter to the Tribunal at the Hearing). In any case there has been no challenge by the Applicant as to the form of the invoice, and this should therefore not be a matter at issue before the Tribunal.

32 On the question of the fee remittance it is accepted that, should the Tribunal not rule in favour of the Respondent, then the Application fee and the Hearing fee should be remitted to the Applicant. As to section 20C, the Respondent does not routinely seek to recover its legal expenditure through the provisions of the Lease and will not do so in this case.

33 The Applicant did not make any further substantive submissions.

The Tribunal's Determination

34 The first thing which should be said, although it is not directly relevant to the Tribunal's determination, is that the actions of the Respondent, in giving to its Leaseholders at Warstones Gardens (assuming that their leases are in similar form to the Lease) the option of agreeing to having the balconies repaired as part of the overall scheme, or electing not to have them repaired and assuming responsibility for the balconies themselves, is outside of the provisions of the leases and is not a course of action which the Respondent should have undertaken. Mrs Baynham has complained in her submissions that she thought it unfair that some Leaseholders were apparently given this option, whereas she was not, but the truth of the matter is that the repairing obligations in the Lease place the burden of repair of the balconies squarely with the Respondent, who can, of course recover its costs in carrying out such repairs through the service charge.

35 The Applicant's obligations under the provisions of Schedule III are to *'keep the interior of the Property in good and tenantable repair'* (paragraph 4.00) and *'To keep clean and tidy and properly tended any garden balcony communal landings passages or other external area forming part of the Property'* (paragraph 4.01). Although the balcony forms part of 'the Property' for the purposes of the demise, it is clearly an external feature in respect of which the Applicant's obligations are limited to keeping it clean and tidy.

36 The Respondent's obligations are those contained in Schedule IV, which are to keep in repair 'the Building and the Estate'. The structural and exterior parts of the Property, of which the balcony is clearly a part, are included within this obligation.

37 It is therefore the determination of the Tribunal that the Respondent acted within its powers in deciding that the balcony should be replaced, and that it was entitled to recover its costs of such repair through the service charge provisions of the Lease. The service charge is therefore prime facie 'payable' for the purposes of section 27A of the Act. However the Applicant has made a challenge as to the quality of the work carried out and also, under section 20B of the Act to the effect that the service charge demand for her contribution was issued more than 18 months after the relevant costs were incurred.

38 As to the quality of the works carried out, the Tribunal is satisfied that, despite the Applicant's complaints as to the issues of rusting, pooling of water and the heat given off from the metal panels, the Respondent has carried out the work to an acceptable standard. The Tribunal did not note any areas of rust at its inspection. The materials to be used in the balcony replacement were specified by a properly qualified firm of structural engineers, and the Tribunal is satisfied that the Respondent's choice of method and the overall standard of the construction were reasonable within the terms of section 19 of the Act. The Tribunal accepts the evidence of the Respondent that it has done everything it can to deal with the issue of water pooling, and that its options in this regard are limited by the size of the balconies, which prevent a greater fall to the drains.

39 Following complaints from some of the leaseholders, and after the intervention of Councillor Paske, the Respondent reduced the charge it was making to the leaseholders with cantilevered balconies to £1,226.31. If there were no issues with regard to the recoverability of the service charge because of the impact of section 20B of the Act, the Tribunal would have no hesitation in determining that the above sum represented good value for money, and that a service charge of such sum is payable by the Applicant to the Respondent in respect of the balcony refurbishment.

40 However, it is clear from the case of *Brent v Shulem B* that, unless a valid notice under section 20B (2) of the Act has been served, where there are stage payments due to the contractor, those stage payments which were incurred more than 18 months prior to the demand for the service charge will not be recoverable because of section 20B (1). Further, the demand itself must be in accordance with the provisions of the Lease.

41 As to the demand, the Applicant has not, as the Respondent points out, made any challenge as to its validity. However, the Tribunal does not consider itself constrained from considering the issue because of this. The Applicant has raised the section 20B point, and the Tribunal has brought to the attention of the parties the *Brent v Shulem B* case, which it considers directly relevant to the Application. The Respondent says that in any case the demand is compliant with the Lease terms. The invoice contains the name and address of the Landlord, and the provisions of the Lease do not require any particular form of demand.

42 The Lease is somewhat unusual in the way the service charge obligations are framed. In a more 'normal' modern lease, the service charge would be calculated by reference to a service charge year, with provisions for the payment by the lessee of advance sums as an estimate of the charges to be incurred by the lessor during the service charge year. At the end of the year a balancing takes place, with any under payment being recoverable from the lessee, and any overpayment credited to future costs. In the present Lease, however, there is simply a covenant to pay the service charge *'on demand'* (and in advance if the Lessor requires) (Schedule III paragraph 2). The only other reference to the demand is in Schedule IV, where paragraph 7 permits the Respondent *'at its absolute discretion to make a demand for Service Charge at least once in each year of the Term'*.

43 The Tribunal notes that the demands for the 'routine' service charges for the years 2010, 2011, 2012 and 2013, copies of which were provided with the Respondent's written submissions, are headed 'Leaseholder Service Charge Invoice'. Each of these has a date during March of the respective year. In contrast the Invoice in respect of the balcony works reproduced at paragraph 17 of this Decision, is headed 'Sundry Debtor Invoice'. However, it should be said that the ground rent demands are also headed 'Leaseholder Service Charge Invoice'. Upon consideration, the Tribunal finds that the heading of the invoice is not a relevant consideration in determining whether it is a valid invoice. A 'reasonable recipient' of the invoice dated 19th March 2009 would not be in any doubt as to what it represented, particularly as it was accompanied by a covering letter which itself referred to the letter of 9th May 2005, when the balcony costs were disclosed to the Applicant. The Respondent is not restricted to one service charge demand per year and the cost of the works concerned is, prime facie, recoverable by the making of a service charge demand.

44 It is the Tribunal's determination, therefore, that the invoice dated 19th March 2009 was a valid demand within the terms of the Lease.

45 There is no evidence as to how the sum of £3,065.77, as the charge applicable for the repair of the Applicant's balcony, was arrived at. The letter dated 9th May 2005 states:

> *'You may be aware that there are three types of balconies on your estate and the Contractors have therefore given me the costs for individual flats. Your balcony is a cantilever balcony and the cost for this design is £3065.77'*.

It is clear from the Tender Document provided by the Respondent with its written submissions, that the contract was for the replacement of two types of balcony and the canopies over the doorways to the individual blocks containing a number of flats (in the case of the Applicant's flat, this is six). The two types of balconies are the cantilever type (as at the Applicant's flat), where the floor of the balcony is constructed out from the main building concrete floor. The other type is a recessed balcony within the confines of the main building. Each of the recessed balconies serves two flats, with a dividing wall between each flat (before the refurbishment).

46 Mr Dalton's written evidence discloses that the final tender price was £231,709. As there are 94 flats at Warstones Gardens, the price divided on an equal basis would have been £2,465 per flat. However, the cantilevered balconies may have been more expensive to refurbish than the recessed balconies, and the decision may have been taken to exclude the ground floor flats from any charge in respect of the balconies. Additionally, there is no evidence as to how the cost of the canopy refurbishment was divided between the flats. The Applicant has not queried the division and the Tribunal therefore finds that, as the calculation was made by the contractor, on the balance of probabilities the method chosen was equitable, and the allocation of £3,065.77 to the Applicant's flat is a fair proportion of the total tender price of £231,709.

47 The Respondent has provided the schedule of stage payments made under the contract (paragraph 25) and also copies of the certificates by the contract administrator that the stage payments had become due. The Tribunal is satisfied that each of the stage payments certified as being payable in the first six certificates were 'relevant costs taken into account in determining the service charge' and that these costs were therefore incurred more than eighteen months before the service charge invoice dated 19th March 2009. Accordingly, unless a notice under section 20B (2) of the Act has been served, the proportion of the invoice of £3,065.77 represented by the first six stage payments is not recoverable through the service charge because of the operation of section 20B (1) of the Act.

48 The Respondent (effectively) advances the argument that the letter of 9th May 2005 should be treated as a section 20B (2) notice because it identifies the exact cost that the Applicant was asked to pay. Accordingly she was in no doubt as to her liability and that therefore the intention behind section 20B was served. However, as the Respondent accepts, the letter of 9th May 2005 makes it plain that the Respondent intended to carry the work out, and that Rok Stonecare Limited had been awarded the contract. Accordingly it cannot be said that the letter complies with the requirements of section 20B (2), as the subsection provides that if a notice is served *'within the period of 18 months beginning with the date when the relevant costs were incurred'* and in that notice the tenant was informed that *'those costs had been incurred and that he would subsequently be required under the terms of the lease to contribute to them by the payment of a service charge'*, then the provisions of section 20B (1) will not apply. Not only is it the case that the costs had not been incurred at the date the letter was written, but in addition there is no

reference to the Lease or the service charge within that letter. As further authority for the above view the Tribunal notes the comments of Mr Justice Morgan in *Brent v Shulem B* at paragraph 62:

> *'Nonetheless, the existence of section 20 does suggest that the reference in section 20 B (2) to "those costs" is referring to actual costs so that a notification of predicted future costs would not suffice.'*

49 A further argument put forward by the Respondent is that there has been no prejudice to the Applicant as a result of the failure to comply with section 20B of the Act, and that therefore, if the Respondent's ability to recover the monies in respect of the balcony refurbishment is prevented by the operation of the section, then this is an affront to natural justice.

50 The Tribunal is not persuaded by the above argument. The Tribunal has no power to excuse the Respondent on the grounds of a lack of prejudice nor has it any power to extend the period of eighteen months. Further there is no provision parallel to section 20ZA of the Act empowering the Tribunal to grant any form of dispensation from the effects of section 20B.

51 The determination of the Tribunal, therefore, is that the only costs that were incurred within eighteen months of the invoice dated 19th March 2009, were those represented by the administrator's certificate dated 17th November 2008, in the sum of £5,573.59.

52 The Respondent argues that this sum should simply be divided by the number of leaseholders (8) who complained about the quality of the work (see paragraph 28). The Tribunal notes that the total of the payments authorised by the seven certificates is £222,949 and that the final payment is exactly 2.5% of that total. The Tender Document states that the retention was to be 2.5%, so it is clear that the seventh certificate relates to the release of this retention. The Respondent's reasoning appears to be that, but for the complaints of these 8 Leaseholders, the retention money would have been released earlier.

53 The Tribunal rejects the Respondent's arguments. The retention is calculated by reference to all of the flats on the Warstones Gardens Estate that had work done to their balconies (or to the canopies), in the same way that all of the other payments authorised by the payment certificates are. The 2.5% authorised to be released by the seventh certificate represents the final payment allocated to each property affected by the works. As the Tribunal has already noted, it is not clear how the original allocation to the Applicant's flat of £3,065.77 was calculated (from the original slightly higher tender price of £231,709). However, the Tribunal has accepted that it was a fair allocation. Accordingly, the Tribunal finds that the proportion of the 2.5% retention, which should be allocated to the Applicant's flat, is to be calculated by applying the following fraction to the retention:

$$\frac{3065.77}{231{,}709.00} \times 5{,}573.59 = £73.75.$$

54 It is the Tribunal's determination, therefore, that the amount recoverable by way of service charge from the Applicant by the Respondent in respect of the balcony refurbishment is £73.75.

The Application and Hearing Fees

55 The Respondent has accepted that, if the Tribunal finds for the Applicant the fees paid by the Applicant for the Application and the Hearing should be reimbursed to the Applicant by the Respondent. The Tribunal's findings are largely in favour of the Applicant and the Tribunal, in accordance with its powers conferred by Rule 13 (2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, therefore orders the Respondent to reimburse to the Application fee of £100, and to pay to the Tribunal the Hearing fee of £150, (a cheque in respect of which had been deposited by the Applicant with the Tribunal clerk, and which has now been returned to the Applicant).

The Section 20C Application

56 The Respondent has confirmed that it would not in any case seek to recover its legal costs through the service charge. The Tribunal therefore grants the section 20C Application and orders that no part of the Respondent's costs incurred in connection with the proceedings before the Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

Conclusion

57 In reaching its decisions the Tribunal took account of its inspection of the subject property, the submissions of the parties, the relevant law and its knowledge and experience as an expert tribunal, but not any special or secret knowledge.

58 If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge W J Martin

08 APR 2014