FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HN/LIS/2018/0066
Property	**:**	Admirals Walk, 30 West Cliff Road, Bournemouth BH2 5HH
Applicant	**:**	Admirals Walk 2000 Limited
Representative	**:**	Napier Management Services Limited
Respondent	**:**	The Lessees(121 flats)
Representative	**:**	
Type of Application	**:**	Service Charges section 27A of the landlord and Tenant Act 1985
Tribunal Member(s)	**:**	Judge Tildesley OBE Mr D Banfield FRICS
Date and Venue of Hearing	**:**	21 May 2019, Russell Court Hotel, Bath Road, Bournemouth
Date of Decision	**:**	18 June 2019

DECISION

Decisions of the Tribunal

1. The Tribunal determines that the Applicant is not authorised under Type 1 and Type 2 leases to recover through the service charge the legal costs in connection with its action against the surveyor and the contractor for alleged negligence and breach of contract in respect of their work on the balconies project.

2. The Tribunal determines that the proposed works to the South Return entrance are necessary and that estimated costs of £97,852.07 meets the requirement of section 19(2) of the 1985 Act of "no greater amount than is reasonable".

3. The Tribunal is not in a position to assess the reasonableness of the costs of the proposed works to the 13th floor until the Applicant presents a coherent case setting out the scope of the works, the justification, the costs and its proposals to mitigate the financial impact on leaseholders. The Tribunal declines to make the determination requested.

Reasons

Background

4. Admirals Walk is a landmark development situated on West Cliff in Bournemouth with unrivalled views over Poole Bay and beyond and in close proximity to the sands and town centre of Bournemouth.

5. Admirals Walk is a 14 storey concrete framed block structure built in 1964 and contains 121 apartments of various dimensions. The building is set in its own grounds with both surface and underground parking areas and has the benefit of 24 hour concierge service.

6. In 2002 109 leaseholders formed Admirals Walk 2000 Limited to purchase the freehold. Admirals Walk Limited granted new 999 year leases to the participating leaseholders. The leaseholders who did not take part in the enfranchisement retained their existing leases on terms of 99 years.

7. Around 2013 Admirals Walk 2000 Limited appointed Napier Management Services Limited as managing agent for the property. Napier initiated a ten year rolling programme to cater for the high maintenance demands of a building of such size and construction located on an exposed seaward position.

8. The implementation of the ten year rolling programme has resulted in sizeable cash calls on the leaseholders for major building projects

which in turn has generated tension and division in the leaseholder community.

9. The most recent major works involved the replacement of balcony rails in stainless steel and the re-waterproofing of the balcony slabs. In July 2015 the Tribunal approved expenditure of £950,345 for these works[1]. In March 2017 the costs of these works which had increased to £1.6 million was back before the Tribunal which disallowed in the region of £191,000 from the costs plus £20,000 as a condition of granting dispensation[2].

10. Admirals Walk 2000 Limited commissioned various reports on the balconies project. The first was from Walker Management which found that the letting of separate packages to three separate contractors was a fundamental weakness of the project. Walker Management also questioned whether the project had been managed to the appropriate standard. The second and third reports dealt with the corrosion and staining of the stainless steel balustrades. Finally Admirals Walk 2000 Limited is presently conducting an investigation of the balcony waterproofing.

11. The decisions on the balconies project provide the context for the current dispute to which the Tribunal now turns.

The Application

12. On 7 November 2018 Admirals Walk 2000 Limited which will now be referred to as the Applicant applied under section 27A of the Landlord and Tenant Act 1985 for a determination of estimated service charges for the years ended March 2019 and March 2020.

13. The Application comprised three elements:

    1) Whether the legal costs incurred in pursuing claims against the surveyor and the contractors involved in the balconies project for damages were recoverable through the service charge?

    2) Whether the estimated costs of demolition and replacement of the South Return Entrance were recoverable through the service charge and if so the amount?

    3) Whether the estimated costs of external refurbishment and concrete repairs of the 13th floor were recoverable through the service charge and if so the amount?

14. On 11 December 2018 the Tribunal directed the Applicant to serve copies of the Application and Directions on the leaseholders of the

[1] CHI/00HN/LSC/2015/0024
[2] CHI/00HN/LSC/2016/0085 & CHI/00HN/LDC/2016/0041

121 apartments. The leaseholders were required to send a reply form by 24 December 2018 indicating whether they agreed or disagreed with the application and whether they required a hearing.

15. The Tribunal received replies from 35 leaseholders, two of whom owned two apartments in Admirals Walk[3]. The split between the supporters of and objectors to the Application was 17:18. The objectors requested a hearing of the Application.

16. The Applicant was required to prepare and distribute bundles of documents for the hearing which was held on 21 May 2019 before the same Tribunal members who heard the applications on the balconies project. The documents in the bundle referred to in this decision are identified by their page number in [ ].

17. Mrs Lacey-Payne of Napier Management Company Limited presented the case for the Applicant. Mrs Lacey Payne was assisted by Mr D Quinton, Major Works Co-ordinator, for Napier. Three directors, Mrs Holliday, Mr Watts and Mr White were in attendance. The Tribunal gave an opportunity for the Directors to address it, which was taken up by Mrs Holliday.

18. The Applicant called Mr R Mathieson Dip Surv MRICS, the Managing Director Ellis Belk Associates Limited as a witness. His statements are at [52 & 52a] and [261].

19. The objectors were represented by Dr Cooper (No 121) and Mr Dixon (No 11)[4]. The Tribunal also heard from Mr Bell (11), Mr Hacker (10), Ms Lazenby-Russell (No 35), and Mrs Shelton (No 104). The Tribunal also had regard to the written statement of Mr and Mrs Edwards (No 33) [243-252] who were unable to attend the hearing.

20. Dr Cooper and Mr Dixon are respectively the Chair and Secretary of Admirals Walk Residents Association which is not recognised by the Applicant whose board of directors are also leaseholders. Dr Cooper, Mr Hacker and Mrs Shelton are former directors of the Applicant.

21. The Tribunal admitted various documents which had been subject to formal applications made by the parties prior to the hearing. After hearing the evidence the Tribunal required the Applicant to provide a copy of the survey of the South Return Entrance carried out by Tallis Surveying in October 2016, and the Schedule of Works for the Entrance.

22. Mr Hacker submitted a further letter after the hearing which the Tribunal declined to admit. The Tribunal had three sets of

[3] See Appendix One
[4] See Appendix Two

representations from Mr Hacker in the hearing bundle [313, 315, 323 and 324] and he had fully participated at the hearing.

23. Immediately after the hearing the Tribunal inspected the areas of the building that were the subject of the Application in the presence of Mr Mathieson and the parties.

24. The Tribunal viewed the South Return Entrance which the Tribunal noted was of timber construction with a flat roof and large single glazed windows. The double entrance doors were fitted with an access control system and the area was heated by electric panel radiators.

25. The Tribunal was shown a pipe said to be the down pipe serving the flat roof which was said to cause water to pool near its outlet. The Tribunal was also shown photographs of the main timber upright which supported the roof exhibiting severe decay but which was normally concealed behind cover panels. The Tribunal also noted areas of rot to the bottom cills forming part of the window surrounds and which had been temporarily filled. Internally the area appeared well decorated but externally the finish to the timber was poor and in need of attention.

26. The Tribunal then visited the underground garage starting in the area directly below the South entrance. The Tribunal saw signs of past water penetration to areas of the concrete slab forming the ceiling and noted a temporary arrangement of plastic guttering said to be needed to collect water permeating the slab. There was no sign of current water ingress in this area. Closer to the vehicular entrance ramp the Tribunal saw what appeared to be signs of active water penetration together with a more extensive arrangement of plastic guttering.

27. The Tribunal next inspected the external walkway at 13th floor level and were shown examples of the concrete panels some of which are said to be in disrepair. Whilst the Tribunal noted several areas of cracking to what appeared to be sections of the concrete frame to the building no significant damage was seen in the panels themselves. The Tribunal did observe, however, that the mastic joints between the panels had hardened and required renewal. The Tribunal also saw that repairs and decoration were required to the metal and timber balustrade where areas of decay were visible. Finally the Tribunal noted that the ply wood panel just below roof level was deteriorating.

28. The Tribunal recorded that the walkway was not continuous around the building with different sections having different access points.

Legal Costs

29. The Tribunal starts with the application to recover the legal costs in connection with pursuing a claim for breach of contract against the contractors (DKP) and a claim for professional negligence against Green Associates, the surveyors, involved in the balconies project.

30. The Applicant had engaged a firm of solicitors, Newnham and Jordan, to advise on whether it had a justifiable claim. The solicitors had indicated that the Applicants should procced to take the dispute through the Pre-action protocol stage. The solicitors had supplied an estimate of £16,500 plus VAT [350] of which £8,140 nett [348] had already been incurred for this particular stage of the dispute. The Applicant, however, acknowledged that the costs would be considerably more if a negotiated settlement was not reached. Also the estimated costs did not include any additional time from the Applicant's surveyor and other legal resources that may be required. The question for the Tribunal is, therefore, not one of reasonableness of costs but whether the respective leases authorised the recovery of these legal costs through the service charge.

31. The hearing bundle included representative examples of the two types of leases for the apartments at Admirals Walk. In this regard a copy of the lease for Flat 26 dated 29 November 2002 between Admirals Walk 2000 Limited, The Investor Trustees, and Richard Anthony Palmer represented the leases for 999 years and referred to in this decision as Type 1 Lease [20-35]. The Type 2 lease was represented by the surrendered lease of Flat 26 dated 2 May 1972 between Jarvis Property Limited and N W Ross and another for a term of 99 years.

32. Mrs Lacey-Payne relied on the definition of Service Charge in the Third Schedule, the terms of Clause 4.4 and the Fourth Schedule of the Type 1 lease as the authority to recover the legal costs through the service charge. Whilst Mrs Lacey-Payne cited the provisions of Clause 3 as the requisite authority for the Type 2 lease.

33. Under the Type 1 lease at clause 3.2 the tenant covenants with the landlord to pay the service charge calculated in accordance with the Third Schedule. Paragraph 1 of the Third Schedule defines Service Costs "*as the amount the Landlord spends in carrying out all the obligations imposed by and in exercising all rights contained in the lease, and not reimbursed in any other way including the cost of borrowing money for that purpose*". The Third Schedule also gives the Landlord authority to collect service charge on account, and to impose a special levy for costs not included in the estimated service costs.

34. The Landlord's obligations are found in clause 4 which are essentially to insure the building and provide the services listed in Schedule 4, which include, amongst others, repairing the roof, outside main structure and foundations of the building; the decoration of the outside of the building at least every seven years unless manifestly not necessary; and improving the building, the common parts and the grounds. Clause 4.4 gives the Landlord authority to take various actions to effect the provision of the services listed in the Fourth Schedule.

35. Mrs Lacey-Payne relied on sub clauses 4.4(i) and 4.4(iv) for the recovery of legal costs which stated:

> (i) The Landlord may engage the services of whatever porters, employees, agents, contractors, consultants and advisers the Landlord considers necessary for the proper maintenance of the building as a block of first class residential flats .....
>
> (iv) The Landlord may take such actions and proceedings as it considers necessary in connection with the proper performance of its obligations under this lease and in procuring the proper performance by tenants of other parts of the building of provisions in their respective leases including without prejudice to the generality of the foregoing, actions and proceedings whether in courts, tribunals or otherwise against tenants of other parts of the building even where the Landlord cannot recover its costs from those tenants.

36. Under the Type 2 lease the tenant covenants to pay such yearly sum as is defined as the Service Charge which effectively is a percentage contribution to the costs incurred by the Landlord in carrying out its obligations in the previous year and certified by a Chartered Accountant.

37. The Landlord's obligations under the Type 2 lease are set out in Clause 3 and cover, amongst other matters, the maintenance of the common parts; the repairs and renewal of the roof and main structure: and the decoration of the exterior.

38. Under Sub- Clause 3(g) the Landlord may employ such porters, managing agents, workman and others as shall from time to time in the opinion of the Lessor be necessary for the proper maintenance of the building as a block of first class residential flats.....

39. Mrs Lacey-Payne was not sure whether the provisions of the leases enabled the Landlord to recover the legal costs in pursuing claims against the contractor and surveyor which was why the Applicant brought the matter before the Tribunal. Mrs Lacey-Payne pointed out that the Applicant was taking this action to recover

leaseholders' monies which had been incurred on sub-standard services, and if the Applicant was successful the monies would be returned to the leaseholders.

40. Mrs Lacey-Payne considered that the Applicant was required as part of its obligations under the leases to recover leaseholder's monies and that the leases particularly the Type 1 lease authorised the Applicant to expend service charge monies on taking action and proceedings as it considers necessary in connection with the proper performance of its obligations.

41. The Respondents strongly disagreed with Mrs Lacey-Payne's view that such legal costs could be recovered as service charges. They pointed out that the Applicant through its managing agent was wholly responsible for the appointment of the surveyor and the contractors for the balconies project. The Respondents maintained that the leaseholders had no involvement whatsoever in their appointment. In the Respondents' view, the incurring of legal costs by the Applicant to enforce its contract with the contractors and surveyor should be borne by it and if need be recovered through the Director's liability insurance and or the liability insurance of its managing agent.

42. The Respondents concluded that the expenditure on legal costs was not authorised by the terms of the respective leases and did not qualify as relevant costs within the meaning of section 18 of the 1985 Act.

43. The Tribunal is satisfied that there is no dispute between the parties on the factual description of the expenditure, namely, the costs of legal advice and representation and associated costs for taking action and potential proceedings against the contractor and surveyor for alleged breaches of contract and of negligence owed to the Applicant in respect of the balconies project. The question, therefore, for the Tribunal is whether such costs can be recovered as service charges through the terms of the Types 1 and 2 leases. This question concerns the proper construction of the leases which is an issue of law.

44. The starting point for questions on the proper construction of leases is the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 Lord Neuberger at paragraph 15 sets out the approach that courts and tribunals should follow when interpreting a lease which should be the same as the rules that apply to the construction of contracts:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to

> mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

45. Lord Neuberger observed at paragraph 23 that service charge clauses are not required to be construed restrictively. Nevertheless the ordinary rules of interpretation require the obligation to pay legal costs through the service charge to be clearly spelled out in the terms of the lease unless there is other language in the lease that demonstrates an intention that such expenditure should be recoverable.

46. The Tribunal begins its analysis with the wording of the Type 2 lease. The Tribunal finds that the lease is silent on the question of costs of legal advice and proceedings. Clause 3(g) refers to the employment of porters, managing agent and others as shall from time to time be necessary for the proper maintenance of the building. The Tribunal considers that to include legal costs within Clause 3(g) is stretching the ordinary and natural meaning of the words used far beyond acceptable limits. The Tribunal is satisfied that a reasonable person would conclude the parties to the Type 2 lease did not intend for legal costs to be recovered as service charges under its terms.

47. Turning next to the Type 1 lease the Tribunal observes that there is no explicit mention of legal costs, clause 4(1v), however, refers to the costs of taking action and proceedings in pursuit of the proper performance of its obligations under the lease.

48. The Tribunal reminds itself of the wording of clause 4(iv) which is set out below.

> "The Landlord may take such actions and proceedings as it considers necessary in connection with the proper performance of its obligations under this lease and in procuring the proper performance by tenants of other parts of the building of provisions in their respective leases including without prejudice to the generality of the foregoing, actions and proceedings whether in courts, tribunals or otherwise against tenants of other parts of the building even where the Landlord cannot recover its costs from those tenants".

49. The Tribunal considers that the operative words of clause 4(iv) are that the costs of proceedings can only be recovered when they have

been incurred in connection with "*the proper performance of its obligations under this lease*".

50. In this case the Applicant is incurring legal costs to pursue an action against the surveyor and the contractor engaged by it for their alleged inadequate work in relation to the balconies project. One of the reasons why the Applicant is taking this action is because of the finding of the previous Tribunal which reduced the costs of the balconies work recoverable through the service charge due to the work not being carried out to the required standards. Given that context, the potential costs of the Applicant's action against the surveyor and contractor have arisen because the Applicant failed to discharge its obligations to the leaseholders by not delivering works to a reasonable standard.

51. The Tribunal finds it would offend the ordinary and natural meeting of "*the proper performance of its obligations under this lease*" if it covered situations where the Landlord had failed in its responsibilities to leaseholders.

52. The Upper Tribunal reached the same conclusion in *Fairbairn v Etal Court Maintenance Ltd* [2015] UKUT 639 LC. The Upper Tribunal rejected the Landlord's contention that legal costs incurred in unsuccessfully defending proceedings brought by a tenant for breach of the Landlord's repairing covenant relating to the structure of the building were costs incurred in proper management and administration of the building. The Upper Tribunal held that costs incurred by the Landlord in protecting itself from the consequences of its own previous omissions had nothing to do with the management and administration of the building.

53. The Tribunal is satisfied that a reasonable person would conclude the parties to the Type 1 lease did not intend for legal costs connected with the Landlord's failure to meet its obligations to leaseholders to be recovered as service charges under its terms.

54. The Tribunal decides that the Applicant is not authorised under Type 1 and Type 2 leases to recover through the service charge the legal costs in connection with its action against the surveyor and the contractor for alleged negligence and breach of contract in respect of their work on the balconies project.

South Return Entrance

55. The works were described in the Notice of Intention to carry out Qualifying Works dated 19 February 2018 [109] as:

> "Replacement of the current entrance to the South Return with new aluminium framed windows and external door, new roof covering, internal finishes and flooring, external waterproofing

> (around the outside perimeter of the lobby only), dropped ceiling and a cost effective decorative lighting design. The installation of an entry system is also being considered, however, may not be possible under the terms of the lease".

56. The costs of the proposed works were £97,852.07 [120] which was broken down: £69,793.39 (contractor), £7,500 (surveyor/contract administrator), £4,250 (managing agent's fee for section 20 work) and £16,308.68 (VAT).

57. The Applicant carried out a statutory consultation process which resulted in four tenders. The Applicant chose the contractor with the lowest tender [116]. The tender of £69,793.39 included a sum of £3,964.62 for a door entry system and a £10,000 contingency.

58. Mr Mathieson gave evidence on the necessity for the works to the South Return entrance. Mr Mathieson described the South Return as a single storey extension of a timber fame construction with single glazing and flat roof which provided a secondary entrance to the building.

59. Mr Mathieson stated that his company, Ellis Belk Associates Limited, first became involved with the project in March 2016 to report on the causes of water penetration into the basement car park. Mr Mathieson identified deficiencies in the waterproofing detailing around the single storey extension which contributed to the ingress of water, particularly at the junction with the concrete deck slab of the underground car park.

60. Mr Mathieson said that Talis surveyors had in October 2016 carried out an excavation of the concrete deck slab on the right hand side[5] of the door of the South Return which revealed a movement joint likely to run around the perimeter of the building. A crack in the joint was seen [262] and Talis surveyors concluded that the linear crack was likely to be a main breach point that allowed the migration of ground water into the underground car park.

61. Mr Mathieson also referred to an inspection of the South Return structure by Talis surveyors conducted alongside the excavation of the deck slab. The surveyors observed that the roof of the South Return was an asphalt deck with a felt overlay. The surveyors reported that the roof was dry and the timber close boards in good condition. The surveyors stated that the edge detail of the roof comprised of a softwood timber joist that spanned to the corner and in turn was supported by a vertical column timber boxing in.

62. Talis surveyors opened up a section of the timber boxing and found that the vertical timber acting as a support column to the corner had decayed to the extent that it was beyond repair. According to

[5] When looking out.

the surveyors, the vertical timber appeared to be supported by the timber glazed units and the perimeter timber boxing which in turn was keeping the up the roof.

63. The Applicant stated that the door of the South Entrance was the original one dating back to 1960s. The Applicant had received advice that a structure comprising uPVC windows would not be able to support the weight of the roof which was why aluminium frames had been chosen for the project. The Applicant pointed out that the proposed works to the South Return had been included in the first ten year maintenance plan presented to the leaseholders in 2013.

64. The Applicant relied on the surveys of Talis surveyors and of Mr Mathieson to demonstrate that the South Return required major renovation. The Applicant asserted that the issues with the South Return entrance were not cosmetic.

65. The Respondents questioned the necessity and the extent of the works proposed. In the Respondents' view, it was not necessary to demolish and rebuild the South Return. They pointed out that the door and windows were sound and that the wood surround was not in substantial disrepair. According to the Respondents, only small areas of the wood surround were rotten.

66. The Respondents did not consider the design defects of the South Return was a major cause of the water ingress to the underground car park. The Respondents believed that blocked drains were largely responsible for the water ingress. The Respondents referred to the recent work carried out on cleaning and unblocking the drains which they said had resolved the problem. The Respondents also drew the Tribunal's attention on the inspection to the construction of plastic gutters in the car park which was designed to collect any water percolating through the ground slab and direct it to the drains inside the car park.

67. The Respondents challenged the Applicant's choice of an aluminium frame. The Respondents contended that an aluminium frame was more expensive than the alternative of uPVC and out of keeping with the current wooden structure which the Respondents preferred.

68. The Respondents blamed the Applicant's lack of regular maintenance for the current problems with the South Return. The Respondents also believed that the funds presently allocated to the proposed works to the South Return could be better deployed on more pressing maintenance problems for the building. The Respondents stated that the funds could be used on the stack pipes and drains which were in urgent need of replacement.

69. The Respondents' principal submission was that the Applicant's proposal comprised improvements and that if works were required to the South Return they should be confined to repairs to the existing wooden structure and to internal decoration and replacement of the carpets. In the Respondents' view the costs of those works should not be more than £10,000.

70. The Tribunal starts with the terms of the two types of lease. The Fourth Schedule of the Type 1 lease sets out the landlord's repairing covenants. Paragraph 1 requires the Landlord to repair the roof, outside main structure and foundations of the building excluding the windows and window frames and balcony screens. Paragraph 4 requires the landlord to repair and whenever necessary decorate and furnish the common parts which are defined as the parts of the building intended for use by some or all of the tenants and other occupants of the building. Paragraph 9 permits the landlord to improve the building, the common parts and the grounds or any services supplied thereto and providing such additional services for the benefit of the Tenant and the occupiers of the other flats in the building as the Landlord shall from time to time think fit and generally in managing and maintaining the building as a block of first class residential flats.

71. Clause 3 of the Type 2 lease requires the landlord at paragraph 3(c) to maintain in good repair and condition the staircases corridors and passages leading to the Demised premises and the entrance foyer on the ground floor and all other communal parts of the Building and where necessary keep the same suitably carpeted cleaned and provided with electric lighting and heating and the said entrance foyer suitably furnished. Paragraph 3(f) states that the Landlord as often as may in the opinion of the lessor's surveyor be necessary repair and renew the roof and main structure of the building and all external parts thereof and all drains gutters soakways sewers pipes wires and cables and other appurtenances serving the demised premises in common with other premises and decorate the exterior of the building in an appropriate manner.

72. The Tribunal finds that the proposed works are authorised by the terms of the Types 1 and 2 leases. The Tribunal considers that paragraph 4 of the Fourth Schedule of the Type 1 lease is more applicable to the renovation of the South Return entrance than paragraph 1. In the Tribunal's view it is arguable whether the South Return forms part of the main structure of the building because it could be demolished with minimal impact on the structural integrity of the building. The Tribunal also notes that paragraph 9 of the Fourth schedule enables the landlord in its discretion to carry out improvements to the building and to the common parts in order to maintain it as a block of first class residential flats.

73. The Tribunal is satisfied that paragraph 3f of the Type 2 lease is the relevant clause for the South Return works because of its reference to "all external parts".

74. The Tribunal prefers the Applicant's evidence on the state of disrepair of the timber structure of the South Return. The Tribunal considers the photographs taken by Talis surveyors of the decayed timber support compelling evidence that a key part of the structure was beyond repair. The Tribunal saw on its inspection extensive areas of rot to the bottom cills forming part of the window surrounds and noted that the finish to the timber was poor and in need of attention. The Tribunal agreed with Mr Mathieson's assessment that it was not practicable to restrict the works to the replacement of the timber support. According to Mr Mathieson, such works would require the erection of a scaffold to support the roof whilst the timber was being replaced, and, in the Tribunal's view, would carry a high risk that the windows would be broken in the process. The Respondents adduced no evidence to contradict the poor condition of the timber support and surround.

75. The Tribunal acknowledges the validity of the Respondents' concerns that there may be other sources of water ingress in the underground carpark, and that the plastic gutter construction had ameliorated some of the adverse consequences of the ingress. The Tribunal, however, is satisfied that the deficiencies in the waterproofing detailing around the South Return, would have contributed to the water ingress.

76. The question that was not asked by the parties was whether the rectification of a design deficiency in the structure constituted a repair which fell within the terms of the Landlord's repairing covenant in the leases. The Tribunal decided that the question was academic for two reasons. First the Tribunal concluded that the disrepair in the timber support and surround coupled with the age of the structure justified the wholesale renovation of the South Return. Further this renovation would be built to modern standards and current building regulations which would necessitate the inclusion of a new dwarf wall around the base of the South Return together with the waterproofing detail of cavity trays and the linking of new damp membrane with the asphalt covering on the concrete slab of the underground car park. Second the Landlord under paragraph 9 of the Fourth Schedule to the Type 1 lease which is the applicable lease for the overwhelming majority of leaseholders permits the Landlord to carry out improvements to the building. The Tribunal is satisfied that the damp proofing works if not a repair would constitute an authorised improvement under paragraph 9 of the Fourth Schedule.

77. The Tribunal finds that the Applicant undertook a competitive tendering exercise and obtained tenders from four building contractors. The Applicant chose the contractor giving the lowest

tender. The Respondents questioned the propriety of the Applicant's contract administrator having negotiations with the preferred contractor to clarify several unauthorised qualifications in the tender. The Tribunal finds that the Applicant has been wholly transparent about the tender process and that the contract administrator's clarifications were legitimate and prudent. The Tribunal observes that the Respondents have produced no alternative quotations challenging the tender figures.

78. One Respondent questioned whether the works to the South Return should be afforded priority over more pressing works to the building. The Tribunal did not have the evidence to evaluate the strength of his submission. The Tribunal also finds that the inclusion of the South Return works in the Applicant's ten year plan for the building suggested that the Applicant had adopted a rational approach and weighed up competing priorities when deciding on its maintenance programme.

79. In view of the above findings the Tribunal is satisfied that the proposed works to the South Return entrance are necessary and that estimated costs of £97,852.07 meets the requirement of section 19(2) of the 1985 Act of "no greater amount than is reasonable".

High Level Repairs and Refurbishment to the 13th Floor

80. The section 20 Notice of Intention dated 10 October 2018 [185] described the works as:

> "13th Floor external refurbishment to include works to the utility towers and works to the concrete band course immediately below".

81. The Applicant said that it was necessary to carry out the works as the exterior decorative order was showing signs of deterioration and to ensure that a good overall standard was maintained.

82. The Applicant viewed the works as a continuation of its maintenance and decoration programme for the building which had seen the completion of similar works to the South return and West elevations.

83. The works were more particularly described in the contract specification [126-183] which had been issued to various contractors. A major component of the specification was the proposals and the costs of ensuring safe access for the contractors to undertake work at high levels. The 13th floor was at the top of the building and exposed to the vagaries of wind and weather particularly on the seaward location. Access to the utility towers presented specific challenges.

84. The works included the replacement of the doors to the lift motor room, install a new cladding system for the fascia boards to the main roof, repair and decorate the timber and metal balustrade to the walkway surrounding the 13th floor, repair, decorate and apply sealant to the concrete panels, provide and fix cladding (Trespa Meteon Panels) to the concrete band course directly below the 13th floor walkway and a series of miscellaneous repairs.

85. On 12 January 2019 Ellis Belk on behalf of the Applicant issued tender invitations to five contractors, of which four returned tenders. The prices of the four tenders adjusted for errors were £435,311, £657,508.45, £677,279,07 and £885,364 excluding VAT.

86. Mr Mathieson recommended the contractor with the second lowest tender because the contractor with the lowest tender deployed rope access to carry out the works as opposed to a cradle system favoured by the other contractors. Mr Mathieson cited the advice of the Health and Safety Executive on *"Working at Height"* which he said identified "rope access" as high risk, whilst the "cradle system" gave the best protection for working at such heights.

87. Mr Mathieson also stated that he had learnt subsequently that the contractors who carried out similar works to other parts of the building had had to contend with heavy sections of the concrete becoming detached when the repairs were being done. In Mr Mathieson's opinion individual rope access climbers would be unable to handle safely detached heavy sections of concrete.

88. Mr Mathieson said that he had hammer tested some of the concrete panels to assess the state of disrepair. Mr Mathieson accepted that he was unable to define precisely the number of panels requiring repair because it was not possible to access all the concrete panels. Mr Mathieson explained that in the concrete repair section of the tender documents he required the contractors to give a price on provisional quantities for panels in various states of disrepair. Mr Mathieson insisted that this was a legitimate and best method of obtaining competitive tenders for jobs where the scope of the work required was uncertain. Mr Mathieson pointed out that it ensured all tenders were given on exactly the same footing and that the eventual price could be adjusted downwards if the provisional quantities were later shown to be too high when the works were completed. Mr Mathieson said that he had increased the provisional sums by about 30 per cent from his original assessment to allow for the unknown extent of the disrepair.

89. The Applicant indicated that it had originally anticipated that the costs of the proposed works to the 13th floor would be funded from reserves. The Applicant recognised that this was no longer possible and had sought to reduce the price of the proposed works by removing the costs of the cladding, which in the case of the preferred contractor would have lowered the tender by around

£68,000 to £589,335.25. The Tribunal sensed that Mr Mathieson did not agree with this decision which was probably connected with his responsibilities under the Construction (Design and Management) Regulations requiring him to design out the potential for working at heights in the future.

90. The Applicant had also communicated to the leaseholders in its Newsletter dated April 2019 that it had agreed to phase the work into separate elements. The Applicant, however, was unable at the hearing to provide its detailed proposals for the phasing of the works because it was awaiting the suggestions of the preferred contractor. Mr Mathieson believed it was better for the contractor to come up with the proposals for staging the works.

91. The Applicant informed the Tribunal that the section 20 consultation process had not been concluded on the refurbishment works to the 13th floor.

92. The Respondents were not satisfied that the Applicant had provided sufficient justification for the implementation of the works to the 13th floor. The Respondents pointed out that the specification for the works was not supported by a surveyor's report identifying the rationale for carrying out works. The Respondents considered that a more thorough investigation should be conducted first so that the extent of the disrepair could be defined more precisely. The Respondents were sceptical of Mr Mathieson's approach of using provisional quantities for the concrete repairs.

93. The Respondents were concerned that the costs of the proposed works were likely to exceed £1 million when VAT and surveyors fees were added to the tender of the preferred contractor. The Respondents questioned the wisdom of the Applicant embarking upon another expensive programme of works whilst the costs and the standard of the works for the balconies project remained unresolved.

94. The Respondents asserted that the Applicant had obtained in the region of £2.5 million from leaseholders in special levies since 2013/14 to fund major works. The Respondents indicated that the service charge budget for 2019/20 was in excess of £500,000. The Respondents expressed their concerns of the Applicant's apparent disregard of the financial impact of its proposals for the building on individual leaseholders who were finding it difficult to meet the ongoing demands for additional service charges.

95. The Respondents contended that there were too many unanswered questions on the refurbishment of the 13th floor and that it should be put on hold until the debacle on the balconies project had been sorted out.

96. The Tribunal starts its consideration with the Applicant's question that it wished the Tribunal to determine which was "the work is reasonable and payable under the terms of the Leases". The Applicant's statement of case dated 15 March 2019 [46-48] added no detail to the question asked in the application. The Applicant supplied the witness statement of Mr Mathieson in support of its application. The Tribunal, however, notes that the statement written in the form of the letter is not of the standard the Tribunal would expect from an expert witness. The statement is simply a narrative of why Ellis Belk became involved with the project. The statement does not set out the investigations carried out by Mr Mathieson except for a brief reference to hammer testing. There is no analysis of the priorities of the works and the consequences of not doing the works. There is reference to a previous consultant but no explanation of the many issues the consultant is said to have overlooked. Significantly the statement does not address the question of the costs of the proposed works. The Tribunal notes that the Applicant had allowed £75,000 for the refurbishment works to the 13th floor in its 10 year maintenance plan until 2026. The Tribunal is, therefore, not surprised by the Respondents' complaint that the Applicant had not provided an adequate justification for the works in its statement of case.

97. The Tribunal acknowledges that Mr Mathieson at the hearing provided clarity about the scope of the works, and the likely costs. Despite Mr Mathieson's efforts, the Tribunal considers there remains uncertainty with the Applicant's case. The Applicant has not put forward a figure for the service charge that it wishes the Tribunal to determine. The Tribunal is not sure whether the Applicant has abandoned the costs of the cladding. The Applicant has indicated that it intends to phase the works but was unable to expand on its proposals at the hearing.

98. The Respondents in their statement of case have relied on the case of *Waaler v Hounslow LBC* [2017] EWCA Civ 45 in which the Court of Appeal said in the context of section 19(1)(a) of the 1985 Act that "reasonableness" had to be determined by reference to an objective standard, not by the lower standard of rationality. The Court of Appeal went onto state that although the Landlord's decision-making process was a relevant factor it had to be tested against the outcome of that decision. One of the factors which had to be addressed when assessing outcome was that the cost of the relevant works is to be borne by the leaseholders.

99. HH Judge Alice Robinson in *Garside v B R Maunder Taylor* [2011] UKUT 367 (LC) found that costs would not be reasonably incurred if no account was taken of the financial impact on the tenants when deciding whether major works should be done in one go or phased. HH Judge Robinson emphasised that liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme. However, this was a different matter from deciding

whether to carry out the works and charge for them in a particular service charge year rather than to spread the cost over several years.

100. The issue of the financial impact on leaseholders is a relevant factor in this case in the light of the recent high service charge demands on them, and the continuing uncertainty surrounding the balconies project. The Applicant has acknowledged this with its proposal to phase the works.

101. The Tribunal, however, is not in a position to assess the reasonableness of the costs of the proposed works to the 13th floor until the Applicant presents a coherent case setting out the scope of the works, the justification, the costs and its proposals to mitigate the financial impact on leaseholders. The Tribunal declines to make the determination requested.

RIGHTS OF APPEAL

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

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

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

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

Appendix One: Schedule of leaseholders who object or agree to the application:

Agree		Object	
Name	**Flat**	**Name**	**Flat**
Mr E Robert	87	Mrs A Cowen	29
Mrs S Grayson	55	Miss C Spencer	91
Mr D Holiday	72	Mr Dixon & Mr Bell	11
Mr & Mrs Trewhitt	101	Mr J Leek	40
Mr T Watts	23	Ms R Shelton	104
Mr N Aslam	39	Mr K Williams	110
Mr & Mrs Bardsley	97	Mr & Mrs Bessell	74
Mr & Mrs Walker	95	Dr R Cooper	121
Mrs P Sorene	43	Mr & Mrs Edwards	33
Mr R Mummery	58 & 67	Mr J Tilley	88
Mr G Murphy	81 & 112	Mr D De Rosa & Mr P De Rosa	108
Mr D Massey	54	Mr R Hartshorn	107
Ms L Hunt	52	Mr S Cohen	10
Mr J Seitler	118	Ms E Levy	79
Mr & Mrs Parsons	14	Mr D Hacker	98
M Flynn & K Slarke	77	Ms J Platts	119
Mrs V Carlisle	8	Ms A Lazenby	35
		Mr K Williams	50

Appendix 2: Leaseholders represented by Mr Dixon and Dr Cooper

Mr Michael Edwards (Flat 33)
Dr Rodney and Elaine Cooper (F 121)
Mr Kevin Dixon and Mr Bell (F 11)
Mrs Rosemary Shelton (F 104)
Mr Ron Field (F 57)
Mr Alan Sabatini (F 73)
Miss Lara and Emily Harwood (F 32)
Mr Daniel and Mr Peter de Rosa (F 108)
Ms Annabelle Lazenby (F 35)
Roger and Connie Hartshorn (F 107)
Mr David Hacker (F 98)

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

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

Section 27A

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

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

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

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

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

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

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

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

Section 20C

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

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

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

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