**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2017] UKUT 411 (LC)**
**UTLC Case Number: LRX/166/2016**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LANDLORD AND TENANT – RIGHT TO MANAGE – freeholders' contribution to cost of major service charge works – sufficiency of FTT's reasons for finding full amount payable despite failure to complete all works – appeal allowed – redetermination by Upper Tribunal following completion of snagging works - appellants' contribution reduced to £10,447***

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)**

**BETWEEN:**

**(1) RICKY GIBBS**
**(2) CAROL GIBBS** **Appellants**

**and**

**CLEVEDON COURT (DULWICH) RTM CO LTD** **Respondent**

**Re: Clevedon Court, Clive Road, London SE21 8BT**

**Martin Rodger QC (Deputy Chamber President) and A J Trott FRICS**

**Royal Courts of Justice, Strand, London WC2A 2LL**

**19 September 2017**

*Jack Parker* instructed by Judge & Priestley, solicitors, for the appellants
Philip Sherreard and Antonio Ahmed of Sterling Estates Management for the respondent

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The following case is referred to in this decision:

*Nogueira v City of Westminster* [2014] UKUT 327 (LC)

## Introduction

1. This appeal against a decision of the First-tier Tribunal (Property Chamber) ("the FTT") is the latest round in a long running battle between Mr and Mrs Gibbs, the owners of the freehold interest in Clevedon Court in Dulwich, and the right to manage company which took over the management of the building from them in 2010. The current dispute concerns the sum which Mr and Mrs Gibbs are obliged by section 103(2), Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") to pay to Clevedon Court (Dulwich) RTM Company Limited, the respondent, as their contribution towards the repair and redecoration of the exterior of the building carried out in 2014 and 2015.

2. By its decision given on 11 October 2016 the FTT determined that some of the works which had been specified as necessary and for which the successful contractor had tendered and been appointed had not been carried out, while other works had not been done to a reasonable standard. The FTT nevertheless found that the cost of the works was recoverable from the appellants "in its entirety", by which it meant that the appellants were required to contribute their previously determined proportion of the cost of the works without any discount or reduction to reflect defective or incomplete work.

3. Permission to appeal was granted by this Tribunal on 26 January 2017, having previously been refused by the FTT. The grounds on which permission was granted essentially concerned the sufficiency of the FTT's reasoning. It was said to be arguable that its decision failed to deal adequately with the issues concerning the quality of the work and the extent to which it had or had not been completed, or to explain sufficiently clearly to the appellants why, notwithstanding the FTT's acceptance that some work had not been undertaken, and that the standard of work was not high, they were nevertheless liable to contribute the full sum claimed from them.

4. At the hearing of the appeal the appellants were represented by Mr Jack Parker of counsel, while the respondents were represented by Mr Philip Sherreard and Mr Antonio Ahmed of Sterling Estates Management Ltd, their managing agents. We are grateful to the representatives of both sides for their submissions.

5. When granting permission to appeal the Tribunal directed that the appeal would be determined as a review of the decision of the FTT. At the conclusion of the hearing it was clear to us that the appeal should be allowed, and we so informed the parties. It was also clear that the dispute over the appellants' contribution was of relatively modest value and that it would be disproportionate to remit the proceedings to the FTT for a further hearing. With the consent of both parties, therefore, the Tribunal agreed that we would make a final determination of the appellants' liability on the basis of the written material provided to the FTT and after undertaking our own inspection of the building.

6. This decision will therefore explain why the Tribunal considered it necessary to set aside the FTT's decision, before proceeding to a determination of the extent of the appellants' liability.

**The relevant facts**

7. Clevedon Court is a block of flats at Clive Road in West Dulwich, South London. As constructed, probably in the 1950s, the building comprised 23 flats arranged in an "L" shaped configuration on the ground and two upper floors. It is served by two staircases providing access to unenclosed walkways on the upper floors onto which the doors of the individual flats open. The staircases and walkways are at the rear and are reached through a gated arch on the shorter wing of the building, facing the street.

8. In October 2006 Mr and Mrs Gibbs acquired the freehold of the building and subsequently built a further 7 flats on what had originally been the flat roof. They also installed a lift, housed in a new tower, and replaced the original Crittall windows throughout the building.

9. Initially Mr and Mrs Gibbs granted only short term tenancies of the new flats on the top floor, but more recently, after the time with which this appeal is concerned, three of the flats have been sold on long leases, leaving the appellants with four flats in hand. The remaining 23 flats in the building are occupied under long leases each of which includes a conventional service charge arrangement requiring the leaseholder to contribute a fair proportion of the lessor's costs and expenses of maintaining, repairing and redecorating the structure and common parts of the building.

10. On 13 February 2010 the respondent, an RTM company owned by the leaseholders of 22 of the flats, acquired the right to manage the building under the 2002 Act. From that date the respondent assumed responsibility for the provision of services.

11. By section 103 of the 2002 Act, when the right to manage was acquired, the appellants became liable to contribute towards the costs of services by paying the RTM company the difference between the aggregate contributions of the lessees towards the "relevant costs" incurred by the company in discharging its obligations and its total expenditure in doing so. The expression "relevant costs" used in the 2002 Act bears the same meaning as is given to it by section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act"), which in this case includes the costs of the repair and decoration of the common parts and exterior of the building. By section 19(1) of the 1985 Act relevant costs are to be taken into account in determining the amount of a service charge only to the extent that they were reasonably incurred, and, where they were incurred on the provision of services or the carrying out of works, only if the services or works were of a reasonable standard.

12. As recorded by the FTT in a decision published on 11 September 2013, the appellants' contribution towards the relevant costs incurred by the respondent was agreed in the course of previous tribunal proceedings to be 2.735% in respect of each of its one bedroom flats and 3.68% in respect of each of its two bedroom flats. The aggregate of the appellant's contribution in respect of their seven flats was 20.09% of the relevant costs.

13. After acquiring the right to manage the respondent resolved to undertake a programme of major works comprising two main elements: internal and external repairs and redecoration; and

improvements to the communal electrical and lighting installations. Although the decision of the FTT dealt with both elements of the major works project, and with other costs, this appeal is concerned only with the external repairs and redecoration.

14. A simple specification of the works was prepared by Sterling Estates Management and put out to tender. On 31 March 2014 notice of the tenders received was given to the leaseholders under section 20 of the 1985 Act and simultaneously to Mr and Mrs Gibbs. There were two tenders, the lower of which was by Willow & Beau Ltd which offered to complete the work for £48,350 plus VAT (which included a £2,000 contingency but was not otherwise broken down). The respondents accepted that tender and Willow & Beau began work on the building in the summer of 2014.

15. The appellants have a long history of withholding their contributions towards the cost of works and services to the building (for good reason, they assert). In its October 2016 decision the FTT recorded that the outstanding charges for the years ending 25 December 2010 to date totalled approximately £55,000. £25,000 of this was said to be disputed while the remaining £30,000 was being withheld on the basis of a claim for damages which Mr and Mrs Gibbs believed they had against the respondent. We were told that Mr and Mrs Gibbs had made a payment of £24,000 since the FTT's decision, but the respondent nevertheless claimed that the sum now due exceeded £44,000.

16. It was an important part of the respondent's case before the FTT, and before the Tribunal, that considerable difficulty had been experienced in funding the necessary works of repair and redecoration because of the refusal of the appellants to pay what was said to be due from them.

17. As a result of the respondent's shortage of funds the works were carried out in stages by the contractor, with scaffolding being erected on one elevation of the building at a time and each elevation being completed only when sufficient funds had been collected from the leaseholders.

18. Mr and Mrs Gibbs instructed Mr R M Balmforth FRICS of Stapleton Long Chartered Surveyors, their former managing agents, to monitor the work. He made six visits to the building, culminating in an inspection on 7 April 2015 after which he produced a report of his findings for the appellants.

19. In that report, dated 13 April 2015, Mr Balmforth identified a number of respects in which work contained in the original specification had not been carried out, and other respects in which work which had been done was of a poor quality. He drew attention in particular to what he considered to be a failure to undertake essential repairs to the rain water goods and water pipes before painting them; to numerous areas where paint had been omitted or only one coat applied; to widespread evidence of poor preparation, including the appearance of rust spots on metal work and masonry paint coming away from rendered surfaces; and to other omissions and defects. He compiled a photographic record of these defects which we were shown.

20. A copy of Mr Balmforth's report was provided to certain leaseholders and it is common ground that further work was then done to the building. Whether that work was done because Mr Balmforth had identified defects and omission, or whether it was snagging work which was due to be carried out in any event is not clear.

**The application to the FTT**

21. On 16 October 2016, no payment having been made by Mr and Mrs Gibbs towards the cost of the works, the respondent applied to the FTT under section 27A of the 1985 Act for a determination of the extent of their liability. Section 27A gives the FTT jurisdiction to determine whether a service charge is payable and, if so, by whom and in what amount. It is convenient at this stage to mention a point concerning the jurisdiction of the FTT and of this Tribunal which was not raised by either of the parties but which is nevertheless important.

22. Section 103 of the 2002 Act makes provision for "landlord contributions to service charges" in respect of flats which are not subject to a long lease held by a qualifying tenant. Notwithstanding the title of the section the contribution required by section 103 is not, strictly speaking, a service charge (an expression which section 18(1) of the 1985 Act defines as "an amount payable by a tenant"); it is a sum payable in respect of services which is equal to the difference between the "relevant costs" (i.e. the costs of services), and the aggregate amount payable in respect of the relevant costs under leases of flats contained in the premises which are held by qualifying tenants.

23. The sums payable by the leaseholders of the 23 flats in the building held on long leases clearly are service charges, and are themselves a proportion of the relevant costs to which Mr and Mrs Gibbs are also liable to contribute. The FTT clearly has jurisdiction under section 27A of the 1985 Act to determine both the individual contributions of the leaseholders and the total of the relevant costs. By deducting the aggregate contributions of the leaseholders from the relevant costs the balance payable by Mr and Mrs Gibbs can be ascertained. It has not been suggested on behalf of Mr and Mrs Gibbs that the FTT lacked jurisdiction to entertain the respondent's application and we are satisfied that it was entitled, at least, to make a determination of the components which enable the appellants' liability to be determined.

24. The respondent's application under section 27A of the 1985 Act sought a determination in respect of the service charge years ending 25 December 2014, 2015 and 2016.

25. On 8 December 2015 Mr and Mrs Gibbs made an application of their own under section 27A additionally seeking a determination of the extent of their liability for 2012 and 2013. Once again it has not been suggested that the FTT lacked jurisdiction to make such a determination. The two applications were subsequently joined and heard together at a hearing which took place over two days in June 2016.

26. In preparation for that hearing Mr Balmforth produced a second report dated 22 April 2016 in which he referred to the fact that additional work had been carried out since his previous report. He identified the following matters as being of "continuing concern":

(a) The failure to repair or replace defective rain water pipes and waste pipes, without any deduction having been made from the contract price.

(b) Wasted expenditure on painting defective pipes.

(c) Failure to repair a leaking water main hose connection (by the time of the FTT hearing it was common ground that this had been attended to).

(d) A failure to replace any of the mastic sealants around the windows in the building, without any deduction from the contract price.

(e) The failure of the contractor to provide a chemical toilet for use by its staff for the duration of the works, without any deduction from the contract price.

(f) The poor standard of the paint work generally, little regard having been paid to preparation and inappropriate materials having been used, in particular rain water goods having been painted with masonry paint.

(g) Significant deterioration in the paint finishes, and widespread rusting to steel gates and railings which had necessitated patch repairs to areas which could be accessed without the need for scaffolding.

Mr Balmforth also considered that further deterioration was inevitable, and that the life expectancy of the decoration was approximately half that which should reasonably have been expected; in his view it would therefore be necessary to undertake comprehensive repainting of the whole building in 2017.

27. Mr Balmforth's report was accompanied by a declaration that he understood his duty to the Tribunal as an expert and that the opinions he had expressed were true.

28. In response to Mr Balmforth's second report the contractor, Willow & Beau, produced a letter whose author was unidentified but whom we assumed to have been a senior member of its staff. The letter disagreed with Mr Balmforth's criticisms point by point and asserted: that all necessary repairs to rain water pipes had been undertaken "properly and satisfactorily taking into account the budgetary constraints provided to us"; that mastic had been replaced; that while a chemical toilet had not been provided alternative arrangements had been made (at a cost) with a local café; that allegations of poor workmanship in the painting of the building were "refuted in their entirety"; that any defects in the paintwork had subsequently been attended to; and that in any event further snagging items remained to be addressed. The contractor provided a large number of photographs showing the building before and after the works.

**The hearing before the FTT and its decision**

29. Oral evidence was given to the FTT by Mr Balmforth on behalf of the appellants, by Mr Adamson, who is both a leaseholder and a director of the respondent, and by Mr Ahmed of Sterling Estates Management. No representative of the contractor appeared at the hearing to answer questions about the work or to confirm the contents of the letter of 16 May 2016 which had sought to refute Mr Balmforth's criticisms.

30. Mr Adamson confirmed that he was satisfied with the major works and considered them to have been undertaken and managed appropriately, although he acknowledged that some snagging items remained to be completed.

31. Mr Ahmed explained that because of insufficient funds (due, it was said, to the behaviour of the appellants in withholding their contributions) the work had been supervised by members of his staff rather than by a chartered surveyor. He too pointed out that some items of work, including snagging items, remained to be dealt with.

32. At paragraph 12 of its decision the FTT referred to the fact that it had been provided with a number of photographs and said that "neither party requested an inspection and the Tribunal did not consider that one was necessary nor would it have been proportionate to the issues in dispute." In view of the disputed issues of fact about the quantity of work which had been undertaken and its quality, and the limitations on the evidence presented to the FTT, we cannot agree that an inspection was unnecessary or would have been disproportionate in this case.

33. It was the appellants' case that significant elements of the original specification had not been carried out, including the replacement of defective downpipes and the absence of new mastic which had been found unnecessary, but that no allowance had been made against the contract price to reflect those omissions. It was also the appellants' case that the quality of the work was poor and that inappropriate materials had been used. A large number of photographs taken after the completion of the main elements of the work purported to substantiate these criticisms. The contractor, on the other hand, asserted in writing that all necessary work had been carried out to a reasonable standard, including by snagging works carried out after Mr Balmforth's last inspection.

34. As the FTT noted, the evidence of Mr Balmforth was not wholly independent in that he had formerly acted as the appellants' managing agent and had been supplanted in that role by the respondent. For that reason the FTT expressed caution in paragraph 34 of its decision about accepting his evidence, saying they could not regard it as independent "but that does not mean that the tribunal cannot attach any weight to his evidence". The FTT made no similar observations about the independence of Willow & Beau, which had been responsible for the works so trenchantly criticised by Mr Balmforth. It is not clear to us on what basis the FTT felt able to resolve disputed issues of fact of the sort which confronted it without inspecting the building and making its own assessment. It is true that by the time of the hearing almost two years had passed since the work had commenced, but it was Mr Balmforth's evidence that specified work had not been done at all and that defects had been apparent in April 2015 with deterioration to be expected at a much more rapid rate than had the work been undertaken competently, so the mere passage of time did not mean that it had become impossible to make use of an inspection to assess the veracity of those opinions.

35. In the body of its decision the FTT recited the evidence given on behalf of both parties. Its assessment of that evidence and its decision, so far as it related to the external works, was contained in paragraph 41. After first noting that the photographs it had been shown clearly

demonstrated that redecoration and repair works had been necessary, the FTT went on as follows:

> "The tribunal accepts that the rainwater pipes probably needed replacing and some works were not done to a reasonable standard. However, the tribunal notes that Willow & Beau are still dealing with snagging issues and the works are not fully complete yet. The tribunal notes the works were spread over a much longer period due to limited funds therefore contractors were coming and going at no additional cost to the applicant. The overall price for the major works (excluding the electrical and lighting works) was £48,350 (excluding VAT), approximately 20% less than the alternative from "4 Most Property Services" in the sum of £60,840 (excluding VAT). Willow & Beau have done additional works at no additional cost. The tribunal notes that none of the other lessees have complained about the major works and their contribution towards the cost. We find that the limited works carried out was justified given the limited funds that were available and the quality of the finished work reflects the price paid. We find that the cost of the major works concerning the external repair and redecoration is recoverable in its entirety."

36. The FTT proceeded to decide a number of other disputes concerning management fees, gardening costs, cleaning costs and minor repairs but those issues do not feature in this appeal.

**The appeal**

37. On behalf of the appellants Mr Parker submitted that the FTT had clearly accepted at least some of Mr Balmforth's criticisms of the work, having concluded that "some works were not done to a reasonable standard" and that "the works are not fully completed yet". Having made those findings it was not open to the FTT to conclude that the entirety of the cost of the specified work was recoverable. He relied on the decision of this Tribunal (His Honour Judge Huskinson) in *Nogueira v City of Westminster* [2014] UKUT 0327 (LC) in which it was said not to be acceptable for the FTT to make no reduction of any kind from a service charge bill for major works in circumstances where it accepted that there were significant defects in the standard of the works. In that case the FTT had accepted an undertaking from the landlord that additional work would be carried out but the Tribunal found that it ought instead to have made a reduction. The same ought to have been done, Mr Parker submitted, in this case.

38. Mr Parker was also critical of the FTT's decision on the grounds that it failed to provide sufficient reasons to explain its conclusions. It made no attempt to identify the work which it considered had not been carried out or which had been done poorly. The appellants were left guessing why omissions and defects which, on the evidence they had adduced, were substantial were nevertheless considered by the FTT not to justify any reduction in the contract price.

39. On behalf of the respondent Mr Ahmed explained the difficulties which it had encountered because of the refusal of Mr and Mrs Gibbs to contribute towards the cost of services. Nevertheless, as far as he was concerned, the work had been done, on the whole, to a reasonable standard; he suggested that the only work omitted had been some elements of repair to down pipes which had been carried out since the FTT hearing.

40. As we explained at the conclusion of the oral argument, we are satisfied that the reasoning contained in paragraph 41 of the FTT's decision is insufficient to sustain its conclusion that the cost of the external repair and redecoration work was recoverable in full. The FTT was clearly satisfied that some of the work in the specification had not yet been completed, as the contractor and the respondent acknowledged; it mentioned the rain water pipes and snagging issues, but without seeking to quantify the amount of work which remained to be done. In our judgment the FTT should have made some effort to assess the difference both in quantity and in workmanship between the work contracted for and the work completed. Rather than doing that it made a number of general observations before concluding that the cost of the work was recoverable in its entirety; we do not consider that those observations support the conclusion.

41. The FTT first made a number of points favourable to the contractor. It had been prepared to spread the work over "a much longer period" to accommodate the respondent's limited funds, yet had sought no additional payment. The FTT may have had in mind that if the tender had been on the basis of a continuous programme of work expected to occupy a fixed period, but the employer had requested that period be extended because of its own cash flow difficulties, that might have justified an increase in the contract price or some reduction in the specification in lieu, but it was no part of the RTM Company's case that any such trade off had been agreed and the tender did not include any reference to the anticipated duration of the contract. In fact the specification made clear that the work was to be carried out "in sections as directed and agreed with client".

42. The FTT then reminded itself that the successful tender had been 20% lower than the alternative quotation obtained and that the contractor had done additional work at no additional cost. It is true that the floors of the walkways were painted by the contractor, although not included in the specification, but we do not see how the fact that the contract price was lower than an alternative tender could justify either work which was not of a reasonable standard or true omissions from the contract specification without some adjustment to the price. The respondent's case, which was supported by the written statement of the contractor, was that all of the specified work had been done to a reasonable standard with the exception of snagging items which would be completed. The FTT made no attempt to assess the extent of the omissions or defects which, contrary to that case, it was satisfied had been permitted. Without such an assessment it would have been difficult for the FTT to determine whether any additional work done by the contractor justified departures from the specification without a corresponding reduction in the contract price. The FTT did not consider that question at all.

43. The FTT next noted that none of the other lessees had complained about the works or about their contribution towards the cost. In the context of the history of disputes between the freeholders and the leaseholders (all but one of whom are members of the RTM Company), and in the face of the evidence given by Mr Balmforth, which the FTT did not consider it could disregard, we do not think it was justified in placing significant weight on the absence of complaints. That absence may have implied that all of the leaseholders were satisfied that the work had been done to a reasonable standard and that Mr Balmforth's criticisms were unjustified, or it may have meant that they did not want to provide support for the appellants, or were absentees or were not sufficiently interested to object.

44. Finally, the FTT expressed the view that the work carried out was justified given the limited funds that were available to the respondent and that the quality of the finished work reflected the price paid. This observation does not begin to address the appellants' case, which the FTT had found to be made out to an unspecified extent, that some works which were necessary had not been done, other works had not been done to a reasonable standard and that the contract had not been fully completed. The task of the FTT was to determine the reasonable cost of the work that had been undertaken to a reasonable standard. It is implicit in the FTT's observation that poor quality work was all that could be afforded. That was not the case presented by the respondent nor, had it been, would it have been a case capable of acceptance by the FTT without a proper consideration of the quality of the work and the price which had been agreed for it. In the absence of such consideration we think the appellants are justified in their complaint that they do not understand what the FTT made of their criticism that the standard of work had been very poor and did not justify the sum charged so that some reduction ought to be allowed against it.

45. We are therefore satisfied that the conclusion that the full contract price was payable despite the failure at that time to complete the specified work to a reasonable standard, cannot be sustained on the reasoning provided by the FTT. We therefore allowed the appeal.

**The rehearing**

46. The parties agreed that the better and more proportionate course would be for the Tribunal to determine the issues concerning the quality and value of the external works for ourselves, rather than remitting the dispute for reconsideration by the FTT. They agreed that we should make our determination having regard to the photographs and evidence provided in writing to the FTT, and without further oral evidence but that we should have the benefit of an inspection.

47. The Tribunal made an unaccompanied inspection of the building in good weather on 27 September and spent an hour and a half viewing it from the ground and from the walkways, and comparing the photographs taken in 2015 with the original specification and with the current condition of the building.

48. We inspected the building after the snagging works were completed. The only outstanding item of the specification yet to be done was the preparation and redecoration of the entrance doors to the flats. We understood from Mr Ahmed that a retention of £1500 plus VAT has been made in respect of such work.

49. The disputed items of "continuing concern" were identified in Mr Balmforth's second report dated 22 April 2016 (see paragraph 26 above). The first two items relate to the soil and rainwater downpipes. Mr Balmforth said the contractor had painted over defective downpipes without first having repaired or replaced them which had led to wasted expenditure.

50. The author of the letter from Willow & Beau Limited dated 16 May 2016, responding to Mr Balmforth's second report, stated that "where required and allowed under the specification, defective rainwater pipes were repaired." Mr Balmforth referred to email correspondence with

Sterling Estates in which it was confirmed that Willow & Beau had included a provisional sum for such repairs. But the specification did not require the repair or replacement of any downpipe; the wording used throughout was: "allow to wash down, prepare and redecorate." From our inspection we noticed there were some plastic downpipes in situ, e.g. on the front elevation, which suggested replacement of the old cast iron pipes, but there is no evidence that any downpipes were replaced as part of the works and we could not identify specific repairs to any downpipe.

51. Some of the downpipes remained in disrepair, e.g. there was a cracked pipe to the right of Flat 7 in the internal courtyard and several pipes were rust stained, e.g. at Flats 12 and 15 in the internal courtyard and on the right hand elevation. Moss was growing at several pipe junctions suggesting that they were inadequately sealed. In our opinion even if some repairs were undertaken there are still recurrent problems of staining after the downpipes were painted. We do not consider this is solely attributable to the passage of time; it is due to painting over defective pipes.

52. We share Mr Balmforth's view that some of the downpipes have been painted with masonry paint. This was noticeable on the downpipes at the front elevation where the paint was blistering on both the plastic and cast iron sections of the pipe. It did not seem to us that Hammerite paint had been used (or at least not throughout, as had been suggested by the contractor) and the paint seemed to match the masonry paint used on the adjoining wall render.

53. The third item of concern was a leaking water main hose connection on the rear elevation. This had been repaired and made good by the time of the FTT hearing.

54. The fourth disputed item is whether, and if so how many, windows have been resealed with mastic. The specification relating to window frames said: "allow to check all silicone sealant around all window frames and reseal where missing/defective." The quotation from Willow & Beau did not identify a separate cost for this item, nor did it indicate what assumptions had been made about the likely number of windows, if any, that would need to be resealed. Mr Balmforth said none of the mastic sealant was renewed, because it had been found not to have been required; if that was the case it would not have justified a reduction in the contract price. For their part Willow & Beau said (rather ambiguously) "this was replaced" and that the material used could be (and presumably was) painted over. In a file note of a discussion with the contractor Sterling Estates said:

> "Where appropriate we are informed that all window frames were sealed before the painter went around and all loose seals silicone removed and attended to and then appropriate exterior flexi sealer used and painting undertaken."

Neither Willow & Beau nor Sterling Estates say how many windows were resealed, but both imply that some were. We saw no clear evidence of such resealing having taken place on those windows that we could see (those fronting the inner courtyard and at ground floor level on the right hand elevation). The sealant did not look new. But that does not mean the work was not done; after two years we would expect the painted sealant to the window frames to have weathered. But Mr Balmforth opined that the sealant was not new two and a half years before

we inspected the property and we are doubtful that a significant amount of replacement took place.

55. The fifth item concerned the failure of Willow & Beau to provide a chemical toilet on site for the use of its workmen. The contractor had instead reached agreement with a nearby (unidentified) café for the use of its facilities for an undisclosed fee. It was said this arrangement was better suited to the respondent's need for the work to progress in stages and therefore avoid committing to paying for a chemical toilet for a relatively long period. We think the respondent's approach was reasonable under the circumstances. Mr Balmforth calculated the cost of the chemical toilet to be £480 plus VAT and we think it likely that a similar sum was probably paid to the café proprietor over the period of the contract. Whether it was or not we do not consider that an adjustment in a preliminary item such as this would enable it to be said that the work itself was not to a reasonable standard, or permit a reduction under section 19(1) of the 1985 Act.

56. The remaining disputed items concern the standard of the paintwork, both to the rendered surfaces (including the balcony walls and soffits) and the downpipes (which we have considered above). There was no issue with the quality of the painted brickwork.

57. Parts of the render were roughly repaired with inadequate smoothing of the filled areas, e.g. on the internal courtyard elevations and on some of the rendered balcony upstands. There were small cracks reopening in the render in places on the front elevation and on the right hand side elevation. Paint was flaking under parts of the underside of the second floor balcony and at the front of the right hand side elevation. Some cables had been painted over in situ. The metalwork on the front and side gate and the metal railings on the front wall appeared to have been painted with Hammerite but there were some patches of rust where the paint had pitted and loosened. Mr Balmforth said that the front railings had been painted with only a single coat of Hammerite without cleaning or preparation but it is possible that Hammerite "Direct to Rust" metal paint was used which (the manufacturer claims) can be directly applied to rusty metal railings (an identified application) without the need for a primer or undercoat.

58. While we noticed some defects in the repairs to the rendering and in the quality of the paintwork generally we do not agree with Mr Balmforth's statement made in April 2016 that "it will be necessary to undertake comprehensive repainting of the whole building during the course of 2017". That exaggerates the poor quality of some of the workmanship which we consider overall to have been of a reasonable standard.

59. There was a general requirement in the specification that loose cables were to be re-fixed. We noticed that there are several loose cables around the building but it seems these are associated with the fitting or removal of satellite dishes which probably post dated the works. Where cables have been re-fixed many of the fasteners have already rusted which may be due to the failure of the zinc plated coating to hardened steel.

60. In summary we find there has been a retention of £1,500 plus VAT in respect of painting work yet to be done on the front doors of the flats; some of the downpipes have been painted

without first having been repaired or replaced leading to abortive expenditure; some of the painting of the downpipes was done with the wrong materials which has led to flaking and blistering of the paint in parts; the repair of some of the rendering was poorly finished; some of the masonry paint is flaking; the leaking water mains hose connection has been satisfactorily repaired; a deduction for the lack of a chemical toilet is not justified in view of the alternative WC facilities provided by the contractor; the evidence of whether the sealant around some or all of the window frames was replaced is inconclusive (although it appears the contractor did allow an unspecified sum for this work, and in any event it is not said that work was omitted which should have been done to comply with the specification); the painted metalwork is rusting and chipped in parts; the loose cables have generally been re-fixed but with fixings that have rusted.

**Determination**

61. Willow & Beau's quotation was given as an overall figure and was not separately itemised, either by reference to each elevation or to the type of work. It is therefore impossible for us to know how much was charged for the work we have found was not done to a reasonable standard. That being so we have allowed for such work by deducting a percentage of the total cost. In our opinion, doing the best we can with the available evidence and having visited the site over three years since the works commenced but after all the snagging works were completed, a deduction of 7.5% is appropriate. This amounts to £4,216 including VAT having made a prior deduction for the retention monies. The reasonable cost of the work that was undertaken to a reasonable standard is therefore £52,004 including VAT of which the appellants' share is 20.09% or £10,447, and we so determine.

Martin Rodger QC
Deputy Chamber President

A J Trott FRICS
Member

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