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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **BIR/00CN/LIS/2013/0040**

Property : **Flat 21 Wickets Tower, 2 Wyatt
Close, Edgbaston, Birmingham
B5 7TJ**

Applicant : **Mrs Wafia Hussain**

Joined Applicants : **Mr and Mrs Odedra
Mrs M Whittier**

Representation : **None**

Respondent : **Birmingham City Council**

Representation : **Mr Justin Bates of Counsel**

Type of Application : **Under Sections 27A and 20C Landlord
and Tenant Act 1985 ('the Act')**

Date of Application : **9th September 2013**

Date and Venue of Hearing: **2nd October 2014 at the Tribunal's
Hearing suite in Birmingham**

Tribunal : **Judge W J Martin
Mr N R Thompson F R I C S**

Date : **23rd January 2015**

DECISION

Preliminary

- 1 On 9th September 2013 Mrs Wafia Hussain (the 'Applicant') made an Application under section 27A of the Act in respect of Flat 21 Wickets Tower, Wyatt Close, Birmingham B5 7TJ ('the Applicant's Flat') to the First-tier Tribunal (Property Chamber). The Application also requests an Order under section 20C of the Act. Birmingham City Council is the Respondent.
- 2 The Lease ('the Underlease') under which the Applicant holds the Applicant's Flat is dated 7th November 1988 and is made between the Respondent (1) and Hadi Hassasn Khalil Al-Ayfari and the Applicant (2). The term is for 101 years (less 3 days) from 25th March 1961. The freehold is vested in the Trustees of the Calthorpe Estate, who granted a headlease ('the Headlease') to the Respondent on 31st December 1963 for the term of 101 years from 25th March 1961.
- 3 The Application requested a Determination by the Tribunal as to the payability and reasonableness of the 'routine' service charges levied by the Respondent in accordance with the provisions of the Underlease for the following service charge years:

1st April 2007 - 31st March 2008
1st April 2008 - 31st March 2009
1st April 2009 - 31st March 2010
1st April 2010 - 31st March 2011
1st April 2011 - 31st March 2012
1st April 2012 - 31st March 2013
- 4 The Application also requested a determination as to the payability and reasonableness of a service charge in respect of major works ('the major works'), which have been carried out at Wickets Tower by the Respondent under the 'Decent Homes' scheme. The Respondent has disclosed that, although the major works to Wickets Tower were (with the exception of the replacement of the windows in the Applicant's Flat) completed on 14th August 2012, no service charge has yet been demanded from the Applicant (or any of the other leaseholders at Wickets Tower). The position with regard to the windows at Wickets Tower is that, with the exception of the Applicant's Flat, all of the 116 Flats at Wickets Tower (whether leasehold or tenanted) have had the windows replaced with uPVC units, and the balconies (formerly open) are now enclosed with a uPVC double glazed screen. The Applicant's Flat has not, as yet, been treated in this manner because the Applicant has refused access to the Respondent's contractors.
- 5 The Tribunal's jurisdiction arises from section 27A of the Act:

'27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to-

- (a) the person by whom it is payable,*
- (b) the person to whom it is payable,*
- (c) the amount which is payable,*
- (d) the date at or by which it is payable, and*
- (e) the manner in which it is payable*

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

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

- (a) *the person by whom it is payable,*
- (b) *the person to whom it is payable,*
- (c) *the amount which is payable,*
- (d) *the date at or by which it is payable, and*
- (e) *the manner in which it is payable*

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

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

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

(6) *[not relevant to this application]*

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

6 Because no service charge in respect of the major works that have been carried out at Wickets Tower has as yet been demanded from the Applicant, it became clear to the Tribunal that it does not have jurisdiction under section 27A (1) of the Act to determine the part of the Application that relates to them. This is because, although the works have been completed, no 'service charge' within the terms of the sub-section has been demanded. Accordingly, the Tribunal has by a Decision and Order dated 23rd January 2015 struck out that part of the Application which relates to the completed major works as required by Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. As regards the windows, however, the Tribunal clearly does have jurisdiction. The amount estimated to be payable by the Applicant is separately shown on the section 20 Notice (see paragraph 20 below), but the work has not commenced and accordingly section 27A (3) of the Act applies.

7 The Tribunal directed that the proceedings as regards the 'routine' service charges would be the subject of an inspection and oral hearing, but that its determination as regards the windows at the Applicant's Flat would be made on the basis of the written submissions of the parties.

Inspection

- 8 The Tribunal inspected the exterior of Wickets Tower on 2nd October 2014 in the presence of Mrs Nicholls (Leasehold Manager) and Mr Taplin (Major Works officer), both with Birmingham City Council. Regrettably, owing to a misunderstanding, the Applicant was not present. Wickets Tower was built in about 1967 and comprises a multi-storey block of purpose built residential flats. There are a total of 116 flats, including the Applicant's Flat. The Tribunal was informed that 15 of the flats have been sold to leaseholders, with the remaining 101 being let to secure tenants.
- 9 The Tribunal was able to see clearly the exterior of the front and rear of the Applicant's Flat, on the third floor. It is the only flat in the block where the balcony has not been enclosed by external windows as part of the major works.
- 10 The Tribunal inspected the internal common parts and the communal grounds surrounding the block.

The relevant provisions of the Underlease

- 11 The Second Schedule to the Underlease contains the following definition of the 'Demised Premises':

'ALL THAT Flat known as Number 21 on the third floor of the Building the site of which is edged red on the plan annexed hereto TOGETHER with:-

(A) All landlord's fixtures and fittings now or from time to time during the term hereby granted thereon or therein

(B) The floors ceilings walls doors and windows thereof so far as not hereinafter excepted'

- 12 Clause 3 (4) contains the lessee's covenant:

'(4) To repair and keep the demised Premises and all landlord's fixtures and fittings therein and all additions in good and substantial repair order and condition at all times during the said term including the renewal and replacement forthwith of all worn or damaged parts'

- 13 The Fourth Schedule to the Underlease contains the following Exception and Reservation:

'(A) The main structure of the Building including the roof and foundations lift shafts machinery and floors (except wooden floors) and all external walls (but not glass in the windows non-structural walls within the demised premises nor the interior joinery plasterwork tiling and other surface of the walls floors ceilings nor the cisterns tanks drains wires pipes ducts and conduits used solely for the purposes of the demised premises)'

- 14 Clause 5 (b) of the Underlease contains the Respondent's covenants with regard to repair and the provision of services:

'(b) The Council shall:

(i) repair rebuild or repaint or otherwise treat as necessary and keep the excepted premises and every part thereof in good and substantial repair order and condition and renewing and replacing all worn and damaged parts thereof painting with two coats at least of good quality paint in a proper and workmanlike manner the external surfaces of the excepted premises and also the halls staircases and landings once in every six years during the said term

(ii) caretake the Building and generally maintain the excepted premises

(iii) clean and maintain the staircase windows of the Building and the staircase lighting therein

(iv) keep any lawns and ornamental or open areas adjacent to the Building mown cultivated or otherwise in an clean and tidy condition

(v) keep all road drives walks footways and paths serving the Building in good repair and clean and tidy

15 The obligation to pay the service charge is contained in Clause 2 of the Underlease, containing the Demise, in which there is reserved as additional rent *'by way of service charge of an amount calculated in accordance with and paid at the times and in the manner provided in the Fifth Schedule hereto'*.

16 The Fifth Schedule (paragraph 1 (a)) defines the Service Charge as [not completed] per centum of the Aggregate of the cost of carrying out the provision of the services contained in Clause 5 (b) of the Underlease and Clause 3 (21) of the Headlease (with adjustments if the reserve fund is to be used or contributed to), plus a ten per centum management charge, or £10, whichever is the higher. The service charge is to be certified by the City Housing Officer *'as soon after the 31st day of March as may be practicable'*. The Certificate is to *contain a fair and proper summary of the costs and expenses incurred by the Council which fall within paragraph 1 (a) of this Schedule...'*

17 Paragraph 5 of provides that *'the costs defined in paragraph 1 (a) shall be ascertained by such method as shall be reasonable'*. Paragraphs 6 and 7 contain provisions requiring the Lessee to pay one half of the estimated service charge for each year in advance on the 25th March and the 29th September and for a conventional balancing operation to be undertaken as soon as possible after the Certificate is issued in respect of the year in question.

18 The lessee's covenants in Clause 3 of the Underlease contains the following provisions considered relevant to the proceedings by the parties:

(4) (C) To clean the interior and exterior surfaces of all the windows of the Demised Premises at least once in every four weeks

(4) (S) Not to carry out any work of any nature to the exterior of the building or demised premises it being the Councils intention to carry out such work in accordance with Clause 5 (b) (i) herein

(6) (A) To permit the Council or its agents or workmen or others at all reasonable times during the term hereby granted to enter on the demised premises for the purpose of carrying out repairs decorations or alterations to any adjoining or neighbouring premises or to the exterior of the demised premises

- 19 Clause 3 (21) of the Headlease requires the Respondent to assume responsibility in every underlease of the flats for maintaining and repairing the main structure, gas pipes and other conducting media, and the main entrance passages staircases and landings in the block. The Respondent is also to assume responsibility for exterior painting and decoration and the cleaning and lighting and of the common parts and the cultivation and maintenance of the grounds.

The windows at the Applicant's Flat

- 20 The issues regarding the windows arose originally as a result of the Respondent deciding to carry out the major works, some time prior to the service of a Notice under section 20 of the Act relating to the works on 18th September 2009. With the Notice and letter accompanying it a Schedule of the estimated costs was provided. This was divided into two parts, Improvements and Repairs. The Respondent accepts that improvements are not recoverable under the Underlease, and so there is no estimated leaseholder contribution for these. However, the Schedule does provide details of the improvements, and the costs allocated to them. The total cost for the balcony enclosure work (including scaffolding) is shown as £1,056,092.34 for the whole of Wickets Tower, or £4,552.12 per Flat. The Schedule also lists the repairs. In respect of the replacement of the windows, the total cost for Wickets Tower is given as £1,815,644.53 including scaffolding. The total estimated leaseholder contribution (for all of the proposed repairs) is shown as £16,168.08, of which the amount in respect of the replacement of the individual windows in the Leaseholder's Flat is shown as £7,826.05.
- 21 For completeness, the Tribunal records that a further section 20 Notice was served on 6th December 2009 in respect of the soil and vent pipe replacement, in respect of which the leaseholder contribution was shown as £2,834.91.
- 22 From the outset the Applicant objected to the major works programme, and particularly objected to the proposed window replacement. On 10th June 2011 she completed a 'Refusal Form' issued by Thomas Vale Construction, the Partner contractor appointed by the Respondent under a long term agreement, in which she says under the heading 'Element of Works - Windows':
- 'As I have said many times, I do not want to be part of this program and I am happy with my current windows. The Council already knows about this and there is nothing in my Lease to specify that I have to follow what the Council is doing to the property.'*
- 23 The Respondent has always maintained that the provisions of the Underlease authorises it to carry out works of repair and to reclaim the cost through the service charge. In particular, the Respondent says that the windows themselves are part of the structure for which it is responsible under the

terms of the Underlease. The Applicant, on the other hand, says that the windows are within the demise, and that therefore the repairing obligation is hers. The Application contains the following request by the Applicant:

'I invite the Tribunal to consider whether the landlord can force me to accept their installation of windows and related external work to my home at an excessive rate, or whether I am allowed to carry out this work in accordance with their specification at my expense which is less than the costs quoted by my landlord.'

24 In the Application, the Applicant also raised the issue of the section 20 consultation:

'I also wish the Tribunal to consider whether the landlord had conducted an early consultation in advance of the qualifying works set out in the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) Regulations 2003. I believe that the landlord did not enter into an early consultation with me or implement that consultation fairly and permitting me to carry out works at my expense providing I sought approval as to the works to be undertaken.'

25 The matters for the Tribunal to determine are therefore as follows:

(1) On a true construction of the Underlease, are the windows within the Applicant's Flat part of the demise and if they are, can the Respondent, against her wishes, remove the existing window frames and replace them with uPVC frames to match the remaining windows at Wicket's Tower and recover the cost through the service charge?

(2) If the replacement is to take place as part of the contract granted to Thomas Vale, has the consultation process been properly carried out under the Service Charges (Consultation Requirements) Regulations 2003 ('the Consultation regulations')?

(3) If the Tribunal finds in favour of the Respondent on the above, would the proposed replacement under the contract granted to Thomas Vale at the cost quoted of £7,826.05 be reasonable within the terms of section 19 of the Act?

The construction of the Underlease

26 The Applicant contends that the wording of the demise to her clearly includes the windows and because of this they belong to her, and it is therefore her decision as to whether they should be replaced.

27 The Respondent said initially that, although the windows are mentioned in the demise, it is clear from the Exception and Reservation in the Fourth Schedule, that, with the exception of the glass in the window, the expression 'main structure and external walls' was intended to include the window frames. Accordingly, Clause 5 (b) obliges the Respondent to 'repair and renew' as necessary.

28 In a later submission, the Respondent referred to the case of *Sheffield City Council v Oliver* [LRX/146/2007], which related to a lease drawn in similar terms to the Underlease, except in that case there was no doubt that the demised premises included the external windows, their frames and the glass.

The President of the Lands Tribunal in the above case referred to the covenant implied by Paragraph 14 (2) (a) of Part III of Schedule 6 to the Housing Act 1985:

'(2) There are implied covenants by the landlord -

(a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting the structure;

- 29 The President made it clear that the above provisions apply by force of statute, whatever the express covenants may say. In paragraph 15 of the Decision he went on to say:

'The principal question that arises is whether the external windows are part of the structure and exterior of the maisonette and/or the building. Authority on the question may be found in Irvine v Morgan [1991] EGLR 261, a decision of Mr Thane Forbes Q.C. sitting as a Deputy Judge of the Queen's Bench Division. The provision under consideration in that case was section 32 (1) (a) of the Housing Act 1961, which implied in any lease of a dwelling-house to which the section applied a covenant "to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes)", effectively, therefore, the same covenant as that to be implied under paragraph 14 (2) (a). The issue was whether certain items, including external sash windows were within the scope of the covenant. The judge held that they were both part of the structure and part of the exterior of the dwelling-house.'

The Tribunal's Decision in respect of the construction of the Underlease

- 30 The President found, in *Sheffield City Council v Oliver* that the same considerations applied to the covenant implied in the Housing Act 1986. Although there is clearly a tension between the words used in the various parts of the Underlease so far as they relate to the windows, the Tribunal is satisfied that, on the basis of the above authority, the repair and maintenance of the window frames is within the Respondent's implied repairing covenant, and therefore the cost of the window renewal is subject to the service charge provisions contained in Clause 2 and the Fifth Schedule to the Underlease. It follows that, despite the fact that the Applicant does not wish the work to take place, the Respondent does, as it has maintained, have the power to carry out all works of repair and renewal, even against the wishes of the leaseholders, and charge for them through the service charge.
- 31 It is clear that the Applicant objects very much to the threat of compulsion in respect of the proposed works. Although the Respondent has accepted that the Underlease does not permit it to charge for the improvement works through the service charge, it is nevertheless apparent that, as part of the programme of major works, the Respondent not only wishes to replace the existing windows at the Applicant's Flat, but also to enclose the balcony with a uPVC glazed screen, in the same manner as has been done to the remaining Flats at Wickets Tower.
- 32 The Tribunal notes that in the final paragraph in *Sheffield City Council v Oliver*, the President expressed the hope that *'as a matter of practice, the council would not without the lessee's approval carry out improvement*

works to the demised premises for which the lessee is to be charged unless the works are no more than as limited extension of repair work'. It should be noted that in that case the lease in question permitted the carrying out of improvements as well as repairs. It is to be hoped in the present case that the Respondent's approach will be tempered in the manner suggested by the President in *Sheffield City Council v Oliver* with regard to both the balcony improvements and the window replacement.

Consultation

- 33 The Respondent, by its written submission made on its behalf by Mr Bates on 26th September 2014, suggests that the Tribunal's jurisdiction does not extend to a detailed examination of the consultation carried out in respect of the major works. The submissions says that the Applicant only makes 'passing reference' to consultation in her written submissions, and for the most part, 'it seems she wanted a personal meeting'. It is therefore suggested that it is improper and outside of the Tribunal's jurisdiction to 'take on its own motion' detailed points with regard to the consultation, as explained by the Upper Tribunal in *Birmingham CC v Keddie and Hill* [2012] UKUT 323 (LC) at [17]:

'...it is important to bear in mind that the jurisdiction of the LVT is a creature of statute but that it also a function of what the applicant, and by his response, the respondent wish the LVT to resolve. It is the jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve, and neither does it have the jurisdiction to do so...'

- 34 The Tribunal does not agree that it does not have the jurisdiction to consider the question of consultation. However, it does follow that, as it has no jurisdiction in respect of the remainder of the major works, its determination can only relate to the consultation process so far as it relates to the proposed installation of the windows at the Applicant's Flat. The Applicant in the Application form clearly asks the Tribunal to look at the issue of consultation (see paragraph 24 above), and accordingly the Tribunal considers that the test identified in *Keddie and Hill* is satisfied. However, this case is not the only authority on the matter. Although, surprisingly in view of his duty to the Tribunal, not mentioned by Mr Bates in his submission of 24th September 2014, the Lands Tribunal case of *Swanlane Estates Limited v Woods and others* [LRX/159/2007] provides some direct guidance. His Honour Judge Mole said at paragraph 16 et seq:

'16. I reject the submission that the LVT was not entitled to raise the section 20 points of its own initiative. What the LVT may usefully raise of its own initiative will depend upon all of the circumstances. It is clear to me that the LVT may be properly concerned to clarify issues of law where parties are not legally represented and where those issues of law go directly to the central question of liability. Although it is not strictly accurate to say that it is mandatory for the landlord to comply with section 20B, if the landlord does not do so then section 20B (1) provides that the tenant is not liable to pay so much of the service charge as reflects costs incurred more than 18 months before the demand. It is quite

possible that the tenant may not be aware of this provision, which Parliament has enacted expressly for his benefit. The LVT was not obliged to sit in silence and find the applicants liable for service charges when the LVT had reason to query whether they were really liable. It was entitled to explore the matter on its own initiative, if that is what it considered justice required.

17. There is always a tension between the role of a tribunal seeking to do justice between the parties according to law where one of the parties is not legally represented and the tribunal's duty to remain, a conspicuously remain, impartial. The tension is particularly acute in the case of the LVT because the LVT decides the facts. Resolution of the problem can usually be achieved by scrupulous fairness in giving the party against whom a point is raised or prompted by the LVT every opportunity to deal with it. If a party has no justifiable ground for complaint about having been given a fair and proper chance to deal with a point, he can have no justifiable complaint about a good point being raised by the Tribunal if it is decided against him.

18. It is for the LVT to make its own procedural decisions, in the exercise of its discretion, in the light of all the circumstances in front of it at the time. The LVT sees the parties and how they behave. The LVT is entitled to be robust in its decisions and unsympathetic to what it may regard as delaying tactics. The Land Tribunal will not interfere with the exercise of the LVT's discretion unless it is satisfied that the conduct of the LVT has been contrary to natural justice in the sense that it has denied one of the parties a fair hearing. A party will not have a fair hearing if he has not been given a fair chance to deal with an important point.'

35 In the present case, in its Directions Order No 2, the Tribunal set out in detail its concerns as to the consultation that had been carried out, as disclosed in the Respondent's factual summary. Given that the Applicant is unrepresented, and has clearly asked the Tribunal to determine whether the Consultation Regulations had been complied with, the Tribunal considered it proper to take this course, rather than to 'sit in silence', but give the Respondent every opportunity to deal with the points raised, as required by *Swanlane*. In Mr Bates' submission of 24th September 2014, as well as objecting to the points being raised by the Tribunal, further written submissions on the substantive issue were in fact made, and these are set out in paragraph 37 et seq below.

36 The relevant parts of the Tribunal's Direction Order No 2 are reproduced below:

'A: Consultation in respect of the major works

13 *The Applicant has raised the issue of consultation in the section 27A Application and her other submissions. The Respondent maintains that it has carried out the statutory consultation correctly. The Respondent's factual summary discloses that on 18th September 2009 a notice of intention under section 20 of the Act was served on the Applicant (and the other leaseholders). A copy of the notice was included with the factual statement. It is clear that the Notice is given under Schedule 3 to the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI2003/1987) ('the Consultation Regulations').*

14 Schedule 3 to the Regulations is headed 'Consultation Requirements for qualifying works under qualifying long term agreements and agreements to which Regulation 7 (3) applies'. The agreement under which the contract for the major works was granted is not a qualifying long term agreement ('QLTA') because although it was entered into in January 2004 (i.e. after the Consultation Regulations came into force, on 31st October 2003) it was not consulted upon under Schedule 2 to the Consultation Regulations. However, the Respondent states that it is a long term agreement entered into with three large contractors, of which Thomas Vale Limited is one, following pan European tendering and in respect of which notice was placed in the Official Journal of the European Union before 31st October 2003.

15 Regulation 7 of the Consultation Regulations provide as follows:

(1) Subject to paragraph (5), where qualifying works are the subject (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works, are the requirements specified in Schedule 3.

(2) Subject to paragraph (5), in a case where paragraph (3) applies the consultation requirements for the purposes of section 20 and 20ZA, as regards qualifying works referred to in that paragraph are those specified in Schedule 3.

(3) This paragraph applies where -

(a) under an agreement entered into, by or on behalf of the landlord or of a superior landlord, before the coming into force of these Regulations, qualifying works are carried out at any time on or after a date which falls two months after the date on which these regulations came into force; or

(b) under an agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, qualifying works for which public notice has been given before the date on which these regulations came into force are carried out at any time after that date.

(4) Except in a case to which paragraph (3) applies, and subject to paragraph (5), where qualifying works are not the subject of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works-

(a) in the case where public notice of those works is required to be given, are those specified in Part 1 of Schedule 4;

(b) in any other case, are those specified in Part 2 of that Schedule.

(5) *In relation to a RTB tenant and particular qualifying works, nothing in paragraph (1), (2) or (4) requires a landlord to comply with any of the consultation requirements applicable to that agreement that arise before the 31st day of the RTB tenancy.*

'Public Notice' is defined in the Consultation Regulations as 'notice published in the Official Journal of the European Journal pursuant to the Public Works Regulations 2006'.

- 16 *'Qualifying works' are defined by section 20ZA of the Act as 'works on a building or any other premises'. Section 20 of the Act limits the contributions of tenants to an 'appropriate amount' unless the Consultation Regulations have either been complied with or if they have been dispensed with by a First-tier Tribunal. Regulation 6 of the Consultation Regulations provides that the 'appropriate amount' is an 'amount which results in the relevant contribution of any tenant being more than £250'.*
- 17 *The Tribunal is concerned that, on the submissions before it, the appropriate Schedule to the Consultation Regulations may not be Schedule 3. For Regulation 7 (3) to apply, it would appear that not only must the qualifying works have been carried out under an agreement for more than 12 months, but also that the qualifying works themselves have been the subject of public notice before 31st October 2003. It is not clear at present to the Tribunal how the second of the two conditions is satisfied. The only public notice which has been disclosed is that relating to the tendering for the long term contract with the three contractors. It is difficult to see how the public notice in respect of the tendering can satisfy the requirement as to public notice having been given 'of the qualifying works'.*
- 18 *If the requirements of Regulation 3 (b) are not satisfied in the present case, it is clear from Regulation 7 (4) that the appropriate consultation requirements are those contained in Part 1 of Schedule 4 to the Consultation Regulations. If this is found to be the case, the contribution of the Applicant will be limited to the appropriate amount, unless dispensation has been applied for, and granted, under section 20ZA of the Act. '*
- 37 Mr Bates, in his submission of 26th September 2014 submits that Schedule 3 of the Consultation Regulations is the only consultation process which makes any sense in the present case, and further that it would seem that, if Schedule 3 does not apply, none of the other Schedules can apply and that therefore there would be no requirement to consult.
- 38 Mr Bates referred to Paragraph 7 (3) (b) of the Consultation Regulations saying that it is badly expressed, but that it is submitted that it applies if:
- (a) there has been an agreement, for which public notice was given before October 31st 2003; and,
 - (b) work was done under that agreement.
- 39 This is the factual basis of the present case, and accordingly, Schedule 3 was the correct consultation process. It has not been suggested that the

requirements of Schedule 3 were not complied with. This conclusion is consistent with other decisions of the LVT. In *Briere-Edney v LB Islington* (LON/00AU/LSC/2008/93), with a very similar factual situation, the LVT concluded that Regulation 7 (3) applied, and that Schedule 3 was therefore the correct consultation procedure. This followed an earlier decision to the same effect, *Bourn and others v LB Islington* (LON/00AU/LSC/2007/0488). Further, the analysis of the Respondent as set out above has been accepted by the Midland Tribunal in the cases of *Keddie and Hill*, and *Massie v Birmingham CC* (BIR/44UD/US/2009/0008).

- 40 Because the case of *Swanlane Estates Limited v Woods and others* had not been put before the parties, the Tribunal considered it right that they should have an opportunity to comment before the Tribunal made its final decision. Accordingly, the parties were invited to make written submissions by letter dated 15th January 2015.
- 41 Mrs Hussain by letter dated 17th January 2015 made the following submission:

'THIS IS MY RESPONSE TO THE CHAIRMAN'S LETTER DATED 13 January 2015.'

Dear Sir,

We require the Tribunal to determine the issue of consultation as it was raised in the application. If the Council had any doubts about this matter they should have sought clarification. The failure to consult in this case meant that I have been prejudiced and it would not be right to dispense with their failure to consult me because the quality and costs of the works are excessive and I would have objected to these works; I have been prejudiced by the council's failure to consult me on the relevant works and for this reason this issue was pleaded; it should have been clear to the council that I was taking their failure to consult me as a strong point because I was complaining about a major item of work and not merely a technical matter.

The council has not provided any proper explanation why they did not consult me; they do not have a defence and it is for this reason they are trying to persuade the tribunal not to determine the matter which I raised.

I have conducted my own hearing and accordingly do not have the expertise the council has. The council will not suffer any prejudice if the tribunal determines the question of consultation because the council has no defence to this claim.

For these reasons I invite the tribunal to determine this issue.'

- 42 For the Respondent, Mr Bates in written submissions dated 19th January 2015 quoted paragraphs 16 and 17 from *Swanlane*. He submitted that there was no conflict between this passage and *Keddie*. Indeed, in *Keddie*, it was recognised that there may be "rare cases" where the Tribunal may need to take an issue not raised by the parties:

'That said, there may of course be rare cases in which it is appropriate or necessary for the LVT to raise issues not expressly raised by the parties but

which fall within the broad scope of the application in order to properly determine the issues expressly in dispute. But even then, the issues must fall within the scope of the application, not something which arises outside of it. This is no doubt what His Honour Judge Mole QC had in mind when he said in Regent Management Limited v Jones [2012] UKUT 369 (LC), LRX/14/2009 that:

"29. The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much. But it must do so fairly, so that if it is a new point which the tribunal raises, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it."

In those rare cases where an LVT does feel compelled of its own volition to raise an issue not raised by the application or the parties, it must as a matter of natural justice first give both parties an opportunity of making submissions and if necessary adducing further evidence in respect of the new issue before reaching its decision. Failure to do so is not only unfair, but may give the unfortunate impression that the LVT has descended into the fray and adopted a partisan position which may well serve to undermine the confidence of the parties in the impartiality of the LVT"

- 43 Mr Bates also quoted the following passage from *Woodfall on Landlord and Tenant* (para. 7.192.1)

'The Tribunal's jurisdiction and function is to resolve issues which it is asked to resolve; it has no jurisdiction to embark on its own inquisitorial process and identify issues which neither party has asked it to resolve. There may be rare cases in which it is necessary or appropriate to raise issues not expressly raised by the parties but which fall within the scope of the application in order to determine the issues expressly in dispute: but even then, the issues must fall within the scope of the application, and the tribunal must give both parties an opportunity of making submissions and if appropriate adducing further evidence in respect of the new issue before reaching its decision.'

- 44 Mr Bates concludes by saying that there is nothing in the material produced by Mrs Hussain which indicates a dispute under section 20 of the Act. Her complaint is about consultation in the broadest sense, not the specifics of the Act. Certainly, nowhere has she particularised an argument as detailed as the one now produced by the Tribunal. There is nothing 'rare' or 'exceptional' (or similar) about the case to justify embarking on such a process now. Simply put, it is not part of the case put against the council and there is no other exceptional reason to deal with the point.

The Tribunal's decision as to its jurisdiction to determine the issue of consultation

- 45 The Tribunal disagrees with Mr Bates' suggestion that 'there is nothing in the material produced by Mrs Hussain which indicates an dispute under section 20 of the Act'. While the statement she makes in the Application does not mention section 20 of the Act, it does mention the Consultation Regulations:

'I also wish the Tribunal to consider whether the landlord had conducted an early consultation in advance of the qualifying works set out in the Landlord and Tenant Act 1985 (as amended) and the Service Charges (Consultation Requirements) Regulations 2003. I believe that the landlord did not enter into an early consultation with me or implement that consultation fairly and permitting me to carry out works at my expense providing I sought approval as to the works to be undertaken.'

- 46 The Tribunal does not see how it is possible to interpret the above in any way other than as a request for a determination as to whether consultation in respect of the major works was properly carried out. Mrs Hussain has in any case confirmed this in her submission of 17th January 2015. She is not a lawyer, and, as expressed by HH Judge Mole in *Regent* 'may have no more than a vague and unfocussed feeling' that consultation had not been properly carried out. The authorities discussed above, in the view of the Tribunal, establish that as the Applicant has clearly raised the issue of consultation in the application, it is entirely proper for it to consider the submissions put forward by the Respondent as to the consultation that took place, and, in the event that it had doubts as to the whether that consultation was correct, to raise those doubts, as it did in its Directions Order No 2. The Tribunal accepts on the basis of the case law referred to above that it would be unfair and improper of it to make a determination without giving the Respondent every opportunity to comment upon those doubts and to adduce such new evidence as it wished to. However, the Tribunal has in the present case given such an opportunity to the Respondent at a very early stage, and it considers therefore that there is no reason why it should not proceed to a determination of the consultation issue.

The Tribunal's decision with respect to consultation

- 47 It must be said at the outset that, since no works have yet taken place and no service charge raised, there can have been no breach of the Consultation Regulations with regard to the window replacement. The Tribunal's decision is therefore in respect of the hypothetical situation that would arise if the Respondent were to proceed to carry out the work under the consultation that has taken place with regards to the remainder of the major works.

- 48 Mr Bates, in his written submissions, says that, although it is 'badly expressed' Paragraph 7 (3) (b) of the Consultation Regulations 'applies' if:

- (a) there has been an agreement, for which public notice was given before October 31st 2003; and
- (b) work was done under that agreement.

If the paragraph applies, then Schedule 3 of the Regulations applies. The Respondent has complied with this Schedule, and there is no suggestion that it has not carried out the consultation properly. The submissions also say that if Schedule 3 does not apply, then, it is suggested, none of the other schedules can apply, and so no consultation would be required.

- 49 The Tribunal does not agree with Mr Bates' analysis. Regulation 7 (4) makes it plain that, unless paragraph (3) applies, the consultation requirements are those in Schedule 4, either Part 1 or Part 2, depending upon whether public notice is required. The Tribunal finds that Regulation 7 (3) does not apply. It is true that the long term agreement entered into between the Respondent and three contractors, including Thomas Vale, was dated before 31st October

2003, but for Schedule 3 to apply, the qualifying works themselves would have had to have been the subject of public notice, and not just the agreement under which they are carried out. Consultation under Schedule 3 is less onerous than under the other Schedules. To obtain the benefit of that less onerous regime, the current position is that the lessor must first have complied with Schedule 1 of the Consultation Regulations in respect of a Qualifying Long Term Agreement. The Respondent did not do so in the present case, because the agreement pre-dated the coming in to force of the Consultation Regulations. Mr Bates appears to say that the transitional provisions (for that is what they are) in Regulation 7 mean that, nevertheless, the Respondent may assume the benefit of the less onerous regime in Schedule 3. The Tribunal does not agree. For that to be the case the meaning of Regulation 7 (3) ought to emerge clearly from the words used. It does not. On the contrary, the words used say the opposite:

(3) This paragraph applies where -

..

(b) under an agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, qualifying works for which public notice has been given before the date on which these regulations came into force are carried out at any time after that date.

[the Tribunal's emphasis]

- 50 The Tribunal does not see how it is possible to interpret the above in any other way than that, for the paragraph to apply, the qualifying works have themselves been the subject of public consultation. The Tribunal notes that there are a number of LVT decisions put forward by Mr Bates in which his analysis has been adopted. However, these decisions are not binding upon this Tribunal, and having considered them, the Tribunal is not persuaded that its above findings are incorrect.
- 51 It is the Tribunal's finding therefore, that in the hypothetical situation that the Respondent exercises its rights to carry out the window replacement at the Applicant's Flat on the basis of the consultation which has taken place, and in the absence of any application under section 20ZA of the Act for dispensation from the consultation requirements, the Tribunal would find that consultation has not been properly carried out, and that the amount recoverable under the service charge would therefore be limited to £250.

The Cost of the Windows

- 52 The Applicant in her submissions maintains that the windows at her Flat are satisfactory and do not require to be replaced, but that if they are replaced, the work can be carried out for considerably less than the cost quoted in the section 20 Notice.
- 53 As evidence of the former, the Applicant supplied a copy of a letter from Chamberlains, Chartered Surveyors, dated 19th March 2012:

'Dear Mrs Hussain,

***RE - INSPECTION OF 21 WICKETTS TOWER WYATT CLOSE
BIRMINGHAM B5 7TJ***

I refer to my visit to your property on Friday 16 March, 2012.

I can confirm that the windows to the property which are of metal and timber construction, in timber sub frames with fixed panes and opening lights where appropriate.

On inspection the windows appear to be in a satisfactory condition and free from any significant defects. The windows have been decorated and well maintained.

Although the windows are original I am of the opinion that they are in a satisfactory condition and at this time their replacement is not required.

Further to my inspection I can confirm that that the windows are likely to have a further economic life of 10-15 years, if they are regularly maintained.

If you require any further information please do not hesitate to contact me this office.

Yours sincerely

Stewart H Sherman Dip Surv MIRCS.'

- 54 A Copy of an estimate from AJS Windows was also supplied. This is for a total of £3,900 including VAT. The estimate includes the replacement of the front door, and accordingly the Applicant says that the cost of the windows on their own is £2,500. Mrs Hussain points out that AJS is a reputable company and the quotation is for 'A' Rated windows.
- 55 The Applicant also exhibited a copy of a letter dated 24th May 2005 from Ms Elkington, the Director of Housing for the Respondent, addressed to the Applicant's late husband, in which the following statement is made:

- '1. Leaseholders will be allowed to replace their own windows subject to prior permission, and agreed specification and the time of completion.*
- 2. Leaseholders who have replaced their own windows will not be requested to contribute towards window replacement block costs except for communal windows.'*

There is a printed set of guidelines with the letter. This states, among other things, that, if permission is given, the leaseholder will have to enter into a deed of variation transferring the ownership of the windows from the Council to the leaseholder. The Applicant draws particular attention to the following statement in the guidelines:

- 'd. When the Department proposes to undertake window replacement work notification will be sent to all the leaseholders in the block. Leaseholders will be informed they have a choice of allowing the Housing Department to undertake the work or they can undertake the work in accordance with the procedure set out in a - d.'*

- 56 A further letter from the Respondent is also exhibited. This is dated 23rd August 2012 and is from Ms Jenny Watts, Home Ownership Manager. In it permission is refused for the Applicant to undertake the replacement herself, on the basis that the Council does have a policy on window replacement, but this only applies to low-rise blocks, and is not available to the Applicant.
- 57 The Applicant's position, therefore, is that although the surveyor's report is to the effect that the windows are sound, she is nevertheless prepared to pay herself for the window replacement as per the quotation from AJS, but does not agree to the replacement at the cost of £7,826.05.
- 58 The Respondent's submission is that the issue before the Tribunal is whether the proposed costs are reasonably incurred and/or reasonable in their amount. In this regard it is settled law that the Respondent is entitled to approach the management of their stock on a 'pan stock' basis, i.e. it is entitled to take account of the needs of the stock as a whole, when deciding whether particular works shall be done to a particular property. As authority for this the Respondent cites *Wandsworth London Borough v Griffin and another* [2000] 2 EGLR 105.
- 59 In addition the Respondent retains most of the flats in the block, and accordingly is liable to pay for the costs associated with those flats. As a general rule, the level of the service charge to be reimbursed by the lessees should be assessed by reference to whether the lessor would have chosen this method of service provision/repair, if the lessor had itself to bear the costs (*Hyde Housing Associated v Williams* [LRX/53/1999]). It is submitted that in this present case this test is amply satisfied.

The Tribunal's decision with regard to the cost of the windows

- 60 The Tribunal does not find that *Wandsworth v Griffin* is of particular help to it. This case was concerned more with the decision by the local authority to replace a flat roof with a pitched roof, and to replace the windows with uPVC units. The local authority used 'cost in use' calculations to justify the higher cost of these methods over cheaper alternatives put forward by the leaseholder. The Lands Tribunal found that this method of assessing the respective advantages of the various methods open to it was reasonable. However, the Tribunal does not find that the case is authority for the blanket proposition that a local authority is entitled to consider the methods it wishes to adopt on a 'pan stock' basis, as suggested by Mr Bates.
- 61 In *Hyde Housing Associated v Williams* P H Clarke, reviewing the authorities on the questions raised in the Appeal, said the following at 31:

'31. The position outlined above, as applied to this appeal, is as follows:

(1) The choice of method of repair to the roof and cladding rested with Hyde, and provided the works were reasonable, Mr Williams cannot insist on cheaper works or only a minimum standard of repair.

(2) When deciding whether works are reasonable there is no presumption either way. It is for the Tribunal to decide the question of reasonableness on the whole of the evidence. However, the burden of proof is on Hyde to show, on the evidence at the re-hearing before this Tribunal, that the decision of the leasehold valuation tribunal on this question is wrong.

(3) Tests to be applied to ascertain whether the works carried out by Hyde were reasonable, that is to say whether the costs were "reasonably incurred", include: whether Hyde would have carried out the same works if the cost was wholly borne by them; whether the works were required to comply with statutory requirements or regulations; whether the works were carried out in reliance on reasonable and competent professional advice.'

- 62 In the event, P H Clarke found that the LVT decision that the works were not reasonable incurred should not be overturned. He was satisfied that the works were carried out in reliance on reasonable and competent advice; he did not have evidence as to whether Hyde would have chosen the method they used if they had been responsible for the whole of the cost (although he noted that it had to bear the cost of the 72% of the cost of the flats not let on long tenancies) and it had not been contended that the works were required to comply with regulations. However, in the event, he preferred the evidence of Mr William's surveyor that the roof had not reached the end of its economic life and patch repairs would have been satisfactory for a few more years.
- 63 In the present case the Tribunal has before it the evidence of a chartered surveyor to the effect that the windows do not at present need replacing. In addition, the Applicant has put forward an alternative quotation for the replacement of the windows at a cost of £2,500, by a reputable company. The Respondent has not put forward any justification for the proposed cost of £7,826.05, other than that this is the cost (including scaffolding) that it has calculated for all of the Flats at Wickets Tower.
- 64 The refurbishment of Wickets Tower came about as a result of the 'Decent Homes Initiative'. It is worth noting that this is not a statutory requirement, and does not apply to private housing, but it has enabled local authorities to upgrade the fabric of their housing stock. However, the funding rules are such that the local authorities are not permitted to fund these works for tenants under long leases. The extensive works which have taken place involved (among other things) the provision of an insulated render to the exterior, the balcony upgrades already referred to and the replacement of the uPVC windows. Scaffolding was required to carry out this work, and the cost of this (and no doubt other 'preliminaries') has been apportioned across the various elements of the work to arrive at the figures shown on the Schedule attached to the section 20 Notice.
- 65 However, the remainder of the works have now been completed. Because of the Applicant's refusal to allow the replacement of her windows the Respondent has, effectively, worked round the Applicant's Flat. The scaffolding has now been removed, the Applicant's original windows remain in place, and her balcony also remains unenclosed. The Respondent if it had wished, could have applied to the Court for an injunction requiring access for the work to be done. Indeed, it threatened such a course on more than one occasion. However, it did not do so, and simply left the Applicant's existing windows in place, and the balcony unenclosed.
- 66 The Tribunal finds, on the basis of the above, that the window replacement at the Applicant's Flat can now only be looked at as a 'one off' project. Looked at this way and applying the tests identified by P H Clarke in *Hyde Housing Associated v Williams* the Tribunal finds, when considering all of the

evidence, that although the Respondent retains the legal authority under the Underlease to carry out works of repair and renewal to the windows in the Applicant's Flat, it would not be reasonable, in view of the surveyor's report, for the Respondent to exercise that authority and insist upon the replacement of the windows. The report makes it plain that they have a further economic life of 10-15 years and the Tribunal has seen no evidence from the Respondent that counters this opinion.

- 67 Accordingly, the decision of the Tribunal is that, if costs were incurred by the Respondent in replacing the windows at the Applicant's Flat, no service charge would be payable by the Applicant.
- 68 If the above is wrong, and it was reasonable for the Respondent to insist that the windows are replaced, the Tribunal finds that the cost in respect of the window replacement would only be reasonably incurred as to £2,500, for the following reasons.

01. The evidence before the Tribunal is that a reputable contractor can do the work for this sum. Had the Respondent not chosen to 'work round' the Applicant's Flat when proceeding with the remainder of the major works project, but instead obtained the necessary legal authority in the form of an injunction to require that the Applicant's windows were replaced at the same time as all of the other windows at Wickets Tower, the Tribunal might have taken a different view. However, in the situation that now exists, i.e. looking at the question of the cost of the replacement of the windows on a 'one-off' basis, there can be no justification or need for the use of scaffolding or mast climbers, and there is no evidence before the Tribunal that a sum of £7,826.05, or anything like it, would be reasonably incurred.

02. The counter argument is that the Applicant has unlawfully refused the Respondent's contractors entry to carry out the window replacement and that therefore, she ought to be obliged to pay through the service charge the sum of £7,826.05 in the same way as the other 14 leaseholders. This is because within the sum of £7,826.05 there is an amount added to the actual window costs as the contribution of the Applicant towards the costs of the scaffolding and other preliminaries and it would be unjust if the Applicant were to be able to escape her share as a result of an unlawful act. However, the Tribunal does not consider this to be the correct approach. All of the other 14 leaseholders have consented to the balcony improvement, and the improvement work and the window replacement have in respect of their Flats been carried out as part of a single project. It could be said that the window replacement should have been looked at in isolation, and not have had the additional costs added to it, because it is abundantly clear that, in order to replace the windows on their own, there is no need for scaffolding, as the balcony itself provides any external access required for the installation at the rear and the front windows could be replaced from within the flat.

03. Whatever the merits of that argument, however, in the present case the factual situation is now as follows:

(a) There is an application before the Tribunal under section 27A (3) for a determination whether, if costs were incurred for the replacement of the windows at the Applicant's Flat, a service charge would be payable.

(b) The Tribunal has found that a service charge would be payable. Section 19 of the Act requires that, in determining the amount of the service charge relevant costs shall be taken into account only to the extent that they are reasonably incurred.

(c) The Respondent accepts that the costs of the associated improvement works of enclosing the balcony are not service charges as the lease does not permit improvements to be carried out under the Respondent's repairing covenant.

(d) The remainder of the major works to Wickets Tower, of which the balcony improvement and window replacement are a part, have been completed and the contractor has left the site.

(e) The window replacement can therefore now only be looked at as a one off project. It is no longer appropriate to consider it as part of the Respondent's 'pan stock' needs and there is clearly no need for scaffolding to accomplish the task. The Applicant has provided a quotation from a reputable contractor that the windows replacement can be carried out for £2,500.

The Routine Service Charges

69 In accordance with the Tribunal's Directions, the Respondent had prepared a Scott Schedule in respect of the service charge years in dispute, which was completed by both parties. Bundles were also provided containing the invoices and written submissions of the parties.

70 The Hearing in respect of the Routine Service Charges took place on 2nd October 2014 at the Tribunal's Hearing suite in Birmingham. This was attended by the Applicant personally, and on behalf of the Respondent by Mr Justin Bates of Counsel, Mrs Helen Kiteley (solicitor), Ms Nicholls (Leasehold Manager) and Mr Taplin who is responsible for managing 'major works'.

71 In the event, the Applicant's challenges to the service charges she has been charged for were, in broad terms, the same for each year in dispute. Accordingly, at the Hearing the submissions of the parties were made on an item by item basis, covering all of the years in question, as set out below.

Day to day Repairs

72 The following Table shows the amount charged to the Applicant in respect of day-to day repairs during the service charge years in dispute.

Year	Leaseholder contribution
2007/2008	£211.72
2008/2009	£219.96
2009/2010	£159.93
2010/2011	£167.80
2011/2012	£74.70
2012/2013	£145.04

73 The Respondent disclosed that the system in operation for dealing with day to day repairs is that, under a qualifying long term agreement, in respect of which consultation under the Consultation Regulations was made, a contractor appointed under the agreement carries out all of the repairs to the Respondent's housing stock, or a large geographical area of it. The service is

responsive, so that when the repairs reporting service call centre receives a complaint from a resident in a particular block it is logged and the contractor carries out the repair. The pricing for each job is now derived from a 'Schedule of Rates' but in the early years it was on a fixed rate basis. Accordingly there are no individual invoices for each job. The system is known as 'bucket pricing'. There are no doubt instances where an individual job would have cost less, but in general the Respondent is satisfied that the system provides good value for money.

- 74 The job sheets for Wickets Tower were all disclosed by the Respondent at an early stage, but, according to the Respondent, the Applicant has made no challenges to any particular item. However, during the Hearing it became apparent that more details and submissions about a number of issues were required from the parties, and as part of this exercise, the Applicant made a number of queries on the job sheets for each year. In fact she raised queries for job sheets as far back as 2002, but there are a number of queries also in respect of each of the years from 2007/2008 to 2012/2013. The Tribunal has no jurisdiction to consider service charge items occurring before 1st April 2007.

The general point being made by the Applicant is that there is a lot of repetition or duplication, and it is all too easy for another block's issues to be charged to Wickets Tower, and for matters which ought to be the responsibility of individual occupiers being charged through the system.

- 75 Mrs Nicholls acknowledged at the Hearing that there might be the odd mistake made, but the Respondent's staff do their very best to ensure that only those charges properly payable in respect of Wickets Tower are included within the service charge. Mr Bates said that the Tribunal should consider the question of proportionality. The overall annual cost for each year is in fact very modest.
- 76 One item of particular concern to the Applicant is that, contrary to the information given by Mrs Nichols at the Hearing, the day to day repairs are charged when there is damage from a fire. The Applicant highlighted a number of such instances, but only one, on 2nd May 2008, is within the period of the dispute. On this occasion the sum of £185.35 was charged for reinstating the communal lights after a fire.
- 77 The Applicant also makes particular reference to items on the job sheets such as asbestos removal (she says that all residents were informed in 2002 that there is no asbestos in Wickets Tower), balcony repairs, smashed doors, replacing 'slab' opposite the shop, repairs to garages etc. She has marked the job sheets, for all the years in respect of which they were supplied with queries and comments of this type.

The Tribunal's Decision regarding the day to day repairs

- 78 The Tribunal accepts the evidence of the Respondent that it does its utmost to ensure that all of the day to day repairs are properly allocated. Whilst the Applicant has raised queries about a number of individual items for each year, these were only raised in the post Hearing submissions, and not at a time which would have given the Respondent an opportunity to properly reply. The Tribunal notes that, for a development of this size, the annual repairs cost (which includes lift call outs) is relatively modest (less than £3 per week for 2012/13) and concludes that the 'bucket pricing' system in

operation appears to offer good value for money for the leaseholders. Accordingly, the Tribunal finds that the day to day repairs for all of the years the subject of the Application are reasonably incurred.

Repairs reporting Service

79 The following table shows the amount for the above service (termed Repairs Administration Cost for 2007/8) for each of the years in dispute.

Year	Leaseholder contribution
2007/2008	£30.16
2008/2009	£30.16
2009/2010	£17.53
2010/2011	£16.33
2011/2012	£16.42
2012/2013	£16.99

- 80 The Respondent explained that the above charges represent the cost of providing the day to day repairs call centre across the City; this being the point of contact for all residents (tenants and leaseholders) to report a defect or repair. The service is 24 hours, 365 days per year. The Respondent has calculated the cost to be charged to its leaseholders by dividing the total cost by the number of properties entitled to receive the service, and then halving this for the leaseholders, who, it is perceived, do not use the service so much as the secure tenants, as they can only report matters relating to communal areas. An additional monitoring fee is then added (see paragraph 81 below). For the first two years the charge was fixed at £30.16, this being the best assessment at the time. However, since then, it is recalculated on an annual basis, which has resulted in lower charges for the later years.
- 81 The Respondent submits, through legal submissions by Mr Bates, that the costs incurred in providing for this service, which are, effectively, staff costs in administering the scheme, are properly recoverable through the service charge. The annual cost for the whole of the city is approximately £1.9 million per annum. As explained above this is divided to produce a figure per property of £28.04 and then this is halved (i.e. £14.02). To this figure there is then added a 25% fee (£3.51 in 2009/10 with no significant differences for the other years). This fee is for 'Asset Management and Maintenance Overheads', which is the charge for monitoring the work of the call centre.
- 82 At the Hearing, the Applicant raised the point that she already pays a Management Fee, and ought not to have to pay further administration costs incurred by the Respondent in running its services. Mrs Nicholls explained that the Management Fee is for running her department. It is for the day to day management of the service charge, such as preparing demands, section 20 consultations demands, correspondence etc. The costs of 'on site' service such as the Repairs Reporting Service are not covered by the management fee, but, it was submitted by Mr Bates, part of the cost of the service itself.
- 83 In his written submissions of 13th October 2014, Mr Bates refers to the Lands Tribunal case of *LB Brent v Hamilton* [LRX/51/2005], in which the President (George Bartlett QC), found that as a matter of construction, a covenant to provide a service would include the costs of the officers who would need to ensure the service is provided. A Council can only act through its officers, it has to incur staff costs in the provision of the services and these costs are to

be paid by the leaseholders. The President also said that the context is important. A Council is compelled to grant a right-to-buy lease, at a substantial discount and at a nominal ground rent and it is unreasonable to expect the lease to convey a subsidy to the leaseholder in the provision of the services.

- 84 The *Brent* case was followed by *Norwich City Council v Marshall* [LRX/114/2007], where the President endorsed his earlier decision. These decisions was consistent with a decision of the High Court in *Wembley national Stadium Ltd v Wembley London Limited* [2007] EWHC 756 (Ch) [2008] 1 P & C R 3. The principal was again followed by the Upper Tribunal in *Palley v Camden LBC* [2010] UKUT (LC), where HHJ Mole QC considered the earlier cases and found that officer costs of the sort considered here should be allowed. The more recent cases of *Paul v LB Southwark* [2013] UKUT 375 (LC) and *Waverley Borough Council v Kamal Arya* [2013] UKUT 501 (LC) also confirm the principle. In *Waverley* Judge Roger QC (Deputy President) considered at [30]:

'It is clear from these authorities that, in principle, the costs incurred by a local authority (or by any other landlord) in arranging the provision of services, and managing their delivery, is properly to be regarded as part of the cost of providing the service which may be recovered from the tenants through an appropriately worded service charge covenant'.

- 85 It cannot be said that the costs in the present case are in any way remote from the services provided. There is not an attempt, for instance, to recover the cost of the Chief Executive's salary, but only those staff costs immediately superior in the 'chain of command'. It must also be said that the sums involved are very small and that there have been no comparative quotes or market prices put forward.
- 86 In separate submissions, the Respondent provided information as to how the 25% uplift for the 'Asset Management and Maintenance Overheads' is arrived at. For this service (and the caretaking service, in respect of which 15% added) the underlying principals are similar. In respect of both the added on costs are for the delivery and management of the services, rather than with the management of the leasehold arrangements, which is covered by the 10% management fee.
- 87 With regard to the uplift for Asset Management and Maintenance Overheads the charge covers the cost of management and administration of the repairs contract under which the repairs are delivered together with a contribution towards the less direct costs of this element of the service (including Finance, HR, IT systems and management of those services). The budget for Asset Management and Maintenance Overheads is £10million with about 70% of the costs being for the delivery of the revenue repairs service, which includes the leaseholders' repairs. Given that the overall budget for repairs managed by the team is £53million, the uplift for the repairs recharges due to the costs of this team amount to about 13%. The remaining 12% is for the 'less direct' elements of the service outlined above, and it is submitted, is somewhat less than the 20% typically added to other services, such as caretaking, cleaning and concierge.
- 88 It is submitted, therefore that the 25% uplift included within the service charge for the Repairs Reporting Service is reasonable and appropriate.

89 The Applicant, in written submissions, said that as far as she is concerned there is nothing in the Lease that requires her to pay additional management charges. The 5th Schedule to the Underlease states that the Service Charge is [] per centum of the aggregate of:

'(a) the cost of carrying out the provision of the services....

(b) Such sum after making allowance for reserves

(c) Management charge equal to 10% of the aggregate of the sums referred to in sub paragraph (a) and (b) above or Ten Pounds whichever is the higher'

The Tribunal's decision with regard to the repairs reporting service

90 The Applicant has not contested the underlying cost of the service, but objects to the 25% management charge included within it, on the basis that the Lease already provides for a management charge of 10%. The Tribunal is aware that in general, when considering the management charges in the private sector, the managing agent's fee will include an amount for the administration required in providing the services, and the leaseholder will not expect to pay an additional amount for administering different elements within it.

91 However, it is apparent from the authorities provided by Mr Bates, that the 'indirect' costs associated with the provision of the services are recoverable in 'an appropriately worded service charge covenant'. In the present case the Fifth Schedule to the Underlease uses the following words:

'The Service Charge shall be [] per centum of the aggregate of:

(a) the costs of carrying out the provision of the services and other heads of expenditure more particularly referred to in Clause 5 (b) hereof and Clause 3 (b) of the Headlease....

(c) a management charge equal to ten per centum of the aggregate of the sums referred to in sub paragraph (a) and (b) above or Ten Pounds whichever is the greater'

92 It is clear from the above that any percentage added to the actual cost of providing a service is then also subject to the 10 % management charge in paragraph (c), and so there is inevitably a double charge on those parts of the service charge which have attracted an 'administration' percentage. However, following the authorities, providing the Tribunal is satisfied that the percentage added is a true reflection of the actual cost of providing the services, this apparent double counting need not concern the leaseholders, because all that is being charged for is the true cost of delivering the services.

93 The Tribunal finds, upon reviewing the authorities provided by Mr Bates, that in principal the Respondent may include an amount within the service charge for its costs, in addition to the Management Fee. The Tribunal also accepts the submissions from the Respondent as to the composition of the uplift of 25%. Accordingly the Tribunal finds that the amounts charged for the repairs reporting service is reasonably incurred for all of the years the subject of the Application.

Ground Maintenance

94 The following table shows the amount for the above service for each of the years in dispute.

Year	Leaseholder contribution
2007/2008	£16.18
2008/2009	£16.22
2009/2010	£15.33
2010/2011	£16.01
2011/2012	£16.08
2012/2013	£26.14

- 95 The Respondent explained that grounds maintenance is carried out on a City-wide basis by its contractor. Areas in Housing ownership are recharged an appropriate amount. The amount allocated to Housing is then divided by the total number of properties that receive a ground maintenance service. The cost to the Applicant in the table above is 116th share of the amount allocated to Wickets Tower. It is submitted that this is the only practical way of charging for the service and the method is 'reasonable' as required by the Lease.
- 96 The Applicant submitted that the method of apportionment through the City was unfair and unreasonable, because the residents of tower blocks get less use from the landscaped areas than low rise. The charges should in any case be calculated on an estate by estate basis.
- 97 Upon being questioned by the Tribunal as to why there is an increase of £10 for 2012/13, Mrs Nicholls explained that the earlier years were mistakenly under charged, and that around £26 will be the norm from now on. She also said that the contract is for fortnightly grass cutting through the summer.

The Tribunal's decision with regard to Ground Maintenance costs

- 98 The Tribunal noted at the Inspection that the general condition of the communal areas was satisfactory. Although the Applicant's objections to the costs being apportioned on a city wide basis are noted, the Tribunal agrees in principal that the Respondent may choose the method it considers appropriate to carry out its duties under its covenant in the Underlease. The method chosen appears to produce a result that is satisfactory, and the Tribunal finds that the overall cost to the leaseholder of just over 50p per week for 2012/2013 (and less than that during the earlier years) to be reasonably incurred.

Building Insurance

- 99 The following table shows the amount for the above service for each of the years in dispute.

Year	Leaseholder contribution
2007/2008	£nil
2008/2009	£5.07
2009/2010	£91.77
2010/2011	£84.95
2011/2012	£87.02
2012/2013	£125.04

- 100 The Respondent explained that at the request of the Applicant and her late husband, their Flat was taken off the block policy in 2006, because they had

their own policy. This should not have been permitted, but in fact the Applicant's Flat was not put back on to the block policy until 2009. This explains the first two years in the table above. The insurance on respect of each block is arranged by the Council's insurance team on a cost per £1000 basis multiplied by the rebuilding cost of each block. There is a £100 excess on the policy, which is normal within the industry.

- 101 The Applicant considers she should be able to insure herself, as she and her husband were once permitted to. There is too much bureaucracy surrounding the insurance. Every time there is a leak, two estimates have to be obtained.

The Tribunal's decision with regard to the insurance premiums

- 102 The Applicant's request that the insurance is effected by herself is something which is not permitted by the Underlease, and is not something which the Tribunal would in any case be in favour of. The insurance of a Block such as Wicket's Tower should be carried out by the freeholder or the head lessor, and the amount of the premiums divided between the leaseholders and collected through the service charge. The fact that the Respondent permitted the practice in the earlier years is irrelevant to this consideration. The Applicant's objections are in any case more to do with the manner in which claims are dealt with, rather than the cost.

- 103 The Tribunal considers that the amount of the insurance premiums charged through the service charge are reasonable, although it is noted that there is a significant increase for 2012/2013. Notwithstanding this, the Tribunal finds that the insurance premiums are reasonably incurred for all of the years the subject of the Application.

Lift Maintenance

- 104 The following table shows the amount for the above service for each of the years in dispute.

Year	Leaseholder contribution
2007/2008	£13.93
2008/2009	£18.11
2009/2010	£9.01
2010/2011	£13.23
2011/2012	£15.34
2012/2013	£16.21

- 105 The Respondent says that the amounts in respect of Lift Maintenance consist of two elements. The first is the monthly safety and operation checks carried out by OTIS, which are charged on a block basis, and the second is an apportioned amount of public liability insurance emanating from the Respondent's Insurance Team. The costs of lift repairs are not shown under this heading. They appear in the jobsheets and are charged for under Repairs. There is no duplication of these charges.
- 106 The Applicant's challenge is, in effect to the additional costs she says were incurred by the contractors carrying out the Major Works. Even though they had mast climbers, they were continually loading heavy materials into the lifts and causing breakdowns. The Applicant said that the lift maintenance is not carried out very well.

The Tribunal's decision in respect of the lift maintenance

107 The Tribunal accepts the Respondent's submissions with regard to the lift maintenance. Although the Applicant is clearly of the opinion that problems with the lifts increased when the contractors were on site for the major works, any additional costs would, as the Respondent points out, be reflected in the day to day repairs, and not the maintenance contract or the public liability insurance. The breakdown between the two elements of the charge has not been shown, but the Tribunal nevertheless considers that the overall costs are reasonably incurred for all of the years the subject of the Application.

Caretaking Service

108 The following table shows the amount for the above service for each of the years in dispute.

Year	Leaseholder contribution
2007/2008	£213.21
2008/2009	£218.16
2009/2010	£114.80
2010/2011	£86.54
2011/2012	£81.49
2012/2013	£140.98

109 The Respondent provided spreadsheets for each year showing how the above charges were arrived at. The following tables show the relevant costs from these spreadsheets.

2007/2008

Caretaker: Ray Temple

Salary	£19,386.00
Clothing and uniform	£350.32
Cleaning materials	£219.24
Communications	£98.60
Other equipment	£1,452.32
Sub total	£21,506.48
15% Admin	£3,225.97
Block Total	£24,732.45
Cost per property (1/116)	£213.21

2008/2009

Caretaker: Ray Temple

Salary	£20,513.51
Other indirect cost	£1.51
Training	£15.08
Cleaning materials	£269.70
Vehicle fuel	£0.12
Vehicle running costs	£92.92
Purchase materials and supply	£39.98

Operational equipment and furniture	£628.37
Equipment maintenance	£16.24
Clothing and uniform	£334.32
Stationary	£0.12
Other purchased services	£65.42
Phones Non Centrex	£5.10
Phones Centrex network	£0.12
Mobiles/pagers	£9.05
Hospitality	£14.15
Sub total	£22,005.85
15% Admin	£3,308.88
Block Total	£25,306.73
Cost per property (1/116)	£218.16

2009/2010

Caretaker: Dirk Backhall

Salary	£9,820.41
Other indirect cost	£0.12
Cleaning materials	£835.55
Travel and car	£0.12 £0.05
Vehicle running costs	£92.92
Purchase materials and supply	£19.02
Personal needs	£0.12
Operational equipment and furniture	£443.93
Admin equipment	£228.40
Equipment maintenance	£8.24
Clothing and uniform	£300.79
Stationery	£0.58
Other purchased services	£62.64
Phones Non Centrex	£-79.82
Mobiles/pagers	£-60.32
Sub total	£11,579.71
15% Admin	£1,736.96
Block Total	£13,316.67
Cost per property (1/116)	£114.80

For the remaining three years the spreadsheets do not provide the incidental expenses in monetary terms, but in what appears to be a percentage. Accordingly the following tables are in an abbreviated format.

2010/2011

Salary	£7,397.74
Total devolved cost per	£1,331.91

block	
Sub Total	<u>£8,752.61</u>
15% Admin	£1,312.89
Block Total	£10,065.50
Cost per property (1/116)	£86.77

2011/2012

Salary	£7,024.67
Total devolved cost per block	£1,194.80
Sub Total	<u>£8,240.07</u>
15% Admin	£1,236.01
Block Total	£10,065.50
Cost per property (1/116)	£81.69

2012/2013

Salary	£6,961.67
Total devolved cost per block	£7,258.65
Sub Total	<u>£14,220.32</u>
15% Admin	£2,133.05
Block Total	£16,353.37
Cost per property (1/116)	£140.98

110 Mr Bates, in his written submissions of 13th October 2014, included the caretaking service with the submissions regarding the repairs reporting service, when considering the additional 15% administration added to the actual costs of providing the service. Accordingly they are not repeated here. The spreadsheets provided show the actual costs, which it is submitted are, (including the administration charge) all reasonably incurred and payable by the Applicant.

111 The Applicant submitted that the caretaking charge does not represent value for money. In earlier years there was a dedicated caretaker who did a good job, but the service now provided is poor. The Caretaking is only part time, but the amount charged is at full time rates.

The Tribunal's decision in respect of the caretaking service

112 For the same reasons as are set out in the paragraphs above relating to the repairs reporting service, the Tribunal finds that, on the basis of the authorities provided by Mr Bates that the principal of there being included within the costs a percentage addition for the Respondent's staff costs is established. The Tribunal also accepts that the amount of the percentage (15%) is a reasonable reflection of the true cost, from the Respondent's submissions on the subject.

113 The Tribunal notes that there has clearly been a decline in the level of caretaking throughout the period in dispute. During the earlier years there was one dedicated caretaker for Wickets Tower, but that now the service is shared with two other Blocks. The cost of the provision of the service has declined throughout the period to reflect this, with the exception of 2012/2013, where the cost is of the order of two thirds of the cost during 2008/2009, whereas the service has apparently declined to one third.

114 From the spreadsheets provided by the Respondent, the Tribunal notes the following:

(a) in 2009/2010 the amount for cleaning materials rose from £269.70 in the previous year to £835.55.

(b) in 2012/2013 the 'devolved cost' rose from £1,194.80 in the previous year to £7,258.65.

115 No explanation was given for either of these significant increases, and in their absence the Tribunal finds that the cost of the cleaning materials for 2009/2010 should be capped at £300, and the 'devolved cost' for 2012/2013 should be capped at £1,400. Accordingly the caretaking charges for the two years are adjusted as follows:

2008/2009:	Sub total	£11,579.71 reduced to £11,044.16
	15% admin	£1,736.96 reduced to £1,856.62
	Total	£13,316.67 reduced to £12,700.78
	Cost (116 th)	£114.80 reduced to £109.49

2012/2013:	Sub total	£14,220.32 reduced to £8,361.67
	15% admin	£2,133.05 reduced to £1,254.25
	Total	£14,220.32 reduced to £9,615.92
	Cost (116 th)	£114.80 reduced to £82.89

Management Costs

116 The following table shows the amount for the above service for each of the years in dispute.

Year	Leaseholder contribution
2007/2008	£59.01
2008/2009	£64.48
2009/2010	£58.03
2010/2011	£53.84
2011/2012	£41.85
2012/2013	£60.13

117 The Lease provides that the service charge shall include a management charge calculated at the rate of 10% of the other service charge expenses, and the above figures. The Respondent explained that this is the cost of administering the service charge costs, the provision of accounts and collection. It is submitted that the cost is very modest given the size of the

development and would be a considerably more in a commercially run development.

118 The Applicant submitted that the management provided is poor. There is no preference shown to leaseholders. The Applicant considers that it is unfair that there are other administration costs added by the Council (i.e. caretaking and the Repairs reporting Service), so that the total amount paid for administration is much higher than the management fees shown on the accounts.

The Tribunal's decision in respect of the management costs

119 In the Underlease the management charge is stipulated to be 10 per centum of the costs of providing the services or £10, whichever is the greater. The method of calculation level of the management fees is therefore a matter which has been agreed, and it is outside of the Tribunal's jurisdiction to adjust the 10% fee added in each year. However, where there has been an adjustment to the level of the service charge, the amount of the management charge must also be adjusted.

The 20 C Application

120 At the Hearing the Respondent confirmed that it is not its policy to include in the service charge its costs in dealing with challenges to the service charges, and would not oppose the granting of the section 20 Application. Accordingly the Tribunal makes the Order requested by the Applicant in the Application.

Appeal to the Upper Tribunal

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

Judge W J Martin