



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

**Case Reference** : CHI/00HP/LSC/2016/0067

**Property** : Compton Grove, 11 Nairn Road,  
Canford Cliffs, Poole, Dorset, BH13  
7NF

**Applicant** : Mrs M E Jay (Flat 2)

**Representative** : -

**Respondent** : Compton Grove Management Limited,  
Mr J O and Mrs P M Adams (Flat 1),  
Mr J T Stone (Flat 3), Mr A R M and  
Mrs M J Robertson (Flat 4), and  
Bayline Investments Limited (Mrs S  
Bell) (Flat 5)

**Representative** : Foxes Property Management Ltd

**Type of Application** : Service Charges : Section 27A of the  
Landlord and Tenant Act 1985 ("the  
1985 Act")

**Tribunal Members** : Judge P R Boardman (Chairman) and  
Mr P D Turner-Powell FRICS

**Date and venue of  
Hearing** : 9 November 2016  
Hearing Room 2, Poole Magistrates  
and Tribunals Centre, The Law  
Courts, Civic Centre, Park Road,  
Poole, Dorset, BH15 2NS

**Date of Decision** : 11 November 2016

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**DECISION**

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## Introduction

1. The documents before the Tribunal are in a bundle comprising 26 sections, each with its own tab (from A to Z) and its own pagination. The section behind tab D has a pagination starting with "A". References in this decision to page numbers (such as A31, B10, D A213, and so on) are to page numbers in those sections, unless otherwise appears
2. In a previous decision relating to this property dated 7 October 2015 (pages P1 to P11) the Tribunal found that :
  - a. the landlord is responsible for maintaining renewing replacing and keeping in good order and substantial repair and condition the main structure of the building, including the main structure of the balconies : clause 6.4.1.1 of the lease of Flat 2 (page J13)
  - b. the balustrades and panels of each of the balconies, including the balconies of Flat 5, are part of the main structure of the balconies, and that the only part of the balconies which are not part of the main structure, but are the leaseholders' individual responsibility, are the surface tiles : clause 2.6.7 (page J3)
  - c. the cost of works carried out in accordance with the landlord's responsibility for maintaining renewing replacing and keeping in good order and substantial repair and condition the main structure of the balconies are therefore costs which can in principle be included in the service charge payable by the leaseholders : clause 5.2.2 (page J6)
  - d. whilst the surface tiling is not part of the main structure of the building as such, if the landlord had to disturb the surface tiling in order to repair the balconies, then the landlord would have a responsibility to make good, and, again, the cost of doing so could in principle be included in the service charge payable by the leaseholders : clause 5.2.9 (page J11)
3. The Tribunal made no findings in that decision in relation to the reasonableness or otherwise of any of the proposals for the actual works to be carried out to remedy the current problems with the balconies
4. This application is, as stated in the application form, for the Tribunal to decide :
  - a. whether the costs of the proposed actual works are payable by the leaseholders by way of service charge
  - b. in particular :
    - whether the works amount to a repair or an improvement
    - whether the consultation procedure required by section 20 of the 1985 Act has been complied with

## **Mrs Jay's statement 23 August 2016**

5. Mrs Jay stated that the proposed works were identified in a planning application dated 1 June 2016
6. Mrs Jay was challenging the amount, and was seeking a determination from the Tribunal as follows :
  - a. could the proposed works be regarded wholly as a repair, as required by the lease, and could the landlord charge the leaseholders through the service charge
  - b. or, could the proposed works, not being like-for-like, be regarded wholly as an improvement, thus obviating the need for repair
  - c. if so, was it reasonable that the new balcony structures desired by the landlord (a company represented by the owners of the flats with balconies – at all times directors since this dispute arose) should be funded by those leaseholders with a preference for changing the appearance of the period style of the building
  - d. or could the proposed works be regarded as part repair (for example, replacing the wooden platform and the wooden supports on the first floor with a modern structure with steel supports) and part improvement (for example, replacing the wood and glass balustrades on the first and second floors with steel and glass balustrades, resulting in an improved outlook for the flats on those floors with balconies – there would be no visual improvement for the outlook for the two ground floor flats)
7. Mrs Jay was not happy that the procedure under section 20 of the 1985 Act had been conducted reasonably (pages A43, A45, A46, A119, A136, A293, A299, A300, A310, and A325 to A328)
8. The planning application dated 1 June 2016 showed a complete demolition of the balcony structure on the first floor, and a full replacement with a new design, which would not be a “repair” of the current structure
9. The proposed replacement of the balcony structures on the second floor was quite different. The only items needing “repair” were the balustrades themselves
10. Mrs Bell of Flat 5 had twice stated that she was willing to pay for her wish to replace her two balconies with a completely new design, and had specifically said that she did not wish to have a like-for-like replacement

## **Report by Peter G May, Chartered Surveyor, April 2013 (pages L4 to 14)**

11. Mr May described the construction of the balconies and the penetration of water, and set out his conclusions, including the following :

- a. the original design and balcony construction fell a long way short of the standard of work which should have been exercised
- b. the original specification and design should have foreseen and addressed the difficulty of preventing flat faced joints from opening and allowing water penetration
- c. in the long term there was no option but to undertake a comprehensive redesign of both the first and second floor balcony structures
- d. replacing them might cost in the region of £28500 plus VAT, of which at least 20% could be for the replacement of handrails and balustrades, and to which professional fees of at least 10% would be added
- e. the option of a comprehensive repair should be discounted
- f. the only course of action was complete replacement, which would offer the best and most cost-efficient solution in the longer term

**Letter from Mr May 11 December 2014 (pages L1 to 3)**

12. Mr May recommended that Elcock Associates Limited should produce plans and proposals

**Letter from Elcock Associates Limited, RICS Building Surveyors & Consultants, 18 March 2015 (pages M1 to 12)**

13. Mr Elcock described the building as a stepped structure, with the two penthouse terraces directly over the first floor flats' living area. The first floor balconies were suspended over the external patio area, not the ground floor flats' living area
14. The penthouse terraces were finished with tiles over an assumed concrete structure, with a parapet wall running to the external perimeter. Laminated softwood timber balustrades with glass infill panels located in front of the parapet wall provided fall protection. The posts were fixed directly to the concrete slab. The fixing arrangement was not known. There was an assumed bitumen based asphaltic product type membrane dressed up to the posts and covered with tiles
15. The first floor balconies were of a similar detail. However, the construction was a suspended timber frame, supported by three timber posts at ground floor level
16. There were reports of water penetration into the lower soffit areas
17. The timber posts and balustrades had weathered, resulting in the balustrades to the smaller penthouse terrace becoming split and dangerously unstable. The posts in other areas were also showing splits caused by water penetration. All the balcony and terrace posts were now beyond repair, and required replacement. Many of the balustrades had split, allowing water to penetrate to the sub-surface beneath, and to travel

across the sub-surface and present itself to the soffits below. The fixing of the balustrades and weatherproofing had failed, resulting in water penetration and visible rot and deterioration of the structural timbers. Given the age of the structure, it could be assumed that the felt was nearing the end of its expected life where exposed and subject to UV rays, which was contributing to the damp ingress. The ground floor posts were clearly rotting, and would have lost a degree of structural integrity. The posts ran through, without any visible breaks, to the first floor posts, which supported the balcony balustrading, so that the whole structure was dangerously weak, and sudden failure should be expected. The structure was a safety concern until the undertaking of temporary supporting repairs or full replacement works. The main issue with the posts was their location and fixing into the ground, which meant they were in direct contact with the moisture and subject to attack from the ground conditions. Ideally the ground surface and timber posts should be separated

18. Attached to the letter were photographs (at pages 1.25 to 1.29) and drawings (at pages 1.30 to 1.33) showing the floor areas of the balconies as they currently were, as well as several options. All existing terrace and balcony balustrading should be removed and replaced, as the existing arrangement was not safe, or satisfactory for remedial repairs
19. Options included :
  - a. removal of all existing timber balustrades and posts and replace with similar, with an improved weathering detail
  - b. installing a new frameless glass balustrade in the same location as the current balustrade
  - c. installing a new frameless glass balustrade over the parapet
20. The three timber posts supporting the lower balcony were clearly in need of replacement, and the attached detail showed steel shoes, so that the new posts were not in direct contact with the ground
21. A second option was to replace the ground floor timber posts with steel posts, supporting a steel beam running the width of the balcony
22. A budget figure was difficult to judge, and would depend on the works undertaken, but could be between £35000 and £50000

**Report by Castlemore Limited, Chartered Building Surveyors  
("Castlemore") (undated) (pages N1 to 6)**

23. The report stated that it followed an investigation on 13 November 2015. It expressed concern about various aspects of the design and construction of the balcony structure, and set out the following views :
  - a. the three main posts needed to be removed completely, redesigned and reconfigured with appropriate support mechanisms to suit a ring beam
  - b. the glulam might be salvageable depending on the support

- mechanisms provided on the new posts
- c. the joist support needed to be changed to structural engineer's approval
  - d. the fixings for the new balustrade might need to be introduced, as they appeared not to be very satisfactory
  - e. the white soffit board needed to be removed to provide access and to be renewed on completion
  - f. the weathering details to the posts needed to be reconfigured
  - g. the balustrade needed to be removed completely and reconfigured in a different position and from different materials; an anodised aluminium balustrade to match the existing stain colour might be a good compromise between differing views, allowing smaller and fewer posts, and very little maintenance
  - h. the gutter section on the deck needed to be changed, and proper sized weir outlets and downpipes needed to be installed, with better designed edge detail; the fascia design might be saved or renewed
  - i. the upper balustrades to the penthouse flat should be in keeping with the lower balconies, and anodised aluminium might be the way to go; the outlook through the balustrade would be vastly improved, maintenance would be reduced, and they could be designed into the roof slopes to improve the appearance, and to look more natural and flowing; the balustrades should be lifted onto the coping stones; that would need some structural consideration, but would lift the balustrades out of the water flow

**Report by Phillip Sanderson, Structural Engineer, 7 December 2015 (pages N7 to 14)**

24. Mr Sanderson stated that the purpose of his report was to ascertain compliance with building regulations of the existing structure. He noted, in note 4 of 7, on page 1 of 8, that "the temporary stability of the structure during all stages of construction is the responsibility of the contractor". Under various headings, Mr Sanderson listed numerous structural checks on various elements of the balcony, and commented that applied shear stress exceeded the permissible shear stress in relation to two of the elements, that the 170 x 50 timber joists failed to comply due to shear at the notches, and that the front glulam beams appeared satisfactory, but that they had a visible deflection which was not satisfactory, which suggested that the glulam beams were maybe "non standard" and of poor quality
25. Mr Sanderson concluded that the section sizes of the structural members were satisfactory, but that connections of members to each other did not comply with building regulations because of excessive section reduction at joints and supports
26. Mr Sanderson noted that the wall plates and fixings were sub-standard, and that the three timber connections were rotted at their base

27. Mr Sanderson recommended that additional supports and connection configurations were developed and installed

**Letter and notice by Foxes under section 20 of the 1985 Act dated 19 February 2016 (pages R4 to 5)**

28. The notice was entitled "Notice of intention to carry out work", and stated that the works to be carried out were the "repair and/or replacement of balcony structures"

**Structural calculations by I W Price & Partners, Chartered Engineers March 2016 (T2 to 26)**

29. The report set out various calculations

**Letter from Borough of Poole Planning and Regeneration Services 5 April 2016 (pages T29 to 30)**

30. The letter gave the following pre-application advice

31. The proposal would replace the existing balcony balustrades and screens with balustrades/screens of a different design because of the deterioration of the existing wooden ones

32. The Borough of Poole considered the style and design of the proposal acceptable

33. All balustrades/balconies would need to be replaced at the same time, in order to minimise the impact on the street scene and character of the area

34. Subject to that, the Borough of Poole was likely to look favourably on a formal planning application for the work

**Tender Report by Castlemore 13 May 2016 (pages O1 to 4)**

35. The report stated that it was suggested that the specification for the new balustrade posts be adjusted from stainless steel to galvanised steel, as the powder coating would not stick so well to stainless steel

36. The two lowest tenders were G R Westbuild (£57625) and Drewsons (£61694). Castlemore recommended awarding the contract to G R Westbuild, whose tender price was made up as follows :

Prelims	5600
Contingency	2500
Site set up	-
Strip out first floor balcony	3840
Replace second floor balcony	13180

First floor balcony replacement	32505
Completion works	<u>incl</u>
Total	57625

37. In addition there would be VAT and fees, which Castlemore listed, making a combined total of £79772.56

38. The next stage would be to undertake the section 20 consultation, based on those figures, and to submit a planning application

**Letter and notice by Foxes under section 20 of the 1985 Act dated 23 May 2016 (pages D A328 to 331)**

39. Accompanying the letter was a statement of the estimates received, and a notice accompanying the statement of estimates. The parties did not draw this letter and notice to the Tribunal's attention during the hearing, but the Tribunal have noted it during a perusal of all the documents after the hearing

**Letter from Borough of Poole Planning and Regeneration Services 1 June 2016 (Page D A337)**

40. The letter was addressed to the "owner/occupier" of Flat 2, and stated that a planning application had been received for the "replacement of timber and glass balustrades and balcony structure"

**Letter from Castlemore to Foxes 23 September 2016 (page X1)**

41. The letter stated that Castlemore's opinion was that the balcony structure and balustrades should be replaced. The existing timber balustrades and handrails had failed after only twelve years, and did not meet any of the necessary structural requirements. The new balustrades would be in stainless steel for cost, strength durability and low maintenance. They would require little or no maintenance and should last in excess of forty years, and were suitable for a coastal environment. The new balcony structure would have steel beams, with proper bolted joints and bearings for the platform to be structurally sound

**E-mail from Castlemore to Foxes 10 October 2016 (page X2)**

42. The e-mail referred to a "quote from a reputable joinery company that can make the balustrades in oak". The length was 27.5 m, which, at a cost of £765 a metre, would cost a little over £21000, for just the balustrading, and did not include the new structure over the ground floor terrace

43. The e-mail stated that "The costs for the equivalent in the tender price is item 5.4 (second floor balustrades) – at a cost of £8500 – and item 6.2 (remaining balcony structure and balustrades) at a cost of £24285



(£21275 + £3010). However, this cost also includes the structure, which is not included in Longman's price)"

44. It went on to state that it was impossible to ascertain what proportion the lowest contractor had allowed for the structure and balustrades individually. However, the length of the second floor balustrades was 14.5 m. At a rate of £765 a metre that was equivalent to £11092, in comparison with the tender figure of £8500, and that did not include any figure for decoration – about 30% more expensive. In theory that could also be applied to the length of the first floor balcony, namely about 13 m, giving a cost of £9945
45. If timber were pursued, it was recommended that the structure still be constructed in steel, in which case it would have to be clad in oak to match, further increasing the cost of installation and maintenance

### **Statements by the parties**

46. The Tribunal has also considered carefully the following statements and accompanying documents :
- a. a statement by Mrs Jay 23 dated August 2016 (pages C1 to 5) and accompanying documents (pages D A1 to 366):
  - b. a statement by Compton Grove Management Company Limited initially dated 15 September 2016, but amended, with references to page numbers in the bundle of documents, on 8 November 2016 (pages E1 to 9)
  - c. a statement by Mr and Mrs Adams accompanied by a letter dated 12 September 2016 (pages F1 to 3)
  - d. a statement by Mr Stone dated 6 September 2016 and accompanying documents (pages G1 to 36)
  - e. a statement by Mr Robertson dated 18 September 2016 and accompanying documents (pages H1 to 84)
  - f. a response by Mrs Jay dated 7 October 2016 (pages Y1 to 11)
  - g. a letter from Mrs Jay dated 23 October 2016 and accompanying documents (pages Z1 to 20)

### **Inspection**

47. The Tribunal inspected the property on the morning of 9 November 2016. Also present were Mr and Mrs Jay, Mr K Lyons and Mr L Baker of Foxes Property Management, Mr M Thomas of Castlemore, and Mr Robertson. The parties told the Tribunal that Mr Adams was unwell, and that Mr Stone was going to hospital that day, so that neither would be attending the inspection. Mr Bell, the son of Mrs Bell, gave the Tribunal access to Flat 5, and Mr Robertson gave the Tribunal access to Flat 4
48. The Tribunal inspected the two balconies of Flat 5 on the second floor, and the balcony of Flat 4, on the first floor, and looked over the dividing wall to the balcony of Flat 3

49. Each of the balconies had balustrades, each constructed of laminated softwood in two joined vertical sections. Between the balustrades, and fixed to horizontal softwood supports, were glass panels, although two panels and one of the horizontal supports were missing in the east-facing balcony of Flat 5. The balustrades at the front of the balconies of Flats 3 and 4 were showing signs of bowing
50. From the garden, the Tribunal inspected the three vertical supports for the balconies. Again, they were each constructed of laminated softwood, but in three joined vertical sections, anchored at the base through the terrace tiles, and fixed to the horizontal beams of the balconies, those beams being again each constructed of laminated softwood, but in three joined horizontal sections. Mr Thomas pointed out where he had removed two sections of the white plastic soffit, one section near the wall of Flat 1, and one section near the front under the balcony of Flat 3. He drew the Tribunal's attention to some cracking where the timber joists had notches at the joints with the perimeter beams. He pointed out that there were only six fixings attaching the rear perimeter beam to the wall of Flat 1
51. The Tribunal also noted that the lower horizontal beam of Flat 3's balcony appeared to be slightly bowed, and that the plastic soffits under the balconies of both Flat 3 and Flat 4 were also showing signs of bowing
52. The Tribunal otherwise found the condition of the balconies to be as outlined in Mr Elcock's report

### **The hearing**

53. Those attending the hearing were Mr and Mrs Jay and Mrs Jay's daughter, Mr Lyons, Mr Baker, Mr Thomas, Mr and Mrs Stone and their son, and Mr and Mrs Robertson. Mr Stone said that he had just come out of hospital. The Tribunal summarised what the Tribunal had seen on inspection that morning. No one attended the hearing on behalf of the owners of Flats 1 or 5
54. The Tribunal suggested that the papers indicated that the issues before the Tribunal were :
  - a. whether the cost of the proposed works would be payable by way of service charge, which required the Tribunal to ascertain whether the proposed works were reasonable, whether the proposed costs were reasonable, and whether the works fell within the relevant provisions in the lease entitling the landlord to include costs of works in a service charge
  - b. whether the landlord had complied with the consultation requirements in section 20 of the 1985 Act
55. The parties agreed, and also agreed that the relevant provision in the lease of Flat 2 (pages J1 to 23) was paragraph 6.4.1, which provided as follows (page J13) :

## **Clause 6 (Landlord's covenants)**

*6.4.1 .....the Landlord will maintain renew replace and keep in order and substantial repair and condition:*

*6.4.1.1 the main structure of the Building including the foundations and the roof thereof with its gutters and rain water pipes and the main structure of the balconies*

56. The parties confirmed that for the purposes of these proceedings the material parts of the leases of the other flats were in the same terms
57. Mr Jay also referred to paragraph 6 of the Third Schedule (page J20), as a minute of an AGM on page D A196 had recorded advice that paragraph 6 of the Third Schedule to the lease gave the landlord power to alter the property but without any ability to recover any costs from leaseholders in doing so. However, the Tribunal indicated that paragraph 6 of the Third Schedule to the lease merely gave the landlord power to alter adjoining property, and not the building of which the flats formed part, and that it therefore did not apply to the proposed works
58. Mr Thomas outlined the balcony defects as set out in the reports of Mr May, Mr Elcock, Mr Sanderson, and Castlemore, and in the calculations by Mr Price. Repairing was not a viable option in all the circumstances. Replacement of the balcony structure and balustrades was the only viable option. Theoretically that could be done entirely in wood, as at present, but it would need to be in hard wood, not softwood as at present, and that would be considerably more expensive to install than steel, and would require frequent and costly maintenance, whereas steel would not
59. Mr Jay said that he accepted that repairing was not a viable option, but did not accept that replacement in wood, on as much of a like-for-like basis as building regulations would allow, would be more expensive than the proposed works. The proposed works incorporated considerable improvements of benefit to other flats, but not to Mr and Mrs Jay's flat. An example of this was the reference in Castlemore's notes on page N6 to the outlook through the penthouse balustrade being "vastly improved", whereas the outlook from the ground floor flats would not be improved at all
60. Mr Thomas said that replacement in wood would itself be an improvement, because the existing wood was softwood, whereas it would have to be replaced with hardwood. However, hardwood would be much more expensive than the proposed combination of wood (for joists) and steelwork (for framework, posts and balustrades). The proposal had changed slightly, in that the steelwork would be galvanised steel, not stainless steel, because the proposed powder coating (matching the current wood colour) would attach better to the former than the latter
61. When asked by the Tribunal for comparative costings for replacement with wood only and replacement with the combination of wood and steel,

Mr Thomas said that he could calculate it. The Tribunal therefore adjourned for an early lunchbreak to enable Mr Thomas to do so

62. After the lunchbreak, Mr Thomas produced some manuscript calculations about the comparative costs so far as the balustrades were concerned. Mr Jay considered them and confirmed that he had no objection to the Tribunal admitting them in evidence
63. Mr Thomas said that the total length of the balustrades was 27.5 m. The cost of wood installation was £765 a metre. The cost of steel installation was £629 a metre, a difference of £136 a metre. Installation in wood would therefore be £3740 (27.5 x £136) more expensive than steel installation, and, in addition, wood would require redecoration every three to four years at a cost of £3370 plus VAT each time (estimate from L & S Finishes dated 4 October 2016 at pages W1 to 3)
64. Mr Thomas said that he did not have evidence about the comparative costs of replacing the balcony structure in wood on the one hand and, in accordance with the current proposals, in a mixture of wood and steel on the other hand, but the former would be more expensive. The total cost of the proposed works, ie balustrades and structure, would be £57625 plus VAT plus fees, making a total of £79772.56, as set out in Castlemore's tender report at page O3. When asked why there was a difference between the figure of £57625 at page O3 and the figures in Castlemore's e-mail dated 10 October 2016 at page X2, namely £8500 for the "second floor balustrades" and £24285 for "remaining balcony structure and balustrades", namely a total of £32785, Mr Thomas said that the difference was for the other elements listed at sections 6.3 to 7.2 of the tender document, which Mr Thomas said was not in the papers before the Tribunal, and that the figures at X2 were only for the purpose of working out the cost of the balustrades
65. Mr Jay said that the replacement should be on a like-for-like basis, which would be much cheaper. The earlier estimates in the reports by Mr May and Mr Elcock had been much lower than the current estimate of £79772, although, in answer to a question from the Tribunal, Mr Jay acknowledged that the earlier estimates had been for works only, and had not included fees. Mr Jay said that there were no costings for replacement of the structure and balustrades in wood. He did not accept that hardwood would be more expensive than softwood or steel. He had had a quote for the cost of the wood itself, which was about £3000 to £4000, but Mr Jay was unable to find it in the papers during the hearing. Once the consultation process had been properly undertaken in accordance with section 20 of the 1985 Act, Mr and Mrs Jay would like to nominate their own builders to quote for replacement in wood on a like-for-like basis, so far as that was possible under building regulations. They had not yet been able to obtain a quote to present to the Tribunal because they had been told that Foxes would have to obtain it. Mr and Mrs Jay were happy for the balustrades and structure to be replaced in accordance with the current proposals, but there was an element of improvement for which they should not have to pay, as it did not benefit them. The fact that

planning consent had been sought was an indication that the proposed work was neither a repair nor a replacement like-for-like. Mr Jay accepted that the balustrades should be replaced with hardwood, not soft wood, but said that the second floor balustrades could indeed be replaced with hardwood, not steel, which would mean that existing footings and fixings could be used, at less expense than adopting a whole new system in each respect. Mr Jay accepted that the recent opening up had revealed weaknesses in the balcony structure which made a stronger case for demolition, but it was not reasonable to be told of that only this morning. The obligation in clause 6.4.1 of the lease was to replace with like-for-like

66. Mr Lyons said that the notice of intention to carry out works dated 19 February 2016 (pages R4 and 5) had been stage one of the section 20 consultation procedure. Foxes were awaiting the Tribunal's decision before implementing the remainder of the procedure. Foxes believed that the existing structure could not be repaired. That meant that it had to be replaced. The current proposal fell within the wording of clause 6.4.1. The proposed works were reasonable, both in structural terms and in cost terms. Foxes believed that the current proposals would be cheaper than replacing in wood, both in installation and in future maintenance. There was no alternative quotation for a replacement in wood, because there would have been a significant cost in preparing a specification and seeking tenders in that respect. The fact that there would be some element of improvement did not itself mean that the proposed works fell outside the wording of clause 6.4.1, or that the proposed works were unreasonable
67. Mr Jay said that the structure and balustrades could be replaced in wood in a like-for-like manner, allowing for building regulations, and there was no evidence to support Foxes' contention that it would be more expensive to do so. Previous estimates by Mr May and Mr Elcock had been much lower, although Mr Jay accepted that further work was now necessary following the defects which had just been discovered
68. In relation to section 20, the Tribunal indicated that, if the Tribunal were to decide that the proposed works fell within the wording of clause 6.4.1 of the lease, and that they were reasonable, the Tribunal's decision in that respect would be subject to the remainder of the section 20 procedure requirements being complied with. Mr and Mrs Jay accepted that that would deal with their challenge in that respect
69. Mr and Mrs Jay confirmed their statement at section 9 of their application form (page A5), namely that they were not seeking an order for limitation of costs under section 20C of the 1985 Act

### **The Tribunal's findings**

70. The Tribunal finds that :
- a. the provision in the lease of Flat 2 which is relevant to this application is clause 6.4.1 on page J13
  - b. contrary to Mr and Mrs Jay's submissions, the test to apply to

determine whether the proposed works fall within the landlord's responsibility under clause 6.4.1 is not whether the proposed works constitute an improvement, in whole or in part, but whether they come within the wording of clause 6.4.1, namely an obligation to "maintain renew replace and keep in good order and substantial repair and condition" the main structure of the building, including the main structure of the balconies

- c. in clause 6.4.1 there is no *express* responsibility to carry out that obligation in a "like-for-like" manner
- d. contrary to Mr and Mrs Jay's submissions, there is no *implied* responsibility in clause 6.4.1 to carry out that obligation in a "like-for-like" manner either, in that :
  - it would have been very easy for the draftsman of the lease to have expressly included such a provision, if that is what the original parties to the lease had intended
  - on the contrary, the inclusion of the express word "renew" after, and in addition to, the word "replace" in clause 6.4.1 carries, by its natural meaning, the implication of something new, and not necessarily something exactly the same as before
- e. in any event, the parties have agreed that repairing the balconies and the balustrades is not a viable option, and that replacement is in principle the only viable option, and the Tribunal accepts that replacement on a "like-for-like" basis would not comply with current building regulations
- f. the payability of a service charge under section 27A of the 1985 Act is subject to the provisions of section 19 of the 1985 Act, in that "relevant costs shall be taken into account in determining the amount of a service charge.....only to the extent that they are reasonably incurred....."
- g. the two options in issue before the Tribunal are :
  - the current proposals by Castlemore, namely the replacement of the balconies and balustrades with a combination of steel and wood, for which the cost is set out at page O3
  - the alternative proposal by Mr and Mrs Jay, namely replacement in hardwood on as close to a "like-for-like" basis as building regulations will allow, for which there is no costing before the Tribunal
- h. in relation to Mr Thomas's assertion that Mr and Mrs Jay's proposal will be much more expensive than Castlemore's proposal, the Tribunal finds that :
  - the question of cost is only one factor in determining whether a cost has been reasonably incurred for the purposes of sections 19 and 27A of the 1985 Act; it is an important factor, but not necessarily a paramount factor
  - neither party has produced for the Tribunal a costing of Mr and Mrs Jay's proposal
  - however, Mr Thomas has calculated that the cost of replacing the *balustrades* in hardwood would be more expensive to install than the current proposal in steel (by some £3740) and more expensive to maintain (in that maintenance of the hardwood

option would cost about £3370 every three years, whereas the steel option would require very little maintenance)

- doing the best it can with very little evidence, the Tribunal finds that it is therefore more likely than not that the replacement of the *balcony structure* in hardwood would also cost more to install and maintain than the proposed replacement in a combination of steel and wood
- i. in relation to Mr and Mrs Jay's submission that the proposed costs set out at page O3 are more expensive than the figures mentioned in the reports by Mr May and Mr Elcock, the Tribunal finds that :
- those figures were only rough estimates, and were from as long ago as April 2013 and March 2015 respectively
  - they did not include VAT or fees
  - further investigations since Mr Elcock's report have revealed further defects on the balcony structure
  - Mr Elcock's estimate ranged from £35000 to £50000, compared with the figure of £57625 in Castlemore's tender report at page O3
  - the difference between Mr Elcock's higher figure of £50000 and the figure of £57625, namely £7625, is large, but not so large, in the context of the circumstances of this case, as to indicate that the cost of £57625, if incurred, would not have been unreasonably incurred
- j. having considered all the evidence before the Tribunal in the round with all the submissions by the parties, the Tribunal finds that :
- the replacement works proposed by Castlemore constitute a reasonable method of remedying the current defects in the balcony structure and balustrades
  - the proposed works fall within the landlord's responsibility to "maintain renew replace and keep in good order and substantial repair and condition" in clause 6.4.1 of the lease of Flat 2
  - the cost of £57625 plus VAT and fees, making a total of £79772.56, is the lowest tendered price, and is a reasonable cost for the works proposed
- k. the Tribunal's findings are subject to compliance with the full consultation procedure under section 20 of the 1985 Act

### **Application under section 20C of the 1985 Act**

71. Mr and Mrs Jay confirmed at the hearing that there was no application for an order under section 20C of the 1985 Act

### **Appeals**

72. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case

73. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision
74. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to admit the application for permission to appeal
75. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result which the person is seeking

Dated 11 November 2016

Judge P R Boardman  
(Chairman)