



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

**Case No** LON/00AY/LSC/2018/0085 &  
LON/00AY/LSC/2018/0117

**Property** Flats 1,2,4,5 and 6 Coligny Court,  
Calais Street, Lambeth London SE5  
9LR

**Applicants** : **Mr Owen Dignan and Others**  
Various leaseholders at Calais Court

**Representative** : **Ms Fatushin and others**  
Leaseholders at Flats 1,2,4,5 and 6  
Coligny Court

**Also in attendance** : **Mr Collard-Counsel**

**Respondents** : **Mr Legge**  
**Mr Holden**

**Representative** : **The Mayor and Burgesses of the**  
**London Borough of Lambeth**

**Also in attendance** : **Ms O'Brien-Counsel**  
**Mr Ahmed**  
**Ms Kellaway**  
**Mr Halpin**  
**Mr Hastwell**

**Type of Application** : **For the determination of the**  
**reasonableness of and the liability**  
**to pay a service charge**

**Tribunal Members** : **Judge Daley**  
**Mr M Taylor FRICS**

**Date and venue of** : **24 August 2018 at 10 am 10 Alfred**  
**Hearing** **Place, London WC1E 7LR**

**Date of Decision** : **09 October 2018**

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**DECISION**

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## **The application**

1. The Applicants (various leaseholders of Calais Gate) in Application No LON/00AY/LSC/2018/0085 and (various leaseholders of Coligny Court) in Application No LON/00AY/2018/0117 sought a determination under s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the reasonableness and payability of service charges in respect of major work.
2. An oral case conference was held on 10 April 2018 where Directions were given. The Tribunal made the following direction:- "(5) the applicants dispute the cost of major works on various grounds, including an alleged breach of Section 20B of the 1985 Act. They rely on a certificate of practical completion issued on 11 September 2015 and service charge demands issued more than 18 months later, on 25 September 2017. (6) The parties agree that both applications should be listed for a preliminary hearing to determine the alleged breach of Section 20B. However, it is not appropriate to consolidate the two applications as there may be different issues at subsequent hearings..."
3. The matter was listed for a preliminary hearing on 24 August 2018. The service charges relate to certain works carried out pursuant to a refurbishment project involving 101 properties. The total sum in dispute is approximately £575,000.
4. The Respondent is the freehold owner of the land known as Calais Gate, Cormont Road and Coligny Court, 30 Calais Street. Coligny Court comprises 9 1-3 bedroom residential flats, and Calais Gate comprises 48 1-4 bedroom residential flats.

## **The Hearing**

5. At the hearing the Applicants were represented by counsel, Mr Collard, the Respondent was represented by counsel, Ms O'Brien. The only preliminary matter was the addition of a page missing from the bundle page 196C.
6. The Tribunal agreed that the issue for this preliminary hearing could be summarised in the Respondent's Chronology and Submissions as follows:- (i) At what stage did the relevant costs become incurred costs

for the purposes of s20B LTA 1985 and (ii) Did any of the letters and communications sent by R to the applicants constitute a valid s 20B (2) notice to some/all of the leaseholders?

7. At what stage did the relevant costs become incurred costs for the purposes of s20B LTA 1985
8. In the Respondent's statement in response, the Respondent set out the following information concerning the scheme of major work:- 23. "... The works related to the roof, external repairs and redecoration, window overhaul and performance upgrade, asbestos investigations/removal, repair and or renewal of outbuildings, paths, fire escape stairs, rainwater goods, brickwork, stonework and communal decorations."
9. The Respondent further stated that -: The contract between the Respondent and its contractor Keepmoat Regeneration (Apollo) Limited... is described as "JCT Intermediate Building Contract with Contractor's Design (IDC) 2011 ("the North Area Contract") the sum was agreed at £2,833,786.63 subject to contractual deductions and increases, and was subject to standard JCT terms.
10. Counsel Ms O'Brien's primary submission was that the costs of the major work were not incurred until the Respondent had made the final payment of the retained sum .Counsel referred the Tribunal to a letter dated 19 December 2014, which had been sent as part of the Section 20 consultation process. The letter stated as follows:- "We originally wrote to you on 13 October 2014 enclosing an estimate of your service charges... I am sending you this letter to revise that estimate because the previous one did not take account of the major works we know are due for your estate...Your estate is due to have major works this year...in the attached we set out the estimate of your contribution... please note this is for information only it is not a bill..." Ms O'Brien stated that an identical letter was sent to the leaseholders of Calais Gate.
11. Counsel referred to *Burr-v- OM Property Management Ltd [2013] 1 WLR 3014*. She stated that the purpose of section 20B was that the tenant was not caught unaware by large bills which are stale, Counsel referred to Burr at paragraph 14-16:- "...The landlord or management company is entitled to reflect reasonable estimated costs in the service charge and the statute makes no provision for adjustment of estimated costs. 15. In my view, therefore, costs are not "incurred" within the meaning of section 18, 19 and 20B on the mere provision of services or supplies to the landlord or management company. Like the Upper Tribunal, I do not find it necessary to decide whether costs are incurred on the presentation of an invoice (or other demand for payment) or on payment. This interpretation accords with the natural and ordinary meaning of the words and is strongly supported by

*section 19(2). 16. I am not persuaded that the policy reasons advanced by Mr Burr compel or support a different meaning. I agree that section 20B was enacted in order to protect tenants from stale claims. But this merely prompts the question: what is the extent of that protection? On the conclusion that I have reached, the tenant enjoys the protection that, subject to 20B (2) he is not liable to pay so much of a service charge as reflects costs incurred more than 18 months after an invoice is presented or payment is made by the landlord/management company..”*

12. Counsel stated that the Respondent did not serve service charge demands in respect of the major work, as the costs were not incurred until they had been calculated; it was only at that point that costs became crystallised. Accordingly there could be no realistic calculation of the costs, until the final account was prepared by Pellings, the contract administrator.
13. In answer to a question from the Tribunal, Ms O'Brien accepted that the contract provided for interim accounts which were payable on a monthly basis.
14. She stated that it was a JCT Contract. Clause 4.7 provided that: "Subject to any agreement between the Parties as to stage payments, the due dates for interim payments by the Employer are: 1. For the period up to the date of practical completion of the Works, the monthly dates specified in the Contract Particulars; 2.a date not later than 14 days after the date of the practical completion;.3 thereafter, the specified dates at intervals of 2 months; and 4. The date of expiry of the Rectification period...the date of issue of the Certificate or making good..."
15. She stated that each of the twelve blocks had mixed tenure every block had leaseholders, as a result although there were interim bills, it was un- realistic to expect the sums paid to be broken down into chargeable and non-chargeable costs. Although it was not impossible for the charges to be broken down, this would require a significant degree of micro-management from both the local authority and Pellings which would add to the costs.
16. If the Tribunal accepted the interpretation of the Applicant, which was that the sums became due on payment of the interim demands, then this would give rise to difficulties when using staged contractor payments.
17. Counsel referred to *Phillips-v- Frances*[ 2015] 1 WLR, she stated that where there were possibly two interpretations of 20B the one which would led to practical difficulties was not intended by parliament. -: Sir Terence Etherton stated that-: "*The processes involved in statutory consultation are potentially time-consuming, expensive and slow. The*

*cost will inevitably be passed on to the tenants through the service charge. It is highly improbable that Parliament intended both the lessors and tenants to be encumbered in this way."*

18. The Tribunal asked why those problems could not be resolved by serving a Section 20B notice. Ms O'Brien referred the Tribunal to *Brent LBC-v-Shulem B Association Ltd [2011] 3015* this stated that -: "(ii) A written notification must tell the tenant that he will subsequently be required under the terms of his lease to contribute to the costs which the landlord states he had incurred by the payment of a service charge. It is not necessary for the notification to tell the tenant what proportion of the costs will be passed on to him nor what the resulting service charge demand will be..."
19. Counsel stated that where staged payments were being made serving a notice was not helpful as the notice required the landlord to state a figure. This would be as difficult as sending out a formal service charge demand. For example there were 2 1/2 years bills from sub-contractors to head contractor. To require the landlord to prepare a section 20 B (2) notice on that basis was not helpful, and would also not be an accurate calculation of the amount due. Sensible reading of section 20B is the root that the parties should take, which would mean using the reality of the JCT Contract and interpreting Section 20B to give effect to the working of the contract.
20. Counsel referred to paragraph 22 of the Respondent's Statement in response in which reference was made to *Brent Council -v- Shulem B Association Ltd [2011] EWHC*. The Respondent stated -: "...it is not necessary for the written notification to tell the leaseholder what proportion of costs will be passed on to the leaseholder nor what the resulting service charge demand will be. The Respondent avers that by sending the draft final account to the Applicants it has notified the relevant Applicants of the relevant costs incurred.
21. Ms O'Brien noted that the contract related not merely to chargeable work, but also to upgrades to tenantable properties where both the kitchen and bathrooms were being upgraded. This added to the complexity of the calculations needed in this case; as it would be necessary when calculating the sum due to determine whether the interim sums paid were for chargeable or non- chargeable work.
22. Counsel Ms O'Brien referred to the case of *Burr-v- OM Property Management Ltd [2013] 1 WLR* ("the Burr Case") at page 3074 G. In this case the Lands Chamber was considering an Appeal in which the landlord was contending that costs were not incurred for the purpose of section 20B until OMP actually paid the costs or at least until it was obliged to pay the costs, Judge Mole QC stated -: "... In the current case I do not think that it is necessary or desirable to try and determine whether costs are incurred when an invoice or certificate is served or

when payment is made. ( I am not necessarily equating an invoice and a certificate different considerations may well apply to them) I do not get much help from dictionary definitions of incurred. It is of greater assistance to recall that statute declares that it is 'costs' that are incurred which are relevant... A liability does not become a cost until it is made concrete, either by being met or paid or possibly by being set down in an invoice or certificate under a building contract..."

23. Ms O'Brien stated that the costs must only be 'incurred' when they are finalised, this was in her submission on payment of the retention sum held by the Respondent as the final sum due was not capable of assessment until this occurred. In the *Burr case* at the Court of Appeal, Lord Dyson MR stated:- Costs are incurred on the presentation of an invoice or on payment; but whether a particular cost is incurred on the presentation on an invoice or on payment may depend on the facts of the particular case. It is possible to foresee that where for example payment of an invoice has been long delayed the decision as to when the cost was incurred might be different depending on the circumstances; it might be relevant to decide whether the payment was delayed because there was a justified dispute over the amount of the invoice or whether the delay was a mere evasion of some sort..."
24. Ms O'Brien stated that the bill had gone considerably over budget and as such the Respondent would have had to calculate what these additional costs related to before it could go down the root of serving a Section 20B notice. She also referred to the fact that in the *Shulem B case*, the court noted that it did not have the actual contract before it. She stated that in this case, the contract was before the Tribunal and she invited the Tribunal to consider the actual contract terms.
25. Counsel referred to para 5.2 of her skeleton argument -: " The total cost towards which the applicants were bound to contribute was not an ascertained sum until the contract administrator issued the final payment certificate on 03.05.2017. Furthermore it could not realistically be described as an 'ascertainable sum' until Pellings issued the Final Account in relation to contracts 1 and 2 on 26.06.2016. In the premises, on either view, the s20B (1) demand was served within the requisite 18 month period."
26. Ms O'Brien referred the Tribunal to the terms of the building contract, and the fact that clause 4.7 referred to the sums as "interim payments". Clause 4.3 also dealt with adjustments to the contract. It was clear that the total price was not just a question of "totting up" the interim sums. Counsel submitted that if you could not say with certainty how much it costs how could you ascertain the service charge amounts that were payable?
27. The Tribunal asked when this point of certainty concerning the final costs of the work was reached in the submission of the Respondent.

28. Ms O'Brien submitted that the earliest point was when the final account was prepared which was 28 June 2016. The service charge demands were served 14 months after that. In support of this, counsel invited the Tribunal to consider the distinction between the final account, as described in the contract and the interim payment. The Tribunal was referred to *Chitty on Contract* where the distinction was drawn between payment of a debt and a claim for damages for breach of contract. There is an important distinction between a claim for payment of debt and a claim for damages for breach of contract. Counsel submitted that although the respondent was bound to pay the sum, the sum had yet to be ascertained and crystallised as a debt. She referred to Section 8, of the JTC Contract.
29. Counsel also considered the remedies in the contract for non-payment, and also how and if the contract could be terminated, and the fact that there was in the contract reference to the retention which would itself only be paid after the defect liability period.

*Mr Collard in reply on behalf of the applicant*

30. Mr Collard on behalf of the applicant stated that the purpose of section 20B was to ensure that the leaseholders were not taken by surprise. The applicants were not given notice of the costs that were incurred. The leaseholders wanted to know (i) how much the works cost and (ii) when it had to be paid. The Tribunal had heard from Ms O'Brien about the difficulties of providing the information; however the Tribunal should consider the fact that no evidence of these difficulties was presented to the Tribunal.
31. The Respondent had had 18 months in which to serve the demand or the notice and this was from when the last invoice was paid in January 2016. This work had been carried out, and the costs had been incurred either when the invoice was issued by the contractor or at the latest, when the invoice was paid.
32. Counsel, Mr Collard referred to *Shulem B-*: "...The parties do not agree that the lessor incurred costs in relation to the matters covered by certificates 1 to 7. The parties do not agree as to the precise date when the lessor should be taken to have incurred costs for the purposes of section 20B in relation to certificates 1 to 7. The dates suggested by the parties as the date when costs were incurred by the lessor in relation to a particular certificate are (i) the date of the certificate (2) the date of service of the certificate on the lessor; (3) the date of payment of the sum identified in the certificate (if paid within 28 days after the certificate)...The lessor accepts that whichever of the suggested dates is taken as the date on which costs were incurred, those costs were



incurred in respect of each of the certificates numbered 1 to 7 more than 18 months before the demand of 15 December 2006...”

33. Mr Collard invited the Tribunal to consider the contract provision, he referred to clause 4 which stated as follows-: *“4.7 1. Subject to any agreement between the Parties as to stage payments, the due dates for interim payments by the Employer are 1. For the period up to the date of practical completion of the Works, the monthly dates specified in the Contract Particulars; 2. A date later than 14 days after the date of practical completion; 3. Thereafter, the specified dates at intervals of 2 months; and 4. The date of expiry of the Rectification Period or, if later, the date of issue of the certificate of making good (or where there are Sections, the last such period or certificate)...3. Interim valuations shall be made by Quantity Surveyor whenever the Architect/Contract Administrator considers them necessary for ascertaining the amount to be stated as due in an interim payment...”*
34. Counsel, Mr Collard stated that Ms O'Brien sought to distinguish between the interim payment and the final bill, Mr Collard stated that it was enforceable by way of summary judgement. He referred to the fact that there was no dispute about the figure due to the contractor and paid as ascertainable amount.
35. Mr Collard submitted that it would have been possible to ascertain what was payable for each block and each lease. There were on going tallies. It would have been possible for the demand to have been served within 18 months. He stated that the Applicants had been keen to be provided with information about the costs of the major work. He stated that in August 2016 there was an attempt to obtain information from the Respondent concerning the final costs. However the costs were not finalised.
36. Counsel referred to *Urang-v- Century Investment Ltd [2011] EWHC 1561*, in this case the High Court were considering whether sums payable as interim payment were debts. In paragraph 26 Mr Justice Edwards-Stuart stated-: *“ The effect of these provisions, in my judgment, is that the amount stated in the certificate as due is a “sum due” under the contract and the employer must pay that sum on the date specified unless he has issued an appropriate withholding notice in time. In these circumstances, the contractor need do no more than prove the existence of a properly issued certificate. He does not have to prove that the valuation in the certificate is correct or that there are no other potential cross claims by the employer, such as, for example, a claim for defects. It may be, and I do not have to decide the point, that if the certificate discloses an error on its face or if it is shown that there is some other irregularity in relation to its issue, that the contractor may not be able to rely on it, without more, as establishing the sum due. However, since that is not the position in this case I need say no more about it. 27. Accordingly, I consider that the amount*

*stated in Interim Valuation No 10 was a "sum due" under the contract and that, since Century did not issue a valid withholding notice in time, there can be no defence to a claim for that sum( or any unpaid balance of it)."*

37. Mr Collard stated that the JCT Contract used in this case provided for any disputes to be raised on the interim sum. He referred to the lease and noted that the terms of the lease, are that the landlord has to notify the leaseholders of the sums to be incurred rather than the actual costs incurred.
38. In his Skeleton Argument at paragraph 11, Mr Collard stated:-: The Applicants' case under section 20B is that they are not liable for the costs of works invoiced and paid for between February 2014 and January 2016, more than 18 months before the demands dated 25 September 2017. Using the words of the section (a) relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge" was served on 25 September 2017: sub-section (1); and (b) the Appellants were not "within the period of 18 months beginning with the date when the relevant costs in question were incurred..."

***Whether the landlord served a notice in compliance with Section 20B (2) of the Landlord and Tenant Act 1985***

39. Mr Collard stated that the next issue was whether the sum was demanded within the 18 months, or notice was given in accordance with Section 20B (2). Mr Collard relied upon the witness statements and evidence of Mr Baker and Mr Legge, whom he tended in evidence to answer questions on the Applicants behalf.

*The evidence of Mr Baker*

40. Mr Baker informed the Tribunal that he was the representative of his wife who was a leaseholder. He was also a representative of Coligny Court. He informed the Tribunal that he had a meeting with Mr John Legge and Paul Halpin, (who was an employee of the Respondent) in August 2016.
41. In his witness statement ,he stated that he was a Commercial Property Manager employed by *Lambeth Living* He stated that on 3 July 2016 he made a formal complaint concerning the major work, which was subsequently followed by a "Stage 2 Formal Complaint" on 21 July 2016. As a result of a response to the formal complaint, Mr Halpin (who was new to the post) was asked to address the final account at a meeting. The meeting, which was attended by Mr Baker, Mr Legge and Paul Halpin the Project Manager on behalf of the Respondent, the meeting took place on Saturday 27 August 2016.

42. Mr Baker stated that Mr Halpin had an electronic version of a Spread sheet titled "Calais & Coligny Final Account", Mr Baker stated that it was difficult to understand as most of the monetary values added were against additional costs, as a result he stated that they could not easily understand or follow the sums and that as such the final cost reference was meaningless.
43. Mr Baker in paragraph 19-20 of his witness statement stated that:- 19. Following the meeting John Legge and I received from Paul Halpin the email below dated 27 August 2016 attached to which was the draft final account spreadsheet that we had been shown *"Thank you for your time this morning. Please find enclosed the final account for Calais & Coligny. Once you have had an opportunity to review please do not hesitate to contact me. Kind regards Paul"* 20. *There was no suggestion or expectation in this that the draft final account be sent on by me to anyone..."*
44. Mr Baker stated that he understood Mr Halpin would get some clarification of items of work as both he and Mr Legg thought that the sums set out in the final account were high as a lot of the work which had originally been included in the specification and Section 20 Notice had been omitted. He stated that Mr Halpin just provided them with a quick guide.
45. Ms O'Brien asked questions on behalf of the Respondent. She asked Mr Baker whether the document had been forwarded to anyone else. He stated that he had not personally forwarded it to anyone else although he understood Mr Legge to have done so. She asked whether it was described as "the document they had been waiting for". Mr Baker stated that it had been a spread sheet document which had been difficult to follow.
46. Counsel for the Respondent stated that it had been made clear that this was the final account. Mr Baker did not accept this proposition. He referred to the document which was entitled "draft final account".
47. Ms O'Brien asked whether the account had been explained. Mr Baker stated that he had been taken through it by Mr Halpin at the meeting on the 27 August 2016. This meeting had taken place following his complaint to Sue Gomer.

#### *The evidence of Mr Legge*

48. Mr Legge also provided evidence on behalf of the Applicants. Mr John Dormer Legge's witness statement was dated 3 June 2018. The Tribunal was invited to accept his witness statement as his evidence in chief. In his statement, he set out that he was the Chair of the Residents Association. In his statement at paragraph 10 he stated:- "The

spreadsheet was a draft/WIP of the 'final account' for the major works. It was not understandable to a layman, and there was no breakdown into what was chargeable to leaseholders, and no breakdown of costs by flat."

49. He provided a copy of the email dated 27 August 2016, which he had sent to six of the leaseholders who formed part of the resident's association for Coligny Court and Calais Gate. He had written:- Richard and I met with Paul Halpin this morning to look over the 'final' account for Calais & Coligny. It is not actually a Final Account for sign off because they have not yet cleared the defects liability period, paid retention monies etc. but Lambeth do it this way with adjustments later. It is also not yet final because Paul Halpin is going through it and talking with us today is part of that. As this is really all draft/WIP, it is best to keep within the Survey Group until things become clearer when we should then share with the residents. This is to avoid confusion and worrying folk..."
50. Counsel, Ms O'Brien asked why at the footnote costs had been given as Current 'final' cost £217,089.92 had been given. Mr Legge stated that he had understood that the costs could change significantly. He referred to the fact that there were two blocks of flats with different sizes which would pay different service charge amounts. As a result he could not be certain what would be paid by leaseholders.

#### *The evidence of Mr Paul Halpin*

51. Mr Paul Halpin provided details on behalf of the Respondents. His statement was dated 8 May 2018. He set out that he had been employed by the Respondent since July 2016. In his oral evidence, he set out that at the meeting he was trying to reconcile the items of work. He was also hoping that he would have further information from Pellings, not with a view to reconciling the final account but in order to provide background and context.
52. Mr Halpin was asked by Ms O'Brien why the words "draft" was placed before the final accounts as it appeared in brackets. Mr Halpin explained that this was because the defect liability period was still to settle. It was not a draft as far as the accounts were concerned.
53. Mr Halpin stated that he met with both Mr Baker and Mr Legge on 27/8/16, from 9am and that the meeting had lasted for approximately 2 hours. He personally did not consider that the accounts were hard to understand, however it was not helpful that the accounts were not in the same order as the specification.
54. Mr Halpin stated that he had worked within housing since 1997 and as such was familiar with such documents. He accepted that the accounts

would have been difficult for a lay person who was unfamiliar with such documents to understand. However by the conclusion of the meeting he had believed that he had explained and talked through to enable both Mr Legge and Mr Baker to understand it.

55. He considered that one of the main problems had been that the sums claimed were not in the same order as the original specification and that he had discussed the specification together with the omissions and additions. Mr Halpin referred to the email dated 27 August 2016, He was asked whether the Applicants had replied, he stated that he had not expected a reply as such he was sending the email to follow up on what he had promised to do at the meeting.
56. . In his statement at paragraph 7 he stated:- "... By sending the draft final account to the two spokespersons I was hoping that the breakdown of charges would be disseminated amongst the relevant leaseholders. I understand that generally that was the case as the Respondent received feedback on the contents of the draft final account."
57. Mr Halpin was asked why he had thought that the information would be disseminated. He stated that he had understood that they were representatives of the leaseholders who made up Coligny Court and Calais Gate, and as such, given this, and the meeting that they had he understood that it would go to the leaseholder group. In answer to a question from counsel, Ms O'Brien, he explained that he had thought that both his email and the attachment would be sent.
58. He was asked about Mr Legge's email in which he had set out that the draft account should not be shared widely at that stage. Mr Halpin did not accept that there was a reason for not sharing the document amongst the leaseholder group.
59. Mr Collard on behalf of the Applicants asked why it had not been sent to all of the applicants. Mr Halpin reiterated that it had been his understanding that it would be shared with the other leaseholders.
60. Mr Collard asked about a subsequent email that had been sent by Mr Baker on 10 November 2017, to which a response had been provided by his colleague David Ansah Major Works Co-ordinator.
61. Mr Collard drew his attention to two key matters set out in the response in particular in the first paragraph, Mr Ansah had stated:- "...The council acknowledges that in this particular instance we may not have notified you by way of a S20B notice within 18 months of the costs being incurred..." The email then continued by stating:- " However the Council's position remains that through the service of the S20 notice, emails, site meetings and correspondence on the matter you would be

aware of the council's intention to issue a service charge demand for the costs which the council have incurred undertaking works to your block or estate..."

62. Mr Halpin was asked why this email did not refer to the draft final accounts that had been served under cover of the email dated 27 August 2016. Mr Halpin agreed that this email had not been specifically referenced however he stated that the email had also not referred to a number of matters which had occurred which were equally relevant.
63. In his closing submissions, Mr Collard submitted that the email dated 27 August 2016 was not a notice sent in accordance with Section 20B (2). The documents which were sent were sent for the purpose of providing the leaseholder group with the opportunity to look at the documents and to discuss them. What was provided by the Respondent's office was a document which had figures as such it was not a notice, and was not sent to all of the leaseholders.
64. In support of this, the email sent by David Ansah did not claim that notice had been given.
65. Counsel referred to *Brent LBC-v- Shulem B Association Ltd* at page 3015, in which it was stated in the heading at Paragraph D-: "*A written notification must tell the tenant that he will subsequently be required under the terms of his lease to contribute to the costs which the landlord states he has incurred by the payment of a service charge. It is not necessary for the notification to tell the tenant what proportion of the cost will be passed on to him nor what the resulting service charge demand will be...*"
66. There was Mr Collard submitted no correct form of Section 20B notice given by the Respondent. He referred the Tribunal to a copy of a notice sent by the Respondent on 7 October 2016 in relation to the service charges for the year ending 2015/16. In the letter, Paul Halpin stated:- "*... We are unable to issue the certified summary of accounts as planned due to some delay in finalising your costs for the period...Enclosed is a Section 20B Notice, which is a requirement when we are unable to issue bills within 18 months of costs being incurred*" Mr Collard referred to the email from Mr Ansah as an acknowledgement that the notice had not been served. The letter included a draft summary of the service charges estimated to be due under each head.
67. In Reply, Ms O'Brien referred to her skeleton argument at 6.1 in which she stated:- "*... It is submitted that in sending the final account to the representatives of the leaseholders association on 27 August 2016 the lessor did notify the lessees in writing of the total costs towards which each lessee would have to contribute under the terms of their leases. Counsel further stated that:- "... it is clear at the least that this*

*notification was in fact received by the leaseholders of Flat 2, Coligny Court and Flats 5, 17, 35 and 46 Calais Gate... This first page clearly sets out the amount paid by R in relation to both Coligny Court and Calais Gate and also identifies the 'chargeable works' i.e. the works in respect of which the lessor could levy a service charge..."*

68. Counsel stated that the degree to which the information set out in the email dated 27 August 2016, came to the attention of the other leaseholders was, a matter of fact, however, notwithstanding the criticisms of the notice, it was effective in respect of 6 of the leaseholders.
69. Ms O'Brien stated that in respect of the email dated 27 August 2016, it was clear from Mr Legge's email that he was able to extract the relevant figure. In respect of Section 20 (2) (b) all that the leaseholder had to include was the cost that the lessee had to contribute to the service charges. Counsel referred to paragraphs 59 and 61 of *Shulem B*. in which it was stated that:- "*... On this reading , there will be a valid notification for the purposes of the subsection if the lessor notifies the lessee that it had incurred costs of £x on certain service charge matters without telling the lessee what sum the lessee will ultimately be expected to pay...It would be on doubt be of more use to a lessee to be told what sum it will be expected to pay by way of service charge but, in my judgment, the words of section 20B(2) do not clearly so require..."*
70. Counsel stated that she was not inviting the Tribunal to draw the inference that others received the notice those in group had. The leaseholders only needed to know how much the leaseholder had spent and that they will be required to contribute towards it.

### **The tribunal's decision**

71. The tribunal having considered the submissions of both parties have determined as follows:-
72. The Respondent by letter dated 16 December 2014 wrote to the leaseholders to inform them that the estate was due to have major works. The estimated costs of the major work were included in the letter. A copy of a letter sent to the leaseholders of flat 2 Coligny Court was included in the hearing bundle; the costs were in the sum of £30,217.34. The Tribunal heard submissions from counsel concerning the nature of the Contract; it was a JCT Contract which provided for interim payments which meant that by the time the Practical Certificate of Completion was served on 14 October 2015, a substantial amount of the cost had already been paid by the Respondent.

73. Clauses 4.6 and 4.7 of The Contract provided that advance payments were to be paid by the Respondent, The Contract provided that the contractor should be paid by way of interim payments. Clause 4.14 provided for the Final Certificate and The Final payment. Clause 4.14 1 stated that-: "The Architect/Contract Administrator shall issue the Final Certificate not later than 28 days after whichever of the following occurs last: 1. The end of the Rectification Period in respect of Works or (where there are Sections) the last such period to expire: 2. the date of issue of the certificate of making good under clause 2.31 or ( where there are Sections) the last such period to expire: 2.the date of issue of the certificate of making good under clause 2.31 or (where there are Sections) the last certificate to be issued or 3. The date on which the Architect/Contract Administrator sends to the Contractor copies of the statement and computations of the adjusted Contract Sum under clause 4.3.2. 2 The Final Certificate shall state 1. The Contract Sum as adjusted in accordance with 4.3.1: and 2. The sum of amounts already stated as due in Interim Certificates plus the amount of any advance payment paid pursuant to clause 4.6 and (where relevant) any sums paid in respect of any such Interim Payment Notice as is referred to in clause 4.8..."
74. Thereafter the Final account in relation to Contracts was issued by Pellings in the total sum of £6,738,836.61. The Defects Liability period expired on 11.09.2016, following this the final certificate for payment of the retention was issued by Pellings in relation to the contract on 3 May 2017.
75. Counsel Ms O'Brien contended in her skeleton argument that the service charge for the major works did not become payable until either 26 June 2016 (when the final account was issued) or on 3 May 2017 when the final payment certificate was issued. Accordingly if the Tribunal accepted this submission the claim for the service charges made on 25 September 2017 were made on time.
76. The Tribunal in reaching its decision has considered what is meant by relevant costs, and as such when those relevant costs become payable. The Tribunal in doing so has considered the use of the JCT contract and how and if it affected the time when the relevant costs became payable, The JCT contracts are explained as follows-: "*The JCT contracts avoid up-front payments from payers to payees. Instead, the payee invoices the payer once work has been certified as completed by an independent third party, the contract administrator (often an architect or surveyor). Often interim certificates are issued where itemised components of the work have been completed, or a verifiable percentage is complete. The JCT encourages retention of an agreed percentage of the contract sum until practical completion and then a percentage for a period after final completion. This avoids payment in advance for such things as minor defects or snagging which need to addressed at the end of the project or come to light after the project is complete. So the invoice at each point is a percentage of the value of the work certified complete. The payer can deduct an amount; however, under the 2009*



*amendments, the method for calculating the new amount must be stated...*  
**Joint Contracts Tribunal taken from Wikipedia, the free encyclopaedia**

77. JCT contracts are a standard contract used for larger projects which as stated above provides for interim payments. It is not unusual for such contracts to be used by local authorities, just as it is also fairly common for a large major works contract for a local authority, for the purpose of economy of scale, to provide for major work to be undertaken on adjoining estates as a larger long term contractual undertaking which may last for several months. As such payments are made in stages. However from the tenant's perspective, the work is considered to have been undertaken and the costs incurred once the contract period has ended. This was when the Certificate of Practical completion was issued by Pellings on 14 October 2015.
78. The Tribunal considers that at this stage costs had been incurred by the Respondent, and that subject to any dispute or reductions or additions it was at this stage that Pellings had completed the work. **In Burr -v- OM Management Ltd [2013] 1 WLR** Lord Dyson declined to determine what was meant by "incurred".
79. However the Tribunal drew some assistance from *Judge Baker QC in Capital& Counties Freehold Equity Trust Ltd plc[1987] 2 EGLR (referred to in Burr-v-OM Management Ltd)* "... that costs will be incurred when they are expended or become payable. .. Further in Burr-v- OM Property at page 3075 it was stated that:- "... The landlord can only give sufficient warning or adequate prior notice of something of which he is aware.... Costs are incurred on the presentation of an invoice or on payment; but whether a particular cost is incurred on the presentation of an invoice or on payment may depend on the facts of the particular case..." In this case, the Tribunal accepts that as a matter of fact the payment of an interim certificate did not amount to a final payment and as such, the Tribunal considers that costs were incurred once the certificate of practical completion was issued on 14.10.15. Practical Completion is defined as the contractor having completed his contractual obligations, so that he can hand over the work to the client.
80. It is at this point that the Tribunal say the Respondent should have been aware that costs had been incurred for the purpose of Section 20B 2 of The Landlord and Tenant Act 1985 and, it is at that stage that the clock, started ticking in respect of the obligation to issue a demand for payment, or alternatively, notify the tenant that payment will be sought at a later date.
81. The Tribunal determines that at this stage although sums of money were retained until such time as the contractor had satisfactorily attended to any "snagging items" If the work was not undertaken, then payment could still have been requested from the tenant subject to the tenant

being entitled to receive a credit and being reimbursed, in the event that the work was not satisfactorily completed.

82. The Tribunal was not provided with details of any dispute between the Respondent and the Contractor, or any reason to consider that it was not possible to serve a notice at this stage, even if the Respondent was not yet in a position to serve a final demand. The decision in *Shulem B* makes it clear that although some care is necessary in stating the service charges that are likely to fall due, that this does not have to be an art of precision by the landlord and that if the landlord is unsure of the precise sum due, he may with a degree of reasonableness, simply overstate the sum that is payable.
83. The Tribunal has heard about the practical difficulties of ascertaining the final sum, and does not seek to say that the costs were finalised at that stage (14 October 2015), however, it was for this very reason that section 20B (2) provided a remedy for landlords who were unable to serve the demands within 18 months.
84. The Tribunal determines that the service charge demand was served on 25 September 2017 more than 18 months after the costs were incurred; accordingly the costs are subject to the operation of section 20B (1) of The Landlord and Tenant Act 1985.
85. The Tribunal has carefully considered whether the email dated 27 August 2016 was sufficient to notify the tenants in accordance with section 20 B(2)
86. Section 20B (2) states:- Subsection (1) [the 18 month limitation period] shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.
87. In her Skeleton Argument, Counsel firstly submitted that the final account was sent to the representatives of the leaseholder association on 27 August 2016. In paragraph 6.1 she stated "...the lessor did notify the lessees in writing of the total costs towards which each lessee would have to contribute under the terms of their lease..." Counsel during the hearing appeared somewhat equivocal as to whether this constituted notice to all of the leaseholders within Colingy Court and Calais Gate. She stated that "at the very least the following tenants would by virtue of having the email forwarded to them have been notified in accordance with section 20(2) B flats 2 Colingy Court, and flats 5,17, 35 and 46 Calais Gate..

88. Both Counsels sought to place reliance upon paragraph 65 of *Shulem B*, the Respondent sought to assert that it was not necessary for the written notification to tell the leaseholder what proportion of the costs would be passed to the leaseholder or what the final charges would be. In his Skeleton Argument, counsel Mr Collard, stated that although that proposition was correct paragraph 65 also stated:- "...the written notification must state a figure for the costs which have been incurred by the lessor...Secondly, the notice for the purposes of subsection (2) must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs..."
89. The Tribunal has considered the email sent by Mr Halpin and the subsequent email correspondence. It is clear that to those who had received the email and the draft account that it was considered to be a work in progress, a starting point towards establishing what the final costs were. Although it was headed draft final account, there were further discussions between the parties concerning what was included in and what was omitted from the major works and also what had been included in the snagging items. The Tribunal has also noted that nothing in the email correspondence reveals an intention on behalf of the landlord that the email and the information attached should be shared or indeed, that the email was sent in contemplation of section 20B (2).
90. The Tribunal accepts that the notice of itself does not have to have been sent in contemplation of section 20B (2) to validly notify the leaseholders, however all of the subsequent correspondence appears to the Tribunal to be an attempt to get to the point where the leaseholders *could* be advised of the sum due for payment.
91. The Tribunal had regard to the email sent by Mr Legge following this meeting which was sent to the tenants referred to as having been notified above. He stated:- "We agreed to go away and have a more detailed look at the entries with a view to probably meet up with Paul again in the next week. This will continue the facilitation of understanding to start to establish where items look sensible and to focus on where things are adrift. Once we have got a better understanding of the accounts and sorted the items into various agreed categories we have a basis to progress discussion with Pellings/others..."
92. This email suggest that there were matter of calculation in relation to the service charges for the major works that were outstanding and that what the leaseholders were required to pay, as far as the leaseholders group had been lead to believe were still very much " up in the air".
93. It was also not within the contemplation of the Respondent that the email dated 27 August 2016 was served as a section 20B (2) notice. The Tribunal having considered the email dated 27 August 2016 and the

subsequent correspondence, finds that this correspondence goes against the suggestion that the leaseholders were notified of the costs, within the meaning of section 20 2 B. The Tribunal does not accept that this responsibility can be delegated from the landlord to the tenants, in the way that has been suggested by counsel, Ms O'Brien.

94. Accordingly the Tribunal finds that the email dated 27 August 2016 was not notification within the meaning of section 20B (2) of the Landlord and Tenant Act 1985. The Tribunal considers that this is a case where the Tribunal has had to consider all of the circumstances in this case including the fact that the tenants were firstly notified of the work to be undertaken on 14 November 2013, the work was completed by 14 October 2015, and thereafter it was not until 25 September 2017 that demands were issued, in all the circumstances the Tribunal finds that the service charges were caught by Section 20B of the Landlord and Tenant Act 1985.

### **Application under s.20C**

95. The Tribunal in the Applicant's skeleton argument was asked to make an order under Section 20C, no counter argument was made by the Respondent. The Tribunal subject to the Respondent's wishing to make submissions (which must be made within 14 days) is minded to grant an order 21. So that the cost of today's hearing should not be recovered from the Applicants.

**Name:** Judge Daley

**Date:** 09 October 2018

### **ANNEX RIGHTS OF APPEAL**

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will

then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

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

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.]

**Section 20C**

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
  - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  - (b) in the case of proceedings before a residential property tribunal, to any residential property tribunal;
  - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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