FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2019/0169**
Property	**:**	**18 Rochester House, Manciple Street, London SE1 4LP**
Applicant	**:**	**Mr Dirk Andreas Woelke**
Representative	**:**	**In person**
Respondent:	**:**	**London Borough of Southwark**
Representative	**:**	**In person**
Type of application	**:**	**Liability to pay service charges**
Tribunal members	**:**	**Judge Angus Andrew** **John Barlow JP FRICS** **Leslie Packer**
Date and venue of hearing	**:**	**10 & 11 September 2019** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**19 November 2019**

DECISION

Note: In this decision figures in [] are references to pages numbers in the document bundles.

Decisions

1. The service charges for the first major works project were demanded in accordance with the lease provisions.

2. The on-account payment in respect of the second major works was demanded before the last quarter day of the year (1 January 2018).

3. The notices issued on 4 May 2012 complied with Section 20B (2) of the 1985 Act.

4. In respect of both major works Southwark did comply with the statutory consultation requirements imposed under section 20 of the 1985 Act.

5. In respect of the installation of the fire breaks in the roof void Southwark did comply with the statutory consultation requirements imposed under section 20 of the 1985 Act.

6. The disputed itemised costs incurred in the first major works were reasonably incurred and were recoverable under the terms of the lease.

7. The disputed costs incurred as responsive repairs in 2016/2017 were reasonably incurred and were recoverable under the terms of the lease.

The applications and hearing

8. On 2 May 2019 the tribunal received Mr Woelke's application under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of his liability to pay service charges in respect of the years 2010/2011, 2011/2012, 2012/2013, 2016/2017 and 2017/2018. In addition, Mr Woelke's applied for orders under section 20C of the 1985 Act and under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002. By these applications Mr Woelke's sought orders limiting Southwark's ability to recover the cost of these proceedings either through the service charge or as an administration charge under the terms of his lease.

9. At the hearing Mr Woelke appeared in person and Southwark was represented by Michael Walsh. Mr Woelke is a solicitor although he does not specialise in landlord and tenant work. Mr Walsh is a barrister.

10. Mr Woelke did not give evidence and consequently he was not subject to cross examination. On Mr Woelke's behalf we heard oral evidence from Julian Robert Davies BSc FRICS. On behalf of Southwark we heard oral evidence from David Spiller, Zaid Nuaman MRICS, Diana Lupulesc, Cheryl Phillips and Trevor Wellbeloved. Mr Spiller is employed as a Chartered Quantity Surveyor at Potter Raper, consultants to Southwark: Mr Nuaman is employed as a Senior Building Surveyor at the same firm: Ms Lupulesc is employed as a Revenue Service Charge

officer by Southwark: Ms Phillips is employed as a Project Manager by Southwark: Mr Wellbeloved is employed as a Capital Works Consultation Manager by Southwark.

11. Jennifer Dawn also attended the hearing. She is an enforcement officer with Southwark. During the hearing Ms Dawn provided Mr Walsh with instructions that enabled him to answer some of our questions although she did not formally give evidence. As with Mr Woelke she was not therefore subject to cross examination.

12. At the start of the hearing Mr Walsh requested that we admit a small additional bundle of documents comprising (a) replacements of the photographs annexed to Mr Nuaman's technical report of 15 August 2019 (b) a replacement of a calculation sheet annexed to the witness statement of Mr Lupulesc (c) replacements of two plans annexed to the witness statement of Ms Phillips and (d) recent inter partes correspondence. The replacement photographs, calculations sheet and plans were of better quality than those included in the bundles.

13. Mr Woelke objected to the request, although the only ground that he gave for his objection was that the replacement photographs could not be verified because the originals had not been taken by Mr Nuaman. The same objection could be taken to the original photographs in the hearing bundle. Furthermore, we could consider any challenge to the authenticity of the photographs when weighing Mr Nuaman's evidence. We could see no logical objection to admitting replacement copy documents that were of better quality than those included in the original hearing bundle. Equally there was no prejudice to Mr Woelke because he was aware of both the original documents and the inter partes correspondence. Consequently, and for each of these reasons we admitted the additional bundle of documents.

14. We granted Mr Walsh's request that we should defer consideration of the section 20C and paragraph 5A applications until after this decision is issued. Directions for the disposal of those applications are to be found at the end of this decision. Mr Walsh also indicated that Southwark would apply for its costs under rule 13 although it is not an application that we would encourage.

Background

15. Rochester House and Harbledown House are two similar four storey blocks of flats build in the late 1920s. They form part of Southwark's Tabard Gardens estate. There are 42 flats in Rochester House and 38 in Harbledown House. As constructed, access to the flat is via stairwells at both ends of each block with external walkways. Both blocks are of a mixed tenure. Some flats have been acquired under the Right to Buy legislation whilst others are occupied by Southwark's rental tenants.

16. Mr Woelke owns flat 18 in Rochester House under a lease dated 7 May 1990 for a term of 125 years from that date [B3-B34].

17. In 2007 Southwark decided to refurbish both blocks as they were in need of repair. It is apparent that the decision was informed by a number of reports. Mr Walsh told us that with one exception all the reports had been destroyed under Southwark's destruction policy. The exception was a Condition and Decent Homes Report [F10-F28], based on a survey undertaken over two days on 28 November and 7 December 2006. The final paragraph of page 25 of the report [F26] confirms that the authors are waiting for *"the mechanical and electrical reports to make their respective recommendations":* a phrase that confirms the existence of other reports that Mr Walsh told us had been destroyed. The report contains much helpful background information that has assisted us in this decision.

18. Southwark gave notice of its intention to complete the refurbishment of the two blocks on 27 June 2007 [F1]. A specification of works was prepared and put out to tender. Southwark issued proposal notices on 31 July 2009 [F42] informing the long leaseholders that the contract would be let to Standage and & Co Ltd at an estimated cost of £1,679,489. Work commenced on 22 March 2010 and was completed by 1 April 2011. There was then a long delay until 28 February 2014 when Southwark issued a final account calculation sheet that effectively crystallised the liability of the long leaseholders [G2-4].

19. It seems that whilst the refurbishment works were being completed Southwark discovered that the roof voids in both blocks were not compartmentalised. This represented a fire risk, in that that any fire could spread quickly along the roof voids. Consequently, Southwark decided to install fire breaks in the roof voids. On 28 March 2011 (just three days before the works were completed) Southwark issued what purported to be both section 20B notices and consultation proposal notices [E193] informing the long leaseholders that the cost of completing the additional work would be £29,150 per block or £58,300, and invited the leaseholders' comments. This cost was also the actual cost and as we were told that all the work was completed by 1 April 2011 the inescapable conclusion is that this work had largely been completed when the notices were issued.

20. Ultimately Southwark demanded £12,884.88 from Mr Woelke in respect of the first major works project that included his share of the cost of installing the fire breaks in the roof voids. Although the position is unclear, Southwark appear to have conceded that costs incurred before 4 November 2010 are not recoverable because they were caught by section 20B. Consequently, Southwark have limited their claim. On the basis of [E218] Southwark appear to have limited their claim to £6,248.30 although that figure is not consistent with the figure of £6,297.41 given at the hearing and contained in Southwark's letter of 18 April 2019 [E205].

21. In October 2015 Southwark ballotted its residents on the possibility of installing new door entry systems *"to improve safety and security*". The extent of the ballot is still not clear to us. We do not know if Southwark ballotted all the residents or only those in selected blocks. In any event they ballotted the residents of Rochester House. The letter enclosing the ballot paper states that Southwark seeks *"to obtain over a 50% approval from the residents"* [F138]. Mr Woelke returned his ballot paper stating that he did not accept the proposal. The ballot results are at [H230] although it is not clear to us when, if at all, the results were communicated to Mr

Woelke. For Rochester House as a whole 35 ballot papers were issued and 20 were returned. Of the 20 returned 13 supported the proposal whilst 7 objected to it. Southwark treated non-returned ballots as objections with the result that the 50% threshold was not met for Rochester House as a whole.

22. Two separate entrances and walkways serve Rochester House: one serves flats 1, 2, 6–21 and the other serves flats 25–42. The 50% threshold was met in respect of the former but not the latter. On that basis Southwark decided to proceed with the installation of a new door entry system serving flats 1, 2, 6–21, which included Mr Woelke's flat.

23. On 20 July 2016 Southwark gave notice of its intention to install the new door entry system [F143]. A specification of the proposed works was put out to tender, and on 6 March 2017 Southwark gave notice of its proposal to let the tender to Thomas Sinden Ltd at an estimated cost of £88,399 [F152], which would result in a rechargeable block of cost of £13,594.52 and an estimated service charge of £1,037.43 However, the proposal notice sent to Mr Woelke records the ballot results not for Rochester House but for Martin House although it records that *"only those blocks with over 50% in favour have been selected for the new door entry system"*.

24. It is apparent that the new door entry system has been installed and the work completed although a final account calculation sheet has not yet been issued. Thus, the only service charges in issue at the hearing related to the on-account demand.

25. The first day of the hearing was largely spent in establishing the chronology of statutory notices, demands, invoices and notifications issued by Southwark in connection with these two major works projects. Despite our initial misgivings we concluded that Southwark had not deliberately attempted to obfuscate the chronology. The reason for the confusion was more prosaic: Southwark had introduced procedures of such complexity that, as Mr Woelke observed, some of its own employees do not understand them.

26. In an effort to assist our understanding of the documents in the hearing bundle we prepared our own chronology tables and we include them in the reasons section of this decision. For the avoidance of doubt, we find the contents of those tables as facts. The delay in issuing this decision results in large measure from the time that we have taken in establishing these chronologies: time that could have been saved if Southwark had prepared its case in a more coherent manner.

The London Borough of Southwark v Woelke [2013] UK UT 0349 (LC)

27. In the above case the Upper Tribunal considered the terms of Mr Woelke's lease in the context of the Southwark's demands for service charges in connection with a previous major works project. We now refer to the Deputy President's decision in that case as the "previous decision".

28. The previous decision contains a helpful description of the relevant lease terms in paragraphs 4-10. As the Deputy President points out in paragraph 10 the lease provisions *"follow a conventional pattern of charging for services by reference to defined years, with equal quarterly payments based on an estimate of expenditure for the forthcoming year followed by a balancing payment or credit once a final year end account has been prepared"*.

29. However, as with many local authorities Southwark collected major works service charges separately from these annual *"conventional"* provisions. Before commencing a major works project, Southwark issued invoices to cover the total estimated cost of the work. After the work was completed and the final account calculated, it than issued either invoices in respect of any shortfall or credit notes in respect of any overpayment. In summary the Deputy President decided that the invoices did not comply with the requirements of the lease. As such, they did not create a liability on the part of the leaseholder to pay the sums demanded. Southwark had to provide revised or additional notifications compliant with the terms of the lease before the sums claimed would become payable.

30. The previous decision created formidable problems not just for Southwark but for other local authorities. In effect the central issue in this case is the extent to which the procedures subsequently adopted by Southwark adequately deal with the problem identified in the previous decision.

31. In particular Mr Walsh on behalf of Southwark relied on paragraph 59 of the previous decision and for ease of reference we now set out both paragraph 59 and the following paragraph 60 that, to an extent counter-balances it:

> 59. *Subject to those essential features, however, I agree with Mr Rainey that the requirements of notice under paragraph 4(1) should be approached in a non-technical manner. In particular, I agree that it is not necessary that all of the information be provided in a single document or even on a single occasion. If on an objective reading of two or more documents on which reliance is placed it would be clear to a reasonable recipient, familiar with the terms of the lease, that the appellant was providing notice for the purpose of paragraph 4(1), and provided that taken together the documents satisfied the minimum requirements I have referred to above, I can see no reason why a single document should be insisted on. There is no reason why service charges for major works should not be identified in a separate document if that is thought to be more convenient for the purpose of identifying charges for which loans or different payment terms are available, provided that the leaseholder is also provided with a statement of the total Service Charge and the balance due for the year. If after notice has been given of the Service Charge for the previous year an additional item of expenditure, previously overlooked, is discovered it would be sufficient for the appellant to provide a statement of the nature and amount of that additional expenditure without repeating its previous summary of the whole of the costs and expenses incurred in the year. It would be essential, however, for the relevant notification to state the total Service Charge for the year, recalculated to take the additional item into account, to identify the*

method of apportionment which had been adopted and to state the new balance due. An additional notification which left leaseholders to work out for themselves that there was no overlap between the cost of major works and the sums previously demanded for revenue items, and to calculate the aggregate Service Charge for the year and the balance now due from them, would in my judgment be defective.

60. *I also consider that annual accounting is essential to the validity of a notification under paragraph 4(1). Annual accounting promotes clarity and ease of comparison for leaseholders. Avoidable complexity, inconsistency and obscurity in accounting are obvious causes of confusion and dispute in relation to service charges and the parties cannot be taken to have intended that costs and expenses incurred in more than one year should be dealt with collectively outside the framework of annual accounting clearly contemplated by the Third Schedule.*

Issues in dispute

61. The disputed issues are helpfully summarised in the Scott Schedule at [B1-B2]. For the purpose of this decision we briefly summarise the issues as follows, by reference to Mr Woelke's case:

    a. The service charges for the first major works are not payable in total because they were not demanded in accordance with the lease provisions: this was the argument considered in the previous decision.

    b. The on-account payment demanded in respect of the second major works is not payable because it was not demanded until after the last quarter day of the year (1 January 2018).

    c. The notices issued on 16 March and 4 May 2012 did not comply with Section 20B(2) of the 1985 Act.

    d. In respect of both major works Southwark have not complied with the statutory consultation requirements imposed under section 20 of the 1985 Act and consequently they can recover only £250 in respect of each project.

    e. In the alternative Southwark had not complied with the statutory consultation requirements in respect of the installation of fire breaks in the roof void and consequently it can only recover £250.

    f. In the alternative itemised costs incurred in the first major works had not been reasonably incurred and/or were not recoverable under the terms of the lease.

g. Two costs incurred as responsive repairs in 2016/2017 had not been reasonably incurred and/or were not recoverable under the terms of the lease.

Reasons for our decisions

The service charges for the first major works project were demanded in accordance with the lease provisions

62. We set out below our chronology of the demands, invoices and notifications relating to the first major works project: -

Date	Action	Bundle page number
1 April 2007	Southwark issue an invoice for an on-account payment of £13,274.45 in respect of the first major works. Southwark accepts that this did not comply with the previous decision.	E10
29 March 2010	Southwark issue (a) a service charge estimate of £969.83 for 2010/11 and (b) an invoice for that sum. Neither refer to the cost of the first major works.	E21, 22
1 April 2011	Southwark issue (a) a service charge estimate of £924.24 for 2011/12 and (b) an invoice for that sum. Neither refer to the cost of the first major works.	E48, E50
1 August 2011	Issue of final account for first major works contract recording a total contract cost of £1,777,955 of which £436,797.99 is rechargeable to the long leaseholders of Rochester House.	G55- G80
30 November 2011	Southwark issue (a) the service charge account for 2010/11 and (b) a credit note for £51.07 because the actual charge was less than the estimated charge of £969.83. The account does not include any of the first major works costs.	E31, E32
28 March 2012	Southwark issue (a) a service charge estimate of £951.84 for 2012/13 and (b) an invoice for that sum. Neither refer to the cost of the first major works.	E64, E66
14 August 2012	Although not apparently included in the bundle it seems that Southwark issue a further invoice for an on-account payment of £857.24 in respect of the first major works.	E7
16 October 2012	Southwark issue (a) the service charge account for 2011/12 and (b) an invoice for £27.00 because the actual charge was more than the estimated charge of £924.24. The account does not include any of the first major works costs.	E55, E56
4 October 2013	Southwark issue (a) the service charge account for 2012/13 and (b) a credit note for £123.51 because the actual charge was less than the estimated charge of £951.84. The account does not include any of the first major works costs	E77, E79
28 February 2014	Issue of Final Account calculation sheet	G2-G4

28 February 2014	Southwark issue three "revised notifications" relating to the 2010/11, 2011/12 and 2012/13 service charge accounts. These revised notifications differentiate between the revenue service charge and the major works service charge. The figures for the revenue service charge appear to restate the sums previously demanded and presumably paid. In respect of the first major works costs the notifications state that the following sums are payable within one month:- In respect of 2010/11, £10,622.64 In respect of 2011/12, £ 1,940.12 In respect of 2012/13, £ 322.12 Total: £12,884.88 Each notification states the total service charge for the year that is said to be "payable within one month".	E15. E43, E59
28 February 2014	On the same day that Southwark issues the three "revised notifications" it also issues a credit note for £1,246.82 in respect of the first major works. This represents the difference between the sum of the invoices issued on 1 April 2007 and 14 August 2012 (£13,274.45 + £857.25 = £14,131.70) and Mr Woelke's share of the actual cost (£12,884.88).	E13

63. The relevant provisions of the lease are to be found in part 1 of the Third Schedule and in particular: -

1(1) In this Schedule "year" means a year beginning on 1st April and ending on 31st March

1(2) Time shall not be of the essence for service of any notice under this Schedule

2(1) Before the commencement of each year (except the year in which the lease is granted) the Council shall make a reasonable estimate of the amount which will be payable (as hereinafter defined) in that year and shall notify the Lessee of that estimate

2(2) The lessee shall pay the Council in advance on account of Service Charge the amount of such estimate by equal payments on 1st April 1st July 1st October and 1st January in each year

4(1) As soon as practicable after the end of each year the Council shall ascertain the Service Charge payable for that year and shall notify the Less of the amount thereof

4(2) Such notice shall contain or be accompanied by a summary of the costs incurred by the Council of the kinds referred to in this Schedule and state the balance (if any) due under paragraph 5 of this Schedule

5(1) If the Service Charge for the year ..... exceeds the amount paid in advance under paragraph 2 ..... Of this Schedule the Lessee shall pay the balance thereof to the Council within one month of service of the said notice

5(2) If the amount so paid in advance by the Lessee exceeds the Service Charge for the year ..... the balance shall be credited against the next advance payment or payments due from the Lessee .....

64. Essentially there were three strands to Mr Woelke's case: -

    a. The invoices issued by Southwark still did not comply with the terms of the lease. Southwark had demanded the total estimated cost at the outset and then issued a credit note for an overpayment when the final account was calculated; and

    b. In paragraph 59 of the previous decision the Deputy President had in mind *"an additional item of expenditure, previously overlooked"* when he decided that further notifications could be given under paragraphs 2(1) and 4(2) of the lease. Mr Woelke pointed out that in this case the cost of the major works had not been overlooked but had simply not been estimated or ascertained; and

    c. It was not clear what was being demanded. Although he did not put it in these terms the "revised notifications" were not consistent with the invoices and credit notes.

65. As explained by Mr Walsh, Southwark has retained a system of invoicing that it accepts does not comply with the previous decision, whilst superimposing on that system a series of notifications that it believes does comply with paragraphs 2(1) and 4(1) of part 1 of the third schedule to the lease as interpreted by the previous decision.

66. In the context of the first major works project Mr Walsh's case on behalf of Southwark was that the revised notifications issued on 28 February 2014 complied with paragraph 4(1) of the lease and any confusion did not justify Mr Woelke's refusal to pay. However, the flaw in Mr Walsh's case is that the leaseholders are now advised that if they wish to take advantage of various payment options they must make payment in accordance with the noncompliant invoices rather than the notifications.

67. With some hesitation but for each of the following reasons we consider that the service charges for the first major works project were demanded in accordance with the lease provisions and consequently they are payable by Mr Woelke: -

    (a) Although no satisfactory explanation was offered for the long delay between the issue of the final account on 1 August 2011 and the issue of the final account calculation sheet on 28 February 2014 it seems that Mr Woelke's liability in respect of each of the three service charge years was not crystallised until 28 February 2014. Consequently, the revised notifications were sent *"as soon as practicable after the end of each year"* as required by paragraph 4(1); and

(b) The revised notifications of 28 February 2014 comply with the requirements of paragraph 59 of the previous decision because the service charges for the major works are identified in a separate document that also states the total service charge and the balance payable for the year; and

(c) Having regard to the factual matrix that underpinned the previous decision it is apparent that the Deputy President's use of the word *"overlooked"* encompassed also expenditure that had not previously crystallised; and

(d) In answer to our question Mr Woelke said that he *"recognised the notifications as demands"* and he was not therefore confused.

The on-account payment in respect of the second major works was demanded before the last quarter day of the year (1 January 2018).

68. We set out below our chronology of the demands, invoices and notifications relating to the second major works project: -

Date	**Action**	**Bundle page number**
16 February 2017	Southwark issue (a) a service charge estimate of £1,166.39 for 2017/18 (b) an invoice for that sum and (c) a notification for the same sum. The notification includes "£0.00" in respect of the second major works.	E140, E138, E136
6 March 2017	Southwark issue (a) a further notification that now includes £1,011.50 for the second major works and (b) explanatory notes saying payment is not required now but should be made only when the invoice is received.	E154, E156, F158
16 February 2018	Southwark issue (a) an estimate of the second major works costs of £1,037.44 of which £1,011.50 is estimated to be incurred in 2017/18 and £25.94 in 2018/19 (b) an invoice for the total estimated cost of £1,037.44 that is debited to the running account.	E162, 160 E8

69. Mr Woelke's case was that because the invoice for the total estimated cost was not issued until after the last quarter day of the 2017/2018 year it was not payable.

70. The invoice however relates to two years. The first for £1,011.50 in respect of costs estimated to be incurred in 2017/2018 and the second for £25.94 in respect of costs estimated to be incurred in 2018/2019. The first estimate refers back to the notification issued on 6 March 2017 that complied with paragraph 2(1) of part 1 of the third schedule to the lease and was saved by paragraph 59 the previous decision. The second estimate related to the forthcoming year commencing 1 April 2018 and was not given after the last quarter day of that year.

The notices issued on 4 May 2012 complied with Section 20B (2) of the 1985 Act.

71. We set out below our chronology of the consultation notices and section 20B notices for the first major works

Date	Action	Bundle page number
27 June 2007	Southwark issue intention notice for refurbishment works	F1
31 July 2009	Southwark issue proposal notice for refurbishment works. On the basis of the winning tender (£1,679,489.00) Southwark estimate rechargeable block costs of £489,026.44 and a service charge of £15,109.62	F42
22 March 2010	Work commences	Ms Dawn
28 March 2011	Southwark issue combined proposal and section 20B notice for additional fire risk works at estimated cost of £29,150 per block	E193
1 April 2011	Work ends	Ms Dawn
1 August 2011	Issue of Final Account	G55 – G80
1 September 2011	Issue of 10th payment certificate putting costs incurred to date at £1,733,506.13	E216
16 March 2012	Southwark issue section 20B notice covering both refurbishment works and the fire risk works recording that "The quoted estimated costs have now been incurred …… and the contract sum currently stands at £1,733,506.12".	F99
4 May 2012	Southwark issue section 20B notice covering both refurbishment works and the fire risk works recording that "costs have now been incurred ….and the contract sum is predicted to come in at £1,970,285,000" with a revised service charge estimate of £14,131.70.	E198
26 June 2012	Issue of 12th and final payment certificate putting costs incurred to date at £1,777,955.02	E217, E218
28 February 2014	Issue of Final Account calculation sheet	G2 - G4

72. As explained above, Southwark conceded that costs incurred before 4 November 2010 were not recoverable because they were caught by section 20B, and it had written off service charges of £6,636.58 leaving, on our calculation, a balance due of £6,248.30. Although not expressly conceded by Mr Walsh, the logical consequence of the first concession is that the 20B notice issued on 16 March 2012 was invalid.

73. That apart, Mr Woelke's case was that the section 20B notices issued on 4 May 2012 was invalid because it recorded not the costs actually incurred but costs estimated to have been incurred. In support of that argument Mr Woelke relied on Brent London Borough Council v Shulem B Association Ltd (2011) 1WLR3014, a decision that is not without its critics.

74. Mr Woelke relied on the wording of the Section 20B notice quoted in the above table in asserting that it recorded estimated rather than actual costs. Mr Wellbeloved's evidence in this respect was however unequivocal and we accept it. He told us that Southwark maintained a chronological table of all payments made in connection with each major works project. The cost figures shown in the 20B notice were taken from the schedule for the first major works project and record the payments actually made at the date of the notice. As Mr Wellbeloved pointed out, the schedule includes not only payments made to the contractors and authorised by the payment certificates issued by the supervising surveyor but also payments in respect of professional fees and the like.

75. We do not disagree with Mr Woelke's observation that there might be adjustments to these payments either authorised by variation orders or on the issue of the final account, in particular if costs are adjusted or disallowed so that the recorded sum might not ultimately be the costs actually incurred. Nevertheless, we are satisfied and find that the 20B notices record the payments actually made by Southwark in respect of the first major works project on the date that they were issued. That is sufficient to comply with section 20B(2) and is consistent with the Shulem B decision. That interpretation is also consistent with the notice itself that refer to costs that *"have now been incurred"*.

In respect of both major works Southwark did comply with the statutory consultation requirements imposed under section 20 of the 1985 Act

76. Our chronology of consultation notices and section 20B notices for the first major works project is set out above. We set out below our chronology of consultation notices and section 20B notices for the second major works project: -

Date	**Action**	**Bundle page number**
1 October 2015	Southwark ballot residents on a proposal for new door entry system saying that it "seeks to obtain over 50% approval from residents"	F138
18 October 2015	Mr Woelke objects	F139
20 July 2016	Southwark issue intention notice for a door entry system	F143
6 March 2017	Southwark issue proposal notice for a door entry system. On the basis of the winning tender (£88,399.00) Southwark estimates a rechargeable block cost of £13,594.52 and an estimated service charge of £1,037.43. The notice records the ballot results for Martin House and not Rochester House.	E145, F152
28 July 2017	Southwark issue section 20B notice which records that it "has been invoiced for £4,951.00 as of June 2017"	E199

14 September 2018	Southwark issue 20B notice, which records that it "has been invoiced for £112,373.00 as of July 2018"	E201

77. As far as the first major works project was concerned, Mr Woelke asserted two breaches of the consultation requirements to be found in part 2 of schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003. Firstly, he said that the intention notice did not contain an accurate description of the proposed works, in that a number of items such as brickwork repairs to the boundary walls had been omitted. In the Scott Schedule Mr Woelke identified seven items of works that were completed but omitted from the description in the intention notice.

78. Secondly, he asserted that the proposal notice failed to contain an adequate statement summarising the long leaseholders' observations in response to the intention notices.

79. Paragraph 8(a) of part 2 provides that the intention notice shall *"describe, in general terms, the work proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected"*.

80. The intention notice [F1] lists seven items including concrete repairs, integral window and front door renewal and brickwork repairs. The notice makes it clear that Southwark is contemplating the refurbishment of Rochester House. Furthermore, the notice informs the reader, on page 2, that "*The detailed schedule of works can be inspected at the Home Ownership Unit, 113 Lorrimore Road, Monday to Friday between the hours 10am and 4pm"*.

81. We are satisfied and find as a fact that the intention notice complies with the consultation requirements in that it includes both a general description of the works and specifies a place and time where a more detailed description of the works maybe inspected.

82. Paragraph 11(5) of schedule 2 provides that where the landlord has received observations in response to the intention notice the paragraph (b) statement shall contain *"a summary of the observations and his response to them"*. Mr Woelke's observations are contained in his 4-page letter of 6 August 2007 [F36], which provoked extensive correspondence and a number of complaints [H171-H224]. It is apparent that observations were made by other leaseholders although copies of those observations do not seem to be included in the hearing bundles.

83. The paragraph (b) statement (referred to by Southwark as the proposal notice) [F42] recorded only one observation: *"Is this refurbishment contract a result of works not carried out in the annual service charge although leaseholders have been charged repairs"*. This was followed by a two-paragraph response the gist of which appears to be that Southwark has the option of remedying disrepair by either annual repairs or by a large-scale contract although it has to be said that the response would do justice to a politician.

84. Mr Wellbeloved's explanation was that: *"While this did not detail every point of each observation, as these were seen to be too general and/or not related to*

the proposed works, the summary did summarise a point of a particular concern which was relevant".

85. We accept that where a landlord receives numerous observations Parliament cannot have intended that the paragraph (b) statement should record each and every one of them. Paragraph 11(5)(b)(ii) simply requires *"a summary"*. Again, with some hesitation we accept Mr Wellbeloved's explanation and we find that the proposal notice did include a broad summary of the observations and Southwark's response. We are encouraged in that conclusion by the very detailed responses given to Mr Woelke's numerous observations and complaints: certainly, he cannot be said to have been prejudiced by the absence of a more detailed summary of his observations and Southwark's response to them.

86. Turning to the second major works project, Mr Woelke's case was based on Southwark's response to the ballot of residents. He pointed out that Southwark's decision to install a door entry system only for flats 1, 2, 6-21 was not consistent with its declared intention of only installing a door entry system in blocks in which the proposal was supported by a majority of the residents. It will be recalled that in Rochester House as a whole a majority (as defined by Southwark) did not support the proposal.

87. However, the ballot was informal and outwith the statutory consultation process. Even though Mr Woelke's analysis was correct there was nevertheless a logic to Southwark's decision, such that it could not be said to be perverse or unreasonable. Consequently, and for each of these reasons we do not consider that Southwark's decision nullifies the consultation process or of itself renders the cost unrecoverable through the service charge.

In respect of the installation of the fire breaks in the roof void, Southwark did comply with the statutory consultation requirements imposed under section 20 of the 1985 Act

88. The background to this issue is set out in paragraph 19 above. The issue is whether the installation of the fire breaks and the first major works formed part of the same set of works. If they did no further consultation was required.

89. Southwark had not helped its case by issuing what purported to be both a proposal notice and a section 20B notice [E193] when the installation had in all probability been completed or at least was on the verge of completion. The implication is that Southwark thought that the installation was a separate set of works, but if that is what it thought the correct course of action would have been to make an urgent application to the tribunal for dispensation. It is regrettable that this misconceived notice led leaseholders to believe that their views were being invited when the work had effectively been completed. It was nevertheless of no effect.

90. It is certainly the case that this additional work was only identified as the first major works progressed. It is self-evident that it was not included either within

the original specification or within the summary of works contained within the intention notice.

91. Nevertheless, we consider that the following factors indicate that installation of the fire breaks and the first major works formed part of the same set of works:-

    a. The installation was authorised by varying the first major works contract so that all the work including the installation was completed under one contract; and

    b. The installation was carried out at the same time, to the same premises and using infrastructure such as scaffolding already in place; and

    c. It was apparent from the outset that Southwark was proposing the refurbishment of Rochester House and within that context the installation of fire breaks, required to meet current building regulations, was similar in character to that originally specified.

92. Consequently, we find that Southwark did comply with the statutory consultation requirements imposed under section 20 of the 1985 Act

93. Although it forms no part of our reasoning, we add as an aside that following the Supreme Court decision in Daejan Investments Ltd v Benson [2013] UKSC 14 Mr Woelke would face an uphill struggle in successfully opposing a dispensation application that Mr Walsh indicated would follow an adverse finding on this issue.

The disputed itemised costs incurred in the first major works were reasonably incurred and were recoverable under the terms of the lease

94. We start by making four observations that are relevant to our decisions under this and the following section.

95. The first is that there is a well-established principle, which predates the 1985 Act, that reasonable cost does not equate to lowest cost. In Waaler v Hounslow LBC [2017]1 W.L.R.2817 Lewis LJ put it another way when he said: -

    "…. it must always be born in mind that where the landlord is faced with a choice between different methods dealing with the problem in the physical fabric of a building (where the problem arises out of design defect or not) there may be many outcomes each of which is reasonable. I agree with [counsel] that the tribunal should not simply impose its own decision. If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper option which was also reasonable".

96. The second relates to the replacement of obsolete, worn or damaged items by modern equivalents produced to current but superior standards. In general terms such replacement will be regarded as a repair rather than an improvement.

97. The third relates to the terms of the lease. Mr Woelke's case was largely based on his assumption that with two exceptions the lease permitted only the recovery of the cost of repairs. That assumption resulted from paragraph 7 (1) of Part I of the Third Schedule to the lease that refers back to the lessor's covenants in clause 4 (2) to (4) of the lease, which in general terms obliges the lessor to keep Rochester House in repair and to redecorate the exterior and common parts as often as may be reasonably necessary. The two exceptions are contained in paragraph 7(9) and allow the recovery of the cost of installing *"by way of improvement"* double glazed windows and *"an entry-phone system"*.

98. However, that interpretation is unduly narrow. Clause 4(2) of the lease requires the lessor not just to repair but *"to make good any defect affecting that structure"*. Furthermore Paragraph 7(6) of Part I of the Third Schedule also allows the recovery of the cost of "*The maintenance and management of the building and the estate…"*. The term permits the recovery of costs of work that might be neither a repair nor an improvement.

99. The fourth relates to the evidence of Mr Woelke's expert, Julian Robert Davies BSc FRICS. He acknowledged that his report had been prepared for Mr Wolke and it did not contain an expert witness declaration, although he was not alone in that omission. However, from his answers to Mr Walsh's questions, it became apparent that he did not understand that his first duty was to the tribunal rather than, as he put it, *"to the parties"*. This undermined our confidence in his evidence, such that we did not feel able to give it the weight that we would normally accord to an expert.

100. With those observations in mind, we now turn briefly to the disputed costs itemised in the Scott Schedule other than those that had not in any event been recharged to the leaseholders.

New front Doors.

101. It seems that this cost accounted for about one-third of the total cost. Rochester House was built about 90 years ago. Over time many of the residents have either replaced or altered the front doors of their flats including the windows above. Many but by no means all the front doors were in disrepair and did not comply with current fire and security regulations. Southwark decided to replace all the front doors. Mr Woelke considered that the cost was excessive. In doing so he relied on the evidence of Mr Davies.

102. Although Mr Davies now refers to the cost as *"excessive"* and the replacement with new hardwood windows as an improvement we note that in his initial report of 10 May 2010 [F66] he observed that *"There is a valid argument for complete replacement with a high performance alternative"*. This brings the cost within Waaler and having regard to each and all of our observations the cost is recoverable.

Anti-graffiti paint

103. Mr Woelke objected to the additional cost of anti-graffiti paint on the ground that it was an improvement although he did not quantify the additional cost, if there was one, that he felt should be disallowed.

104. Over the last few decades, graffiti has become an increasing problem. The decision to use anti-graffiti paint was reasonable. The use was both within Waaler and was no more than the replacement of a worn part with a modern equivalent. Consequently, and for each of these reasons the cost was recoverable.

Electrical works

105. The thrust of Mr Woelke's case was that the electrical work was largely unnecessary and as such was an improvement. Mr Woelke relied on the 2006 Decent Homes Report and a survey or summary [F33-35] that seems to have been derived from it. In that survey the Landlord's Electrical Installation is said to be *"satisfactory"*. Mr Woelke also relied on the evidence of Mr Davies that was at best tenuous. He had inspected the estate in May 2010 and the first page of his report [F60-71] emphasises that he did not inspect those parts *"that are unexposed or inaccessible or free from view"*. At [F65] he simply states that *"previously the electrical trunking, fittings and presumably the wiring was replaced"*. He then continues *"All this work is now the subject of replacement which, if necessary, has in our opinion led to unnecessary expense as this should have been undertaken concurrently"*.

106. Sadly, all those responsible for supervising the work have since died and Southwark had to rely on the evidence of experts who had inspected Rochester House long after the completion of the work and had reviewed the available paper work. Nevertheless, we found the evidence of Mr Nuaman compelling. The 17th edition of the relevant electrical regulations was introduced in January 2008 after the Decent Homes Report. We accept his conclusion that the work would have been necessary *"to bring the existing installations to the required level in the 17th edition otherwise utility providers ……may refuse to reenergise the premises for failing to meet the standards"*.

107. Having regard to our observations above we are satisfied that the work amounted to a repair and that the costs was recoverable.

Lightning conductors

108. There were a number of surprising aspects to Mr Woelke's case but this was perhaps the most surprising. One of his observations in response to the intention notice was *"I am shocked to read that there are no lightning conductors, nor do they seem to be any planned. They must be installed immediately"*. Southwark installed the requested lightning conductors, yet Mr

Woelke now objects to contributing towards the cost on the ground that they are an improvement.

109. The installation of the conductors was both making good a defect in Rochester House and also formed part of its proper maintenance. Although the installation was not a repair as such it was within the contemplation of both clause 4(2) and also paragraph 7(6) of Part I of the Third Schedule. Consequently, the cost was recoverable.

Upgrading insulation (in the roof)

110. Again, Mr Woelke's argument was that the upgrading of the roof insulation amounted to an improvement. Mr Nuaman's evidence, which we accept, was that the upgraded insulation was required by current Building Regulations.

111. As observed above the replacement of an obsolete component by a modern equivalent complying with current regulations is a repair rather than an improvement. In the alternative the upgrade made good a defect in Rochester House and was required for its proper maintenance. Consequently, the cost was recoverable.

Cleaning

112. This related to the steam cleaning of the chimney stacks. Mr Davies accepted that they were discoloured by pollution but said that they could have been left. Mr Woelke considered that the work was unnecessary. Mr Nuaman's evidence was that cleaning the brickwork is "an industry standard" after major repairs to remove dust and grime.

113. Cleaning was part and parcel of the project, as indeed were other items that were not in themselves repairs, such as the erection of scaffolding. As such cleaning was within the contemplation of the repairing covenant and was in any event undertaken for the maintenance of Rochester House. Consequently, the cost was recoverable.

Rainwater downpipe replacement

114. Mr Woelke's principal objection was that the pipes should have been replaced when the gutters were replaced *"a few years earlier…….and would have saved on duplicated costs of scaffolding"*.

115. It is not suggested that the replacement was unnecessary. Indeed, the Decent Homes Report notes that the downpipes were cast iron with some corrosion in places. It is not suggested that the guttering should not have been replaced *"a few years earlier"*. The case for a saving in scaffolding costs is simply not made out and we are satisfied that replacement fell within the repairing obligation and that the cost was recoverable.

Repair of damage due to neglect

116. In essence this was a counter claim by way of set-off for historic neglect. In his statement of case Mr Woelke says that: *"It is impossible for the leaseholder to quantify the effect of the failure to maintain the building on the amount of the works"*.

117. Mr Woelke has not quantified his claim and it must fail in these proceedings. Even had it been quantified we would have declined jurisdiction because in this case we consider that the claim would more appropriately be considered in the cost shifting jurisdiction of the County Court.

Works generally over-specified

118. In terms of the statutory framework, Mr Wolke was asserting that the major works costs had not been reasonably incurred within the meaning of section 19(1) of the 1985 Act because they were over-specified. This was simply an assertion made by Woelke for which there was no evidential support. In his statement of case Mr Woelke put Southwark to proof of *"exactly what amount of each type of work was necessary"*.

119. The work was identified in the Decent Homes Report: it was subject to the statutory consultation process: it was specified and put out to tender: it was supervised and payment was made against payment certificates issued by the supervising surveyor. In a major works projects of this type the relevant costs to be taken into account for the purpose of section 19(1) are the totality of the costs rather than the individual components of those costs.

120. In any event, in service charge cases there is a shifting burden of proof. In the first instance it was for Mr Woelke to adduce evidence demonstrating that the work was over-specified and hence the costs unreasonably incurred. Had he adduced such evidence the burden would shift to Southwark; but he had adduced none and again this aspect of his case must fail.

Electrical survey for leasehold flats

121. The cost per flat was £44.46 and was apparently applied to both tenanted and leasehold flats alike. Mr Woelke relied on the evidence of Mr Davies who suggested that some but not necessarily all leaseholders were subsidising the rental tenants *"where electrical work was not proposed within leasehold properties"*. He said that an adjustment should be made although he offered no suggestion as to what that adjustment should be.

122. We have already observed that Mr Woelke himself did not give evidence and we do not know if any electrical work was proposed to his flat. We again prefer the evidence of Mr Nuaman who said that it was *"the industry standard"* for utility providers to require Electrical Installation Condition Reports for both tenanted and leasehold flats, showing the electrical circuits and installations, before reconnecting to the electrical network. We are satisfied and find that it

is more likely than not that surveys were completed for both tenanted and leasehold flats and that it was reasonable to apply a fixed price to the cost of those surveys even if the surveys of some flats were more extensive than others.

The disputed costs incurred as responsive repairs in 2016/2017 were reasonably incurred and were recoverable under the terms of the lease

Repairs to flat roof

123. During the year responsive repairs were carried out to the flat roof on three occasions. Mr Woelke case was that the roof was resurfaced as part of the first major works project: the work should have been covered by a guarantee and hence the cost was not reasonably incurred. Although he did not put it in these terms, his case was actually one of set-off based on Southwark's asserted failure either to obtain a guarantee for the roof work or if a guarantee existed to enforce it.

124. For Southwark the evidence of Ms Philips and Ms Lupulesc was consistent. Ms Philips said that although all the first major works were covered by a defects liability period, only the UPVC windows had the benefit of a guarantee. Ms Lupulesc said that Southwark maintained a schedule of warranties and guarantees. She consulted that schedule and there were no warranties or guarantees in place for the roof.

125. Ms Phillips' evidence was that only a section of the roof was recovered and that it would not be usual to obtain a guarantee for what was effectively a patch repair. The bill of quantities at [G33 -G35] records the roof work. The roof was not replaced but rather sections of the roof were repaired and re-asphalted. This supports Ms Phillips' evidence and we agree with her that a guarantee extending beyond the defects liability period would not normally be issued for limited work of that type. Consequently, we are satisfied and find that the cost of the repair work was reasonably incurred.

Estate charges marked as responsive repairs

126. A cross-over from the estate road to the public highway had been repaired. Mr Woelke did not suggest that the repairs were unnecessary or that the cost, which worked out at about £5 per flat, was unreasonable. His case was based on Mr Davies' evidence when he said that he *"thought"* that the highway authority would have been responsible for the work although he was unable to say whether the estate road including the cross-over was adopted.

127. Ms Lupulesc evidence was more certain. Although she did not know if the cross-over formed part of the public highway she said that if the highway authority had undertaken the work it would have passed on the cost in any event. We accept her evidence. The work was undertaken for the proper management of the estate and the cost was recoverable under paragraph 7(6) of Part I of the Third Schedule to the lease.

Further directions

128. By **27 November 2019** the Mr Woelke must send to Southwark: -

- a statement in support of the cost limitation applications containing a statement of truth; and
- any legal submissions with copy authorities; and
- copies of any additional documents on which he intends to rely; and

129. By **6 December 2019** Southwark must send to Mr Woelke: -

- a statement in reply containing a statement of truth; and
- any legal submissions with copy authorities; and
- copies of any additional documents on which it intends to rely.

130. Mr Woelke is responsible for preparing the bundle of relevant documents (in a file, indexed at the front and numbered on each page). He must by **13 December 2019** send one copy to Southwark and three copies to the tribunal.

131. Only those documents sent in the bundle are likely to be before the tribunal at the full hearing and parties should not send documents "piecemeal" to the case officer.

132. The bundle must contain copies of:

- the applications with relevant supporting documents
- this decision
- Mr Woelke's statement in support
- Southwark's statement in reply
- the parties' submissions and copy authorities
- any other documents upon which either party reasonably wishes to rely.

133. Any request for an oral hearing should be made in writing and copied to the other party by **20 December 2019**.

134. If neither party requests an oral hearing the tribunal will determine the matter during the week commencing **6 January 2020** on the basis of the document bundles.

135. If a hearing is requested it shall take place at **10 Alfred Place, London WC1E 7LR from 1.30 pm on 8 January 2020** with a time estimate of

one hour and the party requesting an oral hearing shall bring an additional copy of the document bundle to the hearing.

Name: Angus Andrew Date: 19 November 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).