FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AA/LSC/2018/0210**
Property	**:**	**Great Arthur House, Golden Lane Estate, London EC1Y 0RD**
Applicant	**:**	**Various Leaseholders**
Representative	**:**	**DAC Beachcroft LLP**
Respondent	**:**	**The Mayor and Commonalty and Citizens of the City of London**
Representative	**:**	**Comptroller and City Solicitor**
Type of Application	**:**	**Liability to pay service charges and liability to pay administration charges – determination of preliminary issue**
Tribunal Members	**:**	**Judge Carr** **Mr W Richard Shaw FRICS** **Mr Clifford Piarroux JP**
Date and venue of Hearing	**:**	**5th and 6th November 2018** **Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**7th January 2019**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines the following in relation to the preliminary issues;

a. Work carried out to remedy structural defects, even if that work happens to remedy disrepair, falls outside of the definition of 'specified repairs' for the purposes of charging a lessee for works, as long as either (i) the lessee was not notified of the structural defects at the time of the grant of the lease or (ii) the Corporation did not become aware of the structural defect earlier than the end of the initial period of either ten or five years after the grant.

b. A structural defect in this case is broadly understood to be an inherent defect in the design and construction of the building.

c. This interpretation of the definition of 'specified repairs' in the lease means that there is no difference for the purposes of the relevant clause of the lease between

i. Work to make good one or more structural defects and/or

ii. Work so required but the carrying out of which also addresses deterioration and/or consequential damages to the affected part(s) of the building which occurred over the time that the structural defect was not made good; and/or

iii. Work so required to remedy structural defects but the carrying out of which also involves replacement of one or more building components at the end of their lifespan.

d. There is therefore no need to decide on apportionment of the costs of the works.

(2) The Tribunal makes the determinations as set out under the various headings in this Decision

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service

charges payable in respect of major works to the curtain wall, roof and concrete walls of the property.

2. The Tribunal held a Case Management Conference on 3rd July 2018 and issued directions for the hearing of preliminary issues in connection with the construction of the lease.

3. The relevant legal provisions are set out in the Appendix to this decision

The hearing

4. The Applicants were represented by Mr Baker of Counsel at the hearing and the Respondent was represented by Mr Manning of Counsel.

The background

5. Great Arthur House is a Grade 2 listed block of 120 flats constructed in 1957. It is 16 storeys high and, as originally constructed, it comprised a concrete frame with the main east and west elevations largely clad in curtain wall glazing (both windows and opaque, coloured panels) contained by a framework of aluminium sections fixed to a timber sub-frame which, in turn, was fixed to the edge of the floor slabs and ends of the cross walls of the main structure. The applicants (21 of an estimated 48 leaseholders in the block) contend that the curtain walls were defective from the beginning, causing the ingress of rainwater into many flats.

6. The disputed service charges relate mainly to remedial works involving the replacement of the curtain wall. They also cover works to the roof and concrete walls. The work began in 2016 and was completed in the summer of 2018. The Applicants argue that all of the works, which are the subject of the preliminary hearing, were to remedy structural defects.

7. Neither party requested an inspection and the Tribunal did not consider that one was necessary.

8. The Respondents hold long leases of the properties that require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

9. The purpose of the preliminary hearing is to determine whether the works undertaken by the Respondent are chargeable under the Applicants' leases.

10. The Applicants' leases (which are in generally similar form) contain an express covenant (in clause 4(3)) by the lessee to pay to the corporation in the manner and at the times set out within the lease a reasonable part of the costs of carrying out specified repairs.

The definition of "Specified repairs" is set out within the lease. It means repairs carried out in order:

(i) to keep in repair the structure and exterior of the premises and of the Building in which they are situated (Including drains gutters and external pipes) not amounting to the making good of structural defects

(ii) to make good any structural defect of whose existence the Corporation has notified the tenant in the notice served pursuant to [section 10 Housing Act 1980/ section 125 Housing Act 1985] which therein stated the Corporation's estimate of the amount (at then current prices) which would be payable by the tenant towards the costs of making it good (such defects being listed in the Fourth Schedule hereto) or of which the Corporation does not become aware earlier than (ten/five) years after the grant hereof and

(iii) to keep in repair any other property over or in respect of which the tenant has any deemed rights.

11. The actual costs of the works in question total £8,722,106 generating a potential service charge of £72,663.86p per lessee as their contribution under the lease is 0.8331%.

T**he issues for the preliminary hearing**

12. The payability of the service charge depends initially upon the construction of the relevant terms of the Applicants' leases. The Tribunal is asked to determine the following issues in connection with this.

13. In respect of the term 'specified repairs' in the lease(s) and in particular the words 'not amounting to the making good of structural defects'

(i) What distinguishes making good one or more structural defects from carrying out other works of repair?

(ii) For that purpose, in what respect and to what extent if at all is there a material difference between

(a) Work to make good one or more structural defects and

(b) Work so required but the carrying out of which also addresses deterioration and/or consequential damages to the affected part(s) of the building which occurred over the time that the structural defect was not made good; and/or

(c) Work so required but the carrying out of which also involves replacement of one or more building components at the end of their lifespan?

(iii) if and in so far as there is any such difference, what if any apportionment of the cost of such work, between making good a structural defect and carrying out other work of repair should be made and on what principles should that be done?

The arguments

The disrepair/defects to the premises

14. Counsel for the Applicant argued that there were defects in the property and that they had been present from its construction. The curtain walls in particular were defective and caused ingress of rainwater into many flats. He referred to a letter dated 19th August 1994 from the Respondent's Project Control Officer which sought comments on a draft consultant's brief for investigation of windows in the Building. This recorded a history of water penetration through the curtain walling for a number of years. The Respondent then obtained a report from Peter Bell and Partners in about February 1995 which recorded that their survey 'showed consistent leaking in driving rain conditions' and the expansion and contraction of long aluminium members was 'not adequately catered for in the design and so it had leaked from the day it was installed'. At that stage overcladding was recommended as the best solution.

15. In about August 2002 the Respondent obtained a structural engineer's report from Jenkins & Potter in relation to the curtain wall glazing. This report concluded in relation to the leaks,

(i) 'the standard of construction of the framework and particularly the formation of the joints at a

significant number of locations was poor. The overlap of some of the horizontal and vertical aluminium sections at corners was inadequate and had resulted in the formation of open gaps through which rainwater could pass'.

(ii) 'in fabricating the aluminium framework no allowance has been made for thermal movement. The coefficient of thermal expansion of aluminium is more than twice that of concrete and three times that of glass. The consent differential movement between the aluminium and the concrete will have caused stresses to develop and movement of the framework, particularly at the joints to occur. The differential movement will have caused the aluminium framework to deform and where the deformation was beyond the limits of the mastic, failure has occurred between the mastic and either the aluminium or the glass, causing the cladding to leak'.

16. The Jenkins & Potter report also noted a number of other problems;

(i) The vertical members of the aluminium frame were unsupported other than at their ends because most of the packing pieces between the aluminium frame and the timber sub-frame were either loose or missing.

(ii) The opaque glazing was not supported equally along all four sides.

(iii) Wind deflection of the vertical members of the aluminium frame could result in leakage at the corners of the framework and along the seal between the glass and the framework as well as breakage of the opaque panels by causing the latter to bear down on screw heads in the timber sub-frame.

(iv) Many of the brush seals in the opening lights of the windows were in poor condition but even where they were in good condition they were 'incapable of providing a wholly effective barrier against wind driven rain'.

17. From about 4th February 2016 the Respondent has undertaken a scheme of works to the property which includes

(i) Complete removal of the existing curtain walling

(ii) Installation of a completely new curtain wall of different design

(iii) Investigation, strengthening and making good of the structural frame

(iv) New balcony doors and cladding

(v) New sliding windows to the north and south elevations and

(vi) Works to the roof.

18. Expert reports on the property were prepared on behalf of the Applicants by Mr P.F.Plough of Cladtech Associates dated April 2016 in respect of the cladding and Ms C.L de Vos MRICS dated 8th March 2016 in respect of the roof. A number of matters emerge from these reports.

19. Mr Plough's report confirms the existence of several design defects in the original cladding:

(i) The lack of allowance for either thermal or building structural movement in the construction of the aluminium framing components, mullion and transom sections.

(ii) The use of glazing compounds which were not intended to be maintained

(iii) Framing sections which were not designed for bedding/sealing compounds capable of maintaining effective seals and withstanding movement in the frames.

(iv) Construction joints which did not allow for effective sealant application

(v) Lack of provision for drainage in the curtain wall system

(vi) Lack of provision for collecting condensation at window cills, and

(vii) Inadequate height of upstands to the horizontal sliding windows

20. Mr Plough concludes that 90% of the cladding works are required to rectify the design defects.

21. Ms de Vos's report identifies a number of structural defects in the roof relating to water penetration

(i) Inadequate rainwater drainage

(ii) Inadequate falls

(iii) Inadequate overflow to the pond, below which flats 57 and 60 are substantially located

(iv) potential original defects in the exposed concrete roof slab visible in flat 63.

22. Counsel for the Respondent argued that certain conclusions can be drawn from the reports. First, as Counsel for the Applicants had made clear, that there has been a historic problem with water penetration arising from the construction of the curtain wall relating in particular to the unavailability of mastic sealant products in 1957 with sufficient elasticity to cope with the differential thermal expansion of the individual elements of the wall. He said the lack of provision for the differential expansion was not in accordance with modern standards though compliant with best practice at the time and also, not made clear by Counsel for the Applicants, that the cladding was now well past the end of its useful life.

23. He suggested that the Applicants were cherry-picking from the reports to support their conclusions. He argued that reading the reports as a whole, they conclude that the more recent problems, and indeed those current at the time of the decision to undertake the works and immediately prior to those works (as distinct from any historic problems) have been primarily due to the disintegration of the mastic seals and the joints between the aluminium components.

24. He quotes from Jenkins and Potter in their Report from 2002 at sections 8-9, that whilst there were problems of design and construction, there had been deterioration of the condition of the walls and the curtain walling system in its current state had reached the end of its useful life.

25. Similarly, the Building Research Establishment Report of 2004 concluded at para 1 of its Executive Summary

> Was there a defect in the construction or design of the cladding which caused the structure to fail earlier than its projected life-span? The materials that comprise the primary structure of the curtain wall, ie timber and aluminium are, in general, sound. The materials have suffered from the effects of ageing and weathering, but they have not suffered from excessive decay or corrosion. They are in a condition that is consistent with them having been in service for 50 years.

26. Counsel also asks the tribunal to note the Respondent's approach to the undertaking of works to the building and the basis on which those works were being proposed and approved was one of repair/maintenance. He points to comments within a number of reports over the years.

27. His examples include a 'progress report' dated 9th June 2000 which proposed that an Evaluation Report should be produced to consider what action should be taken in respect of the curtain wall and windows at Great Arthur House. This appears to have resulted in the commissioning of the Jenkins and Potter Report. The works project as a whole was, 'defined as Category B *i.e.* need to maintain existing level of service (including the long term structural maintenance of assets)' (Progress Report para 20).

28. He refers to the Update and Capital Bid Report made to committees on 8th, 19th and 21st February 2008 which contained comments such as 'the works are necessary due to the age and condition of those building elements in order to comply with the Government's Decent Homes Standard and to effect repairs' (Summary p.2).

29. He points to comments from a further 'Evaluation Report' produced for committees on 14th and 25th May and 10th June 2010. Here for instance is the comment,

> The proposed curtain walling works are necessary due to the age and poor condition of the facade elements of Great Arthur House which are over 50 years old and for which the City has statutory repair obligations and to effect a lasting solution to the shortcomings of the curtain walling' Summary para c.

30. He refers to a detailed design report prepared in 2013 for committees on 10th, 11th and 23rd January, seeking approval for the proposed design and budget of the works to the building. The Overview contained the following comments.

(At paragraph 1 of the Overview) The original curtain walling and independent flank wall windows have reached the end of their economic life with residents experiencing sever water penetration, condensation and poor thermal qualities. In 2007 the block failed to meet the requirements of the Government's Decent homes Standards.

Whilst a range of remedial works have been undertaken to try to remedy the problems over a number of years, these measures have failed to provide a comprehensive, effective and long term solution.

(At Paragraph 5 of the Overview) the curtain wall and window works were, 'categorised as Type 1 (Health and Safety) as well as a statutory priority of meeting landlord's obligations and the Government's Decent Homes Standard.

Construction of the leases

31. Counsel for the Applicants reminded the Tribunal that the general approach to the interpretation of leases was summarised by Lord Neuberger PSC in *Arnold v Britton* [2015] UKSC 36. In particular he pointed out that the role of the tribunal is to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be, using the language in the contract. The relevant words have to be understood in their documentary, factual and commercial context and meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

32. Counsel for the Respondents agreed that *Arnold v Britton* was important in particular all seven of Lord Neuberger's principles set out between [15] and [23] of the judgment.

The statutory context

33. Counsel for the Applicants noted the importance of the context:- the leases were granted expressly pursuant to the statutory 'right to buy' provisions. The material parts of the leases are (with one relevant difference) in a form which has its origins in provisions contained in the Housing Act 1980.

34. The leases do not contain any express repairing covenant by the landlord. This is because certain covenants are statutorily implied by, *inter alia*, para 14(2) of Sched 6 to the Housing Act 1985. What subpara (a) provides is that there is an implied covenant imposed upon the landlord 'to keep in repair the structure and exterior of the dwelling house and of the building in which it is situated (including drains gutters and external pipes) and to make good any defect affecting that structure.

35. Effectively identical provision for the landlord's repairing covenants was originally made by para 13(1) of Sched 2 to the Housing Act 1980.

36. What this means is that the 1980 legislation introduced, and the 1985 legislation continues, the concept of a defect affecting the structure in right to buy leases generally.

37. The Applicants' leases contain an express covenant (in clause 4(3)) by the lessee to contribute towards the costs of specified repairs. Specified repairs are defined as follows;

> 'specified repairs' means repairs carried out in order
>
> (i) to keep in repair the structure and exterior of the premises and of the Building in which they are situated (including drains gutters and external pipes) not amount to the making good of structural defects
>
> (ii) to make good any structural defect of whose existence the Corporation has notified the tenant in the notice served pursuant to [section 10 Housing Act 1980/section 125 Housing Act 1985] which therein stated the Corporation's estimate of the amount (at then current prices) which would be payable by the tenant towards the costs of making it good (such defects being listed in the Fourth Schedule hereto) or of which the Corporation does not become aware earlier than (ten/five) years after the grant hereof and
>
> (iii) to keep in repair any other property over or in respect of which the tenant has any deemed rights

38. Counsel argues that the drafting of the definition of specified repairs can be traced back to the original 'right to buy' legislation. Counsel took the tribunal through the relevant legislation, including paragraph 15, 16 and 17 of Schedule 2 to the Housing Act 1980.

39. In particular the tribunal noted the provisions of paragraph 16, which provided that ' a provision is not void by virtue of paragraph 15 above in so far as it requires the tenant to bear a reasonable part of the costs of

carrying out repairs not amounting to the making good of structural defects or of the costs of making good any structural defects falling within paragraph 17 below or of insuring against risks involving such repairs or the making good of such defects'.

40. Paragraph 17 in effect makes exceptions for those structural defects the existence of which the landlord notified the tenant before the lease was granted or which the landlord does not become aware of earlier than 10 years after the lease is granted. The reasonable costs of making good structural defects which fall within paragraph 17 have to be paid for by the tenant.

41. These provisions were amended by the Housing and Building Control Act 1984, but the principles remained the same. The current provisions are now found in paragraphs 16A – 16B and 18 of Schedule 6 to the Housing Act 1985 as inserted by the Housing and Planning Act 1986. The current provisions control the recoverability of service charges during an 'initial period' of 5 years only.

42. Counsel for the Respondent agrees in general with the passages from the legislation cited by the Applicants.

43. However, he draws the attention of the tribunal to para 14(2) (a) of Sch 6 to the 1985 Act which provides an implied covenant on the para of a right to buy leaseholder's landlord as follows:

> (i) To keep in repair the structure and exterior of the dwelling house and of the building in which it is situated (including drains, gutters and external pipes) and to make good *any defect affecting that structure* (emphasis added).

44. He argues that it is key to the Respondent's case that the distinction between the concepts of *repairing* the structure and exterior and *making good* 'defects affecting the structure' is extremely important to the resolution of this dispute.

Repairing the structure/making good defects affecting the structure

45. Counsel for the Applicants argues that the provisions recognise a distinction between the landlord's obligation (on the one hand) to repair the structure and exterior and (on the other) to make good any defect affecting the structure. For the Applicants, the latter obligation is broader because a defect may exist without there being any disrepair at all.

46. Counsel for the Applicants argues that it was important to recognise the legal context of the drafting of the 1980 legislation. The Act was drafted at a time when the parliamentary draughtsman would not only have been well aware of the discussion in the case law about the concept of an 'inherent defect' in the context of landlord and tenant law and the relationship of that concept to the notion of a repair but they would also have been aware of the considerable legal debate promoted particularly by *Anns v Merton LBC* [1978] Act 728 HL.

47. He also argues that the term 'defect affecting [the] structure' became transposed in paras 16 and 17 of Sched 2 to the Housing Act 1980 and paras 16A(1)(a) and 16B(1) of Sched 6 to the Housing Act 1985 into the phrase 'structural defects'. He submits it is clear that structural defect is to be equated with 'any defect affecting [the] structure.

48. Counsel took the tribunal through the case law relating to the meaning of structure, referring in particular to *Irvine v Moran* (1990) 24 HLR 1 where the judge, Thayne Forbes QC, said that, as regards the words 'structure of the dwelling house' that in order to be part of the structure of the dwelling house 'a particular element must be a material or significant element in the overall construction. To some extent, in every case there will be a degree of fact to be gone into to decide whether something is or is not part of the structure of the dwelling house'.

49. Other cases have clarified the meaning of structure, for instance that plaster work is included in the definition of structure for the purposes of s.11(1) (a) of the Landlord and Tenant Act 1985, (*Grand v Gill* [2011] EWCA Civ 554 1 WLR 2253), that a roof terrace was included (*Ibrahim v Dovecorn Reversions Ltd* [2001] 2 EGLR 46 and external windows, for the purposes of para 14(2) (a) of Sched 6 to the Housing Act 1985 (*Sheffield City Council v Oliver* LRX/146/2007) .

50. Counsel provided a schedule of the structural defects notified to the Applicants by the Corporation and reminded the tribunal of the statutory duty under section 125 (4A) Housing Act 1985, that 'the notice shall contain a description of any structural defect know to the landlord affecting the dwelling-house or the building in which it is situated or any other building over which the tenant will have rights under the conveyance or lease;.

51. Counsel also argued that, for the purposes of specified repairs in clause 4(3) of the leases, it was clear that the Corporation was aware of structural defects in the cladding for decades and certainly within 10 years of the grant of the earliest lease to the Applicants (flat 44 dated 10 January 1983).

Counsel for the Applicants' submissions in relation to the meaning of the clause and in answer to the issues identified.

52. Counsel for the Applicants took the tribunal through the cases which consider the distinction between disrepair and other defects whilst making it clear that none of the cases considered the particular clause under consideration in this application.

53. Starting with *Quick v Taff Ely BC* [1986] QB 809 CA, it was held that liability under the covenant implied by s.32 (1) (a) Housing Act 1961 did not arise because of lack of amenity or inefficiency but only when there existed a physical condition which called for repair to the structure or exterior of the dwelling house, and that as there was no evidence to indicate any physical damage to or want of repair in the windows or lintels themselves or any other part of the structure and exterior, the council could not be required to carry out work to alleviate condensation.

54. In *Post Office v Aquarius Properties Ltd* (1967) 54 P & CR 61 CA it was held that the obligation under a tenant's express covenant to repair only arose when the property was in a state of disrepair; and where, as on the facts of the case, the defects had existed since the building was constructed and there had been no worsening or deterioration of the condition of the premises, there was no want of repair and therefore no liability arose under the covenant to repair.

55. In *Payne v Barnet LBC* 1998 30 HLR 295 CA, in holding that no common law duty of care in negligence arose in respect of the landlord giving a notice under s.125 Housing Act 1985, Brooke LJ said the following in relation to the distinction between a liability to repair and a liability to make good an inherent defect in the property demised… 'We make this distinction because it appears to us that the draftsman of this schedule was well aware of the vexed problem in landlord and tenant law of distinguishing between a liability to repair and a liability to make good an inherent defect in the property demised….. In *Post Office v Aquarius Properties Ltd* for instance this court held that a covenant by a tenant to keep demised premises in good and substantial repair did not impose any obligation on him to remedy a defect in the structure of the premises, whether that defect resulted from faulty design or workmanship if it had been present from the time the building was constructed and had caused no damage to it. In the Housing Act scheme the landlord is fixed not only with the liability to keep the dwelling-houses' structure and exterior in repair, but also with the liability to make good any defect affecting that structure. However the requirement he must fulfil if he is to be able to pass on to the tenant any of the expense he may incur in meeting these liabilities are different in each case. .'

56. Counsel submitted that a 'defect' in general means a failing or shortcoming and there is no reason for not adopting that general meaning. The statutory context is intended to provide a measure of

protection for right to buy leaseholders and to shift the risk of structural defects initially to the landlord.

57. A 'structural' defect means a defect affecting the structure. Counsel drew on his earlier points to argue that the structure is to be given a broad meaning, and includes all the elements of the cladding and the roof to which works have been carried out.

58. The definition of 'specified repairs' in clause 4(3) uses the term 'repairs' to include making good any structural defect (as does the statutory framework). Accordingly the leases do not adopt a clear-cut differentiation between (on the one hand) the concept of repair and (on the other) the making good of structural defects. While the approach of the courts in cases such as *Ravenseft, Post Office v Aquarius Properties* and *Payne v Barnet* highlights and illustrates the reason for the statutory framework providing particular protection for the leasehold in respect of structural defects where there is no disrepair in a conventional sense, they do not in themselves directly assist in construing the intention in the lease behind the definition of specified repairs.

59. The words 'carried out in order to' in the clause indicate that in this respect the definition requires consideration of the purpose of the works. That purpose is to be ascertained objectively, not according to the subjective intention of the landlord.

60. The works 'not amounting to …' however indicate that a substantive approach is required in determining whether certain repairs are excluded from sub-para (i) of the definition for being 'the making good of structural defects' That substantive approach has a connotation of quantity, quality and/or significance. This looks to the effect of the works in question.

61. Against the background of cases such as *Ravenseft* and *Anns*, the words 'making good' (as distinct from 'keep in repair') in the statutory framework – and accordingly in the leases – seem likely to have been intended to connote remedial work to the structure not dependent on any actual deterioration of the premises or damage caused by the defect. This goes to preliminary issue 1 - What distinguishes making good one or more structural defects from carrying out other works of repair? In that sense, making good a defect involves an element of improvement or betterment.

62. It does not, however, follow that from the moment when any such deterioration or damage occurs remedial work to the structure which addresses both the deterioration or damage and the underlying defect ceases to amount to making good that defect at all. The effect of such work is both repair in a conventional sense and remedying the structural defect.

63. If the work in question does in fact address a structural defect in any significant respect, that work 'amounts' to making good that defect. It does not matter whether happenstantially, there has been deterioration of the Building which the work also addresses, nor yet whether any of the components of the Building has reached the end of its lifespan and is being replaced.

64. Accordingly in relation to preliminary issue 2, there is no material difference between work falling within (a) (b) and/or c

Counsel for the Respondent's submissions in relation to the meaning of the clause and in answer to the issues identified.

65. Counsel for the Respondent took the tribunal to *Payne v Barnet LBC* as his starting point, as in this case the Court of Appeal offered guidance on the distinction in right to buy legislation and leases between repairs and works to make good a structural defect. The case demonstrates, as the headnote makes clear that 'structural defects' are defects affecting the structure which require making good, as opposed to ordinary items of repair or maintenance; in the context of right to buy applications structural defects are limited to the narrow category of inherent defects.

66. Quoting from the same passage in the case as Counsel for the Applicants he argues that the distinction between ordinary works of repair and inherent defects which have caused no damage (as in the above case) is of some importance in the present case.

67. He submits, on behalf of the Respondent, that the fact that such a distinction was drawn by the legislation, and the draftsman's decision to separate the two distinct concepts and apply different requirements to each in relation to passing on the costs of meeting the liabilities reinforces the distinction between (and separation of) the two concepts in the Lease.

68. Whether or not, as originally constructed, the curtain walling system suffered from defective design and/or construction, the fact is that by the time the City resolved to replace it, and indeed long before any such defect had certainly caused damage to the building; there was extensive water penetration through the building with associated rot caused to parts of the timber subframe, the disintegration of the mastic seals and the distortion of the joints of the curtain wall and sub-frame themselves which led to gaps through which water could penetrate further.

69. Not only had there been deterioration to the building, the curtain walling had also been in place for more than 50 years and had, on any basis, reached the end of its useful life. Jenkins and Potter estimated, in 2002, that the cladding could fail altogether and even fall off the building, within 5 – 10 years, *i.e.* by 2012. It had been in place for 59

years by the time the works were commenced. It plainly required repair, and only repair by complete renewal and replacement made any engineering or financial sense.

70. The Respondent's obligation to undertake works to the building and to do something to the curtain wall arise from its repairing covenant and not from its covenant to make good defects affecting the structure. Whether or not there had ever been inherent defects affecting the curtain wall, by the time of the works in question, the building was in disrepair.

71. Counsel then turned to *Ravenseft Properties Ltd v Davstone Holdings* Ltd [1980] Q.B. 12 QBD as the classic case on the meaning of repair. He points out that the facts in *Ravenseft* bear some similarities with the present case. It concerned the question of whether works to the stone cladding of a concrete-frame building amounted to works of repair. In that case no expansion joints had been included when the building was being constructed because it had not been appreciated that the different co-efficients in expansion of stone and concrete rendered such joints necessary.

72. Moreover the stones themselves had not been tied in properly to the building so that, instead of cracking as a result of pressure as the building expanded, they bowed away from the concrete frame and were in danger of falling off the building.

73. The Court held that the installation of expansion joints could be required by the repairing covenant. It was a question of fact and degree whether work constituted repair or an improvement which was outside of the scope of the repairing covenant because it so changed the character of the building as to involve giving back to the landlord a wholly different building from that which had been demised. Moreover no competent professional would repair the cladding without the inclusion of expansion joints so that, as a matter of degree, that was the only way in which the building could be repaired.

74. In *McDougall v Easington DC* (1989) 21 HLR 310 CA in the context of works which completely altered the construction and appearance of the building leaving only its original framework skirtings and door frames, the Court of Appeal said that there were three different tests applicable separately or together in relation to whether the works constituted repairs:;(i) whether alterations went to the whole or substantially the whole of the structure or only to a subsidiary part; (ii) whether the effect of the alterations was to produce a building of a wholly different character than that which ha been let and (iii) what was the costs of the works in relation to the previous value of the building, and their effect on value and lifespan of the building.

75. The application of the *Ravenseft* and *McDougall* principles is a matter of fact and degree in each case.

76. Counsel argued that the following propositions are relevant to the question of whether the works in question to the curtain wall and the windows fall within the Respondent's repairing covenant and clause 4(3) of the lease as works of repair to the structure and exterior of the building.

(i) The curtain wall permitted rainwater to penetrate the outer skin of the elevations to which it was applied, which caused damage to the building

(ii) The curtain wall was also at the end of its serviceable life and was assessed as likely to fail entirely within 5 – 10 years of 2002

(iii) The methods of undertaking work considered by the authority included removal and reinstallation of the existing cladding with new mastic seals. This possibility was however rejected as an unworkable option as it would be likely to last no longer than 10 years when the entire curtain wall would once again need to be disassembled and the same process undertaken again. The disruption for residents would be 'severe' as the interior of the dwellings would be exposed to the elements for around 6 weeks and the costs of this option was estimated at £2.9 million (as compared with £3.6 million for a modern system). It would also not include the benefits of a modern system in terms of condensation and thermal efficiency.

(iv) Another option that was rejected for similar reasons was a halfway house between the reinstallation of the existing cladding and the installation of a modern system.

(v) The installation of a modern system was the best value for money and had the longest life expectancy and the best profile of advantages over disadvantages for the residents.

(vi) The consequences of the work not being undertaken, set out in the overview of the 2013 report para 10 include further water penetration, potential disrepair challenges, further deterioration of the fabric of the building, failure by the City to meet its

statutory obligations, potential health and safety issues as sections of the curtain wall became loose and disproportionate expenditure on short term/temporary remedial works.

77. Counsel argues that it was therefore plain that the cladding could no longer remain in its current state due to its condition, the deterioration of the building, and the inevitability of complete failure at some stage within the comparatively near future as as result of its having reached the end of its service life.

78. The works undertaken are to a subsidiary element of the building and the alterations to it extend only to the substitution of an obsolete and inadequate curtain wall with a modern equivalent. They will not produce a wholly different building from that which was the subject matter of the right to buy leases.

79. Counsel therefore submits that for these reasons the works to replace the curtain walls are works of repair and renewal as a matter of degree. The compete replacement of the curtain wall was inevitable given its age and infirmity, regardless of issues of inherent defect, and the element of improvement effected by these works is only what is to be expected by the replacement of a building element which is 60 years old with a modern equivalent. No competent engineer would have attempted to restore the original cladding or replaced it with a design directly equivalent rather than a modern design. No-one would build a curtain wall in the original manner today, and the decision not to re-install the original cladding does not change the character of the works as works of repair.

80. The decision to undertake these works (including balcony doors) was in order to keep in repair the structure and exterior of the building. No question of making good a structural defect arises.

81. The Applicants rely on these works to argue that a work of repair can also amount to the making good of a structural defect. While it is accepted that, as a matter of abstract logic, it may be possible to argue that works to repair a building may also include, or have the effect of, remedying a structural defect, it is not accepted that, even in such abstract terms, it would be a correct or natural use of language to say that those works would 'amount to' the making good of the defect. They would amount to considerably more than that.

The Tribunal's decision

82. The Tribunal determines the following in relation to the preliminary issues;

(i) Work carried out to remedy structural defects, even if that work happens to remedy disrepair, falls outside of the definition of 'specified repairs' for the purposes of charging lessees as long as either (i) the lessee was not notified of the structural defects at the time of the grant of the lease or (ii) the Corporation did not become aware of the structural defect earlier than the end of the initial period of either ten or five years after the grant.

(ii) A structural defect in this case is broadly understood to be an inherent defect in the design and construction of the building.

(iii) There is therefore no difference for the purposes of the relevant clause of the lease between

(a) Work to make good one or more structural defects and/or

(b) Work so required but the carrying out of which also addresses deterioration and/or consequential damages to the affected part(s) of the building which occurred over the time that the structural defect was not made good; and/or

(c) Work so required to remedy structural defects but the carrying out of which also involves replacement of one or more building components at the end of their lifespan.

(iv) There is therefore no need to decide on apportionment of the costs of the works.

Reasons for the Tribunal's decision

83. The tribunal takes as its starting point the words of the relevant clause of the lease, clause 4(3). It is clear from this clause that the lessees only have to pay for those items that fall within the definition of 'specified repairs'.

84. Certain structural works are excluded from the definition of specified repairs. Those works which are excluded, and therefore fall outside of the charging clause are works not amounting to the making good of

structural defects whose existence has not been notified to the tenant by the Corporation in the statutory notice or works of which the Corporation does not become aware earlier than ten years (or where relevant five years) after the grant of the lease.

85. Counsel for both parties have provided coherent arguments for their respective positions. Counsel for the Applicants argues that all works carried out to remedy structural defects, whether or not they include works of repair or works to replace items at the end of their useful life are works that are excluded from the definition of 'specified repairs', as long as the lessee was not given notice of the structural defect at the time of the grant of the lease, or as long as the Council knew of the works within the initial period.

86. Counsel for the Respondent argues that the only structural repairs excluded from the definition of 'specified repairs' are those which are only remedying structural defects. As soon as they involve repair work or work to replace items at the end of their useful life, they are included in the definition, and the lessee is required to contribute to the costs of the works.

87. The tribunal prefers the arguments of Counsel for the Applicants on the following basis.

88. The tribunal notes what Counsel for the Respondent says in relation to *Payne v Barnet LBC* 1998 30 HLR 295 CA, about the draftsman seeking to separate the two distinct concepts and apply different requirements to each in relation to passing on the costs of meeting the liabilities. It however agrees with Counsel for the Applicants that the definition of 'specified repairs' combines repairs and structural defects in such a way that there is not the clear-cut differentiation that Counsel for the Respondents seeks to demonstrate. Instead it agrees with the Applicants that whilst the cases demonstrate how the statutory framework provides protection for the leasehold in respect of structural defects where there is no disrepair in a conventional sense, they do not directly assist in construing the intention in the lease behind the definition of 'specified repairs'.

89. It does so on the basis of the statutory context, and in particular to the Right to Buy legislation. The purpose of that legislation was to encourage tenants to purchase their homes, and to ensure that the responsibility for paying for structural defects and for repairs was appropriately shared. It makes sense in this statutory context that the Right to Buy purchaser has to pay for structural defects of which he or she is aware at the time of the purchase, which provides an incentive for the landlord to provide full information and an opportunity for the prospective purchaser to consider the prospective purchase in the light of that information, and only to have to pay for structural defects of which the landlord has no knowledge until a set period after the grant

of the lease, whether five or ten years. So the leaseholder gets some, but not unlimited protection. This explanation is consistent with the Applicants' position.

90. It does not make sense in the statutory context that, in relation to structural defects, there is a distinction between remedying those which cause no disrepair, when the landlord would bear the cost, and those which do cause disrepair when the lessees bear the cost. This would provide a perverse incentive to landlords to wait until structural defects cause disrepair before carrying out works, a position which is unconvincing.

91. The words 'not amounting to' are clearly critical to understanding the definition. The tribunal accepts the argument of Counsel for the Applicants, that works ' not amounting to …' require a substantive approach to be taken in determining whether certain repairs are excluded from sub-para (i) of the definition. Repair works will be covered by the definition until they acquire the character of remedying a structural defect. The tribunal disagrees with Counsel for the Respondent, that such an approach requires an unnatural approach to the words 'not amounting to'. The works may well amount to more than remedying a structural defect, but the tribunal does not see that as a problem in the context of the definition.

92. As Counsel for the Applicants argues, the substantive approach has a connotation of quantity, quality and/or significance. It looks to the effect of the works in question. In the opinion of the tribunal works which, considered substantively, have the character of remedying a structural defect are excluded from the definition of specified repairs. This is consistent with the statutory context of the clause.

93. For the sake of clarity, although the points were not argued, the tribunal agrees with Counsel for the Applicants that the word structure is to be given a broad meaning and includes all the elements of the cladding and the roof to which works have been carried out.

94. It also agrees with Counsel for the Applicants that the Respondent was aware of the structural defects at the latest within the period of ten year from the grant of the first Right to Buy lease.

Application under s.20C and refund of fees

95. Any application under s.20C and for refund of fees will be considered at the determination of the substantive application.

Name: Judge Carr **Date:** 8th January 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).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(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 the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, 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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).

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(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
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   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
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(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

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(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

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(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.

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(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 the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, 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.

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(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
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(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

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(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
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of any question which may be the subject matter of an application under sub-paragraph (1).