FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/OOHB/LIS/2021/0003**
Property	**:**	**College Court, Glaisdale Road, Fishponds, Bristol BS16 2HQ & BS16 2HF**
Applicant	**:**	**Sovereign Housing Association**
Representative	**:**	**Capsticks Solicitors LLP**
Respondent	**:**	**The Lessees of Flats 14, 24, 39, 45, 51, 55, 57, 68, 74 and 76**
Type of Application	**:**	**The Landlord and Tenant Act 1985, section 27A**
Tribunal Member	**:**	**Judge M Davey**
Date of Decision with reasons	**:**	**11 August 2021**

DECISION

If service charges are properly demanded by the Applicant in respect of the major works Projects carried out at College Court in 2019 the sum of **£7,092.41** will be payable by each of the long leaseholders.

REASONS

The Application

1. By an application dated of 11 January 2021 ("the Application"), the Applicant, Sovereign Housing Association, applied to the First-tier Tribunal (Property Chamber) ("the Tribunal"), under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), for a determination as to the payability of a Service Charge, under the leases of 34 apartments at College Court, Glaisdale Road, Fishponds, Bristol, BS16 2HF ("the Property") in respect of major works carried out at the Property in 2018/2019 The Applicant is the Landlord under the leases.

2. The Respondents, listed in the Annex to these Reasons, are the long leaseholders of 10 of the Apartments at the Property

3. **Directions**

4. In the Directions of 11 February 2021, Regional Surveyor, Mr D Banfield FRICS, directed that it was likely that the Application could be determined on the papers, without an oral hearing, in accordance with Rule 31 of the First Tier Tribunal Property Chamber Procedure Rules 2013, and set out a timetable to enable the matter to be determined. Mr Banfield also directed that the Tribunal would not inspect the property unless a party or parties requested an external inspection. No such request was made. The Tribunal has therefore determined the matter on the basis of the written submissions of the parties. The Applicant provided a statement of case dated 13 March 2021 and eight of the participating Respondents provided statements of case between 25 March 2021 and 23 April 2021. The Applicant provided a reply, dated 26 May 2021, to the Respondents' statements of case and subsequently provided a bundle of documents in accordance with Directions.

5. One of the Respondents Ms Victoria Hughes (Flat 51) subsequently emailed the Tribunal on 18 June 2021 with further information and comment. As a result, on 24 June 2021, the Applicant made application to adduce a further statement, of Ashley Bedini. The Applicant indicated that it was content for the Tribunal, when determining the principal Application, to have regard to Ms Hughes' email but wished to reply to the same. The Tribunal invited representations from Ms Hughes and she and Marian Allen (Flat 76) responded

6. Having considered the documents Tribunal Judge D.R. Whitney by Directions dated 6 July 2021, agreed that the witness statement of Ashley Bedini and the various emails referred to within that statement should be placed before the Tribunal making the decision in the case. The Judge considered that it was in the interests of justice for all such documents to be placed before the Tribunal to assist in its reaching a determination.

The Case for the Applicant

7. Ms Kirsten Taylor, of Capsticks Solicitors LLP, prepared the case for the Applicant. Ms Taylor set out the following background to the Application. The Applicant is the freehold proprietor of a residential estate known as College Court, Glaisdale Road, Fishponds, Bristol, BS16 2HF ("the Estate") registered at the HM Land Registry under title number BL4678. The Applicant acquired the freehold in 2016. The Estate is a made up of six three-storey purpose-built blocks of flats ("the Blocks"). There are 78 flats in total: 34 flats are held on long leases; the remainder are let to social housing tenants. The long leases were acquired under Right to Buy provisions (or equivalent). The Blocks were purpose-built in 1978.

8. In April 2018 the Applicant instructed Ridge Property & Construction Consultants ("Ridge") to provide a condition report in relation to the existing condition and life expectancy of certain aspects of building elements of the Blocks, namely the front external cladding, the internal extract ventilation system and waterproofing of the rear balconies.

9. Ridge provided a Report, dated April 2018, ("the Ridge Report") which concluded as follows:

   "The timber cladding has reached the end of its life expectancy. The cladding is beyond economic repair, with replacement being the most economical solution."

   "The existing balcony decks and front elevation timber cladding have reached the end of their life expectancy, are defective and will continue to degrade over time."

   "We would recommend complete replacement of the front elevation cladding panels and new waterproofing systems to the rear elevation balcony decks where not already replaced."

10. The Ridge Report recommended replacing the existing timber cladding with steel insulated panel cladding, with a layer of fire protection board. The Report also recommended replacing the balcony coverings with a Alumasc Derbigum waterproofing system.

11. Ridge further recommended that the ventilation system should be replaced as part of the proposed major works. The Applicant was advised that:

- The existing system was around 45 years old and at the end of its life span;
- there had been an influx of issues with the fans not working how they were expected to;
- it was vital that the mechanical extract in each property is working effectively as this is the only means of venting the bathrooms (no external wall or opening window); and
- the age and original design of the extract system meant that it did not meet the current safety standards – there were no fire intumescent ventilation grills.

11. The Applicant commissioned a survey to be carried out by Alumsac Roofing Systems to investigate the condition of the existing waterproofing system on the balconies. Six balconies were surveyed with samples taken from each. All of the balconies surveyed were found to require replacement of the waterproofing.

12. In light of these investigations and the professional advice obtained (see above), the Applicant decided to embark upon a major works programme to the external cladding, ventilation system and balconies ("the Projects"). In the second half of 2018 the Applicant carried out a statutory consultation process in accordance with section 20 of the Landlord and Tenant Act 1985.

13. Having obtained five estimates, the Applicant chose the lowest estimate, of £913,694.54, which was provided by Steele Davies Ltd. Work commenced in January 2019 and was completed on 20 May 2019. The final invoiced cost was £752,080.09. On 23 January 2020, the Applicant served a notice on the leaseholders under section 20B of the Landlord and Tenant Act 1985 stating that they proposed to charge a service charge of £7.092.41 per flat (total £553,207.87) in respect of the works. The Applicant excluded the cost of the balcony works, which they had decided not to recharge to leaseholders.

14. The Applicant's case included all relevant supporting documents. It also included a witness statement by Christopher Marc Elliott, who was the maintenance manager for a patch of the Applicant's properties within Bristol and had assumed much of the responsibility for the Projects. Mr Elliott worked closely with his colleague Ashley Bedini who was the contracts manager for the site. Mr Elliott stated that he was in constant communication with both Ridge Property and Construction Consultants (the "Principal Designer") and Steele Davis (the "Principal Contractor")

together with any sub-contractors that were appointed. He stated that he was also heavily involved with the consultation stage of the Projects that took place in 2018 and attended leaseholder meetings and responded to queries that leaseholders had surrounding the Projects.

15. Mr Elliott explained that the Applicant's revised intention had been to fit stand-alone ventilation systems in each flat but this had been resisted by some leaseholders who did not want ducting in their kitchens or the invasive nature of the works that were required. After a debate with residents, about the pros and cons of the individual systems versus a communal system, the Applicant still met resistance to the former by some leaseholders and the communal system was therefore adopted. Mr Elliott says nevertheless that access will still be needed to flats to balance the system.

16. With regard to the cladding works, Mr Elliott says that the timber cladding, which was previously in place at the front of each block, was around 45 years old and increasingly required interim repairs. He says that the existing thermal insulation did not conform to building regulations and was losing its existing performance through age and deterioration. The timber cladding was also deemed to be a significant fire risk and needed replacing as a priority. Mr Elliott said that the new steel-faced cladding, which is in place on the front of the blocks, now conforms to fire safety regulations. Mr Elliott said that it made economic sense to do the insulation at the same time as the cladding and he referred to the thermal efficiency gains, which he says were thereby achieved.

17. Finally, Mr Elliott explained that doing all the works at the same time generated economies of scale by eliminating the need for duplication of many costs that doing the jobs separately would have entailed.

18. Ms Taylor explained that there are six types of lease at College Court but noted that all of the lease types make similar provision for service charge costs to be charged to leaseholders. She says that crucially, the provisions relating to the apportionment of service charge costs are the same for all lease types.

19. By clause 4(b) of all the leases the tenants covenanted to: "to pay on demand (i) the amounts specified in the first proviso to Schedule A (ii) a reasonable part of the costs incurred or to be incurred by the [Lessor/Vendor]".

20. So far as relevant, the tenant's covenants provide as follows:

Clause 4: "To pay on demand

(i) the amounts specified in the first proviso to Schedule A
(ii) (a reasonable part of the costs incurred or to be incurred by the Lessor in carrying out the repairs to the Property to the Remainder

of the Building and the Scheme within the repairing obligations of the Lessor under Clause 6 of this Lease and …

(v) the cost incurred by the Lessor in improving the Property or the fixtures and fittings therein subject to the provisions of Section 4 of the Housing and Planning Act 1986.

21. The landlord's repairing covenants are as follows:

Clause 6: "(a) to keep in repair [including decorative repair] the structure and exterior of the Property and the Building [including window frames drains gutters and external pipes] and to make good any defects affecting the structure

(b) To keep in repair any other property over or in respect of which the Lessee has rights as specified in paragraphs (a) and (b) of Schedule A

(c) To ensure so far as practicable that such of the services as are provided by the Lessor as specified in paragraphs (c) to (g) inclusive of Schedule A are maintained at a reasonable level and to keep in repair any installation connected with the provision of such services"

22. The rights granted to the lessee under paragraph (a) of Schedule A include:

"(iv) The drainage and disposal of water sewage smoke or fumes"

(v) The use and maintenance of the pipes and other installations for the said passage of drainage and disposal specified in (iii) and (iv)."

23. The first proviso to Schedule A provides as follows:

"PROVIDED THAT the exercise of all rights specified in the Schedule shall be subject to the contribution by those claiming to exercise the same of a share of the reasonable cost of management of the Scheme and of keeping all structures or apparatus affected by such rights in good repair and working order [including replacement where necessary] any dispute over the necessity for repair or replacement the reasonableness of the costs or the number of properties to be settled by the decision of an arbitrator agreed between the Lessor the Lessee and all others also potentially liable to contribute or in default of such agreement appointed by the senior office holder of the local branch of the Royal Institution of Chartered Surveyors".

24. The Applicant contends that despite the minor variations in wording, all of the categories of lease entitle the Applicant to recover the costs of the cladding works and ventilation works from leaseholders through the service charge.

25. The Applicant argues that the works to replace the front exterior cladding fall within the landlord's general repairing obligations in relation to the structure and exterior of the Blocks (clause 6(a)). Similarly, that the works to replace the ventilation system fall within the landlord's repairing obligations in relation to the structure and exterior of the Blocks (clause

6(a)); and the obligations to keep in repair any property over which the tenants have rights (clause 6(b)), namely the pipes and installations for the passage, drainage and disposal of water and fumes (Para (a), Sch. A).

26. The Applicant contends that these costs are recoverable from leaseholders as a service charge under clause 4(b) of the leases and pursuant to the first proviso to Schedule A.

27. The Applicant further contends that the costs of the works have been reasonably incurred and that the statutory consultation process was properly followed. It says that the decision to commence works was taken following professional advice that indicated replacement works were necessary to remedy the external cladding and ventilation system, which were beyond economic repair. The Applicant instructed the contractor who provided the cheapest quotation, and the final costs were substantially lower than originally anticipated.

28. As noted above, the Applicant says that it has decided not to charge leaseholders for the costs of works relating to the balconies at all and has deducted these sums from the total it proposes to recharge.

29. The Applicant seeks to recharge the costs of the cladding works and ventilation works, which total £553,207.87. In relation to apportioning these costs, the Applicant proposes to divide the remaining costs equally between the 78 flats in the building, so that each of the 34 long leaseholders would be required to contribute £7,092.41 each.

The case for the Respondents

30. The Respondents made representations to the Tribunal as follows.

31. **Julie Pearce** (formerly Mildon) (Flat 45) stated that since completion of the works she had had problems with leaking from her balcony into the flat below. She also claimed that she had never been consulted about charges from two years previously and that it was unfair that only leaseholders were being charged.

32. **Clive and Caroline Scorer** (Flat 57) also referred to balcony leaks and questioned both the quality of the Project works, which they said remained incomplete, and the contracting process. They also referred to the fact that since the works stop taps and other services within meter cupboards have become inaccessible. They argued that claims by Sovereign that the cladding would resolve issues around damp and flat temperatures had proved to be unfounded. Mr & Mrs Scorer also raised concerns about Sovereign having stated that they will need to review sinking fund payments before the next programme of works.

33. **Anne Swain** (Flat 74) made similar points to Mr and Mrs Scorrer. She also questioned why contractors in Devizes and Bournemouth were chosen for a project in Bristol. Ms Swain made the additional claim that the new ventilation system, which runs 24 hours a day in the bathroom and wc,

sucks warm air out of the flat thereby increasing her energy consumption.

34. **Claire Robinson** (Flat 24) stated that there had been a lack of clarity as to sinking fund contributions, the accumulated fund and expenditure from the fund and questioned whether Sovereign had ensured adequate advance funding for the major works Projects. She said that the accounts for 2019 showed that there was a scheme fund of £42,638.89, which had reduced to £4,478.99 by the beginning of financial year 2019-2020, and questioned what the funds had been used for.

35. Ms Robinson referred to a meeting in February 2019 at which, she says, Sovereign promised to deliver a five year Plan which has never materialised. Ms Robinson questioned whether use had ever been made of the Government Decent Homes Initiative (1997). Ms Robinson also questioned the quality of the works and referred to inaccessibility of services within the meter cupboards. She also asked how the cost of the work to the balconies was calculated. Ms Robinson further questioned the carrying out of three sets of major simultaneously.

36. In addition Ms Robinson raised the matter of repayment plans and referred to the limited means available to many residents and the stress caused by the Projects over a four year period. Finally, Ms Robinson said that her monthly service charge had risen from £53.37 in March 2021 to £96.33 in April 2021.

37. **Christine Smith** (Flat 55) made similar representations to those referred to above with regard to the cladding, balconies and ventilation system, referring also to the increased size of the ducting system. She also queried the amount of the reserve fund and whether it was being used towards the cost of the Projects.

38. **Marian Allen** (Flat 76) made similar points to the above Respondents. In commenting on the Applicant's statement of case she raised the following issues. That the ventilation system in her flat had not been working since she bought her flat in 2011; of the six flats in her block three have not been completed with the extraction system (and the system had not been balanced); she has no fire intumescent ventilation grill; residents had not been told that the ventilation system would run continuously, thereby increasing the electricity usage; her balcony had been refurbished in 2014 along with many others and they had no problem with leaks until after the major works; she now had damp and mould problems in the bedrooms that did not exist before.

39. **Victoria Hughes** (Flat 51) also made representations similar to those raised by other Respondent leaseholders and more specifically regarding damp in her flat, caused by a leaking balcony above, since the major works Projects stating that despite inspection by Sovereign no repairs had been effected. Ms Hughes also referred to the need to remove post-major works overlapping cladding that had prevented her bedroom windows from opening.

40. **Elizabeth Sowter** (Flat 14) also raised the matter of a promised five year plan that never materialised and queried the need for all three sets of works to have been carried out simultaneously, despite the aim of a reserve fund being to spread costs of major works over a period of time.

41. Two more Respondents made representations to the Tribunal but their comments were not included in the bundle prepared by the Applicant. They are **Mr Alan Newman** (Flat 39) and **Margaret Stevenson** (Flat 68).

42. Mr Newman stated that after two winters there had been no increase in thermal efficiency in his flat since the works were carried out, nor had a thermal efficiency test been carried out. He also made similar representations to those of other Respondents with regard to the ventilation system. Mr Newman said that there had been little maintenance before the works and that the Applicant has not dealt with outstanding snags.

43. Ms Stevenson also replicated the comments of others on the ventilation system, thermal efficiency, failure to deal with snagging and balcony leaks.

The Applicants' Response

44. The Applicant, in its Reply, did not respond to each individual submission by the Respondents, many of which raise similar points, but dealt instead, as follows, with the submissions according to the key themes and issues raised.

Consultation/ due diligence on the appointment of contractors

45. The Applicant says that several of the Respondents make generalised allegations that they were not adequately consulted and/or that the Applicants did not properly evaluate which contractors would "ensure value for money and quality of work".

46. The Applicant denies these allegations and says that it properly carried out the section 20-consultation process in accordance with its statutory obligations. The Applicant says that the Respondents had every opportunity to respond during the consultation process and, that process having been properly carried out, the points raised by the Respondents have no bearing on the payability of the service charges that are the subject of this Application.

Alleged issues with the works

Balconies

47. The Applicant says that the suggestion by some of the Respondents that the works to balconies have caused issues of water ingress is not accepted. The Applicant referred to paragraph 34 of Mr Elliot's statement, which

stated that testing has been carried out, which did not support the conclusion that these water leaks relate to the balcony works.

48. The Applicant says that in any event, because it is not proposing to recover the costs relating to the balcony works at all from leaseholders, the costs of the works to the balconies are not within the scope of this Application.

Ventilation system

49. The Applicant says that some of the Respondents have criticised the new ventilation system on the basis that: (a) it does not allow individual leaseholders control over their ventilation system; (b) stop taps and other services have become inaccessible as a result of these works; and (c) the works are incomplete.

50. The Applicant says that

as to (a), Mr Elliot's statement at paragraphs 8 -12 explains that the option of having individual ventilation systems within each flat was proposed, but some leaseholders were not prepared to allow access for the necessary works. The Applicant says that in the circumstances, it had no choice but to opt for a communal ventilation system instead.

As to (b), Mr Elliot's statement at paragraphs 19 and 20, explains that communal pipes have been enclosed to comply with regulations and that there are stop taps located at the front of each block so water supply can be isolated.

As to (c), as Mr Elliot explains in paragraphs 16-18, the balancing exercise required to finalise the installation has not yet been carried out because access has not been provided by some of the occupiers of the flats in the blocks.

The Applicant says that therefore these matters do not establish that the works were not carried out to a reasonable standard.

Thermal efficiency

51. The Applicant says that some of the Respondents have complained that cladding works have not improved the thermal efficiency of the flats. The Applicant says there is no detail to these allegations, which are not accepted. It says that at paragraphs 29-30 of Mr Elliot's statement, he explains that evidence from flat 34 suggests that the thermal efficiency has improved as a result of the installation of new insulation.

52. The Applicant says that in any event, it is not understood how, or on what basis, lack of increased thermal efficiency could affect the payability of the costs of these works.

Reserve fund

53. Another point raised by some of the Respondents relates to whether the

Reserve Fund should be used to pay for costs of these works. The Applicant says that firstly, this Application is made prospectively to determine whether certain costs would be payable by leaseholders if they were demanded. Once the Applicant has obtained a decision on this point, then it will be entitled to consider the source of that funding, i.e. whether to use some or all of the reserve fund to contribute to the costs of the works. The Applicant says it therefore follows that this matter is simply not relevant to the present Application.

54. The Applicant says secondly, the leases do not specify what the Reserve Fund is to be used for, such that the Applicant has a discretion to decide whether those sums should be used for the costs of these works or not.

The Works Project

55. The Applicants refutes the suggestion by some of the Respondents that it was inappropriate to carry out three works projects at the same time. It says firstly, the Applicant is not proposing to charge leaseholders for the costs associated with works to the balconies, which is a significant proportion of the total costs. Secondly, as explained by Mr Elliot at paragraph 40 of his witness statement, carrying out these works at the same time was more cost effective and will have reduced the overall costs payable by leaseholders.

Other points

56. In her submission Ms Pearce (Flat 45) says that "it [is] unfair that lease holders are being charged when Sovereign clients are not". The Applicant says for clarification that it is proposing to charge each of the 34 long leaseholders 1/78 of the costs of the relevant works. The shares attributable to the remaining 44 flats that are not held on long leases will not be charged to leaseholders and will be funded by the Applicant.

57. Some of the Respondents have raised the possibility of the Applicant offering "repayment plans" for payment of these sums. The Applicant says there is no requirement on the Applicant in the leases, or otherwise, for the Applicant to do so and this issue is therefore irrelevant to the present Application.

58. The Applicant also says that, whilst not relevant to this application, Ms Robinson states that her service charge has increased by 80% but fails to stipulate the timeframe that covers this increase. The Applicant says that by way of an illustration, Ms Robinson's service charge in 2017-2018 was £63.47 per month and the estimated demand she has received for 2021-2022 shows her monthly contribution to be £95.50. This represents a 10% increase year on year, which reflects the increasing costs of services and inflation.

Conclusion

59. The Applicant says that the Respondents' submissions do not raise any relevant matters to suggest that the costs of the works were not reasonably

incurred. It says that the Respondents seemingly accept that the works were necessary and appropriate. The Applicant says it tendered for the works as part of the section 20 consultation and the cheapest contractor was appointed. The eventual costs were less than originally anticipated. The Applicant argues it is clear therefore, that the costs were reasonably incurred.

60. The Applicant says that the main allegation by the Respondents appears to be that the works have not been carried out to a reasonable standard. It says that these allegations are not properly substantiated and, referring to Mr Elliott's witness statement, says that the Applicant's evidence clearly demonstrates that this was not the case.

61. The Applicant says that in the circumstances, it invites the Tribunal to determine that if service charges are properly demanded for the works, then the sum of **£7,092.41** would be payable by each of the leaseholders.

Further developments: Fire safety

62. On 18 June 2021 Victoria Hughes (Flat 51) emailed the Tribunal case officer and the Applicant's solicitor as follows:

> "I have just been advised by a neighbour that the cladding that Sovereign installed in 2019 is a metal composite material (MCM) which has safety concerns attached to it arising from the Grenfell incident back in 2017.
>
> I have been told that due to the cladding used, the flats at College Court are now potentially unmortgage-able due to the cladding being potentially flammable and the material used being listed in the category of materials of concern.
>
> This making both the flats unsafe to live in and also putting Leaseholders in a situation where potentially they cannot sell them.
>
> This information has come to light following a survey carried out by a purchaser – needless to say that purchase has now fallen through.
>
> **I assume this will affect the outcome of the Tribunal?**
>
> As you will be aware, one of the concerns I previously raised was how do Leaseholders know that the quality of materials used are of a high and correct standard.
>
> I had the concern around quality of materials used before I even knew about this cladding issue due to the fact that following the balcony works, I had (and still have) water coming through from the flat above mine into my kitchen ceiling as does my neighbour who lives below me as my balcony is also leaking into her flat."

63. In response the Applicant produced a witness statement of Ashley Bedini, a Project Manager for the Applicant, to which Ms Hughes and Marian Allen responded. Mr Bedini was the Sovereign Contract Manager during

the major works Projects undertaken at College Court in the early part of 2019.

64. Mr Bedini says that on or around 17 June 2021, the Applicant became aware that the sale of a property at College Court had fallen through because a lender had refused lending to a prospective buyer because of the type of cladding on the building. He says that the Applicant does not have full details of the lender's reasons for denying funding, however the Applicant understands that in reaching their decision, it is likely that the lender has followed the "*Valuation of properties in multi-storey, multi-occupancy residential buildings with cladding*" produced by RICS dated March 2021.

65. Mr Bedini says that, although the Applicant fully recognises the concerns that the leaseholders have about the future sale of their properties, it is important to differentiate between the RICS Guidance and the Applicant's duty to comply with Building and Fire Safety Regulations.

66. Mr Bedini stated that on 17 May 2019, Geoff Buckley, a Building Control Surveyor of Buckley-Lewis Partnership Limited (the "Building Control Surveyor"), produced for Building Control at Bristol City Council, an independent Final Certificate in accordance with section 51 of the Building Act 1984. The Certificate relates to the completion of the recladding at the Site.

67. Mr Bedini also said that he echoed the comments made by his colleague Christopher Elliot in his witness statement dated 26 May 2021. He referred in particular referred to paragraphs 21-31 of that statement where Mr Elliott gives a detailed description of the cladding replacement. Mr Bedini said that the previous timber cladding was directly attached to the timber stud of the building and this represented a significant fire risk. By contrast, as part of the major works Projects, a Suplalux fire protection board was fitted between the cladding and the stud to provide fire compartmentation.

68. In response to an enquiry from Mr Bedini as to whether the Blocks complied with regulations after the works and today, Mr Buckley replied, explaining that the original building was clad with timber boarding and did not have the required cavity barriers at floor level. He said that the cladding did comply with the building regulations in force at the time of construction although the lack of cavity barriers would not have complied. Mr Buckley said that that the proposed work carried out in 2019 involved removing the timber boarding, introducing cavity barriers at each floor level, the introduction of a non-combustible boarding to the external face of the existing timber stud walling and upgrading the insulation performance of the external wall by over cladding with Kingspan architectural wall panel (which has a combustible core but is faced with a steel moulded panel to both the external and internal face of the insulation).

69. Mr Buckley said that overall therefore this work improved the external wall construction, the risk of fire spread past the compartment floor and the thermal performance of the external wall. He said that as the building is less than 18.0m in height it would still be a non-designated building and would therefore still comply with the current guidance in Part B (fire Safety).

70. Mr Bedini said that whilst it is accepted that the cladding has a combustible core, the metal exterior would not catch fire. Eventually it would melt causing the combustible interior to set alight but given the time this would take, on a three storey building he considered there to be limited risk of ignition and undue spread of fire over the outside surface of each building without the tenants being safely evacuated.

71. Two of the Respondents, Ms Hughes and Marian Allen, replied to Mr Bedini's evidence. Ms Hughes said that

- "I wasn't aware that the Kingspan cladding that Sovereign decided to use had a combustible core. If I'd been aware of that I would have made an objection before it was installed.
- I don't understand why Sovereign would have chosen to have knowingly used a combustible product, even if it has been faced with a steel moulded panel.
- In clause 7 of Ashley Bedini's witness statement he refers to an 'independent final certificate' which relates to the completion of the recladding at College Court. When I looked at the certificate I noticed it says 'This certificate is evidence (but not conclusive evidence) that the requirements specified in the certificate have been complied with. I don't think it's satisfactory to have a certificate that has the wording 'but not conclusive evidence' in it."

72. Ms Allen said that the disclosure of the fact that the Kingspan cladding has a combustible core is the first time this has been mentioned in any report. She said that had they been informed of this in any meetings attended by them and the Applicant or paper work since then there would have been strong objection to this product being used. Ms Allen said that Sovereign Housing has stated that the existing cladding was combustible and yet the works replaced one combustible material for another without informing the residents.

73. Ms Allen also commented that rather than the work having improved the risk of fire spread past the compartment floor, as stated by Mr Buckley, she believed that the works should have eliminated the fire risk. Ms Allen said that she feels now that "not only do we have a poor product fitted to our property but a product that has potentially put us and our property at a greater risk".

74. Finally, Ms Allen said she felt that the works should be expected to meet a "first class" standard rather than the "reasonable" standard as claimed by Mr Bedini.

Discussion and determination

75. It is a common scenario for older flat developments to require upgrading after a period of time. This can create considerable financial burdens for flat owners in Housing Association developments who have bought long leases of their flats, under the right to buy or similar legislation, whereby they are obliged to contribute through a service charge towards the costs of the work involved.

76. The likelihood of this scenario arising has increased in recent years following revelations that many flat developments no longer satisfy statutory requirements as to fire safety. The present case is an example of such a scenario. The major works Projects carried out at College Court in 2019 has raised a number of concerns for leaseholders who have responded to the Landlord's application to the Tribunal for a determination as to the sums payable by way of service charge towards the costs of those works.

77. The issue for determination by the Tribunal is whether the Applicant Landlord is able to recover from each leaseholder the sum of £7,092.41, claimed to be recoverable by way of service charge contribution to the cost of the Major Works project at College Court in 2018-2019 and if not the amount that is recoverable.

78. The works in question are those of recladding and insulating the Blocks and replacement of the ventilation system.

79. Clause 6(a) of the relevant leases contains an obligation on the landlord to keep in repair [including decorative repair] the structure and exterior of the Property (that is to say the flat) and the Building [including window frames drains gutters and external pipes] and to make good any defects affecting the structure. This clearly extends to the replacement of the front exterior cladding, the additional insulation and the works to replace the ventilation system. All of these works fall within the repairing obligations of the Landlord whose obligations extend to the need to keep in repair any property over which the tenants have rights (clause 6(b) of the lease), namely the pipes and installations for the passage, drainage and disposal of water and fumes (Para (a) of Schedule A to the lease).

80. Clause 4 of the lease contains an obligation on the part of the tenant

"To pay on demand

(iii) the amounts specified in the first proviso to Schedule A

(iv) (a reasonable part of the costs incurred or to be incurred by the Lessor in carrying out the repairs to the Property to the Remainder of the Building and the Scheme within the repairing obligations of the Lessor under Clause 6 of this Lease and …

(v) the cost incurred by the Lessor in improving the Property or the fixtures and fittings therein subject to the provisions of Section 4 of the Housing and Planning Act 1986.

81. In relation to apportioning these costs, the Applicant proposes to divide the costs equally between the 78 flats in the building, so that each of the 34 long leaseholders would be required to contribute £7,092.41 each. The Tribunal agrees that this method of apportionment is fair and reasonable. Ms Pearce (Flat 45) suggested that it was unfair that only leaseholders were being charged but this is a misunderstanding of the true position. The long leaseholders are only being charge 1/78 of the cost (i.e. 34/78 in total). The remainder is borne by the Landlord, it not being recoverable from the social rented tenants because those tenants do not have such service charge obligations in their short-term tenancy agreements.

82. However, the Respondents argue that the sums that they are being required to pay are unreasonable for a variety of reasons. This brings us to the statutory protections, in the Landlord and Tenant Act 1985, that are available to variable service charge payers. The relevant provisions apply to a service charge as defined in section 18 of the Act, which provides that

> (1)……."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."

83. The service charges in this case undoubtedly fall within that definition. Section 19(1) of the Act provides that relevant costs shall be taken into account in determining the amount of service charge payable for a period (a) only to the extent that they are reasonably incurred and (b) where they are incurred on the provision 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.

84. Section 27A(1) of the Act gives the Tribunal jurisdiction to determine whether a service charge is payable and, if it is, (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. The present Application is concerned with the amount that is payable. This turns on whether the costs incurred by the Landlord were reasonably incurred and whether the works in question were of a reasonable standard.

85. Before dealing with those matters we should refer to section 20 of the 1985 Act, which provides extra protection for leaseholders by way of a statutory consultation process, where works on a building are involved, the costs of which would mean that an individual lessee would be obliged to pay more than £250 by way of service charge. Failure to consult, unless the Tribunal dispenses with that fault, means that the sum recoverable is limited to £250 per leaseholder whatever might otherwise have been recoverable. Despite the fact that some of the Respondents in the present case suggested that they had not been consulted on the works in question the evidence is clear that the Landlord carried out a full section 20 consultation and the Tribunal is accordingly satisfied that any sums payable by way of service charge are not limited by reason of failure to comply with section 20.

86. This therefore brings us to the matter of the extent to which the costs claimed were reasonably incurred and whether and to what extent the works were of a reasonable standard.

87. Some Respondents questioned whether it was necessary to do all the works at the same time but the Applicant has given convincing reasons as to why this approach was adopted. These are set out in Mr Elliot's witness statement as follows:

"By doing the Projects at the same time the Applicant was able to save costs in a number of areas:

40.1. One site compound was utilised for the Projects therefore the Applicant only needed to provide facilities once, including facilities such as waste provision, site protection, traffic management plans and risk assessments;

40.2. The Applicant was able to utilise specific recycling processes for many of the discarded materials such as paint points, timber, the discarded asphalt. This would not have been cost effective on a smaller project and a multi-use skip would have been used.

40.3. There was only one set of administration fees, the Principal Designer was able to collate all of the relevant documentation and complete one handover of the Health and Safety file;

40.4. By completing the Projects simultaneously, the Applicant was able to access the most competitive pricing from the Principal Designer and Principal Contractor, there was certainly an efficient use of economies of scale.

40.5. The original method set out for the ventilation works involved lifting fans through the ceiling, thus requiring invasive holes to be cut. As there was scaffolding on the exterior of the properties, the contractors were able to insert the fans through the space where the louvres were replaced. This represented a significant cost saving and minimised disruption to leaseholders. If the ceiling needed to be removed, specialised works would

have needed to be completed to isolate the asbestos within the artex. This was not required and there were no associated decoration costs of making good the ceiling either.

41.The Projects were originally estimated to take 3 months, however, during February 2019 the works were delayed by the "Beast from the East" This led to a delay of around 2 weeks however, the works were on the whole completed without delay and very efficiently. In hindsight, if the Applicant had opted to leave one of the Projects, then there would have been delays due to the COVID-19 pandemic. The costs of materials and scaffolding in particular are likely to have meant the Projects would have been a lot more expensive due to demand and Brexit."

88. The Tribunal is satisfied that these are satisfactory reasons for completing the works, which were all necessary, simultaneously.

89. Some Applicants questioned the choice of contractor, although there was no evidence to establish that this choice was unreasonable. As noted above the Applicant carried out a section 20-consultation. The tendering process produced five tenders of which the cheapest, that of Steele Davies Limited, was chosen. Indeed the final costs were substantially lower than originally anticipated. The Tribunal accordingly finds that the choice of contractor was reasonable.

90. Since the Grenfell Tower disaster there has been widespread national concern as to the fire risk that certain types of cladding may present, especially on high-rise buildings. Two of the Respondent leaseholders at College Court have raised serious concerns as to the quality of the recent cladding works on the Estate. They argue first that they have only recently (in June 2021) become aware of the fact that the cladding used is of a type known as MCM (Metal Composite Material). They say that because there are serious concerns as to fire safety associated with the flammable core of this material it should not have been used at College Court and they would have objected had they known that this type of product was being proposed at the outset. The Respondents believe that the sale of a neighbouring flat recently fell through because of the presence of the cladding, and that this effectively suggests that the flats are unsaleable.

91. The implication is that the costs of the cladding works were therefore unreasonably incurred by the Applicant and/or that the work was not of a reasonable standard (see section 19 of the 1985 Act) and this should have an impact on the sums recoverable in respect of the cladding works by way of service charge.

92. The first point to note is that it is settled law that it is for the landlord to choose the method of repair when complying with its repairing obligations in the lease. But was it unreasonable for the Landlord to choose the Kingspan cladding in 2018/2019? The Applicant took professional advice as to the appropriate method of dealing with the problem of deficient cladding in the Building before the works. Ridge recommended the Kingspan cladding system as a solution.

93. Requirement B4 of Schedule 1 to The Building Regulations 2010 deals with external fire spread and provides as follows:

> **B4.** (1) The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building.
>
> (2) The roof of the building shall adequately resist the spread of fire over the roof and from one building to another, having regard to the use and position of the building.

94. Regulation 7(1) of the Building Regulations provides that building work shall be carried out (a) with adequate and proper materials which (i) are appropriate for the circumstances in which they are used, (ii) are adequately mixed or prepared, and (iii) are applied, used or fixed so as adequately to perform the functions for which they are designed; and (b) in a workmanlike manner.

95. Regulation 7(2) deals with fire classification of certain products used in external walls but does not apply to a residential building of less than 18 metres above ground level.

96. In the present case an approved independent building inspector, Mr Buckley, had issued a certificate to the effect that the cladding and its fitting met the relevant statutory requirements including fire safety.

97. Ms Hughes and Ms Allen suggest that the Kingspan cladding material used is potentially dangerous and should not be used, but the Tribunal has not seen any evidence sufficient to establish that this is the case. Ms Hughes has referred to the fact that a prospective sale of a flat in the development has recently collapsed because the purchaser's lender would not approve a loan on the basis of the cladding of the Blocks. Neither the Applicant nor Ms Hughes has produced relevant details of the case. However, it is a quite separate issue to that with which the Tribunal is dealing.

98. In his witness statement Mr Bedini said that "We do not have full details of the Lender's reasons for denying funding however, we understand that in reaching their decision, it is likely that they have followed the "*Valuation of properties in multi-storey, multi-occupancy residential buildings with cladding*" produced by RICS [the Royal Institution of Chartered Surveyors] dated March 2021.

99. That Guidance to valuers concerns what is called an External Wall System fire safety process. The Guidance was issued after the works in the present case were completed. It advises valuers that in certain circumstances they should require a EWS1 certificate. This is a form, which certifies that someone who is suitably qualified to do so has assessed the external wall cladding system. Its purpose is to ensure that a valuation can be provided for a mortgage or re-mortgage on a property which features an external wall cladding system of uncertain make up, something that has both safety implications and which may affect value if remediation is required due to the fire risk associated.

100. The process results in a signed EWS1 form per building, with two options/ outcomes:
(A) external wall materials are unlikely to support combustion
(B) combustible materials are present in an external wall with sub options of either, (i) fire risk is sufficiently low that no remedial works are required, or (ii) fire risk is high enough that remedial works are required.

101. The form was originally designed following Government advice regarding external wall systems on buildings above 18m and was created to ensure residential buildings over 18m tall could be assessed for safety to allow lenders to offer mortgages. Changes in Government advice in January 2020, brought all residential buildings of any height potentially within scope. As a result the RICS Guidance was amended in March 2021. It now says that in the case of a building of 4 or fewer stories where there are ACM, MCM or HPL cladding panels on the building the valuer should require an EWS1 form.

102. It is important to appreciate that this Guidance is related solely to valuation for lenders. The Building Regulations are quite separate. Furthermore, it is public knowledge that the Government announced on 21 July 2021 that a panel of experts had advised it that an EWS1 certificate should not need to be required for buildings under 18m high and that it would act accordingly. The Government has yet to implement this advice.

103. Several Respondents also argued that the sums, which the Applicant proposed to demand, were unreasonable, on the ground that the cladding and insulation works in question were deficient because the flats were not noticeably warmer. The Respondents say that there has been no gain but against that the Applicant has established that at the same time as the cladding was installed a fire protection board was fitted together with a further layer of insulation. To demonstrate the benefits of this the Applicant applied for and contained an energy protection certificate for Flat 34 (a social rented unit), which showed an increase in rating that raised the insulation in the wall from 3 to 4. The Tribunal considers that the matter of thermal efficiency or inefficiency is one of fact, which would need appropriate evidence, which it has not seen, to substantiate the claims in question. The Applicant says that it explored the possibility of external grant funding towards the costs of insulation but the Building seemingly did not qualify for the same.

104. Based on the evidence provided by the parties, the Tribunal finds that, in the absence of any compelling evidence to the contrary, it is not able to determine that the costs incurred in 2019 on the cladding system recommended to the Applicant by their appointed consultants and signed off by the independent Building Inspector, were unreasonably incurred or that the works were not of a reasonable standard.

105. Some Respondents were critical of the ventilation works, including the observation that the ventilation runs continually and is noisy. As to the fact that individual systems were not fitted in the flats the Applicant explained

that this was originally the preferred option but some leaseholders were not prepared to allow access for the necessary works which is why a communal ventilation system was used. It is not clear why the Applicant did not use powers in the lease to enable it to enter and carry out the works. However, it did not. Unfortunately, this means that stop taps are not accessible within individual flats and the Tribunal agrees that this is a disadvantage, notwithstanding that the Respondent says that stop taps are located at the front of each block for use in an emergency. However, the Applicant is exploring whether an isolation valve can also be fitted within each property.

106. It is clear that the system has yet to be balanced to run efficiently and that this cannot be done until access can be gained to all flats, which may take time given the reluctance of some flat owners to permit the necessary access. When done this may solve the grievances. If not it will be incumbent on the Applicant to ensure that the system functions in a way that does not increase costs for leaseholders and does not operate in an unacceptably noisy manner. However, at this stage the Tribunal does not have sufficient evidence to establish that the sums expended by the Applicant in respect of the ventilation works were unreasonably incurred or unreasonable in amount. This does not mean that individual leaseholders would not have grounds to complain to the Applicant where the system is not properly functioning in their particular flat.

107. Some Respondents made reference to possible repayment plans to be provided by the Applicant, but that is a matter between the parties and does not have a bearing on the issue to be determined by the Tribunal. Respondents also made reference to the Reserve Fund (provided for by four of the six types of lease). However, that is also a separate matter from the reasonableness of the costs of the major works Projects and is one in respect of which the Respondents may seek to engage the Applicant in discussions.

108. The major works Projects have clearly been a long-term source of stress and anxiety for the Respondents, who are not legally represented and have been faced with unfamiliar legal processes and argument. Many of the concerns of Respondents relate to the balconies, which is clearly an ongoing issue. The Applicant does not propose to charge the Respondents for the costs of those works, and therefore those costs do not fall within the scope of the present Application. However, there are clearly defects with regard to the balconies, which will need to be addressed. It is also clear that any outstanding ventilation works will need to be completed by the Applicant as soon as possible together with any other outstanding snagging issues mentioned by many of the Respondents.

109. In conclusion, with regard to the re-cladding and ventilation works, the Tribunal finds it has not been established that the costs incurred by reason of the major works Project are unreasonable in amount and determines therefore that, if and when charged, the sums proposed to be claimed by the Applicant are reasonable in amount.

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional Office, which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Annex	**The Respondents**
Flat 14	Miss Elizabeth Sowter
Flat 24	Claire Robinson
Flat 39	Allan Newman
Flat 45	Julie Pearce
Flat 51	Victoria Hughes
Flat 55	Christine Smith
Flat 57	Clive Scorrer
Flat 68	Mrs M D Stevenson
Flat 74	Anne Swain
Flat 76	Marian Allen