FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LSC/2022/0166**
Property	**:**	**Various Properties at Brewster House and Malting House, Barleymow Estate, London E14**
Applicants	**:**	**Lessees of Brewster House and Malting House (see list attached to application)**
Representative	**:**	**Bishop & Sewell**
Respondent	**:**	**London Borough of Tower Hamlets**
Type of application	**:**	**Payability of service charges**
Tribunal	**:**	**Judge Nicol** **Mr DI Jagger MRICS** **Mr JE Francis**
Date and venue of Hearing	**:**	**12th, 13th & 14th June 2023** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**11th September 2023**

DECISION

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(1) The charges which the Respondent seeks to impose on the Applicants for the major works programme of structural strengthening to Brewster and Malting Houses are not payable.

(2) The parties may make any applications relating to the costs of the proceedings within 28 days of this decision being sent out.

Relevant legal provisions are set out in the Appendix to this decision.

Reasons

Introduction

1. Brewster House and Malting House are two similar blocks on the Barleymow Estate in east London. Together, they consist of 112 flats, 80 of which are let to council tenants and 32 on long leases. The Applicants are the lessees of 9 of those flats and the Respondent is the freeholder.

2. The properties were constructed in or around 1967 using the same construction method, the "Large Panel System" ("LPS"), which failed in the Ronan Point disaster in 1968. The Respondent carried out remedial work recommended by the Government in the light of the disaster but it now appears that more work is required to meet the relevant standard for resistance to trauma following any abnormal loading. The Applicants have so far been informed that the total estimated cost to them will be £672,709.

3. The Applicants challenge the payability and reasonableness of the service charges under section 27A of the Landlord and Tenant Act 1985. In accordance with directions issued on 22nd September 2023, the application was heard over 3 days from 12th to 14th June 2023. A large number of people attended for the hearing but the Tribunal only heard from the parties' respective counsel, Ms Ellodie Gibbons for the Applicants and Mr Justin Bates for the Respondent.

4. The relevant documents were contained in 2 bundles (in electronic format), the first of 1,444 pages and the second of 710 pages. Both counsel had helpfully provided skeleton arguments in advance of the hearing. A bundle of authorities was also provided.

5. The bundles contained two witness statements from officers of the Respondent, Ms Cheryl Williams from the insurance department and Mr Carl Alleyne who provides project management and contract administration services. Also, each party presented expert evidence, from Mr Arnold Tarling on behalf of the Applicants and Mr Robert Vozila on behalf of the Respondents. However, the parties agreed that no live evidence was required and so the Tribunal heard none.

6. By letter dated 6th June 2023, the Applicants also requested that the Tribunal inspect the site but the Tribunal could identify no compelling reason to do so.

7. Unfortunately, it has taken longer than expected for the Tribunal to produce this decision, for which the Tribunal apologises.

Background

8. The Barley Mow Estate used to be an industrial area operated by the Barley Mow Brewing Co. In the 1960s the estate was acquired by the London County Council and redeveloped as housing. The estate was transferred from the LCC to the Greater London Council in 1965. The

redevelopment works were completed around 2-3 years later by Taylor Woodrow Anglian. Post completion, the Barley Mow Estate consisted of three 14-storey LPS tower blocks known as Brewster House, Risby House and Malting House; eight 3-storey low rise LPS blocks, known as 1-72 Barleycorn Way; and two traditionally built medium rise blocks known as Kiln Court and Oast Court.

9. In his skeleton argument, Mr Bates summarised the situation:

> 1. The Large Panel System for designing and constructing buildings initially promised to be something of a utopia. Large concrete panels could be mass-produced in a factory setting, delivered to site and then used to construct residential buildings. Unfortunately, that utopian promise did not eventuate. The critical flaw in LPS buildings is that they rely on the walls to bear the weight of the building and provide the structural integrity of the whole building. As the Ronan Point tragedy in 1968 revealed, if that assumption fails for any reason (at Ronan Point, a gas explosion), then there is a risk of catastrophic collapse.

10. The Ronan Point disaster happened on 16th May 1968 – a piped gas explosion resulted in the progressive collapse of one corner of the 22-storey block, killing four people and injuring 17 others. The blocks on the Barley Mow Estate had yet to be occupied. The GLC began a London-wide programme of reinforcement works for LPS buildings but, on 15th November 1968, the Government published Circular 62/68 setting out standards recommended by the Ronan Point Inquiry which were higher than those being used by the GLC. Circular 71/68, providing further details as to how to address the issues arising from Ronan Point, was issued on 20th December 1968. Although it took some archival research to find out precisely what happened in the late 1960s, it appears that the GLC resolved to comply with the Circulars and duly carried out strengthening works to the blocks. They also removed the provision of piped gas before the blocks were occupied.

11. The Barley Mow Estate was transferred to the Respondent on the abolition of the GLC in 1986. In 1988, it was the subject of interest from the London Docklands Development Corporation which needed to assess the impact of the Limehouse Link tunnel and its construction on the 3 blocks on the Estate:

    (a) Scott Wilson Kirkpatrick reported in August 1988 and concluded, "… similar structural defects have been found in both Risby and Malting blocks. The extent of explorations have been too limited in extent to allow an accurate statistical conclusion to be drawn. However the evidence is sufficiently strong, and also sufficiently similar to the defects found in Ronan Point, that we are confident that the conclusion can be drawn that the sub-standard workmanship and design defects exist throughout both blocks. We are of the opinion that the defects generally found are not structurally significant under normal loading conditions. … However we have not been able to satisfy ourselves that the bolts used in fixing the strengthening angles will not, in some situations, fail

prematurely under explosion conditions and therefore cause progressive collapse."

(b) SP Christie & Partners, acting on behalf of the LDDC, produced an Interim Structural Report in September 1988. It noted that, "Following the partial collapse of Ronan Point, a similar TWA building, in 1968 the 14-storey blocks were strengthened to withstand forces equivalent to a standard static pressure of 2½ lb/ft (17kN/m). In order to accommodate an abnormal load, such as a gas explosion, which could cause progressive collapse, current standards and regulations require that the load bearing system should be designed to accommodate forces equivalent to a standard static pressure of 34 kN/m, ie twice the reputed capacity of the strengthened connections. As a precaution gas has not been supplied to the 14-storey blocks although the risk of occupants using liquified petroleum gas cylinders exists."

(c) In March 1990 Carter Clack produced a report. It noted that Risby House would be adversely affected by the construction of the Limehouse Link road and so would be demolished. It also considered options to remedy the existing condition of Brewster and Malting Houses, including strengthening so that they could withstand abnormal loads.

12. At some point between 1990 and 1994, Brewster and Malting House underwent additional strengthening works by the LDDC and were refurbished internally with the benefit of new external wall insulation, i.e. cladding.

13. In 2012, the Building Research Establishment produced its LPS Handbook. Mr Vozila described it as providing a change in the understanding of how LPS buildings are assessed and behave under accidental loading. It is now apparently the standard guide for such assessments.

14. In 2016, a fire in Shepherds Bush raised concerns about cladding (even before the Grenfell Tower disaster) and so the Respondent decided to carry out a stock survey in 2017. This identified the cladding on the Barley Mow Estate as being of particular concern. Further, cracking in LPS buildings on the Ledbury Estate in Southwark brought the issue of LPS construction back to public attention. Therefore, the Respondent commissioned further reports on Brewster and Malting Houses.

15. Wilde Carter Clack carried out a desktop study of Brewster and Malting Houses and produced a report in January 2018. Amongst other matters, the report noted, "The SWK study assumption of the characteristic strength of the concrete based was on verbal advice from the original (Phillips Consultants) design engineer and assumed the precasting yard had good supervision and control. It has since been found from intrusive testing on other LPS buildings that frequently lower strengths exist which invalidate this assumption and the design checks carried out on this basis." They also stated, "A period of almost 30 years has passed since the last extensive intrusive investigations have been carried out. Regular invasive testing of buildings is a requirement of a LPS building

…" They recommended that an intensive structural re-assessment of the buildings should be carried out.

16. In July 2018, Wilde Carter Clack reported on their structural appraisal of Brewster and Malting Houses. The Executive Summary stated, "Analysis based on the size and strength of reinforcement found in the investigation locations indicates that the reinforcement is of insufficient size and that under full normal service loads (dead load plus 1.5KN/m^2), the reinforcement would be overstressed. … The lounge slabs adjoining the flank walls at all levels fail and would, in the event of a non-piped gas explosion, cause destabilisation of the flank wall. In order to minimise the risk of disproportionate damage in the event of a severe non-piped gas explosion occurring within the habitable areas of the building it would be necessary to undertake selected strengthening works", subject to further investigations.

17. Those further investigations were conducted and, in December 2019, Wilde Carter Clack reported on their structural re-appraisal of Brewster and Malting Houses. The above-quoted passages from the July 2018 report were repeated. Additional testing was recommended, following which they produced an Addendum Report in February 2020. They concluded that certain areas would require additional strengthening in order to provide lateral restraint to the flank wall in cases of a severe non-piped gas explosion.

18. On 25th March 2020, the Respondent concluded that major works should be carried out to comply with the recommendations in Wilde Carter Clack's reports. The works would include:

- Installation of external steel frame.
- Application of external reinforcement to cross walls.
- Installation of internal bedroom steel frames.
- Installation of lobby cupboard steel frames.
- Associated works.

19. On 14th May 2020 the Respondent served consultation notices in accordance section 20 of the Landlord and Tenant Act 1985. The total cost was estimated at £8,066,944.38 (half to each block) and the anticipated liability of each leaseholder was:

- One bedroom apartment – £60,971
- Two bedrooms – £73,066
- Three bedrooms – £82,136

20. The Respondent conducted consultation over and above the minimum statutory requirements, including resident meetings, drop-in sessions, regular newsletters, and one-to-one meetings in individual residents' homes. However, no major changes resulted, in particular to the leaseholders' liability.

21. The Respondent operates a Framework Agreement which permits the direct award of works contracts to certain contractors. This contract was awarded to Wates which was already on site with a full site set-up, presumably for works in relation to the cladding. Wates took possession of the site on 17th May 2021 but the works were suspended in May 2022 pending Wates signing the Building Contract and Novation Agreement. A practical completion date had yet to be established by the time of the Tribunal hearing.

The Application

22. On 17th May 2022 the Applicants made their application to the Tribunal. Essentially, they raise two questions:

(a) Whether the costs of the major works are payable under the service charge provisions in the leases; and
(b) If they are, whether those costs will have been reasonably incurred.

The leases

23. It appears that there are around 10 different versions of leases of flats at Brewster and Malting Houses, partly as a result of their being granted at different times, although the Respondent granted them all.

Applicant	Flat	Date of Lease
Belinda Jane Le Mesurier	10 Brewster House	10/1/05
Timothy James Woodward Christel Hawkins	15 Brewster House	24/6/02
Constantinos Thoma Gillian Susan Thoma	26 Brewster House	9/9/02
Jean-Paul Noel Raven	44 Brewster House	1/10/90
Ya Wen	46 Brewster House	15/9/03
Kear Khanom Ali	56 Brewster House	22/7/02
Carolyn Rayner (nee Jones)	7 Malting House	7/8/89
WSJL Ltd	17 Malting House	23/8/99
Mengqian Li	23 Malting House	26/6/95

24. The following are the relevant lease clauses, save that the italicised words are not present in all the Applicants' leases:

> 4. THE LESSEE HEREBY COVENANTS with the Lessors and with and for the benefit of the Flat Owners that throughout the term the Lessee will:-
>
> (4) Pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto …
>
> 5. THE Lessors … HEREBY COVENANT with the Lessee as follows:-
>
> (5) Subject to and conditional upon payment being made by the Lessee of the Interim Charge and the Service Charge at the times and in the manner hereinbefore provided:-

(a) To maintain and keep in good and substantial repair and condition:

(i) The main structure of the Building including the principal internal timbers and the exterior walls *and windows* and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in the Building)

(o) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors may be considered necessary or advisable for the proper management maintenance safety amenity or administration of the Building

7. PROVIDED FURTHER AND IT IS HEREBY AGREED as follows:

(5) *That the Lessee shall take the Demised Premises in their present state and condition [and with the knowledge that the Demised Premises suffer from the structural defects (if any) referred to in the Sixth Schedule hereto*

THE FIFTH SCHEDULE

The Service Charge

1. In this Schedule the following expressions have the following meanings respectively:-

(1) "Total Expenditure" means the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under Clause 5(5) of this Lease less sums expended from the monies set aside under Clause 5(5)(p) of this Lease *and save such repairs as amount to the making good of structural defects other than structural defects already notified to the Lessee and which are specified in the Sixth Schedule hereto or of which the Lessor does not become aware earlier than 5 years from the date of this Lease and a reasonable proportion of the cost of insuring against risks involving such repairs not amounting to structural defects (except for structural defects notified as aforesaid) of which the Lessor does not become aware earlier than 5 years from the date of this Lease and also of insuring against the making good of structural defects* and any other costs and expenses reasonably and properly incurred in connection with the Building …

(2) "the Service Charge" means such reasonable proportion of Total Expenditure as is attributable to the Demised Premises …

25. The Sixth Schedule referred to in the above-quoted terms is either blank or states "none" – no defects are listed in the Applicants' leases.

The Arguments

26. Mr Bates put forward a number of arguments as to why the Respondent was entitled to charge the Applicants for the strengthening works to Brewster and Malting Houses. Each is considered in turn below.

Maintain

27. The parties agree that the proposed works do not involve repair in that they are not aimed, either in whole or in part, at remedying a deterioration in the buildings from some previous physical condition (*Quick v Taff-Ely Borough Council* [1986] QB 809 and *Post Office v Aquarius Properties Ltd* [1987] 1 AllER 1055).

28. However, the obligation under clause 5(5) of the lease is to "maintain" the "main structure of the Building". Mr Bates argued that this was apt to describe the proposed works.

29. The words "maintain" and "keep in good condition" have not received as much judicial attention as "repair". In *Welsh v Greenwich LBC* [2000] 3 EGLR 41 the Court of Appeal held that a clause to "maintain the dwelling in good condition and repair" extended to an obligation to remedy condensation damp which did not cause or arise from any disrepair. Robert Walker LJ said at paragraph 24 of his judgment:

> Where there is severe black spot mould growth … that cannot, in my judgment, be regarded as merely a matter of amenity dissociated from the physical condition of the flat, even if there was, as counsel agreed, no damage to the structure.

30. Ms Gibbons pointed to the commentary on *Welsh* in *Dilapidations: The Modern Law and Practice* (7th Ed):

> 8-14 This passage suggests that even though there need not necessarily be disrepair, nonetheless some form of physical manifestation in the subject-matter of the covenant is required before the covenantor is liable. In principle, this must be correct, since if it were not, it is difficult to see where the covenantor's liability ends: for example, it might otherwise be said that he is liable to carry out strengthening work to a building designed and built with inadequate floor loadings.
>
> 8-15 Absent special circumstances, it is thought that where an obligation to keep in good condition is included as part of a wider covenant to keep in repair, it will ordinarily be interpreted as meaning that no work is required until some degree of physical damage or deterioration has occurred.

31. The authors cite a number of cases in support of their assertion in section 8-15:

(a) In *Fluor Daniel Properties Ltd v Shortlands Investments Ltd* [2001] 2 EGLR 103, the landlord covenanted to "uphold maintain repair amend renew cleanse and redecorate and otherwise keep in good and

substantial condition and as the case may be in good working order and repair" various parts of a multi-occupied office building and its plant. The judge accepted counsel's submissions that while this clause "extends to the doing of works which go beyond repair strictly so called, … the obligations contained in the clause presuppose that the item in question suffers from some defect (ie some physical damage or deterioration or, in the case of plant, some malfunctioning) such that repair, amendment or renewal is reasonably necessary."

(b) *Mason v TotalFinaElf UK Ltd* [2003] 3 EGLR 91 concerned a covenant to "well and substantially uphold support maintain amend repair decorate and keep in good condition the demised premises". Blackburne J held at paragraph 23 of his judgment, "I do not consider that … merely because a piece of equipment is old and there must inevitably come a time when the equipment must be replaced, preventative works can be required to prevent the consequences of the equipment failing even though, in the meantime, it continues to perform its function."

(c) In *Westbury Estates v The Royal Bank of Scotland* [2006] CSOH 177 at paragraph [34], Lord Reed said he was "[D]oubtful whether the words 'and condition', in the phrase 'good and substantial repair and condition', introduce a different concept from that of 'good and substantial repair': cases in which a contrary view has been taken, such as *Crédit Suisse v Beegas Nominees Ltd* and *Welsh v Greenwich LBC*, appear to me to depend on their particular circumstances (notably, the specific terms of the provision in the former case, and the context of the lease in the latter case)."

(d) In *Alker v Collingwood Housing Association* [2007] 2 EGLR 43, the landlord covenanted to keep the demised property, a house, in good condition and to repair and maintain specified parts. It was held that the obligation to keep in good condition, even if it encompassed an obligation to put into good condition, did not encompass a duty to put the front door of the premises into safe condition by replacing a glass panel made of ordinary annealed glass with a panel made of safety glass where the panel was not in disrepair and there had been no failure to maintain it.

32. Mr Bates referred the Tribunal to *Assethold Ltd v Watts* [2014] UKUT 0537 (LC); [2015] L&TR 15, in which the Upper Tribunal considered whether legal costs incurred by a landlord in obtaining an injunction against an adjoining owner prohibiting works to a party wall came within services described in the lease as, "To maintain and keep in good and substantial repair and condition and renew or replace when required the Main Structure …" At paragraph 49 of his judgment, the Deputy President stated,

> To my mind, "to maintain" and "to repair" each connote the doing of something to the subject matter of the covenant. To repair involves undertaking work to restore the subject to a former condition from which it has deteriorated. To maintain involves preserving a functional condition by acts of maintenance performed on or to the thing to be maintained. In neither case is the expression apt to describe a process or activity remote from

> the thing to be repaired or maintained. I do not consider that one can properly speak of repairing or maintaining a building in good and substantial repair and condition by providing legal services at a distance, nor do I think that such services can be said to be incidental to repair or to maintaining that condition. I also suggest that, as a matter of ordinary language, the risk against which maintenance is directed is a risk of deterioration through use, rather than injury or damage caused by the exceptional activity of another.

33. Mr Bates asserted that "maintenance" was about prevention, in contrast to "repair" which was about the cure. He submitted that clause 5(5)(j) of the lease supported his interpretation by permitting the Respondent to employ surveyors, builders, architects and engineers for the proper maintenance of the building.

34. In the Tribunal's opinion, Mr Bates sought too wide a meaning for the word "maintain". Remedying a major structural defect absent of some degree of physical damage or deterioration does not come within the term. Clause 5(5)(j) does not expand on the Respondent's obligations to maintain or repair rather than simply permitting the employment of suitable professionals in support of those obligations.

Sweeper clause

35. Mr Bates submitted that, if the proposed works did not fall within clause 5(5)(a) of the lease, they would fall within clause 5(5)(o).

36. Clause 5(5)(o) of the lease is what is commonly known as a "sweeper" clause in that it aims to "sweep up" or include management functions not expressly addressed in other clauses. Of course, giving a clause such a label does not define its meaning or extent. Interpreting a contractual term requires ascertaining the objective meaning of the language in the context of the contract as a whole: *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

37. Ms Gibbons referred the Tribunal to *Service Charges and Management* (5th ed):

> 2-18 It appears from earlier cases that it will be difficult for a landlord to rely on a general sweeping up clause in order to carry out substantial works or to provide significant services.

38. The text gives examples:

(a) In *Jacob Isbiski & Co Ltd v Goulding & Bird Ltd* [1989] 1 EGLR 236 the sandblasting of external walls was held not to come within a proviso permitting the landlord "at his reasonable discretion" to "hold, add to, extend, vary or make any alteration in the rendering of" services.
(b) In *Mullaney v Maybourne Grange (Croydon) Management Co Ltd* [1986] 1 EGLR 70 the replacement of windows was held not to come

within a clause referring to "such further or additional costs which the company shall properly incur in providing and maintaining additional services and amenities".

39. In *Gilje v Charlgrove Securities* [2001] EWCA Civ 177 the Court of Appeal made the trite point that, if a landlord seeks to recover money from a tenant, "there must be clear terms in the contractual provisions said to entitle him to do so".

40. Ms Gibbons adopted the argument also mentioned in *Service Charges and Management* that a restrictive approach to the interpretation of sweeper clauses is justified on the basis that, if the parties had intended the cost of significant works to be recoverable, they would have provided for it expressly rather than leaving it to a sweeper clause. In *Holding & Management Ltd v Property Holding and Investment Trust plc* [1989] 1 WLR 1313 the Court of Appeal refused to allow a landlord to recover the cost of substantial external works under a sweeping up clause which entitled it to claim costs which it "considered necessary" to maintain the property as "first class residential flats", there already being a detailed repairing provision in the lease.

41. Mr Bates asserted that the words of clause 5(5)(a) cover the proposed works and that is the end of it. However, as the Supreme Court in *Wood* emphasised, contractual interpretation is not a matter of taking the words literally. They must be read in context. Taken literally, it is difficult to see what the sweeper clause could not possibly cover.

42. Part of the context is the statutory right to buy which was exercised for the creation of all the Applicants' leases. Statute limits the obligations of a purchaser exercising the right to buy. The Applicants' leases appear to have been drafted on the basis of the Housing Act 1985 as originally enacted. Paragraph 18 of Schedule 6 provides:

> (1) Subject to the following provisions of this paragraph, where the dwelling-house is a flat, a provision of the lease or of an agreement collateral to it is void in so far as it purports –
>
> (a) to enable the landlord to recover from the tenant any part of costs incurred by the landlord in discharging or insuring against the obligations imposed by the covenants implied by virtue of paragraph 14(2)(a) or (b) (landlord's obligations with respect to repair of dwelling-house, etc.),...
>
> (2) A provision is not void by virtue of sub-paragraph (1) 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.
>
> (3) A provision is not void by virtue of sub-paragraph (1) in so far as it requires the tenant to bear a reasonable part of costs incurred in respect of a structural defect –

(a) of the existence of which the landlord informed the tenant in the notice under section 125 (landlord's notice of purchase price, etc.) stating the landlord's estimate of the amount (at current prices) which would be payable by the tenant towards the cost of making it good, or

(b) of the existence of which the landlord becomes aware ten years or more after the grant of the lease.

(4) Where the lease acknowledges the right of the tenant and his successors in title to production of the relevant policy, a provision is not void by virtue of sub-paragraph (1) in so far as it requires the tenant to bear a reasonable part of the costs of insuring against risks involving such repairs or the making good of such defects.

43. In *Payne v Barnet London Borough Council* (1998) 30 HLR 295, which concerned a block of flats constructed using LPS, the Court of Appeal considered the right to buy scheme under the Housing Acts 1980 and 1985. Starting with the Housing Act 1980, Brooke LJ at 301 and 302 said:

> In the Housing Act scheme the landlord is fixed not only with the liability to keep the dwellinghouse's structure and exterior in repair, but also with the liability to make good any defect affecting that structure. However, the requirements 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.

44. Essentially, if the landlord wished to pass on to the lessee the costs of making good structural defects, they had to provide notice of those defects.

45. In *City of London Corp v Various Leaseholders of Great Arthur House* [2019] UKUT 341 (LC) further described the scheme:

> 33. The purpose of the relevant provisions of the statutory code was to protect former council tenants from exposure to very substantial and unexpected service charges upon their acquiring long leases of their flats. That protection was tempered by reference to time. Works to repair the structure and exterior would be chargeable to the lessees, but not the more substantial costs associated with remedying structural defects, unless either the lessee had bought on notice of the likelihood of such works or the defect was first discovered a number of years into the term of the lease. That objective is more likely to be achieved if the cost of unforeseen works that have the effect of remedying a structural defect (which works are likely to be more expensive than works of simple repair) is excluded from the service charge rather than included.
>
> 40. A structural defect is not confined to a so-called inherent defect but must be something that arises from the design or construction (or possibly modification) of the structure

> of the Building. It is to be contrasted with damage or deterioration that has occurred over time, or as a result of some supervening event, where what is being remedied is the damage or deterioration. That is repair and is not in the nature of work to remedy a structural defect, even if it is a part of the structure that has deteriorated.

46. The works proposed by the Respondent are in respect of structural defects as so described. It would be entirely contrary to the purposes of the statutory right to buy scheme if such works could be caught within a sweeper clause rather than being addressed expressly and specifically.

47. Even looking at the words of the lease as a whole in isolation from the statutory scheme and its purposes, it is clear that clause 5(5)(o) is not intended for works so extensive that the costs would vastly exceed those likely in any category expressly mentioned. A lease which carried that kind of unknown and unknowable liability would be close to unsellable and cannot have been the parties' intention as it appears from the wording of the lease.

48. Mr Bates asserted that other clauses in the lease supported his wide interpretation of clause 5(5)(o), such as the broad right of entry under paragraph 2 of the Third Schedule. However, that right of entry is entirely supplementary to clause 5(5), existing solely for the purpose of supporting compliance with the obligations in clause 5(5). In the Tribunal's opinion, it is consistent with its interpretation of clause 5(5)(o).

Total Expenditure

49. Mr Bates deployed a similar argument in relation to paragraph 1(1) of the Fifth Schedule which defines "Total Expenditure" as including "any other costs and expenses reasonably and properly incurred in connection with the Building".

50. However, in the Tribunal's opinion, this may be dismissed for the same reasons. Indeed, the argument against Mr Bates's interpretation is even stronger in relation to paragraph 1(1). It is a definitional section and is not intended to provide for liabilities found nowhere else in the lease.

51. Paragraph 1(1) is quoted in paragraph 24 above. Some of the leases have the additional words set out there in italics. Those words provide a definitive exclusion of the Respondent's proposed works since they relate to structural defects which were not notified to the lessees in any way and which were known to the Respondent on the grant of the leases.

New issue

52. Mr Bates argued that, in fact, the proposed works do not relate to problems known on the grant of the leases. He submitted that there were 3 distinct stages in the story of this case:

(a) The problem with the LPS system was first identified and addressed, following the Ronan Point disaster, in the late 1960s. The GLC complied with the Government's guidance in the two Circulars.
(b) In the late 1980s, new problems were discovered and new remedies were suggested when investigations were carried out as part of the London Docklands development.
(c) In recent times, again new problems were discovered and new remedies recommended arising from yet further investigations. In particular, the proposed works will tackle the buildings' vulnerability to abnormal loads which previous investigations did not identify as something which needed remedial work.

53. Mr Bates submitted that each stage was entirely discrete from the other so that the Respondent is now dealing with a situation which did not exist in the past.

54. In the Tribunal's opinion, this argument confuses the underlying problem with the coincidence of further investigations, the fact of advancing knowledge and the later devising of further remedies. The fact is that LPS has a defective design. That defect was there at the start and still exists. Since it first arose, more has been learned about it and further remedies have been devised. However, that knowledge and those remedies relate to the same defect.

Reasonableness

55. For the above reasons, the Tribunal rejects the Respondent's arguments and is satisfied that charges for the proposed works are not payable under the terms of the Applicants' leases. However, in case their arguments on payability did not succeed, the Applicants argued in the alternative that the costs would not be reasonably incurred. For the avoidance of doubt, the Tribunal gives its own views.

56. According to Ms Gibbons's skeleton argument,

> It is not suggested that the Respondent could have procured the same work for less cost and the Respondent's evidence that it could not have insured against the cost of the Works is unchallenged. However, on the basis of the Applicants' expert evidence, it will be said not only that the costs will not be reasonably incurred given –
>
> 1) the level of costs,
>
> 2) the mixed tenure nature of the Property, in particular, the fact that the majority of flats are council owned,
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> 3) the fact that the works are, in essence, works of improvement, and
>
> 4) that the Respondent failed to set aside sufficient funds to cover future costs of necessary strengthening works,
>
> but also because the Works will not adequately address the inherent structural defects within the Property.

57. Mr Bates objected that the final part in the above-quoted paragraph was not in the Applicants' Statement of Case. He was prepared to meet the first four points but was surprised by the additional part. Ms Gibbons submitted that the Respondent's expert, Mr Vodzila, was cognisant of the issues and had addressed them but Mr Bates responded that his expert was not his client and he would have wanted to take their instructions.

58. The Tribunal is not satisfied that the Respondent did have sufficient notice that the Applicants would run this additional argument. It was present in the evidence of Mr Tarling but a party is not expected to meet every point that happens to come up in the papers – pleadings are for the purpose of identifying which issues will be argued and a gap in the pleading cannot be filled by an expert's report. Ms Gibbons pointed out that some of the relevant information only became known to Mr Tarling very recently but that is only a ground to support an application for amendment and/or adjournment, not to enable an unpleaded point to be used to surprise the Respondent.

59. In relation to the level of costs, Mr Bates pointed out that they are not yet known. He referred to *Jam Factory Freehold Ltd v Bond* [2014] UKUT 443 (LC) in which the Upper Tribunal commented that challenges to estimated costs are usually regarded as "a fairly sterile affair because what really matters, in terms of ultimate liability, is the actual service charge calculated at the end of any service charge year". The Tribunal is not satisfied that it has the evidence to establish that the Respondent's estimates are unreasonable as estimates of the likely costs.

60. The Tribunal shares Mr Bates's lack of understanding of the second point. Because the estate is mixed tenure, the Respondent will be bearing the majority of the cost of the works. The Tribunal does not accept Mr Bates's rather bold submission that "it was inherently unlikely that a local authority … would choose to incur unnecessary costs". However, there is already a set procedure for apportioning costs between lessees and the Respondent and there is nothing to suggest that it would not be equally appropriate for the costs of the proposed works.

61. The third point that the works are of improvement would seem to be a point on liability. The Tribunal struggles to understand how this would render the costs of the works unreasonable.

62. Since the costs are not yet known, the Applicants would find it difficult to criticise them on the ground that the Respondent has not set aside sufficient funds. In any event, the Respondent's finances are not normally a matter for the Tribunal.

63. Essentially, the Applicants' challenge to the reasonableness of the works and their costs is premature. They retain the right to bring a fresh challenge on this issue as more, particularly the final costs, becomes known, subject to the above finding on payability.

Costs

64. The Tribunal does not anticipate that either party will be asking the Tribunal to exercise any of its limited costs powers following receipt of this decision, save possibly for reimbursement of fees. However, any application for costs must be sent to the Tribunal and copied to the other party within 28 days of this decision being sent out.

Name: Judge Nicol **Date:** 11th September 2023

Appendix of relevant legislation

Landlord and Tenant Act 1985

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.