FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/43UE/LSC/2024/0080**
Property	**:**	**Parklands, Park View Road, Leatherhead, Surrey, KT22 7GB**
Applicant	**:**	**Trinity (Estates) Property Management**
Representative	**:**	**Thomas Dawson of counsel**
Respondent	**:**	**1) Metropolitan Thames Valley Housing** **2) The Long Leaseholders of the Flats at Birch Court, Cedar House, Maple Court and Oak House, Parklands** **3) The sub lessees of the Flats at Ash Court, Cherry Tree Court, Chestnut Court, and Redwood Court, Parklands**
Representative	**:**	**For Metropolitan Thames Valley Housing – John Beresford of counsel**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**R Waterhouse FRICS** **N Robinson FRICS** **T Wong**
Venue	**:**	**Havant Justice Centre, The Court House, Elmleigh Road, Havant, PO9 2AL**
Date of hearing	**:**	**14 March 2025**
Date of decision	**:**	**25 April 2025**

DECISION

Decisions of the tribunal

What is the scope of "works" for which a determination under section 27 is made?

(1) The exact scope of the works cannot realistically be known until such time the work is underway.

(2) The nature of the work is sufficiently evidenced in the witness statements and the Smith Baxter reports for the tribunal to make a determination on who is responsible for what "works" and whether the Management Company can charge a service charge. The "works" are likely to include; replacement or resetting of windows, replacement of defective seals, and repair of any damage, if found, caused to the structure by the defective seals, or "works" to make good the "Maintained Property" during the course of the "works".

(3) The evidence from Smith Baxter and others is that the property is in disrepair. The tribunal finds the property is in disrepair.

(4) The tribunal finds the sealant currently in place is an ancillary part of the window.

Who is responsible for carrying out the "works" of putting the windows into repair?

(5) The tribunal determines that the costs associated with replacing, repairing or resetting the windows are:

In the case of windows that form part of the common parts these fall to be considered as part of the "Maintained Property" , those parts of the estate which are described in the Second Schedule and the maintenance of which is the responsibility of the "Management Company", and the cost of replacement, including replacement, window, fitting , seals and making good.

In the case of windows within flats, these are within the demise of the "Property" as defined in the Third Schedule, essentially each leasehold flat as such, their repair, replacement fitting falls to the responsibility of the leaseholder.

Who is responsible for payment of the costs of the "works"?

(6) The costs for undertaking repairs to the windows within the "Maintained Property" fall to be paid by the Respondents under Paragraph 5 of Part A of the Sixth Schedule of the Leases and the Sixth Schedule of the MTVH Lease.[31].

(7) In the case of windows within flats, these are within the demise of the "Property" as defined in the Third Schedule, essentially each leasehold flat as such, the window's repair, replacement, fitting including replacement seals falls to the responsibility of the leaseholder and so the Management Company cannot repair and so no cost can be properly incurred, and no service charge is payable.

(8) The decision does not imply reasonableness of any charges that may be sought to be recovered in the future.

(9) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985, or Paragraph 5A Schedule 11 to the Commonhold and Leasehold Reform Act 2002. In light of the decision the parties are invited to make representations on this matter within 28 days of notification of the decision.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether the lease provides for the Management Company to undertake various "works" and recovery the cost of doing so.

2. Specifically, from the Application Form:

> "The Applicant is proposing to carry out a scheme of works ('the Works') to the windows of the flats at the Property."

> "The Tribunal wishes the Tribunal [sic] to decide whether the anticipated costs of the Works are contractually recoverable from each of the Leaseholders as part of the service charge."

The hearing

3. The Applicant **Trinity (Estates) Property Management Limited** ("Management Company") was represented by **Thomas Dawson** of counsel.

4. The first Respondent **Metropolitan Thames Valley Housing** was represented by **John Beresford** of counsel

5. The second Respondent **Sharon Lam** of Flat 6 Oak House represented herself.

6. The third Respondent **Catherine Peachey/Jeremy Peachey** Flat 1 Oak House was represented by Jeremy Peachey.

7. The fourth Respondent **Nicola Barker** Flat 12 Cedar House represented herself.

8. The fifth Respondent **Cathy Lansbury** 2 Cedar House.

9. The sixth Respondent **Emma Edwards** submitted a witness statement and was present at the hearing.

The background

10. The property which is the subject of this application comprises eight blocks, four of which (Birch Court, Cedar House, Maple Court and Oak House) are held on long leases to which the Applicant is a party as Management Company. The other four blocks (Ash Court, Cherry Tree Court, Chestnut Court and Redwood Court) are all let to a housing association, Metropolitan Thames Valley Housing (MTVH), under the terms of the Head Lease. This Head Lease was made between (1) Laing Homes Limited (as Landlord) (2) the Applicant (as Manager) and (3) Thames Valley Housing Association Limited (as Tenant). This Head Lease was granted for a period of 150 years from 5 October 2005. MTVH has in turn sublet all the 42 flats on shared ownership leases. The property was constructed around **2005 to 2007.**

11. Photographs of the building were provided in the hearing bundle. Neither party requested an inspection, and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

12. The Respondents hold long leases at the property which provide for the Management Company to keep the "Maintained Property" in repair and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

13. In or around **early 2015**, as a result of a survey undertaken by a prospective purchaser, the owner of flat 12 Cedar House reported an issue to the National House Building Council (NHBC), who provided warranties for the flats when new.

14. The NHBC subsequently inspected and issued a report dated **30 April 2015.** The report said the builder had incorrectly sealed the gaps with silicone which had been unable to accommodate the resultant movement and torn allowing wind and rain to enter. To remedy this the NHBC recommended flexible sealant be used. The cost of the works being under the threshold for the NHBC scheme of minimum value of £1378.

15. In or around **2020** other leaseholders raised concerns with the Applicant. On **28 July 2020** Smith Baxter Chartered Surveyors were

instructed to investigate specifically Flat 9 and Flat 13. The report was issued on **12 August 2020** and subsequently updated 1**6 November 2020.**

16. In Flat 13 large gaps were found at the head of the window frame. Smith Baxter recommended further exploratory investigations.

17. Smith Baxter reinspected Flat 9 Cedar House on the **24 September 2020** and Flat 13 on the **23 October 2020**. They concluded that the internal timber frame had moved significantly, which has then caused the windows and door frames to drop relative to the outer masonry leaf of the cavity wall. On the basis the timber frame appears to have moved uniformly, and as a whole, it was thought likely the cause of the movement is shrinkage of the timber. In its updated recommendations, Smith Baxter suggested that

"it should now be a case of taking out and reinstalling all the windows and doors to the correct positions and making good both internally and externally where the windows had been moved. The full extent of these remedial works would need to be fully assessed given the potential extent of the problem in this building, and potentially others on the development which have shown signs of the same issue"

18. On **28th January 2021,** the Applicant's then Head of Surveying, Nick Lawrence, sought to engage with the NHBC. Mr Lawrence advised that the Applicant had now identified similar problems in other flats and attached a copy of the First Report. He submitted that

"It is clear that there is a common problem across all flats at Cedar House that was not considered as part of the investigation at the time, nor taken into account when the cost of the work was estimated. Accordingly, we would like to reopen this claim in the light of these findings, with the scope now to include all flats at Cedar House, and in the similar, neighbouring blocks (Oak, Ash, Chestnut, Birch and Maple Houses)".

19. The NHBC responded on **24th February 2021** advising briefly that the policies for the Property "….have all now expired so we are unable to consider any new areas of damage as a claim".

20. Smith Baxter on **17 and 19 August 2021** inspected flats within Birch Court, Cedar House, Maple Court, and Oak House. The Second Report concluded that all blocks were found to be affected by movement, albeit the most marked degrees remained at the top floor of each block. It also remained the case that little internal damage was visible – as at the date of the inspection, only two flats had incurred water ingress. However, the Second Report noted secondary lines of sealant across many of the

windows, which Smith Baxter said hid the extent of the overall movement and the historic water ingress.

21. The Second Report concluded that it should have been apparent to NHBC in 2015, when Flat 12 was being investigated, that the windows across the Property had been incorrectly installed to accommodate the predictable differential movement.

22. On receipt of the second report the Applicant instructed RWK Goodman Solicitors to consider bringing a claim against the NHBC, the solicitors advised the prospects were limited given the claim would be out of time.

23. The Applicant contacted the NHBC on **15th September 2021** submitting:

"that the inadequate detailing will have been evident at the time of the 2015 claim and that this would have existed across all the blocks on this development and should have been properly investigated at that time".

24. The Applicant provided the NHBC with a copy of the Second Report and highlighted a number of pertinent findings stating:

"The prior claim made in …respect of 12 Cedar House for the same problem means that the issue was logged before the expiration of the warranty. It should have been apparent when 12 Cedar House was being investigated that the windows across the estate had been incorrectly installed to accommodate the predictable differential movement".

Continuing that "We would dispute that this matter is now time barred given it was raised in 2015. Also, it is clear that the works detailed by Smith Baxter, which are necessary to remedy the poor detailing, will far exceed the excess amounts and therefore we would ask that the original claim and the more recent one is reopened, and that a proper and correct assessment is conducted by the NHBC".

25. The NHBC responded on **21st September 2021** advising

"*Regrettably our position has not changed on this matter. Whilst it was reported that 12 Cedar House was suffering for damp/water ingress, no other properties were noted to be suffering damage within the life of the policy. Nor was it brought to our attention prior to the policy expiry dates that other issues were present at site. It remains the policyholder/managing agents responsibility to notify us of a potential claim and information for us to assess a claim within the notification period."*

26. In or around December 2021 the applicant instructed a contractor to undertake remedial works to Flats 9, 13, 15 Cedar House and 12 Oak House.

27. On 1st March 2023, the Applicant wrote to Taylor Wimpey (who had acquired the business of the developer, Laing Homes Limited) in connection with the ongoing issues. The Applicant noted that Taylor Wimpey had been made aware of issues with the windows by leaseholders,

"...but the wider ... issue does not appear to have been addressed, nor rectified despite requests from leaseholders in 2012 through to 2015. As a result of this issue, leaseholders are facing exorbitant costs and extensive works to rectify the problem, which we believe should have been identified and rectified by Taylor Wimpey at the time of the initial discovery. As this issue is defect from the time of build, we do not believe that leaseholders should be responsible for bearing the costs of rectifying the issues with the windows, that have occurred as result of this error by Taylor Wimpey. Therefore, we request an urgent meeting to discuss this matter in detail and to discuss a way forward".

28. Taylor Wimpey responded substantively on **9th November 2023** stating that as the properties are estimated to have been completed circa 16 years ago, they are outside of the developers 2-year warranty and outside of the NHBC 10-year warranty. Taylor Wimpey suggested that the Smith Baxter report did not identify structural defects – namely,

"It states in conclusion that predictable differential movement has occurred between the timber frame and masonry outer skin which would suggest this is within normal parameters". Taylor Wimpey concluded "As previously advised, given the age of the development and given Taylor Wimpey no longer hold a freehold interest in the buildings, we are not prepared to take this matter further".

29. In **December 2023,** the Applicant instructed Smith Baxter to inspect flats in Ash Court, Cherry Tree Court, Chestnut Court and Redwood Court. Their subsequent report is dated **31st January 2024** ('the Third Report'). The Applicant notes that MTVH's surveyor also attended some of the inspections, which were carried out between 22nd and **26th January 2024.** Smith Baxter were able to gain access to 28 of the 42 flats. At paragraph 3.03 of the Third 37 Report, Smith Baxter commented

"All blocks were found to have been affected by the shrinkage and settlement of their internal timber frames. The severity of the issues were however found to be significantly less than that to the private blocks".

"No evidence of water ingress around the windows was identified. Based on our conversations with the residents visited there has been no known history of past water ingress caused by the windows. This is in contrast to the private blocks who have had several flats affected requiring remedial works".

30. In its conclusion at paragraph 3.15, Smith Baxter advised

"... the majority of the window frames have been subjected to very minor distortion. Caused by the original window installer not allowing sufficient space to accommodate the anticipated routine shrinkage of the timber building frame. Adjusting the opening casements to improve alignment and providing secondary thicker seals should reasonably resolve this for most flats. The external window sealants have failed to most of the second floor flats and a limited number of first floor flats. With 10-20mm gaps owing to shrinkage of the timber building frames. The window frame sealants to the lower flats shall require replacing in the next 2- 5 years regardless owing to age. No windows were found to require immediate replacement."

31. Smith Baxter considered that there was no immediate need for remedial works to be undertaken. Smith Baxter suggested that

"....it would be sensible to coordinate the works to coincide with the next external decorations/roofing projects when external access provision is required".

Amongst the works suggested was adjustment of the opening casements in order to minimise the gaps present in the compressible seals.

32. On **27th February 2024,** Smith Baxter - having now been able to inspect those privately owned flats not previously seen, produced a further report.

33. At paragraph 3.04 of the Fourth Report, Smith Baxter advised

" The further investigations have confirmed that the pattern of defects is generally consistent per block. With limited defects at ground level then worsening progressively upwards through to the upper floors. With the worst being to the top floor of the highest two blocks Cedar House and Oak House."

34. In its conclusions at paragraph 4, Smith Baxter concluded that the majority of flats are affected by varying degrees of distortion to their window frames, however, commented

"To most it is nominal and causing no concerns to the current residents. Easing and adjusting of the existing opening casements in combination with more accommodating compressive gaskets should resolve most current sound ingress and heat loss. Only a limited number across all blocks may require replacement owing to distortion, before requiring replacement due to age which would fall under the leaseholder's responsibility".

Smith Baxter noted that currently no flats appeared to be affected by water ingress damage. Regardless of the frame shrinkage issued, Smith Baxter noted that the window frame sealants are approaching the end of their anticipated lives due to age anyway.

35. On 11th March 2024, the Applicant wrote again to all long leaseholders (and MTVH) to provide them with an update, noting that of the blocks owned by MTVH now 39 been inspected as well as further flats within the other 4 blocks, that had not previously inspected

36. The Applicant also drew attention to the fact that some of the works identified within Smith Baxter's recommendations could potentially be deemed to be the responsibility of the individual leaseholder, such as the easing and adjusting of internal window fixtures, albeit, arguably the need for repair only arose from the underlying issues with the windows.

The lease

37. Reference is made to the sample lease [48] between Trinity (Estates) Property Management Limited (2) and Sylvia Ann Shepherd and David Cumming Shepherd in respect of Flat 47 Parklands, Cleeve Road, Leatherhead. [46] Flat 47 is also known as 13 Oak House.

38. This lease provides the following relevant lease provisions;

- "**Estate"** The land described in the first schedule known for development purposes as The Parklands Cleeve Road, Leatherhead.
- "**Block"**- means the part of the Estate in which the Property are situate.
- "**Building(s)"** - means the building(s) comprising several flats and all structural parts thereof including the roofs gutters rainwater pipes foundations floors all walls bounding individual Dwellings therein and all external parts of the buildings and all Service Installations not used solely for the purpose of an individual Dwelling and the expression "Building" has a corresponding meaning.
- **"Dwellings"** means the properties and the Property forming Building(s) or Block or the Estate (as the context permits) and a Dwelling means any one of them.
- **"Maintained Property"** means those parts of the Estate which are more particularly described in the Second Schedule and the maintenance of which is the responsibility of the Manager.

The Second Schedule contains the definition of "Maintained Property" which consists of

The Second Schedule

The Maintained Property

1. The Maintained Property shall comprise (but not exclusively)

1.1 The Access ways the Parking Spaces the Communal Areas shown on the Plan the drying areas (if any) and in gardeners management stores (if any)

1.2 The entrance hall passages landings staircases and other internal parts of the Building (s) which are used in common by the owners or occupiers of any two or more of the Dwellings therein and the glass in the windows and doors of all such common parts together with all decorative parts ancillary thereto

1.3 The structural parts of the Building(s) including the roofs gutters rainwater pipes foundations floors and walls bounding individual Dwellings therein and all external parts of the Building(s) including all decorative parts

1.4 All doors and windows frames **not** forming part of the demise of any of the Dwellings

1.5 All Service Installations not used exclusively by any individual Dwelling

1.6 For the purposes of cleaning only the external surface of the external windows of the Dwelling save for the external surfaces of the external windows which are accessible from private balconies serving the Dwellings

2. Excepting and Reserving from the Maintained Property

2.1 The glass and window frames and the external doors of the Dwellings SAVE FOR the external decorative parts of the said window frames and doors which (for the avoidance of doubt) shall form part of the Maintained Property.

2.2 All interior joinery plaster work tiling and other surfaces of walls the floor down to the upper side of the joists slabs or beams supporting the same and the ceilings up to the underside of the joists or beams to which the same are affixed to the Dwellings

2.3 All Service Installations utilised exclusively by individual Dwellings

The Third Schedule
The Property

ALL THAT the flat (together with the floor surface only of any balcony or patio coextensive therewith (if any) and the air space above such balcony or patio to a height of one storey above the surface thereof) shown in red on the Plan being part of the Block together with (for the purpose of obligation as well as grant)

1.1 the doors and windows thereof including the glass therein but not the external decorative surfaces thereof"

Sixth Schedule

Maintenance Expenses

The Sixth Schedule

The Maintenance Expenses

Part "A"

(Private Apartment Costs)

5. Inspecting rebuilding repointing repairing cleaning renewing redecorating or otherwise treating as necessary and keeping the exterior and structural of the Block comprised in the Maintained Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof

Part C

(Cost applicable to any or all of the previous parts of this schedule)

15 All other reasonable and proper expenses (if any) incurred by the manager

15.1 in and about the maintenance and proper and convenient management and running of the estate including in particular but without prejudice to the generality of the foregoing any expenses incurred in rectifying or making good any inherent structural defect in the Block or any other part of the estate (except in so far as the cost thereof is recoverable under any

insurance policy for the time being in force or from a third party who is or who may be liable therefor)

The Issues

39. The Applicant seeks a determination that if the cost of the "works" were to be incurred they would be payable as service charge by the Respondents to the Applicant pursuant to section 27A of the 1985 Act.

Issue 1- What is in disrepair and what are the "works" to put it into repair?

Applicant's position

40. The Applicant's position in terms of what is in **disrepair** is given by the various reports by Smith Baxter. In summary, in respect to the windows, they are that windows in the various blocks have to varying degrees disrepair. That disrepair being gaps between the windows and the frames to varying amounts, which cause rain or wind penetration. In addition, some windows exhibit distortion to varying degrees. The disrepair is attributed to the use of defective seal, specifically a non-flexible sealant when compressible seals should have been used at the point of construction.

41. The Applicants position in terms of what is needed to **put into repair** again is taken from various reports by Smith Baxter. As the level of disrepair across the estate differs so too does the level of "works" required to put into repair. The "works" comprise adjustment of windows within their frame, to removal of the window, insertion of new seals and replacement of distorted windows.

42. The Applicant contends that what is meant by "repair" were considered in *Waaler v Hounslow LBC* [2017] EWCA Civ 45; [2017] 1 W.L.R. 2817 at [2822] by Lewison LJ as follows:

> The concept of repair takes as its starting point the proposition that that which is to be repaired is in a physical condition worse than in which it was at some earlier time: *Quick v Taff Ely Borough Council [*1986] Q.B. 808.
>
> Where the deterioration is the product of an inherent defect in the design or construction of the building the carrying out of works to eradicate that defect may be repair: *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] Q.B. 12.
>
> Prophylactic measures taken to avoid the recurrence of the deterioration may also be repair: the *Ravenseft Properties Ltd*

case at [22], *McDougall v Easington District Council* (1989) 21 H.L.R. 310 at 315.

In principle where there is a choice of methods of carrying out repair, the choice is that of the covenantor provided that the choice is reasonable one: *Plough Investments V Manchester City Council* [1989] 1 E.G.L.R. 244.

At common law, there is no bright line division between what is repair and what is improvement: the McDougall case at 315.

The use of better materials or the carrying out of additional work required by building regulations or in order to conform with good practice does not preclude works from being works of repair: Postel Properties Ltd v Boots the Chemist Ltd [1996] 2 E.G.L.R. 60.

Where a defect in a building needs to be rectified, the scheme of works carried out to rectify it may be partly repair and partly improvement: Wates v Rowland [1952] 2 Q.B. 12.

43. The Applicant submits that the Defect constitute disrepair despite the fact that they are caused by an inherent defect in the construction of the building. The Applicant considers this proposition is supported by Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] Q.B. 12. Specifically, that the defect is "inherent" in the sense that a defective material was used to install the windows across the entirety of the Property during construction. At p.21 [1980] Q.B. 12 C Forbes J states:

"The true test is , as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised. In deciding this question, the proportion which the cost of disputed"

44. The Applicant submits the "works" constitute repair in the sense that they would remediate the Defect which have emerged over time and restore the Property to a condition similar to when it was first built and prior to the shrinkage of the timber frame. This in no way is a *"wholly different thing from that which he demised*" as stated in Ravenseft .

First Respondent's Position: Metropolitan Thames Valley Housing

45. The first Respondent submits that there is no clear definition of the works. That the Applicant defines the "works" as those identified by Smith Baxter as being required to remedy the Defect. The first Respondent says without a "detailed specification" the tribunal cannot

give a determination. citing Eshraghi v 7/9 Avenue Road (London House) Ltd [2020] UKUT 208 (LC):

"50.Section 27A is clearly intended to have a wide ambit. The FTT has jurisdiction to consider whether a service charge is payable whether or not any sum has already been paid (section 27A(2)) and whether or not any valid demand has been made in respect of costs already incurred (Cannon v 38 Lambs Conduit LLP). In addressing the most basic question of whether a service charge is payable at all the route by which the person who incurred the relevant costs intends to recover them does not seem to me to be relevant. That question simply requires consideration of the terms of the lease and the nature of the cost incurred. If the costs fall within the charging provision in the lease they are, or may become, the subject of a service charge payable by the tenant and may therefore be the subject of scrutiny under section 27A".

46. The first Respondent submits that the Applicant (from para 22 of the Applicant's Reply) appears to be only seeking determination on whether the costs of remedying the actual disrepair that has occurred as a consequence of the design/inherent defect rather than a determination relating to the repair of the design/inherent defect itself AND any repairs that have occurred as a consequence of the design/inherent defect.

47. The first Respondent takes the description of the design/inherent defect as identified in paragraphs 27 and 28 of the Applicant's Statement of Case. This being in short "the Inherent Defect is the use of a less flexible silicone sealant (as opposed to more flexible compressible seals) to fill the gap around the window frames when the buildings were constructed."

The second Respondent: Sharon Lam

48. The second Respondent contends there is an inherent structural defect caused by installation of the wrong form of seal in the windows during construction. Further that the Applicant's reliance on Ravenseft Properties Ltd v Davstone Ltd is not directly applicable for three reasons.

49. The first, that in Ravenseft the court considered whether rectifying an inherent defect could fall under a general repairing obligation when no specific lease term excluded it. In this case the second Respondent argues that the lease distinguishes between inherent defects and general repairs

50. The second, in Waaler v Hounslow LBC [2017] EWCA Civ 45, the specific terms of the lease take precedence over the general principles as to what can be recovered as a service charge.

51. The third, that Trinity failed to act in a time means that costs were not properly incurred.

52. The second Respondent also argues that a state of disrepair requires an element of deterioration from a prior good condition. The windows were defective from the time of construction because incorrect seals were used. Therefore, there cannot be disrepair if the property was never in repair. Quick v Taff Ely Borough Council [1986] QB 809 applying.

The third Respondent: Catherine Peachey

53. The third Respondent argues that *City of London V Great Arthur House* is applicable in that it draws a distinction between inherent defects and merely repairs required from old age. It is contended because there is a distinction in the lease this is applicable.

The tribunal analysis and decision.

54. The application is for determination as to the payability of a service charge, should costs be incurred in the repair of windows. The tribunal has heard that different windows are impacted to differing degrees, some just requiring adjustment of the casements themselves, replacement seals, through to, in the case of distorted windows replacements.

55. The disrepair emanates from the failure of the window to be wind and watertight and in some cases distortion of the frame. Smith Baxter the surveyors to the Applicant have said this disrepair is caused by the incorrect use of non-flexible sealant, when the windows were installed in a structure that was expected to shrink in its normal operation.

56. The disrepair is therefore caused by a defect, that was in place at the start of the building's life, and the defect can properly be called an inherent defect.

57. The first Respondent raises the distinction between an application for determination of a service charge for the remedying of repairs emanating from the presence of the defect rather than repair of the defect itself. The Application itself is clear that it does not make such a distinction. The tribunal therefore is considering; whether the cost to repair of the defect and any subsequent disrepair to the windows could properly form a service charge to the Respondent leaseholders.

58. The tribunal is satisfied that given the range of disrepair of windows over the estate the proposals by Smith Baxter are sufficient detail for the tribunal to make a determination over whether cost of “works” to the windows may properly form part of the service charge.

59. The tribunal having established what disrepair is within the Application now considers what repairs may be permissible.

60. The Applicant considers that caselaw supports the remedying of the inherent defect as putting the building into repair because that which is given back is not materially different.

61. Considering the Respondents contentions in turn:The second Respondent argues that *Ravenseft* is not applicable because differing lease terms apply here. The tribunal is satisfied that *Ravenseft* provides authority that the repair of the inherent defect is allowable in the repair of the window as a whole.

62. The second Respondent also contends that as there was an inherent defect in place, therefore the property could not be said to have ever been in repair hence it cannot be said to be in disrepair. The property was signed off by building control and was wind and watertight at the start. The seals have deteriorated since and so disrepair has occurred which necessitates being put into repair.

63. The tribunal is therefore content that it understands the scope and nature of the disrepair and repairs that are envisaged that form the basis of the determination. The repairs vary from window to window but include casement adjustment, new seals, new windows where necessary.

Issue 2 – Who is responsible for putting into repair that which is in disrepair?

Applicant's position

64. The Applicant cites the Smith Baxter report 27 February 2024, para 4 notes in relation to some of the works to some of the windows:

> *"To most it is nominal and causing no concerns to the current residents. Easing and adjusting of the existing opening casements in combination with more accommodating compressive gaskets should resolve most current sound ingress and heat loss. Only a limited number across all blocks may require replacement owing to distortion, before requiring replacement due to age which would fall under the leaseholder's responsibility".*

65. The scope of the disrepair has been determined in the examination of the first issue above. For the Applicant to be able to charge a service charge, the repairs must be to property which the Applicant has responsibility for keeping in repair. The Applicant cannot properly levy a service charge to leaseholders on repairs to property the Applicant does not have responsibility to repair. In order to determine the extent to which the Applicant has the responsibility to repair examination of the lease construction is critical.

66. The Applicant in their Statement of Case paragraph 12 notes in the Sixth Schedule Part A paragraph 5 of the Lease that the Applicant has the obligation to;

"inspecting rebuilding repointing repairing cleaning renewing redecorating or otherwise treating as necessary and keeping the exterior and structure of the Block comprised in the Maintained Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof".

67. The "Maintained Property" is defined in the Definitions section as leases as

"those parts of the Estate which are more particularly described in the Second Schedule and the maintenance of which is the responsibility of the Manager".

68. At para 1.3 of the Second Schedule as part of the "Maintained Property" is "The structural parts of the Building(s) including the roofs gutters rainwater pipes foundations floors and wall bounding individual Dwellings therein and all external parts of the Building(s) including all decorative parts".

69. Further at paragraph 1.4 of the Second Schedule as part of the "Maintained Property" is "All doors window frames not forming part of the demise of any of the Dwellings."

70. It is the Applicant's position that they have responsibility to maintain and repair the structural elements of the blocks, which include the timber frame (and external decorative parts to the windows of the flats).

First Respondent's: Metropolitan Thames Valley Housing

71. The first Respondent's statement of case admits the Applicant's Statement of Case paragraphs 7 to 18 save for paragraph 9, in so far they recite the lease terms.

72. The first Respondent accepts that the question of who has responsibility to repair rests, with the interpretation of the lease.

Tribunal analysis and decision

73. The Management Company is responsible for the "Maintained Property" as set out in the Second Schedule. Of relevance is paragraph 1.4 of the lease which sets out that the Management Company's responsibility does not include windows and doors reserved within the demised property.

74. The Third Schedule sets out the demised property which at paragraph 1.1 shows the doors and windows forming part of the demised property.

75. The tribunal finds that proper construction of the lease provides that windows and the glass therein are within the demise (that is for each flat) and are the responsibility of the leaseholder. This responsibility encompasses repair or replacement by the leaseholder.

76. The lease identifies "external decorative parts of the window", as part of the "Maintained Property". The tribunal does not consider the windows themselves to be part of any "external decorative part of the window". Decorative implies an element which goes beyond function. The tribunal considers the window itself functional and so by definition the external decorative parts cannot form part of the window.

77. The tribunal finds that windows outside the demised areas, that is outside the demise of individual flats, are within the "Maintained Property" and so the responsibility of the Management Company. Windows within demised premises are not.

Windows within the "demised" premises

78. In respect of the windows and their seals within the demised property (leasehold property), Smith Baxter report the seals are inherently defective. The Applicant contends the seals form part of the structure [33 para 29] and hence part of the "Maintained Property".

79. The tribunal considers whether the seals ought properly to be considered part of the "Maintained Property". The tribunal considers the natural sequence of fitting the window is first the building structure is completed then the window is fitted using permanent fixings such as screws and seals. The seals or in this case sealant are therefore part of the windows fitting process and ancillary and form part of the whole functioning window. It cannot be logical that sealant constitutes part of the structure or "Maintained Property".

80. **The tribunal finds the sealant not part of the structure and therefore not part of the "Maintained Property".**

81. For the windows that are part of the demised property, any disrepair of the structure falling into the definition of "Maintained Property" caused by failure of the window seal whether an inherent defect or not, is the responsibility of the Management Company to repair. The issue as to whether the incorrect seals constitute an inherent structural defect and so impact on the ability of the Management Company to recover the service charge are considered below.

82. In the case of the windows in the demised property. The seals are ancillary to the windows. If the seals are inherently defective, then that inherent defect is of the seal and the seal forms part of demised window the demised premises. So, repairs of windows and their seals within the demised premises are not the responsibility of the Managment Company to repair nor can a service charge be made for the cost.

83. In the case of the windows in the demised property. As the inherent defect is part of the leaseholder's property and the Management Company has no recourse to charge for repairs on items that are not part of the "Maintained Property", the provisions relating to inherent structural defect and insurance exclusions do not engage.

Windows within the "Maintained Property"

84. Windows within the "Maintained Property", and their seals are the responsibility of the Management Company. Any further damage to the "Maintained Property" caused by the defective seals, would normally be the responsibility of the Management Company to repair.

Issue 3 – For repairs to the "Maintained Property" who is liable to pay

Applicant's submissions

85. **First** , the Applicant relies on the responsibility to maintain and repair the "Maintained Property", which is found under Paragraph 5 of Part A of the Sixth Schedule of the Leases and the Sixth Schedule of the MTVH Lease.[31] In respect of windows in the "Maintained Property" in some cases just their seals in others the windows themselves are in disrepair. The Applicant says the disrepair is captured under the obligation under Paragraph 5 to be put in repair by the Management Company.

86. The leaseholders under the Leases have covenanted to pay service charges, pursuant to the Eighth Schedule, Part 1, paragraph 2: "To pay to the Manager or its authorised agent (or to the Lessor in the event that the Lessor is managing pursuant to paragraph 1 of the Ninth Schedule) the Tenant's Proportion at the times and in the manner herein provided and without deduction or set-off and free from any equity or counterclaim."

87. The tribunal finds that the Management Company is obligated to repair windows, and their ancillary fittings and seals, within the "Maintained Property" and that they can properly charge a service charge for such "works" under Paragraph 5 of Part A of the Sixth Schedule.

88. **Second** the Applicant relies on the Sixth Schedule Part C 15.1 states that the manager can recover "reasonable and proper expenses" in relation to "rectifying or making good any inherent structural defect in the Block or any part of the estate (except in so far as the cost thereof is recoverable under any insurance policy for the time being in force or from a third party who is or who may be liable thereof).

89. The current use of sealant is accepted by all parties as being inherently defective. The lease provision Part C which discusses inherent structural defects talks in terms of inherent structural defect. (Underlined by the tribunal.) **The tribunal does not consider seals to be considered structural, so the provision is not engaged.**

90. If the tribunal is wrong on the seals not constituting an inherent structural defect, then the Sixth Schedule at para 15.1 says the costs may be recoverable "(except in so far as the cost thereof is recoverable under any insurance policy for the time being in force or from a third party who is or who may be liable thereof)."

91. The tribunal has not heard any evidence to show that any insurance, NHBC Warranty or third party is available from which to recover these costs. The point at which these costs may be considered recoverable is the point at which the costs are incurred. These costs have not yet been incurred.

92. The contentions put by the Respondents are considered in relation to windows in the "Maintained Property".

93. First, the second Respondent contends that the Seventh Schedule does not permit recovery of expenses costs associated with inherent defects. That the Sixth schedule, which mentions inherent defects only in Schedule 6 Part C but not Schedule 6 Part A and so by proper construction, the costs *"cannot be re-charged"* to the leaseholders.

94. The tribunal finds that seventh schedule is concerned with the tenant's proportion not the costs of the obligations that are to be apportioned. The Schedule 6 Part C does not mention inherent defect but "inherent structural defects", the tribunal does not consider defective sealant to be structural and so the provision is not engaged.

95. The Respondents argued that application of the Paragraph 1.1 of the Tenth Schedule, of the leases contain the;

Covenants on the part of the Manager" "Conditional on the Manager having first received payment of the Lessee's Proportion then to carry out the works and do acts and things set out in the Sixth Schedule.....Provided that:

"Conditional on the Manager having first received payment of the Lessee's Proportion then to carry out the works and do the acts and things set out in the Sixth Schedule as appropriate to each type of dwelling including (for the avoidance of doubt) procuring the repair and maintenance of such of the Accessways and Service Installations serving the demised Premises as are situate outside the Estate Provided that:

1.1 The Manager shall not be personally responsible for any damage caused by any defects or want of repair to the Maintained Property or any part thereof unless such matters are reasonably apparent by visual inspection or until Notice in writing of any such defect or want of repair has been served on the Manager and the Manager shall have failed to make good or remedy such matter within a reasonable period following receipt of any such notice."

96. The tribunal is with the Applicant on this point in that the Applicant can only be liable for "*any damage caused by any defects or want of repair*." The cost of repairing the defects is not itself any damage caused by any defects or want of repair. The defects under consideration in this application are the windows and their fittings including seals only.

Application under s.20C of the Landlord and Tenant Act 1985 and or Paragraph 5A Schedule 11 of the Commonhold and Leasehold reform Act 2002.

97. The tribunal did not hear representations on this within the hearing but invited the parties to make representations if they so wished to the tribunal after the substantive decision was issued. The parties are invited to make representations on this matter within 28 days of notification of the decision.

98. In so far as parties have made submissions between the end of the hearing and the issuing of the decision, those submissions will be considered within any others received in compliance with paragraph 97 above.

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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

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