10876

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2014/0524 & LON/00BG/LSC/2014/0525**
Property	:	**11 & 17 Brayford Square, London E1 0SG**
Applicant	:	**Swan Housing Association Limited**
Representative	:	**Mr Nicholas Grundy (Counsel) Devonshires Solicitors**
Respondent	:	**Mr N Parkin and Mrs T Hashi (Flat 11)** **Mr T Harvey (Flat 17)**
Representative	:	**Mr Parkin and Mr Harvey**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mr J P Donegan (Tribunal Judge)** **Mr J Barlow JP FRICS (Valuer Member)** **Mrs L Walter (Lay Member)**
Date and venue of Hearing	:	**26 & 27 February 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**27 April 2015**

DECISION

Decisions of the tribunal

(1) Subject to the Applicant serving valid Certificates in accordance with paragraph 6 of the fifth schedule to the leases, the contributions payable in respect of the major works undertaken at Brayford Square, London E1 0SG ("Brayford Square") in 2008/09 are:

Flat 11 Brayford Square	£4,986.53
Flat 17 Brayford Square	£5,085.86

(2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") so that none of the Applicant's costs of these tribunal proceedings may be passed to the Respondents through any service charge.

(3) Since the tribunal has no jurisdiction over County Court costs and fees, these matters should now be referred back to the County Court at Mayors & City of London Court.

The applications

1. The Applicant seeks a determination pursuant to section 27A of the 1985 Act, as to the amount of service charges payable by the Respondents in respect of major works undertaken at Brayford Square in 2008/09.

2. Proceedings were originally issued in the County Court Money Claims Centre on 22 May 2014, under claim numbers A29YM176 (Mr Parkin and Mrs Hashi) and A297M197 (Mr Harvey). Defences were filed on 25 June 2014. The claims were transferred to the County Court at Mayors & City London Court and then in turn transferred to this tribunal, by orders of District Judge Parfitt dated 01 October 2014.

3. Directions were issued at a case management hearing on 04 November 2014, which included provision for the two cases to be heard together.

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

The hearing

5. The Applicant was represented by Mr Grundy of Counsel at the hearing. Mr Richard Pearce and Mrs Claire Thorogood gave oral evidence on behalf of the Applicant. The Respondents were unrepresented. Mr

Parkin appeared on behalf of himself and Mrs Hashi. Mr Harvey appeared in person. Both Mr Parkin and Mr Harvey gave oral evidence.

6. The tribunal were supplied with a total of five hearing bundles, being two bundles from the Applicant for each flat and a separate bundle from Mr Harvey. Immediately prior to the hearing the tribunal received a helpful skeleton argument from Mr Grundy with a bundle of authorities, relating to the preliminary issue. Following the lunch adjournment, Mr Grundy also supplied the tribunal with a short bundle of photographs that had been taken by Mr Pearce and which had been copied to Mr Parkin and Mr Harvey.

7. The hearing concluded late afternoon on Thursday 26 February 2015. The tribunal inspected Brayford Square during the morning of Friday 27 February in the presence of Mr Grundy, Mr Pearce, Mrs Thorogood, Mr Parkin and Mr Harvey. The inspection included a walk around the first floor deck and the ground level of Brayford Square, where Mr Parkin and Mr Harvey pointed out the various items of external work, which they considered to be substandard. The tribunal did not inspect the interior of any of the residential or commercial units. The tribunal members also inspected the exterior of two adjacent blocks on the Estate at Jamaica Street and Clovelly Way, on their own.

The background

8. The proceedings concern major works undertaken at the Exmouth Estate ("the Estate"), in 2008/09. The Respondents' contributions to these works were originally demanded in invoices issued by the Applicant on 03 May 2011. The amount of these contributions has subsequently been varied.

9. Brayford Square forms part of the Estate and consists of five linked blocks with commercial units on the ground floor and 13 flats above, on the first floor. Of these flats, 8 have 3 bedrooms and 5 have 4 bedrooms. The blocks are linked at first floor level by communal walkways. The Applicant is the freeholder of Brayford Square.

10. Mr Parkin and Mrs Hashi hold a long lease of 11 Brayford Square ("Flat 11") and Mr Harvey holds a long lease of 17 Brayford Square ("Flat 17"). Their leases required the landlord to provide services and the tenants to contribute towards their costs by way of a variable service charge. The relevant provisions of the leases are referred to below:

The leases

11. The lease of Flat 11 was granted by The Mayor and Burgesses of the London Borough of Tower Hamlets ("Lessors") to Mr John Henry Rugg

and Mr Robert William Rugg ("Lessee") on 25 February 1991, for a term of 125 years from 25 April 1988.

12. The lease of Flat 17 was granted by The Mayor and Burgesses of the London Borough of Tower Hamlets ("Lessors") to Mr William Harvey and Mr Terence Harvey ("Lessee") on 18 May 1998, for a term of 125 years from 25 April 1988.

13. Both leases are in substantially the same form, save there are different definitions of "*Building and Address*" at paragraph 4 of the Particulars. In the case of Flat 11 the definition is "*8-20 Brayford Square Stepney E1*". In the case of Flat 17 the definition is "*All that block known as 15-17 Brayford Square London E1 0SG*".

14. By an order of the Leasehold Valuation Tribunal ("the LVT") dated 29 November 2011, the existing definition of the Building at paragraph 4 of the Particulars was varied to:

All those buildings, structures, staircases and raised walkways contained within the land edged red on the plans attached hereto and known as 1 to 21 Brayford Square, Stepney, London E1 but excluding, in particular those buildings known as 6 & 7 Brayford Square (as defined below)

6 & 7 Brayford Square are all those buildings and structures edged blue on the plans attached hereto

For the avoidance of doubt, insofar as 6 Brayford Square and 5 Brayford Square share a party wall ('the Party Wall') the Building extends to the mid-point of the Party Wall

This variation applied to all of the residential leases at Brayford Square, including Flats 11 and 17 and the variation took effect on from 01 April 2012.

15. The relevant provisions in the leases are set out below.

16. Clause 1 sets out various definitions, including:

(6) "The Accounting Period" shall mean a period commencing on the First day of April and ending on the Thirty First day of March in any year

17. The Lessees covenants are set out at clause 4 and include:

(4) Pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such Charges to be recoverable in default as rent in arrear

18. The Lessors covenants are set out at clause 5. These include a covenant for quiet enjoyment (clause 5(1)). Clause 5(5)(a) obliges the Lessors to maintain and repair:

(a) The main structure of the Building, including the exterior walls, roof, main drains gutters and rain water pipes;

(b) The service pipes and conduits;

(c) The Common Parts;

(d) The boundary walls and fences;

(e) Any flat/s occupied or used by any caretakers, porters etcetera; and

(f) All other parts of the Building that are not demised to any other Lessee and not let or intended for letting

19. Clause 5(5)(b) of the leases, sets out the Lessors' redecorating obligations. These are to be performed "*As and when the Lessors shall deem necessary*" and include:

(i) To paint the whole of the outside wood iron and any other work of the Building heretofore or usually painted and grain and varnish such external parts as have been heretofore or are usually grained or varnished

20. The definition of the demised premises is to be found in the first schedule to the leases and extends up to the plastered coverings plaster work of the ceilings (paragraph (c))

21. The detailed service charge provisions are to be found in the fifth schedule to the leases. The definitions are at paragraph 1 and include:

(2) "the Service Charge" means such reasonable proportion of Total Expenditure as is attributable to the Demised Premises or (in respect of the Accounting Period during which the Lease is executed) such proportion as is attributable in the period from the date of this Lease to the Thirty-first day of March next following

22. Paragraph 3 requires the Lessee to pay an Interim Charge, by four equal instalments in advance on 01 April, 01 July, 01 October and 01 January in each Accounting Period. These sums are paid on account of actual

service charge expenditure for the Accounting Period in question. Any end of year surplus shall be carried forward and credited to the Lessee's service charge account (paragraph 4). Any end of year deficit is payable within 28 days of service upon the Lessee of a Certificate and shall be recoverable as rent in arrears (paragraph 5).

23. Paragraph 6 provides:

As soon as practicable after the expiration of each Accounting Period there shall be served upon the Lessee by the Lessors or their Agents a certificate containing the following information:

(a) The amount of Total Expenditure for that Accounting Period

(b) The amount of the Interim Charge paid by the Lessee in respect of that Accounting Period together with any surplus carried forward from the previous Accounting Period

(c) The amount of the Service Charge in respect of that Accounting Period and of any excess or deficiency of the Service Charge over the Interim Charge

The issues

24. The directions issued on 04 November 2014 specified that the tribunal's jurisdiction was limited by the County Court particulars of claim to the costs comprised in invoices in the sum of £6,865.57 (Flat 11 and £7,001.61 (Flat 17), in respect of the major works.

25. The directions identified the relevant issues for determination as follows:

(i) Whether the major works cost was properly and reasonably apportioned as between the affected properties;

(ii) Whether the landlord has properly calculated the cost of the major works attributable to the Property;

(iii) Whether the charge for preliminaries in the major works cost was excessive/not reasonable;

(iv) Whether the major works were properly carried out to a reasonable standard;

(v) Whether the major works to the roof were unnecessary, as not required, whether those works were carried out to a reasonable standard and whether the cost of those works was reasonable; and

(vi) Whether some or all of the major works were carried out at all or at a reasonable costs when related to the extent of the works e.g. in relation to the scaffolding.

26. By the time of the hearing the issues had been refined by the service of the parties' statements of case and Mr Pearce's witness statements.

Preliminary issue

27. In a letter to the parties dated 24 February 2015, the tribunal queried whether or not the Applicant's service charge demands had been issued in accordance with the fifth schedule to the leases. That letter referred to the Upper Tribunal's decision in ***London Borough of Southwark v Woelke [2013] UKUT 0349 (LC)*** and asked the Applicant's advocate to deal with this issue in his opening submissions.

28. The tribunal's particular concern was that the contributions to the major works do not appear to have been demanded as an Interim Charge or as an end of year balancing charge, pursuant to the fifth schedule. Rather they appear to have been demanded on an ad hoc basis, in the invoices dated 03 May 2011 and not as part of the Service Charge for the year ended 31 March 2012. The purpose of the tribunal's letter was to give the parties advance notice of a preliminary issue that would need to be considered at the hearing. The tribunal considered it appropriate to raise this issue, given that it is fundamental in any service charge dispute to establish whether charges have been demanded in accordance with the lease.

29. In his skeleton argument, Mr Grundy contended that this preliminary issue should not be entertained by the tribunal and referred to the Upper Tribunal's decisions in ***Fairhold Mercury Limited v Merryfield RTM Company Limited [2012] UKUT 311 (LC)*** and ***Jastrzembi v Westminster City Council [2013] UKUT 284***. He pointed out that this issue had not been raised by any of the Respondents, either in their defences to the County Court proceedings or in their statements of case for the tribunal, or in the tribunal's directions. Mr Grundy argued that two days notice was insufficient time for the Applicant to deal with the issue. He also argued that the point raised by the tribunal was a purely technical one that could be remedied, as observed at paragraph 61 in ***Woelke.***

30. In his opening submissions, Mr Grundy again referred to paragraph 61 in ***Woelke***. This makes it clear that a failure to demand service charges in accordance with the lease does not mean that the charges can never be recovered. Rather deficiencies can be corrected.

31. Mr Grundy did not pursue his argument that the preliminary issue should not be entertained by the tribunal. Rather he suggested that the

Applicant could serve revised end of year Certificates upon the Respondents, which will include the cost of the major works. He suggested that there was no time bar to recovering the contributions to the major works, as notices had been served under section 20B(2) of the Landlord and Tenant Act 1987 ("the 1987 Act") on 24 March 2010. He also handed up copies of the notices. Mr Grundy invited the tribunal to determine the Respondents' liability to contribute to the cost of these works, subject to the production of valid Certificates. It will then be for County Court to determine if the revised Certificates are valid.

32. Mr Parkin was unsure whether he had received the notice dated 24 March 2010. However he and Mr Harvey agreed to Mr Grundy's proposal, to enable the Tribunal to determine their liability to contribute to the major works. For the avoidance of doubt, the tribunal has not determined whether valid notices have been served on the Respondents under section 20(B)(2) of the 1987 Act. Rather this will be a matter for the County Court.

33. The tribunal then proceeded to hear the substantive applications. The evidence and submissions are summarised below.

The evidence and submissions

34. The tribunal heard oral evidence from two witnesses for the Applicant, Mr Pearce and Mrs Thorogood.

35. Mr Pearce verified the contents of his two witness statements dated 05 February 2015 (one for each flat). He is a Home Ownership Project Manager, has 40 years experience in the social housing sector and has worked for the Applicant since April 2005.

36. Mr Pearce has been involved in leasehold management at the Estate for 8 years and is familiar with the major works undertaken in 2008/09, which arose from the Decent Homes Programme. He was involved to a large extent in the section 20 consultation procedure but was not involved in the management of the works or responsible for checking the works on a daily basis. Due to his limited involvement, there was little Mr Pearce could say regarding the specific challenges to the quality and cost of the works. Given the issues in dispute, the tribunal is surprised that the Applicant did not adduce any evidence from the officers directly involved in the management of the works or the agents that supervised the works.

37. In his statements Mr Pearce explained that the Applicant acquired the freehold of Brayford Square in 2006, following a large scale voluntary transfer from the London Borough of Tower Hamlets ("LBTH"). Numbers 1-7 and 21 Brayford Square are commercial units and 8-20 are residential flats, which Mr Pearce described as "*bungalows in the*

air". 6 and 7 Brayford Square, which consist of a community centre and nursery, are distinct from the rest of the development and are only connected by party walls.

38. Mr Pearce addressed the various challenges made by the Respondents, as best he could, in both his statements and his oral evidence. The challenges were also addressed in the Applicant's two statements of case (one for each flat), dated 09 December 2014.

39. In his oral evidence, Mr Pearce explained that the majority of the blocks on the Estate are medium to high rise, concrete structures that were built in the mid to late 1960s. Brayford Square is very different in that it is only two storeys, has a central square and is of brick construction. Mr Pearce believes that it was constructed in the 1970s.

40. Mr Pearce's statement gave details of the background to these proceedings, including the application to the LVT to vary the leases. The application was necessary, as the residential leases at Brayford Square gave different definitions of the Building. This made it impossible to consistently apportion service charge expenditure between the flats. LBTH had not applied the strict provisions of the leases during its period of ownership and had apportioned service charges equally between all of the leasehold flats. Following its purchase of Brayford Square, the Applicant initially continued with this practice. Following a consultation exercise, the application to vary the leases was submitted to the LVT. This was contested by a number of leaseholders, including Mr Parkin and Mr Harvey. The order varying the leases was made on 29 November 2012.

41. Mrs Thorogood briefly gave oral evidence at the hearing with the permission of the tribunal, although there was no witness statement from her. She has been employed by the Applicant as a Leasehold Services Manager for approximately 18 months and has worked in leasehold management for approximately 20 years.

42. Mrs Thorogood's evidence was confined to the manner in which the service charge contributions had been calculated and subsequently adjusted. Although there was no statement from her, she was able to confirm those parts of Mr Pearce's statement and the statement of case that dealt with these issues. She was also able to speak to a letter that she had sent all leaseholders on 30 April 2014, setting out the reasons for the adjustments.

43. Mr Parkin and Mr Harvey both gave oral evidence. Both had summarised their challenges to the major works in their defences to the County Court proceedings. These were mostly generalised but there were also some challenges to specific items in the final account for the major works. Mr Parkin also relied upon a statement of case dated 11

January 2015 and Mr Harvey relied on a reply to the Applicant's statement of case, dated 12 January 2015.

44. Many of the challenges raised by Mr Parkin and Mr Harvey were the same and the tribunal took much of the oral evidence from Mr Parkin. However Mr Harvey raised a number of supplemental points, some of which were specific to his flat.

45. Mr Parkin made a number of criticisms of the Applicant and its management of the major works, which included:

- The cost of the works had been inflated and included bogus charges. Mr Parkin's reasoning is that minutes for the Applicant's London Regional Committee meeting on 13 December 2010, referred to an assumed recovery rate of 80% for the major works contributions. The minutes also stated that the Applicant's business plan could cope with a lower rate, if necessary.

- The Homes and Community Agency had been critical of the Applicant's governance in a Judgment dated December 2012.

- Some of the Applicant's senior officers who had overseen the major works had been suspended.

- Mr Parkin has asked the Applicant's CEO to investigate the works but this has been ignored.

- In a decision dated 28 August 2012, concerning a flat at another block on the Estate (49 Jamaica Street), the LVT had disallowed the cost of roof repairs as the old roof was under warranty.

46. Mr Parkin clearly felt aggrieved by the Applicant's handling of the major works and was keen to vent his various grievances. However the tribunal made it clear that its jurisdiction was limited to a determination of the sums claimed in the County Court proceedings.

47. At the end of the hearing, Mr Grundy, Mr Parkin and Mr Harvey made closing submissions on the disputed elements of the major works. At the request of the tribunal, these focussed on the final account breakdown dated November 2014.

48. Following the conclusion of hearing the tribunal wrote to both parties on 02 March 2015, asking for clarification as to where the cost of works to the gutters and downpipes appeared in the final account breakdown. The Applicant's solicitors replied in a letter dated 04 March 2015. Mr Parkin replied in an email dated 06 March 2015.

49. Having heard evidence and submissions from the parties and considered all of the documents provided, including Mr Grundy's skeleton argument the tribunal has made the following determinations.

Necessity of the major works

50. The Respondents' primary point is that the works were unnecessary, as the Applicant plans to redevelop or demolish Brayford Square. These plans were detailed in various documents referred to by Mr Parkin. He also referred to the Applicant's refusal to renew commercial leases on the ground floor and the purchase of 10 Brayford Square in 2007 for the sum of £466,900. The Respondents contend that there was no point in the Applicant undertaking costly, long term repairs at Brayford Square, given the intention to redevelop.

51. In his statement of case, Mr Parkin suggested that the Applicant's intention to redevelop Brayford Square had interfered with his right to quiet enjoyment of his home. He raised a similar complaint in relation to restrictions on access to other parts of the Estate. The tribunal explained that it had no jurisdiction to deal with any counterclaim for breach of the covenant for quiet enjoyment, as this did not form part of the case transferred from the County Court. Rather Mr Parkin will have to pursue this issue separately.

52. Mr Pearce acknowledged that there are long term redevelopment plans at Brayford Square. These involve the replacement of the commercial units on the ground floor with residential accommodation and do not affect the flats on the first floor. The Applicant did have pre-applications discussions with LBTH regarding the complete redevelopment of Brayford Square (including the first floor) and an informal proposal was made. However this was not pursued. There has been no formal planning application to redevelop the Square, notwithstanding that paragraph 48 of its statements of case incorrectly referred to *"..a previous planning application being rejected"*.

53. Mr Pearce also stated that the major works were required, irrespective of the Applicant's future plans and that it would not have been good practice, commercially viable or financially efficient for the works to be undertaken on a piecemeal basis.

54. In his closing submissions, Mr Parkin described the Applicant as a social landlord and a developer. He referred to a meeting with the leaseholders where the Applicant had set out its intention to demolish Brayford Square. He also stated that the Applicant was negotiating to buy other flats at Brayford Square and would seek compulsory purchase orders if necessary, to enable its redevelopment. Mr Parkin suggested that the bulk of the charges for the major works should be disallowed, given the intention to develop, but did not propose a figure.

55. Mr Grundy pointed that the Applicant was obliged to comply with its repairing obligations at Brayford Square, otherwise it could face claims for breach of covenant. The purchase of one of the flats did not relieve it of these obligations. Mr Grundy also stated that the Applicant had no plans to demolish Brayford Square, which would be there *"for the foreseeable future"*.

The tribunal's decision

56. The tribunal determines that it was reasonable for the Applicant to undertake the major works.

Reasons for the tribunal's decision

57. It is clear that the Applicant has considered the demolition and redevelopment of Brayford Square in the past. No doubt this formed part of its informal discussions with LBTH and was a factor in the decision to purchase Flat 10 in 2007. However the tribunal notes that the Applicant currently has no redevelopment that may affect the individual residential flats at Brayford Square or the roof of the building. The plans will have evolved over time and as a result of the discussions with LBTH. Clearly there has been no formal planning application to redevelop the square and any redevelopment is still some time off. The error at paragraph 48 of the Applicants' statement of case is unfortunate, as this naturally made the Respondents suspicious. However this is not relevant to the necessity of the works.

58. The Applicant had and has a contractual obligation to comply with the repairing covenants in the leases. The possible redevelopment of Brayford Square did not absolve it of that obligation. The tribunal is satisfied that the Applicant undertook the major works to comply with this obligation and accepts Mr Pearce's point that the works were required, irrespective of the Applicant's future plans. The Respondents produced no expert or other independent evidence to suggest that the works were unnecessary. It is also worth pointing out that the works were undertaken in 2008/09 and the Respondents have already had the benefit of the works for approximately 6-7 years.

Whether any of the sums billed are "non-applicable charges"

59. The invoices dated 03 May 2011 were accompanied by a service charge calculation and a detailed spreadsheet, giving a full cost breakdown of the final account for the major works at the Estate. These documents distinguished between the cost of works that were rechargeable to Brayford Square and those rechargeable to the Estate as a whole.

60. In his statements, Mr Pearce acknowledged that the original spreadsheet provided by the Applicant was unwieldy and difficult to

interpret. As a consequence, a simplified A4 version had been provided to leaseholders in April 2014. This was headed "*FINAL ACCOUNT BREAKDOWN FOR BRAYFORD SQUARE (Mar 2014)*".

61. In his oral evidence, Mr Pearce explained that one contract had been awarded for all works on the Estate, rather than separate contracts for each block, to achieve economies of scale. This took the form of a JCT major works contract and the works were supervised by Baily Garner LLP, who acted as agents for the Applicant. In relation to Brayford Square a final account had been prepared that included the cost of works specific to this property and a proportion of the Estate wide costs. The Estate wide costs were split between the various blocks on the Estate.

62. Mr Pearce also explained various deductions had been made to the March 2014 final account, to reflect items that had been incorrectly charged. The total amount of these deductions was £42,158.96. A revised final account was produced in November 2014. In cross-examination Mr Pearce conceded that the charge for internal communal doors (£720) should also be deducted from this account.

63. Mr Harvey queried sum of £21,300 that had been charged for roof insulation at Brayford Square. He referred Mr Pearce to a letter dated 13 June 2011, in which Mr Pearce had stated "*You refer to the cost of insulation, please note that as shown on the spreadsheet these costs are not charged*". In fact the roof insulation was charged to the residential leaseholders in the final account and has not been deducted. Mr Pearce could not recall the reason for the statement made in his letter of 13 June 2011. Equally he could not think of any reason why the insulation cost should be deducted from the final account.

64. In his submissions, Mr Parkin suggested that the insulation of individual roofs should be the responsibility of individual leaseholders. He pointed out that he was unable to check if the roofs of other flats had been insulated and suggested that grants might have been available for the insulation. Mr Parkin also submitted that the insulation of the roofs served little purpose, as each flat had a large patio area which formed part of the roof to the commercial units below. These patio areas had not been insulated.

65. Mr Grundy pointed out that the roof voids did not form part of the demised premises, as defined in the first schedule to the leases. Upon this basis the insulation of the voids falls within the Applicant's repairing obligations. Mr Grundy submitted that the statement in Mr Pearce's letter of 13 June 2011 did not amount to an enforceable waiver. The insulation costs were included in the final account dated March 2014 and in a revised final account dated April 2014.

The tribunal's decision

66. The tribunal determines that the sum of £22,020 should be deducted from the November 2014 final account for "non-applicable charges".

Reasons for the tribunal's decision

67. The tribunal makes two deductions from the final account. Firstly there is the £720 charge for the internal communal doors that was conceded by Mr Pearce. Secondly there is the sum of £21,300 for the roof insulation. In his letter of 13 June 2011, Mr Pearce stated that the insulation had not been charged and had not been included in the spreadsheet. This must be a reference to the detailed spreadsheet that accompanied the invoices dated 03 May 2011. The tribunal has studied the spreadsheet and can see no reference to the insulation.

68. Mr Pearce was unable to explain why the insulation had not been charged in 2011, even though this issue had been specifically raised in Mr Harvey's reply to the Applicant's statement of case. For whatever reason, the Applicant decided not to charge the insulation when it originally billed the works. However the insulation cost was then included in the final accounts dated March and November 2014, without explanation. The tribunal concluded that it was unreasonable to add this item to the final account, three years after the original bills and disallows it in full. The Applicant's approach to billing the works has been confusing and the demands have been adjusted on two occasions. Further adjustments have been made since the County Court proceedings were issued and it is no surprise that the Respondents viewed the demands with suspicion.

The apportionment of the major works costs

69. The original contributions to the major works, demanded on 03 May 2011 were calculated in accordance with the old lease definitions. These were apportioned solely between the residential flats with no apportionment for the commercial units.

70. The inconsistent definitions of the Building in the leases meant that differing calculations had to be used to work out the contributions due from each flat. For those flats where the definition of the Building was 8-20 Brayford Square (13 flats) the costs were split so that the 3-bedrooom flats, including Flat 11, were each charged 7.62% of the specific costs for Brayford Square (£324,740.44 plus fees) and the 4-bedroom flats were each charged 7.79%.

71. For those flats where the definition of the Building was 15-17 or 18-20 Brayford Square, the costs were split so that each flat paid 33.33% of the total costs that were attributable to their specific blocks. This meant that Flat 17, which has 4 bedrooms, was charged 33.33% of the costs attributable to block 15-17 (£75,934.33 plus fees).

72. In addition each flat at Brayford Square was charged 2% of the Estate wide costs (£266,095.86 plus fees).

73. Based on these calculations, Flat 11's contribution to the major works was calculated to be £28,602.35. Flat 17's contribution was calculated to be £29,211.06. However in each case the contribution was capped at £10,000.

74. The contributions were subsequently revised in September 2012 and April 2014. The September 2012 adjustments were made to take account of the commercial units on the properties on the ground floor, so that some of the costs were attributed to these units. For those flats with the 8-20 Brayford Square definition of the Building, the percentages were reduced to 2.07% (3 bedrooms) and 2.11% (4 bedrooms). In the case of Flat 17, the block cost was reduced to £68,000. This was based upon a 23% share of the specific costs for Brayford Square.

75. Mrs Thorogood wrote to the residential leaseholders on 30 April 2014, advising that it was making further adjustments to the contributions, so that all flats were treated in the same way. As a consequence, all 3-bedroom flats were charged 2.07% of the adjusted costs that were rechargeable Brayford Square and all 4-bedroom flats were charged 2.11%. These adjusted costs, excluded works to units 6 and 7 and amounted to £267,454.88 plus fees. In addition each flat was still charged 2% of the Estate wide costs (£266,095.86 plus fees).

76. As a result of the further adjustments, the revised sums demanded in April 2014 were £6,865.57 (Flat 11) and £7,001.61 (Flat 17) and these were the sums demanded in the County Court proceedings. In its statements of case, the Applicant conceded that another adjustment is required. The sums demanded in April 2014 included the cost of works to private balcony screens, which should not have been charged to the Respondents. This additional adjustment was shown in the November 2014 final account and means that the sums now being claimed by the Applicant are £6,751.99 (Flat 11) and £6,885.56 (Flat 17).

77. In his statements, Mr Pearce referred to the definition of the Service Charge at clause 1(2) of the fifth schedule to the leases, which is a "..such *reasonable proportion of Total Expenditure as is attributable to the Demised Premises*". He contended that the adjustments had been made to ensure that all leaseholders had been charged a fair proportion of the cost of the major works, based on an equal split of the costs involved.

78. Mr Harvey challenged the manner in which the original contributions had been calculated and the Applicant's motives for adjusting the contributions. His primary concern was that the contributions had not been calculated with reference to the specific works undertaken at his

block (Block 15-17) and he had not been provided with a breakdown of those works. Rather the breakdowns provided related to Brayford Square, as a whole.

79. Mr Harvey also challenged the breakdowns upon the basis that the size of 21 Brayford Square had not been taken into account and a Parking Zone had been excluded. 21 Brayford Square is a commercial unit that is used as a carers centre and which occupies the whole of the ground floor below the block containing Flats 18-20. The Parking Zone occupies the ground floor below the blocks containing Flats 13-17. This area used to form part of the communal grounds but is now fenced off and is used exclusively by the Applicant, its contractors and staff.

80. Mr Harvey contends that the apportionments used by the Applicant are incorrect and provided the tribunal with a schedule, setting out alternative apportionments. Based on the April 2014 demands he had calculated the ratio of the residential and commercial service charge contributions, per unit, to be 1:4.37. This was based on treating 21 Brayford Square as 3 commercial units, so there were a total of 13 residential flats and 8 commercial units. Mr Pearce had then made an adjustment to take account of the Parking Zone, which he treated as 5 residential flats. Upon this basis he had calculated that the flats should each pay 1.89% towards the cost of the works that were specific to Brayford Square.

81. In its statements of case, the Applicant explained that the Parking Zone did not form part of the apportionment calculation, as it is obliged to maintain and repair this area under clauses 5(5)(a)(v) and (vi) of the lease.

82. In his closing submissions, Mr Grundy reminded the tribunal of the definition of Service Charge at paragraph 1(2) of the leases. The Respondents are required to pay a "*reasonable proportion of Total Expenditure*". Mr Grundy suggested that there was a rational and reasonable explanation for the apportionments used by the Applicant for the major works. The fact that alternative methods of apportionment were possible did not mean that the Applicant's apportionments were unreasonable.

The tribunal's decision

83. The tribunal determines that the adjusted apportionments used by the Applicant, as set out in Mrs Thorogood's letter of 30 April 2014, are reasonable. For the avoidance of doubt the apportionments for each flat are:

Flat 11 – 2.07% of costs rechargeable to Brayford Square and 2% of Estate wide costs

Flat 17 – 2.11% of the costs rechargeable to Brayford Square and 2% of Estate wide costs

Reasons for the tribunal's decision

84. The starting point is to consider the lease terms. The leases do not provide any mechanism for apportioning the contributions to the major works. Rather the leaseholders are to pay a reasonable proportion of Total Expenditure.

85. At the hearing, Mr Harvey accepted that the new definition of the Building, arising from the LVT order dated 29 November 2011, should apply to the contributions to the major works. The adjusted apportionments are based on this new definition, which excludes units 6 and 7 Brayford Square. It follows that the Applicant was correct to disregard these units when apportioning the charges.

86. Clearly there is more than one way to apportion the contributions to the major works. There is no requirement that the Applicant uses the approach that results in the lowest cost to the residential leaseholders. Rather it must act reasonably and more than one approach could be reasonable. The tribunal preferred Mrs Thorogood's approach to that suggested by Mr Harvey. The latter was difficult to follow and made subjective assessments of 21 Brayford Square and the Parking Zone, which could be challenged.

87. The tribunal agrees with Mr Grundy that the Applicant's explanation of the current apportionments (as set out in Mrs Thorogood's letter of 30 April 2014) was both rational and reasonable.

Compliance with section 20 of the 1985 Act in relation to Qualifying Long Term Agreements ("QLTAs")

88. This point was only pursued in relation to Flat 11 and initially related to just the roof repairs. In his defence to the County Court proceedings, Mr Parkin alleged that the roof repairs were undertaken without a proper section 20 consultation. He made various criticisms of the consultation procedure including the Applicant's failure to disclose any report identifying the precise works to his roof or a copy of the main contractor's report during the consultation period. He also complained that the Applicant had not produced any of the tenders from the roofing sub-contactors.

89. In his statement of case, Mr Parkin repeated his complaints about the consultation for the roof repairs. He also raised a new complaint, regarding the consultation procedure generally. This related to the notices of intention to enter into a QLTA, issued by the Applicant on 13 November, 11 December and 22 December 2006. These were solely

addressed to Mr Parkin and did not include Mrs Hashi's name. They were sent to Mr Parkin at Flat 11 and there was no suggestion that Mrs Hashi was living elsewhere at the time. Mr Parkin raised a number of other general points but these did not relate to the validity of the consultation procedure.

90. Mr Parkin argued that his contribution to the major works should be limited to the statutory cap for QLTAs of £100, upon the basis that there had been breaches of section 20. However on being questioned by the tribunal he acknowledged that he had not read section 20 or the Service Charges (Consultation etc) (England) Regulations 2003 ("the 2003 Regulations") and could not identify specific breaches of the consultation procedure.

91. Mr Pearce accepted that the notices of intention had only been addressed to Mr Parkin but pointed out that the subsequent notices, dated 03 June 2008, were correctly addressed to both leaseholders. He also made the point that Mr Parkin and Mrs Hashi live together, so the earlier notices would have come to her attention. Further Mr Parkin has raised numerous objections and observations in relation to the major works and participated fully in the consultation process. If there has been a breach of section 20, arising from the earlier notices being addressed solely to Mr Parkin, then this was minor. Mr Pearce suggested that if the tribunal considers it necessary, dispensation should be granted upon the basis that no prejudice has been suffered.

92. Mr Pearce also made the point that the Applicant had used the Official Journal of the European Union ("OJEU") process to obtain tenders for the major works and that the cheapest and most cost effective contractor had been chosen for the works.

93. Mr Grundy submitted that the only potential default on the part of the Applicant was the failure to include Mrs Hashi's name in the notices of intention. This did not invalidate the service of these notices, as she jointly owns Flat 11 with Mr Parkin who had received the notices. Mr Grundy argued that service of a consultation notice on one of two joint tenants was sufficient, in the same way that service of a notice to quit on one of two joint tenants is good service. Alternatively, Mr Parkin had received the notice as Mrs Hashi's agent.

94. Mr Grundy's fall-back position was that if there had been a breach of the consultation procedure then the tribunal should grant dispensation under section 20ZA of the 1985 Act. This was upon the basis that there had been no prejudice to Mrs Hashi, by failing to include her name in the initial notices. Mr Grundy suggested that the tribunal could grant dispensation even though there was no formal application, as this had been referred to in the statements of case.

The tribunal's decision

95. The tribunal determines that there has been no breach of section 20 of the 1985 Act. It follows that the £100 statutory cap does not apply.

Reasons for the tribunal's decision

96. Although Mr Parkin criticised various aspects of the consultation procedure, he could not identify any specific breaches of section 20. The tribunal agrees with Mr Grundy that the only potential default was the failure to include Mrs Hashi's name on the notices served in late 2006. Flat 11 is jointly owned by Mr Pakin and Mrs Hashi. The general presumption is that service of a notice on one of two joint tenants is sufficient. The notices were served at Flat 11 and there was no suggestion that Mrs Hashi was living elsewhere, which might displace this presumption. The tribunal is satisfied that the notices of intention were validly served.

97. Given that there was no breach of section 20, it was unnecessary to go on and consider the informal application for dispensation.

Preliminaries/scaffolding

98. The total charge for preliminaries in the November 2011 final account was £70,633.66, of which £44,486.52 were the apportioned scaffolding charges for Brayford Square. This left a balance of £26,147.14 attributable to other preliminaries.

99. In his defence, Mr Parkin pointed out that the initial charge for other preliminaries, as shown in the May 20011 invoice, was £53,009.21. He had challenged the figure, which was subsequently reduced in the 2014 final accounts.

100. Both Mr Parkin and Mr Harvey argued that the scaffolding costs were excessive. They pointed out that the majority of this scaffolding was erected on the first floor walkways and patio gardens, so only had to span the upper parts of Brayford Square. At most the scaffolding only had to span two storeys. Further the scaffolding was only in place for a matter of weeks, whereas at other blocks the scaffolding remained for months. Mr Harvey pointed out that the scaffolding costs at Brayford Square were the second highest on the Estate.

101. Mr Parkin and Mr Harvey also referred to the lower scaffolding costs for other blocks on the Estate. In the case of 1-71 Jamaica Square, the figure was £10,955.25, at 1-84 Clovelly Way it was £8,716.35 and for 3 blocks at Cornwood Drive it was £11,383.81. Jamaica Square and Clovelly Way are much larger and taller blocks than Brayford Square. The blocks at Cornwood Drive have a similar footprint to those at Brayford Square but an additional storey.

102. Mr Pearce explained that the scaffolding costs had been apportioned between the various blocks at the Estate by the contractor, rather than the Applicant. He believed that the apportioned costs for Brayford Square were higher than many of the other blocks, due to the design of the blocks and the nature of the works, which included high level repairs to the roof and exterior together with structural works.

103. In his statement, Mr Pearce referred "*an independent validation of the cost of the scaffolding*", which the Applicant obtained from the Potter Raper Partnership ("PRP"). PRP were one of Swan's appointed Employer Agents during the works contract. The validation took the form of a letter from Mr PJ Bass MRICS of PRP dated 26 February 2014. That letter explained that the scaffolding cost for the Estate was a tendered sum, which was broken down by the contractors for each block. The cost for the scaffolding at Brayford Square formed part of the most competitive tender.

104. Mr Bass assessed the reasonableness of the costs by comparing the total cost of works requiring scaffolding across the Estate and the total cost of scaffold applicable works to Brayford Square. Brayford Square accounted for 13.31% of the total. Applying this percentage to the total tendered cost of the scaffolding (£384,019.75), gives a figure of £51,113, which is higher than the sum charged for Brayford Square (£44,486.52). Mr Bass therefore concluded that sum charged was reasonable. He also made the point that the total cost of scaffold applicable works at Brayford Square equated to over 50% of the total cost of the works to this block, whereas the rest of the Estate averaged approximately 20%. Upon this basis he concluded that the cost of scaffolding at Brayford Square should be proportionately higher than the other blocks at the Estate.

105. Mr Pearce also pointed out that the works formed part of a QLTA, which were tendered through the OJEU process. As such the works had been subject to full consultation and the most cost effective contractor had been chosen.

106. In his closing submissions, Mr Parkin suggested that the scaffolding costs should be reduced to £10,000 or below, having regard to the apportioned costs elsewhere on the Estate. He stated he was not in a position to assess the reasonableness of the other preliminaries.

107. Mr Grundy reiterated that the scaffolding costs had been apportioned by the contractors and suggested that their approach was reasonable. Again there was more than one approach to apportioning the costs, as demonstrated by the letter from Mr Bass dated 26 February 2014, which suggested a higher apportionment for Brayford Square. Mr Grundy also suggested that it would be wrong to compare the apportioned scaffolding costs at Brayford Square with other blocks at

the Estate, without evidence of the type of scaffolding at the other blocks.

108. In relation to the other preliminaries, Mr Grundy pointed out that the sum charged of £26,147.14 amounted to approximately 11% of the total apportioned costs for Brayford Square (excluding scaffolding and preliminaries) of £238,978.66. He suggested that this percentage was within a reasonable range and it was not unusual to find preliminaries accounting for 15-20% of total build costs.

The tribunal's decision

109. The tribunal determines that the amount payable in respect of the preliminaries is £37,102.39 , which is broken down as follows:

Apportioned scaffolding costs for Brayford Square	£10,955.25
Other preliminaries	£26,147.14
	£37,102.39

Reasons for the tribunal's decision

110. At the end of the inspection, the tribunal walked around 1-71 Jamaica Street, which is a very substantial, six-storey block and is considerably larger than Brayford Square. The tribunal accepts that the scaffolding design at Brayford Square might have been more complex, but the amount of scaffold used at Jamaica Street would have been far greater. It is illogical that the apportioned charges for Brayford Square were approximately 4 times those at Jamaica Street.

111. The tribunal did not find the retrospective validation from Mr Bass to be of assistance. He had suggested that costs be apportioned based on the amount of works requiring scaffolding at each block, without having regard to the size of the block or the amount or complexity of the scaffold. This could result in anomalies. For example a one-storey block and a twenty-storey block that both required the same roof repairs would end up with the same charges, even though the amount of scaffold would be far greater for the latter.

112. Using its own knowledge and professional experience, the tribunal concluded that the apportioned charges for Brayford Square were far too high and were unreasonable. It then considered what a reasonable charge would be. The Respondents did not provide any expert evidence or alternative quotes. Rather they relied on the apportioned costs for other blocks on the Estate. Doing the best it could on the limited evidence available, the tribunal concluded that the scaffold charges

should be no higher than those at Jamaica Street. It therefore allows a sum of £10,955.25 for the apportioned scaffolding costs. The difference between this figure and the sum claimed is £33,910.27.

113. There was no substantial challenge to the other preliminaries and the tribunal accepts that 11% of total costs is within a reasonable range. The tribunal allows the other preliminaries in full.

Roof repairs

114. Both Mr Parkin and Mr Harvey challenged their liability to contribute to the roof repairs. The total amount charged for these repairs in the November 2014 final account was £127,283.85. Of this sum £21,300 was the cost of insulation, which has already been disallowed. The other roof items came to £105,983.85 in total.

115. Mr Parkin stated that he had not been supplied with any guarantee for the roof works or evidence that these works complied with building regulations. He also referred to the Applicant's failure to produce any proof or report establishing the need to replace the underfelt, tiles, guttering, lead flashing, timber fascia and bargeboards, downpipes and Velux windows. Mr Parkin also suggested that the quality of the roof works was poor. He alleged that the contractor had damaged tiles when removing them from the roof and had then re-used these damaged tiles. Mr Parking also referred to defective pointing, missing roof tiles and guttering that was broken or badly repaired/replaced.

116. Mr Harvey queried why the works at Brayford Square were more extensive than those to other roofs at the Estate, which had been patch repaired. He considers that the works were unnecessary. In the case of Flat 17 there had been a historic problem with water leaks but these had been repaired and there were no leaks at the time of the major works. Mr Harvey considered that any future leaks could have been dealt with as part of routine maintenance. He also suggested that the roof works had been inconsistent. Flats 8 and 18 had both suffered water ingress. The roof of Flat 18 had been replaced whereas the roof of Flat 8 had been repaired. These repairs had not eradicated the water ingress, which is continuing. Further the roof of Flat 11 had been replaced, even though it was suffering no water ingress.

117. Mr Harvey suggested that the roof repairs should not have been solely charged to the flats. Rather they should have been charged to the residential and commercial units, upon the basis that all units benefitted from the repairs.

118. Mr Pearce explained that there had been an initial roof survey of a sample of blocks on the Estate, before the consultation procedure began. This did not include Brayford Square. Later on the condition of

the roof at Brayford Square was investigated by the Applicant's agents, Higgins Construction Plc ("Higgins"). The roof is made up of a number of tiled, pitched roofs over the individual flats.

119. Higgins determined that part of the roof covering needed replacement whilst other parts only needed repair. Mr Pearce contended that it was inappropriate to compare the roof at Brayford Square with the roofs of other blocks at the Estate, which have flat roofs. Given that the roof at Brayford Square was over 25 years old at the time of the major works it was unsurprising that substantial repairs were required.

120. In the case of Flat 11, Higgins established that repairs were required to the roof. However Mr Parkin and Mrs Hashi did not allow access to the contractors. The Applicant was concerned about the delay in obtaining access and the impact this would have on the cost of the major works. It therefore decided to replace the pitch roof above Flat 11 separately, outside the major works contract. The roof has since been replaced but Mr Parkin and Mrs Hashi have not been charged for this. Rather they have only been charged for roof repairs that formed part of the major works, with their contribution amounting to approximately £1,700.

The tribunal's decision

121. The tribunal determines that the amount payable in respect of the roof repairs is £105,983.85.

Reasons for the tribunal's decision

122. The tribunal rejects the suggestion that that the cost of the roof repairs should have been shared by the commercial units and the residential flats. Mr Pearce's description of the flats as bungalows in the sky was apt. They are quite distinct from the commercial units and the roof repairs were undertaken for the benefit the flats. Upon this basis it is entirely reasonable that the cost of these repairs was borne solely by the flats.

123. In relation to the cost of the works, there was no expert's report or independent evidence to establish that the charges were too high or to justify a reduction in the charges. As far as the tribunal could tell, based on its inspection and having regard to the time that has passed since completion of the works, the roof repairs had been undertaken to a reasonable standard. The tribunal therefore allows the cost of the repairs (excluding the insulation) in full.

Other specific challenges to final account

124. Mr Parkin and Mr Harvey were critical of the quality of some of the works, namely the painting, pointing, asphalt and concrete repairs. They suggested that the painted areas had not been properly cleaned or primed and the paintwork started to blister and peel within a year of completion. Further there were some areas had not received any paint.

125. The colour of the new pointing did not match the original and there were white marks. In addition there are areas where the pointing is cracking and falling out. The Respondents also referred to cracks in the asphalt repairs on the upper deck walkways and indiscriminate holes being drilled in the` concrete and filled. Mr Parkin relied on various photographs of the repairs that were appended to his statement of case.

126. The Applicant does not consider that the works were substandard but accepts that there were some snagging items upon completion of the works, which were set out in the schedule of defects and which had been remedied. It also relies upon the fact that the works were undertaken over 5 years ago and some deterioration was to be expected.

127. In relation to the pointing, Mr Pearce acknowledged that there were areas where the colour of the new mortar does not completely match the old. He stated that it was very difficult to get a precise match but suggested that the colouring would start to match up over time, as the new pointing ages. Mr Pearce referred to the colour of the pointing, as being a matter of aesthetics.

128. Mr Pearce also referred to white marks that had appeared on some of the brickwork. He explained that this was due to minerals and salts being drawn to the surface of the new bricks, when the bricks come into contact with water. When the bricks dry, a harmless white residue can be left behind. Mr Pearce explained that this process is common and that there was nothing that the Applicant could have done to prevent this. Again, he suggested that the new brickwork would start to match the old over time, as it weathers.

129. As to the concrete and asphalt works, Mr Pearce contended that these were undertaken to a reasonable standard. He suggested that some minor cracking in the asphalt was to be expected over time, due to weathering and normal wear and tear. Mr Pearce made the point that all snagging items had been attended to and again referred to the appearance of the new asphalt, as a matter of aesthetics.

130. Mr Parkin queried the charge for replacing windows and doors in the final account. He argued that the aluminium window frames were in good condition and did not replacing. Mr Parkin also pointed out that the windows in his flat had not been replaced. Neither had the windows in units 6 and 7. This suggested that none of the windows required replacement.

131. In its statements of case, the Applicant explained that the replacement of all of the windows had been proposed as part of the major works programme. However it became clear that a majority of leaseholders had already replaced their windows, so only a small number of windows were replaced or overhauled. The total sum charged for this work in the final account was £15,504.13.

132. Mr Harvey criticised the works to the guttering upon the basis that various gutters were a different colour to the downpipes. He has also suggested that this work could have been undertaken as part of routine maintenance, with repairs being undertaken as and when necessary. Mr Pearce accepted that some of the colouring on the gutters and pipes did not match and might *"..not be aesthetically the most pleasing"*. However he does not consider that this has any effect on the quality and integrity of the works. Mr Pearce suggested that it made good financial sense to include these repairs as part of the major works, given the extent of the repairs and the need for scaffolding for many elements of the works.

133. In his closing submissions, Mr Parkin suggested that various items in the November 2014 final account should be disallowed in full, due to the poor quality of the works, namely:

Item		
3.3	Asphalt works Communal Balconies	£8,184.84
5.1	Actual Brickwork repairs	£23,553.21
8.3	External Decorations	£7,160.00

In relation to the concrete repairs (item 4.1 - £7,968.50), Mr Parkin suggested a reduction of 50% due to the unsightly appearance of the repaired areas. He did not suggest any specific reduction in relation to the window repairs.

134. Mr Parkin also suggested that the charge for removing the refuse hopper (item 13.00 - £466.55) should be disallowed, as this work was unnecessary.

135. Mr Parkin and Mr Harvey pointed out the various mismatched gutters and downpipes during the tribunal's inspection. In its letter to the parties dated 02 March 2015, the tribunal queried if the work to the gutters and pipes had been included in the final account at item 3.5 – Existing Drainage and gullies (£2,100). In their response dated 04 March 2015, the Applicant's solicitors confirmed that these items had indeed been charged at item 3.5. However this was challenged by Mr Parkin in his email dated 06 March 2015. He pointed out that item 3.5

came under the heading "*Refurbishment of Balconies, walkways and linkbridges*", whereas the work to the gutters formed part of the roof repairs.

136. Given his criticisms of the quality of the works, Mr Parkin suggested that the contract administration fee (3.03%) and the Applicant's management fee (10%) should also be disallowed in full. He also relied on the reductions in the sums demanded by the Applicant and pointed out that had he paid the original invoice for his flat, or even the sum demanded in the County Court proceedings then he would be out of pocket.

137. Mr Harvey supported the reductions proposed by Mr Parkin and also observed that the amount charged for the brickwork repairs was extremely high, given the work undertaken.

138. In his skeleton argument, Mr Grundy made the general observation that the Respondents' complaint was largely about the cosmetic appearance of the works. Further they had produced no expert evidence to show that the sums paid by the Applicant were unreasonable.

139. In his closing submissions, Mr Grundy referred to the various photographs showing the asphalt repairs. He pointed out that these had been taken some years after the repairs in question, which had been certified by the contract administrator at the time. There was no justification for disallowing the charge for the works and the Respondents had produced no evidence to suggest that an alternative charge would be reasonable. Mr Grundy made very similar points in relation to the concrete and brickwork repairs and the external decorations.

140. Mr Grundy submitted that the charge for the windows and doors had not been challenged in Mr Parkin's statement of case and there was no evidence from the Respondents to justify a reduction in the sum charged. He suggested that one reason why the windows in units 6 and 7 were not replaced might be the commercial use of these properties.

141. Mr Grundy pointed out that the charge for moving the refuse hopper had not been raised by the Respondents previously and there was no evidence to support the Respondents' position.

142. In relation to the gutters and downpipes, Mr Grundy reiterated that the Respondents' complaint was about the appearance of these items. He suggested that there should be no reduction for the mismatched colours, which did not affect the serviceability of these items.

143. Mr Grundy submitted that the contract administration fee of 3.03% was very low and that a typical fee for this size of contract was around 5%. As to the management fee of 10%, he accepted that there had been errors in the way the major works had been billed and managed but the Applicant "*got to the right result in the end*". Once again, Mr Grundy pointed out that there was no evidence from the Respondents to suggest that different fees were appropriate.

The tribunal's decision

144. The tribunal determines that the amount payable in respect of these disputed items are:

3.3	Asphalt Works Communal Balconies	£8,184.84
3.5	Existing drainage and gullies	£0
4.1	Actual Concrete repairs	£7,968.50
5.1	Actual Brickwork repairs	£23,553.21
7.1	Window and door replacement	£15,504.13
8.3	External Decorations	£7,160.00
13.00	Move refuse hopper to 8-20 Brayford	£466.55
	Contract Administration Fee	3.03%
	Management Fee	5%

Reasons for the tribunal's decision

145. Again, the Respondents did not produce any expert's report or other independent evidence to justify a reduction in the disputed charges. Rather they relied on their own observations of the works and various photographs. The works were undertaken in 2008/09, approximately 6-7 years ago. During the inspection, the tribunal observed several areas of cracking in the new asphalt and blistered paintwork. However this is unsurprising given the passage of time and since the works were completed.

146. Clearly the asphalt repairs and external decorations were undertaken and were of some value. It was unrealistic for the Respondents to suggest there should be no charge for these items. Whether the amount of the charges was reasonable is a different matter. However there was

no evidence from the Respondents to establish that the charges were too high. The tribunal was unable to use its own knowledge and expertise to try and retrospectively value these repairs, given the time lapse. The best evidence of the quality of the works was the contemporaneous certificates issued by the contract administrator, who must have been satisfied that the work had been completed to a reasonable standard. The tribunal allows the charges for the asphalt repairs and external decorations in full.

147. The tribunal allows the concrete repairs in full for similar reasons. Based on its inspection, the tribunal accepts that some of the repairs were unsightly. However there was no suggestion that the repairs, which had already lasted 6-7 years, were ineffective. Further there was no independent evidence to justify any reduction in this item, let alone the figure of 50% proposed by Mr Parkin.

148. The tribunal allows the brickwork repairs in full, although it had some reservations as to the quality of the repointing. The inspection revealed a number of random areas of brickwork that had been repointed. In several cases only small sections of mortar had been cut out and replaced, rather than the full brick length. There were also some bricks where the new mortar was loose or falling out. However these works were undertaken 6-7 years ago and some deterioration is to be expected. Further there was no evidence from the Respondents to establish that the brickwork charges were too high. There was a modest disparity in the colour of the old and new mortar but this is to be expected, as the old mortar has weathered for longer. This disparity will reduce over time, as will the white salt marks on the bricks. Neither of these issues justified a reduction in the brickwork charges.

149. The tribunal also allows the cost of moving the refuse hopper in full. This had been moved so that is now inside one of the secure, access gates leading up to first floor. Previously it had been outside the gate, meaning that it could be used by anyone. It was eminently sensible for the Applicant to move the hopper, so that it can only be accessed by residents.

150. The position in relation to the guttering and downpipes was very different, as the challenge primarily related to the materials used and the random appearance of the rainwater goods. The inspection revealed a number of instances where the colours did not match, with a mixture of black, grey and white gutters, hoppers and pipes. Further in several cases there were different coloured fastening clips. There were also sections of guttering where there were black bargeboards with white gutters and then white bargeboards with black gutters. The overall appearance of the rainwater goods is haphazard and the tribunal is surprised that these works were signed off by the contract administrator. Clearly all of the gutters, hoppers, pipes and clips should be the same colour. Whilst this is a matter of aesthetics, it is

reasonable to expect new components to be the same colour as the existing. This has not occurred and the solution is to replace or paint the mismatched components so they have a uniform appearance. Clearly this will incur additional expense and the Respondents should not have to pay for two sets of works to the rainwater goods. The tribunal disallows this item in full. It accepts that the works to the gutters and downpipes was billed at item 3.5 of the final account, as stated by the Applicant's solicitors. Accordingly the sum disallowed is £2,100.

151. The tribunal agrees with Mr Grundy that the contract administration fee of 3.03% is very low. Given the passage of time and the absence of any expert or independent evidence, it is very difficult for the tribunal to assess the quality of the contract administration. One obvious failing is that the repairs to the guttering and downpipes were certified yet were clearly substandard. The tribunal considered whether to make a reduction in the fee to account for this failing but concluded that this was inappropriate. The cost of the work to the gutters and pipes (£2,100) accounted for less than 1% of the total cost and has already been disallowed in full. It follows there has already been a reduction in the contract administration fee of 3.03% of this cost (£63.63). There was no evidence before the tribunal to justify any further reduction.

152. In relation to the management fee, the tribunal concluded that some reduction is appropriate given the Applicant's poor management of the major works and the billing of these works. The contributions now being demanded for the works are a fraction of the sums originally demanded. The Applicant has had three attempts at billing the works and this process has taken over three years. Even now, the demands do not appear to comply with the lease terms. Given these failings the Applicant should not be able to recover its management fee in full. However the tribunal concluded that it would be unduly harsh to completely disallow the fee, as proposed by the Respondents. The management provided by the Applicant has been of some benefit and the tribunal allows 5%, being half the fee claimed.

Estate wide charges

153. Mr Parkin and Mr Harvey stated that some of the communal areas on the Estate had been blocked off, creating private squares. They suggested that they should not have to pay estate charges in areas which they do not have access so but did not suggest a specific sum that should be disallowed.

154. Mr Pearce accepted that some areas were blocked off during the major works, as a safety measure. The Applicant offered keys to areas which residents need direct access to, in order to get to their particular blocks. In both his statements and oral evidence, Mr Pearce stated that the Respondents could have keys to other gated areas on the Estate.

155. Flats 11 and 17 have each been charged £532.19 plus fees for works to the Estate.

The tribunal's decision

156. The tribunal determines that the amount payable in respect of the estate wide charges is £532.19 plus fees, for each of the flats.

Reasons for the tribunal's decision

157. The argument advanced by the Respondents was really a counterclaim for breach of any rights over the other parts of the Estate, as set out in their leases. However they made no counterclaims within the County Court proceedings. It follows that the tribunal has no jurisdiction to determine whether there has been any breach of these rights or whether any set off would be appropriate. The tribunal makes no finding on whether there has been a breach. In any event the Respondents have now been offered keys to other gated areas on the Estate.

Summary

158. The total reduction in the cost of the major works attributable to Brayford Square, as determined by the tribunal, is £58,030.27 (excluding fees). This figure is broken down as follows:

Disallowed cost of roof insulation	£21,300.00
Conceded cost of internal communal doors	£720.00
Disallowed cost of guttering and drain pipes	£2,100.00
Reduction in scaffolding costs	£33,910.27
	£58,030.27

159. In order to calculate the sums due for each flat it is first necessary to apply the service charge proportions for Flats 11 and 17 (2.7% and 2.11%, respectively) to the reduction in the cost of the works (£58,030.27). This results in a reduction for Flat 11 of £1,357.75 and £1,383.98 for Flat 17. These sums need to be deducted from the adjusted sums claimed in the November 2014 final accounts, before adding the contract administration fee (3.03%) and the reduced management fee (5%). Adopting this approach the potentially, recoverable contributions to the cost of the works are:

Flat 11

Individual Block and Estate Contribution	£5,973.63
Less deduction for sums disallowed/reduced	£1,357.75
	£4,615.88
Plus	
Contract Administration fee @ 3.03%	£139.86
Reduced management fee @ 5%	£230.79
	£4,986.53

Flat 17

Individual Block and Estate Contribution	£6,091.80
Less deduction for sums disallowed/reduced	£1,383.98
	£4,707.82
Plus	
Contract Administration fee @ 3.03%	£142.65
Reduced management fee @ 5%	£235.39
	£5,085.86

160. These sums will only become payable by the Respondents if the Applicant now issues valid Certificates in accordance with paragraph 6 of the fifth schedule to the leases.

Application under s.20C and refund of fees

161. At the end of the hearing, Mr Grundy advised the tribunal that the Applicant was not seeking a refund of the fees paid in respect of the hearing[1].

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

162. In a letter to the tribunal that accompanied his hearing bundle, dated 03 February 2015, Mr Harvey requested an order under section 20C of the 1985 Act. That letter set out the grounds of the application, which was supported by Mr Parkin. The tribunal also heard oral submissions on the section 20c application at the end of the hearing. Mr Grundy opposed the making of such an order and suggested that the preliminary issue raised by the tribunal, as to the validity of the service charge demands, should have no bearing on the application. Alternatively he invited the tribunal to make an order that the Applicant's costs could only be passed through the service charges if the County Court finds that valid service charge demands have been served.

163. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances to make a section 20c order, so that none of the Applicant's costs of these tribunal proceedings may be passed to the Respondents through any service charge. The Respondents have secured substantial reductions in their contributions to the major works and this dispute has largely arisen from the confusing manner in which the works have been billed. The Applicants have adjusted their figures on several occasions and until recently there has been a lack of transparency in their demands. The Respondents were entirely justified in contesting these proceedings and it would be unjust for them to end up paying any part of the Applicant's costs.

The next steps

164. The tribunal has no jurisdiction over ground rent or County Court costs. This matter should now be returned to the County Court at Mayors & City of London Court, to decide these issues. It will also be for the County Court to decide the validity of the revised Certificates to be served by the Applicant and the claims for interest.

165. The Respondents may wish to seek independent legal advice upon the revised Certificates, once served and any outstanding grievances that have not been resolved by this decision.

Name: Tribunal Judge Donegan **Date:** 27 April 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

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

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

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

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

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

Section 20

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

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

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

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

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

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

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

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

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

Section 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all of any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.