11468

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2014/0382**
Property	:	**54 John Kennedy House, London SE16 1QF**
Applicant	:	**Ms Runa Akhtar**
Representative	:	**Mr Jerry Hewitt – Lay Representative**
Respondent	:	**London Borough of Southwark**
Representative	:	**Mr Faisel Sadiq - Counsel**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Ms Sue Coughlin** **Mr Alan Ring**
Date and venue of Hearing	:	**10 and 11 September 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23 November 2015**

DECISION PART 1

Decisions of the tribunal

1. The tribunal determines that:

Definition of 'Silwood Estate'

1.1 The definition of the Silwood Estate as used in the lease of the Property is that set out in paragraph 70 below;

Fair Proportion

1.2 The 'fair proportion' of service charge costs and expenses payable by the applicant to the respondent is that explained in paragraph 88 below;

Routine service charges

1.3.1 We record the parties informed us that they had agreed the routine service charges payable by the applicant to the respondent are:

2009/10	£856.14
2010/11	£877.54

1.3.2 The amount of the routine service charges payable by the applicant to the respondent for the year is as follows:

2011/12	£ 1,475.73

Stack pipes

1.4 The applicant is not liable to pay the invoice dated 1 October 2010 being an estimate in the sum of £829.01 [R194]; but

1.5 The applicant is liable to pay to the respondent the sum of £782.34 by way of a contribution to the cost of stack pipe repairs mentioned in an undated demand [R196] that may have been sent out on or about 5 October 2011 with a credit note [R198] and that sum became payable at the end of the financial year, namely on 31 March 2012;

Emergency lighting and fire doors

1.6 The applicant is not liable to pay to the respondent the following sums:

£339.40 (estimate) demanded 1 October 2011 [R217] or £368.31 (final account demanded on or about 5 July 2013 [R219/222] in respect of a contribution to the cost of emergency lighting works;

£250 (capped) demanded on 3 November 2011 [R202] in respect of a contribution to the cost of works to the fire doors

Major works £40,701.67

1.7 The applicant is not liable to pay to the respondent the estimated service charge of £40,701.67 demanded on 12 February 2013

[A232] as a contribution towards the cost of proposed major works Ref:12/150P6; but

1.8 The applicant may be obliged to contribute to the cost of those works in due course subject to the issue of a final account in respect of them and the issue of a demand in proper form and subject to any further determinations the tribunal may make in connection or associated with those works.

2. The reasons for our decisions are set out below.

NB Reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing files provided to us for use at the hearing. The prefix 'A' refers to the applicant's file and the prefix 'R' refers to the respondent's file. The prefix 'SB' refers to a supplemental bundle.

Procedural background

3. These proceedings have had a complex and unfortunate procedural history. This decision sets out the determinations we have been able to make to date. It is known as the Decision Part 1. As will be explained shortly there were some aspects of the matter that we were not able to determine at the hearing in September 2015. We will determine them in due course following a further hearing, if necessary. Our determination of them will be set out in a Decision Part 2.

For avoidance of doubt time for any application for permission to appeal pursuant to rule 52 shall not run until the issue of our Decision Part 2, or further order.

4. On 24 June 2014 the tribunal received from the applicant (Ms Akhtar) an application form made pursuant to section 27A Landlord and Tenant Act 1985 (the Act) [A18]. The application form raised a large number of matters set out in a fairly complicated way, possibly due to the manner in which the respondent (the council) dealt with accounting matters especially where major works estimates and final accounts straddle several accounting periods. The application form also sought an order pursuant to section 20C in respect of any costs which the council might incur in connection with the proceedings

The various items in challenge may be summarised as follows:

2009/10	Door entry installation charge; Refund of all interest paid; All sums paid for all 'make safe and temporary repairs'; and Matters raised in a particulars of claim document annexed to the application form:
2010/11	Major works invoice £954.36 – roof works; Major works invoice £250.00 – fire doors;

	Major works invoice £829.01 – stack pipe repairs; Major works invoice £125.79 – concrete repairs; Refund of 70% of routine service charges of £1,811.33 Refund of all interest paid; All sums paid for all 'make safe and temporary repairs' Concrete Repairs 2 and S20B (undated); and Matters raised in the particulars of claim
2012/13	Major works service charges for the whole year; An estimated invoice £6,530.05; Refund of 50% of routine service charges of £1,532.32; Refund of all interest paid; All sums paid for all 'make safe, concrete repairs and spalling works'; Concrete Repairs 2 and S20B (undated); and Matters raised in the particulars of claim
2013/14	Major works service charge estimate £40,701.67 dated 12 February 2013; Refund of all interest paid; Refund of all costs, fees and charges concerning a loan of £41,251.67 made by the council to Ms Akhtar and secured on the property; Refund of 50% of routine service charges of £1,738.27; All sums paid for all 'make safe, concrete repairs and spalling works'; Concrete Repairs 2 and S20B (undated); Any charges for works that the landlord unreasonably neglected to include within the Apollo Keepmoat major works contract which will now cost more; Matters raised in the particulars of claim; Payment of £1,200.00 for distress and damage caused to emotional well-being of Ms Akhtar for the period of one year; and An alleged failure to send a summary of tenant's rights and obligations with a demand
2014/15	All major works service charges of any kind; A refund of approximately 50% of the estimated cost of routine service charges; Concrete Repairs 2 and S20B (undated); Any charges for works that the landlord unreasonably neglected to include within the Apollo Keepmoat major works contract which will now cost more; Any cost incurred or estimated for all 'make safe, concrete repairs and spalling works'; Refund of all fees, charges and money paid to the council for the miss-sold mortgage loan; Payment of £600 for distress and damage caused to the emotional well-being of Ms Akhtar and continuing at the rate of £5 per day; and

Matters raised in the particulars of claim

The attached particulars of claim
Page 1 is at [A31] pages 2- 5 are at [R1 – 4].
The document refers to a number of provisions in the lease granted by the council to Ms Akhtar and makes a number of legal submissions. Starting at [R3] there is a list of 25 individual claims most of which have already been mentioned above. One new claim is no. xvi – Costs [R4].

5. A case management conference was held on 14 August 2014. Ms Akhtar was represented by Mr Jerry Hewitt (Mr Hewitt), a lay representative. Evidently Mr Hewitt is a secure tenant of a flat within John Kennedy House and has pursued a detailed study of several major works contracts placed by the council on several of its estates. Ms Akhtar and Mr Hewitt have worked closely together on a number of issues concerning John Kennedy House and Ms Akhtar is or was chair of the John Kennedy Campaign Group [A16].

The council was represented by Miss A Mills, an enforcement officer in its Home Ownership Services unit.

Detailed directions were given on 14 August 2014 [A10] in relation to most of issues raised by Ms Akhtar. It may be noted that some of those issues have since between resolved between the parties.

One matter that was expressly said not to be within the jurisdiction of the tribunal was the alleged miss-selling of a loan by the Council to Ms Akhtar to enable her – principally – to discharge the demand for £40,701.67 in respect of proposed major works.

The directions made two express references to the demand for £40,701.67 (although it mentions the sum of £41,251.67 which was in fact the amount of a loan taken out by Ms Akhtar from the council to be put toward payment of the invoice for £40,701.67) – the first is whether it stated the name and address of the landlord and whether it was accompanied by a summary of tenant's rights and obligations – the second was whether the amount payable should be reduced due to some parts of the works arising from alleged historical neglect, whether the works were done to a reasonable standard, and whether additional works not part of the original programme were necessary, and, if so, whether the applicant should contribute towards the costs of any of those additional works.

6. Those directions also made reference to existing court proceedings between the parties and that Mr Hewitt said that 90% of issues in the court proceedings are similar to the issues raised in the tribunal proceedings. Evidently the parties were to write to the court to see if the court would transfer the proceedings to this tribunal so that this tribunal might consider linking the two matters if possible.

7. It was not made clear to us whether the parties did write to the court, but so far as we are aware the court has not transferred any part of the court proceedings to this tribunal.

8. We make the observation that, not unreasonably, Ms Akhtar and Mr Hewitt concluded that the tribunal would undertake a detailed consideration of the major works carried out in consequence of the demand for £40,701.67, including any issues of historic neglect, whether the works were done to a reasonable standard and whether Ms Akhtar was entitled to set-off against any sum found due and payable the various damages claims she had identified in the application form.

9. The directions made provision for the parties to serve statements of case, to complete Scott Schedules, to give disclosure and that a substantive hearing would take place on 4 and 5 December 2014.

10. Ms Akhtar's statement of case dated 9 October 2014 is at [A70-102] and runs to 109 paragraphs. The council's statement of case dated 14 November 2014 is at [A103 – 136] and runs to 117 paragraphs, and a considerable number of documents are appended to it.

11. At the request of the parties the substantive hearing was deferred from 4/5 December 2014 to 19/20 February 2015. On that occasion Ms Akhtar was represented by two trainee solicitors and the council was represented by Ms E Bennett, a senior enforcement officer in its Home Ownership unit

    A few days prior to the hearing Ms Akhtar had lodged sets of five lever arch files said to contain material documents. Ms Akhtar submitted that the hearing could not go ahead fairly because the council had not given full disclosure of documents dealing with the historic neglect issue and the interface with the major works. Ms Akhtar submitted that the request for full disclosure had been made by Mr Hewitt on her behalf in September 2014. Evidently the Council did not respond to it because it took the view Mr Hewitt was not a party to the proceedings.

12. On that occasion the members of that tribunal spent a deal of time investigating what had occurred and came to the view that both parties were at fault and had contributed to a breakdown in communications.

13. The parties were at odds as to what required to be disclosed and the tribunal issued further directions [A513]. Directions included further disclosure by the council, provision for a response (if any) to the five lever arch files and for both parties to exchange supplementary witness statements by 14 May 2015. A new hearing date of 4/5 June 2015 was set.

    The directions expressly confirmed that the issues to be determined at the next hearing were those identified in the directions dated 14 August 2014 plus the definition of 'Estate Charge' mentioned in the lease [A515 – para 9].

14. In a supplementary statement of case dated 15 April 2015 the council made a response to the five lever arch files which Ms Akhtar wished to rely upon at the hearing [A517 – 527]. An opening complaint was that four of the files did not have a sufficient index and that documents do not follow any sequential, chronological or topical sequence and has no statement of case or point of reference to ascertain their relevance or context.

15. The application came on for a substantive hearing on 4 June 2015. Ms Akhtar was represented by Mr J Hewitt. The council was represented by Mr Sadiq of counsel and assisted by Ms E Bennett.

16. At the outset Mr Sadiq sought an adjournment, due to the non-availability of a witness – Mr Vince Edwards due to unanticipated surgery. The tribunal considered the importance of Mr Edwards' oral evidence and also gave detailed consideration to the Scott Schedule produced by Mr Hewitt. That tribunal took the view that the Scott Schedule did not set out the areas of dispute as regards:

    a) The major works element; and
    b) The other service charges.

    That tribunal accepted that Ms Akhtar had done her best to comply with directions but noted the template prescribed in the original directions did not define adequately the areas of dispute and how they should be presented. That tribunal concluded that apart from the bed weighting apportionment and the definition of 'Estate Charge' issues it was unclear exactly what aspects of the service charges were in dispute.

    That tribunal observed it would have difficulty in proceeding to hear the application given the then current form of the Scott Schedules. That tribunal indicated that if the hearing was postponed it would give directions for Ms Akhtar to produce fresh Scott Schedules. At that point Mr Hewitt supported the Council's application to adjourn.

    That tribunal also observed that some of the files of documents produced for use at the hearing lacked indexes and some pagination. It also noted that there was some duplication of materials and invited the parties to try and cooperate on producing one condensed set of hearing bundles.

    Given the lack of readiness for a substantive hearing the tribunal gave further directions and made provision for a further case management conference to be listed [A6].

17. Thus it was that a case management conference was held on 7 July 2015 [A2]. On this occasion Ms Akhtar was again represented by Mr Hewitt and the council was represented by Ms E Bennett.

18. It was noted that the parties had exchanged Scott Schedules. The council was given permission to serve a brief reply by 15 July 2015. The parties were to exchange witness statements of fact by 21 August 2015.

The council was to provide several sets of an indexed and page numbered bundle for use at the hearing, limited to a total of 350 pages.

Ms Akhtar was given permission to produce several sets of a further bundle if she considered that the Council's bundle did not include documents material to her case, again limited to 350 pages.

The application was listed for a one day hearing on 10 September 2015.

Later, following representations made in correspondence, those directions were varied so that each the contents of each bundle was increased to not more than 500 pages and the hearing was scheduled for a day and a half.

19. We pause to observe that at this stage Ms Akhtar and her representative reasonably believed that the issues to be determined remained those as set out in the directions dated 14 August 2014 plus the two additional points that had occurred along the way, namely the ·d weighting apportionment and the definition of 'Silwood Estate'.

The hearing on 10 and 11 September 2015.

20. The application before us commenced at 10:00 Thursday 10 September ·d concluded at 17:00 Friday 11 September 2015.

21. Ms Akhtar was represented by Mr Hewitt. The council was represented by Mr Sadiq, assisted by Ms E Bennett.

22. We had been provided with a trial bundle prepared by the council which runs to 527 pages, plus a supplemental bundle containing pages [RSB1-76] and the council's skeleton argument which runs to 16 pages.

23. We had also been provided with a bundle prepared on behalf of Ms Akhtar which runs to 538 pages plus a skeleton argument which runs to 205 paragraphs over 25 pages.

24. The Scott Schedules were at [R32-39]. They gave rise to some difficulty. They noted against various disputed items the amount, if any, which Ms Akhtar was willing to concede she should contribute but did not give any indication as to how those sums had been arrived at. Further in the 'Applicant's Column' a number of items were said to be 'Agreed'.

In fact they were not all agreed, as such. Mr Hewitt submitted that the Scott Schedules had to be read in conjunction with a series of detailed notes set out on pages [A44- 66]. It thus became apparent that some, if not most, of those items 'Agreed' were subject to certain overriding arguments. Mr Hewitt submitted that this had been made

clear by him when he had submitted the Scott Schedules to the council digitally. This was not accepted by the council. In discussion it became apparent that having received the Scott Schedules digitally a council representative had 're-typed' some or all of the comments in the 'Applicant's Column' such that the copies presented in the trial bundle were not necessarily exactly in the same format that Mr Hewitt had served them in. He said that he may need to check the copies in the trial bundle carefully against his master copy on his computer to ensure they were accurate. The several council officers present at the hearing were unable to give us any coherent explanation of why it was felt necessary or helpful to 're-type' the comments in the 'Applicant's Column' of the schedules. In our experience it is most unusual to do so. Having done so we consider it most discourteous of the council not to have told Mr Hewitt what had been done so that he could check the accuracy of their work.

24A. Inevitably there were some housekeeping matters to attend to.

25. Mr Sadiq made an application that Ms Akhtar's statement of case be struck out under rule 9(3)(d) and/or (e). He complained that Ms Akhtar had failed to provide proper particulars of the claims in the Scott Schedules. He said that getting Ms Akhtar to clarify her case was like trying to nail jelly to the wall. He said that Ms Akhtar's conduct was vexatious and abusive.

26. Evidently the revised Scott Schedules had been provided to the council shortly prior to the CMC held on 7 July 2015 and on that occasion the council is said to have been critical of the content of them. The judge who conducted the CMC is said by the council to have made some remarks about them allegedly suggesting that if clarification was required Mr Hewitt ought to provide it. The judge did not make any express order in her directions about the Scott Schedules.

27. The council has not seen fit to write to Mr Hewitt identifying what clarification was sought. Evidently they were hoping Mr Hewitt would volunteer it, and they have simply waited for him to do so.

28. Prior to the hearing the council did not see fit to make an application to the tribunal for an order for further details to be provided. No explanation for such a failure was provided to us.

29. The council had not given Ms Akhtar or Mr Hewitt any prior notice of the strike out application; it was simply included in Mr Sadiq's skeleton argument, which was provided some 7 days late and only 2 days prior to the hearing.

30. Given the history to these proceedings we were disappointed that those instructing Mr Sadiq saw fit to instruct him to make such an unmeritorious application so late in the day and without giving lay representatives due prior notice. We had no hesitation in refusing the application.

31. Mr Sadiq also made an application for permission to rely upon the witness statement of Mr Sheehy [SBR21] in which he deals with some of the points made more recently on behalf of Ms Akhtar. Mr Hewitt did not oppose the application and we gave the permission requested of us.

The issues we could determine

32. In money terms the biggest issue before us related to the demand for £40,701.67, whether, and if so to what extent it is or was payable by Ms Akhtar and what sums, if any, could set against it in terms of historic neglect, cost and quality of the works and Ms Akhtar's damages claims.

33. The historic neglect point may be of some significance in this case because it was not in dispute that the council took quite a while (2007 - 2012) to decide whether or not to demolish the whole block as part of a major regeneration scheme for the area and thus carried out only urgent or essential works to the block whilst it deliberated over what to do.

34. We considered that we could properly deal with some of those issues before us but probably not all of them. This was because the demand in question was for an estimated sum on account. No final account has yet been issued, although the subject works were completed as long ago as March 2014. It also appeared that some of the work was still subject to snagging even though the 12 months defect liability period had ended.

35. We were told that the council hoped to be able to issue the final account by November 2015 and that thereafter it would issue a demand for the sum that it then claimed to be due from Ms Akhtar

36. In the absence of a final account and what the final cost of the disputed items might be we felt that we could not properly make determinations on the cost of those works, or elements of them. The question of any deduction for historic neglect was bound up closely with the actual works carried out and the final cost of them. We also took the view that much, if not all, of Ms Akhtar's claims for damages were bound up with this major works scheme and the way in which it was managed.

37. In this jurisdiction this tribunal is sometimes entitled to assume jurisdiction to determine a counterclaim which a tenant may have against their landlord arising out of its obligation to provide services and which the tenant is entitled to set–off against service charges otherwise due and payable. Guidance is set out in *Continental Property Ventures Inc v White* [2007] L&TR 4; LRX/60/2005, a decision of HHJ Michael Rich QC sitting in what was the Lands Tribunal in February 2006. That case also concerned alleged historic disrepair.

The judge held, in paragraph 15:

15. It was submitted that the determination of such claims for damages was outside the jurisdiction of the LVT. I accept that the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under s.27A has been invoked. I see no reason of principle why such jurisdiction should not extend to determining even a claim for loss of amenity or loss of health arising from breach of a repairing covenant, but would draw attention to what I said in Canary Riverside Pte v Schilling (LRX/65/2005 decision dated 16 December 2005) as to the desirability of the LVT's exercising restraint in the exercise of the extended jurisdiction given to it by the Commonhold and Leasehold Reform Act 2002. I said at paragraph 42 and following of my Decision:

> *"42. When the issue [as to the applicability of the Unfair Terms in Consumer Contracts Regulations 1999] was raised in the course of the Costs application, Mr Fancourt QC submitted that the LVT had no jurisdiction to consider the matter. But s. 27A of the Act of 1985, inserted by s.155 of the Act of 2002 provides, without limitation that "an application may be made to the leasehold valuation tribunal for a determination whether a service charge is payable". Mr Fancourt raised both before the LVT and before this Tribunal a number of examples of issues which it would hardly be appropriate for the LVT to undertake to determine, at least if another more appropriate tribunal was seized of the matter. This, however does not mean that Parliament has not also given the LVT jurisdiction to determine such issues.*
>
> *43. No doubt, if a party to proceedings before a LVT takes proceedings for the determination of such an issue before what the LVT accepts is a more appropriate court, the LVT will, as it did in the course of the Service Charges application adjourn its proceedings pending such determination. It has power so to do under its inherent jurisdiction to regulate its own procedure. That this would be a reasonable and proper course if an issue were raised, to take Mr Fancourt's examples, as to voidability for mistake, forgery or misrepresentation, I do not doubt. Such matters are better determined under Court procedures and by judges, rather than by specialist tribunals, encouraged to adopt comparatively informal procedures.*
>
> *44. I should take the same view where the LVT has jurisdiction to determine only one aspect of a matter better determined as a whole. The LVT, although, as I think, entitled to decide whether a term is not binding because unfair, has no jurisdiction thereupon to make a determination whether the lease shall continue in existence without the alleged unfair term. It may well therefore regard it as convenient, if other proceedings are brought to determine whether service charge is payable under a term said not to be binding because unfair, to adjourn an application within its jurisdiction, pending such determination*
>
> *45. I can see no basis, however, for saying that the LVT lacks jurisdiction to determine any issue not expressly the subject of some other tribunal's exclusive jurisdiction, if determination of that issue is essential to determining whether "a service charge is payable." That is the issue which s.27A gives the LVT jurisdiction to determine. That must include any issue necessary for or incidental to such determination ..."*

38. We came to the view that we would determine as many issues as possible but we could not determine everything. We said that we would determine the following the issues:

38.1 The definition of 'Estate Charge'

38.2 The bed weighting apportionment issue;

38.3 The routine service charges payable in each of the years 2009/10, 2010/11 and 2011/12;

38.4 The liability of Ms Akhtar to contribute to the costs of major works concerning:

Stack pipe repairs;

Emergency lighting works;

Fire doors; and

38.5 The reasonableness of the amount of the estimate of the cost of major works which led to the issue of a demand to Ms Akhtar dated on 12 February 2012 for an on account payment of £40,701.67; and

38.6 Whether Ms Akhtar was or is obliged to pay the amount of that demand.

39. We came to the view that at this time we could not determine the actual costs of the major works associated with the demand of £40,701.67, the extent to which those costs might be reduced to reflect historic neglect, whether those works were carried out to a reasonable standard and whether Ms Akhtar was entitled to set-off against any sum found due and payable in respect of those works the various damages claims that she had identified in her application form.

40. Ms Akhtar and Mr Hewitt were bitterly disappointed with this decision. They said that had come here to present their case on those points in accordance with the directions given in August 2014 and re-stated in February 2015. Mr Hewitt submitted that Ms Akhtar was suffering substantial financial hardship, had paid fees of £630 to the tribunal and was not now going to get a determination of her damages claims.

41. This tribunal understands and sympathises with Ms Akhtar's disappointment, but the volume of documents, the rival arguments and their manner of presentation and the extent to which there was overlap had the consequence that some of the issues to be determined did not become clear until this tribunal had the benefit of a thorough review of the papers.

42. We apologise for the fact there will be some delay in the determination of the outstanding issues but we will endeavour to do what we can to resolve the issues between the parties as fairly and as quickly as we can.

The Decision Part 2

43. The prime issue is the final account and the amount of the contribution to the cost of the major works which the council contends is payable by Ms Akhtar. Some subsidiary issues may flow from that.

44. We were told that the final account was to be issued by November 2015. It not already issued, we very much hope it will be issued within the next few weeks. It seems to us that Ms Akhtar and Mr Hewitt may need a little time to study the final account. They may have some questions for the council and we hope that reasonable and proper questions will be answered promptly.

45. If at that stage there are significant challenges which Ms Akhtar wishes to make about the amount of the contribution payable by her we shall need to convene a case management conference to clarify the issues then outstanding and to give further directions leading to a hearing to determine them. We may also need to consider whether this tribunal ought to assume jurisdiction to determine any claims for damages which Ms Akhtar may wish to make in the light of the guidance given in *Continental Property Ventures.*

45A. Although not very clearly pleaded it appears that Ms Akhtar also sought an order from the tribunal that the loan agreement she entered into with the council should be set aside and that she should be repaid all interest paid by her under that agreement.

It is not immediately obvious that we have jurisdiction to make a determination of the type sought and this was not something we took submissions on at the hearing. It is, or may be, closely connected with the amount of Ms Akhtar's contribution to the major works. We thus consider it appropriate to defer this and leave it over to be dealt with in Part 2 of the proceedings.

Further directions

46. Following the issue of the Decision Part 1 the proceedings shall be stayed pending further order.

47. The council shall by **5pm Friday 4 December 2015** provide a copy of the final account for the subject major works to the tribunal and to Ms Akhtar. If it is unable to do so by that time and date the council shall explain the reason for the delay and state by what date the final account will be provided.

48. By **5pm Friday 5 February 2016 Ms Akhtar** shall notify the tribunal whether there are any remaining issues arising from or connected with the final account and if there are any, shall set out a brief note of them. The tribunal will then convene a case management conference with a view to giving further directions for the disposal of the outstanding issues. That will include the application under section 20C LTA 1985 and Ms Akhtar's application for reimbursement of fees of £630 paid to the tribunal.

49. The parties are reminded of the overriding objective and the obligation to cooperate with the tribunal. That includes an obligation to cooperate with one another. The parties are encouraged not to take minor or insignificant points but to focus on the bigger things that really matter. The parties are also reminded that the tribunal may be able to make its free mediation service available to them. The tribunal also encourages the parties to try and resolve the issues between them without the need for a further formal hearing.

Reasons for the Decision Part 1

The lease

50. Ms Akhtar was a secure tenant of the council from 1998 onwards. Ms Akhtar decided to exercise the right to buy conferred by the Housing Act 1985. Her application was accepted and the relevant documentation is at [A75-78].

51. Thus it was that on 4 July 2005 the council granted to Ms Akhtar a lease of the property. A copy is at [R44]. The lease grants a term of 125 years at a ground rent of £10 pa and on other terms and conditions therein set out.

52. Material definitions are:

The building:	*means the building known as 1-96 John Kennedy House including any grounds outbuildings gardens yards or other property appertaining exclusively thereto;*
The estate:	*means the estate known as Silwood Estate including all roads paths gardens and other property forming part thereof;*
The flat:	means flat 54 – which is on the eighth and ninth floors '*... shown coloured pink on the plan or plans attached hereto...*';
The services:	*means the services provided by the Council in respect of the flat and other flats and premises in the building and on the estate...* Included are such matters as central heating, hot water, lift, caretaking, lighting and cleaning of common areas, entry-phone system, concierge service, maintenance of common TV aerial and landline, maintenance of estate roads and paths, estate lighting, maintenance of gardens and landscape areas and unitemised repairs (not defined)

53. Clause 2(3)(a) is a covenant on the part of the tenant to pay the service contributions set out in the Third Schedule at the time and in the manner there set out. Clause 2(3)(a) is a covenant to pay interest on

any part of the service charge not paid on the due date, at the rate of 5% above the base rate of National Westminster Bank from time to time.

54. Clause 4 sets out a number of covenants on the part of the council, including:

(1) ...

(2) *To keep in repair the structure and exterior of the flat and of the building (including drains gutters and external pipes) and to make good any defect affecting that structure*

(3) *To keep in repair the common parts of the building and any other property over or in respect of which the Lessee has any rights under the First Schedule hereto*

(4) ...

(5) *To provide the service ... set out under the definition of 'services' ... and to ensure that so far as practicable they are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services*

(6) *To insure the building ...*

(7)-(9) ...

55. The service charge regime is set out in the Third Schedule which, so far as material, provides as follows:

(1) *... year means a year beginning on 1st April and ending on 31st March*

(2) *Time shall not be of the essence for service of any notice under this Schedule*

(2)(1) Before the commencement of each year ... the Council shall make a reasonable estimate of the amount which will be payable by the Lessee by way of Service Charge ... in that year and shall notify the Lessee of that estimate

(2)(2) The Lessee shall pay to the Council in advance on account of Service Charge the amount of such estimate by equal payments on 1st April 1st July 1st October and 1st January in each year ... (the payment days)

(3) ...

(4) *(1) As soon as practicable after the end of each year the Council shall ascertain the Service Charge payable for that year and shall notify the Lessee of the amount thereof*

(2) Such notice shall contain or be accompanied by a summary of costs incurred by the Council of the kinds referred to in paragraph 7 of this Schedule and state the balance (if any) due under paragraph 5 of this Schedule

(5) In essence any balancing debit is payable within one month of the notice and any balancing credit is credited to the tenant's account against the next payment that may be due

(6) *(1) The Service Charge payable by the Lessee shall be a fair proportion of the costs and expenses set out in paragraph 7 of this Schedule incurred in that year*

(2) The Council may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses

(7) *The said costs and expenses are all costs and expenses of or incidental to:*

(1) The carrying out of all works required by sub-clause (2) to (4) inclusive of Clause 4 of this lease

(2) Providing the services hereinbefore defined

(3) Insurance ...
(4) All rates taxes ...

(5) Any insurance against liability of the Lessee or others ...

(6) The maintenance and management of the building and the estate (but not the maintenance of any other building comprised in the estate)

(7) The employment of managing agents ...

(8) All VAT ...

(9) The installation by way of improvement of:

(1) double-glazed windows (including associated frames and sills) in replacement of any or all of the existing windows of the flat and of the other flats and premises in the building and in common areas of the building; and
(2) an entry-phone system ...

should the Council in its absolute discretion ... decide to install the same or either of them

(8) ...

(9) *The summary of costs referred to in paragraph 4 of this Schedule shall contain an explanation of the manner in which the proportion of those costs apportioned to the flat under paragraph 6 of this Schedule has been calculated*

56. Annexed to the lease were two plans, one for the 8th floor [R47] and one for the 9th floor [R48]. Neither are floor plans and neither are coloured. In fact both plans are identical street plans save that one bears a manuscript annotation '8th Floor' and one bears a manuscript annotation '9th Floor'.

Both are headed 'REGENERATION DEPARTMENT' and are dated 8 August 2003.

What they show is a tiny building in the centre of the plan said to be '1-96 John Kennedy House'.

To the north-west lies Hawkstone Road, to the east lies Rotherhithe Old Road and to the south lies Rotherhithe New Road. To the south-west lies Rotherhithe Primary School.

Kennedy House lies within a triangle formed by Hawkstone Road and part of Rotherhithe Old Road and part of Rotherhithe New Road.

d Street is some distance away to the west.

The Silwood Estate

57. The issue we can determine is the extent of the Silwood Estate as used in the lease properly construed.

58. The question is whether the expression the 'Silwood Estate' as used in the lease means the original large Silwood Estate – as contended for by the council or whether that is an error and it should read 'Hawkstone Estate' being a smaller part of the original Silwood Estate – the original having been broken down into several component parts – as contended for on behalf of Ms Akhtar. The distinction might have some relevance in the application of grant funds and as to estate expenditure to which Ms Akhtar must contribute.

59. Evidently the Silwood Estate was originally developed by the then London County Council (LCC) in the early 1960's and straddled two boroughs which are now known as LB Southwark and LB Lewisham. Following local government reorganisation in about 1980 responsibility for managing the LCC housing stock transferred to the London borough in which it was situate. Thus responsibility for the original Silwood Estate became shared between LB Southwark and LB Lewisham.

60. In or about April 1999 the council and LB Lewisham agreed upon a joint regeneration plan for the Silwood Estate. In consequence

evidently part of the Silwood Estate located within Lewisham has been demolished and new buildings erected.

61. Over the ensuing 15 years or so that part of the Silwood Estate for which the council has responsibility and on which John Kennedy House stands has seen considerable and significant change. Much has been demolished and/or regenerated. As noted earlier there was a period between about 2007 – 2012 when the council deliberated over the demolition of John Kennedy House. Thus on various systems and databases parts of the original Silwood Estate for which the council is responsible have become known as Silwood, Silwood 2, Hawkstone, Hawkstone East and/or Hawkstone West.

62. The gist of the case for the council is that the lease is to be interpreted as meaning the original and larger estate part of the Silwood Estate within its borough. The council say that it has sub-divided that part of the original estate into three parts and given some of those parts new names:

Silwood
Hawkstone Estate West sometimes called Silwood 1
Hawkstone Estate East sometimes called Silwood 2

Evidently this was done for internal administration purposes only and for related social/community identity purposes and as part of the wider regeneration plan
These changes were made prior to the grant of the lease in 2005.

The council has managed to complicate matters even further because sometimes it joins Hawkstone West and East together and calls the combined estates simply 'Hawkstone'. Ms Akhtar has produced at [A139 – 144] a range of documents which illustrate the complexity.

It was not in dispute that John Kennedy House stands on that part of the estate which is now generally referred to as Hawkstone.

63. According to a document issued by the council in November 2014 [R505] its original Silwood Estate comprised 14 properties, of which John Kennedy House is one and had a combined bed weighting of 3,195. The bed weighting allocated to John Kennedy House was 545

Following a block and estate survey carried out across the borough for administrative purposes new estate definitions were adopted.

Hawkstone Estate West:

Property	**Bed weighting**
Brydale House	545
Canute Gardens	334
Jarman House	227

Rotherhithe Old Road flats	242
John Kennedy House	545
Rotherhithe New Road	4
Total	1,897
Hawkstone Estate East Two properties	192
Silwood Estate Five properties	733
Addy House Estate One property	545
Others Two properties	20
Grand Total	3,387

64. Evidently in about 2013/14 the two Hawkstone Estates were combined for some administrative purposes.

65. The evidence submitted by the council was contradictory in parts but for service charge purposes it appears that it applies bed weightings:

Estate repairs and lighting (electricity) - Silwood - 3,195
Grounds maintenance (care and upkeep) – Hawkstone East & West – 2,089

(Evidently the reason for this is to fit in with the contracts for services placed with the service providers)

Building (John Kennedy House) – 545

65A. Having said that we can see from [A347] – the Grounds Maintenance costs for 2009/10 that John Kennedy House is said to be on the Hawkstone Estate West and the cost has been apportioned on the basis of a bed weighting of 545 for the block (John Kennedy House) and 1,894 for the estate.

At [A348] is the same document for 2014/15 which states that John Kennedy House is on the Hawkstone Estate and the cost has been apportioned on the basis of a bed weighting of 545 for the block and 2,090 for the estate.

66. Mr Sadiq submitted that the lease was quite clear. It referred to the Silwood Estate and that was the contractual basis the parties entered into. The fact that for some administrative or other purposes John Kennedy House is regarded as being on the Hawkstone Estate is neither here nor there he said.

67. On behalf of Ms Akhtar it was submitted that the lease contained an error and that the word 'Silwood' should be interpreted and read as meaning 'Hawkstone'. Mr Hewitt submitted that the error came about because within the council internal databases and records were not kept up to date and the legal department which drew up the lease had been misinformed. Whilst that submission was made, no evidence to support it was adduced.

68. Ms Akhtar gave evidence and was cross-examined. Ms Akhtar accepted that when she first became a secure tenant her property was on an estate known as Silwood Estate and that her block was part of the Silwood Estate. Ms Ahktar said that later, in about 2002 new signage went up and the name of her estate changed to Hawkstone. There after documents referred to her estate as being Hawkstone.

69. Ms Akhtar evidently used to work in a solicitors office and her firm acted for her when she exercised the right to buy. Ms Ahktar said that she read a draft of the lease before signing it but she candidly admitted that she did not notice the reference to Silwood Estate; it was not something that registered with her. Ms Akhtar said that it was not until much later on that she realised her lease referred to the Silwood Estate.

Decision and reasons

70. We prefer the submissions made by Mr Sadiq and we find that in the lease, the expression 'Silwood Estate' properly interpreted means the Silwood Estate comprising of the 14 properties listed on [R505] which includes John Kennedy House.

71. Our reasons for doing so are because the lease plainly uses the expression 'Silwood Estate' which is an expression with which both parties were familiar. The council has managed and maintained properties on an estate known as the Silwood Estate and there are many documents and records within the council which show that the Silwood Estate comprises of those 14 properties.

72. Mr Hewitt invites us to correct an error in the lease by means of construction or interpretation. That is to say we should interpret the word 'Silwood' as if it means the word 'Hawkstone'. Correction by construction is sometimes a legitimate tool for the courts and tribunals to adopt when faced with an obvious error in a written instrument. Once an error is corrected the contract is interpreted in its correct form. This process is to be contrasted from a situation where a party asserts that a contract fails to properly record what both parties had actually agreed. Where that occurs a party is entitled to apply to the court for the instrument to be rectified. That process is known as rectification. This division of this tribunal does not have jurisdiction to rectify instruments.

73. However the rules on correction by construction are quite clear. There are two conditions. The first is that there must be a clear mistake.

Secondly it must be clear what correction ought to be made in order to cure that mistake. In the present case we find that it is not clear that a mistake was made. At the time the lease was granted the council did manage an estate which was known as the Silwood Estate and for several purposes and for many years has been managed as one estate, albeit that for some administrative and community reasons parts of it had other names attributed to them from time to time. Further it was not obvious from the lease that the correction should be to substitute 'Hawkstone' for 'Silwood' and it was not obvious that an interested bystander acquainted with the factual matrix before both parties would readily state that position.

Fair proportion - bed weighting method

74. The lease obliges the tenant to contribute a 'fair proportion' of relevant costs and expenses incurred by the council.

75. To ascertain the proportion payable the council had adopted a bed-weighting method. Mr Hewitt submits that such a method is not a fair way to apportion the costs and expenses.

76. Ms Diana Lupulesc, a revenue services charges officer employed by the council gave oral evidence and was cross-examined. Ms Lupulesc confirmed that her witness statement at [RSB4] was true.

77. Ms Lupulesc explained to us that the application of the method is that each dwelling is allocated a number 4. An additional 1 is added for each bedroom within the dwelling. The subject flat is formally a two bedroom flat and so is given a bed weighting of 6, being 4+2.

78. John Kennedy House is a block comprising a mix of studios, one bedroom flats and two bedroom flats. It has a total bed weighting of 545 as shown on the detailed breakdown at [RSB 31]. Ms Lupulesc said that from records she had seen in the office a bed weighting of 545 had been applied to John Kennedy House from the outset when the council took on responsibility for it. She was unaware of any changes having been made over the years.

79. In cross-examination Ms Lupulesc said she was unaware of any cases where the council had yet formally given consent to alterations which had resulted in the creation of an additional bedroom in a flat.
She was aware of some allegations which had been made about unauthorised alterations and these were under investigation she said. These included allegations made in respect of flats 11 and 30.
Ms Lupulesc suggested that if a tenant added a bedroom then records would be updated.

80. Mr Sadiq submitted that the council's bed weighting method had been tacitly approved by the Upper Tribunal (Lands Chamber) in *LB Southwark v Paul and others* (LRX/105/2011) and in *LB Southwark v Bevan* [2013] UKUT 114 (LC). Mr Sadiq also sought to rely on *Mehra v Citywest Homes Limited* [2010] UKUT 311 (LC). He said that a

landlord is given a degree of latitude but has to be within the range of what is reasonable. He submitted that the council's method sat within that range, it has been in operation from inception and is a fair basis.

81. Mr Hewitt did not call any evidence on this topic, but made submissions. Mr Hewitt asserted that some flats in the block have been sub-divided and if the council choose to apportion by the number of bedrooms the size of the bedroom is immaterial and it is critical the council should keep its database up to date and make adjustments as and when appropriate.

82. Mr Hewitt said that the method adopted was unfair and that a fairer method would be to calculate the proportion by way of floor area. He said that the council records should show the floor area of each flat and so it would not be a difficult task to undertake the exercise.

Decision and reasons

83. We prefer and adopt the submissions of Mr Sadiq.

84. In the experience of the members of the tribunal there is probably no one method of apportionment that is fair to everyone. There are several different methods of apportionment but each one contains some element of unfairness to someone.

85. In the present case the council is not obliged to adopt the fairest method, but it is obliged to adopt a fair method. We are satisfied that what the council calls its bed weighting method falls within the range of fair methods open to the council to adopt.

86. Of course the bed weighting method is something of a misnomer. It seems to us that whether a 'bedroom' is used for sleeping in or used as a study, for example, that use will not generally have an impact on apportionment of service charges. Equally if a large studio flat has some internal partitioning erected to create a small private space for sleeping in that again may not have an impact on service charges apportionment.

87. The suggestion made by Mr Hewitt that if the council choose to adopt a bed weighting method it must monitor the blocks across its estate and keep an accurate and up to date database and adjust accordingly seems to us to be unwieldy and unrealistic. It would entail adjustments to apportionments to both block charges and estate charges. If there were several alterations to the database during the course of a financial year it may entail charges being calculated on a number of different bases during the course of that year. We consider it would add undue complexity and the additional costs incurred would be wholly disproportionate.

88. Taken overall we find that the method adopted by the council may be a little crude but it is not inherently unfair. It is, of course, to be remembered that it was the method in place when Ms Akhtar decided to exercise the right to buy and to acquire a long lease of her flat.

Routine service charges

89. During the course of the hearing it became apparent that the applicant's principal objection to the 09/10 and 10/11 service charges was that they should have been subject to capping in accordance with s.125A and Schedule 6 of the Housing Act 1985. According to Mr Hewitt the applicant had not been given the benefit of this capping at any time since her purchase, however her application related only to the two years in question. The Respondent accepted that this was a mistake on their part and this enabled the parties to agree that the amount of the routine service charges payable was as follows:

2009/10	£856.14
2010/11	£877.54

As to 2011/12 Mr Hewitt was able to withdraw some of the challenges which had been made on behalf of Ms Akhtar, but there remained an issue regarding the estate charge and grounds maintenance.

90. This boiled down to the increase in the hourly charge adopted to reflect the costs of the council's direct labour organisation undertaking the work.

In terms of relevance to Ms Akhtar historically her contributions were as follows:

2009/10	£24.74
2010/11	£21.64
2011/12	£47.21
2012/13	£20.66
2013/14	£20.75
2014/15	£28.44 (estimated)

Inevitably the paper trail to track through the costs actually incurred plus the associated overheads and then the apportionment of those costs across the several estates served by the DLO was not a straightforward exercise.

Decision and reasons

91. We need to keep a sense of proportion. At the hearing a disproportionate amount of time was spent on this issue.

92. Despite the written and oral evidence presented to us the council was unable to give us a coherent explanation of what it was that caused such a large one-off increase in the year in question.

93. In those circumstances we were not satisfied that the sum claimed was reasonable in amount and we have reduced it by £25.00, down to £22.21 which is broadly an average charge taken over the other years.

94. Accordingly the routine service charges payable by Ms Akhtar for 2011/12 are reduced to £1,475.73.

Major works – stacks

95. Oral evidence was given by Mr John Ottley who is a chartered surveyor with Blakeney Leigh Limited. His witness statement is at [RSB1]. He told us his statement was true.

96. Mr Ottley was cross-examined. His attention was drawn to a report at [A158] prepared by NGL Associates in June 2012. Mr Ottley told us that the soil stack pipes run up through the block to vent on the roof. He said that there are 10 stacks but two merge on or near the roof thus there are only eight vents on the roof.

97. Mr Ottley also explained that the stacks get clogged up from time to time depending upon what is flushed into them. From time to time stacks need to be re-cored to clear away materials built up on the inside walls of the stacks. There are different ways in which this task can be performed. In simple terms one is to remove the duct panel in the bathroom, the other is to remove the toilet in order to access to the stack. The former can give rise to difficulties and also damage tiling and/or a fitted suite in the bathroom.

98. Mr Ottley said that two stacks were re-cored under his supervision in 2007/8. Later it was reported there were smells from some stacks. Mr Ottley tendered to get a price for 10 stacks but the contract which was placed was for 8 only because 2 had already been done. In both cases it was necessary to gain access to each flat and occupiers were not always as cooperative as they might have been. It was a major and time consuming exercise to conclude. Contractors were on site for five weeks and the project did not overrun.

99. Mr Ottley took us through the accounting documents and answered questions put to him.

100. At [R196] there is an undated letter (probably sent on or around 5 October 2011) which shows that Ms Akhtar's contribution to the costs of the project amount to £782.34.

101. Mr Hewitt told us that he did not propose to call any evidence to challenge the costs claimed. Mr Hewitt had prepared a section 20 argument. The Court of Appeal decision in *Phillips v Francis* [2014] EWCA Civ 1395 was explained to Mr Hewitt and he decided not to pursue that argument.

Decision and reasons

102. We found Mr Ottley to be an honest and genuine witness upon whom we could rely with some confidence. We accept his evidence.

103. In the absence of any evidence to the contrary we find that the costs were reasonably incurred, reasonable in amount and payable by Ms Akhtar.

104. For reasons which will appear later we find that it was not open to the council to issue demands for sums on account or demands for final sums due willy nilly during the course of the financial period. Where a balancing debit has been demanded it is payable at the end of the financial year in which it is demanded. For this reason we find the amount of £782.34 was payable by Ms Akhtar on 31 March 2012.

Major works – emergency lighting works and fire doors

105. We can take both of these together.

106. The amount claimed for emergency lighting works is £368.31. The amount claimed for fire doors is capped by the council at £250 because the council accepts it did not consult on the proposed works in accordance with section 20 of the Act because it considered the works to be emergency works to be carried out without delay. It may be recalled that the council had an unwelcome experience with an outbreak of fire in one of its high rise blocks.

107. Witnesses for the council took us through the procurement process for both sets of works. There was no competing evidence adduced by or on behalf of Ms Akhtar. As regards the fire doors it was accepted by Mr Hewitt that the works needed to be done, and that the works were carried out to a reasonable standard. As regards the emergency lighting, Mr Hewitt questioned Mr Orford quite closely on the relationship between routine checking and replacement of defective light fittings/photocells and the apparent replacement of quite effective light fittings as part of the emergency lighting works. Mr Orford explained the difference between the regular lighting which has a battery back-up which kicks in in the event of a power or circuit failure, which is covered council's in-house day to day repairs service and the specialist emergency lighting system installed to enable speedy evacuation of the building if/when required.

Mr Hewitt submitted that if Ms Akhtar was obliged to contribute to the cost of the emergency lighting costs that contribution should be limited to £170. Mr Hewitt did not provide any evidence or explanation as to how that sum had been arrived at.

Broadly we were satisfied that it was reasonable to undertake both sets of works and that the cost of both of them was reasonable in amount as contended for by the council.

108. However for the reasons set out below we find that Ms Akhtar is not obliged to contribute to those costs. This arises from the application of the five-year period follow the exercise of the right to buy.

109. By a notice dated 10 November 2003 the council informed Ms Akhtar that it had been established that she had the right to buy the subject flat [A75]. The notice reminded Ms Akhtar that she was expected to pay for services, repairs and improvements. The notice referred to two Appendices A and B giving estimates of costs Ms Akhtar was likely to have to meet. The notice stated that:

"The reference period adopted for the purposes of the above estimates begins on 10 May 2004 and ends on 31 March 2010"

What was actually attached was an Appendix 1 and an Appendix 2.

Appendix 1 [A77] is dated 5 November 2003.

Stated that as regards Service Charges: *"The attached Appendix 2 applies"*

As regard Capital Repairs it states:

Repairs/Renewals required to:

Item	***Estimated Cost (£***	***Apportioned Costs***
External Decorations		
Internal Communal Repairs		
Window Renewal		
Roof Repairs		
Concrete Repairs		
Door Entry & Security Works		
Total	***£3,500,000.00***	***£11,000.00***

Appendix 2 [A78] is also dated 5 November 2003

So far as material it states:

Type of Service	**Average annual cost**	**Service Charge**
	£	**For Property £**
Central Heating	0.00	0.00
Lift	68.24	68.24
Care and Upkeep	205.16	205.16
Entryphone	0.00	0.00
TV Aerial	19.64	19.64
Estate roads, drains & lamp columns	4.16	4.16
Estate Lighting	61.28	61.28
Garden maintenance	66.72	66.72
Unitemised repairs	91.56	91.56
Sub Total		**516.76**
Buildings Insurance		73.45
Sub Total		**590.21**

Management costs		59.02
Annual Total		**649.23**
Quarterly Charge		**162.31**

110. The subject lease was granted on 4 July 2005.

111. The material statutory provisions are set out in Housing Act 1985 Schedule 6 paragraphs 16A, B, C, D and E. Copies of those provisions are attached to this decision.

112. Mr Sadiq submitted that both sets of works fell within Appendix 1 and were included within the £11,000 mentioned adjusted for inflation. There were two points that arose from that. First the reference period for Appendix 1 was 10 May 2004 to 31 March 2010 and both sets of works were billed after this period. Mr Sadiq argued that the section 125 notice was advisory only and did not oblige the council to carry out any works at all and in any event only applied to works to be paid for within the initial period of the lease. If the works were carried out after the expiry of the initial period it was 'tough' the tenant was obliged to contribute to the costs incurred.

113. Mr Hewitt submitted that the subject costs were not capital repairs within Appendix 1 but were unitemised repairs within Appendix 2. He argued that by reference to paragraph 16B of Schedule 6 the initial period of the lease is defined to be five years after the grant of the lease save that where a lease provides for service charges to be calculated by reference to a specified annual period, the initial period continues until the end of the fifth such period beginning after the grant of the lease.

114. Mr Hewitt submitted that the lease provides for a financial period beginning on 1 April and ending on 31 March. The lease was granted on 4 July 2005. Thus the first financial period beginning after the date of grant is 1 April 2006, ending on 31 March 2007 and the fifth financial period after grant ends on 31 March 2011.

Discussion and reasons

115. It was unhelpful that Appendix 1 did not allocate estimated costs to each of the six categories of anticipated expenditure mentioned. Simply putting in global figures of £3.5m and £11,000 does not assist the tenant in appreciating the potential costs that he or she may have to contribute to. We draw attention to section 125A(3) of the Housing Act 1985 which provides that:

> *"(3) The following estimates are required for works in respect of which the landlord considers that costs may be incurred in the reference period:*
>
> *(a) for works itemised in the notice, estimates of the amount (at current prices) of the likely cost of, and of the tenant's likely contribution in respect of* ***each***

item, and the aggregate amounts of those estimated costs and contributions, and

(b) for works not so itemised, an estimate of the average annual amount (at current prices) which the landlord considers is likely to be payable by the tenant."

(Emphasis added)

116. In general we prefer the submissions made by Mr Hewitt on this subject.

117. We find that itemised works are works which the council might undertake within the initial period. We accept that the council is not obliged by the notice to carry them out (although under the terms of the lease the council is obliged to keep in repair the structure and exterior of the flat and the building and to make good any defects affecting the structure and to keep in repair the common parts of the building). Thus the notice is limited to works which the council contemplates that it might carry out within the relevant period. As a matter of logic itemised works cannot apply to works which the council does not, at the time of giving the notice, contemplate carrying out. Thus it cannot apply to emergency works the need for which only became apparent after the section 125 notice was given.

118. We find that neither set of works is expressly mentioned in Appendix 1. That is not surprising because we find that neither set of works was contemplated by the council when the notice was given. We are reinforced in that finding by the fact that both sets of works were considered to be emergency works, that is to say, not planned works. As regards the fire doors the need to carry out the works was so urgent that the council decided not to delay carrying them out whilst it undertook a section 20 consultation exercise.

119. Thus we find that both sets of works fall within 'Unitemised repairs' mentioned in Appendix 2 and are subject to an initial period of five years as provided in paragraph 16B of Schedule 6.

Those works were estimated £91.56. To ascertain the cap for each of the five years a buildings costs inflation formula is to be applied. We were not told what that was for each of the five years concerned.

120. The fire doors works were carried out between 1 August and 1 December 2009, thus within the five-year initial period [R202]. For some reason, not explained to us the demand to Ms Akhtar to contribute to those costs was not made until 11 November 2011, which is outside the initial period.

It cannot be right that the council avoids the application of the cap simply by delaying a demand for payment. We find that the council ought to have made a proper demand to Ms Akhtar within the initial period and that if it had done so the cap would have applied. In the financial period ended 31 March 2011 the amount 'Responsive (minor) repairs' was £837.70

121. The emergency lighting works were carried out between 18 October and 17 November 2010, again within the five-year initial period, but outside the reference period. The invoice from the contractor to the council is dated 16 November 2010 [R407].

Again for reasons we were not told the council sent Ms Akhtar a demand for an estimated contribution of £339.40 dated 1 October 2011 and a final demand for an actual contribution of £368.31 dated 5 July 2013, both dates well outside the five-year initial period.

These works are not itemised works so they fall to be considered under paragraph 16B(3)(b). The council did not produce any evidence of the average rate produced by averaging over the reference period all works for which estimates are contained in the notice. We were told by Mr Hewitt that Ms.Akhtar's contribution to unitemised repairs during the first three years had not been capped and that these amounts had been significant but no figures were provided.

We note that the actual sums claimed by the council for unitemised (block) repairs was:

2009/10	£767.22
20010/11	£787.01
2011/12	£463.69
2012/13	£353.47

The amount of the estimate in the notice was £91.56.

The council did not persuade us that the sum claimed, £368.31, was payable by Ms Akhtar.

We again make the point, in so far as it may be relevant, that it cannot be right the council avoids the application of the cap simply by delaying a demand for payment. We find that the council ought to have made a proper demand to Ms Akhtar within the initial period. In the financial period ended 31 March 2011 the amount 'Responsive (minor) repairs' was £837.70

122. For the above reasons we find that Ms Akhtar is not obliged to contribute to the cost of the fire doors and the emergency lighting works.

Major works – estimate £40,701.67

123. Mr Orford referred to his witness statement [RSB17] and said that it was true. Mr Orford took us carefully through the procurement process and explained how the estimate had been put together.

124. Mr Orford was cross-examined by Mr Hewitt on a number of the elements of the estimate.

125. Mr Orford struck us as a witness upon whom we could rely with some confidence. We accept his evidence. We find that the estimate was a reasonable estimate given the information reasonably available to the council at the time the estimate was prepared.

126. It was not in dispute that the council had carried out a section 20 consultation exercise in respect of the project.

127. The council sent to Ms Akhtar a demand dated 12 February 2013 which, on the face of it required a payment of £40,701.67 [R232]. That document contains errors or mis-statements and together with the attachments to it [R233 and 234] it is confused and confusing.

128. The demand at [R232] states that if the sum demanded was to be paid in accordance with the terms of the lease, the council expected payment as follows:

Year 1 (i.e. current year)	£6,530.05 payable in full on 1 April 2013
Year 2 (i.e. 2013/14)	£31,572.78 payable by four equal instalments on 1st April, July, October and January
Year 3 (i.e. 2014/15)	£2,598.84 payable by four equal instalments on 1st April, July, October and January

That arrangement is plainly not what the lease provided for.

Page [R233] may suggest that the works will be undertaken in phases and the costs might be incurred in stages:

2012/13	£6,530.05
2013/14	£31,572.78
2014/15	£2,598.84
	£40,701.67

Page [R234] reads as follows:

"Notification: Service Charge Account 2013 – 2014

Account Number: 6101507580
Property Reference: 45699
Property Address: Flat 54, John Kennedy House ...

Revenue Service Charge:

Invoice Number 5000324961
Estimated Revenue Service Charge for 2013 -2014 *£1,738.27*

Major Works Service Charge:

Invoice 500346117
Individual Contribution – 12/150P6 – John Kennedy House

	Refurbishment 2012	*£40,701.67*
Due in year one	*(1 April 2012 to 31 March 2013)*	*£ 6,530.05*
Due in year two	*(1 April 2013 to 31 March 2014)*	*£ 31,572.78*
Due in year three	*(1 April 2014 to 31 March 2015)*	*£ 2,598.85*
Total for the year 2013 – 2014		*£39,841.10"*

128. We have not seen the estimated service charge demands for the years 2012/13 and 2013/14 but breakdowns of what was estimated may be set out on [R244 and R248 respectively]. In neither case is there any reference to estimates of major works contributions.

129. It was not in dispute that regime operated by the council was not in accordance with the terms of the lease. Paragraph 2 of the lease clearly provides:

> *(2) Time shall not be of the essence for service of any notice under this Schedule*
>
> *(2)(1) Before the commencement of each year ... the Council shall make a reasonable estimate of the amount which will be payable by the Lessee by way of Service Charge ... in that year and shall notify the Lessee of that estimate*
>
> *(2)(2) The Lessee shall pay to the Council in advance on account of Service Charge the amount of such estimate by equal payments on 1st April 1st July 1st October and 1st January in each year ... (the payment days)*
>
> *(3)* ...
>
> *(4) (1) As soon as practicable after the end of each year the Council shall ascertain the Service Charge payable for that year and shall notify the Lessee of the amount thereof*
>
> *(2) Such notice shall contain or be accompanied by a summary of costs incurred by the Council of the kinds referred to in paragraph 7 of this Schedule and state the balance (if any) due under paragraph 5 of this Schedule*

130. The practice of the council for a number of years was to separate out routine or revenue service charges from major works service charges and to account for them separately. In *Southwark LBC v Woelke* [2013] UKUT 349 (LC) (a decision of the Deputy President, Mr Martin Rodger QC) it was held that such a practice was not compliant with the requirements of the lease. As such non-compliant demands do not create a liability on the part of the tenant to pay the sum demanded. The landlord had to provide some revised or additional notifications compliant with the terms of the lease before the sums claimed would become due.

131. Mr Hewitt submitted that there had been no compliant demand for the sum of £40,701.67 and that sum was not payable.

132. Mr Sadiq submitted that paragraph 44 of *Woelke* did not preclude a late notification after the financial period had commenced because the lease provided that time was not to be of the essence. Mr Sadiq acknowledged that a late notification which had passed the first date for payment of an instalment on account would result in the tenant not being liable to make that instalment, but there would be an adjustment at year end when the amount of any balancing debit was calculated.

133. Mr Sadiq also submitted that a notification can be in one or more documents and that the council has more than one opportunity to get the paperwork right – *Woelke* paragraphs 59 and 61.

134. Mr Sadiq drew attention to the loan made to Ms Akhtar to enable her to pay the amount of the demand and drew attention to paragraph 53 of *Woelke* which said:

"Any leaseholder who availed themselves of the favourable payment terms offered by the appellant would no doubt be taken to have agreed to waive strict compliance with the third schedule, so far as it related to the cost of the major works..."

Mr Sadiq submitted that Ms Akhtar has waived her right to rely upon the payment terms of the lease as a mechanism for evading liability for payment.

Discussion and reasons

135. First the council relies upon the demand at [R232]. We have already stated that document to be confused and confusing. It is dated 12 February 2013 and thus given towards the end of the financial period 1 April 2012 to 31 March 2013 after all four days for payment of instalments have passed. It states that in year one, that is to say the year 2012/13 the amount of £6,530.05 is payable in full on 1 April 2013. That is plainly wrong and not in accordance with the terms if the lease.

136. We find that not only must a demand or notification be made within the terms of the lease but also the demand must also be clear and unambiguous. The tenant needs to understand clearly how the demand is arrived at and what is to be paid and that the obligation to pay is within the terms of the lease.

137. Whilst we are prepared to accept that an estimate might be notified during the course of the financial year to which it relates and that quarterly instalments falling due on the payment days after the notification is given may be payable, we do not accept that a demand or notification for payment on account can be given after the expiry of the financial period to which it relates.

138. The lease enables the landlord to collect four equal payments in advance on specified days if so demanded. Thus the landlord may, but is not obliged to, demand such payments on account. If a landlord chooses not to demand such payments on account, then after the year end the landlord can make a demand for that actual costs incurred provided that it complies with the provisions of paragraph 4 of the Third Schedule to the lease. If there are no payments on account to be credited then the full amount is payable within one month of the notification.

139. We are not aware of any compliant demand having been made of Ms Akhtar which the council says clearly includes the actual amount of Ms Akhtar's contribution to the subject major works. Indeed, as at the time of the hearing the council had not issued a final account for those works. A compliant demand cannot be issued unless and until the actual cost of the works has been ascertained.

140. It appears to us that if council has or is about to issue the final account for the works, it can include the amount of the contribution it claims is payable by Ms Akhtar in a compliant demand for the final account of all service charges payable by her for the current year ending 31 March 2016 and the balancing debit thereon will be payable one month after such a demand is given to Ms Akhtar.

141. The above finding is sufficient to dispose of the council's claim that the sum of £40,701.67 is now, or has for some while, been payable by Ms Akhtar. Mr Sadiq also made a submission in respect of waiver. Although not strictly necessary for us to deal with it we make some comments about it in case this matter is taken further.

142. Mr Sadiq submitted that in line with paragraph 53 of *Woelke* if a tenant avails him or herself of favourable payment terms or plan then the tenant might have waived any technical defects with the demand.

143. First no evidence of any favourable payment terms or plan was presented to us. Evidently the council offered Ms Akhtar a loan to effect payment of a large sum of money. The amount of that loan was £41,251.67 which is greater than the sum in question, and we infer that may be due to fees being payable. Also it carries interest and is secured on Ms Akhtar's leasehold interest. It is not immediately clear to us that the offer of such a loan to pay a sum which is not lawfully due and payable can properly be characterised as 'favourable payment terms'.

144. Mr Hewitt made a submission that the loan was taken out under duress, the council having made dire threats as to what would happen if she did not pay the amount demanded. No oral evidence was called to support that submission. We infer that it may have been put a little strongly but it is clear to us that the council was pressing Ms Akhtar very hard to effect payment. We are not satisfied that the taking of the loan was a voluntary act on the part of Ms Akhtar such that it might amount to a waiver. It seems to us on the evidence that the loan was taken out and the sum paid to the council in a manner that can be characterised as 'under protest'.

145. For these reasons we reject the submission that Ms Akhtar waived the various defects with the demand for £40,701.67.

Florrie's Law

146. In the papers before us, and during the course of the hearing, reference was made to Florrie's Law. This is a reference to The Social Landlords Discretionary Reduction of Service Charges (England) Directions 2014 [A42].

147. Evidently Ms Akhtar was under the impression that she had made an application under those regulations for a reduction in the amount of service charges payable by her on the grounds of exceptional hardship but had not been told of the outcome.

148. Ms Akhtar has not produced a copy of any such application. The (several) council officials present at the hearing said that they were not aware of any such application having been received. Indeed, the council officials informed us that although they had adopted a policy as required by the Direction they were not aware of any specific application form being in existence. We were told that if an application was to be made it would be considered by the council against the material criteria set out in the Directions.

149. It is a moot point whether it is within the jurisdiction of this tribunal to consider whether a social landlord has incorrectly exercised its discretion on an application under the Directions. Some say that it does have jurisdiction because it goes to what is payable by the tenant by way of service charges. Mr Sadiq suggested there were arguments to the contrary.

150. Whatever the position on jurisdiction may be, there was no copy of any such application before us and it was not clear whether any such application has yet been made to the council by Ms Akhtar. In these circumstances we cannot make any findings on this issue.

Tenant's hardship

151. On a related issue Mr Hewitt made several references to Ms Akhtar suffering severe financial hardship and the effect of that upon the service charges payable by her. It may be helpful to the parties to make a few comments on that.

152. First no evidence of Ms Akhtar's financial circumstances was put before us.

153. Secondly Mr Hewitt sought to rely upon the case commonly known as *Garside v RFYC Limited* [2011] UKUT 367 (LC) a decision of HHJ Alice Robinson sitting in the Upper Tribunal (Lands Chamber) and dated 15 September 2011. It may be helpful if we make some comments about that decision. As we understand it the decision does not enable this tribunal to make adjustments to service charges payable by a tenant simply on the

basis of the financial circumstances of a tenant. Rather that case concerned a development which had not been well maintained for a good while. A group of lessees sought and obtained the appointment of a manager under section 24 Landlord and Tenant Act 1987. The manager proposed to carry out a series of major works, adding about £100,000 to the service charge account for 2009 and £538,012 for 2010. A number of lessees were concerned about the very significant increase in the service charge account and their ability to pay their respective contributions.

154. The judge held that there was nothing in the ambit of what was reasonable in this context so as to exclude considerations of the financial impact on the tenants. The judge gave the expression 'reasonable' a broad, commonsense meaning and considered whether the financial impact on tenants through the service charge should be a factor such that the works might be phased over a period, perhaps several years.

155. The judge made it clear that the liability to pay service charges could not be avoided simply on the grounds of hardship, even if extreme. The also held that if repair work was reasonably required at a particular time, carried out at reasonable cost and to a reasonable standard and the cost was recoverable under the lease the tenant could not escape liability by pleading poverty.

Penal costs

156. During the course of the hearing both parties were highly critical of the conduct of the other during the course of these proceedings. However we record that neither party wished to make a rule 13 application for penal costs.

Next steps

157. For avoidance of doubt the next steps in these proceedings will follow on from the issue of the final account for the major works and the directions set out in paragraphs 46-48 above.

Judge John Hewitt
23 November 2015

Status: Law In Force

Housing Act 1985 c. 68

Schedule 6 CONVEYANCE OF FREEHOLD AND GRANT OF LEASE IN PURSUANCE OF RIGHT TO BUY

Part III LEASES

Service charges and other contributions payable by the tenant

This version in force from: **October 11, 1993** to **present**

(version 2 of 2)

[

16B.—

(1) Where a lease of a flat requires the tenant to pay service charges in respect of repairs (including works for the making good of structural defects), his liability in respect of costs incurred in the initial period of the lease is restricted as follows.

(2) He is not required to pay in respect of works itemised in the estimates contained in the landlord's notice under section 125 any more than the amount shown as his estimated contribution in respect of that item, together with an inflation allowance.

(3) He is not required to pay in respect of works not so itemised at a rate exceeding—

(a) as regards parts of the initial period falling within the reference period for the purposes of the estimates contained in the landlord's notice under section 125, the estimated annual average amount shown in the estimates;

(b) as regards parts of the initial period not falling within that reference period, the average rate produced by averaging over the reference period all works for which estimates are contained in the notice;

together, in each case, with an inflation allowance.

(4) The initial period of the lease for the purposes of this paragraph begins with the grant of the lease and ends five years after the grant, except that—

(a) if the lease includes provision for service charges to be payable in respect of costs incurred in a period before the grant of the lease, the initial period begins with the beginning of that period;

(b) if the lease provides for service charges to be calculated by reference to a specified annual period, the initial period continues until the end of the fifth such period beginning after the grant of the lease [.] [2]

[...] [2]

] [1]

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	**LON/00BE/LSC/2014/0382** **LON/00BE/LSC/2016/0111**
Properties	:	**54 John Kennedy House (0382)** **11 John Kennedy House (0111)** **London SE16 1QF**
Applicants	:	**Ms Runa Akhtar (0382)** **London Borough of Southwark (0111)**
Representatives	:	**Mr Jerry Hewitt (0382)** **Mr Faisel Sadiq - Counsel (0111)**
Respondents	:	**London Borough of Southwark (0382)** **Stell LLC (0111)**
Representatives	:	**Mr Faisel Sadiq – Counsel (0382)** **Mr Jerry Hewitt (0111)**
Type of Applications	:	**Section 27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Ms Sue Coughlin** **Mr Alan Ring**
Date and venue of Hearing	:	**12 May 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**11 July 2016**

DECISION PART 2

Decisions of the tribunal

1. The tribunal determines that:

   1.1 The council did not give a notice to its tenant, Ms Runa Ahktar of 54 John Kennedy House pursuant to section 20B(2) of the Act in respect of the major works project referred to as the 'John Kennedy House Refurbishment 2012 Major Works' (the works); and

   1.2 The notices dated 30 May and 30 June 2014 one or both of which were given by the council to its tenant, Stell LLC of 11 John Kennedy House, pursuant to section 20B(2) of the Act in relation to the works, were not valid notices

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of one of the hearing files provided to us for use at the hearing.

Procedural background

3. The London Borough of Southwark (the council) is the landlord of John Kennedy House (JKH).

4. Ms Runa Akhtar (Ms Akhtar) is the tenant of flat 54 JKH. Ms Akhtar made an application pursuant to section 27A of the Act for a determination of the amount payable in respect of a number of service charges claimed by the council. That application was allocated reference number 0382. The application included the amount (if any) payable by Ms Akhtar - whether on account or as a final contribution - in respect of the works.

5. Following a hearing the tribunal issued a decision part 1 in respect of several of the claims in issue. It is dated 23 November 2015. It should be read in conjunction with this decision which is part 2.

6. The exact amount payable in respect of the works was parked because the council has not issued a final account setting out the sums it claimed it had actually incurred on those works. Despite the works having been completed in 2014 the council indicated there would be further delay before it would be able to issue the final account to its lessees.

7. One of the issues raised by Ms Akhtar in relation to the works was that the council had not given to her a notice pursuant to section 20B(2) of the Act in connection with the expenditure the council had incurred on them.

8. In order to make some progress with resolving some of the issues between the parties the tribunal decided to hear the evidence and

arguments on the section 20B(2) point as a standalone issue. Directions were duly given.

9. Meanwhile it became apparent to the tribunal that in February 2014 the council had commenced court proceedings against Stell LLC, its tenant of flat 11 JKH, which included a claim to an advance payment in respect of the works. A detailed defence was filed and Stell requested the proceedings be transferred to the tribunal, unfortunately, that did not happen until an order was made by the court on 4 March 2016. The proceedings transferred was allocated reference number 0111.

10. It was evident that a section 20B(2) point might also arise in the Stell proceedings and directions were issued to the effect that if it was a point in issue it would be heard and determined at the same time as the section 20B(2) point relating to 54 JKH.

11. As it happens Mr Jerry Hewitt who is a secure tenant of 49 JKH was appointed to represent both Ms Akhtar and Stell in relation to this issue.

12. The hearing of the section 20B(2) issue was scheduled to be heard on 12 May 2016. Before getting on and dealing with that issue we wish to record our disappointment with both parties for the manner in which they prepared for the hearing. Clearly there is a degree of antipathy between Mr Hewitt and the council. They fail to cooperate with one another and it appears they go out of their way to be awkward and difficult with one another. We appreciate that Mr Hewitt is a lay representative but he has some understanding of the tribunal process and the issues. He clearly has a detailed knowledge of (and views about) the overarching partnering contract entered into by the council by which the subject works (and others) were procured. Given the issues on the section 20B point are relatively straightforward namely, was a notice given to Ms Akhtar and was the notice given to Stell a valid notice, Mr Hewitt served statements of case which are far too long and raised far too many complex and irrelevant issues. In retaliation the council refused to include in the hearing bundle a good deal of the documents Mr Hewitt had requested to be included, evidently on the footing they were not relevant or material. There was then a squabble between them about that and complaints and applications were made to the tribunal. Included in the directions issued to try and keep case preparation on track, and to get to the heart of the rival cases, was a direction that the skeleton arguments to be filed by the parties should comprise no more than 3 pages A4. Mr Hewitt chose not to comply with that direction arguing that he was unable to do so.

13. The upshot of all of this was that at the hearing the tribunal was inundated with lever arch files some prepared by Mr Hewitt and some prepared by the council but all of which contained materials and many pages which were not relevant to the issue before the tribunal. The fault lies with both parties but the outcome was that it made the hearing

more time consuming, complex and cumbersome than was really necessary.

The gist of the issues

14. The council says that it gave two section 20B(2) notices to Ms Akhtar which were posted to her at 54 JKH. They are dated 30 May 2014 [52] and 30 June 2015 [55]. Ms Akhtar says that she did not receive either of them.

15. Stell is a buy-to-let investor and when it acquired its lease of 11 JKH it gave the council an 'away' address for correspondence. The council says that it gave a notice to Stell dated 30 May 2014 addressed to 11 JKH [53] and to the 'away address' of 124 Amblecote Road, London SE12 9TS [54] and a further notice dated 30 June 2015 which was posted to both 11 JKH [56] and to the away address [57].

    Stell accepts it received at least one of the notices from the council but argues that neither of them is a valid notice. No evidence was put before us as to the address or addresses at which the notice(s) were received by Stell. This issue was addressed in a written witness statement dated 12 March 2016 by Ms Elena Valdameri, a director of Stell. Ms Valdemeri was present throughout the hearing on 12 May 2016 but Mr Hewitt did not call her to give oral evidence.

16. Given those issues we propose to deal first with the factual question of whether notice was given to Ms Akhtar and then with the more legal argument as to whether either of the forms of notice are valid notices.

17. As it happens for the reasons explained below we find that the council has not shown that it gave either notice to Ms Akhtar. However, should it be held elsewhere that we are wrong in that finding, it follows that if those notices were given to Ms Akhtar our view would be that they are not valid notices for the same reasons as relate to the Stell notices that we have set out below.

The giving of the notices to Ms Akhtar

The statutory scheme

18. Section 20B of the Act was enacted to encourage residential landlords to demand service charges reasonably promptly and to ensure that tenants did not receive late demands unexpectedly or out of the blue. Thus subsection (1) provides that if a cost is incurred and no demand for the contribution payable by the tenant in respect of that cost is served on the tenant within 18 months, the tenant is not liable to pay his or her contribution to that cost.

19. Subsection (2) of section 20 provides a method by which a landlord may avoid the consequences of the sanction imposed by subsection (1) and provides:

    (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.

To rely upon this provision a landlord has to show that: *'the tenant was notified in writing'*. Such notification is generally referred to as a 'section 20B notice'.

20. The Act is silent as to the manner in which such notification may be given, save that it must be in writing. It was not in dispute that the ordinary rules governing the service or giving of notices apply. The landlord has a free hand as to the method it will deploy to give the notice to its tenant. Obvious examples of readily available methods include by post via Royal Mail, personal delivery via a commercial delivery or courier company or delivery by hand by an agent or a member of staff. In the event in this case the council chose a method which was intended to involve Royal Mail.

21. It was not in dispute that as regards the subject notices the following passage from para 17.242 *Woodfall: Landlord and Tenant* is material:

> ***Sending of notice to quit by post***
> *17.242*
> *Where a notice is sent by post, it is a question of fact when the notice arrives. In the normal course of events a notice is not given unless it arrives at the place where it is addressed. Where a letter is properly addressed, pre-paid and posted, there is a statutory presumption that it has been sent, and a statutory presumption that it is delivered in the ordinary course of post. The presumption is rebuttable.*

Thus we find the starting point is that a notice is not given unless it arrives at the place to which it is addressed, unless the statutory presumption applies.

22. The statutory presumption is set out in section 7 Interpretation Act 1978 which is in these terms:

> ***7. References to service by post.***
> *Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by* ***properly addressing, pre-paying*** *and* ***posting*** *a letter containing the document and, unless the contrary is proved, to have been effected at* ***the time at which the letter would be delivered in the ordinary course of post.*** [emphasis added]

The 1985 Act does not expressly authorise or require a section 20B(2) notification to be given by post but it does not prohibit the use of the post. Service by post has long been a common law permissive method of giving a notice. In those circumstances we infer that section 7 gives an implied authority to give a notice by post where that is permitted at common law. We acknowledge that this was not a point raised by

anyone at the hearing. We also acknowledge that there is some support for a contrary view.

In the Case Notes on *Westlaw UK's* annotation of section 7 there is the following passage:

"As for section 7, I am not sure that this applies at all. The 1994 Act does not expressly authorise the service of documents by post, it merely confers a general rule-making power with respect to inter alia 'the service of documents' (section 78(2)(c)). As I have discussed, even the 2000 Rules do not expressly authorise the Registrar to send documents by post. I have concluded that it is within his powers under the Rules to do so, but I doubt that the mere fact that the Registrar is not acting ultra vires 2 the Rules amounts to authorisation by the 1994 Act within the meaning of section 7 of the 1978 Act. Even if section 7 would otherwise apply, however, it is my opinion that a 'contrary intention' appears from rule 31(2) for reasons that I give below. ..."

but unfortunately the authority relied upon is not cited.

Given the circumstances and the way in which this issue was argued before us we proceed on the footing that section 7 is engaged.

23. So, the statutory presumption applies and in order to take the benefit of it the council has to show the notice was:

- Properly addressed;
- Pre-paid;
- Posted; and
- Where there is evidence to the contrary, the time at which the letter would be delivered in the ordinary course of post.

For many years in the United Kingdom letters were 'posted' by being delivered to the Post Office, later Royal Mail, for onward delivery to the addressee. We take posted to mean that, although now for commercial reasons Royal Mail offers a service whereby it collects mail from bulk senders. That means to us that a letter is now 'posted' when it is delivered into the Royal Mail system, whether by inserting it into a pillar box, leaving it at a Post Office, or a Royal Mail sorting office or when it is collected by Royal Mail from the sender for onward transmission to the intended recipient.

24. It was also not in dispute that where a landlord requires to establish good service or deemed service of a notice the following extract from *Tanfield Chambers: Service Charges and Management 3rd edition* is material:

15-033
... In the event that service is disputed by a tenant, it will be for the landlord to establish as a fact in issue good service or deemed service (if applicable) of the notice in question. Essentially this will involve proving:

(1) that a notice addressed to the tenant has been delivered to a particular address; and
(2) that this address was a good address for service/deemed service; alternatively, that the notice otherwise came to the actual attention of the tenant.

Whilst this observation was made in the context of a consultation notice under section 20 of the Act it was common ground that it also applied to notifications given under section 20B(2) of the Act.

We are reinforced in the approach we should adopt by the observations made by Mr Martin Rodger QC, Deputy President Upper Tribunal (Lands Chamber) in *Nottingham City Council v Tyas* [2013] 492 UKUT (LC) where, in the context of section 7 he said:

"34. ... If it is disputed or not admitted that a notice has been posted at all, then it is for the authority to satisfy the tribunal on the balance of probability that it was. A certificate of posting from the Royal Mail is one way in which the fact of posting could be proved, but it is not the only way and an authority may choose to rely only on a certificate or other evidence by its own officer. If it does so, it will be for the tribunal to decide whether it is satisfied that the notice was posted and, if the tribunal is so satisfied, it will be for the intended recipient to establish that it was not received."

26. Before leaving statutory provisions it is convenient to record that Mr Sadiq also placed some reliance upon the provisions of section 196 Law of Property Act 1925 (LPA 1925).

It was not in dispute that the subject leases incorporated the expression:

"(5) Section 196 of the Law of Property Act 1925 shall apply to any notice under this lease"

The provisions of section 196 LPA 1925 are as follows:

196.— Regulations respecting notices.
(1) Any notice required or authorised to be served or given by this Act shall be in writing.

(2) Any notice required or authorised by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be

served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned by the postal operator (within the meaning of Part 3 of the Postal Services Act 2011) concerned undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.

(6) This section does not apply to notices served in proceedings in the court.

27. Mr Sadiq accepted that a section 20B(2) notice was not a notice to be served under the lease or a notice to be served under the LPA 1925, (plainly it is a notice to be given under section 20B(2) Landlord and Tenant Act 1985), but he submitted that the incorporation of section 196 into the lease meant that all lease notices and all statutory notices required to be given by the landlord to the tenant in connection with the lease were subject to the section 196 provisions. In support of that proposition Mr Sadiq relied upon the expression *'any instrument ... coming into operation after the commencement of the Act ..."* in subsection (5).

28. Mr Sadiq did not provide any authority to support his proposition. We reject it for the reasons set out below:

28.1 We do not accept that the expression 'instrument' includes Acts of Parliament. Parliamentary draftsmen tend to be precise with such language. If it was intended the provision should apply to subsequent Acts it is more likely than not that the expression 'enactments' or something like that would have been used.

28.2 Section 205 Law of Property Act 1925 sets out general definitions and subparagraph 1(viii) states:

"Instrument" does not include a statute, unless the statute creates a settlement;"

28.3 Subsequent legislation in the property sector has made express provisions for the service of notices and documents and in doing so makes no reference to section 196 LPA 1925 being disapplied or modified in some way. Examples include:

Section 23 Landlord and Tenant Act 1927;
Section 66 Landlord and Tenant Act 1954;
Section 93 Agricultural Holdings Act 1986

The council's case on deemed service

29. The council relied upon the evidence of Mr Joseph Sheehy. His witness statement it at [37] and the method of service is described in paragraph 24. At the hearing Mr Sheehy expanded on that in his oral evidence.

30. In essence he said that the council had about 15,000 section 20B(2) notices to serve. The council entered into a contract with Swisspost to prepare and serve them on its behalf. The council prepared the basic draft notice as a template and sent it by email to Swisspost with an excel spreadsheet that includes the name and addresses for service on the lessees plus other relevant data in a different format spreadsheet. He said that Swisspost then uses software akin to mail merge and using the template inserts the lessee details, address, the address of the subject property to which the notice relates and the contract expenditure amount. Before printing the whole batch of letters Swisspost send to the council a representative sample for review. Once officers are satisfied that the mail merge process has accurately occurred Swisspost is authorised to print and arrange delivery of the notices in the run.

31. We pause to observe at this point that as regards the two batches of notices we are concerned with, namely the 30 May 2014 batch and the 30 June 2015 batch, the council did not adduce any evidence as to when and by whom the checks and reviews described by Mr Sheehy were actually carried out.

32. Mr Sheehy went on to explain in his witness statement that once given authority to print the notices they are given to Royal Mail. He said that Swisspost then confirmed to the council that Royal Mail had received the letters for delivery. It is not clear to us how that confirmation was given. If it was by way of documents, copies were not provided to us in respect of either batch of mailings. We find that we must treat that part of Mr Sheehy's evidence with some caution.

There was no evidence presented to us as to when or how the batch of mailings were put into Royal Mail's postal system

33. We went carefully through the few documents disclosed by the council on this point as follows:

2014 Batch

[159] is an invoice dated 18 June 2014 issued by Swisspost to the council for £2,036.40. It refers to a quantity of 14112. It cites a Job Title of *"Major Works Notification S20B Mailing (May 2014)"*, a Job No of *"7917704"* and a Project No of *"10110208"*
It also bears the expression *"Date Delivered 05/06/2014"*

Evidently the contract was placed with Swiss Post Solutions Limited – a Swiss Post company – which is sometimes referred to as SPS for short.

[160] is another invoice, virtually identical to [159] - it bears the same job and project numbers but this invoice is for £5,092.44

[161] is an invoice which appears to be issued by Secured Express Limited to Key Print. It is dated 2 June 2014. The 'Job Date' is 30 May 2014 and in the column headed 'Qty' the number 13825 has been inserted

[162] is another invoice issued by Secured Express limited to Key Print. Some detail had been redacted. What remains appears to record:

'Job No 14794 SPS s20B Mailing Letter 20 Unsorted Mech 30/05/2014'

[163] is an email dated 3 March 2016 from Keith Shears to Trevor Wellbeloved which records the following information:

'14,112 records supplied
Fell into the following mailing categories:
13,825 x mailsort (Secured Mail attached)
9 x unsorted (Secured Mail attached)
88 x Pull Packs (list supplied attached)
[]90 x Overseas (see attached – however do not have a copy of the docket in the job bag) (the exact figure is not known because it has been partly obliterated by a hole punch).

Hope this helps'

2015 Batch
[164] is an invoice SPS to the council £262.01 dated 21 July 2015
The 'Job Title' is *"Not Been Billed s20B Mailing (July 2015)"*
The Job No is *"8512534"* and the Project No is *"10959049"*.
The 'Qty' is *"197"*.
It also bears the expression *"Date Delivered 09/07/2015"*

[165] is another invoice SPS to the council also dated 21 July 2015. It is virtually identical to [164] save that it is for £2,278.80.
The 'Qty' is *"16268"*.

[166] is another invoice SPS to the council also dated 21 July 2015. Again virtually identical to [164] and [165] save that it is for £5,593.38.
The 'Qty' is *"16071"*.

[167] is a purchase order issued by the council to SPS. It is dated 8 July 2015 which records:

Description	Order qty	Unit	Price per unit	Net value

Annual s20B Mailing Postage UK	1	Each	4,661.15	4,661.15
Annual s20B mailing Postage overseas	1	Each	262.01	262.01
Annual s20B Print Costs	1	Each	1,899.00	1,899.00

[168] is a document headed 'CITIPOST COLLECTION SHEET' and records:

Job No	**Job Description**	**Format**	**Item Weight (g)**	**Qty mailed**	**Comments**
16603	SPS – Annual s20B Mailing	L	12	16064	MS
16603	SPS – Annual s20B Mailing	L	12	7	STL
16603	SPS – Annual s20B Mailing	L	12	197	O/seas

34. At paragraph 28 of his witness statement Mr Sheehy said that: *"The Respondent was notified by Swisspost that it had arranged delivery of the letters to the Applicants and has not received any information to the contrary."* Reference to the 'Respondent' is a reference to the council. Reference to the 'Applicants' is a reference to Ms Akhtar and Stell. It was not made clear to us what form that 'notification' took. If it was by way of a document, a copy was not provided to us.

In his oral evidence Mr Sheehy was not able to explain when, where or how the batch letters got into the Royal Mail system. He was unable to explain clearly the role evidently played by subcontractors engaged by Swisspost. He said that in 2014 Secured Mail sorted the letters and delivered them to local Royal Mail sorting offices and in 2015 Citipost did the same thing. But there was no detail or supporting evidence as to how, where and when those deliveries were made.

Mr Sheehy said that the covering envelopes bore a return address for the council. He said that if letters are not delivered they should be returned to the council unopened.

We were also told that the arrangement with Swisspost was that the letters would be sent out franked with the cost of second class mail.

35. Mr Sheehy also told us it was the policy of the council to address the s20B(2) notices simply to 'The Leaseholder' followed, on the next line down by the first line of the address. We see an example of that at [52] and [53] which are the May 2014 notices, where the address window is, as regards 54 JKH:

"The Leaseholder
54 John Kennedy House
..."

Mr Sheehy explained the reason for that was that sometimes lessees assign their leases and notice of assignment is not always given with the consequence that they are not always confident of the name of the current lessee at any given moment.

The same format was not adopted for the 2015 mailing. Here the address window for 54 JKH [55] records:

"5898115AG000055/380/1/010052
54 John Kennedy House
..."

It is fair to say that close to the top of the notice there is the expression: *"To the Leaseholder of 54 John Kennedy House"* but that would not appear in the 'address window'. Mr Hewitt demonstrated this to us by producing a council A5 envelope with various measurements annotated.

It may be noted that all three 2015 notices produced to us [55- 57] bear the long line of numbers immediately above the first line of the street address.

36. Mr Sheehy struck us as being a genuine and honest witness. In response to questions he was careful and measured. In general terms we accept his evidence of what he was aware of personally, in so far as that goes, but he was not able to assist as to how Swisspost managed the printing and posting of the batches of notices.

37. Whilst dealing with oral evidence it is convenient to make our findings of fact on Ms Akhtar's evidence.

38. In short Ms Akhtar told us that she had not seen the subject S20B(2) notices until they had been included by the council in the disclosure file produced for the previous hearing. Ms Akhtar told us that she was

always concerned about the cost of the proposed major works and kept a file into which she placed all documents received on the subject. She said that if she had received the notices she would have placed them in the file. They were not in the file so she was confident she had not received them.

39. At one time the council suggested that Ms Akhtar may have sublet 54 JKH and that notices sent to her at that address might not have been passed on to her. In the event Ms Akhtar said that she had never sublet the whole flat and that she has lived in 54 JKH throughout the material period. The council eventually accepted that position. Ms Akhtar did accept that for part of the period she had a lodger from time to time who shared the flat and helped with the bills. There was more than one lodger, but only one at a time. Ms Akhtar was cross-examined closely on the lodgers point and it was suggested to her that if mail was delivered when the lodger was at home, but Ms Akhtar was not, it might not have been passed on to her. Ms Akhtar was as certain as she could be that that did not occur.

40. Some of Ms Akhtar's answers during cross-examination were confused and confusing. However, we have no reason to believe that Ms Akhtar was not being truthful with us. There was no evidence before us that the lodger interfered with Ms Akhtar's mail. We have no reason to disbelieve her on that point. We accept Ms Akhtar's evidence and we find as fact that she did not receive either of the section 20B(2) notices dated 30 May 2014 and 30 June 2015.

Summary and discussion

41. Has the council produced evidence to show that either or both of the notices were:

- Properly addressed;
- Pre-paid;
- Posted; and
- The time(s) at which in the letter (s) would be delivered in the ordinary course of post?

We find that it has not.

On the 'properly addressed' point we conclude that in our judgment a notice addressed in the 'address window' of the envelope to, for example:

"The Leaseholder
54 John Kennedy House ..."

would be properly addressed.

However, a notice addressed in the 'address window' to, for example:

"5898115AG000055/380/1/010052
54 John Kennedy House ..."

would not be properly addressed to the lessee. There is no indication of the intended recipient or means by which the intended recipient might be identified.

42. Whilst there is evidence before us that the notices to be sent out were intended to be franked with the cost of second class mail there is no evidence at all before us as what pre-payment, if any, was actually franked on the envelopes that were supposed to be sent out, both generally and specifically as to the notices intended for Ms Akhtar.

43. Were the notices posted? We simply do not know. There is no evidence before us as to when, where and by whom the notices were posted in the sense of being put into the Royal Mail system. In our judgment invoices from Swisspost to the council do not amount to evidence on any of those points. No satisfactory explanation was provided to us as to the roles played by Secured Express Limited, Key Print and/or Citipost. There was no evidence that any of those companies actually did what they were supposed to have done. At the very least we would have expected to see some evidence from Swisspost taking us through the process ending up with an explanation as to when, where and how the notices were posted with Royal Mail. There is also quite clearly lack of clarity as to when the envelopes were put into the Royal Mail system. It can be seen from paragraph 33 above that a variety of dates are mentioned.

44. We acknowledge that Stell admits it received one or both of the notices. Thus there is some evidence that some notices were sent out. Evidently Stell's notices were sent to both the flat address and to its 'away address'. We do not know at which address(es) the notice(s) was received. However, in our judgment the fact of receipt of one notice by one lessee does discharge the burden on the council as regards service of notices on Ms Akhtar.

45. We also acknowledge that Ms Akhtar regularly received other documents/demands sent to her by the council. Some examples were shown to us. However the difference there appears to be that they were addressed to her by name and posted locally, not via the Swisspost bulk mailing process adopted for the S20B(2) notices.

46. Finally, if notices to Ms Akhtar were sent out on behalf of the council when would they be delivered in the ordinary course of business? We do not know because the council did not adduce any evidence on this point. At the least we would have expected some evidence from a Royal Mail employee indicating when a letter put into the Royal Mail system at the specified location, at the specified time and date properly pre-paid or franked with the cost of second class mail would, in the ordinary course of business, have been delivered to an address in post code SE16 2QF.

47. For these reasons we find that the council has not shown that either notice was actually delivered to Ms Akhtar and it has not shown that the statutory presumption in section 7 Interpretation Act 1978 applies. Further, even if the council could have shown that the statutory presumption applies, we find the contrary is proved because we accept Ms Akhtar's evidence that she did not receive either of the notices.

48. Before leaving this topic there are a couple of observations we should make.

49. The first is that Mr Hewitt filed a skeleton argument which had been prepared by Mr Sam Madge-Wyld of counsel. In its heading it contains a number of errors but appears to have been filed on behalf of the lessees of 11 and 54 JKH. It states that both notices were served on both lessees. At the hearing Mr Hewitt clarified that this was in error. He said that Ms Akhtar had always been clear that neither of the notices had been served on her. We thus treated the submission as having been made on behalf of Stell only. Mr Sadiq did not take any objection to our doing so.

50. The second is that during the course of the hearing the council gave the impression that a soft approach should be taken because it had something like 15,000 S20B(2) notices to give and that it was an expensive exercise. We reject that. First, it is perhaps a telling point that its procurement processes for major works are such that it finds itself on two separate occasions about a year apart when it has to serve so many S20B(2) notices. The second is that S20B(1) is quite clear as to the sanction to be imposed if a reasonably prompt demand for service charges is not given to the lessee. Section S20(2) enables a landlord to avoid that sanction by giving a notice. It seems to us that a landlord who wishes to take advantage of that provision should make a degree of effort to ensure that the notice is given to its lessees. In our judgment treating such notices as if they are akin to a junk mailing process is simply unacceptable.

Were either or both of the notices valid notices compliant with S20B(2)?

51. First it may be helpful to set out some factual context against which the notices fall to be construed.

52. The major works project included works within some individual flats (which the council lets to its secure tenants) typically works to kitchens and bathrooms. These works were always to be at the sole cost of the council. At the outset of the project/correspondence the council referred to these costs as being 'non-rechargeable'.

53. Works to the block and common parts were to be shared with the council and its long lessees each of whom would pay their appropriate percentage. As regards 54 JKH our decision part 1 determines what that percentage is.

54. In addition to the cost of the works incurred or paid to the main contractor the council also sought to recover from its long lessees contributions to the professional fees incurred (both external and internal) and an administration fee.

55. The correspondence as regards 54 JKH starts with a consultation notice dated 26 October 2012 [58]. It describes the project as: ***"John Kennedy House 2012 Refurbishment Contract"***. It is a six-page document.

On the first page it clearly identifies Ms Akhtar's estimated contribution to the works as being £42,028.55.

On the second page it makes reference to a long term partnering contractor, says the works have been estimated to cost £4,485,879.65 and were expected to take 50 weeks to complete with a 12-month defects period.

On the third page it helpfully stresses that the long lessees do not contribute to the cost of non-rechargeable works identified on an accompanying spreadsheet. It states the cost of the rechargeable works was estimated at £3,140,012.64.

Having explained how Ms Akhtar's percentage contribution is arrived at it helpfully explains clearly how her estimated contribution of £42,018.55 is arrived at, as follows:

"Major works to your building	*£3,140,012.64*
Your Contribution	*£34,568.95*
Professional fees @ 10.5%	*£ 3,629.74*
	£38,198.69
Administrative fee @ 10%	*£ 3,819.87*
Estimated service charge	***£42,018.55***

Before leaving this document we wish to observe that the numbers given in the above document may not have entirely accurate. At [93] is a calculation sheet. It confirms that the total estimated cost of works was £4,485,879.66 but it breaks that down as to:

Re-chargeable	£3,084.592.09
Non-rechargeable	£1,401,278.57

56. A broadly similar format of consultation notice was adopted for 11 JKH but as that is a smaller flat the estimated service charge amounted to only £28,012.37 [68].

57. One might have thought that a similar format would be adopted by the council as the project progressed, in order to compare like with like, and to keep lessees up to date with their personal obligations. Also one might have thought that a similar format would be adopted for the purpose of any S20B(2) notices that might be necessary. That did not turn out to be the case.

The S20(B) (2) notices.

58. The content of the two notices is critical to validity and for ease of reference we set out the text of both notices in the schedule to this decision part 2. We have cited the notices referable to 54 JKH but the text is the same as for those in respect of 11 JKH. We have taken the opportunity to highlight in yellow key passages.

59. As regards the notice dated 30 May 2014 the council stated that the contractor had invoiced £4,640,795.80. This figure is derived from a spreadsheet we were given and which we have page numbered [118.1]. Mr Sheehy took us through it. It sets out details of the sums certified from time to time as being payable under the main contract. As at 18 April 2014 Interim Valuation No:13 had been issued [118] recording net value of works to date at £4,593,564.38. But, also included in the spreadsheet were four entries totalling £47,231.42 concerning the cost of fire damage works to the nearby Brydale House which had been included in error.

60. Further the sum of £4,640,795.80 cited in the notice included all of the non-rechargeable costs. Mr Sheehy said that the exact amount of the non-rechargeable costs could not be ascertained until the final account had been agreed with the main contractor, but in broad terms he said the amount of the non-rechargeable costs would be in the region of £1.5m. There is support for that view because when the S20 consultation notice was issued in October 2012 it stated that the estimated contract sum was £4,485,879 of which £3,140,012 was estimated to be rechargeable, so that the non-rechargeable costs were then estimated to be £1,345,867.

61. What the notice did not include or make any reference to was the professional fees incurred or the administration costs incurred. It is clear from a second spreadsheet we were handed [118.2] mentioned below that the vast majority of the professional fees claimed were incurred over the period 13 March 2012 and 30 April 2014 so that the council would have been aware of them in May 2014 when the first notice was prepared.

62. As regards the notice dated 30 June 2015 the council stated it had been invoiced £5,079,953 as of May 2015. This figure is derived from a spreadsheet we were given and which we have page numbered [118.2]. Mr Sheehy took us through it. It sets out details of the sums certified from time to time as being payable under the main contract. By March 2105 the final account had been agreed as between the council and the

main contractor in the sum of £4,667,099.80 [122]. That sum was included in the spreadsheet at [118.2] Also included were quite a number of items entitled 'Construction fees' some of which were internal (to the council) and some of which were paid to external advisers. These totalled £332,554.41. Curiously also included was expenses totalling just over £116,278 which were incurred prior to the October 2012 estimate being prepared and which had not been included in the previous spreadsheet at [118.1] which been prepared a year earlier. A total of £47,943.34 referable to fire damage works at Brydale House was included, again in error. Also included was *"£1,793.00 John Kennedy LVT Fee 1"*.

63. Mr Sheehy again said that it was reasonable to assume that within the agreed contract sum of £4,667,099.80 the non-rechargeable costs would be in the region of £1.5m. Thus the rechargeable cost of works as concerns the long lessees would be in the region of £3,167,100

64. With a rechargeable contract sum of, say £3,167,100, there would be added

Rechargeable contract sum	£3,167,100
Professional fees @ 10.50%	£ 332,545
	£3,499,645
Administration fee @ 10.00%	£ 349,964
	£3,849,609

65. We can see that in this notice the council has still not made an adjustment for the non-rechargeable costs (of about £1.5m), has still (wrongly) included nearly £48,000 for fire damage works to Brydale House, has included some miscellaneous items some of which appear questionable (for example LVT costs and hire of halls), has included professional fees of £332,554, which is about right. This clearly suggests that when this notice was prepared the council were aware that the rechargeable costs were in the region of £3,167,100 and that the 10.5% professional fees recoverable in respect of such costs were in the order of £332,500.

What the council did not include for was an administration fee of around £350,000.

66. It was explained to us that the administration fee of 10% is to reflect the cost of staff engaged by the council to monitor and supervise the project and the subsequent accounting exercise. By March 2015 the contract was substantially complete and the final account agreed with the contractor. Thus by that time the vast bulk of administering and supervising the contract will have been carried out and the council will by then have incurred the costs of the staff involved. Such authorities as

there are on the question of when costs are incurred are not of assistance to us because they do not concern this topic and when in-house costs incurred by a landlord over a period of time are incurred for the purpose of section 20B. It seems to us it is logical to conclude that such costs are incurred when the staff concerned are paid their salaries and when the on-costs of employing staff, such as national insurance and pension contributions, are incurred.

67. The fact that the 10% contract administration fee might be added to a leaseholder's account at some later stage does not, in our judgment, mean that the cost is incurred on the date when it is added to the account. The date the amount is added to the leaseholder's account is merely the date on which the council chooses to begin the process to recover the contribution from the lessee. Under the terms of the lease the council claims to be entitled to impose a 10% administration fee on major works projects. However, where that fee has been incurred but not demanded of the lessee within 18 months, the council is only entitled to recover it if it has been the subject of a valid S20B(2) notice.

Are the notices valid?

68. Against the above background we have to consider whether either or both of the notices are valid notices.

69. Mr Sadiq submitted, and we agree, that there is no authority directly on point to assist us.

70. What may be of assistance to us are the observations made by Morgan J in *Brent LBC v Shulem B Association Ltd* [2011] EWHC 1663 (Ch). The copy report provided to us is [2011] 1 WLR 3014 and we shall refer to paragraph numbers of that report.

71. *Shulem B* concerned major works carried out by a local authority and the contribution to the costs incurred payable by the leaseholders. Shulem B held leases of 15 flats. Clause 2(6) of the leases was a fairly crude form of service charge provision. It did not impose an obligation on the tenant to pay in advance and did not provide for year-end accounts with balancing debits or credits as the case may. The judge held that the landlord was entitled to demand the tenant's contribution to costs of works once they had been incurred. The ratio of the case was the validity of a contractual demand for payment. The judge concluded that the demand relied upon by the landlord was not a valid contractual demand within the requirements of clause 2(6) of the subject leases. He held that clause 2(6) entitled the landlord to demand a due proportion of actual expenditure. It did not allow the landlord to require payment of a figure which the landlord states is not based on actual expenditure.

72. However, in *Shulem B* the question was raised as to the validity of a notice given pursuant to S20B(2) and the judge helpfully went on to give his views on the notice. Of course those remarks are *obiter*. That means they do not form part of the *ratio decideni* of the case and thus do not create binding precedent, but may be cited as 'persuasive

authority' in later cases. Given that the remarks were made by Morgan J, an eminent and very experienced property lawyer and judge, it is our view that they must command considerable respect and weight.

73. In *Shulem B* the landlord gave a notice which stated that the actual costs had not been calculated. It enclosed an invoice for payment on account and said that a further invoice would be issued once the actual costs were ascertained. It also said that if the actual costs were less than the estimated on account invoice a refund of any excess would be made.

It then went on to set out the estimated costs as follows:

Scaffold	£948.00
General repairs and decorations to external and communal parts	£8,268.68
Communal windows	N/A
Windows to property	£4,032.85
Communal doors	N/A
Preliminaries	£2,364.43
Sub-total	£16,834.62
15% Management fee	£2,525.19
Total	**£19,359.81**

The notice then said:

"We will offer a discount of 5% if this invoice is paid in full within 28 days of the above date.

Therefore full payment must be received by 23 March 2006.

Your discounted charge is £18,391.82"

74. The judge reviewed the provisions of S20B(2) and made a number of observations in his judgment. Given the importance of them we set them out in full:-

55. A written notification under section 20B(2) must state 'that those costs had been incurred'. 'Those costs' refers back to 'the relevant costs in question' and this in turn refers back to the costs in question for the purposes of section 20B(1), that is, the costs which the lessor wants to take into account in determining the amount of a service charge but which costs were incurred more than 18 months before a demand for payment of the service charge. Thus, the phrase 'that those costs have been incurred' can be expanded so that it reads 'that the relevant costs which were incurred more than 18 months before the relevant demand for payment of the service charge have been incurred'.

57. If the notification for the purposes of section 20B(2) has to state some information as to the amount of the relevant costs, is it sufficient if the lessor

states that it does not know what the costs have been but instead states that it knows what it expected the cost to be in advance of the work being done? In my judgment, subsection (2), taken literally, appears to require the lessor to state the costs it has actually incurred. A statement that, in advance of the work, it expected to incur a particular cost does not give the necessary information.

58. I have considered what a lessor should do if it knows that it has incurred costs but it is unable to state with precision what the amount of those costs was and it is concerned to serve a notice under section 20B(2) to stop time running against it. In my judgment, there is a clear practical course open to a lessor in such a case. It should specify a figure for costs which the lessor is content to have as a limit on the cost ultimately recoverable. In my judgment, a lessor can err on the side of caution and include a figure which it feels will suffice to enable it to recover in due course its actual costs, when all uncertainty has been removed. If a lessor states that its actual costs were £x that will be a valid notification in writing for the purposes of subsection (2) even though the lessor knows that it may turn out that the costs will be somewhat less than £x. If the lessor wants to ensure that the lessee is not misled by such a notice, it will be open to the lessor to explain that although it is making a clear statement that its costs were £x, it hopes that it might be in a position later to state that the actual costs were less than £x. An example might be where the lessor is in dispute with the builder as to the sums payable to the builder. The lessor could properly notify the lessee that the builder is claiming a sum which means that the costs will be £x but the lessor is attempting to negotiate with the builder so that the resulting costs will be less. In such a case, the lessee would not be misled and the lessor would have protected itself by making a statement that the costs it had incurred were £x. In any event, it is my view that if a lessor states that the cost was £x, it satisfies the subsection even in a case where it is not certain as to what the costs will eventually turn out to be. If the lessor states that the costs are £x, and it later puts forward a service charge demand based on a smaller sum, then the statement of the greater amount includes a statement of the lower amount. In the present case, no issue arises as to what the legal result would be if the section 20B(2) notice referred to £x and the lessor later put forward a service charge demand which takes into account a figure which is greater than £x. My view is that the lesser sum of £x does not include the excess over £x so that no notification for the purposes of the subsection was given in relation to the excess.

59. The second matter which must be stated in a notification under section 20B(2) is that the tenant would subsequently be required under the terms of his lease to contribute to the costs by the payment of a service charge. Taken literally, this does not oblige the lessor to state the resulting amount of the service charge. On this reading, there will be a valid notification for the purposes of the subsection if the lessor notifies the lessee that it has incurred costs of £x on certain service charge matters without telling the lessee what sum the lessee will ultimately be expected to pay. It may be that in some cases, the lessee will know what proportion of the total costs it will have to pay. The lease in question may identify a fixed percentage of service charge costs. However, many leases do not specify a fixed percentage. It would no doubt be of more use to a lessee to be told what sum it will be expected to pay by way of service charge but, in my judgment, the words of section 20B(2) do not clearly so require.

65. Accordingly, my conclusion as to the interpretation of section 20B(2) is that the written notification must state a figure for the costs which have been incurred by the lessor. A notice which so states will be valid for the purpose of subsection (2) even if the costs which the lessor later puts forward in a service charge demand are in a lesser amount. Secondly, the notice for the purposes of subsection (2) must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge. It is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee nor what the resulting service charge demand will be.

66. It remains to apply this interpretation of section 20B(2) to the letter of 23 February 2006. I have already analysed the contents of that letter in some detail. The letter does not state the actual costs which were incurred by the lessor in relation to the major works. It does state that major works have been carried out and that the lessor has incurred actual costs. The letter states that the lessor does not know what those actual costs were. The letter repeats the figures which were initially provided in March 2004 as a prediction of future cost. There is a separate point which can be made about the statement of costs in the letter. The letter does not attempt to say what were the total costs which will be taken into account in determining the amount of the service charge but rather goes to the end of the process by identifying (on the basis of estimated costs) the sum which will be claimed by way of service charge from the lessee. I think it is likely, in another case, if a lessor served a notice stating that it had incurred costs on major works and that the lessee's liability to pay would be a specified sum that would be taken as sufficient compliance with section 20B(2). However, in the present case, the letter does not state the actual costs which have been incurred nor does it state what figure will be payable by the lessee as its proportion of actual costs but rather it states what the lessor says is the lessee's proportion of estimated costs.

67. I can see that if the letter of 23 February 2006 had been drafted somewhat differently it would then have been a valid notification under subsection (2). If the lessor had stated that the actual costs were a specified figure and the lessee's proportion of those actual costs was again specified, that would be valid for the purposes of subsection (2), even though the lessor did not truly know what the actual costs would finally turn out to be. Indeed, as explained earlier, I would uphold a notice which stated that the actual costs were £x even if the lessor added a statement that the lessor might be able to inform the lessee in due course that it had managed to reduce its liability towards those costs.

69. For the sake of completeness, I will address the second requirement of subsection (2) that the notice tells the lessee that he will subsequently be required to contribute to the costs by the payment of a service charge. The letter of 23 February 2006 is not drafted with this requirement in mind. Instead of stating that the lessee will subsequently be required to contribute by way of service charge, it purports to state that the lessee is thereby required to contribute by way of a service charge. However, adopting a nontechnical approach, in view of the fact that the letter states that the lessee is required to contribute by way of a service charge and if the actual costs are greater than the sums identified in the letter the lessee will then be required to pay the difference, I would have concluded that the letter of 23 February 2006 did contain the second statement required by subsection (2).

75. For the reasons explained the judge held that the letter of 23 February 2006 did not constitute a valid notification in writing for the purposes of S20(B)(2).

The arguments raised

76. The first argument was raised by Mr Madge-Wyld in his written submissions was that it was clear from *Shulem B* that a valid notice:

> *"must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge".*

As to that submission Mr Madge-Wyld plainly had in mind paragraph 65 of Morgan J's judgment.

77. It was not disputed by Mr Sadiq that the express words cited above in paragraph 76 were not included in either of the notices. Mr Sadiq submitted that it was clear from both notices that the recipient lessee would be required under the terms of their lease to contribute to the costs mentioned by the payment of a service charge. Thus whilst not deploying the exact words of S20B(2) Mr Sadiq submitted that the effect of the words was sufficiently clear to the reasonable recipient.

78. We have considered carefully the guidance given by Morgan J on this point in paragraph 65 of his judgment. He makes clear that a landlord *"**must** tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge"* (emphasis added). The guidance is that the obligation imposed by S20B(2) is to use those precise words is an imperative. The judge does not qualify his guidance by use of words such as 'or words to similar or like effect'.

79. Whilst we accept there is some force in the submission made by Mr Sadiq we find we are obliged to follow the guidance given by Morgan J. Thus we find that neither notice is a valid notice because they do not contain the material words in the format set out in S20B(2).

80. In case it be held that we are wrong in the above decision it is helpful to the parties if we now go on to make our findings on the other challenge to the notices.

81. Thus the next issue we address is the submission that the costs said to have been incurred and identified in the notices are simply wrong and incorrect by a margin; and include costs which are non-rechargeable to the leaseholder and fail to include costs which had been incurred and which would normally be rechargeable and the quantum of the errors is so significant that it renders the notices invalid.

82. Our findings are that S20B(2) notices concern costs incurred by the landlord which the tenant, under the terms of the lease is liable to contribute to.

83. In the May 2014 notice the council states that the contractor has invoiced £4,460,795. It acknowledges that that sum 'may' include non-rechargeable costs. The figure specified is plainly not 'costs incurred which the tenant is liable to contribute to'. The council accept that included in that sum there is about £1.5m of non-rechargeable costs.

The use of the word 'may' include non-rechargeable costs is perhaps a little disingenuous when the council were aware that it did include such costs and that those costs were to the tune of about £1.5m.

That is about one third – quite a margin. Also the council accepts that it wrongly included just over £47,231 of costs referable to the fire damage works concerning Brydale House – so the margin grows.

84. In *Shulem B* Morgan J explains that a landlord must state a figure for the costs which have been incurred. Where a landlord does not know exactly what costs have been incurred he is entitled to put forward a figure to act as a cap. If the actual costs come in below the cap the lesser sum is payable, but if they come in above the cap, the cap limits the tenant's contribution. Thus clearly a little leeway is allowed. However, we find that if the figure selected for the cap is so ridiculously high as to be unsustainable and plainly wrong and unjustifiable it invalidates the notice. The tenant is not being given proper and realistic information. This is the more important where, as here, the notice is being given by a landlord so that it can avoid the consequence and sanction of not complying with S20B(1) of the Act.

85. We also observe that the May 2014 notice does not make any reference to or include the substantial professional fees and administration fees that the council had incurred by the time that notice was prepared. Thus, in any event the council cannot now seek to recover a contribution to those two items of costs under the May 2014 notice.

86. As to the June 2015 notice, the council states that the contractor has invoiced £5,079,953. Again the council acknowledges that that sum 'may' include non-rechargeable costs. In fact that statement is wrong because by this time the parties had agreed the final account as between the contractor and the council at £4,667,099 so the contractor ought not to have invoiced £5,079,953. Again, the figure specified is plainly not 'costs incurred which the tenant is liable to contribute to'. The council accept that included in that sum there is about £1.5m of non-rechargeable costs. That is about one third – quite a margin. Also the council accepts that it includes just under £48,000 of costs wrongly included because they are referable to fire damage works concerning Brydale House – so the margin grows.

87. We do accept that the figure of £5,079,953 includes the £4,667,099 agreed with the contractor plus about £332,554 said to comprise professional fees incurred – although some of them may be questionable on a more detailed analysis. Again the figure given does not include the administration costs which had been incurred by the council prior to the date when the notice was prepared.

88. We find this notice is also invalid for the same reasons as given above. The information imparted in the notice is just so wrong and incorrect. In our judgment the information does not do what Parliament intended it to do when S20B(2) was enacted.

89. Before leaving this subject we wish to comment on the guidance given by Morgan J in *Shulem B.* In paragraph 65 he sets out what is required for a valid notice and then says:

> *"It is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee nor what the resulting service charge demand will be."*

Whilst we hesitate to challenge that guidance we wish to make the point that in our view the purpose of S20B(2) was to inform tenants of what costs had been incurred and that they would be required to contribute to them by the payment of a service charge. In our judgment that would involve giving to the lessee some meaningful information as to what the amount of that contribution might be. We question whether simply informing a tenant that costs of, say, £5m have been incurred and that he will be required to contribute to it gives him any meaningful information as anticipated by S20B(2). If the lease specifies a fixed percentage contribution a tenant will be able to do the maths and work it out for himself. That is not the case with regard to JKH, and indeed many other forms of lease that we regularly come across in our tribunal work.

90. As regards JKH the council has the model well to hand. It is set out clearly in the October 2012 consultation notice (see para 55 above). It could so easily be replicated for the subsequent S20B(2) notices. If such an approach is not required by S20B(2) we would strongly recommend the council to adopt it for reasons of good practice and tenant relations.

The steps ahead

91. We are conscious of the implications for the council arising from our decision part 1 and this decision part 2. In respect of the determinations set out in those two parts time shall run for the purposes of rules 52 and 55 as from the date on which this decision part 2 is sent out to the parties. Those rules concern any applications for permission to appeal and/or review of a decision.

92. We then need to allow time to pass for the parties to consider whether they wish to make an application for permission to appeal and for any such applications to be processed.

93. In relation to both the application made by Ms Akhtar and the court referral in respect of Stell there will be some loose ends to tidy up.

94. Accordingly, Judge John Hewitt proposes to undertake a case review during week commencing 18 September 2016 to ascertain what the position is at that time and to give such further directions as then will be appropriate. That may include convening a case management conference to clarify with the parties and their respective advisers what the loose ends are and how they are best dealt with.

95. Meanwhile any party is free to make an application in writing if there is an urgent issue which needs to be dealt with.

Judge John Hewitt
11 July 2016

The Schedule

The 30 May 2014 notice

Section 20B Landlord and Tenant Act 1985

Notice of Costs Incurred
The Leaseholder
54 John Kennedy House
Rotherhithe Old Road
London
SE16 2QF

Southwark Council

Reference:12/150P6
Contact: Jennifer Dawn
Tel: 020 7525 4324

Property Ref: 45699
LBS Property: 54 JKH

380/1A/005948

John Kennedy House Refurbishment 2012 Major Works

On the 26 October 2012 the council served on you a Notice under Section 20 of the Landlord and Tenant Act 1985 (as amended) in respect of proposed major works to your block and or Estate with an estimated contract cost of £4,485,879.65

This notice is to inform you that costs have started to be incurred in respect of this contract and as of May 2014, the contractor has invoiced Southwark Council for £4,460,795.80. This amount is a gross figure and may include costs for works that are non-rechargeable to leaseholders.

S20B of the Landlord and Tenant Act 1985 (as amended) requires the landlord either to invoice or serve notice on leaseholders regarding costs incurred within 18 months. This notice also serves to inform leaseholders of the

contract spend in order to prepare and inform them in advance of the actual invoice.

The final account for the contract will be prepared when the full costs are confirmed, you will be provided with a summary of expenditure and your account will be adjusted to reflect any increase or decrease in charges.

The details of expenditure are not yet known in respect of your individual service charge implications; you will be notified of the actual contract costs and therefore your actual contribution when the final account is agreed.

Please note that this is not an invoice.

If you have any queries regarding this notice please contact the Capital Works Group at 153-159 Abbeyfield Road, London SE16 2BS

Yours sincerely

The 30 June 2015 Notice

The heading was the same save that the 'Contact' was named to be Tabitha Cox

John Kennedy House Refurbishment 2012 Major Works

We are writing to you because we haven't been able to calculate the service charge cost on this contract yet. You have been invoiced for this work which has started on site, but the final costs have not yet been agreed. When this is the case the landlord must inform leaseholders of how much has been spent on the contract to date.

This letter is not an invoice and no action is required from you.

S20B of the Landlord and Tenant Act 1985 (as amended) requires the landlord either to invoice or serve notice on leaseholders regarding costs incurred within 18 months. This notice is to inform you that costs have started to be incurred by the council in respect to this contract.

On the 26/10/2012 the council served on you a Notice under Section 20 of the Landlord and Tenant Act 1985 (as amended) in respect of proposed major works to your block and or Estate with an estimated contract cost of £4,887,814.48 plus professional fees. You were invoiced for these estimated costs in March 2013.

Southwark Council has been invoiced for £5,079,953.00 as of May 2015. This amount is the figure for the whole contract and may include costs for works within the contract that are non-rechargeable to leaseholders.

The final account for the contract will be prepared when the full costs are confirmed. The details of expenditure are not yet known in respect of your individual service charge implications; you will be notified of the actual contract costs and therefore your actual contribution when the final account s agreed. You will be provided with a summary of expenditure and your account will be adjusted to reflect any increase or decrease in charges.

This notice also serves to inform leaseholders of the contract spend in order to prepare and inform them in advance of the actual invoice. If you have any queries regarding this notice please contact the Capital Works Group at 153-159 Abbeyfield Road, London SE16 2BS.

Yours sincerely