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HM Courts & Tribunals Service

Residential Property
TRIBUNAL SERVICE

Case reference: LON/00BG/LDC/2012/0080

DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION FOR DISPENSATION WITH THE CONSULTATION REQUIREMENTS

Premises:	**All the leasehold flats on the Barkantine, St John's, Kingsbridge and Samuda Estates on the Isle of Dogs**
Applicant:	One Housing Group Limited
Respondents:	The leaseholders of the 773 leasehold flats on the Barkantine, St John's, Kingsbridge and Samuda Estates on the Isle of Dogs
Date heard:	4 June 2013
Appearances:	Ranjit Bhose QC, instructed by Judge and Priestley, solicitors, for the applicant Michael Negrou (11a and 13 Glengall Grove) Zayneb Izzidien (35 Glengall Grove)
Tribunal:	Margaret Wilson Dallas Banfield FRICS Laurelie Walter
Date of decision:	10 June 2013

Introduction and background

1. This is a landlord's application under section 20ZA of the Landlord and Tenant Act 1985 ("the Act") for dispensation with any statutory consultation requirements with which it is found to have failed to comply in respect of a contract for the carrying out of external works to a large number of blocks of flats on the Barkantine, St John's, Kingsbridge and Samuda Estates on the Isle of Dogs. The respondents to the application are the leaseholders (called "the tenants" in this decision) of those flats on the estates which are subject to long leases.

2. The application was made in the course of proceedings relating to an application made by the landlord under section 27A of the Act to determine the tenants' liability to pay service charges in respect of the external works. In the course of those proceedings a hearing was held in relation to a number of preliminary issues and our decision in respect of those issues was issued on 30 January 2013. That decision sets out much of the relevant background which will not be repeated here.

3. A number of the issues considered at the preliminary hearing related to the landlord's alleged non-compliance with the relevant consultation requirements which are set out in Part 1 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003, the contract being such as to require public notice under the rules of the European Union. We held, in paragraph 102 of the decision, that the landlord had failed to comply with the requirements of paragraph 1(2)(a) of Schedule 4 in the following respects:

i. The description of the proposed works in the notice of intention in respect of Yarrow House did not include the replacement of the door entry system, in breach of paragraph 1(2)(a) of Schedule 4.

ii. The description of the proposed works in the notice of intention in respect of Pinnace House did not include the replacement of the lift, in breach of paragraph 1(2)(a) of Schedule 4.

iii. The description of the proposed works in the notice of intention in respect of Argyle House did not include full electrical re-wiring, in breach of paragraph 1(2)(a) of Schedule 4.

iv. The landlord failed adequately to serve a notice of intention on Mr and Mrs Choudhury of 33 Hedley House and 36 Pinnace House respectively and on Peter Thomas of 80 Bowsprit Point.

v. The landlord failed to state its response within 21 days to the observations of Jamie Thomas of 80 Bowsprit Point, Kim Willcock of 4 Argyle House and Ian Kingham of 29 Spinnaker House, in breach of paragraph 6 of Schedule 4.

4. In paragraph 121 of our decision we held that the landlord's failures to include in the description of the works the replacement of the door entry system in Yarrow House, the replacement of the lift in Pinnace House and full electrical re-wiring in Argyle House were serious breaches of the consultation requirements which may have caused significant prejudice to the tenants of flats in those blocks.

5. In paragraph 122 we held that the landlord's failures to serve notices of intention were minor breaches which caused no, or no significant, prejudice to Mr and Mrs Choudhury or to Peter Thomas and that the landlord's failure to respond within 21 days to the observations of Jamie Thomas, Ms Willcock and Mr Kingham were also minor breaches of the consultation requirements which caused no, or no significant, prejudice to the tenants concerned.

6. In paragraph 103 we held that, although, contrary to Mr Bhose's submission, the consultation requirements applied to the replacement of the roofs of 5 - 35a and 47 - 65a Glengall Grove, the notice of intention having described the proposed work as repairing and overhauling those roofs, in the circumstances dispensation with the requirements was likely to be granted in respect of the replacement of the roofs of those blocks.

7. Because at the date of our decision the judgment of the Supreme Court in *Daejan Investments Limited v Benson* was awaited, we deferred consideration of the landlord's application for dispensation until after the judgment was issued. On 9 March 2013, shortly after the decision of the Court ([2013] UKSC 14) was issued, directions were made for the determination of the application for dispensation. Paragraph (d) of the introduction to the directions provided that, in the light of the majority decision of the Supreme Court, not only submissions but also evidence were required for the purpose of the determination, and that evidence was required particularly on the issues of whether prejudice had been suffered by the tenants affected by reason of the landlord's failures to comply with the consultation requirements and, if they had suffered prejudice, the nature and degree of that prejudice. An oral hearing was directed to take place on 4 June 2013 and directions were made for conduct of the hearing.

8. The directions included a requirement that the tenants of flats in Yarrow House, Pinnace House and Argyle House must, no later than 12 April 2013, send to the landlord a statement, which was to explain:

> *whether they consider that they have suffered any, and if so what, prejudice by reason of the landlord's failure to say in its notice of intention to carry out the external works that it proposed to replace the door entry system (Yarrow House), that it proposed to replace the lift (Pinnace House), and that it proposed to carry out full electrical re-wiring (Argyle House). The statement must describe in general terms the observations the leaseholders would have made in response to the notice of intention had the works been mentioned in the notices and must include an outline of all the reasons why the leaseholders concerned consider that dispensation from the consultation requirements should not be granted in respect of the breaches of the consultation requirements which the tribunal has found to have occurred, and their submissions as to the order that the tribunal should make on the landlord's application for dispensation with compliance with the consultation requirements.*

9. The tenants of flats in 5 - 35a and 47 - 65a Glengall Grove were directed, also no later than 12 April 2013, to send to the landlord a statement explaining:

> *whether they wish to oppose an application for dispensation from the consultation requirements in respect of the replacement of the roofs to those blocks and whether, if they do, they consider that they have suffered any, and if so what, prejudice, by reason of the landlord's failure to say in its notice of intention to carry out the external works that it proposed to replace the roofs of the blocks, and must include an outline of any reasons why in their submission dispensation from the consultation requirements should not be granted in respect of the breaches of the consultation requirements which the tribunal has found to have occurred.*

10. The landlord was directed no later than 3 May 2013 to respond to any statements served on it by the relevant tenants.

11. The only tenants who submitted statements in accordance with those directions were Michel Negrou, the tenant of 11a and 13 Glengall Grove, and Dobrinka Pepeldjiyska, the tenant of 9a Glengall Grove, who submitted a joint statement dated 9 April 2013, and Linda Williams, the tenant of 18 Argyle House, who submitted a statement dated 11 April 2013 in which she said that she was the joint block representative, together with Ms Willcock, for the tenants of flats in Argyle House who have taken an active part in these proceedings. The landlord responded to those statements in a document dated 3 May 2013.

The hearing

Introduction

12. At the hearing of the application for dispensation from the relevant consultation requirements the landlord was represented by Ranjit Bhose QC,

instructed by Judge and Priestley, solicitors. Matthew Saye, the landlord's Assistant Director of Home Ownership Services, was also present. Mr Negrou and Zayneb Izzidien, the joint tenant of 35 Glengall Grove, were the only tenants to attend.

13. Mr Bhose said that, of the tenants affected by the present application, a number, in addition to those who had previously settled their disputes with the landlord, had also now settled. Those who had settled included, he said, Mrs Williams and Ms Willcock of Argyle House, and, of the four remaining tenants of flats in Argyle House, the only ones who had previously taken an active part in the proceedings and had not settled were in Poland and could not be contacted. He said that, of the 18 tenants of flats in Pinnace House, five had now settled, four remained active participants, and the remaining nine had played no active part. He said that Mr Mahmud, who had appeared at the preliminary hearing and had there submitted that the notice of intention relating to Pinnace House was inadequate, remained an active participant in the proceedings as far as the landlord was aware. He said that, of the nine leaseholders of flats in Yarrow House, four had settled and five remained active participants; of the 26 leaseholders of flats in 5 - 35a Glengall Grove, 14 had settled and 12 remained active participants; and, of the 18 leaseholders of flats in 47 - 65a Glengall Grove, four had settled and 14 remained active participants.

14. Mr Bhose confirmed that the tribunal's directions for the disposal of the application were on 13 March 2013 placed on the landlord's website and on 20 March were placed on the noticeboards of the relevant blocks, and that a hard copy of the directions, with an explanatory covering letter, was sent on 19 March 2013 to all leaseholders in the blocks affected and to all active leaseholders in the other blocks on the four estates. He also confirmed that all those documents were sent to leaseholders at the addresses they had given to the landlord for correspondence. In those circumstances we are satisfied that the hearing was adequately brought to the attention of the tenants concerned.

The argument

15. Mr Bhose summarised the proper approach to prejudice in the light of the majority judgment of the Supreme Court in *Daejan.* He submitted that in the light of the judgment the tribunal should not concern itself with whether the non-compliance with the consultation requirements was serious rather than technical or minor, that the consultation requirements were but a means to the end of protecting tenants from paying for inappropriate works or paying more than would be appropriate and that the tribunal was required to focus on whether the tenant concerned had been prejudiced in either respect by the landlord's failure to comply with the regulations.

16. In relation to the statement from the leaseholders of flats in Argyle House, he said that all the works not included in the notice of intention were identified in GDA's report, and that Mr Bull of Baily Garner had said in evidence that the works were required. He said that the primary statement of case of the tenants of Argyle House (13/439), dated 22 April 2012, although very detailed, took no point on consultation and did not take issue with the new lateral main. He submitted that the leaseholders had suffered no prejudice caused by the landlord's non-compliance, that the evidence showed that the impugned works were necessary, and that the tenants' statements of case were not consistent with a claim that if they had been notified of the impugned works they would have made any observations or taken other steps that might have resulted in the landlord not proceeding to carry them out.

17. In relation to the statement from the leaseholders of flats in 5 - 35a and 47 - 65a Glengall Grove, Mr Bhose reminded us of the evidence of Mr Bull and Mr Wigley of Baily Garner, which we summarised in paragraph 103 of our previous decision, and of the extra-statutory consultation undertaken by the landlord when the need to replace the roofs was established, also summarised in paragraph 103. He said that the tenants affected were on 21 May 2010 given notice of the landlord's intention to re-roof the blocks together with a copy of Baily Garner's survey report, and were given 30 days to

comment, so that there was substantial compliance with the consultation requirements and no question of any prejudice arising from non-compliance.

18. In relation to Pinnace House and Yarrow House, Mr Bhose submitted that since none of the leaseholders affected had provided any statement in response to the tribunal's directions, the tribunal should assume that they did not object to the application for dispensation.

19. Asked by the tribunal whether it was open to us to consider for ourselves whether there might be prejudice and whether we could in doing so consider evidence submitted to the tribunal for the purpose of the previous hearing, Mr Bhose submitted that it would be quite wrong, and procedurally unfair, for the tribunal to adopt such an approach because, since the leaseholders had not responded to the direction to explain the prejudice which they considered that they had suffered, the landlord, which could have answered such claims, had been deprived of the opportunity to do so. He said that if claims of prejudice from those leaseholders had been properly made, the landlord would have adduced evidence to disprove such claims and to show that the works were necessary. He accepted that the failure to include the impugned works in the notices of intention was an error, but submitted that it was not deliberate, and said that all the matters which leaseholders have said that they wish to raise in respect of the need to carry out the works and in respect of the standard and cost of the works can be raised in due course at the hearing of the landlord's application under section 27A of the Act.

20. Mr Negrou and Mrs Izzidien (who, though she had not served a statement in respect of the application for dispensation, we permitted, without opposition from Mr Bhose, to make oral representations) said that they had suffered prejudice by reason of the landlord's non-compliance with the consultation requirements. Mr Negrou submitted that if the landlord made errors in complying with the consultation requirements, it should pay, and that he had been given insufficient time to instruct his building surveyor, Dr Suffiani, to inspect the roof and provide a report. Mrs Izzidien agreed with Mr Negrou, and said that she had not received the consultation letters, that the report

from Monier Redland, the roofing contractor, which the landlord had provided was not arms length because it had carried out the works, and that the costs were inflated. She said that she had throughout contended that the works were unnecessary and that the tribunal ought not to dispense with compliance with the consultation requirements.

Decision

21. It remains our view that, as we said in our previous decision, the breaches in respect of the entryphone system in Yarrow House, the lift in Pinnace House and the full electrical wiring in Argyle House were serious breaches and, left to ourselves, we would have been inclined to say that even if the works were, on the balance of probabilities, necessary, the leaseholders affected were indeed prejudiced, in our understanding of the word, in that, being unaware in advance that the works were to be carried out, they were deprived of the opportunity to obtain their own evidence before the works were done in order to demonstrate, if they could, that the works were unnecessary. Whether such evidence would have persuaded the landlord not to carry out the works is open to question, but we think that the tenants of those blocks lost a right of some value because they were not informed in advance of what the landlord proposed to do.

22. Furthermore we are satisfied that it may be possible in some cases, if not the present one, for a tribunal to infer from all the evidence available to it that leaseholders have suffered prejudice notwithstanding that they do not themselves put forward of evidence of prejudice because, for example, they are too old or unwell to do so or are unaware of or do not fully understand the judgment of the Supreme Court. We are aware, too, that some leaseholders lack the capacity to take legal or other advice to enable them to resist a landlord's application for dispensation with the consultation requirements, and we are also aware that many lawyers and surveyors are reluctant to accept instructions to appear before the tribunal unless they are certain to be paid, or, indeed, are paid in advance. Not all lawyers and surveyors are likely to be

satisfied from the majority judgment in *Daejan* that their fees will inevitably be paid by the landlord.

23. However in the present case, despite our misgivings, we are satisfied that Mr Bhose is correct in his submission that it would be wrong for us to conclude that any of the tenants in Yarrow House, Pinnace House, and Argyle House were prejudiced by reason of the landlord's non-compliance because they have entirely failed to comply with our clear direction to explain the prejudice they may have suffered. We accept that it would be procedurally unfair in the circumstances to refuse to dispense with compliance with the consultation requirements in respect of the breaches we have identified, notwithstanding our provisional view that they may have caused prejudice.

24. In relation to 5 - 35a and 47 - 65a Glengall Grove, although Mr Negrou and Dobrinka Pepeldjiyska served statements in response to the directions for the present hearing, and Mr Negrou and Mrs Izzidien appeared at the hearing and made oral submissions, their evidence did not establish significant prejudice. The need to re-roof the block was the subject of informal consultation before the work was done in the course of which the tenants of those blocks were given, we accept, 30 days, which was time enough for them to have obtained evidence, if it was obtainable, that re-roofing was not necessary. In our view the re-roofing of the blocks was a classic case for dispensation from the consultation requirements and we see no reason to change the view we provisionally expressed in our previous decision that dispensation from the consultation requirements was inevitable.

25. We therefore dispense from compliance with all the relevant consultation requirements in respect of the external works with which we have held that the landlord has failed to comply.

CHAIRMAN Margaret Wilson

DATE: 10 June 2013

HM Courts & Tribunals Service

Residential Property
TRIBUNAL SERVICE

Case reference: LON/00BG/LSC/2012/0146 and LON/00BG/LDC/2012/0080

DECISION OF THE LONDON LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTIONS 27A, 20ZA AND 20C OF THE LANDLORD AND TENANT ACT 1985

Premises:	**All the leasehold flats on the Barkantine, St John's, Kingsbridge and Samuda Estates on the Isle of Dogs**
Applicant:	One Housing Group Limited
Respondents:	The leaseholders of the 773 leasehold flats on the Barkantine, St John's, Kingsbridge and Samuda Estates on the Isle of Dogs
Heard:	12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28 and 29 November 2012
Appearances:	Ranjit Bhose QC, instructed by Judge and Priestley, solicitors, for the applicant Rafal Czaplicki, the leaseholder of 8 Kingdon House Robert Gould, the leaseholder of 142 Kelson House, on behalf of the leaseholders of 13 flats in Kelson House Colin Hammond, the leaseholder of 46 Montcalm House Zayneb Izzidien and Mohammed Aziz, the leaseholders of 35 Glengall Grove

Ian Kingham, the leaseholder of 29 Spinnaker House, on behalf of the leaseholders of 10 flats in Spinnaker House
Anthony Lane, the leaseholder of 78 Bowsprit Point
Kong Lee, the leaseholder of 44 Knighthead Point,
Tracey Lyons, the leaseholder of 26 Reef House
Kabir Mahmud, the leaseholder of 36 Pinnace House
Shebul Miah, the leaseholder of 26 Topmast Point
Rose Nathan, the leaseholder of 7 Montfort House
Michael Negrou, the leaseholder of 19 Llandovery House and five other flats on the estates
Najma Rahman, the leaseholder of 23 Reef House
Jamie Thomas, the leaseholder of 89 Bowsprit House
Kim Tu, the leaseholder of 17 Chipka Street
Olga Venzhyna, the leaseholder of 48 Montcalm House, on behalf of all the leaseholders of flats in Montcalm House
Linda Williams, the leaseholder of 19 Argyle House
David Wright, a leaseholder, on behalf of the leaseholders of 92 flats in Alexander House, Alpha Grove, Bowsprit Point, Byng Street, Cheval Street, Clara Grant House, Gilbertson House, Hibbert House, Knighthead Point, Midship Point, Scoulding House, The Quarterdeck, Tideway House and Topmast Point on the Barkantine Estate, and Ballin Court, Hedley House and Reef House on the Samuda Estate

Tribunal: Margaret Wilson
Dallas Banfield FRICS
Laurelie Walter MA

Date of decision: 30 January 2013

Introduction

1. This is the determination of preliminary issues raised in an application by the landlord, a housing association, of four estates on the Isle of Dogs in the Docklands area of east London under section 27A of the Landlord and Tenant Act 1985 ("the Act") to determine the liability of respondents, who are the leaseholders of some 773 flats in 63 blocks on the estates, to pay service charges for major works. The landlord maintains that it complied with the relevant consultation requirements of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Consultation Regulations") but has applied for dispensation from compliance with any of those requirements with which it is found to have failed to comply. This determination is also made in response to questions which arise in that application, but because the decision of the Supreme Court in *Daejan Investments Ltd v Benson,* heard on 4 December 2012, may influence our decision on the application for dispensation, we have determined only preliminary issues of fact which are relevant to that application, namely whether there have been any, and, if so, what, breaches of the consultation requirements and, if there have been such breaches, whether any leaseholders may thereby have suffered some prejudice. We will decide whether to dispense with compliance with any of the consultation requirements after the decision of the Supreme Court has been received and the relevant parties have had the opportunity to comment on its effect and will make directions for that purpose after the decision of the Supreme Court has been issued.

2. The documents used at the hearing are contained in 23 bundles in addition to a bundle of authorities and a bundle of final written submissions. References to the bundles are by bundle number followed by the page number. Bundle 1 page 1 is thus 1/1. The numbering of each bundle starts at page 1.

Background

The properties

3. The four estates with which the applications are concerned are the Barkantine, Kingsbridge, St John's and Samuda Estates. They comprise purpose-built blocks of different types and built at different dates from 1927 to 1969, together with a few terraced houses. There are 70 blocks in all, varying in type from two storey blocks containing four flats to 22 storey blocks containing 82 flats. A list of the blocks is at 2/16 and a brief description of each block is at 7/319 and 320. The Barkantine Estate comprises 26 blocks, the Kingsbridge Estate three blocks, the St John's Estate 32 blocks and the Samuda Estate nine blocks. The estates contain, in all, 1956 units of accommodation of which 1183 are occupied by periodic tenants of the landlord and 773 are held on long leases granted under the Right to Buy scheme and now held either by the original leaseholders or their successors in title. 63 of the blocks include flats owned by leaseholders. A significant number of leaseholders do not live in their flats but sub-let them.

The landlord

4. The oldest blocks on the estates were built for the Greater London Council which granted the earliest leases ("the GLC leases"). In due course the freehold title was acquired by the London Borough of Tower Hamlets ("LBTH") which built further blocks and granted further leases ("the LBTH leases"). In 2000 the government published a Housing Green Paper requiring all social housing to be brought to the "decent homes standard" by 2010, and the LBTH, along with many other local housing authorities, decided to transfer much of its housing stock to housing associations which could more easily borrow the funds required to carry out the necessary works. In 2002 a charitable housing association called Toynbee Island Homes ("Toynbee"), a subsidiary of Toynbee Housing Association, was chosen as the preferred transferee of the four estates on the Isle of Dogs.

5. By a letter dated 14 February 2005 (19/365) the LBTH informed the leaseholders that it proposed to transfer the ownership and management of the estates to Toynbee, that the law required the consent of the periodic tenants for the transfer to proceed but a ballot of leaseholders would also be held and the leaseholders' views would be passed to the Secretary of State and taken into account. In fact both the periodic tenants and the leaseholders supported the transfer to Toynbee, and after a ballot of the periodic tenants the Secretary of State gave consent, as required by section 43 of the Housing Act 1985, to the transfer of the estates to Toynbee, which took place on 5 December 2005. Thereafter Toynbee granted further leases ("the Toynbee leases"). The present landlord has granted further leases in the same form as the Toynbee leases.

6. On 1 August 2007, Toynbee Island Homes, Toynbee Housing Association and Community Housing Association, all of them charitable housing associations, formed One Housing Group Limited, but Toynbee Island Homes, Toynbee Housing Association and Community Housing Association continued in existence as subsidiaries of One Housing Group. On 3 December 2007 Toynbee Island Homes Limited changed its name to Island Homes Housing Association Limited. In September 2012, while the present hearing was pending, Island Homes Housing Association Limited transferred all its stock to One Housing Group Limited. Some of the leaseholders harbour suspicions that those transactions in some way affect the liability of the landlord towards them, but we have been categorically assured, and we accept, that they make no difference whatsoever to the liability of the landlord towards the leaseholders or to the liability of the leaseholders towards the landlord.

The leases

7. The great majority of the leaseholders hold either LBTH or Toynbee leases, which are essentially in the same form. The landlord's repairing covenants in the GLC lease are very similar to those in the LBTH and

Toynbee leases, but the GLC lease, unlike the LBTH and Toynbee leases, expressly requires the leaseholder to contribute to the cost of improvements. The terms of the leases which are relevant to the present disputes will be set out later in this decision as part of the discussion of the disputes.

The major works

8. In about 2003, not long after it had been chosen as the preferred transferee of the estates, but before the transfer, Toynbee appointed an employer's agent, Developing Projects Limited, which is a specialist project manager, and consultants, Baily Garner LLP, to assist and advise it in relation to the transfer and to the works which would be required. The landlord and Baily Garner agreed that Baily Garner's fees would be equivalent to 4.67% of the cost of the proposed works in accordance with a fee proposal (1/327) which is undated and unsigned but which clearly resulted in an agreement at some time in 2003. Baily Garner continued to advise the landlord as its consultant after the stock transfer and prepared the contractual requirements for the works.

9. The works consisted of three packages: internal works to the flats occupied by periodic tenants ("the internal works"), the refurbishment of the external elements, internal common parts and electrical and mechanical installations of the blocks ("the external works"), and works to the communal grounds ("the environmental works"). The present dispute relates only to the external works. In Baily Garner's fee proposal the total budget for all three packages of works was said to be £33,434,073 (1/332), and the same document also provided that it was assumed that the procurement of the contract or contracts for the works would be by way of a "design and build" method of procurement (1/332).

10. Two contractors, Mulalley Limited ("Mulalley") and Rydon Limited, were chosen by the landlord to carry out the internal works. The works were carried out between 2007 and 2008.

11. For the purpose of the external works, stock condition surveys of each block, previously obtained in 2001 by the LBTH, were in 2008 updated by Baily Garner (2/from 178) who drew up what they referred to as "validation reports" which were used as the basis for draft "employer's requirements" (bundles 3, 4 and 5), which included the scope of works for each block (3/from 234). Specialists were employed to survey the mechanical and electrical installations (4/349), lifts (4/304), asbestos (4/346), drainage (5/4) and door entry systems (4/206). 16 blocks - nine on the Samuda Estate, the four high rise blocks on the Barkantine Estate, and three on the Kingsbridge Estate - were the subject of "condition overview reports", prepared in late 2008 (example at 13/369).

12. It appears that in 2008 the landlord proposed to carry out the external works under a contract procured on the basis of specifications and drawings. Between February and May 2008 or thereabouts notices of intention to carry out the external works were sent to the leaseholders of at any rate some of the blocks under Part 1 of Schedule 4 to the Consultation Regulations, which sets out the consultation requirements for very large contracts, awarded by public bodies, for which public notice is required by the rules of the European Union. An example of one of those notices, dated 12 May 2008, is at 22/21. There was then a change of plan and the landlord decided to use a design and build contract and withdrew the notices of intention which it had served. On 5 January 2009, having advertised the proposed contract in the Official Journal of the European Union ("OJEU") (6/1), it on the same day gave to the leaseholders new notices of intention (example at 7/79).

13. Contractors who were interested in tendering for the contract were required to submit expressions of interest and to complete a pre-qualification questionnaire, prepared by Developing Projects, concerned with factors which included their financial status, technical capacity, project delivery and health and safety record (6/from 47). The timetable for the selection process (6/51) included "tender interviews (OPTIONAL)". Expressions of interest were received from a large number of contractors (6/14 and 15), and between 11 and 17 February 2009 the completed pre-qualification questionnaires were

evaluated by Stuart Wigley and Michael Osborne of Baily Garner, Paul Marsh of Developing Projects, Alice Trail of One Housing Group, Jon Megan of Island Homes and two tenant representatives. According to the initial tender report dated 3 June 2009 (6/from 22) the evaluation process was based on 70% for cost and 30% for value.

14. On 25 February Baily Garner issued a revised version of the employer's requirements on which the tenders were to be based.

15. After the evaluation of the pre-qualification questionnaires had been completed, invitations to tender (6/125) were on 3 March 2009 issued to five contractors, all of whom had completed the pre-qualification questionnaire to the satisfaction of the evaluators. The invitations to tender provided (6/126) that *the selection process for the preferred tenderer will be based upon the most economically advantageous tender for the project by reference to the criteria for tender evaluation set out in appendix 2.* Appendix 2 (6/144) provided: *the contract will be awarded on the basis of the most economically advantageous tender for OHG and the best quality product and services that OHG believes likely to be provided by the tenderers. Assessment will be made against each of the criteria set out in this invitation.*

16. Two of the contractors who had been invited to tender withdrew from the process and another was then invited to tender but also withdrew. Tenderers were required to price on the basis of the employer's requirements, architect's drawings and an amended form of the JCT standard form of building contract Design and Build 2005 edition, plus provisional sums and provisional quantities items. Three contractors submitted tenders: Breyer Group plc, Mulalley, and Wates Construction Limited. Breyer's tendered price was £15,867,555.20, Mulalley's was £16,889,012 and Wates' was £17,779,002 (6/27), all based on a contract period of 78 weeks and all excluding VAT. When the tenders were checked it was found that Breyer's tender contained an arithmetical error which had caused it to under-price by £334,912.51 (6/28), that Mulalley's tender contained an arithmetical error which had caused it to under-price by £4025 (6/29), and that Wates' tender contained an

arithmetical error which had caused it to under-price by £274,400.36. Mr Wigley prepared the first tender report dated 3 June 2009 (6/22) which recommended that further clarification should be obtained from the contractors and included (6/31) that *an interview is likely to be a requirement of the process and this aspect will form a contribution towards the 30% quality assessment*, and that tenderers *may be required to attend an interview with delivery partners and other relevant employer representatives. The employer's agent will notify all tenderers if they are required to attend an interview. Tenderers will need to ensure that the relevant staff are available to attend, including as a minimum:- (a) the person submitting the tender on behalf of the tenderer's organisation; and (b) the relevant director, (or equivalent) who will oversee the appointment, if successful.*

17. Mr Wigley prepared a second tender report dated 7 July 2009 (6/145). At paragraph 1.02 (6/147) he said that, of the 30% of the marks available for quality, *it is intended that 25% is allocated against the responses to twelve questions asked in the tender and the remaining 5% allocated as a result of contractors' performance at interview.* The report also said (6/150) that the arithmetical errors had been brought to the contractors' attention and that all three of them had agreed to stand by their tendered prices. The report also explained that the overhead and profit included in Mulalley's tender was 6%, in Wates' it was 6.5% and in Breyer's it was 10%, comprising 7.5% overhead and 2.5% profit. The scores given in the report (explained at 6/159), before the interview, were:

cost 70 marks:	Breyer 70	Mulalley 65.49	Wates 61.57
quality 25 marks:	Breyer 15.42	Mulalley 19.17	Wates 17.92
total:	Breyer 85.42	Mulalley 84.66	Wates 79.49

Breyer was thus ahead at that stage.

18. Interviews took place on 16 July 2009. The interviewing panel comprised (6/162) Paul Marsh, Mr Wigley, Mike Brooks of One Housing Group, Pam Cole, a periodic tenant and a member of the Island Homes Board, and

Rumana Khair, described as an independent member of the Island Homes board. A schedule showing the scores awarded by the panel is at 6/169A. According to a third tender report dated 17 July 2009 (6/160, at 163) Breyer *did not perform well at interview and failed to provide adequate substance to their answers. Both the attendees from Mulalley and Wates provided good detailed responses to questions asked and their presentations were excellent.* Following the interviews a consolidated score for both price and quality was produced (6/171) and the contractor with the highest score on that basis became Mulalley, at 89.41, with Breyer at 88.37 and Wates at 84.19 (6/163). In consequence, the report recommended the appointment of Mulalley.

19. On 29 July 2009, a second consultation notice, a notice of estimates, was given to the leaseholders (example at 7/81). It said that, subject to the consultation, the landlord proposed to award the contract to Mulalley, and included the statement that the form of contract for the external and landscape works was intended to be design and build. It said that a full description of the proposed works, the full estimated costs and the contract specification were available for inspection at the landlord's Millwall Office. Attached to the notice were a summary breakdown of the costs to each estate (7/87) in which all the figures taken from the contract sum analysis (4/from 120), and a summary of observations received in respect of the first notice (7/from 88). The notice provided that observations were to be received by 30 August 2009, which was a Sunday and the day before a bank holiday, "in order for Island Homes to have regard to them" (7/85).

20. On Tuesday 1 September 2009 the contract was awarded to Mulalley (contract award notice at 6/172) and on 14 October 2009 a JCT Design and Build (Revision 2) contract (6/from 183) between the landlord and Mulalley was signed, incorporating the employer's requirements drafted mainly by Baily Garner, although the employer's requirements for some specialist works, such as mechanical and electrical installations, were drafted by specialists. Under the contract, provisional sums were used for concrete testing and underground drainage, but for all other items the price was fixed. The total contract price, exclusive of VAT and professional fees, was £16,889,012

(6/193), including some £2,700,000 for the environmental works. The contract provided that the contractor would take possession of the site on 14 October 2009, and that the contractual date of completion was 18 December 2010. It provided (6/216) that the contractor was *responsible for carrying out and completing the entire design for the works*, and included provision for a performance bond (6/195). On 14 October 2009 Mulalley took possession of the site and thereafter carried out works to 41 of the blocks.

21. The landlord engaged two independent clerks of works, employees of Hickton, a company which provides independent clerks of works to the construction industry. They were on the site full-time throughout the contract period and provided weekly progress schedules to Baily Garner. The project manager was Paul Marsh of Developing Projects Limited. Baily Garner was the employer's agent and CDM co-ordinator, reporting to Developing Projects

22. A certificate of practical completion was not produced to us or, apparently, issued, but the works were substantially complete by 18 December 2010 and, generally speaking, the defects period ran from that date until 18 December 2011 (although we were told that the defects period for some of the blocks has still not expired).

23. By letters dated 29 March 2010 (7/94) the landlord informed the leaseholders of the interim service charges for the year 2010/2011, which included the interim charges for the proposed external and environmental works.

24. By letters dated 21 May 2010 (1/294A and 1/299A) the landlord notified the leaseholders of Finwhale House (who have subsequently settled their disputes) and of 5 - 35a and 47 - 65a Glengall Grove that it had been decided that it was necessary to replace the roofs to their blocks instead of repairing them as had previously been proposed and sought their observations on the revised proposals. By an employer's instruction dated 24 May 2010 97/26) the landlord instructed the contractor to install in each block a three-dish

integrated reception system ("IRS") instead of the previously intended single dish system.

25. In about June 2010, for reasons mainly connected with expected delays and difficulties in obtaining planning permission, the landlord decided to omit the environmental works from the contract and to carry them out under a separate contract (see 7/29). The leaseholders were so informed by letters dated 10 August 2010 (7/93). The environmental works have now been largely completed and they are the subject of a separate application by a number of leaseholders, yet to be heard, under section 27A of the Act.

26. After the omission of the environmental works cost of £2,786,274.32, the final cost of the external works was £15,384,503.42, excluding VAT and fees.

27. Letters dated 28 September 2011 were sent to the leaseholders enclosing demands for the actual service charges for the year 2010/2011 and requiring any balances to be paid.

The statutory provisions

28. By section 27A of the Act an application may be made to the tribunal to determine whether a service charge is payable and, if it is, the amount which is payable. A *service charge* is defined by section 18(1) of the Act as *an amount payable by the tenant of a dwelling as part of or in addition to the rent (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and, (b) the whole or part of which varies or may vary according to the relevant costs.* Relevant costs are defined by section 18(2) and (3). By section 19(1), *relevant costs shall be taken into account in determining the amount of a service charge payable for a period (a) only to the extent that they are reasonably incurred, and (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard, and the amount payable shall be limited accordingly.*

By section 19(2), *where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred, any necessary adjustment shall be made by repayment, reduction of subsequent charges or otherwise.*

29. Section 20 of the Act, as substituted by section 151 of the Commonhold and Leasehold Reform Act 2002, includes:

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

30. Section 20(3) provides that the section applies to qualifying works *if relevant costs incurred on carrying out the works exceed an appropriate amount,* and section 20(4) provides that regulations may be made to provide that *this section applies to a qualifying long term agreement (a) if relevant costs incurred under the agreement exceed an appropriate amount, or (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.*

31. Section 20(6) provides that where an *appropriate amount is set by [the Consultation Regulations], the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.* The *appropriate amount* in respect of qualifying works is, by virtue of paragraph 6 of the Consultation Regulations, *an amount which results in the relevant contribution of any tenant being more than £250.* By paragraph 4(1) of the Consultation Regulations, *section 20 shall apply to a*

qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount with results in the relevant contribution of any tenant, in respect of that period, being more than £100.

32. The effect of these provisions is that where a landlord is in breach of the Consultation Regulations, then, unless a tribunal dispenses with compliance with the Regulations, no leaseholder is required to pay more than £250 for qualifying works or more than £100 for each service charge year in respect of a QLTA.

33. Section 20ZA(1) of the Act provides that *where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.* Section 20ZA(2) includes:

> *"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into by or on behalf of the landlord or a superior landlord for a term of more than twelve months.*

Regulation 3 of the Consultation Regulations lists agreements which are not QLTAs.

34. Further statutory provisions and those parts of the Consultation Regulations which are relevant to the disputes are set out later in this decision.

The proceedings

35. A large number of leaseholders were unhappy with the cost and standard of the works and some of them refused to pay the service charges for them. The landlord brought proceedings in the county court to recover unpaid service charges against a number of those who had refused to pay, and other

leaseholders brought proceedings in the tribunal under section 27A of the Act to determine their liability to pay service charges for the works. All the county court proceedings were at different times transferred to the tribunal under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

36. On 4 January 2012 a tribunal, on consideration of the files relating to twelve of the transferred claims and applications under section 27A of the Act, of its own motion decided that, in the interests of consistency and saving costs, the claims and applications should be consolidated, and directed that a case management conference should be held on 14 February 2012. It also directed that the landlord should notify all leaseholders who might be affected by the outcome of the proceedings and invite them to join the proceedings if they wished to do so.

37. Many leaseholders attended the case management conference on 14 February and the tribunal decided, having heard representations on behalf of the landlord and by many of the leaseholders, to invite the landlord to make its own application under section 27A of the Act to which all the leaseholders were to be respondents. Directions were made for the preparation of evidence for hearing of the application which was provisionally fixed for three weeks commencing on 12 November 2012. Shortly afterwards the landlord duly issued the application under section 27A to determine the liability of all the leaseholders to pay service charges for the external works.

38. On 13 July 2012 the landlord issued an application for dispensation from any of the consultation requirements with which it might be held to have failed to comply, naming all the leaseholders as respondents. On 20 July 2012 Robert Gould, a leaseholder, on behalf of the leaseholders of flats in Kelson House on the Samuda Estate, made an application under section 20C of the Act to prevent the landlord from placing any of the costs it might incur in connection with the proceedings on the service charges of the leaseholders of any of the flats in Kelson House.

39. A further case management conference was held on 2 August 2012 and directions dated 4 August 2012 were made for the conduct of the application for dispensation and for the further conduct of the application under section 27A. By the date of that case management conference it had become clear that there would be insufficient time at the hearing in November to determine the reasonableness of the costs and standard of the works to the numerous blocks in respect of which there were disputes, that the hearing should relate only to general issues, mainly of law, and to the landlord's application for dispensation from compliance with the consultation requirements, and that issues relating to the reasonableness of works to individual blocks should be considered at further hearings at later dates. The directions provided that any leaseholder who wished to do so should serve a statement of case and that no leaseholder who had not done so by 14 September 2012 (later varied to 28 September) could make representations at the hearing on any matter which had not been outlined in his or her statement of case.

40. A further case management conference was held on 26 October 2012. On that day, One Housing Group Limited was substituted as applicant in the applications under sections 27A and for dispensation from compliance with the consultation requirements in place of Island Homes Housing Association Limited, and the issues to be considered at the forthcoming hearing, which had been considered in general terms at the previous case management conference, were more precisely identified.

41. The hearing began on 12 November and occupied 12 days. It was held at the Docklands Sailing and Watersports Centre on the Isle of Dogs. The landlord was represented by Ranjit Bhose QC, who called Steven Bull BSc (Hons) MRICS, formerly of Baily Garner but now with Airey Miller Partnership LLP, Stuart Wigley MRICS APMP of Baily Garner, and Matthew Saye, Assistant Director of One Housing Group Limited, to give evidence. A large number of leaseholders appeared in person and gave evidence and/or made submissions on their own behalf or on behalf of others. Those leaseholders who made submissions, with the exception of the leaseholders who, during

the proceedings, reached agreement with the landlord, are listed on the front-sheet of this decision.

42. In three of the blocks on the estates there are no leaseholders. The leaseholders of flats in a number of blocks submitted no statements of case and made no representations at the hearing. The blocks in relation to which, so far as we are aware, no disputes arose at any stage of the proceedings were:

Barkantine Estate

Cressal House
Janet Street
Kedge House
6-32 Strafford Street
Winch House

Kingsbridge Estate

Michigan House

St John's Estate

Alice Shepherd House
Ash House
Cedar House
East Ferry Road
Elm House
Manchester Road
Normandy House
Skeggs House
Tamar House
Thorne House
Valliant House
Watkins House

43. Both before and during the hearing a number of leaseholders, including some who had previously taken an active part in the proceedings, reached confidential agreements with the landlord. Towards the end of the hearing the landlord provided a list of the leaseholders of 180 flats who had settled their disputes. Further agreements were reached after the hearing, and, according to a list provided by the landlord, the leaseholders of 250 flats had now settled

their disputes. We were told that agreements reached after the hearing resolved all disputes in respect of the following further blocks:

Barkantine Estate

Strafford Street

St John's Estate

Castalia Square
Oak House

Samuda Estate

Dagmar Court

The issues

Introduction

44. As was perhaps inevitable, a good deal of the evidence given and submissions made by the leaseholders related to the cost and standard of the works rather than to the issues to which this hearing was directed. Much of what the leaseholders said, while it may not have been relevant to the preliminary issues, will be relevant to the reasonableness of the costs and standard of the works.

45. The issues identified in the directions dated 26 October 2012 were based on a list prepared by Mr Bhose for the purpose of the case management conference but revised in the light of submissions made by some of the leaseholders at the case management conference. They were:

i. whether the costs incurred on the following elements of work were either recoverable as works of repair, or recoverable as works of improvement, or irrecoverable:

a. the installation of the IRS;
b. landlord's lighting;
c. cavity wall insulation;
d. infill panels;
e. signage;
f. anti-slip coverings on balconies;

ii. whether the leaseholders of ground floor flats are liable to contribute to the costs of works to lifts and entryphones;

iii. the legal effect, if any, of the landlord's failure to operate a sinking or reserve fund;

iv. issues relating to section 20B of the Landlord and Tenant Act 1985;

v. issues relating to section 21B of the Act;

vi. whether the landlord complied with the statutory consultation requirements for consultation in relation to:

a. the works;
b. the appointment of Baily Garner LLP;

vii. whether, if the landlord failed to comply with the statutory consultation requirements in relation to the works or to the appointment of Baily Garner LLP, dispensation should be granted under section 20ZA of the Act;

viii. whether the landlord is estopped or otherwise prevented as a matter of law from demanding such service charges as may be otherwise due by reason of promises made prior to the stock transfer from the LBTH to Toynbee;

ix. the appropriateness of letting one contract for all the works;

x. whether it was inappropriate to accept the tender from Mulalley by reason of any pre-existing connection between the contractor and the landlord or the contractor and Baily Garner LLP;

xi. any issues of general application arising under section 20C of the Act.

46. Some leaseholders also questioned the way in which preliminaries were apportioned between the blocks, and they and Mr Bhose made brief submissions on this issue. Mr Bhose invited us to defer our decision on the issue until the costs of the works to each block are considered. We accept that invitation.

47. Other issues which may well be relevant to the service charges of more than one block were raised by some leaseholders but are not considered in this decision because they were raised too late for the landlord's evidence in relation to them to be available. Such issues include the relevance to the reasonableness of the costs of the works of guarantees which had been obtained or arguably ought to have been obtained by the LBTH for works carried out to blocks on the Barkantine Estate prior to the transfer, the benefit of which ought arguably to have been passed to the present landlord. This decision is intended to dispose of all the issues listed in paragraph 45 with the exception of the question whether compliance with the consultation requirements should be dispensed with in the instances where we have found the landlord to be in breach of those requirements. It is not intended by this decision to dispose of any general issues other than those listed in paragraph 45. Any other general issues of law, or issues of fact and law, can be raised when block-specific issues are considered in due course.

48. Each of the preliminary issues was raised in one form or another by at least one of the leaseholders in their statements of case made in response to the pre-hearing directions. Some of those issues had been raised by only one

leaseholder; others had been raised by many or most of them. Many leaseholders took no part in the proceedings. Mr Bhose submitted that, since the liability to pay service charges is an individual one, and since every leaseholder was given the fullest opportunity to join in the proceedings and many chose not to do so, it was not open to us to credit a valid point to a leaseholder who had not himself taken it. He reminded us that HHJ Gerald, sitting in the Upper Tribunal (Lands Chamber), said in *Birmingham City Council v Keddie and Hill* [2012] UKUT 323 that *it is the jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction.* Further or alternatively, Mr Bhose submitted, if we considered that there were some points raised by some leaseholders on which we could legitimately make findings in favour of other leaseholders who had not made such points, such findings could not extend to matters such as compliance with the statutory consultation requirements, because if an individual leaseholder did not himself assert that the landlord had failed to comply with the consultation requirements, still less did not assert that he had suffered prejudice by reason of the non-compliance, it was not open to the tribunal to find non-compliance with the consultation requirements in relation to that leaseholder, or that he had suffered prejudice from such non-compliance.

49. We respectfully agree with HHJ Gerald (and other Upper Tribunal judges, including the President of the Upper Tribunal (Lands Chamber) in *Beitov Properties Limited v Elliston Bentley Martin* [2012] UKUT 133 (LC) LRX/59 2011, who have recently expressed similar views), that it is not for the tribunal to search for points which none of the parties has chosen to take. The present situation is, however, entirely different. What Mr Bhose in effect asks us to say is that a finding of law should not be applied to leaseholders who have not themselves advanced the point, even though such a finding would affect their liability to pay a service charge. We do not think that is right, and such a conclusion would defeat one of the main objects of the single landlord's application, which was to achieve consistency. If, for example, we

were to decide that a particular cost is irrecoverable under a lease, it appears to us that the finding should be taken to apply to all the leaseholders with that form of lease. And if we were to find, on the basis of a submission from a single leaseholder, that a statutory consultation notice did not comply with the Consultation Regulations, we would expect that finding to apply to notices in the same terms sent to other leaseholders, whether or not they had appeared at the hearing and taken the point, had appeared at the hearing and not taken the point, or not appeared at the hearing at all. Equally if we were to be satisfied that the landlord had failed to have regard to a particular leaseholder's wise and relevant observations, we consider that it would be open to us in principle to find, depending on the evidence, that not only that particular leaseholder but also others were prejudiced by the landlord's failure. Clearly, however, it would be wrong in principle for us to make findings of fact in favour of a leaseholder who has not invited us in a statement of case, submitted in good time, to do so. Furthermore, it is not in our view open to leaseholder A to take factual points on behalf of leaseholder B unless leaseholder B has given to leaseholder A clear instructions to do so and the points have been taken in good time.

50. Naturally we accept that those leaseholders who have entered into compromises with the landlord are bound by the terms of those compromises which will be unaffected by this decision.

51. The issues will be considered in the order given in the directions rather than according to their significance.

1. Are certain costs recoverable under the leases?

52. Many leaseholders argued that the three-dish IRS which the landlord decided to install, without further statutory consultation, part of the way through the external works (see paragraph 24 above), in place of the originally proposed one-dish system, fell outside the landlord's repairing obligations in their leases. Some leaseholders of flats in Argyle House and John

MacDonald House on the St John's Estate and in Yarrow House on the Samuda Estate argued that the electrical re-wiring of the communal electricity supply (referred to in the list of issues in the directions dated 26 October 2012 as "landlord's lighting") fell outside the repairing obligations. Leaseholders of flats in Argyle House and Glengall Grove, and others, submitted that the replacement of single glazed wooden-framed windows with uPVC double glazed units was an improvement which fell outside the repairing obligations. Some leaseholders of flats in Yarrow House argued that cavity wall insulation fell outside the repairing obligations. Several leaseholders argued that new signage on the estates fell outside the repairing obligations because it could not conceivably affect the amenity of the buildings. The leaseholders of flats in Spinnaker House, and some other leaseholders, argued that the provision of anti-slip waterproof coverings on balconies fell outside the repairing obligations.

53. The relevant provisions of the leases are these:

i. By clause 5(5)(a) of the LBTH and Toynbee leases (2/from 106 and 2/from 147 respectively) the landlord covenants, so far as is relevant:

> *to maintain and keep in good and substantial repair and condition:*
>
> *(i) the main structure of the building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in the building)*
>
> *(ii) all such gas and water mains and pipes drains waste water and sewage ducts and electric cables and wires as may by virtue of the terms of this lease be enjoyed or used by the lessee in common with the owners or tenants of the other flats in the building*
>
> *(iii) the common parts*

(vi) all other parts of the building not included in the foregoing

(ii) By clause 1(9) of the LBTH lease and clause 1(11) of the Toynbee lease *the common parts* means:

> *all main entrances passages landings staircases (internal and external) gardens gates access yards roads footpaths parking areas and garage spaces (if any) passenger lifts (if any) means of refuse disposal (if any) and other areas included in the title above referred to or comprising part of the lessors' housing estate and of which the building forms part provided by the lessors for the common use of residents of the building and their visitors and not subject to any lease or tenancy to which the lessors are entitled to the reversion*

(iii) By clause 5(5)(m) of the LBTH and Toynbee leases the landlord covenants:

> *to maintain and where necessary renew or replace any existing lift and ancillary equipment ...*

(iv) By clause 6(b) of the GLC lease (2/from 130) the landlord covenants to:

> *keep in good repair and condition (and wherever necessary to rebuild and reinstate and renew and replace all worn and damaged parts) (i) the main structure of the building including all foundations forming part of the building and the drains gutters and external pipes thereof all exterior and all party walls and structures and all walls dividing the flats from the common hall staircases landings steps and passages in the building and the walls bounding the same and all painting and decoration of the exterior of the building and all electrical and other fittings and windows in the building and all doors therein save such doors as give access to individual flats and including all roofs and chimneys and every part of the property above the level of the top floor ceilings and (ii) any wireless and television masts and aerials cables*

and wires erected by the lessor on the building or in or over the roof or roofs of the building and available for use with the flat and the other parts of the building

(The extracts from the GLC lease given in this decision are taken from the form of lease in hearing bundle 2 which, we were assured, was indeed the GLC lease. The extracts given in the landlord's first statement of case at 1/28 differ from the version of the lease in the hearing bundle.)

(v) Clause 6(d) of the GLC lease provides that the landlord will:

so far as practicable provide the services to or in respect of or for the benefit of the flat and the building at a reasonable level including keeping in repair all machinery installations and apparatus at the Estate connected with the provision of services

(vi) Clause 5(5)(o) of the LBTH and Toynbee leases provides that the landlord is entitled:

without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the lessors may be considered necessary or advisable for the proper management maintenance safety amenity or administration of the building

(vii) Clause 5(h) of the GLC lease provides that:

If and whenever the lessor shall make any improvement affecting the flat to the estate or any part thereof the lessee shall upon the service of a written demand pay to the lessor a fair proportion of the cost of the improvement ...

54. Mr Bhose submitted that all the disputed works fell within one or more of these covenants. He submitted that the obligations to keep the building in

good and substantial condition and to keep it in good and substantial repair were discrete, and that the obligation to keep the building in good and substantial condition was wider than the obligation to keep it in repair in that it permitted works to be carried out which extended beyond repair, strictly so-called, and did not require a state of disrepair to exist before it was triggered. He cited a number of authorities on the point, but since we accept his submissions we do not find it necessary to refer to them in this inevitably lengthy decision. He said that the cost of all cavity wall insulation had been met from grants and not passed to any leaseholder and we accept that.

55. The leaseholders' submissions amounted in the main to assertions that the works were unnecessary and the costs therefore unreasonably incurred, or that the works were not only unnecessary but, particularly in the case of the three-dish IRS system, had been badly executed, did not work properly and had been left incomplete and unusable. Those submissions are not relevant to the preliminary issues. Ian Kingham, the leaseholder of 29 Spinnaker House, representing the leaseholders of the ten leasehold flats in Spinnaker House, submitted that clause 5(5)(o) in the LBTH and Toynbee leases did not provide the landlord with a general right to carry out works which went beyond repair and that the clause was limited in its scope by the earlier provisions of clause 5.

56. We are unable to accept the leaseholders' submissions on the issues. No question arises as to whether the contentious works fall within clauses 5(h) and 6(b) of the GLC lease, which they clearly do. We are satisfied that they also fall within the LBTH and Toynbee leases, either because they fall within the covenants to keep (which as a matter of law includes the requirement to put) the relevant elements of the buildings in good and substantial repair, or because they fall within the covenant to keep (and therefore put) them in good and substantial condition, or because they fall within clause 5(5)(o) of the LBTH and Toynbee leases. Whether the works were necessary, and of an appropriate standard and cost, will be considered at a later stage of the proceedings.

57. We do not consider that clause 5(5)(o) of the LBTH and Toynbee leases is limited in its scope as Mr Kingham suggested. There is a rule of construction which provides that, where specific instances are given in a statute or contract, an inference ought to be made that general words which follow them are to be limited to instances similar to those specifically mentioned. Whether that rule applies depends on the particular words used. Clause 5(5)(o) in our view stands alone and provides the landlord with the right to carry out each of the disputed categories of works as *necessary or advisable for the proper ... maintenance safety [or] amenity of the building.* Section 19 of the Act provides, however, that relevant costs in determining the amount of a service charge may be taken into account *only to the extent that they are reasonably incurred,* and section 18(1)(a), as amended by schedule 9 to the Commonhold and Leasehold Reform Act 2002, includes within the definition of *service charge* the cost of improvements, permitted by the GLC lease. Therefore if, when questions of reasonableness are considered, it appears that any of the works in question were not necessary, or were badly executed, or were significantly too expensive, the tribunal will no doubt decide to disallow all or some of the costs attributable to them.

2. Are the leaseholders of the ground floor flats liable to contribute to the costs of works to lifts and entryphones?

58. This question was asked by the leaseholders of Flats 5, 13 and 15 (16/148) which are ground floor flats in Pinnace House, a six storey block on the Samuda Estate. They said that such costs were not passed to them prior to the stock transfer, although they did not argue that the leases did not permit recovery of such charges.

59. Had they sought to argue that the leases did not permit recovery of these costs, the argument would not have succeeded. The LBTH and Toynbee leases expressly include the lifts within the *common parts* which the landlord is liable to maintain and to which the leaseholder is liable to contribute by way of a service charge and at clause 5(m) contains a landlord's covenant to

maintain and, where necessary, renew the lifts. Lifts also in our view fall within *the main structure of the building* which the landlord is required by clause 6(b) of the GLC to maintain. Maintenance and, if necessary, replacement of the entryphone systems in our view also falls within the landlord's covenants to keep the building in good and substantial repair and condition. We were given no evidence to support the argument that leaseholders of ground floor flats in Pinnace House are, by way of a binding concession, not liable to contribute to the costs of works to lifts or entryphones.

3. What, if any, is the legal effect of the landlord's failure to operate a sinking or reserve fund?

60. This issue was raised by Mr Gould on behalf of the leaseholders of flats in Kelson House.

61. All the leases contain a covenant by the landlord to maintain a sinking or reserve fund. The covenant is contained in paragraph 1(e) of the eighth schedule to the GLC lease and in clause 5(p) of the LBTH and Toynbee leases. Neither the present landlord nor the LBTH has ever maintained such funds but it was suggested that they should, acting reasonably, have done so in order to ease the financial burden on the leaseholders faced with large bills for major works.

62. It is not within the jurisdiction of this tribunal to require a landlord to perform its leasehold covenants, and, even if it were, we would not have said that it was unreasonable not to have operated a sinking or reserve fund. It is within our knowledge that few, if any, social landlords of mixed-tenure properties operate sinking or reserve funds, partly because such funds, they find, cause widespread dissent and many leaseholders are reluctant to contribute to them. To have operated such a fund would not have affected the reasonableness of the cost of the works or the leaseholders' liability to pay service charges.

4. Section 20B of the Act

63. Although identified in the directions as "issues related to section 20B of the Act", the issues as they were developed at the hearing embraced the questions whether the service charge demands and certificates were valid, and those issues will also be considered under this head.

64. Section 20B of the Act provides:

> *(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.*
>
> *(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.*

65. An example of the demand for an interim service charge for the works is at 7/94. It relates to a flat in Knighthead Point on the Barkantine Estate, is dated 29 March 2009 and is headed "Re estimated service charges - interim charge for 2010/2011" and, so far as is relevant, reads:

> *Please be advised that in accordance with your lease your interim charge for the accounting period 1 April 2010 to 31 March 2011 is as detailed below:*
>
> | | |
> |---|---|
> | *Annual service charge* | *£1594.09* |
> | *Major works service charge* | *£8468.73* |
> | *Total interim charge* | *£2515.71* |

The interim charge is payable by four equal instalments on 1 April 2010, 1 July 2010, 1 October 2010 and 1 January 2011.

The demand is accompanied by the service charge budget for the block for 2010/2011 and by a statement of the estimated costs for the major works to the block for the same year (7/96 and 97).

66. An example of the demand for actual service charges for 2010/2011 is at 7/117 - 131.

67. The fifth schedule to the LBTH and Toynbee leases contains, so far as is relevant, the following provisions:

1(2) "the service charge" means such reasonable proportion of total expenditure as is attributable to the demised premises ...

1(3) "the interim charge" means such sum to be paid on account of the service charge in respect of each accounting period as the lessors or their managing agents shall specify at their discretion to be a fair and reasonable interim payment
1(3) the interim charge shall be paid to the lessors by four equal payments in advance on the first day of April the first day of July the first day of October and the first day of January

5 If the service charge is respect of any accounting period exceeds the interim charge paid by the lessee in respect of that accounting period together with any surplus from previous years carried forward as aforesaid then the lessee shall pay the excess to the lessors within twenty eight days of service upon the lessee of the certificate referred to in the following paragraph ...

6 As soon as practicable after the expiration of each accounting period there shall be served upon the lessee by the lessors or their agents a certificate containing the following information:

(a) the amount of the total expenditure for that accounting year

(b) the amount of the interim charge paid by the lessee in respect of that accounting period together with any surplus carried forward from the previous accounting period

(c) the amount of the service charge in respect of that accounting period and of any excess or deficiency of the service charge over the interim charge

Similar provisions are contained in the eighth schedule to the GLC leases.

68. David Wright, the leaseholder of a flat in Bowsprit Point on the Barkantine Estate, representing himself and the leaseholders of 91 other flats in blocks on the Barkantine and Samuda Estates, submitted that neither the interim nor the final demands for service charges in respect of the works were valid demands, and that if they were now to be correctly demanded they would be time-barred by virtue of section 20B because the relevant costs were incurred more than 18 months before a valid demand for payment, if it was made, would be made. He correctly accepted that, on the authority of *Gilje v Charlegrove Securities Ltd* [2004] 1 All ER 91 (Etherton J as he then was), section 20B is of no application to interim charges.

69. The leaseholders of flats in 5 - 35a Glengall Road and the leaseholders of flats in Argyle House, relying on some written submissions from counsel instructed by a leaseholder who has, since they were written, settled her dispute, took similar points. Mr Bhose submitted that they had done so at a late stage, in a blatant attempt to "ride free". Be that as it may, if the arguments are good arguments, they ought to succeed, and we will consider on their merits all the points which they and other leaseholders have made.

70. Some leaseholders submitted that the interim demand was in fact for an interim charge of £2515.71 (using the example set out in paragraph 65 above) in all, by four quarterly instalments of £628.93. Although a cursory reading of

the front page of the demand might at first suggest that the submission is correct, a more careful reading of the whole document makes it plain that the demand is for quarterly payments of £2515.71. It is unfortunate that the person who drafted the demand did not take more trouble to ensure that such an important document clearly expressed the landlord's intention, but we are satisfied that it was sufficiently clear to amount to a valid demand.

71. Some of the leaseholders who took issue with the adequacy of the interim demand submitted that paragraph 1(3) of the fifth schedule to the LBTH and Toynbee leases requires the landlord to "specify" in the certificate a "fair and reasonable interim payment" and that it failed to do so and the certificate was accordingly invalid. Some leaseholders, including Zayneb Izzidien and Mohammed Aziz, the leaseholders of 35 Glengall Grove, submitted that the interim demand was neither fair nor reasonable because it included the costs of the environmental works which the landlord had, at the time when it made the demand, already decided to exclude from the contract. Mr Bhose submitted that all was required was for the landlord to make a genuine estimate of the charges on the basis of the information available to it at the time, and that it was clear from the documents accompanying the interim demand that it had done so.

72. Mr Wright and some of the leaseholders of flats in 5 - 35a Glengall Grove also submitted that the final charges had not been the subject of valid certificates under paragraph 6 of the fifth schedule to those leases because the certificates had not been served *as soon as practicable after the expiration of [the relevant] accounting period* and did not state *the amount of the interim charge paid by the lessee in respect of that accounting period together with any surplus carried forward from the previous accounting period* as required by paragraph 6(b) of the fifth schedule.

73. An example of the documents relied on as certificates is the letter dated 28 September 2011 at 1/291. Mr Bhose submitted that the letter was a valid certificate. He said that the words *as soon as practicable* did not make time of the essence for the service of a valid certificate, and that the letter was in fact

sent as soon as was practicable. He accepted that, contrary to the requirements of paragraph 6(b) of the fifth schedule to the LBTH and Toynbee leases, the letter did not state the amount of the interim charge paid by the leaseholder, but submitted that it was permissible to read the letter together with the summary statement of service charges, major works costs and ground rent dated 21 November 2011 of which an example is at 1/256. He submitted that in any event each leaseholder who took the point was estopped by convention from doing so, because, until the service of their statements of case, they had acted on the assumption, common to the landlord, that the certificates were valid, or alternatively that those who had paid any balancing charges had waived the right to complain that the certificate was invalid.

74. We reject the leaseholders' submissions as to the adequacy of the interim demands. We do not accept that the leases require the demand for estimated charges to contain a statement to the effect that it is, in the opinion of the landlord, a fair and reasonable interim payment. We are satisfied that, provided the landlord has made a genuine and not unreasonable estimate of the interim charges, as in this case it did because it produced a detailed breakdown of the costs on which it was based, it has done enough to satisfy the requirements of paragraph 1(3) of the fifth schedule to the LBTH and Toynbee leases. There is no evidence that at the date of the interim demands the landlord had already decided to exclude the environmental works from the contract. In relation to the demands for balancing charges, while we accept that the document relied on as a certificate within the meaning of the leases did not, regrettably, comply with the requirement to state the amount already paid as an interim charge, and we reject the submission that it is permissible to read the document dated 21 November 2011 as part of the document dated 28 September 2011, we on balance accept that the evidence suggests that none of the leaseholders who asserts in these proceedings that the service charge certificates were invalid did so when they received them or within a reasonable time thereafter, and that they are estopped by convention from doing so now. We also accept that the landlord is entitled, if the certificate was indeed invalid, to serve another, compliant, certificate, along the lines

held to be permissible by the Court of Appeal in *Leonora Investment Company Ltd v Mott MacDonald Ltd* [2008] EWCA Civ 857.

75. The leaseholders of flats in Argyle House who were represented by Linda Williams (written submissions at 13/440) also submitted that the demands for interim service charges were inconsistent with a statement in the Leaseholders' Handbook which provided that amounts would be charged only when works were complete. It is however clear from the Handbook that, as we would expect, it is not intended to have legal effect and does not replace the terms of the lease, although, as with many documents emanating from the landlord, the explanation of the method of charging for major works was poorly expressed in the Leaseholders' Handbook.

76. In all those circumstances we are satisfied that the interim and, on balance, the final service charges for the major works were validly demanded and that no question under section 20B of the Act arises.

5. Section 21B of the Act

77. This issue was raised by Mr Wright. He submitted that the summaries of tenants' rights and obligations given to the leaseholders with their service charge demands (example at 7/102) were not in the form required by section 21B of the Act because they omitted the words *service charges* from the heading. He submitted that those words were required by the Service Charges (Summary of Rights and Obligations) (England) Regulations 2007 and that the President of the Lands Tribunal had said in *Tingdene Holiday Parks Limited v Cox* [2011] UKUT 310 (Lands Chamber) that such words were essential and that their omission invalidated the notices.

78. It is correct that the Service Charges (Summary of Rights and Obligations) (England) Regulations 2007 provide that the title of the document must read *Service Charges - Summary of Tenants' Rights and Obligations* and that the summaries given to the leaseholders in the present case omitted,

unaccountably, the words *service charges* from the title, but we are satisfied that the omission does not invalidate the notices. A reasonable recipient of the notice would have understood the purpose of the document and could not have failed to realise that it related to service charges, and we are satisfied that it was therefore adequate in accordance with the principles set out by the House of Lords in *Mannai Investment Company Limited v Eagle Star Life Assurance Company Limited* [1997] AC 749. The present case is entirely different from *Tingdene,* where the landlord served only a photocopy of the Queen's Printer's form of the 2007 Regulations with a service charge demand, without further explanation.

79. We are therefore satisfied that the summaries of rights and obligations were valid.

6. Did the landlord comply with the statutory consultation requirements in relation to the appointment of Baily Garner LLP and in relation to the contract for the external works

The agreement with Baily Garner

80. Before and during the first week of the hearing it was the landlord's case that the agreement between the landlord and Baily Garner was not a QLTA within the meaning of Act because it was entered into before Toynbee became the landlord. At the beginning of the second week of the hearing, after evidence on the issue had been given by Mr Bull and Mr Wigley, Mr Bhose said that, while landlord did not concede that the agreement appointing Baily Garner was a QLTA, it would no longer to seek to recover more than £100 from each leaseholder in respect of all the payments it had made or was liable to pay to Baily Garner in respect of the external works, such payments to cover all the accounting periods during which Baily Garner was employed by the landlord or its predecessors in respect of those works.

81. It seemed to us that that offer was fair and ought to be accepted, because on any view Baily Garner had provided services of a value in excess of £100 to each leaseholder, and because, even if the leaseholders had succeeded in their arguments that the agreement with Baily Garner was a QLTA and that compliance with the consultation requirements in respect of it should not be dispensed with, their contributions would have been limited to £100 for each leaseholder *for each accounting period* during which Baily Garner was employed in connection with the contract. The leaseholders who were present accepted the landlord's offer. In the circumstances we make no finding as to whether the agreement between the landlord and Baily Garner was a QLTA and whether, if it was, the consultation requirements relating to QLTAs should be dispensed with, and we simply record that each leaseholder is liable, if he or she has not already paid it, to pay the sum of £100 to the landlord in respect of the services of Baily Garner provided in connection with the contract for the external works. That finding does not necessarily apply to the services which Baily Garner has carried out in respect of the environmental works, the leaseholders' liability for which remains to be determined. It will be open to the parties to deploy their arguments on the issue once more when the environmental works are considered. We do not propose to express a view in this decision as to whether the agreement was a QLTA because the arguments on the issue were not completed at the hearing.

The qualifying works

82. We turn now to the important issue of whether the landlord complied with the relevant consultation requirements in relation to the external works.

83. The landlord's case at the hearing was that it consulted under Part 1 of Schedule 4 to the Consultation Regulations, which contains the regulations which apply to qualifying works for which public notice is required. Part 1 of Schedule 4 provides:

1(1) The landlord shall give notice in writing of his intention to carry out qualifying works -

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall -

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) state the reason why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for carrying out the works is that public notice of the works is to be given;

(d) invite the making, in writing, of observations in relation to the proposed works; and

(e) specify-

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

2. (1) Where a notice under paragraph 1 specifies a place and hours for inspection-

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

3. Where, within the relevant period, observations are made in relation to the proposed works by any tenant or the recognised tenants' association, the landlord shall have regard to those observations.

4. (1) The landlord shall prepare, in accordance with the following provisions of this paragraph, a statement in respect of the proposed contract under which the proposed works are to be carried out.

(2) The statement shall set out-

(a) the name and address of the person with whom the landlord proposes to contract; and

(b) particulars of any connection between them (apart from the proposed contract).

(3) For the purpose of sub-paragraph (2)(b) it shall be assumed that there is a connection between a person and the landlord-

(a) where the landlord is a company, if the person, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(4) Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the amount of the relevant contribution to be incurred by the tenant attributable to the works to which the proposed contract relates, that estimated amount shall be specified in the statement.

(5) Where-

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4); and

(b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed contract relates, the total amount of his expenditure under the proposed contract,

that estimated amount shall be specified in the statement.

(6) Where-

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4) or (5) (b); and

(b) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the works to which the proposed contract relates,

that cost or rate shall be specified in the statement.

(7) Where it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (6)(b), the reasons why he cannot comply and the date by which he expects to be able to provide an estimated amount, cost or rate shall be specified in the statement.

(8) Where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, the statement shall summarise the observations and set out his response to them.

5 (1) The landlord shall give notice in writing of his intention to enter into the proposed contract -

(a) to each tenant; and

(b) where a recognised tenants; association represents some or all of the tenants,, to the tenants' association.

(2) The notice shall -

(a) comprise, or be accompanied by, the statement prepared in accordance with paragraph 4 ("the paragraph 4 statement") or specify the place and hours at which the statement may be inspected,

(b) invite the making, in writing, of observations in relation to any matter mentioned in the paragraph 4 statement;

c) specify:

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) Where the paragraph 4 statement is made available for inspection, paragraph (2) shall apply in relation to that statement as it applies in relation to a description of proposed works made available for inspection under that paragraph.

6. Where, within the relevant period, the landlord receives observations in response to the invitation in the notice under paragraph 5, he shall, within 21

days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations.

7. Where a statement prepared under paragraph 4 sets out the landlord's reasons for being unable to comply with paragraph (6) of that paragraph, the landlord shall, within 21 days of receiving sufficient information to enable him to estimate the amount, cost or rate referred to in sub-paragraph (4), (5) or (6) of that paragraph, give notice in writing of the estimated amount, cost or rate (as the case may be) -

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

84. Issues which one or more leaseholders raised in relation to compliance with the Consultation Regulations are these:

i. whether the landlord should have consulted not under Part 1 of Schedule 4 but under Schedule 2, which contains the consultation requirements for QLTAs for which public notice is required, and then under Schedule 3, which contains the consultation requirements for qualifying works carried out under QLTAs;

ii. whether the landlord failed properly to serve the consultation notices on some of the leaseholders;

iii. whether the landlord should, by virtue of paragraph 1(1)(b) of Schedule 4, have given notice of intention to the Samuda Estate Local Management Organisation ("SELMO");

iv. whether the description of the works was in some instances insufficient to comply with paragraph 1(2)(a) of Schedule 4;

v. whether the landlord should have undertaken fresh consultation in accordance with the Consultation Regulations in respect of the replacement of the roof coverings of 5 - 35a and 47 - 65a Glengall Grove;

vi. whether the landlord provided information in relation to the proposed works and type of contract in such a form that it was not practicable for the leaseholders to make meaningful observations upon them;

vii. whether the landlord had, as required by paragraph 3 of Schedule 4, sufficient regard to the observations made in response to the notice of intention;

viii. whether the landlord sufficiently complied in the requirement in paragraph 6 of Schedule 4 to state within 21 days of receipt of the observations its response to those observations; and

ix. whether the second notice of estimates was valid.

i. Should the landlord have consulted not under Part 1 of Schedule 4 but under Schedule 2 and Schedule 3?

85. Schedule 2 contains the consultation requirements for QLTAs for which public notice is required. Schedule 3 contains the consultation requirements for qualifying works under QLTAs. A number of leaseholders submitted that, since the contract for the external works (which, at the time, also included the environmental works) was going to take more than a year to complete, it was a QLTA and should have been consulted upon under Schedule 2, and then, subsequently, the works themselves should have been consulted upon under Schedule 3.

86. They said that when it gave notice of intention the landlord appeared to share that view, because the notice (7/79) was expressed in the terms appropriate for a notice under Schedule 2 rather than Schedule 4. The notice,

which does not indicate under which Schedule it is given, begins, after the heading *Statutory Consultation for Major Works*: *As your landlord, Island Homes intends to enter into an agreement to carry out major works*, rather than the usual *intends to carry out qualifying works*, following the words of paragraph 1 of Schedule 4. Furthermore, the leaseholders submitted, in its first statement of case in relation to its application under section 27A, the landlord said (1/32): *for the major works two stage consultation was required in accordance with Schedule 2 and Schedule 4 (Part 1) of the Regulations,* (although its later general reply, drafted by Mr Bhose, included (1/53): *for the avoidance of doubt, the consultation was undertaken under Sch.4 Part 1, and not under Sch. 2. The references in the Statement of Case (at Para. 42) are in error*).

87. It was Mr Bhose's submission that although, as a matter of language, the contract met the statutory definition of a QLTA (*an agreement entered into by or on behalf of the landlord or a superior landlord for a term of more than twelve months)*, leading to a provisional conclusion that it was a QLTA, such a conclusion would be absurd and should be rejected. He submitted that the intention of Parliament was to capture within the definition of a QLTA agreements which were to run for periods of years - either framework agreements under which individual call-off contracts or works orders would be drawn, or long-term agreements for the provision of goods or services. He submitted that it was not intended to include within the definition of a QLTA stand-alone contracts for the carrying out of works which happened to extend beyond 365 days. He submitted that the limitation on recoverable costs for QLTAs by reference to a *period prescribed by the regulations* contemplated recurring costs, that there was no logical reason to require consultation under Schedule 2 for a building contract which was expected to last for 366 days and not for one which was expected to last for 365 days. He said that if the definition was to be taken literally, then very large numbers of building contracts would be QLTAs, because, including their defects periods, which were usually for one year, they would inevitably last for more than a year.

88. We accept Mr Bhose's submission that Parliament is unlikely to have intended a stand-alone building contract which was expected to take more than a year to perform to be regarded as a QLTA, required be consulted on under Schedule 2 and then under Schedule 3. As we pointed out at the hearing, the statutory definition of a QLTA is absurdly wide. The exceptions set out in paragraph 3 of the Consultation Regulations are very few. If the definition is to be taken literally, a contract of marriage entered into by a landlord would be a QLTA. And certainly, as Mr Bhose submitted, if the definition is to be taken literally, many, if not most, contracts for major works would be QLTAs because they almost invariably include a provision for a defects period, usually of a year, after completion of the works. In our view common sense is required to interpret the phrase, and common sense suggests that a stand-alone contract for works to a building is not intended to be a QLTA. We are therefore satisfied that the landlord was required to consult under Part 1 of Schedule 4 to the Consultation Regulations and not under Schedules 2 and 3.

89. Having said that, it is hard to escape the conclusion from all the evidence that the early stages of the consultation process were not carried out as efficiently as they should have been. We were not provided with evidence from the persons who were responsible for organising the early stages of the consultation process or who gave instructions for the landlord's first statement of case in the application. It is particularly surprising, in view of the importance of the statement of case, made in the knowledge that the leaseholders were challenging the adequacy of the consultation process, that it included the statement that the first consultation notice was given under Schedule 2 to the Consultation Regulations, and we are inclined to suspect that whoever gave those instructions either believed that the landlord was in fact purporting to consult under Schedule 2 when it gave the first notice in January 2009 or was not sufficiently familiar with the Consultation Regulations and did not know under which Schedule the landlord was consulting, although we of course accept from Mr Bhose that his instructions for the purpose of drafting the landlord's general reply were otherwise.

ii. Did the landlord fail to give notice of intention to some leaseholders?

90. In relation to the second issue arising under this head, namely whether the landlord failed to give notice to some of the leaseholders of its intention to carry out the works, Matthew Saye, the landlord's Assistant Director of Home Ownership Services, gave evidence. He was not employed by the landlord until 22 June 2009, after the notices of intention were served. He said in paragraph 4 of his witness statement (1/90) that his information was that the notices of intention were delivered by hand to each leasehold property by the caretaking team, and he produced (1/98) a memorandum from a former employee of the landlord, Jon Megan, confirming that that was done. Mr Saye did not say in his written statement anything to the effect that the notices of intention were sent, or also sent, to the postal addresses of non-resident leaseholders. The hearing proceeded at first on the basis that, as Mr Megan's memorandum suggested, the notices of intention were not sent to non-resident leaseholders at their postal addresses but only hand-delivered to the flats. However, when questions were asked at the hearing by individual non-resident leaseholders as to whether they were served with the notices of intention, it emerged that some of them, at any rate, appeared, contrary to the information given to Mr Saye, to have been served by first class post at the addresses they had given for correspondence.

91. We agree with Mr Bhose that submissions by individual leaseholders that they were not served with notices under the Consultation Regulations should have been made in advance of the hearing in accordance with the tribunal's directions in order to enable the landlord to locate the relevant evidence, and we therefore entertain such submissions only in the few instances where they are supported by evidence lodged in good time by the leaseholder concerned.

92. We do not, however, accept Mr Bhose's submission that service on non-resident leaseholders of notices under the Consultation Regulations only at their flats on the estates is in principle sufficient in cases where such leaseholders have previously provided the landlord with a different postal address. Mr Bhose submitted that, since clause 8 of the LBTH lease provides

that *any notice in writing certificate or other document required or authorised to be given or served hereunder shall be sufficiently given or served if it is ... affixed or left on the demised premises,* service of consultation notices on non-resident leaseholders by leaving the notices at their flat was sufficient. In our view that submission is incorrect, because consultation notices are served under the Act and not under the lease.

93. Moreover we do not think that the landlord can derive support, as Mr Bhose suggested that it might, from section 196 of the Law of Property Act 1925, specifically applied by clause 11 of the GLC lease to *any notice under the lease*, but applied generally to all leases *unless a contrary intention appears*. That section is primarily concerned with the service of notices required or authorised to be given by that Act, which do not, of course, include consultation notices. It provides that such notices are sufficiently served if they are left for the leaseholder at *any house or building comprised in the lease*. Section 196(5) extends the provisions of section 196 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.* We read that subsection as applying to notices given under the lease and not to notices served under section 20 of the Act, although, it is arguable (but was not argued) that the Act is an *instrument affecting property.* We prefer the conclusion that Parliament intended landlords to give section 20 notices to leaseholders at the last address known to the landlord, and that service of such notices only at the demised premises is not sufficient if the landlord is or ought to be aware that the leaseholder does not live there.

94. The non-resident leaseholders who asserted in statements of case, provided in good time, that they had not received one or both of the notices were:

i. Burhan Choudhury, the joint leaseholder of 33 Hedley House, asserted (20/22) that he had not received the notices. He gave oral evidence to that effect and was cross-examined. A copy of the second notice was produced

showing that it was sent to Mr Choudhury's correspondence address, but it appears probable that the first notice was left only at the flat. Mr Choudhury wrote to the landlord on 31 March 2011 asking whether a notice of intention had been given to him and he was sent a copy of the notice which had been delivered to the flat. He gave evidence that he had not received the notice and that he was not familiar with the section 20 procedure, although he agreed that he is a professional property investor who owns a number of leasehold properties and also a professional managing agent. We found his evidence unconvincing and are satisfied on the balance of probabilities that he was made aware of the first notice even if it was not, and we accept that it was not, sent to his correspondence address.

ii. Rufia Choudhury, Mr Choudhury's wife, is the leaseholder of 36 Pinnace House, but Mr Choudhury said that he handles all her business affairs. We reach the same conclusion in respect of the service of the first consultation notice relating to 36 Pinnace House as we did in respect of the notice relating to 33 Hedley House.

iii. Peter Thomas, who is the father of Jamie Thomas, was, at the time when the first notice was given, the leaseholder of 89 Bowsprit Point although he has since then assigned the beneficial interest in it to Jamie Thomas. Peter Thomas wrote to the tribunal to say that he had not received the notice of intention at his address in Northumberland, although he agreed that his son had later found a copy of the notice which had been delivered to the flat. We accept that the notice of intention was not served on Peter Thomas at the address he had given for correspondence.

iv. Mr Gould, in his written closing submissions, complained about what he considered to be the landlord's general failure to serve notices on non-resident leaseholders at their correspondence address, but gave no specific examples.

95. We accept that, in the three instances described above, the first consultation notice was not served on the address for correspondence which

the non-resident leaseholders had provided to the landlord as, in our view, it should have been, but was delivered only to the leaseholder's flat on the Isle of Dogs.

iii. Should the landlord have given notice of intention to the Samuda Estate Local Management Organisation?

96. It was submitted by Anthony Lane, the leaseholder of 78 Bowsprit Point on the Samuda Estate, and by Mr Gould, that the landlord should, by virtue of paragraph 1(1)(b) of Schedule 4, have given notice of intention to SELMO. They said that the leaseholders of flats on the Samuda Estate had been led to believe that SELMO would be formally consulted about the proposed works. However we are satisfied that SELMO was not at any time a *recognised tenants' association* within the meaning of section 29 of the Act and there was accordingly no requirement for the landlord to consult it.

iv. Was the description of the works given in some of the notices of intention sufficient?

97. Paragraph 1(2)(a) of Schedule 4 requires the notice of intention to give a description of the proposed works *in general terms*. In the present case the description of the works was given in a schedule attached to the front page of the notice, and the schedule contained a list of the proposed works to the particular block in which the recipient's flat was situated. The notices relating to blocks where one or more leaseholders challenged the adequacy of the description are attached to Mr Saye's statement and are in bundle 1 at pages 105 to 149. The majority of the schedules begin *works to your block will comprise external repair and refurbishment including: ...* ; others begin *works to your block will comprise ...* but omit the words *external repair and refurbishment including: ...* . In each case those words are followed by a list of the proposed works. We accept that in each case the schedule is to be regarded as part of the notice.

98. A number of leaseholders submitted that the description of works in the notice which they were given was inadequate. They said that the failure to describe the works in sufficient detail defeated the underlying purpose of the Consultation Regulations, which was to give leaseholders sufficient information to enable them to make constructive comments. The submissions they made included the following:

a. the leaseholder of 6 Yarrow House, Mr D Sitaula, represented at the time by Davis Brown, chartered surveyors (their letter at 16/243), said that the works to the door entry system of the block were not listed in the first notice (1/144). Yarrow House is a block of 14 flats. Works to the door entry system of Yarrow House were carried out at a cost of £17,607.10 (1/145), plus VAT, fees and preliminaries, equivalent to over £1250 plus VAT, fees and preliminaries from each leaseholder.

b. Mr Kingham submitted that the notice in respect of Spinnaker House (1/146) did not describe proposed works but described proposed surveys to identify the proposed works.

c. Leaseholders of flats in Montcalm House said in written submissions that the schedules attached to the notices given in respect of their block (example at 1/148) did not include a large number of works which were carried out (listed in the schedule at 1/149), namely renewing external doors, replacing wooden windows with uPVC double glazed windows, high pressure cleaning of existing floor and stair surfaces, application of anti-slip coatings to balcony coverings, repairing external metal and timber surfaces, installation of letterboxes, external signage, replacing existing external mains gas pipework and replacing rising cold water service to cold water storage tanks. They said that the landlord had not undertaken a detailed survey before carrying out the works but had relied on a broad, generic stock condition survey and that they considered that the additional works had been added only in order to increase the cost of the works beyond the threshold for OJEU procurement.

d. Kabir Mahmud, the leaseholder of 36 Pinnace House, said that the schedule attached to the notice (1/138) which he and the other leaseholders of flats in the block received did not include the replacement of the lift, or any other works to the lift. He said that the condition survey of the block (2/217) did not indicate that any works to the lift were necessary. The condition survey said that that the condition of the lift car was *fair* and that it should be replaced in 12 years, that the condition of the lift motor room was also *fair* and should be replaced in 15 years, and that lift motor room security was *good*. According to the schedule of works carried out to Pinnace House (1/139), which is a block of 36 flats, the lift was replaced at a cost of £85,180.01 (1/139), equivalent, we assume, to, at least, some £2366.11 plus VAT, fees and preliminaries, from each leaseholder. Mr Mahmud also said in his oral evidence that no drainage works were described in the notice, but the notice refers to "survey and repairs to below ground drainage".

e. A number of leaseholders submitted that the landlord should have consulted all the leaseholders in respect of the installation of a three-dish IRS system. In each of the notices of intention produced to us it was said that the works would include "installation of a communal digital integrated reception system and connection to each flat." The contract provided for a single-dish system, but a variation to a three-dish system was instructed during the contract period.

f. Mrs Williams, on behalf of the leaseholders of 12 flats in Argyle House, submitted that the appendix to the notice of intention in respect of Argyle House (1/106) did not indicate that the block was to be fully re-wired, that previously unpainted concrete surfaces were to be painted, or that anti-slip coatings were to be applied to the balconies.

g. A number of leaseholders submitted that new external signage should have been described in the notices of intention.

99. Mr Bhose reminded us that in deciding whether the descriptions were adequate we should bear in mind that the obligation was to describe the

works *in general terms* and a specific or detailed description was not required. He accepted that it would have better if the replacement of the lifts in Pinnace House had been included in the notices of intention, but submitted that a large number of works to Pinnace House were listed, and the notice therefore complied with the statutory requirements.

100. We accept that a general and brief description of the works is all that is required and that the description given in the great majority of the notices of intention was adequate. We accept that items which are relatively small in value need not be specifically listed provided they fall within general words, such as "general repair and refurbishment", in the notice.

101. We are also of the view that the omission of one or more items of work from the description given in the notice does not invalidate the notice as a whole. It would in our view be absurd, and cannot have been the intention of Parliament, if the omission from the description of the proposed works of a single item, or a few items, which ought to have been included should be taken to invalidate the whole notice. The approach to dispensation in such circumstances was not the subject of submissions at the hearing, and further written submissions from the landlord and from the affected leaseholders will be sought before we reach our decision whether to dispense with compliance with the consultation requirements in respect of the failures to include in the description works which ought to have been included.

102. Our conclusions on whether the alleged omissions of works from the notices of intention amount to breaches of the consultation requirements are as follows:

a. We are satisfied that the works to the door entry system of Yarrow House do not fall within the general description of the works given in the notice of intention. In our view they should have been specifically mentioned, and we consider that the omission was a serious breach of paragraph 1(2)(a) of Schedule 4.

b. We are satisfied that the notice of intention for Spinnaker House sufficiently described the proposed works and was adequate.

c. In relation to the notice in respect of Montcalm House, we agree that, if all or most of the wooden windows were to be replaced with uPVC double glazed windows, that should have been specifically mentioned in the notice, in which the only reference to windows was "existing PVCu windows and balcony doors will be overhauled/repaired as necessary". It is not however clear from the schedule of works carried out what works were undertaken to the windows in the block. There is an item "renew windows with uPVC: £2517.57, and also "install double glazed windows: £3046.98", from which we infer that the majority of the windows in the block, a five storey block of 55 flats, were not replaced, but only, we assume, those which could not be repaired. On balance, we regard the description of the works given in the notice of intention in respect of Montcalm House to be adequate.

d. We regard the omission of the replacement of the lift, or any mention of works to the lift, in Pinnace House as a serious breach of paragraph 1(2)(a) of Schedule 4. The landlord agreed that these were not emergency works. They were a major and expensive item which does not in our view fall within any of the general words in the appendix to the notice. No evidence was given to explain the omission, although it is fair to say that it was not specifically discussed until towards the end of the hearing. We are satisfied that the notice sufficiently describes the drainage works which were carried out.

e. We regard the description "installation of a communal digital integrated reception system and connection to each flat" as sufficient to include a three-dish system.

f. We are satisfied that the words "repairs to communal and private balconies" in the notice relating to Argyle House are adequate to cover the provision of anti-slip coatings, and, on balance, that the words "external repair and refurbishment" include the painting of previously unpainted concrete

surfaces. But we accept that the full electrical re-wiring to the block, which appears to have cost about £37,500 plus fees and VAT, presumably equivalent, since the block comprises 20 flats, to some £1875 plus VAT and fees from each leaseholder, is not described in the notice of intention which, under the heading "mechanical and electrical works", identifies only the renewal of cold water storage tanks and associated works, the provision of new emergency lighting to communal parts, and the installation of the IRS. We regard that failure as a serious breach of the consultation requirements.

g. We accept that external signage is sufficiently included in the words "external repair and refurbishment" in all the notices of intention.

v. Should the landlord have undertaken fresh consultation in accordance with the Consultation Regulations in respect of the replacement of the roof coverings of 5 - 35a and 47 - 65a Glengall Grove?

103. The notice of intention in relation to 5 - 35a and 47 - 65a Glengall Grove (1/115) described the proposed work as including repairing and overhauling the roofs. Mr Bull and Mr Wigley said in evidence that once the scaffold was in place it had been found that repair of those roofs was likely to be uneconomic, and that Mulalley had then commissioned a report from Monier Redland, a roofing specialist, dated 10 March 2010 (1/383), which confirmed that opinion. Once the landlord was informed that replacement was required it undertook extra-statutory consultation with the leaseholders by sending them a copy of a report by Baily Garner recommending replacement (1/299A) together with a covering letter inviting observations on the proposals. Mr Bhose submitted that it could not have been Parliament's intention that in those circumstances, when the contractors were on site, the landlord should undertake full statutory consultation. In our view the more correct analysis is that, strictly, the landlord should in such circumstances have undertaken full consultation and that its failure to do so requires dispensation from the consultation requirements, but that it would without question be granted such

dispensation in the circumstances, particularly as the landlord acted reasonably in promptly giving to the leaseholders as much information as it could about the revised proposals and an opportunity to comment upon them.

vi. Did the landlord have regard to all the observations made in response to the notice of intention as required by paragraph 3 of Schedule 4?

104. Mr Saye's evidence was that after he joined the landlord on 22 June 2009 he personally and carefully reviewed the folders in which leaseholders' observations on the notice of intention had been kept and, having reviewed them, he compiled the summary (7/from 88) of observations which was attached to the second consultation notice. It was not suggested to him in cross-examination that that evidence was untrue. He said that many of the observations which leaseholders had made had been replied to by letter, and a number of telephone queries had been answered.

105. The hearing bundles include a number of careful and detailed letters from the landlord in response to leaseholders' observations, although it is unfortunate that, in answer to written questions about the IRS Mr Megan asserted, incorrectly, that it was the entryphone system (example at 20/75). We accept that, in general, the landlord did its best to respond to leaseholders' observations and we accept Mr Saye's evidence that he read and considered all the leaseholders' observations. The phrase *have regard to* does not mean *agree with*. The phrase does in our opinion require observations, however short, long or repetitive, to be read and considered, and, if it suggested that regard has not been had to a particular observation, the landlord should be in a position to prove the contrary, the most satisfactory means of doing so so being the production of a letter containing a reasoned response. We accept Mr Bhose's submission that none of the leaseholders has, at the appropriate time, put in issue a failure to have regard to his or her observations on the notice of intention and that there is no established breach of the consultation requirements in this respect.

v. Did the landlord provide information in relation to the proposed works and type of contract in such a form that it was not practicable for the leaseholders to make meaningful observations upon them?

106. Mr Saye said that the form of tender, a full copy of the employer's requirements and the draft contract were available for inspection at the landlord's Millwall office and that he also arranged for the same information to be available on CDs, and that CDs containing the information were sent or handed on request to leaseholders who requested them. He explained in his oral evidence the very great efforts to which the landlord and Baily Garner had gone to make information available, both electronically and on paper, to the leaseholders. He said that it was unfair to criticise the landlord for making available more information than the law required.

107. A number of leaseholders, and in particular Mr Gould, who is a highly qualified chartered surveyor and a former chair of the Toynbee board, and Mr Thomas, submitted that after the second notice was given in July 2009 the landlord provided information about the works and the contract in such profusion that it was virtually impossible for the leaseholders to extract the information they needed in order to understand the proposals. Mr Gould said that the landlord simply made available the whole of the employer's requirements and contract documents for all the 41 blocks to which works were to be carried out and that it was only with the utmost patience and dedication that it was possible, even for an experienced building professional such as himself, to fathom what the landlord proposed. He submitted that if the landlord had consulted on a block-by-block basis, as in his opinion it should have done, the leaseholders would have had easier access to the documents and would thus have been in a position more readily to make constructive comments about the landlord's proposals. Other leaseholders said that the second stage of the consultation was flawed because information relating to the notice of estimates was not available to leaseholders, CDs prepared by Baily Garner giving particulars of the proposed works not being available, they maintained, until 3 September 2009, and hard copies not being available at the landlord's office despite promises to the contrary, and some of

them complained that second stage of the consultation process took place in the summer holidays at a time when there was a postal strike.

108. Mr Bhose submitted that all that was required of the landlord was compliance with the Consultation Regulations, and that it could not be properly criticised for doing more.

109. We accept that all that is required of the landlord in relation to consultation is compliance with the Consultation Regulations and that if, by providing more than the Regulations required, the landlord overwhelmed the leaseholders, as we believe that it did, it cannot be taken to have thereby put itself in breach of the Regulations, although we can well understand, and we accept, that the enormous volume of documents which this massive and unwieldy contract inevitably generated made it very difficult for leaseholders to understand and comment on them in the time available to them.

vii. Did the landlord sufficiently comply in the requirement in paragraph 6 of Schedule 4 within 21 days of their receipt to state its response to observations received in response to the notification of the proposed contract?

110. Mr Saye gave evidence that before the second consultation notice was given he arranged for extra staff to be available and that he set up a team to deal with observations from leaseholders, visits to the landlord's office, the inspection of documents and questions from leaseholders during the 30 day period allowed for observations. He said that he also arranged for Baily Garner to have staff available to provide assistance during the 30 day period. He said that he explained the process to the landlord's staff and set up a spreadsheet (1/102) on a shared drive to log receipt of observations as they were received. He said that he was able to view the spreadsheet from any location and that, while observations were being considered, he spent as much time as possible at the landlord's Millwall office to consider the observations and to help to prepare replies to them. He said that he advised

the team about how to respond, or where to seek the information required for a response, and that Mr Bull of Baily Garner helped with technical information. He said that he was aware that the contract could not be awarded until the 30 day period for observations had expired and "we had fully considered all the relevant observations".

111 Mr Saye said that he was away on holiday for the last two weeks of August and that the period for observations expired on Sunday 30 August 2009, the day before the August Bank Holiday. He said that he went to the Millwall office on his first day back at work on Tuesday 1 September and made sure that all the relevant observations had been added to the spreadsheet, that he checked the reception areas and entrances for any hand delivered documents, and checked with the staff to make sure that any other documents which had been posted or handed in were available. He said that he then checked to see that no further documents had been received at the landlord's Suttons Wharf South office. He said that he then carefully read through all the observations to ensure that no issues had been raised which justified a delay in awarding the contract. He said that although there were about 200 written observations, in addition to observations by telephone, almost half of the written observations were on a standard template prepared by Mr Wright. He said that as far as he could recall the only leaseholder who took issue with the use of a design and build contract was Mr Gould and the only leaseholder who suggested that the works should be carried out under separate contracts rather than one contract was Mr Kingham. He said that he was satisfied, after considering all the observations, that no issue had been raised which justified delay in awarding the contract and, having considered them, he later on 1 September reported by telephone to the project team that the contract could be awarded, and that it was awarded later the same day.

112. Mr Saye said that, in addition to statutory consultation, the landlord consulted with all the leaseholders by letters, newsletters (examples at 1/from 246) and meetings, and that a "consultation event" was held in June and July 2009 for each of the four estates. He said that that all the residents had been aware for a number of years that major external works were to be carried out

because they had been extensively discussed when the stock transfer was taking place, the main purpose of the stock transfer being to facilitate the refurbishment of the estates. He said that Mulalley held open days for residents to explain what works were proposed to individual blocks and sent newsletters during the works to keep residents informed.

113. Mr Saye said that the landlord was aware that major works had previously been carried out to the Barkantine Estate. He said that his understanding was that no work was done under the external works contract which did not need to be done, but he agreed that there had been a problem caused by the fact that the LBTH had not provided the landlord with guarantees or warranties in respect of past works at the time of the stock transfer. He said that he was aware that the landlord had pursued the provision of guarantees and warranties "very vigorously", and that its efforts had included making a Freedom of Information request for the documents.

114. Several leaseholders submitted that the landlord had treated leaseholders with contempt by letting the contract on the working day following the last date for the submission of observations. We can understand why they should feel aggrieved about this. But it should be borne in mind that notwithstanding that the second notice provided that observations were to be received by 30 August 2009 "in order for Island Homes to have regard to them" (7/66 and paragraph 22 above), paragraph 6 of Schedule 4 does not contain any requirement that the landlord must *have regard to* observations made in respect of the second notice, but only that it must respond to them in writing within 21 days, and there is nothing in paragraph 6 of Schedule 4, or anywhere in the Consultation Regulations, to prevent the landlord from entering into a contract before it has stated its response to all the observations, as happened in this case. Paragraph 6 of Schedule 4 can therefore be said to provide no real protection to leaseholders. Nevertheless it seems to us that paragraph 6 does require the landlord to give a considered and reasoned response to observations made in accordance with paragraph 5, and that a cursory response such as "we acknowledge receipt of your observations" or "thank you for your observations which have been noted"

would be inadequate. In this respect we disagree with Mr Bhose's submission to the contrary. The point does not, however, arise because, with the following exceptions, all leaseholders who made observations were given reasoned responses.

115. Mr Bhose conceded that not every leaseholder who made observations to the second notice received a written response within 21 days. His concessions related to:

a. Mr Jamie Thomas, the leaseholder of 80 Bowsprit Point, who received a response dated 9 December 2009 (8/164) to his observations dated 30 August 2009 (8/142). The response contained apologies for the delay and provided a reasoned answer to his questions.

b. Kim Willcock, the leaseholder of 4 Argyle House, who did not receive a response within the 21 day time limit. She sent a reminder and received a detailed response dated 9 February 2010 (8/25).

c. Mr Kingham is highly qualified civil engineer of great experience, and the former Chief Engineer of London Underground. He made detailed observations dated 16 August 2009 (10/134) but received a reply (example at 10/141) which bore no relation to any of the observations he had made and was a copy of a generic reply to an entirely different set of observations made by Mr Wright.

116. Michel Negrou, who owns a number of flats on the St John's Estate, said in his oral submissions, though not in his previous written statement (20/145), that he had not received a response to his observations dated 15 August 2009. Mr Bhose said that the point was new and the landlord had no record of Mr Negrou's letter dated 15 August 2009. In other isolated cases it is possible written responses were not sent or, if sent, were not received.

117. We accept Mr Bhose's submission that failure in a few instances to respond to observations adequately or in time does not vitiate the whole

consultation process. Where there are, as here, relatively few instances of, as we are satisfied, inadvertent non-compliance with paragraph 6 of Schedule 4, in our view it is appropriate to find non-compliance in individual cases, rather than a systemic failure which could be said to vitiate an entire stage of the entire consultation process.

118. We find that there was a failure to comply with paragraph 6 of the Schedule in relation to Mr Thomas, Ms Willcock and Mr Kingham.

viii. Did the second notice fail to comply with the Consultation Regulations?

119. The leaseholders of Montcalm House submitted that the second notice did not comply with the Consultation Regulations in that it described works different from those described in the notice of intention. We do not accept this as a valid criticism. As Mr Bhose submitted, the second notice is not required to contain a description of the works, and, as was made clear in the second notice, it contained a general description of the works to be undertaken to all four estates.

Our conclusions on failures to comply with the consultation requirements

i. Breaches

120. To summarise, we have concluded that the landlord failed to comply with the consultation requirements in the following respects:

i. The description of the proposed works in the notice of intention in respect of Yarrow House did not include the replacement of the door entry system, in breach of paragraph 1(2)(a) of Schedule 4.

ii. The description of the proposed works in the notice of intention in respect of Pinnace House did not include the replacement of the lift, in breach of paragraph 1(2)(a) of Schedule 4.

iii. The description of the proposed works in the notice of intention in respect of Argyle House did not include full electrical re-wiring, in breach of paragraph 1(2)(a) of Schedule 4

iv. The landlord failed adequately to serve a notice of intention on Mr and Mrs Chaudhury of 33 Hedley House and 36 Pinnace House respectively and on Peter Thomas of 80 Bowsprit Point.

v. The landlord failed to state its response within 21 days to the observations of Jamie Thomas of 80 Bowsprit Point, Kim Willcock of 4 Argyle House and Ian Kingham of 29 Spinnaker House, in breach of paragraph 6 of Schedule 4.

ii. Prejudice

121. We are satisfied that the failures to include in the description of the works the replacement of the door entry system in Yarrow House, the replacement of the lift in Pinnace House and full electrical re-wiring in Argyle House were serious breaches of the consultation requirements which may have caused significant prejudice to the leaseholders of flats in those blocks.

122. In our view the failures to serve the notices of intention were minor breaches which caused no, or no significant, prejudice to Mr and Mrs Chaudhury or to Peter Thomas; and the landlord's failure to respond within 21 days to the observations of Jamie Thomas, Ms Willcock and Mr Kingham were also minor breaches of the consultation requirements which caused no, or no significant, prejudice to the leaseholders concerned.

123. We leave for decision after we have received and considered further submissions in the light of *Daejan* the question whether the degree of

prejudice in each of the three instances listed in paragraph is 121 sufficient to justify a refusal of dispensation. In each case it has to be borne in mind that what may be regarded as the most important right granted to leaseholders under Schedule 4 Part 2 of the Consultation Regulations, namely the right to nominate a contractor from whom the landlord must try to obtain an estimate, is not given to tenants where the value of the works is such that public procurement is required.

7. Should dispensation from the Consultation Requirements be dispensed with?

124. This question will be considered after further written submissions from the landlord and from those leaseholders who have been or who may have been prejudiced by the above breaches in the light of the decision of the Supreme Court in *Daejan*.

8. Is the landlord estopped or otherwise prevented as a matter of law from demanding service charges by reason of promises made prior to the stock transfer?

125. Some of the respondents in Kelson House, represented by Mr Gould, submitted that, before the stock transfer, Toynbee gave a promise to all leaseholders that, after the transfer, service charges would be capped at a total of £10,000 for a period of five years, not only for leaseholders who had bought their leases under the Right to Buy scheme but also for purchasers from them, and that the landlord was estopped from breaking the promise. Mr Bhose said that the landlord denied that such a promise was given or that, if it was made, it was capable of creating an estoppel. He said that the landlord operated a policy which included a service charge cap in some circumstances but that it did not extend the cap to purchasers from the original Right to Buy leaseholders. That, he said, was the same policy as that which was applied by the LBTH before the stock transfer.

126. Mr Gould could show us no evidence that any promise was made to extend the cap to purchasers from the original leaseholders. He said, and we accept, that there had been a great deal of debate on the subject in the period leading to the transfer, and we accept that he, and no doubt others, genuinely believed that such a promise had been made. We are satisfied that that belief was no more than wishful thinking. The documents do not support any such promise. A "leaseholder consultation document" (17/from 264) and a letter to leaseholders from Angus Anderson, an Independent Tenants' Adviser, (19/426) sent with it both made clear that the leaseholders' contributions to the cost of works would depend on the terms of their leases. There is simply no evidence to support the estoppel which Mr Gould proposes.

127. Mr Bhose submitted that, even if such a promise had been made, it would not have been unconscionable for the landlord to resile from it because the consent of the leaseholders to the stock transfer was not required as a matter of law, and there was no evidence that any leaseholder voted in favour of the transfer in reliance on a promise about the capping of service charges. We agree with those submissions.

9. The appropriateness of letting one contract for all the external works

128. The definition of this issue in the directions does not adequately cover the general issues between the parties in respect of the contract, which are not only whether it was appropriate to let one contract for all the external works but also whether it was appropriate to use a JCT Design and Build form of contract rather than the more traditional form of contract based on specification and drawings. Inevitably there is some overlap between this section of the decision and the next, which is concerned with the choice of Mulalley to carry out the works.

129. Mr Wigley said that before the merger of Toynbee with One Housing Group, the Toynbee board, then chaired by Robert Gould, had expressed a preference for a traditional form of tender with schedules of works and

detailed specifications and drawings. He said that in his opinion that method of procurement created problems for a client who might be faced with extra costs and the difficulty of resolving conflicts between the design team and the contractor related to the cost of variations, whereas, in the case of a design and build contract, the contractor was responsible for designing the work required to meet the employer's requirements and for the supervision and final quality of the works, and included in its bid an element to cover risk. He said that in the more traditional method, using quantities, the client would have a contingency sum allocated in the budget to cover the inevitable cost of variations, but the contingency could be too high or too low. In a design and build contract, he said, the risk was passed to the contractor who would build a contingency into his price, and the client therefore obtained more certainty on the budget. He said that Baily Garner's fees were less with a design and build contract than they would have been under a traditional form of contract since, with design and build, the detailed design was the contractor's responsibility. He said that many housing associations used design and build contracts to undertake the repair and renewal of their existing stock, that he had been involved in a number of such projects to a total value of £100 million, and that he would recommend a design and build contract to clients for projects of this size. He said, in answer to questions from Mr Gould, that in his experience design and build was consistently used for the vast majority of projects of this kind.

130. In his written statement Mr Wigley had listed what he considered to be the advantages of all the works being carried out under one contract. They were:

i. health and safety advantages derived from co-ordinating activities on various sites, including traffic management and congestion, by comparison with the difficulties of managing four or more contractors on four estates at once;

ii. it was more cost effective to use one contractor because the management and coordination of site offices could be done by one person;

iii. consistency and competitiveness of preliminary costings;

iv. it was a good way of developing relationships with residents, and better than having different contractors carrying out different works on different days to different blocks;

v. more competitive rates could be achieved; he said that when the works were tendered it was a competitive market although at the present time the market "might not be so receptive to such a large contract";

vi. in his experience the material costs were driven lower by bulk purchasing, and although a small tender for each block might enable smaller and less expensive contactors to tender, it would not have been feasible to have 63 contractors on site;

vii. operating as a single contract would save management time and the costs of contract supervision as multiple meetings, reports and minutes would need to be organised with a number of smaller contracts.

131. Asked by Mr Bhose whether there might have been a duplication of design work between Baily Garner and the contractor, Mr Wigley said that, with design and build, Baily Garner's design work was limited to producing the employer's requirements, whereas with a traditional form of contract, Baily Garner would have had to do more detailed design work for which the fees would have been higher.

132. Asked by Mr Kingham whether it would have been more sensible to have awarded four separate contracts, one for each estate, he said that Baily Garner had produced different employer's requirements for each estate, each of which had been considered individually for that purpose, and that he therefore did not consider that it would have been more sensible to have awarded four separate contracts.

133. Asked by the tribunal to give examples of the economies of scale which had been achieved by this large contract, he was unable to provide any examples.

134. Mr Bull also gave evidence. He is a quantity surveyor who was employed by Baily Garner from 2004 to February 2012. He said that items of work were quoted at a fixed price where it was considered that there was sufficient information at the tender stage for the contractor accurately to quantify and price the amount of work required. He said that there were also items of work which had provisional sums set out in the tender and these were allocated for work items which could not reasonably be quantified by the tendering contractors. On those items, he said, the contractor would propose a variation once it had been able to obtain access to all the relevant areas or had undertaken further specialist work. An employer's instruction would then be issued for each change once it had been approved. He said that, in addition, there were provisional quantities which were included in the employer's requirements which were in respect of items where Baily Garner had indicated an approximate area for a particular work item but the contractor could make its own assessment during the tender stage as to the likely extent of work required and price it accordingly. He said that where works such as concrete repairs were subject to re-measurement by the contractor they were priced at tendered rates.

135. A number of leaseholders, including Mr Gould and Mr Kingham, submitted that it was unreasonable, and had led to increased costs and unnecessary works, to award such a large and unwieldy contract and to use a design and build contract. They said that the decision to use design and build was detrimental to the leaseholders because it took no or insufficient account of the risk that the contractor would be paid for items of works which were not done. They said that although certainty of price was said to be the main advantage of design and build, certainty was not, in the result, achieved. Mrs Izzidien and Mr Mohammed of 35 Glengall Grove made submissions to similar effect, and said that, by way of example, the budgeted figure for overhauling the roof in 5 - 35a Glengall Grove was £3800 but the actual cost

(1/116) was £75,224.83 and the scaffolding costs for the block increased by £34,819.56.

136. Mr Kingham submitted that there was no justification for the use of a design and build contract or of a contract of such massive size. He said that the size of the contract was a major factor in the carrying out of unnecessary works to the Barkantine Estate which in 2000 - 2001 had been the subject of expenditure of about £30 million, resulting in service charges to each leaseholder of about £25,000, and did not need to be included in the contract for major external refurbishment works. He said that a number of items of work were carried out simply in order to obtain guarantees which ought to have, but had not, been provided to the landlord by the LBTH. He said that there had been no proper process to establish what works were required to the Barkantine Estate, and that the landlord could not provide pre-tender reports for the majority of the blocks on the Estate which suggested any need to include it in the major works programme. He made a number of criticisms about the way the works were managed, and submitted that it would have been far more efficient and cheaper to have awarded separate contracts for each of the four estates, which were very different from each other.

137. Mrs Williams, on behalf of the leaseholders of 12 flats in Argyle House, also submitted that the contract was too large and was carried out without proper supervision. She said that Argyle House was covered in a netted scaffold for 16 months although the residents had been told that the scaffold would be up for about 17 weeks, and submitted that if the works had been scheduled on a block-by-block basis they would have been carried out more speedily and efficiently. She submitted that there was no proper chain of command for administering the contract.

138. Mr Mahmud made a number of complaints about the standard of the works.

139. Mr Jamie Thomas submitted that the Barkantine Estate ought not to have been grouped with the other estates because it had been the subject of expenditure of about £30 million only some eight or nine years before.

140. Colin Hammond, the leaseholder of 46 Montcalm House, produced a notice of intention dated 12 May 2008 (22/21) relating to the then proposed works to Montcalm House which were proposed to be carried out under a contract based on specification and drawings. The notice described works to Montcalm House, which were identical in every respect and described in identical terms, save for the addition in the second notice of "repairs to bin store enclosures and refuse facilities", to those proposed in the notice given to him in January 2009 (1/148). The estimated cost of the works described in the first notice of intention was £115,557.96 for works to be carried out under a traditional contract, as against a rather startling £451,954.96 for virtually the same works, only eight months later, to be carried out under a design and build contract.

141. Mr Bhose submitted that the test to be applied in deciding whether the decision to award one design and build contract for all the external works was a reasonable decision was whether it was open to a reasonable and prudent building owner in the position of this landlord, namely a substantial public landlord which owned four estates, to do so. He said that the question was to be answered without the benefit of hindsight and without regard to what he called the "unproven and denied" assertions of the leaseholders about what happened as a result of the contract, which would, he said, be relevant and legitimate, if substantiated by evidence, when the reasonableness of the costs of works to specific buildings was considered. He relied on the evidence of Mr Wigley as to the wide use by public landlords of design and build contracts, and said that there was no rule of law which prevented landlords from entering into very large contracts. He said that the inclusion in the contract of the Barkantine Estate, much criticised by, in particular, Mr Kingham and Mr Thomas, was perfectly reasonable, and that the fact that major works had been carried out to it in 2000/2001 was taken into account in the more moderate scope of works to the Barkantine Estate identified in the

employer's requirements. He submitted that the criticism of Baily Garner's work on drafting the employer's requirements was unjustified, and that, in general, the evidence available at this stage showed that the employer's requirements accurately specified what was required to be done in respect of each of the blocks.

142. Mr Bhose said that it should be remembered that this was a competitive tender and that if contractors did not judge their pricing in a reasonable way they risked losing the contract. He submitted that it was wrong to criticise the reasonableness of entering into this form and size of contract on the grounds that the costs increased above the fixed contractual price. He said that the majority of the works were carried out for a fixed price, that where additional works were undertaken there was a clear contractual process which ensured that they were not carried out unless they were necessary, that additions were common in any form of building contract, and that the final cost, excluding the omitted environmental works, was only 9% higher than the contract sum (£15,384,503.42, excluding the environmental works cost of £2,776,364.32, instead of £14,112,647.68 (7/from 29). In any event, he submitted, even if it could be demonstrated that, at the time when the contract was entered into, the landlord should have known that the design and build contract would prove more expensive than a traditional form of contract, that would not matter so long as the decision to proceed with it was reasonable in the light of all the circumstances known at the time.

143. Mr Bhose submitted that it was not possible on the presently available evidence to conclude from the difference between the prices shown by the two notices of intention in respect of Montcalm House, only eight months apart, produced by Mr Hammond, that the cost of the works had increased because of the size or nature of the contract, since the details of the earlier specification were not in evidence so that it was not possible to judge whether the works were like-for-like. He accepted that this and similar points could perfectly properly be raised when the reasonableness of the costs of the works to specific blocks was considered.

144. It is hard to avoid some misgivings about the wisdom of the decisions to award one contract of such a massive scale and to use a design and build contract. We can easily accept Mr Wigley's evidence that 41 different contractors working on 41 blocks, or even four contractors working on each of the four estates, all at the same time, would have caused chaos, but there would have been other ways of packaging these works into smaller parcels, or of phasing the works, which would, we think, have achieved an efficient result. In our own (admittedly limited) experience, design and build contracts are most usually used for new buildings rather than for the refurbishment of existing buildings, which is not to say that the use of a design and build contract was necessarily unwise. It is also, we think, fair to say that although certainty on price was said by Mr Wigley to be the main benefit of a design and build contract, two major elements, namely concrete repairs and drainage works, could not be priced in advance and, inevitably, there were significant variations, so that certainty of price could not be and was not achieved.

145. But without the benefit of hindsight we cannot be satisfied that the landlord acted unreasonably in the way the contract was drawn and the works packaged. We accept Mr Bhose's submission that it would be wrong in principle, and certainly premature, to draw any such general conclusions at this stage, for the reasons he gives. When the time comes for us to consider the reasonableness of the costs of the works and all the relevant evidence is before us we may find ourselves satisfied that the size and nature of the contract did indeed achieve economies of scale, and that, even if the cost of some items was outside the range of what would generally be considered to be reasonable, higher costs on those items were counterbalanced by savings on other items. Alternatively we may find that the costs, looked at in the round, and bearing in mind that the reasonableness of the costs is to be assessed on an individual block basis, were unreasonably high.

10. Was it was inappropriate to accept the tender from Mulalley by reason of any pre-existing connection between Mulalley and the landlord or Mulalley and Baily Garner?

146. As with the previous issue, the identification of the issue in the directions did not accurately reflect the real dispute, which was whether it was for any reason inappropriate to choose Mulalley rather than Breyer, whose tender price was substantially lower than that of Mulalley. It was not seriously suggested by anyone, and certainly was not established, that there was any impropriety in the tender process. The suggestion was, rather, that the landlord had decided in advance of the tender process that it wanted Mulalley to be chosen, that its choice was unwise because Mulalley's tender was significantly more expensive than that of Breyer, and that undue importance was accorded in the tender process to Mulalley's and Breyer's performance at interview, which must have been assessed on a subjective, and probably unreliable, basis.

147. The OJEU notice (6/1) provided that the contract was to be awarded on the basis of *the most economically advantageous tender in terms of ... the criteria stated in the specifications in the invitation to tender or to negotiate or in the descriptive document.* The landlord chose the invitation to tender as the criterion for determining which was the most economically advantageous tender and it appears (see background at paragraphs 15 - 17 above) that the requirement for an interview was not introduced into the process until after the tenders had been received and considered.

148. Mr Wigley and Mr Bull agreed that the interview was the critical element in the choice of Mulalley over the significantly cheaper Breyer. Mr Wigley agreed that Breyer was a good and respected contractor with whom Baily Garner had worked both before and since the works which are the subject of this dispute. He said that "the interview part of the process enabled us to evaluate training and apprenticeships". He agreed with Mrs Izzidien's suggestion that Mulalley had won the contract "by a whisker".

149. As discussed in paragraph 18, the interviews took place on 16 July 2009. The interviewing panel did not include a leaseholder. The scores awarded by the panel are at 6/169A.

150. Asked by Mr Bhose whether he agreed with the leaseholders' suggestion that the landlord could have saved over £1 million by instructing Breyer, Mr Wigley said that there was a legitimate procedure in place which awarded 30% for quality, that the procedure was followed, and Breyer did not win. He said that contactors who had not been successful in a public procurement process were entitled to ask for justification of the award and often did, and that Breyer had asked for an explanation in the present case and had accepted the explanation it was given. He said that parts of Breyer's tender caused concern, in particular its substantial arithmetical error which led it to under-pricing by £334,912.51, which, taken together with its proposed 10% for overheads and profit, might have led it to cut corners with the work.

151. Questioned by Mr Gould, Mr Wigley agreed that all the pre-qualified tenderers, including Breyer, were considered to be competent to do the work. He said that Baily Garner had previously worked on projects with Breyer and had found its performance to be satisfactory, and he agreed with the suggestion that the fact that this project was a large one was "their problem". Many leaseholders submitted that the landlord had unreasonably chosen to pay an unnecessary premium of over £1 million for Mulalley, and that there was no reason to suppose that Breyer would not have been perfectly adequate. Mr Gould submitted that it was simply not correct to suggest, as Mr Wigley and Mr Bull had done, that an interview was a necessary part of the procurement process required by European regulations. He said that the invitation to tender (6/125) which set out the tender procedure and the evaluation criteria (6/126) did not include a requirement for an interview. He said that the fact that an interview was even a possibility was not mentioned until the first tender report (6/31), after the tenders were received. He said that it was clear from the way events developed that the landlord and/or Baily Garner were looking for a way to appoint Mulalley.

152. Mr Gould said that the interview scores at 6/169A showed that Breyer scored "satisfactory" in its answers to seven questions but *answered the question but did not provide a full response* to two questions. He said that question 2 (*what measures and procedures have you in place that you will*

use on site to ensure quality is achieved?) on which Breyer was marked as not having provided a full response related to quality control, and that it was surprising that Mulalley scored highly on that question because the standard of the internal works to tenanted flats had been poor. He said that in any event quality control should not have been an issue because of the design and build nature of the contract which required the contractor to supervise its own work, because the landlord intended to, and did, appoint its own clerks of works and its own project manager and because Baily Garner were going to supervise the works. He said that question 8, on which Breyer was also marked as not having provided a full response, related to cost control, which was surprising on a fixed price contract. In the remaining question, he said, Mulalley and Breyer scored even at 4.5 marks.

153. We have misgivings about the choice of Mulalley over the significantly cheaper Breyer. If this had been a contract which did not require public procurement and the leaseholders had been entitled to nominate a contractor, we think they would have had a very strong argument that the landlord would have acted unreasonably if it decided, on the basis of a 20 minute presentation (6/168) followed by a 20 minute interview (6/166), to award the contract to a contractor whose tender was the more expensive by over £1 million, when the under-bidder was agreed to be reliable and efficient and there were to be extensive safeguards in place to ensure that quality and cost were satisfactory. We are concerned that factors such as the quality of a contractor's training and apprenticeships schemes may have been given too much emphasis in the decision not to award the contract to an otherwise suitable contractor, and we doubt whether it was appropriate to accept a significantly higher tender price on the basis of such considerations, important as they are. We do not think that Breyer's arithmetical error in pricing the contract should necessarily have caused concern about its ability to perform the contract, because of the safeguards designed to ensure quality, whatever the contractor. We can well understand why the leaseholders might consider that undue emphasis was placed on the presentation and interview, and that the ability of Breyer to carry out the works to a reasonable standard should not have been in real doubt.

154. But, reluctantly, we again find ourselves unable to be satisfied that the landlord's decision to award the contract to Mulalley was outside the range of reasonable decisions. When the time comes to consider the costs of the works, if those costs prove to be outside a reasonable range, no doubt they will be reduced.

11. Issues of general application under section 20C of the Act

155. It was made clear in the tribunal's directions dated 4 August 2012 that it was open to each of the leaseholders to seek an order under section 20C of the Act whether or not they had issued a formal application under the section.

156. We are satisfied that the leases in principle permit the landlord to recover as service charges the reasonable costs it has incurred in connection with the proceedings. We accept that clause 5(5)(j)(ii) of the LBTH and Toynbee leases, which provides that the landlord may *employ direct or enter into contracts with such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the building,* together with clause 5(5)(o), discussed above, permits the landlord to take or defend proceedings in the tribunal and to instruct lawyers for that purpose if it is necessary to do so, and that the leaseholders are liable to pay service charges in respect of the costs thereby incurred. We also accept that clause 8(ii) in the GLC lease, which provides that the landlord shall *at all times manage the building in a proper and reasonable manner and ... shall at all times be entitled ... to employ architects surveyors solicitors accountants contractors builders gardeners and any other person firm or company properly required to be employed in connection with or for the purpose of or in relation to the building or any part thereof and pay them all proper fees charges salaries wages costs expenses and outgoings* entitles the landlord in principle to incur and to recover its reasonable costs of these proceedings.

157. The ability to bring and defend proceedings in the tribunal is nowadays a wholly necessary function of management, and a landlord cannot properly manage a building without the capacity to come to the tribunal, with, if necessary, the benefit of legal representation. We are satisfied that the leases should be taken to permit, in principle, the recovery as service charges of legal costs incurred in connection with proceedings under the Act, although they are recoverable only to the extent that they are reasonable. We are of course aware of the cases, such as *Sella House v Mears* [1989] 1 EGLR 65, which say that clear words are required in a lease for legal costs to be recoverable, but we consider that the words of the leases in the present case, are, on a reasonable and fair construction, sufficiently clear to enable legal costs to be recovered as service charges when they are incurred for the purpose of management, which includes bringing proceedings necessary to establish the leaseholders' liability to pay service charges.

158. That is not to say that the landlord's costs, or all the landlord's costs, ought necessarily to be recovered as service charges, or that all its legal costs have been reasonably incurred. Section 20C of the Act enables the tribunal to order that the landlord's costs *are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge.* In exercising its discretion under the section the tribunal may, by section 20C(2), *make such order ... as it considers just and equitable in the circumstances.* It is clear from the guidance of the Lands Tribunal in *The Tenants of Langford Court v Doren* LRX/37/2000 that all the relevant circumstances may be taken into account by the tribunal when it decides whether to make such an order, and that the making of an order under section 20C does not depend simply on the outcome of the application. There is no reason in principle why a tribunal may not order that a proportion of the landlord's costs should not be placed on the service charges of some, or all, of the leaseholders.

159. Mr Bhose suggested, and several leaseholders who were present agreed, that the question whether orders should be made under section 20C, and, if so, what orders, should be considered on the basis of written submissions from the parties made after this decision has been disseminated

and considered. We agree. However we do not consider that the question should be considered until we have reached a decision on dispensation, and we will therefore make further directions in relation to orders under section 20C once that issue has been determined.

The further conduct of the proceedings

160. After we have determined the application for dispensation from compliance with the Consultation Regulations a further case management conference will be arranged for the purpose of making directions for the determination of block-specific issues and of the application made by a number of leaseholders to determine their liability to contribute to the cost of the environmental works.

CHAIRMAN.....

DATE: 30 January 2013