10723

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2013/0831** **LON/00BK/LDC/2014/0078** **LON/00BK/LSC/2014/0388**
Property	:	**26 Berkeley Court, Marylebone Road, London NW1 5NA**
Applicant	:	**Cambard RTM Company Limited**
Representative	:	**Mr Michael Walsh Counsel**
Respondent	:	**Dr Salma Yasmin Abbasi**
Representative	:	**Dr S Y Abbasi In Person**
Type of Applications	:	**Sections 20ZA and 27A Landlord and Tenant Act 1985 – Dispensation with consultation requirements and determination of service charges payable.**
Tribunal Members	:	**Judge John Hewitt** **Mr Luis Jarero BSc FRICS** **Mr John Francis QPM**
Date and venue of Hearing	:	**15-17 December 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**31 March 2015**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

   1.1 The need for the applicant to comply with the consultation provisions of section 20 Landlord and Tenant Act 1985 (the Act) is dispensed with as regards three major works projects the subject of section 20 notices dated 22 June 2011 [60], 26 April 2012 [254] and 25 January 2013 [290] referred to respectively in paragraphs 30, 33 and 37 below;

   1.2 The sum of £7,029.63 claimed in the court proceedings Claim 3YQ173457 was payable by Dr Abbasi to Cambard RTM at the time those proceedings were issued;

   1.3 The tribunal does not make any adjustments to the service charge accounts or to the sums payable by Dr Abbasi to Cambard RTM in respect of the years ending 31 March 2011, 2012, and 2013; and

   1.4 It declines to make an order pursuant to section 20C of the Act in respect of any costs which Cambard RTM may have incurred or may incur in connection with these proceedings.

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

NB1 Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

NB2 This decision applies to three closely and interrelated applications before the tribunal as follows:

LSC/2013/0831 in which the applicant is Cambard RTM Company Limited and the respondent is Dr Abbasi. This application concerns a court referral and the liability of Dr Abbasi to pay the balance of an half yearly on account payment of service charges;

LDC/2014/0078 in which the applicant is Cambard RTM Company Limited and the respondent is Dr Abbasi. In this application the applicant seeks retrospective dispensation from the s20 consultation requirements in respect of three sets of major works and was said to have been made in case it be held that the consultation process actually carried out was flawed (which was denied); and

LSC/2014/0388 in which the applicant is Dr Abbasi and the respondent is Cambard RTM Company Limited. In this application Dr Abbasi seeks a determination as the amount of service charges payable by her by way of contribution to the three sets of major works.

For ease of reference in this decision the following definitions are adopted:

Cambard RTM	means Cambard RTM Company Limited
CDL	means Cambard Development Limited; and
Dr Abbasi	means Dr Salma Yasmin Abbasi

Procedural background

3. Berkeley Court is a 1920/30s prestigious ten storey mixed use development comprising 129 residential apartments laid out above retail and commercial units, close to prime central London. Most of the residential apartments are substantial in size and expensive to purchase; some recently changing hands at sums in excess of £3m.

   Berkeley Court occupies an island site bounded by:

   Marylebone Road to the south;
   Melcombe Street to the north;
   Baker Street to the east; and
   Glentworth Street to the west.

4. Dr Abbasi is the lessee of flat 26 Berkeley Court. The lease vested in Dr Abbasi obliges her to pay a service charge. In brief the service regime is that the service charge year is the period 1 April to 31 March following. Prior to the commencement of each year a budget is set. That budget is or may be in two parts – routine expenditure and a contribution to a reserve fund. The lessee's estimated liability is ascertained and that amount is payable by way of two equal instalments, one on 25 March and the other on 29 September in each year.

5. Cambard RTM acquired the right to manage some years ago, the landlord not having maintained the development to the standards required by lessees.

6. In or about March 2013 Cambard RTM set a budget for the year 2013/14. The consequence of that budget was that Dr Abbasi's contribution to the reserve fund was calculated to be £15,500, payable by way of two instalments of £7,750 each.

7. The applicant made a demand for £7,750 to be paid on 25 March 2013. It was not paid in full. A payment was made or credited to the respondent's account such that a balance of £7,029.63 was due to Cambard RTM.

8. In August 2013 the applicant commenced court proceedings against the respondent, Claim Number 3YQ17357, and claimed:

Arrears	£7,029.63	
Interest pursuant to s69		
County Courts Act 1984	£ 211.07	(and continuing at £1.54 per day

Legal fees	£ 363.00
Sub-total	£7,603.70
Court fee	£ 245.00
Solicitor's costs	£ 100.00
Total	**£7,948.70**

9. A defence was filed. Dr Abbasi averred that major works costs incurred by Cambard RTM and which were being funded from the reserve fund were:

   9.1 excessive, disproportionate and unreasonable; and/or
   9.2 not urgently required or required at all; and/or
   9.3 improvements rather than repairs, and therefore not provided for under the terms of the lease.

10. The effect of an order made by District Judge Silverman on 7 November and drawn 21 November 2013 was that the claim was transferred to this tribunal for determination.

11. At a directions hearing it became apparent that the reasonableness of the strategy for the reserve fund, the sums to be paid into it and the sums to be drawn down from it were intimately involved with three major works projects, the costs of which were likely to exceed several £m. Dr Abbasi contended that the three consultation processes carried out by Cambard RTM in respect of those projects were flawed. It also became apparent that Dr Abbasi wished to raise wider issues. Under the court referral application LSC/2013/0831 the jurisdiction of the tribunal was limited to the one claim to the balance of an on account payment.

12. This position was not satisfactory to the parties. In consequence Cambard RTM issued its section 20ZA application, LDC/2014/0078 and Dr Abbasi issued her section 27A application, LSC/2014/0388. Included in the application was an application by Dr Abbasi pursuant to section 20C of the Act in relation to any costs which Cambard RTM had incurred or may incur in connection with these sets of proceedings

    Several sets of directions dated 27 June and 30 July 2014 concerning the three applications were issued which provided, amongst other matters, that the three applications would be heard together in December 2014.

The hearing

13. The hearing took place on 15, 16 and 17 December 2014. Cambard RTM was represented by Mr Michael Walsh of counsel. Dr Abbasi represented herself and was accompanied and supported by her sister, Ms Najma Abbas, Ms Danish Ahmad and another lady who was a note taker.

14. A considerable amount of documentary and oral evidence was put before the tribunal.

15. **Cambard RTM called**:

Mr Stephen Boniface	[826]
Mr Eliot Cohen	[1632]
Mrs Gloria Goldring	[969]
Mr Pavel Guzminov	[881]
Mr Mamal Torfeh	[1309]
Mr Michael Barry Stannus Gray	[560, 984 & 997]
Mr Daniel David Michaels	[1616]
Mr Antoine Kohler	[1649]

Dr Abbasi called:

Herself	[663 & 1089]
Mr Paul Henry	[817]
Ms Danish Ahmad	[618]
Mr Steven Dolland	[615]

16. Despite some initial confusion in the papers, during the course of the hearing Dr Abbasi withdrew all challenges to routine service charge accounts and confirmed that her challenge was to the costs of the three major works projects which we shall detail below.

The lease

17. The lease of 26 Berkeley Court is at [34]. It was not controversial. It is dated 1 February 1989 and granted the residue of a term of 999 years from 29 September 1988. The lease envisioned the role of a maintenance trustee and for the lessees to become a member of a company named Cambard Limited which was to have a voice in the management of certain parts of the building. Cambard Limited still exists and it seems that a number of lessees are directors of it, including Messrs Cohen, Guzminov, Kohler and Torfeh but that company did not play any part in the proceedings before us. It was not in dispute that in February 2005 Cambard RTM was formed and has acquired the right to manage the building.

18. The lease provides for the lessee to contribute to the costs and expenses incurred in insuring the building, carrying out of repairs and maintenance and the provision of services. The details of the regime, referred to as the Maintenance Provision, are set out in clause 4 of the lease [37] and the Fourth and Fifth Schedules to it [43]. It may be summarised as follows:

The accounting period is 1 April to 31 March;
Before each accounting period a budget is prepared and the lessee's potential liability is calculated;
Two equal instalments of that liability are payable on 25 March and 29 September in each year; and

At the end of each year a certificate shall set out expenditure incurred, the amount of the lessee's contribution, credit is given for the sums paid on account and any balance ascertained.

There is a provision for a reserve fund set out in paragraph 2(a)(ii) of Part III of the Fourth Schedule [43] in these terms:

"(ii) subject to clause 5(F) an appropriate amount as a reserve for or towards those of the matters mentioned in the Fifth Schedule as are likely to give rise to expenditure after such Maintenance Year being matters which are likely to arise either only once during the term then unexpired of this Lease or at intervals of more than one year during such unexpired term including (without prejudice to the generality of the foregoing) such matters as the painting of the common parts and the exterior of the Building the repair of the structure thereof the repair of the drains and the overhaul renewal and modernisation of any plant or machinery ***(the said amount to be computed in such manner as to ensure as far as reasonably foreseeable that the Maintenance Provision shall not unduly fluctuate from year to year)*** *..."* [emphasis added]

The lease suggests that broadly there are four sizes of flats and the service contributions are:

Type A (32 flats)	0.93%
Type B (32 flats)	0.85%
Type C (32 flats)	0.74%
Type D (28 flats)	0.63%
Type D (2 flats)	0.58%
Type D (1 flat)	0.56%
Porter & controlled (2 flats)	0.00%

Dr Abbasi has one of the Type A larger flats and her contribution to expenditure is thus 0.93%

Annual accounts

19. To give a flavour of the levels of expenditure the annual accounts produced to us show:

Expense	2010	2011	2012	2013	2014
Porterage	£297,692	£333,155	£303,745	£298,157	
Power	£199,765	£183,613	£156,863	£169,215	
Maintenance & repairs	£184,928	£198,914	£277,881	£226,829	
Insurance	£92,541	£111,750	£87,534	£88,013	
Professional fees	£24,399	£24,382	£42,379	£24,460	
Management	£44,238	£46,244	£38,204	£35,728	

fees					
Surveyors' fees	£8,802	£10,488	£25,412	£14,488	
Total	**£852,365**	**£909,923**	**£913,066**	**£875,776**	
Reserve Fund balances	£1,846,693	£1,733,689	£1,595,438	£615,346	
Reserve fund contributions demanded of Dr Abbasi	£nil	£nil	£nil	£4,650	£15,500

20. It would appear that in most years there were transfers into the reserve fund and in some years expenditure was drawn down from the reserve funds but the movement of the funds was not explained to us in respect of each of the years in question. There is also a suggestion that the reserve might be sub-divided and cover more than just major works costs.

Some background

21. Before detailing the subject major works projects it may be helpful to give a little history to set the scene.

22. Lessees were unhappy about the manner in which Berkeley Court was being managed and maintained. Cambard RTM was formed to exercise the right to manage so that management was in the control of the lessees. The view was taken that there had been years of poor management and there was a good deal of accumulated repairs, maintenance and redecorations to tackle. A ten year capital expenditure plan was prepared with a view to carrying out works in phases. This plan was in place when Dr Abbasi was invited by Mrs Goldring to join the board of Cambard RTM in October 2008.

23. The first major project to be tackled was the Glentworth Street façade. This was commenced in February 2009 at a cost of some £2,263,000. The project was managed by the then managing agents, Blenheims. In broad terms a surveyor was appointed to oversee the project, main contractors were appointed who in turn placed sub-contracts. A tendering process had been undertaken prior to Dr Abbasi joining the board. Dr Abbasi has a background in civil engineering and is a director of a company undertaking major infrastructure projects in the Middle East and in Africa. Dr Abbasi had concerns about the structure of the contract and insisted on thorough quality assurance and control processes be implemented and that vetting procedures be implemented for tendering and placing of contracts on future projects.

24. Dr Abbasi said, and we accept, that she was very familiar with the Glentworth Street project in her capacity as a director of Cambard RTM whilst that project was carried out. Evidently directors took the view

that the structure of the project was unwieldy with several different parties having an involvement which they considered added significantly to the overall cost over which they had little or no adequate day to day control. The view was arrived at that future projects should be managed in a different way.

25. Although Dr Abbasi was adamant that the Glentworth Street project was not at all managed in a conventional way, we find that it was generally typical of how major works are carried out in the residential sector with a managing agent taking a lead role, the appointment of a surveyor or contract administrator to oversee the works and to certify sums payable to a main contractor working with a series of sub-contractors.

26. Dr Abbasi worked with a sub group to plan the next phase of works and some proposals were put to the full board which did not find favour. It appears that there were some personal clashes and Dr Abbasi was not reappointed to the board at the September 2010 AGM.

27. Given the substantial cost of the Glentworth Street project the directors decided that lessees should have a 'reserve fund holiday' for the years 2010, 2011 and 2012 whilst a different way forward was planned.

28. Mr Guzminov joined the board at the September 2010 AGM. Mr Guzminov, a Russian citizen, told us that he graduated in Moscow in 1988 in catastrophe management and had invested in real estate projects in Russia before coming the UK. Mr Guzminov told us that he looked into the accounts, had questions and concerns which, he said, Blenheims were unable to answer to his satisfaction. Mr Guzminov was concerned that Blenheims managed the building and also managed and controlled the finances. At his instigation the board decided to change managing agents to RMD Properties (London) LLP in April 2011, and to appoint new accountants, Brindley Millen Limited in place of Alvis & Company. Under the new regime service charges were to be payable to and held by Brindley Millen which would then pay the bills as and when authorised to do so under what was described to us as being a ticketing system, which appeared to us to be quite complex.

The subject major works projects
External elevations

29. First we record that it was not in dispute that the subject projects comprised qualifying works for the purposes of section 20 of the Act and that the applicable scheme for consultation is that set out in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements)(England) Regulations 2003 (the scheme).

30. By notice dated 22 June 2011 [60] Cambard RTM gave notice to lessees of the intention to design, procure and execute works described as:

"Phased works to the external elevations comprising Melcombe Street, Baker Street and Marylebone Road elevations involving the survey,

inspection and repair of brickwork, stonework, metalwork, structural frame, waterproofing and associated works.

The reason stated why it was necessary to carry out the proposed works was for good estate management and on the advice of the company's appointed surveyors, Devonshire Partnership

It was stated the proposed works would take approximately 18 months.

The notice was intended to be a notice of intention given pursuant to paragraph 1 of the scheme.

Observations were to be sent to James Compton of Comptons LLP Solicitors, 90-92 Parkway, Regents Park London NW 7AN [sic] citing reference JSC.10482.3.

31. By notice dated 9 December 2011 [63] Cambard RTM gave notice to lessees that estimates had been obtained. It stated, wrongly as it happens, that they were obtained by its appointed firm of Chartered Surveyors, Devonshire Partnership. A tender report was attached.

It appears that a full set of the tender documents is at [69- 255].

The notice stated that tender returns were as follows:

Triton Building Restoration	£570,021
Gaysha Building Limited	£674,985
Killby and Gayford Limited	£766,133
H A Marks Limited	£901,200
Ledevila (UK) Limited*	£1,368,119

Evidently the prices mentioned above were said to be *"net figures (exclusive of VAT, Contingencies, & Professional fees etc."*

*It may be noted that Ledevila was incorporated on 19 September 2011 on which day a Mr Danas Luksys was appointed its sole director and officer. Mr Luksys is said to be a national of Lithuania.

The notice and an accompanying letter also dated 9 December 2011 explain that Cambard RTM had set up a wholly owned subsidiary, CDL, to supervise the proposed works. It stated that CDL intended to sub-contract the works in a strictly controlled environment in order to (a) save costs and (b) ensure the works are carried out diligently to the standard expected by the leaseholders. It said that CDL would do so at a cost of £775,842 which was to include all the works mentioned in the tender documents, but did not include a 20% contingency to cover professional fees, Building Regulations, Highways Costs, CDM and VAT at 20% where applicable.

The notice also stated that the board had appointed a new surveyor, Mr Stephen Boniface of The Whitworth Partnership.

The notice further stated that the cost of the proposed works was to be met from the reserve fund.

As before observations on what was proposed were to be sent to James Compton.

It appears this notice was intended to be compliant with paragraph 4 of the scheme.

Evidently the works mentioned in this notice have been carried out.

32. It is helpful to record here that CDL was incorporated on 16 May 2011. A Mr Graham Jacob was appointed secretary on 13 December 2011 and resigned on 1 March 2013. Mr Danas Luksys was appointed a director on 23 March 2012. The two founding directors, probably company agents both resigned on 11 April 2012. Thus since that date Mr Luksys has been the sole director of CDL.

Roof, roof garden and light wells

33. By notice dated 26 April 2012 [254] Cambard RTM gave notice to lessees of the intention to design, procure and execute works described as:

- *"It has been discovered that there is no adequate drainage surrounding certain garden sections, the roof areas of the passenger lift shaft housings, and summerhouse structures. This has caused major water penetration into the fabric of the building. The installation of a new drainage system is a necessity to rectify the above.*
- *Another result of the poor drainage issue on the roof is that it has enabled water pressure to build up and this causes further damage the [sic] fabric of the building. The installation of a new drainage system will rectify this.*
- *It has also been noted that the parapet walls (the surrounding walls of the roof garden) have deteriorated where tree and plant roots are forcing their way into the structure, thus causing cracks to appear and water to penetrate. Roots are also damaging the roof structure. Works are planned to rectify this.*
- *As with the external elevations cracks and defects are noted within the various light-wells. Works are proposed to rectify these problems and works will include repair works to the balconies and fire escapes.*
- *There are cracks and defects to the lift housing at roof level. Again a similar problem to the main elevation. Works are intended to rectify these issues."*

It was said the works will take approximately six months.

The reason given why it was necessary to carry out the proposed works was good estate management, to protect the building and on the advice of the appointed surveyors, The Whitworth Partnership.

The notice was intended to be a notice of intention given pursuant to paragraph 1 of the scheme.

As before observations on the notice were to be sent to James Compton, although on this occasion citing reference JSC-Cambard.

34. By notice dated 1 June 2012 [257] Cambard RTM gave notice to lessees that estimates had been obtained. It stated, wrongly as it happens, that they were obtained by its appointed firm of Chartered Surveyors, The Whitworth Partnership.

It stated that three contractors were approached and three tenders were submitted as follows:

CDL	£1,097,755 [260]
Dynamic Solar	£1,562,088 [257(3)]
SNS Europe	£1,912,270 [257 (1)]

It stated the prices quoted exclude contingencies where applicable, VAT at 20% where applicable, professional fees, Building Regulations and CDM costs.

The notice stated an intention to place a contract with CDL at a price of £1,317,306 which incorporated a contingency amount of 4% of the net value of the tender, professional fees, Building Regulations, CDM and VAT at 20% where applicable.

It stated the cost of the works will be met by the reserve fund.

As before observations on the notice were to be sent to James Compton citing reference JSC-Cambard.

It appears this notice was intended to be compliant with paragraph 4 of the scheme.

35. We observe that:

> The CDL quote is dated 21 May 2012 and is at [260-288] and where [261 – 288] set out a more detailed schedule of proposed works;
> The Dynamic Solar quote [257(3)] is just over one page, it is not dated and is not on headed notepaper;
> The SNS Europe quote [257(1)] is dated 14 June 2011[sic] (but ? typo for 2012) and evidently issued by a company which was dissolved on 6 July 2011.

36. We were told that the works the subject of this notice have been completed.

Large inner light wells

37. By notice dated 25 January 2013 [290] Cambard RTM gave notice to lessees of the intention to design, procure and execute works described as:

"Repairs and decorations to the two large inner light wells"

It was stated the works will take approximately six months

The reason given why it was necessary to carry out the proposed works was good estate management and on the advice of the appointed surveyors, The Whitworth Partnership.

As before observations on the notice were to be sent to James Compton but on this occasion citing reference number LIW.

The notice was intended to be a notice of intention given pursuant to paragraph 1 of the scheme.

38. By notice dated 8 March 2013 [293] Cambard RTM gave notice to lessees that estimates had been obtained. It stated, wrongly as it happens, that they were obtained by its appointed firm of Chartered Surveyors, The Whitworth Partnership.

The notice records that three tenders were received as follows:

CDL	£1,200,000	[297-338] dated 20 Feb 2013
Dynamic Solar Ltd	£1,448,540	[461-503] dated 1 March 2013
SNS Europe Limited	£1,396,403	[504-547] dated 7 March 2013

The notice stated an intention to place a contract with CDL at a price of £1,440,000 which figure incorporates a contingency amount of 14% of the net value of the tender, professional fees, Building Regulations, CDM and VAT ay 20% where applicable.

It stated the cost of the works will be met by the reserve fund.

As before observations on the notice were to be sent to James Compton.

It appears this notice was intended to be compliant with paragraph 4 of the scheme.

We were told that most of the works covered by this notice have been carried out and that the remaining works were to be completed shortly.

39. CDL's tender carried forward is £1,200,000. CDL's covering letter is dated 20 February 2013. It states that its prices exclude VAT and that it

has not allowed for any local authority fees, e.g. Building Control. It is difficult to see how the figure of £1,440,000 for CDL mentioned in the notice has been arrived at. As a matter of arithmetic we note that £1,200,000 + 20% = £1,440,000.

Expert evidence

40. Both parties sought and obtained permission to adduce expert evidence. The report of Mr Boniface for Cambard RTM is at [826]. The report of Mr Henry for Dr Abbasi is at [817].

41. There is an agreed Experts Joint Statement at [1707]. A copy is attached to this decision because it sets out a number of matters on which the experts agree and thus in respect of which we do not need to make findings. We take the agreed matters as read. The attached copy of the statement is not signed by both experts but at the hearing we were assured that the document is agreed and that a signed version is held by one of the parties.

42. Mr Henry's report, and thus the Experts Joint Statement is limited to the first project, the external elevations because that was the limit of the remit given to him by Dr Abbasi.

43. The experts are agreed that the works were necessary and that it was reasonable to carry them out. They were influenced by an abseiling report carried out in September 2011, the fact that masonry was falling off the elevations onto the street below, that Westminster City Council (WCC) had served a dangerous structure notice 22 September 2011, that by the end of 2011 Transport for London (TfL) had identified Marylebone Road as an 'Olympic Route' and that TfL required all scaffolding to be removed from the route prior to the London Olympics 2012 and that if the works were not carried out promptly WCC would carry out the works quickly and at whatever cost and would re-charge that cost to Cambard RTM. If this latter step had been taken Cambard RTM would have no control over the scope of works or the cost of them, a position not considered to be satisfactory. We can thus readily appreciate why Cambard RTM went ahead to commission the works and we can readily appreciate why the two experts concluded that it was reasonable for it to do so.

44. In cross-examination Mr Boniface clarified that he has a history of procurement of historic building construction projects. He said that usually such projects were subject to JCT standard contracts but he has come across unusual or unorthodox procurements processes previously.

45. Mr Boniface said that he was first involved in December 2011. He was briefed and the September 2011 abseiling report was provided to him. He said that until scaffolding was erected it was not possible to determine exactly what work was required, opening up works were undertaken to reveal the exact state of masonry and steel work and the extent of repairs required. He confirmed that his role was to advise on

technical issues, specifically the nature and extent of repair considered appropriate, as well as to check the quality of the work was satisfactory. He was also tasked to ensure that where work was necessary that it was carried out but that no unnecessary work was to be undertaken.

46. Mr Boniface said, and we accept, that the scaffolding was erected in January 2012 and was struck in May 2012. During that period he made several visits to the site to inspect the works and progress. Visits were also made by Assent, a firm of approved inspectors, who were responsible to deal with Building Regulations issues. He said that overall the steel work was found not to be too bad, the depth of work required was not as bad as had been feared. One balcony was found to require extensive work.

47. Mr Boniface said that the specification was that originally drawn up by Mr Eamon Malone of Devonshire Partnership and that was rolled out for the three elevations to be done. Mr Boniface disagreed that it was wrong to do that.

48. Mr Boniface told us that he was not involved in the decision not to place the contract with Killby and Gayford. Also he was not involved in the setting up of CDL or the recruitment of staff, although he did give some general advice on the level of expertise they should engage. Mr Boniface was informed of the appointment of Danas Luksys as project manager and that a resident engineer, Marcus was engaged for the project. Assent had an in-house engineer, Adrian Tanswell, who also made visits. On one occasion external advice was sought from SKD, particularly with regard to works on the Marylebone Road elevation.

49. Mr Boniface said that he had no input on any of the section 20 notices and he was not called upon to make any assessment of costs or costs control. Mr Boniface said he did not know who dealt with cost control but believed the board of Cambard RTM may have delegated responsibility to certain directors. There was no contract administrator to certify or approve payments. Mr Boniface said that he did not know the contractual arrangements between Cambard RTM and CDL. He understood that some payments were released after he had certified the quality of certain work undertaken but he did not certify any amounts for payment and he did not issue any certificates for payment.

50. Mr Boniface accepted in cross-examination that setting up CDL was a risky business – it relied upon a project manager able to assess and react to issues promptly and it relied on him to check quality of work from time to time and to identify any input needed from further engineers. It also relied upon Assent to ensure compliance with Building Regulations. He did not consider that Danas had a conflict of interest. He said that the arrangement was not too removed from or dissimilar to a design and build contract. He explained that on some conservation projects a budget was prepared and works were carried out on day rates with progress being carefully monitored against the

budget as the project unfolds and the exact nature and extent of works required is ascertained. On such projects you work day by day and keep cross-referring back to the budget to compare progress.

51. Both Mr Boniface and Mr Henry are in agreement that neither of them was aware of any costs controls in place; and we accept that. Mr Boniface was clear that quality controls were in place. He said that routine inspections were carried out by Assent, he himself visited the site regularly and photographs of what was found were frequently sent to him. Mr Boniface said that he was also aware that several directors of Cambard RTM went on site and looked at the works at close quarters on frequent occasions. Overall he was satisfied that numerous quality controls were in place.

52. Mr Henry was less certain. He would have expected to see better record keeping and some level of costs controls. In cross-examination Mr Henry described his experience and expertise and some of the projects he had worked upon. He accepted that he had not previously worked on a project of a similar size, scale or cost as the works at Berkeley Court. In the past five years he has not worked on any project where the cost exceeded £0.5m.

53. Mr Henry and Mr Boniface made a joint inspection of the external facades. Mr Henry accepted that from what he could see at street level the works had been carried out to a fair order and there were no obvious signs of poor workmanship. Mr Henry said that he also went onto the roof. He had limited information on what works were carried out but it appeared to him works had been completed. He said there was nothing he saw to suggest that works were not complete.

54. We found both Mr Boniface and Mr Henry to be honest and helpful witnesses doing their best to assist us. There was a large measure of agreement between them. For obvious reasons neither were able to assist us with the costs of the works. Where there was a difference in emphasis between them, such as on the question of adequacy of quality control, we prefer the evidence of Mr Boniface because we find he has the greater experience on projects such as those under consideration, there were elements of external inspections and although not everything was carried out correctly first time around no real evidence of or examples of poor quality workmanship have been presented to us. Further in general terms and accepting that Mr Henry only had limited access what he was able to see was acceptable to him. Mr Henry had not studied the numerous photographs that were taken during the project and which were offered to him. It was not clear to us if that was beyond his brief or because he did not consider they would assist him.

55. As regards the internal light wells Mr Boniface told us that he identified the need for some works, including works to the parapets. In closer inspection there were cracks in the walls, similar to those seen on the external elevations. Mr Boniface said he was of the view that the building had moved, possibly due to or during the construction of the

Jubilee line and Baker Street Station which are beneath the building. Voids, water and air combined and led to corrosion of the some of the steel work. What was required was opening up, checking, cleaning down, application of a protective coating, sealing up the voids and then making good.

56. Mr Boniface told us that he did not prepare any specification for these works. He made a site inspection, looked at what was needed but no more. He said that he did not specify any paint to be applied, that was specified by the contractors engaged by CDL. He said he was aware that there were still problems with one of the light wells where the original paint specified was not wholly appropriate and this was to be addressed during 2015. He explained that Portland stone can be porous and there had been discussions about suitable coatings to apply and that he had been shown some materials that had been used elsewhere in Europe.

57. Mr Boniface told us that he had never written a specification of works for CDL. CDL often proposed solutions and sometimes discussed them with him and sometimes he would carry out some checks.

58. Mr Boniface said that apart from supplying the words for notices of intention as regards the roof, roof garden and inner light wells and then the two large light wells, he had no role in the section 20 consultation process or the tendering of those two sets of works.

59. Mr Boniface confirmed that whilst the three projects were substantially complete there remained some snagging still be dealt with but he was unsure how payment for that work would be dealt with.

Further evidence called

Mr Eliot Cohen

60. Cambard RTM called Mr Eliot Cohen. His witness statement is at [1632]. His evidence related to the costs of gas and electricity and he was cross-examined by Dr Abbasi. In the event Dr Abbasi did not pursue a challenge to those costs. We do not have to make any findings about them but for the sake of good order we record that we accept Mr Cohen's evidence.

Mrs Gloria Goldring

61. Cambard RTM called Mrs Gloria Goldring. Her witness statement is at [969]. Mrs Goldring told us that she was a director of Cambard RTM from February 2005 until she retired as a director at the January 2014 AGM.

62. Mrs Goldring told us that the Glentworth Street project was 20 months of hell and could not be repeated. Directors felt that they needed more control and set up a new scheme to separate out day to day management, accountancy, surveying and managing agents' functions. The proposed new format was presented to members at a general meeting. In addition because many members reside abroad they have

an extensive web site with ready access to a great deal of information about what is happening at and planned for Berkeley Court.

63. Dr Abbasi had joined the board at her (Mrs Goldrings) suggestion and headed a working party on the proposed works to the Marylebone Road elevation. A scheme was worked up and presented by Dr Abbasi which was costed at £1.7m + VAT + expenses. It was proposed a contract be placed with BTP. Some directors wished to go ahead with that project and sign the contract but as it was June 2011 and an AGM was planned for September 2011 Mrs Goldring considered that the project should be deferred because a new board might be elected and might not wish to go ahead with it. In the event at the AGM Dr Abbasi was not re-elected a director. Evidently some new directors went through the documents, allegedly found some discrepancies. It was then decided to appoint new managing agents and separate out the various functions as described in paragraph 62 above.

64. Mrs Goldring said that Eamon Malone of the Devonshire Partnership drew up a specification and put it out to tender. Five tenders were received but they had large gaps and substantial provisional sums. The board were not happy with the tenders as they did not think that they would achieve the board's objective. A suggestion was put forward that Cambard RTM should have its own building company. It was recognised that the board would need experts to assist, hence the appointment of Mr Boniface. Mrs Goldring said that Mr Boniface attended board meetings gave presentations. New accountants (originally styled Brindley Jacob, but the name later changed to Brindley Millen) were engaged to keep a tight control of finances and to ensure that budgets were adhered to. Mrs Goldring said that whilst she was aware of all of these matters Mr Guzminov and Mr Torfeh were more involved on a day to day basis than she was.

65. In cross-examination Mrs Goldring described what was termed a ticketing system whereby all issues or complaints are posted by the managing agents, RMD and followed through and where all payments out were posted and certain directors given delegated authority to instruct the accountants to effect payments.

66. Mrs Goldring said that Eamon Malone and the Devonshire Partnership services were terminated due to expense. Mrs Goldring also described a ten year plan which was originally costed at £20m but said that Mr Torfeh was more familiar with the details.

67. Mrs Goldring struck us as a witness upon whom we could rely with some confidence and we accept her written and oral evidence.

Mr Pavel Guzminov

68. Cambard RTM called Mr Pavel Guzminov to give evidence. His witness statement is at [881]. Mr Guzminov said that he was first appointed a director in September 2010. He described what he claimed was his experience in Russia of finance and real estate investment.

69. Mr Guzminov said that he had concerns about the way in which Berkeley Court had been managed by Blenheims. He considered there were numerous contractors with sub-contractors, many seemed to become bankrupt, there were lots of changes in personnel and staffing, especially with the cleaners which he considered led to security issues. Mr Guzminov concluded that a big shake up was needed and he began to prepare plans for a presentation to the board for the appointment of new accountants, managing agents and surveyors much as described by Mrs Goldring. The new appointments were firms/persons recommended by him. His proposals were accepted by the board and were duly implemented.

70. Mr Guzminov said that it was his proposal to set up their own building company, CDL. He introduced Danas Luksys whom he had known from projects they had collaborated on in Russia. His plan was that CDL should engage Danas to lead a team to carry out the substantial works required at Berkeley Court. He explained that Danas worked on connections –it was who you know.

71. Dr Abbasi cross-examined Mr Guzminov closely on a number of matters. In relation to the external elevations Mr Guzminov said that the Killby and Gayford tender had been rejected because it contained too many uncertainties. Extra works outside the quoted figure would be required and there would be no control over the costs. He claimed that with CDL, the appointed surveyor would control any extra works and thus could control the costs. He explained that Cambard RTM set the budget and CDL would do the works up to that budget and no more.

72. Dr Abbasi asked Mr Guzminov how it was that when Danas Luksys was running his own company, Ledevila, his tender was £1,368,119 but when running CDL his budget figure was £775,847. In a rather unconvincing reply Mr Guzminov sought to explain that the Ledevila tender was an error on the part of a member of Danas' staff and had not been signed off by Danas himself. Mr Guzminov said that Danas had all the information he needed.

73. Mr Guzminov claimed that the tender process for the three projects was overseen by the managing agents, RMD and that RMD and Mr Boniface reviewed all technical documents. He said that the technical detail was prepared by Mr Boniface. Mr Boniface has denied that. As will be seen shortly a partner of RMD who gave oral evidence, Mr Daniel Michaels, denied that RMD had any part of the tender process.

74. Mr Guzminov did not know who invited SNS Europe or Dynamic Solar to tender. He said it was not him.

Mr Guzminov said that Dynamic Solar had submitted two tenders. He said the company was run by a Lithuanian man and he walked around Berkeley Court with him. In the event, as regards the first tender it was established that Dynamic Solar did not have appropriate insurance or a

team in the UK; He did not consider it to be a reputable company and so it was decided not to pursue them. Why the tender was used as part of the consultation exercise Mr Guzminov could not say. Equally, he was unable to explain why SNS was invited to tender on the next project and why the second tender was used as part of the consultation process.

75. Mr Guzminov said that the tender returns were sent to RMD which made reports to the board. He was not able to produce those reports. He claimed all the board members participated in the evaluation of the tenders – but different directors at different times.

76. Mr Guzminov also claimed that RMD drafted the section 20 consultation notices with an input by Mr Boniface. Mr Guzminov said that all the documents were seen by the board but they had to move forward and did not always have time. It was much cheaper to go with CDL anyway.

77. Mr Guzminov was unable to give us any clear understanding of how the CDL invoices were approved for payment. By way of example in cross-examination he was asked about an invoice dated 05.08.14 [1573] in the sum of £3,125 + VAT of £625 = £3,750 said to be: *"Additional Works Brickwork fence on the roof garden."* Mr Guzminov was not sure who authorised payment but accepted it may well have been him. He said that there was ugly and damaged brick walls adjacent to the walkways on the roof garden and that CDL worked on them. He did not know if anyone checked the price claimed for value for money. He said he saw the work CDL did, it did not raise any questions for him and *"I did not worry about this amount"*.

78. Mr Guzminov said he was satisfied that CDL was pressed very hard on pricing, it had salaries to pay. He said that Danas was squeezed very hard and he did not make any profit as expected. He said that to make extra money private jobs for lessees were taken on. Also he said that CDL had taken on a job elsewhere to try and recoup some losses. Initially he was unable to say where that was but later in his evidence he recalled that it was at a site in Kensington.

79. Mr Guzminov explained that of the three major projects undertaken it was not possible to say what each one cost at the end of the day. The projects were not accounted for separately. CDL tended to be paid from the reserve fund but professional fees and related expenditure was paid from the general account but the expenses was not allocated or apportioned to any particular project.

80. Overall Mr Guzminov was adamant that using CDL the three projects were carried out at much less cost than if a more conventional procurement had been undertaken. He was proud that most of the works identified in the ten year plan had been completed in less time and at a much lower cost than the £20m at one time estimated.

81. We did not consider Mr Guzminov to be a wholly satisfactory witness. He did not demonstrate an eye for detail. On quite a few occasions in cross-examination he claimed not to know the answer to a question only to come back to it later following sudden recollection. We have to treat his evidence with caution save where it is corroborated by other reliable testimony.

Mr Daniel David Michaels

82. Cambard RTM called Mr Michaels to give evidence. His witness statement is at [1616].

83. In cross-examination Mr Michaels said that RMD had a small part in the consultation process. The section 20 notices were drafted by RMD with some technical input from Mr Boniface. Following approval of the drafts by the board they were uploaded to the website and hard copies printed off and sent out, mostly by email.

84. He said that RMD had day to day management of Berkeley Court but only a limited role in the major works projects. He said that he did not know who invited the contractors to submit tenders; it was not RMD. He said that the tenders were submitted to Mr Compton who then sent them to RMD. The figures were extrapolated and sent on to the board. He was not aware of any reports of tender analysis prepared by RMD for the board; it was not his remit to do that, they only had day to day management.

85. Mr Michaels said he did not know how CDL communicated with the board. He sometimes instructed CDL to carry out a piece of work. He would get a quote from CDL. When the job was done he would get an invoice, check it against the quote and if it matched he would approve it with a recommendation for payment. He said all of this was done on the ticketing system.

86. We found Mr Michaels to be a reliable witness upon whom we could rely with some confidence.

Mr Mamal Torfeh

87. Cambard RTM called Mr Torfeh to give evidence. His witness statement is at [1309]. In the event the matters raised in his witness statement were not in dispute. Mr Torfeh told us that he had been a resident of Berkeley Court for 20 years and a director of Cambard RTM since September 2010.

88. Mr Torfeh said he was fully involved in the tendering process for the external elevations project. He presented a report to the board and the AGM on that subject. He explained that when setting up CDL the board knew it was taking a risk but all the pointers were that we could get the works undertaken to a satisfactory standard but at a much cheaper figure. He said that the board was very hands on and kept a close eye on progress. He said that he went up on the scaffolding regularly. He also

said there were regular reports to the board and that Mr Boniface also reported regularly.

89. In cross-examination Mr Torfeh said that CDL provided a budget for the projects and they were run to that budget. CDL estimated costs and in the early days he, Mr Torfeh, monitored them very carefully and was satisfied they were acceptable. He said they did not have a detailed specification but a list of requirements prepared by Mr Boniface which were prioritised. The list did not specify what materials to use; that was left to CDL to determine.

90. Mr Torfeh confirmed that Danas was introduced by Pavel Guzminov. At the time Mr Torfeh interviewed Danas about his skills and capacity and was satisfied with what he heard. He said that today he was more convinced he was the right man for the job, and he would employ him to do work on his house. He said that Danas was engaged on a salary and they were so pleased with his work that at the end of the year they voted him a bonus.

91. Mr Torfeh was taken to some slides which he had prepared for a general meeting presentation in July 2013. The gist was that the Marylebone Road elevation project was completed by CDL in 20 weeks at a cost of £300,000 + VAT which compared more than favourably with estimates between £1.870m and £2.026m if a more conventional procurement had been undertaken. When questioned about the figure of £300,000 he said it had come from the accountants. He accepted that he did not know how RMD checked the invoices, if they did. Also he did not know how the invoices were apportioned or allocated to the various budgets. He said he was aware that CDL was working on different projects at the same time. He said he was certain that the accountants would not have checked the invoices against the budgets. In the absence of any credible explanation to support the claimed figure of £300,000 we cannot see how this can be supported.

92. Mr Torfeh said that at times there was urgency to get things done and he accepted that not everything went right and that sometimes CDL had to correct errors and re-do works. Cambard RTM paid CDL to do the remedial works, but he claimed the outcome was still within budget; but said: *the extra expense goes with having your own company.*

93. Apart from concerns about the accuracy of the figure of £300,000 we found Mr Torfeh to be a reliable and honest witness doing his best to assist us.

Mr Barry Gray

94. Cambard RTM called Mr Gray to give evidence. His witness statements are at [560, 984 and 997]. Mr Gray is the company secretary of Cambard RTM and attended its board meetings and AGMs. Mr Gray confirmed that Dr Abbasi was a director of the company from 27 October 2008 until 6 September 2010 during which period it was

decided to collect a reserve fund of £1.2m per year as from 2009 and did not voice objection to that proposal.

95. Dr Abbasi did not challenge Mr Gray's evidence but in cross-examination sought some clarification; although not on issues directly before the tribunal.

96. We found Mr Gray to be a careful and meticulous witness upon whom we can rely with confidence.

Mr Antoine Kohler

97. Cambard RTM called Mr Kohler to give evidence. His witness statement is at [1649].

98. In cross-examination Mr Kohler said that he was unaware how payments to CDL are approved. He said his remit was the approval of day to day expenditure to RMD.

99. Mr Kohler said that expenditure is tracked through the ticketing system both as regards routine expenditure and major works projects. He said that the expenditure was tracked and reviewed by the board on a monthly basis but he did not know if it was reviewed against the original estimated cost.

100. We found Mr Kohler to be a reliable witness and we accept his evidence which was not really challenged by Dr Abbasi.

Ms Danish Ahmed

101. Dr Abbasi called Ms Ahmed to give evidence. Her witness statement is at [618]. Mr Walsh did not challenge or cross-examine Ms Ahmed on the evidence of fact in her witness statement.

Mr Steven Dolland

102. Dr Abbasi called Mr Dolland to give evidence. His witness statement is at [616].

103. In cross-examination Mr Dolland clarified that his concerns are of the standard of governance. He said that he had considerable experience of corporate affairs having been an officer of nine companies.

104. Whilst stressing that he had no evidence of money going astray he was concerned that Mr Guzminov had introduced the accountants Brindley Jacob, had introduced Danas Luksys and exercised a deal of control over the board of Cambard RTM. He further complained that there was no independent audit of the accounts of CDL which were also prepared by Brindley Jacob. Mr Dolland stressed the need for good governance and transparency and complained that the current set up is murky and completely unsatisfactory. He said that Brindley Jacob collect the service charges and hold the funds, CDL invoice Cambard RTM which in turn authorises Brindley Jacob to make payments to CDL and in excess of £3m has been paid over to CDL. Further the registered offices

of both Cambard RTM and CDL are at Brindley Jacob's address and until recently Mr Jacob was secretary of CDL.

105. Mr Dolland may well be right in his conclusions but we did not consider that his evidence was directed at the particular issues we have to determine which are whether the costs incurred on the three major works projects were reasonably incurred, are reasonable in amount, are payable by Dr Abbasi and whether the section 20 consultation process was carried out correctly and if not whether some or all of the consultation requirements should be dispensed with under section 20ZA of the Act. We find that the question of good corporate governance is not directly related to those issues.

Dr Abbasi

106. Dr Abbasi gave evidence herself. Her witness statements are at [663 and 1089].

107. In cross-examination Dr Abbasi said she had lived in Berkeley Court since 1970 although had not been the lessee of flat 26 until 1996. Dr Abbasi accepted that flat 26 is a type A flat, one of the larger flats and that it is located on the seventh floor. Dr Abbasi also accepted that the Berkeley Court is at the higher end of the market with flats selling for between £2m - £4m and that commensurate high standards have to be maintained. Dr Abbasi also accepted that major works projects at Berkeley Court are unlikely to cost less than £1m.

108. Dr Abbasi was highly critical of the structure of the Glentworth Street project, which she claimed was unnecessarily expensive and the layers of firms involved which she believed added to the costs. Dr Abbasi was also critical that some professionals were paid as a percentage of cost incurred and she did not consider this led to an incentive to curb costs. Dr Abbasi claimed there was nothing conventional about the Glentworth Street project. Cambard RTM had no control over it, simply received reports. We are not directly concerned with the Glentworth Street project but we observe that both parties are agreed that it was not an ideal model and going forward a different approach would be more appropriate.

109. As regards the external elevations Dr Abbasi accepted that lessees were fully consulted and that the works were necessary and were needed. Dr Abbasi accepted that it was a reasonable decision to carry out the works and accepted that if things are left to degrade it will cost more to repair them. Dr Abbasi said she had no evidence to dispute the professional advice given to the board. Dr Abbasi confirmed that she had received the two section 20 notices.

110. Dr Abbasi was highly critical of the setting up of CDL. She said it was the wrong thing to do because of the huge risks. Dr Abbasi denied that it gave Cambard RTM any real control over finance and that if things went wrong there was no recourse. Dr Abbasi was also critical of the close relationship between Pavel Guzminov and Danas Luksys.

111. Dr Abbasi gave some examples of poor workmanship and peeling paint and expressed concerns about applying coatings to Portland Stone and whether that was the right thing to do. Dr Abbasi said she could not say it was wrong, but she did not know that it was right. Dr Abbasi accepted that she did not know if the works carried out were unreasonable.

112. As regards the other two projects, the roof, roof gardens and inner lightwells and the two larger lightwells, Dr Abbasi accepted that she received the section 20 notices, such as they were. Dr Abbasi did not nominate contractors because she was working in Dubai at the time. Dr Abbasi was very critical of the tender process. Dr Abbasi asserted that even CDL did not take it seriously and said this was supported by the letters at [260 and 296] which she claimed were virtually identical thus showing little real thought had gone into them. In both cases Dr Abbasi claimed the consultation process was poor, unconventional and phoney but she accepted that the works were necessary and she was unable to establish the works carried out were not to an acceptable standard. When pressed Dr Abbasi accepted that she was unable to demonstrate any prejudice suffered by her in the flaws in the consultation process of which she complained. Dr Abbasi also accepted that we do not live in a perfect world and *"... sometimes we have to do the best with what we have."*

The law

113. The relevant statutory provisions we are concerned with are set out in the Schedule to this decision.

114. In terms of case law or precedent our attention was drawn to *Daejan Investments Limited v Benson and others* [2013] UKSC 14 in which the Supreme Court gave guidance as to the approach which tribunals ought to take when determining applications for dispensation made pursuant to section 20ZA of the Act.

Discussion and conclusions

The section 20 consultation and dispensation

115. It is convenient to take this first.

116. In the event Dr Abbasi did not challenge the consultation process in respect of the external elevations project. Dr Abbasi accepted that notices were given, competitive tenders were sought, obtained and evaluated. In the event the decision was taken to award a contract to CDL and although Dr Abbasi considers that to have been a risky arrangement it seemed to us that Dr Abbasi was not contending that the decision to award the contract to CDL was contrary to the consultation requirements.

117. Dr Abbasi did challenge the two consultation processes carried out in respect of the other two projects. We agree with Dr Abbasi that the processes were deeply flawed. The evidence given on behalf of Cambard CDL as to the manner in which the notices were prepared and the

tender process undertaken was most unsatisfactory. Notices contained incorrect information and attributed statements to external advisers which were not correct. The actual tender process was a complete mystery to us because none of the witnesses were able to say who decided to whom invitations to tender should be sent and what information was provided to them. The tenders that were provided by Dynamic Solar and SNS Europe do not appear to be very professional or put together with any real thought or care. At a very early stage Mr Guzminov concluded that both of those companies was unacceptable but the tenders they provided were presented to lessees as being genuine, reputable and realistic. That was inexplicable. Even more inexplicable was the decision evidently taken by someone to invite the same two companies to tender for the third project and the tenders received were again presented to lessees as having some validity.

118. Paragraph 4 of Schedule 4 Part 2 of the regulations require that estimates must be obtained and at least one of them must be from a person wholly unconnected with, in this case, Cambard RTM. We have no doubt that it is to be inferred that the estimates presented to lessees must be real and genuine and submitted by companies or persons whom are considered able and competent to undertake the proposed works. Any concerns about the proposed contractors which a landlord or RTM company may have should be identified and made clear in a tender report. In the present case no or no meaningful tender reports were presented to lessees. Such callous disregard to the consultation process can rightly be criticised.

119. It is plain to us on the evidence of Mr Guzminov that in relation to the two projects in question Cambard RTM had no intention whatsoever of placing a contract with Dynamic Solar or SNS Europe. We find that on both of these projects the intention at the outset was to award the contract to CDL and that Dynamic Solar and SNS Europe were involved simply to make the numbers up, to give an impression of consultation and to try to show CDL in a favourable light. We are reinforced in this conclusion by the rather crude tenders submitted by CDL which was probably aware that it had no real competition for the contracts.

120. The third limb of the scheme is that by paragraph 6 the lessee is to be given a notice when a contract for the carrying out of qualifying works has been placed, save where the contract is made with a lessees' nomination or the person who submitted the lowest tender. There was no evidence of compliance with this paragraph. Dr Abbasi did not formally raise the point. Mr Walsh submitted that given all three contracts were placed with CDL which could be regarded as a company controlled by the lessees and thus considered to be a contractor nominated by lessees, or some of them at any rate. We are not prepared to go that far and failure of compliance with paragraph 6 was not part of Dr Abbasi's case but, as will be seen shortly we find such failure does not have any material effect on the outcome of the application.

121. For the several reasons set out above we conclude that in relation to the two projects in question the consultation process was deeply flawed.

122. However, that is not an end of the matter. It is clear to us from the judgment in *Daejan v Benson* that in certain circumstances it may be right to grant dispensation where the process has been flawed, incomplete or even absent altogether.

123. Sections 20(1)(b) and 20ZA (1) provide that the requirements can be dispensed by agreement or by the tribunal where it is reasonable to do so. Here, there is no question of Dr Abbasi agreeing with dispensation. It is clear from *Daejan v Benson* that the focus is shifted from the gravity of the breaches to that of any prejudice suffered by lessees. The emphasis is not on penalising a landlord or RTM company which may not have complied fully or at all with the consultation process but to do what might be necessary to protect lessees from unreasonable service charges or prejudice. Lord Neuberger made it clear that any prejudice found to exist can often be cured by granting dispensation on terms.

124. In the subject case Dr Abbasi accepted, rightly in our view, that the failures in the consultation process had not caused her to suffer any prejudice.

125. In the particular circumstances of this matter and in the absence of any prejudice we find that it is reasonable to grant dispensation. We find that in setting up and operating CDL the directors of Cambard RTM were making a genuine attempt to try and keep costs of the major works down. Having set up CDL we can see why it made sense to award the further contracts to it. However, in our view Cambard RTM ought to have carried out the consultation process fully and properly instead of going through a flawed process and presenting misleading notices to lessees, however well-intentioned that might have been overall.

126. We have decided not to grant dispensation subject to conditions. We find that in the absence of prejudice it would not be right to impose a financial condition because that would be more akin to a penalty. Also we bear in mind that Cambard RTM is a RTM company which is reliant on service charges for its income and that any financial penalty would or may ultimately be borne by its members.

127. For the sake of good order we record all of the long lessees are the respondents to the section 20ZA application. Pursuant to directions six lessees plus Dr Abbasi indicated they wished to participate in the proceedings. In the event only Dr Abbasi served a statement of case and attended the hearing to oppose the application.

The court proceedings and the reserve fund for year ending 31 March 2014

128. The budget for the year 2014 included a provision to the reserve fund. Dr Abbasi's contribution to that fund amounted to £15,500 which was payable in two equal instalments.

129. Dr Abbasi asserts that such a sum was unreasonable in amount and that under the terms of her lease the sums to be transferred to and from the reserve fund should be evened out to achieve an outcome ***(the said amount to be computed in such manner as to ensure as far as reasonably foreseeable that the Maintenance Provision shall not unduly fluctuate from year to year)*** ..." [emphasis added].

130. We bear in mind the lessees enjoyed a 'reserve fund holiday' in the three years 2010, 2011 and 2012. Dr Abbasi's contribution to the reserve fund for 2013 amounted to £4,650.

131. Cambard RTM acquired the right to manage in 2005. It undertook the Glentworth Street major works project which all concerned agreed was a disaster. A reserve fund holiday' was decided upon whilst the directors considered the best way forward with major works projects which again, all concerned agreed were required.

132. By 2012 CDL was set up and the directors of Cambard RTM were of the opinion that it had completed its first project successfully. So much so that they voted Danas Luksys a bonus.

133. The ten year plan was reviewed. Against what was concluded to be a successful project carried out by CDL it was decided to take advantage of the set up and to proceed with two more major works projects which got underway in 2012 and 2013.

134. As at 31 March 2013 the reserve fund had dipped to £615,346, considerably less than the balances in the three prior years. It was at about this time that directors gave consideration to the budget for the year commencing April 2013. At that time the two projects were in hand or planned to start. Dr Abbasi accepted in her evidence that any major works project at Berkeley Court would not cost less than £1m.

135. Against that background the budget was set for 2013/14 to ensure that there was sufficient in the reserve fund to cover those two projects. Given that Cambard RTM is a RTM company, no doubt with limited capital assets to call on if need be we can see why that course was taken.

136. We find that such a course was within the range of courses open to a landlord or RTM company acting reasonably and responsibly. Accordingly we find that the allocation to the reserve fund was reasonably incurred and was reasonable in amount. Whilst some of the works might have been deferred for a year or perhaps two, having set up CDL, for good or bad, it did make sense to take advantage of the set up and to use it to complete the outstanding works which all concerned agreed needed to be done sooner or later. Dr Abbasi accepted that in deferring works the ultimate cost of repairs might be greater.

137. We do not dismiss the provision which provides that the reserve fund should ideally be managed so as to not to unduly fluctuate from year to year. That is an aspiration rather than an imperative. Those managing the building have to be pragmatic and take practical steps. Inevitably after a three year 'reserve fund holiday' and the review of a ten year it is not unreasonable that there might be some fluctuation until things are back on an even course. We do not find that the fluctuation here is such that it constitutes a breach of the lease on the part of Cambard RTM, such that Dr Abbasi is not obliged to make the contribution to the reserve fund.

138. Accordingly, we find that the balance due of £7,029.63 claimed in the court proceedings was payable by Dr Abbasi to Cambard RTM at the time when those proceedings were commenced.

139. Other sums were also claimed in the court proceedings. As to the legal fees of £363.00 no evidence was put before us concerning this claim. We infer it might relate to a variable administration charge but we cannot be sure and even if it is there is no evidence before us on which we could properly conclude that it was reasonably incurred, is reasonable in amount and payable by Dr Abbasi.

140. As to the claims to statutory interest, court fee and solicitor's costs these are all matters solely within the jurisdiction of the court to determine and this tribunal has no jurisdiction in respect of them.

141. We therefore return the file to the court so that these claims can be progressed by the court if that is what the parties want.

The reasonableness of the costs of the major works projects.

142. In opening his case Mr Walsh readily accepted that setting up and operating CDL was unconventional, perhaps unorthodox, but it was not wrong or unlawful. It was a course within the ranges open to a landlord and/or a RTM company to take. We would not disagree with that, although it is step to be taken with caution for a RTM company. The reasons are obvious and include a lack or recourse if projects do not go well and the question how remedial works are to be paid for.

143. The difficulty that arises in this case is that none of the parties know exactly what works have been carried out, to what standard or at what cost. Cambard RTM has not kept separate accounts for each project and thus cannot say with any precision what the final actual cost was against budget. Further it appears that CDL was given a budget for a project, rather than a specification. Thus we assume that towards the end of the budget if money was tight works originally contemplated might have been re-prioritised and perhaps some 'nice to haves' were dropped in favour of 'must haves'.

144. Both parties agree that in general terms the scope of the three projects was reasonable and that the works were needed.

145. Dr Abbasi rightly points out that in the absence of a detailed specification, schedule of materials and methodology it is impossible to understand what works have been carried out and at what cost. It follows that she cannot demonstrate some of the works might not have been carried out at a reasonable cost when measured against the quality of what was done.

146. Within the papers there are a substantial number of invoices [1410 – 1588] issued by CDL to Cambard RTM. We do not know on what contractual basis, if any, those invoices were raised. The invoices themselves are not very illuminating. By way of random example:

[1490] Scaffolding for internal wells Part 1 £32,000.00
[1574] Pergola repairs £2,599.00
[1583] Balcony Waterproofing in Southern Main Lightwell £11,234,00

Without further information or bills of quantities no cross-check can be undertaken.

Further it was unclear to us what checks, if any, were made by whom whoever it was that authorised the payment of the invoices submitted.

147. We can readily appreciate the practical difficulties that arise in putting in place firmly costed contracts where at the outset so little is known as to the nature and extent of what work will actually be required until scaffolding has been erected and opening up works carried out. Mr Boniface has given some clear examples that arose in the present case. Often such works can only be carried out at day work rates but this of itself raises issues of financial control and cost overruns. Ideally Dr Abbasi would like to have seen much more certainty and supporting documentation but creating that would, of itself, have incurred cost.

148. All that the parties are able to say in this case that three major projects have been undertaken. At what cost is not known. What is known is that substantial sums have been drawn down from the reserve fund but we were not provided any details of movements on that fund and it would appear that not all sums drawn down were used to defray major works expenditure. In addition some major works associated expenditure, such as professional fees, appears to have been debited to the routine service charge account.

149. It seems to us on the one hand Cambard RTM cannot show the detail of what works have been carried out and at what cost. On the other hand Dr Abbasi is unable to show that works have been carried out at an unreasonable cost. Although there have been some teething and snagging problems Mr Henry was unable to find any significant concern with the quality of those works that he was able to see, limited as that might have been.

150. What Cambard RTM has been able to do is show through:

1. Mr Boniface is that only necessary works were carried out and that he was satisfied with the quality of works that he inspected (which was not each and every piece of work);
2. Assent is that there was independent inspection of building control requirements; and
3. Those directors who were heavily involved in the projects that they were satisfied with the nature and quality of the works undertaken and the function of Danas Luksys as project manager.

151. We infer that given Cambard RTM is a RTM company and that all the directors of it are lessees who pay service charges the starting point is that the works were intended to be carried out at a reasonable cost to a reasonable standard.

152. Although the current guidance is that tribunals do not decide section 27A applications on the legal application of burden of proof, we consider that where a lessee makes the application he or she has to show a prima facie case that either the cost or the standard of work was unreasonable. We find that in the subject case Dr Abbasi has been unable to do that, the evidence has just not been available to her to swing the burden to Cambard RTM to justify the costs incurred.

153. Dr Abbasi has been able to demonstrate that the section 20 consultation process was flawed but has not been able to show that those flaws have had an adverse impact on the costs incurred. Neither has Dr Abbasi been able to show that the absence of a formal contract with CDL and the absence of the testing of CDL's costs has had such an impact.

154. In these circumstances we must find that there are no adjustments to be made to the service charge accounts covering the years in which reserve funds have been drawn down to discharge the costs incurred on the major works projects.

The section 20C application

155. Dr Abbasi made an application pursuant to section 20C of the Act that none of the costs incurred or to be incurred by Cambard RTM are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by her. So far as we are aware this is the only section 20C application before us and no other lessee has (as yet) made such an application in relation to those costs.

The application was opposed by Mr Walsh.

156. The gist of Dr Abbasi's application was that Cambard RTM made too many mistakes and representations to lessees, some of which were designed to mislead, that there has been breach of trust and that directors took it upon themselves to put binders in the lobby of Berkeley Court concerning these proceedings in pursuit of the

endeavour to destroy her reputation with fellow lessees and in with the deliberate intention to intimidate and scare her.

157. In opposing the application Mr Walsh submitted that the submissions made by Dr Abbasi were irrelevant and should be ignored. Mr Walsh said that substantial costs had been incurred in dealing with Dr Abbasi's application concerning routine costs which was abandoned halfway through the hearing, costs were thus wasted by her own actions. Mr Walsh also submitted that Dr Abbasi's conduct during the proceedings was disproportionate and exacerbated by outrageous allegations.

158. In considering the application we have to decide whether to exercise the discretion vested in us having regard to what is just and equitable. Further we have to consider what will be the practical and financial consequences for all those who will be affected by any order we may make and to bear those consequences in mind when deciding how to exercise the discretion.

159. We find that both parties must bear responsibility for the costs which Cambard RTM have incurred. On the one hand the approach by Cambard RTM to the section 20 consultation process and the apparent cosy relationship with CDL and the accounting practices may have been designed to save money but the clouding of transparency has undoubtedly fuelled suspicion even if there is nothing to be suspicious about. On the other hand Dr Abbasi spent a good deal of the hearing pressing her opposition to the dispensation application when it seems she had not taken competent advice on the effect of *Daejan v Benson* on the application and the need for her to demonstrate prejudice. Further the late withdrawal of her challenges to the routine service charges will undoubtedly have caused Cambard RTM to incur additional costs.

160. This tribunal is essentially a no costs tribunal and costs orders are not usually made save in exceptional circumstances, which do not appear to arise here. In general terms the tribunal will expect each party to bear its own costs.

161. If a lease gives a party the contractual right to pass costs through the service charge account then we have to consider whether that party has acted in such a way that it is just and equitable he be deprived of that contractual right. We make no finding as to whether such a contractual right exists in this case but if it does we do not consider that Cambard RTM's conduct has been such that it should be deprived of that right. We bear in mind also that Cambard RTM is a RTM company and its only source of funds may be those properly recoverable through the service charge. If costs were not to be recoverable Cambard RTM is at risk of being insolvent and directors would require to take appropriate steps. It seems to us that given the reasons why the right to manage was acquired in the first place it might not be in the best interests of the

lessees in general if management were now to revert to the freeholder due to the insolvency of Cambard RTM.

162. For these reasons we decline to make an order pursuant to section 20C of the Act.

163. For avoidance of doubt we should make it clear that if the costs of these proceedings are passed through the service charge it will be open to all lessees to challenge them, by way of a section 27A application, if they consider they were not reasonably incurred or not reasonable in amount. Also it will be open to all lessees (other than Dr Abbasi) to make a section 20C application in respect of those costs.

Judge John Hewitt
31 March 2015

The Schedule

Landlord and Tenant Act 1985

18.— Meaning of "service charge" and "relevant costs".

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

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

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

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

(3) For this purpose—

(a) "costs" includes overheads, and

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

19.— Limitation of service charges: reasonableness.

(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.

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

(2A)-(3) (4) ... [repealed]

(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.

20.- Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

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

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

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

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

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

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

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

20C.— Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken
into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

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

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

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

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

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

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

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

20ZA Consultation requirements: supplementary

(1) Where an application is made to the appropriate 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.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and
"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.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or
(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

27A Liability to pay service charges: jurisdiction

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

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

The Service Charges (Consultation Requirements)(England) Regulations 2003 SI 2003 No.1987

The regulations were not controversial and we have simply recorded Schedule 4 Part 2 which sets out the process to be followed.

PART 2
CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS FOR WHICH PUBLIC NOTICE IS NOT REQUIRED

Notice of intention

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 proposed works may be inspected;

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

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

(d) 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) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

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.

Duty to have regard to observations in relation to proposed works

3.-

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

Estimates and response to observations

4.—

(1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate–

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate–

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)–

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out–

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), 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 is, 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.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by–

(a) each tenant; and

(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)–

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(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.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

5.-
Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract
6.—
(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)–

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Case No.: LON/00BK/LSC/2013/0831

IN THE FIRST TIER TIRBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

PROPERTY: Flat 26 Berkeley Court, Marylebone Road, London. NW1 5NA
APPLICANT: Cambard RTM Company Ltd
RESPONDENT: Ms Salma Yasmin Abassi

EXPERTS
JOINT STATEMENT

Stephen Boniface (for Applicant)
And
Paul Henry (for Respondent)

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1. This statement is prepared in accordance with the directions dated 14 January 2014 and 27 June 2014.

2. The Experts have considered the case as set out by the parties and, having considered the directions, believe that their comments should deal only with the major works and not routine maintenance matters.

3. The matters this joint statement considers are:

   a The necessity of the works.

   b The quality of the works.

   c Whether the costs are reasonable.

Necessity of Works

4. It is understood that following the major works to Glentworth Street some years ago, it had been intended that the works to elevations continue, hence the use of the term 'Phase 2' for the major works to the other elevations.

5. A fan scaffold had been in place, as a security measure (against falling masonry), for some years.

6. An abseiling report on the condition of elevations was prepared and is dated 2nd September 2011.

7. A Dangerous Structure Notice was issued by Westminster City Council on 22nd September 2011.

8. By the end of 2011 Transport for London had identified Marylebone Road as an 'Olympic Route' in relation to the 2012 Olympics. TfL required all scaffolding to be removed from the route prior to the Olympics.

9. The Experts are agreed that the works were necessary the initial scope of which is indicted by the contents of the absell report produced on the 2nd September 2011.

Quality of Work

10. The Experts are agreed that there was no conventionally recognised building contract used (e.g. JCT), or any form of recognised cost control on the works carried out following completion of the works to the Glentworth Street elevation.

11. It is noted that Devonshires (a firm of Chartered Surveyors) had produced a Schedule of Work and Specification in 2011 and that this included reference to

the nature of the works and what was required. Whilst it appended the abseiling report (mentioned above), there was no other reference to quantities.

12. There was no formal contract administrator. The Project Manager was the director of Cambard Developments Ltd, a company specifically formed for the purpose of undertaking the major works.

13. The Experts have not seen the contract between the Applicant and Cambard Developments Ltd.

14. The Expert for the Applicant, Stephen Boniface, was commissioned in December 2011 and he was to undertake periodic inspection in order to check quality and advise on any technical matters that arose during the works. Inspections were undertaken every couple of weeks, or when the need arose. In addition, remote checks were undertaken by use of photographs being taken and shared over the internet.

15. Assent, were a company of Approved Inspectors and were employed to deal with Building Regulation matters. They undertook inspections on a periodic basis during the works. Assent periodically called upon their in-house engineer, Adrian Tanswell, for input.

16. Cambard Developments Ltd employed an engineer in-house, for the major works to the main elevations. In turn, the engineer, on at least one occasion, referred to an independent engineer, SKD, particularly with regard to works along the Marylebone Road elevation.

17. More recently, Eamonn Malone (of Devonshires – who produced the original Schedule of Work) inspected and has provided a statement to the Tribunal commenting on the quality of work.

18. Mr Henry is of the view that the set-up was unconventional, i.e. there being no independent quality/cost control in place, the only identifiable quality control available appears to be that of the in-house engineers without reference to any representative of the residents/leaseholders of the building and no costs controls would appear to have been in place,

19. Mr Boniface comments that it is correct to state that the contractor had a responsibility to control quality levels and his role was periodically to check (on behalf of Cambard RTM Company Ltd) that the quality was being maintained.

20. For further clarification, Mr Boniface comments that it was not practical to provide sample panels when the work commenced to the Marylebone Road elevation,

because once the scaffolding was in place there were severe time pressures to get the work completed. The standard of the early work was assessed and verbally agreed and this was then used as the standard for the rest of the elevation and to the other elevations. With regard to quality, Mr Boniface is satisfied, from his inspections and photographs taken during the works, that the quality is satisfactory. In addition, Mr Boniface takes the view that the quality has been independently verified by virtue of the periodic inspections and final sign-off by Assent (and their engineers), as well as involvement of in-house engineers and (on at least one occasion) by independent engineers (i.e. SKD).

Reasonableness of Costs

21. A Schedule of Work and Specification was prepared by Eamonn Malone (of Devonshires) in 2011 and put out to tender. Eamonn Malone interviewed the tenderers and prepared a tender report. It identified a number of concerns, particularly with regard to provisional sums and contract period. It is understood that the Applicant did not want a repeat of the problems (cost and time over-runs, as well as general disruption), that had arisen with regard to the works to Glentworth Street.

22. The tenders returned in 2011 included a large number of provisional sums and several items were priced together rather than individually.

23. When Stephen Boniface became involved, he was advised that, based on the experience of Glentworth Street, the Applicants considered that there was a high risk of cost and time increases and that the final cost would be higher than the tender sums.

24. The Experts do not have any detailed information regarding the formation of Cambard Developments Ltd or of the contract between them and the Applicant.

25. It is understood that the same Schedule, etc. that was put out to tender by Devonshires (which Mr Henry has previously advised is inadequate for its purpose) was used for costing by Cambard Developments Ltd. The Experts have not seen a priced version of the Schedule however.

26. It is not known precisely how Cambard Developments arrived at a cost or how later variations were quantified or priced.

27. It is not possible to assess the cost of the works by methods usually adopted for building contracts of this nature, due to the unorthodox nature of how this particular project was set-up and run.

28. It is not possible to assess the cost by a unit rate, or other suitable measure.

29. Stephen Boniface is prepared to say that the cost of the works undertaken by Cambard Developments Ltd is reasonable by comparison with the tenders of 2011 and by comparison with the cost of the previous works to Glentworth Street.

30. Paul Henry however can not comment on the

A) Costs of the works, as there is no sustantiable method of identifying the works required or carried out. Furthermore, it is not possible to value the works against those carried out the Glentwoth Street, as there is insufficient information available on the phase two to works to compare one against the other.

B) Quality of the works, as there is no, Substantive methods of identifying the actual works carried out as the vast majority of the repairs, etc are now covered over and no physical record of what was carried out and to where exists.

Concluding Comments

31. Based on the information currently available to the experts, it is our opinion that works were required to the building as is evidenced by the abseil report produced on the 2nd September 2011. The quantum of the works actually carried out however cannot be fully assessed due to the absence of detailed schedules.

32. Mr Henry is concerned with regard to the quality of the works carried out, once again the same cannot be fully assessed due to the absence of any quality standard being available/provide either by written description (providing a written technical description of the minimum standard required) or a practical sample (i.e. a sample repair panel being produced at the commencement of the works) against which all future repairs could be measured. Either/both of which Mr Henry would have expected with a project of this nature.

33. Mr Boniface agrees that the way this project has been dealt with is unconventional. It is also accepted that there was no readily recognised quality standard set down in writing. However, the standard of the early work was assessed and verbally agreed and this was then used as the benchmark standard for the rest of the elevation and to the other elevations. With regard to the technical works, the understanding that Mr Boniface had (on being instructed) was that the repairs were to be along the lines of a conservation

approach, i.e. as much as necessary, but as little as possible. In other words no unnecessary or excessive work, but not to ignore repairs and that the result would mean that major works of a similar nature would not have to be re-visited in the foreseeable future. To assist with this, periodic input from engineers was obtained.

34. With regard to costs, it is not known how costs were arrived at, how any variations were priced, or what specific cost controls were employed during the works.

35. Mr Henry takes the view that as no costs controls were employed during the works it is not possible to demonstrate best value being achieved.

36. Whilst Mr Boniface agrees that the methods were unorthodox and do not follow standard recognised procedures, he believes (from discussions on site) that the contractors adopted a view that the contract figure was a budget against which they regularly assessed their progress.

37. Mr Henry is of the opinion that without a fully priced specification, or any pricing breakdown, or unit rates to apply to the agreed works, or any measurement of the works carried out, it is not possible to confirm that the costs are reasonable

38. Mr Boniface agrees that there are no readily recognised pricing breakdown or units rates. However, as already stated, Mr Boniface is satisfied that the overall cost is reasonable. This view is supported by Mr Malone (who prepared the original documents and dealt with the tender) in his brief statement at Exhibit J to the Statement of Case dated 5th September 2014.

39. Finally, in our opinion the management of the project based on the information currently available would appear to rely solely on the integrity of the contractor and their employees.

40. Mr Henry is of the view that for a project of this size and nature it is very unusual to rely so heavily on the contractor. And, as a professional in the construction industry he would have expected that some independent monitoring/ analysis on behalf of the residents/lessee of the works as they proceed would have been essential if only to be able to demonstrate best value to the residents/ lessee.

41. Mr Boniface accepts that the situation is unusual, but takes the view that the general arrangement is not unlike a 'design and build' form of contract.

Signed	Signed .....
Stephen Boniface (for Applicant)	Paul Henry (for Respondent)
Dated	Dated