**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | CHI/00ML/LSC/2021/0082<br>CHI/00ML/LIS/2021/0043 &<br>CHI/00ML/LDC/2021/0083 |
| **Property** | : | Sussex Heights, St Margaret's Place, Brighton BN1 2FR |
| **Applicant** | : | Sussex Heights (Brighton) Limited |
| **Representative** | : | Ms Whiteman, Dean Wilson LLP |
| **Respondent** | : | P Ward (Flat 24a)<br>S Davey (Flat 6e)<br>E Beaumont (Flat 7e)<br>J Lui (Flat 6a and 3a)<br>R Healey (Flat 10e)<br>M Brisley (Flat 8e)<br>H Guinness (Flat 6d)<br>J Laing (Flat 3d)<br>A Papikyan (Flat 22d)<br>E Bondaruk (18d)<br>A Hudson (16c)<br>C Wan (Flat 3a)<br>P Michaelson (Flat 1e) |
| **Representative** | : | Peter Ward |
| **Type of Application** | : | Applications to determine service charges and dispensation for consultation procedures – section 20ZA and section 27A Landlord and Tenant Act 1985<br>Applications that costs not be recoverable as charges- section 20C Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 |
| **Tribunal Member(s)** | : | Judge J Dobson<br>Mr M Ayres FRICS<br>Mr M Jenkinson |
| **Date and venue of hearing** | : | 7th, 8th, 9th March 2022<br>Remote- video proceedings |
| **Date of Decision** | : | 24th June 2022 |

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## DECISION

## Summary of the Decision

1. **The Tribunal grants the Applicant dispensation from compliance with the requirements in Schedule 1 to the Services Charges (Consultation Requirements) (England) Regulations 2003. The Tribunal does not impose any conditions.**

2. **In respect of the Applicant's application concerning service charges pursuant to section 27A of the Landlord and Tenant Act 1985, the Tribunal determines that the proposed major works are reasonable. The service charges demanded to date in respect of payment for the major works are payable under the terms of the Lease and reasonable and the further service charges will be payable and reasonable where required to be demanded in respect of the costs of the major works and the planned bi-annual maintenance required to retain the benefit of the guarantee for the major works during the subsequent ten years.**

3. **The Tribunal therefore determines in respect of the Respondent's application concerning service charges pursuant to section 27A of the Landlord and Tenant Act 1985 that the service charges for 2011 to 2030 insofar as they relate to the funds required for the costs of the major works and the ongoing maintenance required to retain the benefit of the guarantee for the major works are payable and reasonable.**

4. **The Tribunal refuses the Respondents' applications pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of the Commonhold and Leasehold Reform Act 2002.**

## The Background

5. The Applicant is the head lessee of Sussex Heights, Brighton ("the Building"), pursuant to a head-lease dated 31st March 1993 ("the Head-Lease"). The Applicant is, as its name suggests, a resident- owned company, which owns only the Head- Lease of the Building.

6. The Building is twenty- four storeys tall, containing 116 leasehold flats ("Flat" individually or "Flats" collectively) and structural and communal parts from the first floor upwards (twenty- three floors) together with the entrance hall only on the ground floor. The Building was built in or about 1968 with a concrete frame and concrete floors. It is some 102 metres high. That makes it the tallest residential building on the South Coast. It is consequently a prominent building and is located near to the centre of Brighton, set back a little from the seafront and built on a site which also

contains the Hilton Metropole Hotel. That all has some relevance as context to the applications for determination, including but limited to the fact that access for works is difficult. Whilst of no direct relevance to this application, it has also attracted some interest arising from the peregrine falcons that nest on the roof.

7. The Respondent are the lessees under long leasehold of various Flats in the Building. Those leases were already in place prior to the Head- Lease being granted. The leases are held for a term of 125 years commencing in or about 1970. They are in the same or substantially the same form. The Respondent produced what is described as the transcribed wording of a typical lease ("the Lease"), there being no dispute that it was so typical. References to clauses and paragraphs agreed are to provisions of the Lease i.e. that of the typical lease as termed. The freeholder is Hotel Metropole (Brighton) Limited, which played no part in this case.

8. The Tribunal understands that the exterior face of the Building was originally covered in mosaic tiles, which were finished with a carbonation coating. Behind the tiles is a layer of render and wire mesh. The existing coating/ membrane material (Ronocrete Joltec) had been originally installed in the 1980s and had been re-coated in the early 2000s, 2002/2003 was said in witness evidence, so producing two layers. That was common ground.

9. The original windows to the property had been single glazed with Crittal metal frames. Many have since been replaced over the years in one manner or another- and not consistently the same. It is unclear just how many variations there are. One particular identified difference of approach was that some windows had been replaced seeking to undertake the work from inside the flats and some from outside. There were various references during the hearing to different methods of installing windows, whether from the inside of the Flats or the outside and above whether sills and other trims had been dealt with at that time or not. A minority of the windows had not been replaced at all and so were the original metal framed single glazed windows. They were long since obsolete.

10. The lintel and frame metal are embedded in the concrete of the exterior walls. They have rusted, although Mr Ward, the First Respondent and representative of the other Respondents, asserted that as galvanised steel they should not if correctly maintained. The correctness or otherwise of that and any relevant failing does not alter the actual position and no claim arising from any historic maintenance issues was before the Tribunal. The Applicant's case includes that the galvanised windows, caps and seals were painted with the proprietary product at the time of the last Joltec re-coating.

11. It also merits brief mention that all Flats have balconies. A number of those balconies have been enclosed by the lessees, which the Tribunal surmises was not intended at the time of construction of the Building.

12. It is apparent that, no doubt due in part to its size and position, the elements have affected the Building one way or another over the years. There have been previous proceedings in relation to the Building. Other repair works had been undertaken from time to time, the Tribunal understands including by, or principally by, contractors using ropes to abseil.

13. There is a problem with water penetration to the Building, the cause of the works proposed, which has been experienced for several years. It is common ground that the Joltec coating is at the end, indeed it appears to be accepted is beyond the end, of its life. Also, that some of the mosaic tiles are detaching or have detached- approximately 30%, as estimated. Further, it is agreed that no additional coats of Joltec can be applied, such that a different approach is required. Some of the concrete itself has been affected by water penetration for a number of years including through the Joltec and where there are missing or damaged tiles- and may indeed be saturated as suggested (by Mr Tunbridge- see below). There appear to be blisters of water behind the coating.

14. It is also common ground that there are water leaks around some of the windows. That water penetration includes penetration into various of the Flats themselves. The Applicant's witness statements present a clear picture of significant problems with water penetration and damp being experienced by lessees with obvious impact on the condition of the Flats and on occupiers. Damp is seeping to the interior, some of which may be tracking from other areas of the Building than outside the particular Flats. There is also water penetration- Mr Ward asserted the main part but the Applicant witnesses did not accept that- via defective windows, in part as a consequence of the condition of the sealants but also where the original or subsequent windows are defective or there are metal trims which have deteriorated and are rusting.

15. It is not in dispute that work is overdue. It appears to be agreed that there has been an effect on the value of the Flats, although whether that is the £100,000 suggested by Mr Ward or not is beyond the information the Tribunal possesses.

16. The Applicant added in it's Reply a contention that as at 25th January 2022 when an inspection took place, the position in respect of the façade had worsened from that previously identified, with debris which has fallen from the Building visible on lower roofs and with the Building apparently sucking in moisture at the twenty third floor and rising damp travelling up the Building. Work is therefore said in the Reply to be urgent- although the different intended timing in light of available funds is addressed below.

17. The issue has been one of how to address those matters, combined with the need to fund the work, where number of investigations have been undertaken over the course of a few years prior to this application and reports commissioned in respect of potential solutions and available options. Mr Ward referred to one as far back as 1988 which considered the tiles and render detaching. There had been significant effort in recent years

in respect of a solution involving over- panelling the facades of the Building. Indeed, planning permission had been obtained for such works. That was the solution said by the Respondents to be appropriate, rather than the works proposed by the Applicant. A tender process had been pursued.

18. A detailed chronology was provided in the bundle [232]. There is no attempt to repeat it in this Decision, although some of the developments merit mention.

19. The Applicant had obtained a report from Grummit Wade in 2011 [235 onward]. The company had been involved with the Building for several years. There was considerable doubt then that a third coat of Joltec would be possible. It was considered that the weight of that product would cause material to detach from the walls. The report included a number of comments about the windows to the Building, including that metal windows should, if possible, be replaced before the works to the facades are undertaken. A specific issue was identified where the original windows had been replaced but the metal sills remained. Whilst not a necessity, the best approach to take as identified by Grummit Wade was for the metal windows, sill and caps to be removed, although referring to lessees doing so as a condition of replacing windows. The enclosure of balconies was said to have helped with cold bridging, although issues remained.

20. BLB Chartered Surveyors were first appointed by the board in 2016. Mr Ward and Mr Laing were involved in that appointment. The Tribunal understands that some further investigation of coatings took place. Subsequently, a Feasibility Study was prepared [252 onward]. BLB noted that they had included systems which exceeded the board's budget, of £800,000, indeed all the options did so. At that time, BLB expressed the opinion that the tiles and Joltec were having a detrimental effect on the fabric of the Building (as well as its appearance) and referred to the poor condition- perished and corroding- of the window trims and detailing. BLB further expressed the firm opinion that a third coat of Joltec was not appropriate because it was failing and because of the level of blistering (blistering with fluid- filled pockets had previously been identified where water had got behind the render in a survey by Edge), to such an extent that a further coat would not have the desired effect of making the building waterproof and so would be a waste of money.

21. BLB recommended that the facades be over-clad at a cost estimated at around £2 million at that time. The Applicant asserts it to be of considerable relevance that the Study was prepared in the context of the then board of the Applicant strongly desiring over-cladding. A tender process was initiated with the assistance of Avalon.

22. The currently intended contractor, Maintenance Painting Systems ("MPS") became involved in July 2018. That company was asserted to be used to harsh marine environments and to using the correct product for the given environment. It was said that Daniel Goulding had contacted MPS on behalf of the Applicant because of work with some similarity undertaken

by it at another property nearby, Bedford Towers, which the Applicant's evidence says received satisfactory feedback. MPS proposed another coating solution. MPS had approved materials for such work, although made by others it was established in the hearing. Whilst MPS had approved products for such use, they were not the only such products in existence (as Mr Ward pointed out during the hearing- see below). A report was prepared by MPS [474 onward].

23. It was said that the MPS proposal had been given to BLB for it to look again at such a solution. The further BLB documents did not continue to recommend over- cladding but rather recommended an alternative coating system, so a solution of the nature proposed by MPS, as the appropriate way forward. The correctness of that opinion is not accepted by the Respondents. Therein lay the principal cause of the current dispute.

24. The works sought to be undertaken by the Applicant involved, in brief summary, cleaning the outside of the Building, identifying and removing the damaged Joltec coating and loose tiles and render together with repairing concrete, bringing the surface forward where required to be level, the application of an elastomeric waterproof compound coating (Rustoleum Murfill); making window perimeters watertight as far as practicable by applying mastic sealant beading (the Applicant's case is that the large number of the windows in Sussex Heights replaced with UPVC have substantially thicker frames and in places they have been fixed into the rendered face of the building such that leaks can only be prevented that way), together with removal of defective seals and original metal trims, sills, brackets and panels where possible or otherwise some cutting back, and finally upgrading the roof access [BLB 81/146]. It should be added that the work cannot be undertaken using scaffolding and that rope access is required.

25. Relevant documents were prepared by BLB [53 to 146] in relation to the proposed design and build contract, including tender and contract documents with drawings and in usual form. The documentation makes it clear that tenders can state any elements of the works which a potential contractor cannot tender for but otherwise must include all work necessary to complete the works to be contracted. The works are set out essentially in the terms and to the length in the preceding paragraph, bracketed matters excepted.

26. A Notice of Intention [46 onwards]- the first formal stage in the consultation process laid down by statute and regulations (see below) was served on 7th April 2021 by Ellmans, the management company for the Building. The lessees were given until 10th May to provide observations- and twenty- nine questions were asked, the majority by Respondents Mr Ward and Mr Papikyan [40-45]- and put forward any contractors for the Applicant to contact. The second Notice [50], providing one estimate only, which was from MPS, but appropriate information otherwise including the estimated contribution, was then served on 2nd August 2021. Observations were requested by 2nd September 2021, to which two lessees replied that the requirements of section of the Act had not been complied with.

27. The anticipated cost of the major works pursuant to the estimate from MPS received at that time amounted to £1,375,000 plus VAT, and so a total of £1,650,000, in the first instance, excluding professional charges. Those charges are stated at 5.25%, so £86,625 inclusive of VAT on the above figures. Hence, the overall costs of the major works would be £1,736,625.

28. In addition, it was anticipated that there would be ongoing maintenance required during following ten years (occurring in years two, four, six and the eight) at a cost of approximately £300,000 plus VAT, £360,000 in total, to address any deterioration, including of the coating failure of mastic sealant and staining from Crittal window elements. The combined cost, inclusive of VAT, of the works involved in the project was therefore in excess of £2million, even at 2021 prices. The Tribunal understands from Mr Tunbridge - and accepts from its expertise combined with a lack of challenge to it, that the cost has already risen since May 2021. Mr Tunbridge suggested by 10% across the board.

29. It should also be recorded that replacement of communal windows to the south elevation stairwells of the Building was dealt with in a report by Edge (which also prepared other reports from 2014 onwards, principally as to windows) and the Tribunal understands that the reference in the BLB documentation prepared for contractors' tenders referring to possible additional work of new windows includes those communal windows [137]. However, that falls outside of the specific contract works.

30. Service charges have been demanded in advance twice- yearly by way of instalments towards the cost of the major works in the sum of £700 to £900 (for one- bedroom and two- bedroom Flats respectively, although there seem to be four types of Flat, which have been referred in some documents to A/B/C or D) per Flat.

31. The current board of directors of the Applicant support the proposed works. Mr Ward and Mr Laing, another Respondent, had been members of the board until dates in 2018, respectively, indeed Mr Laing had been the Chair for (approximately) six years (he said and there was no reason to doubt him as being there or thereabouts correct). They had been involved in seeking a solutions to the difficulties with the exterior to the Building. Previous directors, including, Mr Ward and Mr Laing, had favoured over-cladding. Mr Papikyan had been a board member until April 2021.

32. It is worth stating for the avoidance of doubt, that the Murfill coating is described as water- based and not flammable. Inevitably, changes to buildings of the nature of this Building, and indeed many others, give rise to concerns as to fire risks and any increase in those risks. It is therefore of relevance that the parties did not identify that as an issue in this instance.

**The Application and history of the case**

33. The Applicant sought determination of service charges for the years 2018 to 2022 inclusive in relation to proposed major works pursuant to section 27A Landlord and Tenant Act 1985 ("the Act") and also an order for dispensation in relation to consultation procedures pursuant to section 20ZA of the Act and the Services Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations"). The applications are dated 13th September 2021.

34. The named Respondents filed an application of their own seeking determination of service charges concerning reserve fund contributions from 2011 onward and until 2030 in respect of the major works (so the Tribunal understands the period in which the sums to pay for the major works have been demanded to date of those to be demanded for the balance of the cost of the works and the related ongoing maintenance) and concerning the consultation which was dated 27th August 2021 (it will be appreciated that pre-dated the Applicant's application) and received 6th September 2021. The service charge item more specifically said to be in issue was "the reserve fund element of each service charge" at 0.9% for what are described as A,B,D and E flats (the two bedroom Flats) and 0.7% for what are described as C flats (the one bedroom Flats). The Tribunal understands the different percentages are reflected in the levels of service charges which have been demanded, as referred to above. However, it was also made clear that the question which the Respondents wished the Tribunal to determine was "the suitability of the proposed external works and the legality of the section 20 procedure adopted by the Board". Therefore, to a high degree the applications of the Applicant and Respondents respectively are two sides of the same coin. The same law therefore applies again to that application.

35. Within the application form, the Respondents also made an application for an order under section 20C of the Act that the costs of the proceedings should not be recoverable by the Applicant as service charges and an application pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the title of which will continue to be used in full), for an order that the liability to pay an administration charge in respect of contractual litigation costs be reduced or extinguished. Those applications related to the proceedings issued by the Respondents. On 12th January 2022, the Respondent's representative made a further application pursuant to section 20C of the Act in respect of the costs of the Applicant's application. There was no equivalent paragraph 5A application.

36. For the avoidance of doubt, whilst strictly the Respondents are the applicants in respect of their own applications, the titles appropriate in respect of the Applicant's application have been used throughout these proceedings and are retained in this Decision.

37. Directions were given on 4th October 2021 in respect of all of the applications, which consolidated them into this one set of combined proceedings and listed a case management hearing. Further Directions were given only a few days later on 13th October 2021 but merely altered dates ahead of that hearing. At the case management hearing on 4th

November 2021, the final hearing was listed for up to three days, the parties were given permission to rely on expert evidence of a chartered surveyor and other steps to prepare the case for a final hearing were timetabled. Subsequent applications were made in respect of specific disclosure of documents. The net effect was that various specific documents and sets of documents were specifically directed to be disclosed by the Applicant to the Respondents. No subsequent issue as to disclosure was identified., at least until fairly briefly in this hearing

38. The Directions provided for the Applicant to produce a bundle of documents relied on by the parties in relation to the issues for determination. The Applicant did so. The PDF bundle amounted to some 1690 pages.

39. Whilst the Tribunal makes it clear that it has read those bundles, the Tribunal does not refer to many of the documents in detail in this Decision, it being impractical and unnecessary to do so. Where the Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that the Tribunal has ignored or left them out of account. Insofar as the Tribunal does refer to a relatively limited number of specific pages from the bundles, the Tribunal does so by numbers in square brackets [ ], and with reference to PDF bundle page- numbering.

40. Ms Whiteman, on behalf of the Applicant, also provided a Skeleton Argument, dated 3rd March 2022, together with a number of attachments comprising statute law, caselaw and commentary. Following the end of the Skeleton Argument itself, a short Chronology was provided of various events asserted to be relevant.

41. There has been a rather longer delay in this Decision being produced than the usual and longer than the target date. It is only appropriate to sincerely apologise to the parties for the delay since then and for any frustration and inconvenience arising. The Tribunal does so.

42. This Decision seeks to focus on the key issues, although a number of other matters raised are also mentioned to one extent or another. It will be appreciated that this is a lengthy Decision, as the Tribunal considers befits the amount involved, albeit that the legal issues are not so uncommon. Even so, it cannot cover every last detail and would be unreadable if it attempted to do so.

43. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Not all of the various matters mentioned in the bundle or at the hearing require any finding to be made for the purpose of deciding the relevant issues in these applications.

## The Lease

44. The Head Lease was provided [1534 onwards] and includes various plans.

45. Clause 1 of that Head Lease identifies the grant to the Applicant, which specifically includes the walls of the Building, amongst the various other elements.

46. The transcribed Lease was also provided [1551 onwards]. The principal pertinent parts of the Lease with regard to service charges and matters for which they are payable state as follows.

47. Clause 1. defines the given Flat, said to include:

"(a) all walls enclosing the flat (but in the case of an external wall of the buildings only the interior face of such wall and in the case of any dividing wall between the flat and any other flat or flats in the Buildings only one-half of such wall severed vertically) (b) the ceilings and floors (including the floor structures of the flat other than the main beams thereof) (c) the gas electrical water and sanitary apparatus now or hereafter installed in and belonging exclusively to the flat and all other the Landlords fixtures and fittings therein (d) all conduits pipes wires and cables carrying or conveying gas electricity water soil television-aerial lead telephone ventilation and such like carried in the floors screeds ceilings walls or ducts incorporated with the Flat and which are not used by or for any other flat whether in common with the Flat hereby demised or otherwise"

48. At clause 4. the Applicant and Respondents mutually agreed the service charge mechanism as follow:

"(i) On or before the twenty-fourth day of June One thousand nine hundred and seventy and on or before the anniversary thereof in every succeeding year during the continuance of the term hereby granted the Lessor shall send to the Lessee an account (hereinafter called "the Maintenance Account") showing the annual maintenance cost as hereinafter defined for the year ending on the previous thirty-first day of March.
(ii) As from and including the twenty-ninth day of September One thousand nine hundred and seventy the maintenance charge shall be an annual sum equal to 0.9 per centum of the annual maintenance cost as hereinafter defined.
(iii) On the said twenty-ninth day of September One thousand nine hundred And seventy and on every subsequent twenty-fifth day of March and Twenty-ninth day of September in every year in advance throughout the residue of the said term the Lessee shall pay to the Lessor by way of maintenance charge such sums as shall represent one half of the Lessee's contribution (calculated as aforesaid) in respect of the annual maintenance costs as hereinafter defined for the year ending on the previous thirty-first day of March as shown in the last preceding maintenance account.
(iv) The annual maintenance cost as from the twenty-ninth day of September One thousand nine hundred and seventy shall be the total of all sums actually expended by the Lessor during the period to which the relevant maintenance account relates in connection with the management and maintenance of the Buildings and in particular but without limiting the generality of the foregoing shall include the following:-

(a) the costs of and incidental to the performance and observance of each and every covenant on the Lessor's part contained in sub-clauses (ii) (iii) (iv) (v) and (vi) of Clause 5 of this Lease.
...........

(d) all fees charges and expenses payable to any solicitor accountant surveyor valuer or architect or other professional or competent advisor whom the Lessor may from time to time reasonably employ in connection with the management and/or maintenance of the Buildings (but not in connection with collection of ground rents payable by any lessee thereof) and in or in connection with enforcing the performance observance and compliance by the Lessee and all other lessees of flats or flats in the Buildings or their obligations and liabilities under this Clause 4 including the preparation of the maintenance account and the collection of maintenance charges.

(v) In addition to the items of cost and expenditure mentioned or referred to in sub-clause (iv) of this Clause 4 there shall be included in the annual maintenance cost commencing with the year ending the thirty-first day of March One thousand nine hundred and seventy such sum as the Lessor's Managing Agents or Surveyors shall reasonably consider desirable to be retained by the Lessor by way of a Reserve Fund as reasonable provision for such of the costs expenses outgoings and other matters mentioned or referred to in sub-clause (v) of this Clause as are not of a regularly recurrent annual nature PROVIDED THAT the amount standing to the credit of such Reserve Fund and being not then appropriated to meet liabilities actually incurred nor specifically appropriated to meet the cost of periodic expenditure on redecorating the exterior of the Buildings or the common parts or on replacement of any furniture equipment or apparatus in the common parts shall be brought into account by way of deduction in calculating the annual maintenance cost for the year ending on the Thirty-first day of March One thousand nine hundred and seventy-four and for each successive seventh year calculated therefrom.
(vi) The Lessor will use its best endeavours to maintain the Annual Maintenance Cost at the lowest reasonable figure consistent with the due performance and observance of its obligations herein but the Lessee shall not be entitled to challenge any maintenance account nor to object to any item of expenditure therein on the ground that the materials works or services in question might have been provided or performed at a lower cost.

49. Clause 5 (ii) of the Lease provides that the Applicant will do as follows, amongst other matters:

"(ii) ............... when and as necessary maintain, repair, cleanse, repaint, redecorate, support and renew:
(a) The roofs the gutters pipes conduits and all other the drains and other devices for conveying rain-water from the Buildings.
(b) the main structure and external elevation of the Buildings including in particular (but not by way of limitation) the foundations and exterior walls thereof.
(c) The passages staircases landings entrances lifts and all other parts of the Buildings (including the ceilings thereof) together with the furniture furnishings fixtures and fittings in or about the same enjoyed or used by the Lessee (or available for such enjoyment or use by him) in common with the other lessees or occupiers of the Buildings.
........................"

**The relevant Law**

50. The relevant statute law is set out in the Appendix to this Decision. Leaving aside the section 20C application for now, there are two separate elements and so the relevant legal principles in respect of each are set out in turn. Given the amount involved in this case and the degree of dispute between the parties, the Tribunal considers there to be merit in setting that out in some detail. The approach to be taken by the Tribunal necessarily involves applying the law to the facts of the dispute.

**Service charges**

51. Essentially, pursuant to section 18 of the Act, the Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the Lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a lessee to a lessor for the costs of services, repairs, maintenance or insurance and the lessor's costs of management, under the terms of the Lease. The Tribunal has jurisdiction where the whole or part varies or may vary according to the costs incurred.

52. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable. Section 19 provides that a service charge is only payable insofar as it is reasonably incurred and works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges. The amount payable is limited to the sum reasonable.

53. The Tribunal takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties.

54. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account."

55. There are innumerable case authorities in respect of several and varied aspects of service charge disputes. Many have no direct relevance to this dispute. However, examples of relevant authorities for the purpose of this Decision and the key points arising from them are set out below:

*Holding and Management Limited V Property Holdings and Investment Trust PLC* [1990] 1 All E.R.938

The test to adopt in deciding whether or not particular works can be regarded as repair depend on the context in which repair appears in the

lease, the defect, the remedial works proposed and various circumstances listed, the weight to be given to which will vary from case to case.

*Forcelux v Sweetman* [2001] 2 EGLR 173

There are two elements to the answer to the question of whether the cost of any given service charge item is reasonably incurred, namely

i. Was the decision-making process reasonable; and
ii. Is the sum to be charged reasonable in light of the evidence?
The second element was stated to be particularly important.

*Lord Mayor and Citizens of Westminster v Fleury and Others* [2010] UKUT 136 (LT)

The first element principally involves a consideration of whether the proposed method is a reasonable one in all the circumstances, even if other reasonable decisions could have been made. However, that is not a complete answer to the question and other evidence should be considered.

*The London Borough of Hounslow v Waaler* [2017] EWCA Civ 45

The process is relevant but to be tested against the outcome. The fact that the costs of the work will be borne by the lessees is part of the context to whether the costs have been or will be reasonably incurred and interests of the lessees must be conscientiously considered and given the weight due, although they are not determinative- the lessees have no veto and are not entitled to insist on the cheapest possible means of fulfilling the landlord's objective. Reasonableness is to be determined applying an objective test. The judgment also distinguishes between costs of repairs and costs of improvements and the circumstances of the lessees being of greater import in the latter than the former.

*Garside v Maunder Taylor* [2011] UKUT 367 (LC)

The nature and location of the property and the amount demanded in previous years, in particular any significant increase and the financial impact on the tenants are relevant to the question of whether costs have been reasonably incurred. So too, the degree of disrepair and the urgency or otherwise of work being undertaken.

*Plough Investments v Manchester City Council* [1989] 1 EGLR 244.

The lessees are not entitled to require the landlord to adopt a minimum standard of repair, the choice being the landlords' provided it is reasonable, but on the other hand, the lessor could only recover for what were truly repairs. That assumes of course no lease provision allowing recovery in respect of improvements, although it has been said there is no bright line between the two.

56. In respect of how the landlord addresses required works, the question is therefore whether the method adopted was a reasonable one in all the circumstances. That is to say, one of what may be a number of reasonable courses, even if other reasonable decisions could also have been made**.** The correct answer to the question of works being reasonable is fact sensitive and can only be answered by considering all the evidence relevant in light of the provisions in the Lease.

**Consultation Process**

57. Section 20 of the Act applies and Section 20(1) provides that the "relevant contributions of tenants" will be: "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." Whereas the Act refers to tenants, that does not mean tenants under short- term tenancies but rather lessees, the term adopted in this Decision, under long leases. Similarly references to landlord mean lessor in respect of the long leases.

58. Section 20ZA (4) of the Act provides that "the consultation requirements" be prescribed by statutory instrument. The requirements in respect of major works are set out at Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003 (the "Regulations"). It merits setting out the steps which the landlord is required to take.

59. The details which are to be included in a written notice of intention are identified in paragraph 1(2). Those require the landlord to, amongst other things, "(a) describe, in general terms, the relevant matters...(b) state the landlord's reasons for considering it necessary to enter into the agreement; (c) where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works..." The Regulations continue, providing in paragraph 3 that where observations are received from a lessee, the landlord shall have regard to those.

60. Paragraph 4 of the same schedule provides that where a nomination is made by tenant, the landlord shall try to obtain an estimate from the nominated contractor. The landlord shall obtain at least two estimates, at least one from a contractor unconnected with the landlord and provide a statement setting out the estimated cost and including that of the nominated contractor. The landlord must also give a summary of observations received. The Regulations further provide, paragraph 5, that where observations are received from a lessee in relation to the estimates the landlord is, to give responses to those observations within 21 days of receipt. Further, having entered into a contract, the landlord has to summarise the observations received in relation to estimates and provide reasons for the award of the contract.

61. The contributions would be limited to a specified sum (£250 for qualifying works, or £100 in any accounting period for a QLTA) unless the

Consultation Requirements have either been complied with or dispensed with in relation to the works or the QLTA respectively.

62. The Tribunal may dispense with the consultation requirements "if satisfied that it is reasonable to dispense with the requirements" under section 20ZA(1) of the Act. In *Daejan Investments v Benson* [2013] 1 WLR 854, the Supreme Court set out principles upon which the Tribunal should make decisions about dispensation. Consequently, there is less relevant caselaw, the task now being one of applying *Daejan* to the given situation.

63. The leading judgment of Lord Neuberger explained that a tribunal should focus on the question of whether the lessee will be or had been prejudiced in either paying where that was not appropriate or in paying more than appropriate because the failure of the lessor to comply with the regulations. The requirements were held to give practical effect to those two objectives and were "a means to an end, not an end in themselves".

64. Significantly, the factual burden of demonstrating prejudice falls on the lessee. The lessee must identify what would have been said if able to engage in a consultation process. If the lessee advances a credible case for having been prejudiced, the lessor must rebut it.

65. Lord Neuberger also explained that "the landlord can scarcely complain if the [Tribunal] views the tenants' arguments sympathetically." He continued, at paragraph [68] of *Daejan*:

"The [Tribunal] should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the [Tribunal] is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the [Tribunal] is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so. For the same reasons, the [Tribunal] should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that [Tribunal] should uncritically accept any suggested prejudice, however far-fetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. But, once the tenants have shown a credible case for prejudice, the [Tribunal] should look to the landlord to rebut it."
(insertions added)

66. Where the extent, quality and cost of the works were in no way affected by the lessor's failure to comply, Lord Neuberger said as follows:

"I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be- i.e. as if the requirements had been complied with."

67. The "main, indeed normally, the sole question", as described by Lord Neuberger, for the Tribunal to determine is therefore whether, or not, the lessee will be or has been caused relevant prejudice by a failure of the

Applicant to undertake the consultation prior to the major works and so whether dispensation in respect of that should be granted. The question is one of the reasonableness of dispensing with the process of consultation provided for in the Act, not one of the reasonableness of the charges of works arising or which have arisen.

68. The Upper Tribunal in *Northumberland & Durham Property Trust Limited v Marshall* [2022] UKUT 92 noted that this Tribunal must identify the steps which the landlord has taken and those which it has omitted and for which it required dispensation. It must enquire into the consequence of those steps not having been complied with. The *Marshall* decision highlighted a passage from the speech of Lord Neuberger in *Daejan* who explained that it was necessary to take account only of the sort of prejudice which section 20 of the 1985 Act was intended to protect against:

> "... the only disadvantage of which the [lessees] could legitimately complain is one which they would not have suffered if the requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted"

69. In Marshall, it was further said:

> "106. Proper consultation would not have resulted in a different contractor being appointed, or different work being done; there is therefore no need to determine at this stage whether the suggested deficiencies in the quality of the work were real or illusory. If the appellant considers that there is substance in the complaint that poor quality work was carried out by [the contactor chosen] which ought to result in a reduction in the cost charged to leaseholders, that point can be made in a separate application under section 27A, 1985 Act, challenging the amount of the service charge"

70. If dispensation is granted, that may be on terms.

71. The Court of Appeal in *Aster Communities v Chapman* [2021] 4 W.L.R. 74 applied *Daejan* in the particular context of conditions being placed on th4e grant of dispensation. One aspect was that *Aster* determined that if all lessees in a development suffer prejudice because a defect in the consultation process means that one did not persuade the landlord to limit the scope or cost of works in some respect, the Tribunal can make dispensation conditional on every lessee being compensated. The thinking is that the reduction in the scope or cost of works would have benefitted each lessee. If dispensation was to be granted against them all, the totality of the prejudice should be addressed.

**<u>The Hearing</u>**

72. The hearing was conducted remotely with the Tribunal at Havant Justice Centre across three days, 7th, 8th and 9th March 2022.

73. Ms Whiteman represented the Applicant. The Respondents were represented by Mr Ward. The Tribunal is very grateful to both for their assistance with these applications.

74. The Tribunal received written witness evidence from eight witnesses. For the Applicant those were Alfred George Offord, Gill Varle, Kenny Munnelly, Diane Page and Ralph Timberlake, on behalf of whom there were three such statements and where the first exhibited various other documents. For the Respondent they were Julian Lang, Susan Davey and Aram Papikyan.

75. Oral evidence was given on behalf of the Applicant by all of those witnesses save for Mrs Varle. The majority of that was by Mr Timberlake. Whilst he was imperfectly clear about various aspects, the Tribunal was not unduly concerned about that given the involvement of BLB- the Tribunal accepted that it was reasonable for reliance to be placed on the expert opinion the board received and so it was unnecessary to be fully versed in all details.

76. Oral evidence was given on behalf of the Respondent by all three of Mr Lang, Ms Davey and Mr Papikyan. The evidence of Mr Papikyan was given remotely by telephone. .

77. The Tribunal received expert evidence from Mr Tunbridge, Quantity Surveyor, on behalf of the Applicant and oral evidence in response to questions asked by the parties' representatives and the Tribunal during the hearing for the entirety of the second day and into the third morning. Mr Tunbridge consequently said a good deal about various matters in oral evidence, and so it is particularly impractical to set out all of that. All the same, it will be appreciated that the Applicant's approach is founded in the advice of BLB, of which Mr Tunbridge is a Director and hence his opinion is of some note, so various references must properly be made to it are made in this Decision.

78. The written reports of BLB were prepared in the course of dealing with the question of works to the Building. They were not prepared for the purpose of these proceedings, were not addressed to the Tribunal and were not presented in the manner that might be expected of expert evidence in proceedings involving matters of substantial value. Nevertheless, where they were explained and expanded upon in oral evidence, it was not considered appropriate to dwell unduly on those formalities, irrespective of any greater significance in other circumstances.

79. The Respondents did not seek to reply on expert evidence in these proceedings. Mr Ward indicated at the case management hearing that they would rely on previous reports, although those were not expert evidence prepared for these proceedings either.

80. Both sides made oral closing submissions in respect of dispensation from consultation, the reasonableness of the major works and consequent service charges and also as to recoverability of the costs of the proceedings.

The parties' representatives confirmed that they had said all that they sought to.

81. It should be recorded for the avoidance of doubt that the Tribunal did not seek submissions in respect of such of the cases referred to by the Tribunal above but not cited by the parties. The Tribunal considers that the authorities are well-established and that nothing legally controversial in the context of this case arises from any of them. They set out broad principles, rather than being on all- fours factually with this case and so the Tribunal applied those principles to the findings of fact made in this specific instance.

## Consideration of the Disputed Issues

82. The Tribunal does not set out the parties' cases at length in advance of discussion of the relevant issues. The cases were set out extensively in writing, supplemented by recorded oral evidence and submissions. The Tribunal refers to the relevant parts of the parties' cases in its consideration of the issues below.

83. However, in very brief and broad terms, the Applicant's case firstly in respect of dispensation was that that the non- compliance was limited to the Applicant's inability to issue a statement to the Respondents and other lessees with two or more estimates and that in light of the reason for that, dispensation ought to be granted because, firstly, there had been no prejudice and, secondly, even if there had been, the wider circumstances merited grant of dispensation. Secondly, in respect of the service charges themselves, the Building requires work to be undertaken- that is not in dispute as noted above- and the works proposed are a reasonable approach to resolving that problem, at a competitive cost, with the service charges being reasonable as a consequence of that. The Respondents' case was said by the Applicant to essentially be that the Respondents considered the works not to be the appropriate solution.

84. The Applicant's case was also that whilst not all of the funds required for the works had been charged as service charges, service charges would continue to be demanded at the £700/900 per six months rate and that by the time the work was complete, it would be able to be paid for in full, although it was said in oral evidence that it would be a close call.

85. In similarly brief and broad terms, the Respondents' case in respect of the works, was that the proposed works are not the appropriate solution to the problems of water penetration suffered by the Building and that rather the appropriate solution is one of over-cladding the Building. It necessarily followed that service charges for what was said not to be appropriate work were not accepted as being reasonable. The Respondents argued that over-cladding would be the more cost- effective solution in the long term. The Respondents alleged in their application that "the Board have colluded with one contractor at the expense of any competition" and hence dispensation from consultation requirements should not be granted.

86. The Respondent raised queries in relation to parapet capping, the Crittal head trims and sills for the windows. A query was also raised about waterproofing on the basis of the lessees being responsible for their own windows, although that aspect was based on an apparent misunderstanding of the Lease- see further below.

### i) Application for dispensation from consultation requirements

87. The Tribunal determines that the Applicant be granted dispensation from consultation requirements in respect of the lack of a second estimate of cost of the works and that the recoverable service charges against the Respondents are not therefore to be limited to £250 per lessee. The Respondents were unable to demonstrate prejudice arising from that failure to obtain a second estimate.

88. The Applicant's primary argument was that there was no prejudice caused to the Respondents because of the accepted failure to comply with consultation requirements. The Applicant had provided one estimate, from MPS- the company which had originally proposed the type of solution which BLB had subsequently decided on as appropriate. The Applicant accepted that it did not obtain a second estimate from a contractor. It was the Applicant's secondary position that even if prejudice were established dispensation should be granted in any event for a number of reasons set out in the Applicant's Skeleton Argument.

89. The Applicant argued that it sought to obtain estimates from two alternative contractors, Central High Rise Limited ("CHL"), who were suggested by Mr Ward in response to the Notice of Intention, and Concrete Repairs Limited ("CRL"). The first is described in the Applicant's application as a rope access specialist and the latter as a concrete repair specialist. It was not in dispute that those two were contacted. The Applicant's case was that having tried as the Regulations require, to obtain an alternative estimate from the contractor nominated by a lessee, it was unable to do so and that it was unable to obtain a second estimate generally. In light of the lack of success, compliance with consultation requirements was asserted to be impossible or extremely unlikely. The Applicant also referred to the fact that other previously proposed schemes for the Building have faced similar problems in relation to alternative estimates. The Applicant additionally submitted that the costs are competitive for high risk, specialist work and in line with previous estimates obtained for alternative schemes and that the expert evidence supports the reasonableness of the costs proposed [1288 and 528-529].

90. The Respondents argued that the Applicant had planned to contract with MPS long before the tender process commenced and that a director of the Applicant, Yann Thomas, had put off CHL, being the reason why that contractor had not submitted a price in response to the tender. It was said that until the lessees put forward CHL, BLB had not sought out alternatives to MPS and the Respondents said had no intention of doing so.

91. Mr Papikyan asserted in evidence that many other companies may be able to undertake the work and so could have been approached. Mr Ward asserted in the hearing that contractors may have been put off by the apparent need to make the windows watertight. The Respondents also argued that the fee payable to BLB as a percentage of the cost of the works themselves should also have been the subject of a consultation process.

92. There were accordingly a number of points made by the Respondents and that the Tribunal considers that each needs to be explored, which the Tribunal does below.

93. The Tribunal noted that the question as to whether to grant dispensation required consideration of the element or elements of the consultation process which had not been followed and therefore in respect of which the dispensation was sought. It was only that or those elements which the Tribunal needed to address. That said, it was plainly of relevance as to how much, if any, of the remainder of the consultation process had been complied with and what effect that had. This was not a case in which the consultation requirements as a whole had been entirely ignored or where the Applicant had proceeded unbeknown to the Respondents. The Tribunal was content that the consultation process had been followed save for the lack of a second estimate.

94. The Tribunal bears in mind that whilst the Applicant contacted two potential contractors, including CHL put forward by a lessee, the Applicant did not actually obtain an estimate from another contractor. CRL was described as a company that BLB had worked with at Brighton Marina and also for English Heritage and at Sussex University, "seemed optimistic" about providing a tender. Mr Ward on behalf of the Respondents accepted CRL to be a suitable contractor. It was said that they were initially asked to tender within three weeks but requested and were given a further two weeks but then declined to. It was said that CRL described the work as being too difficult to carry out and not worth tendering for, so it would not seek to provide a price for the project. That was the end of matters with that company.

95. The Applicant did not approach perhaps two or three companies not put forward by lessees and obtain, or at least seek to obtain, comparable estimates from those. Alternatively, if it did, there is a lack of evidence of that. The Applicant asserted that BLB were instructed to seek other tenders where available but that is briefly asserted and with no clear substance, at least beyond contact with CRL. The Applicant's evidenced effort to obtain a second estimate was limited. Whilst it was obliged to seek estimates from contractors proposed by lessees and to include any such in the statement to lessees, the Regulations do not say that the Applicant must provide an estimate and at least one from a contractor put forward by a contractor proposed by a lessee, but rather that it must provide two estimates. It ought to be added that the Applicant's case, including for example the witness statement of Mr Timberlake, said that the Applicant is still continuing the process of finding alternative contractors and BLB are

approaching other contractors for such tenders, although there was a lack of corroboration of that.

96. A refusal of grant of dispensation by the Tribunal would not of course prevent a further, albeit delayed, consultation taking place if such a second estimate could be obtained at that time, although there would be potential for increase in costs involved because of the further delay. The Tribunal noted that if a second estimate could never be obtained, consultation requirements could never be complied with and another application would be needed for dispensation would be required, where if that were not to be granted, works could never proceed because of the limit to the extent to which the costs were recoverable through service charges (the Applicant would be massively short of funds as a lessee- owned company with little or no other income or other assets and whilst in principle the Applicant would be able to require payment of funds from its shareholders, the Tribunal does not consider that is something which ought to be given weight in this situation). However, some caution is required at speculating, with danger of detracting from more relevant issues.

97. The Tribunal gave weight to the difficulties which it accepted would be likely to be experienced in obtaining quotes. The Tribunal was very much mindful of the size, nature and site of the Building and, applying the Tribunal's experience and the evidence before it, the likely lack of suitable contractors to undertake such works and who might be interested in undertaking these in particular. There was probably a small pool from which the Applicant (or Respondent) could seek tenders. That did not of itself mean that none could be obtained.

98. Against that background, the Tribunal turns to the question to answer, namely whether the Respondents have demonstrated a prima facie case of prejudice by being required to pay for works where that was not appropriate or in paying more than appropriate. The matter in issue was the second of those- it was not asserted that work to the Building was inappropriate, rather for the purpose of the dispensation aspect of the case the issues was whether the Respondents would pay more than appropriate.

99. It is not uncommon for lessees to fail to demonstrate prejudice where they assert costs are unreasonably high but do not in advancing that case obtain an estimate. The Respondents were made aware that contractors could be put forward and Mr Ward took that opportunity to put forward an alternative contractor as identified above. The Respondents, or at least some if not all, were knowledgeable about the Building and its condition. The witness statement of Mr Tunbridge [1305] said that BLB was instructed to prepare a tender document for use containing various details for sending to interested companies and he gave oral evidence that the tender documentation was sent to any contractor put forward, which was not challenged. As therefore in principle it ought to have been possible for the Respondents to obtain an estimate, assuming there to be contractors willing to provide one and just as the Applicant could have obtained more, consideration is required of the reasons put forward for the lack of any

contractor proposed by the Respondents putting forward such an alternative estimate.

100. Firstly, the Respondents asserted that the reason why CHL declined to tender was the contactor was specifically dissuaded from submitting a tender by Yann Thomas, a director of the Applicant. More particularly, they alleged that it was made very clear the current directors had already decided to proceed with MPS and therefore that submitting a further tender would be pointless. In effect, whilst the specific procedural failing in the consultation process was therefore one of the Applicant failing to provide a second estimate (whether from the lessees' proposed contractors or otherwise) the Respondents effectively advanced a wider point that the tender process had not been carried out in good faith.

101. The Tribunal considered it notable that the Respondents had made a serious allegation against Yann Thomas, but the Applicant did not call him as a witness, notwithstanding that he was the obvious person to seek to refute the allegation. That necessarily risked the inference being drawn that there was something in the Respondents' allegation and that Yann Thomas sought to avoid being cross- examined about it. The Tribunal did infer from the failure of Yann Thomas to give evidence, which the Tribunal regarded it as disappointing at best, that there may have been some less than wholly satisfactory conduct on his part, although it considered that it could go no further.

102. Mr Timberlake re-iterated the asserted reasoning applied by CHL, although it was not clear how he knew and hence his comments were of limited assistance. He did also accept- albeit without accepting that CHL had been actually dissuaded by Yann Thomas- that CHL had been aware of the involvement of MPS and said they did not want to waste time. The Applicant's case was that CHL declined to tender, explaining that they had no wish to do so because of the high- risk nature of the job and because of the need to use cradles rather than scaffolding [1307]. They had attended the Building, met with BLB, been provided further details and been shown round. Mr Timberlake went so far in his statement say CHL "certainly weren't discouraged", although the basis of his certainty was less than clear. The Applicant's evidence on the issue was therefore not strong. However, more significantly neither was that of the Respondents.

103. The Tribunal concluded having considered the point that it was clear that CHL were aware that MPS had been involved and approached to tender, so much is agreed, and it not hard to see that where the Applicant had been involved with MPS for a time, another contractor would perceive that company to be favoured. Indeed, the Tribunal considers that perception would almost certainly have been correct. However, there was insufficient evidence for the Tribunal to find that the Applicant had through its director, whether off his own back or otherwise, specifically dissuaded or prevented CHL from providing an estimate, including by the Tribunal drawing any appropriate inference. The Tribunal determined that there was insufficient on which to do so. The inference which could be drawn, that conduct was less than wholly satisfactory, went some way less

than far enough for the Respondent's argument to succeed. If the Tribunal had found that the contractors put forward by the Respondents had been deliberately put off, it is at least possible that the Tribunal would have found the Respondents to have been prejudiced but there is no purpose in exploring that further in the event. The Tribunal concluded that the evidence and any permissible inference supported CHL generally being put off from tendering by the situation, as opposed to being specifically dissuaded.

104. In any event, if was far from clear where the point would have taken the Respondents. Mr Ward accepted that CHL were not suitable contractors anyway. BLB also had some doubts about the appropriateness of CHL in any event, as it was predominantly a rope access company providing steeplejack services, rather than a contractor for external repairs and similar such as was required in this instance. Against that background, even if CHL had tendered, it is improbable that they would have been appointed, irrespective of other contractors. Hence, whether or not they were actively dissuaded from tendering, which could not be condoned if demonstrated, did not identifiably impact on the outcome of the consultation process and so demonstrate any prejudice to the Respondents.

105. The Tribunal similarly did not accept the Respondents' potentially wider second allegation of collusion between the Applicant and the intended contractor had been demonstrated to be correct. Collusion would usually be understood to mean a secret and deceitful arrangement between two parties and involving a civil wrong or criminal offence. The Tribunal finds that would put matters far too high.

106. It is right to say that MPS became involved with the Building in 2018 and so prior to the consultation process. It is also right to say that the solution proposed by the Applicant is one put forward by MPS, albeit subsequently accepted to be the appropriate type of approach by BLB, much as it had not been previously, albeit Mr Tunbridge asserted reflecting their original instructions. The tenders were for the provision of a solution which MPS was known to be able to provide, having suggested it. It is easy to identify why it might be considered that MPS was, at least, at an advantage and indeed the Tribunal finds that it was. As noted above, the Applicant also made less than identifiably strenuous efforts to obtain a second estimate other than from CHL or CRL and Mr Ward was correct that no suitable list, or similar, of potential tenderers had been complied. The Tribunal therefore understands why that may have created the impression that there had been something untoward and hence why the Respondents were concerned about the point.

107. Mr Timberlake whilst accepting there was contact with MPS as a provider of a potential solution, re-iterated that BLB were specifically asked to invite other tenders. Mr Ward asserted in cross- examination of Mr Tunbridge that BLB was not really interested in seeking alternative contractors, referring to an email sent [1209]. Mr Tunbridge said that his comment in the email about matters being not what the board wanted

related to delay and the fact that the consultation process would cause delay. Further, the communication by Mr Tunbridge to the Applicant about CRL said in respect of providing documents to that company, “I am happy to do this but you need to be certain you want to go down this route first because if they are better value then MPS would/might have to be discarded?” [1239]. That suggests the Applicant firmly envisaged contracting with MPS such that Mr Tunbridge was concerned that an alternative potential contractor was not desired by the Applicant, although it indicates that BLB was no averse to a different contractor, at least one which it knew.

108. Mr Tunbridge was adamant about approaching contractors put forward by residents and referred to his professional duty as a member of the RICS to give a level playing field on which to receive prices. Mr Tunbridge said that MPS and the others were provided with the same specification to price up. However, he said that also the base information was the same, in fact the set of documents given to other potential contractors was different, but implicitly better, due to negotiations as to storage which had taken place and health and safety matters. The Tribunal found no reason to doubt that Mr Tunbridge complied with his professional obligations. That confirms doing what the Regulations specifically require where lessees propose contractors and there could be no less. It is not the same as going out to a few other potential contractors and inviting tenders. However, the communications with CRL seem to the Tribunal to have been genuine enough. BLB appear to have made a genuine effort to encourage CRL.

109. The Tribunal found nothing untoward in MPS being one of those contractors which were approached to tender, providing a tender or necessarily in that tender being accepted in this instance. Weighing up the Applicant’s apparent preference for MPS with the other circumstances, the net effect was that the Tribunal did not accept anything which could properly be described as collusion.

110. Thirdly, Mr Papikyan in evidence, raised a different issue which may have gone to the question of other contractors having an equal opportunity. Mr Ward also asserted that, putting the point to Mr Timberlake although Mr Timberlake did not accept it. Mr Papikyan’s specific assertion was that the others were given only three weeks in order to submit a tender whereas MPS had a couple of years in which to anticipate and prepare for the process. Ms Whiteman in contrast noted that in fact there had been a period from April or thereabouts until August, Whilst, the contrast in the timescales is still obvious, the period that other contractors were given was far from being so short as to prevent them submitting a tender if they wished to do so. Hence, whilst MPS had been involved to an extent in respect of the Building for a considerable time, the other potential contractors had not in contrast had an inadequate time. They could also, had they wished to, have a requested a longer time if that was all they required (in a similar manner to that mentioned at paragraph 93 above). Whilst the Applicant. might not have agreed, it may have been as obvious to the Applicant then as it appears now, that refusal of that additional time would have been to invite challenge. Given the lack of any

evidence of any clear effect on the outcome of the consultation if the timescale had been different, and particularly where at first blush the timescale was ample, the point does not assist the Respondents.

111. Mr Ward asserted in the course of being cross- examined, that he had not been provided with documents enabling the selection of a contractor and also he said that he later learned that there were no tender documents, preventing due diligence. He did not accept the consultation notice to give sufficient information to potential contractors and said that contractors needed reasonable information. He apparently did not accept the documents produced by BLB to be sufficient. The Tribunal did not agree that there was a lack of information or otherwise find that reasoning for the lack of another contractor being proposed by the Respondents to be a good one. The Respondents did not argue that following CRL and CHL declining to tender, they then sought to propose, or to contact, any other contractor who then requested additional information and so there is nothing to support any argument that the Applicant would have failed to provide information if so requested.

112. The Respondents could have an issue raised by the Applicant about refusal to consider other tenders if there had been any for the Applicant to consider and it had refused to. For example, there may have been an issue as to timing if any late tender had been submitted. However, irrespective of the approach which may have been taken by the Applicant, the Tribunal could have considered any further estimate sought and obtained.

113. As Mr Ward observed in cross- examining Mr Timberlake- and in criticising the suggestion by the board that the coating was a "special product"- such products are readily- enough available. Other contractors were potentially able to offer one. That cuts both ways. Whilst it may very well be that the Applicant could have contacted more contractors had it shown more interest in doing so, so too could the Respondents, even if outside of the tender timescales as mentioned above. The extent to which appropriate contractors could be found who not only had appropriate materials but were more generally suitable for the work may well, the Tribunal accepts, be more difficult than simply finding suitable products which could be applied, but the principle holds.

114. The inescapable fact is that there is no other contractor contacted by the Respondents and who has provided a price for the work before the Tribunal. That is despite the several additional months during which one could have been obtained. Whilst nothing turns on the point, the Tribunal has some doubt as to the Respondents enthusiasm for seeking other estimates for the works proposed by the Applicant. It is abundantly clear that the Respondents do not support the Applicant's approach and do not wish works to be undertaken of that nature. This is therefore just a such case as mentioned above, namely where an allegation is that cost is higher than it ought to be (amongst other issues) but no alternative cost has been provided which supports potentially lower cost and so service charges to the lessees. None of the reasons for a lack of an alternative estimate advanced on behalf of the Respondents have been made out.

115. Mr Ward asserted in closing that the Applicant had not adequately demonstrated value in only obtaining one estimate. However, that ignores the need for the Respondent to advance a credible case of prejudice for that reason which the Applicant would need to respond to. It fails to recognise where the, at least initial, evidential burden lies. That is to say, whilst it can validly be said that there is no specific yardstick against to measure the cost of the major works as estimated by MPS, it is for the Respondents to demonstrate that the MPS estimate may not be good value, rather than simply relying on the Applicants to prove that it is.

116. Moving on to other arguments advanced, Mr Ward emphasised that MPS excluded a guarantee of the Building being water- proof, whereas he argued that the documents sought a price for doing that. Mr Ward implied that MPS was aware that it did not need to make the Building watertight and so had an advantage to that extent. He put to Mr Timberlake in cross-examination that contractors may have been put off by a specification which required the Building to be watertight, where it would be difficult to achieve that. Mr Timberlake accepted in cross- examination that there was no indication that it was not necessary for a contractor to provide a warranty that the Building would be watertight and unconvincingly said contractors could have come back with what they were able to achieve.

117. Mr Tunbridge denied that the documentation he had issued required that water tightness. In effect, Mr Timberlake was wrong to accept it did. He said that the requirement was for a coating system with a ten- year guarantee and sealant around the windows but not a need for guarantee about window perimeters. The guarantee was only stated to be for the coating system. The windows were to be addressed as far as possible. There was some time spent on the issue in cross- examination of Mr Tunbridge. Mr Tunbridge stated that the MPS estimate met the tender requirements and suggested that Mr Ward misunderstood. As to whether any contractor may have done is not known.

118. The Tribunal noted that the description of works page in the tender documents [81] refers to "making the windows perimeter watertight". There is no specific reference to a guarantee being provided. On the other hand, the result required to comply with the contract, unless the contractor specifically said that it would not comply with part of the requirements, is apparently clear. "Watertight" is a term easily understood. The Tribunal that the parties were in agreement it would be very difficult to make the Building watertight and not possible to guarantee doing so, at least not within the scope of the major works intended. The final page [146] gives a little more detail as to works and says in respect of the windows "check and replace where necessary all defective sealants to window surrounds". That does not mention that in replacing sealants the window perimeter must be made watertight. At best, there is a lack of clarity as to requirements.

119. Hence, it was plausible that other contractors may have been put- off if they understood there to be a requirement to do something which could not, or there was a significant risk could not, be achieved, or at least not

achieved without significant cost. Or otherwise put- off because requirements appeared unclear and later difficulties may arise. However, no other contractor, of the limited pool in any involved, did adopt the course of querying the need for water tightness to the window perimeters, or lack of it, or otherwise seek to clarify what was required, according to the evidence provide to the Tribunal. Equally, there is no other evidence of a contractor being put off by a perceived need for water tightness of the window perimeter and an inability to provide that.

120. The Tribunal concluded, following consideration of the point in consequence of the potential merit of it, that there was effectively speculation about what could theoretically have happened rather than actual evidence. Further, no appropriate inference could be drawn from other evidence. Whilst the Tribunal therefore appreciates the Respondent's concern, in the event the Respondent has consequently been unsuccessful in its argument.

121. The Tribunal should record that it finds no evidence of deliberate price-inflation as argued for by the Respondents. There is no basis for the Tribunal properly concluding that the Respondents, or indeed the lessees generally and including those supportive of the Applicant, face paying any greater sum than they otherwise would because the estimate of MPS is other than a genuine one for the works. That is a quite particular point and different to the wider of question of cost of the works. The lack of demonstrable price inflation does not of itself make the MPS estimate a reasonable one but that falls to be considered in the usual way.

122. The Tribunal observes that the Respondents faced one further difficulty even had there been an estimate obtained by the Respondents, namely if the board had been set on using MPS for the major works, a second estimate may not have altered the outcome of the consultation process. Mr Ward noted in closing that the board has shown no appetite for competitive tenders and, as noted above, the board plainly had an inclination to contract with MPS.

123. It is highly likely that any estimate by another contractor would have been subject to considerable scrutiny by or on behalf of a landlord with no great enthusiasm for the other contractor. It appears likely that any potential issue identified would have led to such a contractor being rejected, albeit that it is apparent the Applicant would have needed to provide reasons and that those would have been scrutinised by the Respondents. Even if an alternative quote had been lower, it does not follow that the Applicant must select the cheapest quote and it is the Applicant which selects the contractor. It may be that another contractor would have found favour if appreciably cheaper. However, from the evidence available, the Tribunal finds that unlikely. Rather, the Tribunal considers that the Applicant would have been very likely to contract with MPS. Ms Whiteman queried with Mr Ward what difference it was asserted there would have been if another estimate had been obtained, to which Mr Ward candidly conceded that he did not know.

124. In effect, all that the Respondents could point to was the suggestion of putting off the unsuitable contractor suggested by Mr Ward, about which they were unable to make out their case. The Tribunal determines on careful consideration of the estimate, the costs anticipated and the expert evidence that the Respondents did not discharge the factual burden, even viewing matters in the sympathetic manner appropriate, and did not demonstrate a credible case of prejudice by the lack of second estimate sufficient for the Applicant to be required to rebut it. The Respondents had not demonstrated that a second estimate would, if able to be obtained, have been likely to have been lower and would have been acceptable to the Applicant and so adopted. Whilst the Tribunal repeats that it finds the Applicants efforts could have been greater, that is not enough for the Respondents to succeed.

125. The Tribunal does not get as far as considering how to address any prejudice and relevant circumstances, having identified none to be made out. There is no need to consider whether dispensation ought to be grnated in spite of any prejudice. Speculation as to what approach might have been taken in the event of prejudice being demonstrated is therefore unhelpful.

126. It follows from all of the above that the Tribunal does not consider that the grant of dispensation should be subject to any conditions. The Respondent's did not request such and did not identify any suitable conditions. There is, for example, no indication of legal or expert fees incurred in investigating the question of prejudice.

127. Finally, in respect of the fee of BLB, the Tribunal agrees with the Applicant that the fee is not a matter which required a separate consultation. Professional fees are not works, as the Applicant correctly identified. There has consequently been no breach in respect of consultation requirements, none applying.

128. Although Mr Ward maintained in cross- examination that BLB would be involved every two years in relation to maintenance and that there should be an agreement, the Tribunal did not identify there to currently be a long- term agreement to which consultation would have applied on the information available. In the event of one, there necessarily will need to be consultation or dispensation but that will be a matter for another time, falling outside of the current applications.

129. The Tribunal emphasises in conclusion and for the avoidance of doubt that this element of the Decision was about the Applicant's consultation with lessees and departure from the requirements of the Regulations. It relates to the course of action which the Applicant sought to take and in relation to which it was consulting. It is not of assistance in respect of this element of the case that the Respondents may not have agreed with the works which the Applicant proposed to undertake. That is a question properly for the second element of this case, discussed below.

### ii) Reasonableness of the service charges in respect of the major works

130. The Tribunal determines that the approach taken by the Applicant in respect of the works to the external walls and to the windows, insofar as work was to be undertaken, was reasonable and that the cost of the works is payable and is reasonable.

131. The Applicant's best point was that works are required now- or at least as soon as practicable- where the works proposed by it would address problems experienced, something must be done and the works can be paid for. The Respondents' best point was that the works will have a finite lifespan, such that further significant work- with matching cost- will be required in a few years' time once the guarantee for the currently proposed work has expired and ongoing thereafter, such that the proposed works may not be the best solution in the long run.

132. The Respondents did not argue that the works were ones for which no service charges were payable under the terms of the Lease or that they could not be liable to pay them. It was part and parcel of the Respondent's case that works to the Building are required and would properly be paid for by way of service charges. As noted by the Applicant's representative, it is also not suggested that any difficulties have arisen due to an inherent defect or that the Applicant's obligations go beyond repair. In any event, clause 5 of the Lease as quoted above is amply clear that work of the nature of that proposed falls within both the Applicant's obligations and the matters for which service charges can be charged.

133. The question for determination was the reasonableness of the works which would produce those service charges, and hence of the costs to be incurred in undertaking those works and consequently of the charges which would pay those costs, assuming always that the works undertaken will be of a reasonable standard, which necessarily cannot yet be known.

134. As explained in *Waaler*, in particular -see above- the answer to that question involves consideration of whether the Applicant followed a reasonable process and whether the costs and consequent charges are reasonable. In respect of the second limb- and the point will be returned to in some detail- the Tribunal repeats that the question for the Tribunal to answer was whether the works were an approach which the Applicant, where it was the Applicant's decision to make, could reasonably choose to adopt. That is to say, the approach was one of what may be a number of reasonable courses which could be decided on. The Tribunal emphasises that it is not therefore engaged in determining which of two solutions should be adopted. That may be a question for the primary decision maker: the Tribunal is not that primary decision maker. The Tribunal does not determine a question of which solution is best.

135. Rather, the Tribunal is determining whether the Applicant's approach is one of the reasonable approach which may be adopted. Unless the Applicant's approach is deficient to the extent of not being any of the potentially reasonable options, it is an approach which the Applicant can properly take. Further, unless the position were determined to be that only

the over-cladding solution was a reasonable approach, perhaps because its merits were so overwhelming that it could not reasonable for the Applicant to proceed in any other manner, the over-cladding solution may be meritorious without that causing the Applicant's preferred solution not to be a reasonable one.

136. The Respondents may regard that as a relatively low bar for the Applicant to clear given their perspective on this matter. However, it is vital to appreciate that is the bar, not any higher one which the Respondents may have preferred.

137. Without dealing with the point at length in the circumstances, the Tribunal finds that the process followed by the Applicant was reasonable overall. The Tribunal does not embark on a forensic analysis. *Forcelux* itself did not do so. Reasonableness allows for a range of actions and should be taken in the round. The fact that the cost of the work falls on the lessees is relevant to whether the costs have been or will be reasonably incurred and hence it is important that proper consideration was given to those interests of the lessees. Nevertheless, the approach taken by the Applicant is, as explained in *Waaler* subordinate to the outcome. So, reasonable works will not normally become unreasonable because of any failings in that process.

138. The approach taken by the Applicant has already been addressed to a fair extent in this Decision when considering the consultation process above. As identified, reports had been obtained at various times in recent years including in 2021, a detailed specification was prepared and the Respondents were informed of all of that, including meetings discussing matters and communications. Mr Timberlake said, and the Tribunal accepts, that there was shareholder's meeting at which the approach then proposed by BLB of a coating was explained and discussed. He later said, in response to questions about a survey of residents carried out by Mr Papikyam that there had also been other meetings at which residents could raise concerns, which the Tribunal found to be supported by other evidence.

139. The nature of the works has been identified, so too that the works would be overseen by surveyors, BLB, which would decide on the state of the repair of the relevant part of the Building. It was said on behalf of the Applicant that it followed the advice from BLB, which it is difficult to criticise unless that advice were demonstrably unreasonable and clearly so, which does not apply in this case.

140. The element of the process which might be said to be missing is the identifiable consideration of the resources of the Respondents and the other lessees. Mr Timberlake concedes in his witness statement that some leaseholders are starting to struggle with those payments However, it is of note that the funds have been accumulated over a period of time and by regular and consistent payments, rather than being demanded in one large hit. To that extent there has been as much allowance for any Respondents who would need to budget and could not afford more immediate lumps

sums as the Tribunal considers practicable. The Applicants have also adopted an option rather less expensive than others, notably the over-cladding.

141. It is also not clear to what extent the Applicant has managed expectations and the lessees understand that the major works will be a partial but not complete solution to problems experienced, not least with water penetration, as explained further below. The evidence that Mr Tunbridge gave of documents being provided to the board of the incompleteness of the solution and ongoing issues, did not make it clear- Mr Tunbridge did not know for example - whether those had been circulated to lessees. However, management of expectations is not at the heart of the matter falling for determination.

142. The Tribunal concluded that there is nothing which the Applicant has done in those regards which is unreasonable or where it is identifiable that anything else might have been done in respect of the process which would have altered the outcome.

143. The Tribunal turns to the work intended to be undertaken and for which costs incurred will result in service charges demanded of the Respondent.

144. As touched upon above, the specific approach proposed to be taken by the Applicant is for a coating to be applied and for sealant to be applied to the windows. Mr Ward suggested that coating is essentially the same material as Joltec, to which Mr Timberlake conceded it to be similar, although he asserted not the same. He said that the new coating could be maintained, whereas Joltec could not**.** Mr Tunbridge also explained that Joltec was not breathable whereas the proposed Murfill waterproof compound is, the Tribunal understood due to technical advances in this type of product in the intervening years, which is another relevant difference. It was said that the existing exterior would be made good as far as practicable so that it was ready to be coated and that damaged tiles would be attended to. He accepted that BLB had previously rejected breaking off material and reiterated that he held concerns about a difficult task but said that he was prepared to bow to the judgment of the contractor subject to his appropriate colleague having sight of the method statement.

145. Mr Ward challenged the lack of a method statement, to which Mr Tunbridge's response as correct that there was no contract yet and that in the process of that a detailed method statement would be expected. The Tribunal was on balance prepared to accept that a method statement would be prepared, albeit that none had been, and that would suffice. The Tribunal did note that the tender document had required tender stage method statements with the tender and so could understand concern.

146. There was substantial criticism on the part of the Respondents of the Applicant's proposed solution. The Respondents contended that purposes of the work should be to retain the mosaic tiles which are detaching from the facade, eliminate all rust staining suffered by the Building from and to

ensure the window perimeters are waterproof, whereas the Respondents contended that the MPS proposal fails to do this on all three counts. It was unsurprising that the Respondents' case rested in a fair part on the reports which had been obtained prior to 2021, not least the BLB Feasibility Study and other matters from the time at which over-cladding was identified as the appropriate solution. Those were specifically directed to works to the exterior of the Building and advocated just the approach the Respondents asserted the Applicant should adopt.

147. It is important to note that Mr Tunbridge clarified the circumstances of his previous comment that a coating solution was not suitable. He said that the directors at the time, notably Mr Ward and Mr Laing, sought a thirty-year guarantee but that could never be obtained for such work. Both then and on other occasions, Mr Tunbridge made what the Tribunal accepted to be reasonable reference to the outcome which his client at the time wished to achieve. The perspective of the Board had changed over time, as will be apparent.

148. It was noted by Mr Ward and put in cross- examination that a third coating of Joltec had been ruled out as suitable, including by BLB. Mr Ward suggested the proposed coating would suffer the same difficulties, including accelerating de-bonding. More bluntly Ms Davey said that there are serious problems with the Building and "a coat of paint is not the answer". Mr Ward expressed concern, which the Tribunal understood, that the ceramic tiles prevent water which has penetrated into the concrete coming out again. He said that unless those are removed, the Building cannot "breathe". Mr Ward returned to the point more than once, explaining it well. He added that removing all tiles, taking the Building back to concrete and applying breathable render had been explored by BLB but rejected on health and safety grounds.

149. Mr Timberlake conceded what BLB had written some years ago as to inadequacy of a further coating but asserted that there would not simply be the application of another coat, rather that there would also be attention to damaged tiles and other repairs and that BLB had analysed the situation and solutions again in light of the particular solution proposed by MPS. Some weight was placed on the approach taken to Bedford Towers. Mr Ward put to Mr Offard, who accepted it, that in respect of Bedford Towers the windows had been replaced in conjunction with the coating work, so there was a difference between the two sets of work. Mr Offard had, the Tribunal adds, expressed confidence in MPS because of the work to that other property.

150. Mr Tunbridge was recalled to address the issue of water penetration into the fabric and the coating further. He expanded upon his earlier evidence. He expressed his opinion that water had collected in the concrete over a number of years through cracks and percolated inwards not outwards. His opinion was that a breathable coating would allow air through and would assist in water dissipating as some would be carried away in the air, although he conceded only over a long period. In contrast, he asserted that encapsulation by boarding would mean the water would

percolate inwards. The dissipation would, however, only apply to the 30% of the Building where the tiles had come away, not the other 70% with impervious tiles.

151. Mr Tunbridge explained that sufficient water had permeated through for there to be communal areas wet to the touch and water within the concrete was likely to continue to travel in with the removal of the water being likely to require the use of dehumidifiers in the Flats and ventilation. That was a fairly unattractive picture to paint but the Tribunal accepted it to be a realistic one and that the aim had to be to prevent ongoing water penetration as far as possible. In effect, the effort was to avoid the long-standing problem getting worse and to facilitate it improving gradually over a period of time- probably years- rather than there being an immediate solution as such to that particular problem.

152. Staining to the existing Joltec from rusting of metal elements would not, the Tribunal understood, necessarily be eliminated in the longer term, although Mr Ward accepted in evidence that it could be removed for the time being. The Tribunal noted the potential for further rusting of the galvanised steel and Mr Ward's opinion about encapsulation of the steel being appropriate. His point was that as the metal would not be encapsulated, the staining would return. He asserted that it would only take one storm for the rust to show, although that particular point had not been put to the Applicant's witnesses and the Tribunal, did not accept Mr Ward as necessarily correct to that specific extent, although nothing turned on it.

153. The Tribunal considered the relevance of potential further rust-staining to the merits of the Applicant's proposed solution to the problems with the facades. The works do not include a guarantee of preventing further staining, which it is accepted will inevitably recur unless and until the metal trims and similar are removed. The Tribunal noted it is said that will be attended to in the bi- annual maintenance but it is not clear whether that will remove all present and, in any event, staining would be present in the interim and not aesthetically pleasing. It is one of the aspects which is less than ideal, but the Tribunal does not consider it weighs heavily in consideration of the Applicant's proposed solution- it is not irrelevant but other factors carry rather greater weight.

154. The work by MPS will be provided with a ten- year guarantee. It was the Applicant's case that the nature of the design and build contract to be entered into with MPS makes MPS accountable for that. Mr Timberlake said, and the Tribunal accepted, that it was in light of the fact that MPS was prepared to guarantee that the coating to be applied would be watertight, that BLB had been asked to revisit the potential solution.

155. In respect of the windows, it was explained on the part of the Applicant that MPS would inspect each window and any leaks and BLB would monitor that work, with consideration being given to how the windows could be resealed. There would then be work to the seals and the application of sealant as most appropriate. That was included in the cost of

the works. It should be recorded that Mr Ward doubted the application of mastic by MPS, which he said was not part of the tender and would involve MPS taking a greater risk than it needed to with no incentive to do that. He did not accept Ms Whiteman's suggestion that was included. Mr Ward returned a number of times to there being an exclusion in the MPS tender and did not accept what Mr Tunbridge said about that matter.

156. The Tribunal found that that whilst there was a lack of clarity about the need for water tightness- see above for the contrasting indications as to whether that was required- it was clear that mastic sealant was required. The Tribunal was content that MPS understood and there was an expectation of attending to that.

157. Returning to the question of guarantees, it was identified, and returned to, that MPS would not provide a guarantee which extended to the windows. That was a matter of concern to the Respondents and the subject of cross- examination of the Applicant's witnesses. Mr Ward said that the tender was quite specific and Mr Tunbridge's evidence of work to be undertaken was a disjoint, as Mr Ward termed it, with the tender. Mr Ward's set out his belief that the tender included guaranteeing the water tightness of the windows, which Mr Tunbridge said was wrong asserting that the requirement was for a coating system with a ten- year guarantee and sealant around the windows but not a need for guarantee about window perimeters. Mr Ward addressed the lack of guarantee in respect of windows with some vigour.

158. The Tribunal has addressed the lack of clarity above and does not repeat previous comments. The Tribunal considered that it would not have been reasonable to expect a guarantee from MPS, or other contractor, that there would be no difficulties arising from the windows as a whole in the circumstances. Each would need to be looked at individually- of the many to the Building, and the contractor was to carry out limited work in relation to any of them, still less to replace them all. Further, the Tribunal noted that as part of the ongoing maintenance included in the proposed works, any defective sealant would be addressed.

159. A guarantee would, it should be emphasised, be provided in relation to new windows insofar as any were fitted. That was plainly different to applying mastic sealant to windows already in situ. However, as identified, the fitting of new windows, whether to communal areas or to the Flats, was additional work rather than work included in the tender documents or the major works set out in the Notice of Intention.

160. The point was firmly made by Mr Ward that the Applicant's proposed works would only last ten years- although the Tribunal notes it to be more accurate to say that they are only guaranteed for that time- at which time works would need to be done again. Mr Ward described the solution as a temporary one which would just waste funds, although Mr Timberlake disagreed and the Tribunal considers Mr Ward's description was wrong- it was inevitably not a permanent solution any more than any other would be

but nevertheless to describe it as temporary suggested a rather shorter lifespan than actually the case.

161. Mr Timberlake said, and the Tribunal found this an accurate assessment, that the major works were part of ongoing maintenance and would get the Building out of the situation it is in. It was he said, the beginning of a long- term strategy. He admitted that it was not known whether another coat of Murfill would be possible to apply, although he said that if it could be, the cost would have been about that of the currently proposed major works- albeit that he said that figure was given in communication from MPS which he accepted was not in the bundle, perhaps unhelpfully.

162. The Tribunal did not find that the Applicant's solution was unreasonable because of the potential lifespan of it. Both of the proposed solutions would be the subject of a ten- year guarantee, neither guarantee being identifiably longer than the other- provided in both instances, regular work required at additional cost is undertaken in order to maintain that guarantee(and according to Mr Offard the length of guarantee that had been given for the Joltec coatings had been the same). The guarantee being for ten years rather than any longer period does not render the Applicant's proposal one which is not reasonable. Mr Ward's point was a sound one, but not a winning one.

163. The Tribunal also observes, although it was not determinative, that solutions are likely in practice be effective for longer than the ten- year period of the guarantee. In all likelihood both solutions would require further work once the guarantee has ended in order to maintain the exterior of the Building and to extend the life of the solution as far as practicable. The specifics of that would be a matter of speculation by the Tribunal, of no identifiable benefit.

164. It was, perhaps understandably less than entirely clear, at this juncture, what would happen after that, although again that issue arises with both the Applicant's proposed solution and potentially with the Respondent's preferred one. Nevertheless, what happens after will need to be resolved. Mr Timberlake could only say that what was to happen then had to be determined. Mr Ward noted that current plans provided no funds for what happens when the guarantee ends- a point of some relevance for the future- see below.

165. Mr Ward also challenged the level of fees of BLB. Whilst that is a small percentage of the overall cost in this instance, a sum of over £70,000 is not small in itself. Mr Ward challenged whether the fees were value for money. Mr Timberlake maintained that they were and observed that they were based on a percentage.

166. The Tribunal considered the level of fees and the nature of the role of BLB in comparison to other instances in its experience. In applying that knowledge and expertise, the Tribunal could not identify that the fees, whether the calculation of them as a percentage or the likely sum that

produced, were not reasonable. Mr Ward said in evidence that it was galling that £50,000 had been paid in fees to BLB in respect of design and delivery of a potential over- cladding scheme which it was proposed would now not be delivered. The Tribunal understood that position on one level but did not consider it to be demonstrated those past fees had been unreasonable, nor certainly made the anticipated future fees unreasonable.

167. The timescale for the undertaking of the work as explained by Mr Timberlake was in one year to eighteen months, as at the date of the hearing, and hence apparently around or about Spring and Summer 2023. Expanding on the position in terms of funds, he said that at the current rate there would be funds in place within the subsequent year- so in time for work as anticipated. The Tribunal understands that funds will not permit earlier commencement of work (although the Applicant had previously suggested a desire for work to start in 2022).

168. The Tribunal turns to whether the merits of the alternative approach identified by the Respondents are so overwhelming that in that context it is unreasonable to do anything else. They were not.

169. As identified above, the Respondent's solution to the problem of the Building not being water-tight would have been to apply over-cladding. Mr Ward maintained in his evidence that over- cladding was the appropriate answer. He said that all of the independent engineers who had been involved and had considered a number of solutions- he said six- but had arrived at similar conclusions in some "good", as he described them, reports. The Respondents asserted that the over- cladding solution would last longer than the Applicant's intended solution. Mr Ward asserted that consequently if would be more cost- effective in the long- term- the "whole life cost" as termed. It was necessarily accepted that the cost would be greater in the short- term. BLB had particularly advised at the time, Mr Ward said, a Kingspan product and later STO Reno over-panelling, comprising render onto inert cladding panels. He distinguished between a paint scheme as the answer for persons wishing to sell and over-cladding as a long- term solution for those who wish to live in the Building a long-time. Although that is a neat distinction and of itself gives a clear contrast, the Tribunal did not find matters to be that simple or the distinction entirely accurate.

170. Mr Ward challenged Mr Tunbridge as to why he had not pursued the over-cladding that had obtained planning permission. Mr Tunbridge explained that an expression of interest had been sent to nine contractors, three or four of those indicated willingness to submit a tender but only one had done so, Kennet Construction, heavily caveated. Some twenty- seven clarifications were sought. Mr Tunbridge said that when those were sought to be addressed, Kennet withdrew. It was said that the job was too large and complicated for them especially where scaffolding could not be used. Ms Whiteman also put to Mr Laing a problem as to access, which he accepted. He also conceded that how to store panels had been a concern. Mr Tunbridge added that at the time, the budget he had been given by Mr Laing was £750,000 (not quite the same figure as £800,000 mentioned

above but nothing turned on that) and also added that meeting Building Regulations may not have been possible.

171. It was apparent that the Respondents had expected their preferred solution to be significantly less expensive than it had turned out to be. Mr Laing was candid that at the point at which £1million had been accumulated it had been "a disagreeable surprise" to discover the cost at that time to be double that figure, a figure which had previously been indicated. The cost of the Respondent's solution had been earlier quantified as £2.5million (plus VAT plus professional charges) in BLB's 2016 Feasibility Study [265] and was estimated as £3.5million or more plus VAT (and charges) currently. Ms Whiteman also referred Mr Ward to a report of Stuart Radley Associates which had set out pros and cons of difference schemes and noted the considerably greater cost expected for an over- cladding scheme. Further ongoing cost is identified to enable a 10-year guarantee to be in place. Ms Whiteman put to Mr Ward that by now the whole life cost was £4million. Mr Ward noted that included windows, Ms Whiteman observed those comprised £620,000 of the cost [688]- a quite different figure to that given by Mr Ward- see below- although nothing turns on it. She most pertinently noted current funds to be approximately £1.7 million.

172. It was recurring theme of the evidence of the Applicant's witnesses that a large amount of money had been spent on investigations as to solutions, in particular an over-cladding solution, but that there had never quite been sufficient available funds and so there had never been work undertaken. Consequently, works had been the subject of continual delay and there had been continuing and increasing effects on the Building and on the Flats in the Building, particularly damp. Mr Timberlake suggested that efforts had been exhausted. In effect, that is why the current solution had been pursued and a reason why the Applicant wished to adopt it.

173. The Tribunal finds that not only are there insufficient funds now but also that it is very unclear when, if at all, there may be sufficient funds. Whilst the Tribunal appreciates that service charges can continue to be demanded- and it is to be hoped will be paid or any debt can be enforced- the Tribunal has carefully noted the increasing cost and that delay to the over- cladding work would lead to ongoing increase to costs. The sum available from the service charges would have to be sufficient to pay an increasing sum. That sum is in the danger of remaining behind despite more and more money being paid out to the Applicant to fund the future work or catching up only gradually. That will not only mean that no work would be undertaken at the current time but that it would be uncertain when- and it may it seems not be for quite some time- the work could be undertaken in the future.

174. That must be a very unappealing prospect for the lessees and is an equally impractical approach to take. Those lessees experiencing problems would have no indication as to when the problems might be resolved. The condition of the Building would be very likely, the Tribunal considers in its experience, to deteriorate further and not only would those already

suffering effects continue to need to endure those but additional lessees may also then suffer water- penetration due to the condition of the exterior, or lack of such works to the windows as the Applicant's approach will include, or other problems with their properties. Ongoing deterioration would indeed compound the problem as to cost- not only would cost of currently intended work increase but there may also be additional work and additional cost for that.

175. Ms Whiteman put to Mr Ward that if the Applicant raised £200,000 per year (for major works) it would take ten years to raise the difference in cost between the two solutions. In fact, at the rate the Tribunal understands the Applicant has been collecting service charges for the major works to date, the period would be potentially twice as long, such that the rate would have to increase significantly to even achieve the figure postulated by Ms Whiteman.

176. Mr Ward's answer to that was a loan with collateral being taken out by the Applicant or the lessees. It is very far from apparent that is practical, still less that there would be any enthusiasm for it. Mr Laing contended that it was, as he termed it, a "viable banking solution" but even so he accepted it did not win approval. The Tribunal doubts such collateral as the Applicant could provide- a head-lease- would be an attractive basis for a lender advancing such a significant sum, whereas co-ordinating a large number of loans to lessees, even if they agreed to it, appears highly improbable. It is unnecessary for the Tribunal to reach any specific determination as to that in any event- it is not step required by the Applicant's solution and the Respondent's one will not in the event proceed, at least not for at least the next several years. Mr Ward's only alternative that the Applicant carry on with the application of mastic year by year at a cost of £20,000 to £30,000 per year and leave the Building shabby until the over-cladding could be paid for was not regarded by the Tribunal as an appropriate approach.

177. The Tribunal mentions that the Applicant's representative argued that the scheme proposed by the Respondents would amount to an improvement and provided with her Skeleton Argument an extract from an oft- cited work, Woodfall: Landlord and Tenant which discusses circumstances in which works may amount to an improvement. A specific case of McDougall v Easington D.C. [1989] HLR 310 was also relied upon. The Applicant's oral evidence sought to explain the basis for there being an improvement was that another layer would be placed on the Building. The Tribunal does note that works can amount to repair even if they result in an improvement to the condition which would have existed in the absence of disrepair, if that improvement is a consequence of the effective method of repairing. However, it is not necessary for the Tribunal to reach any definitive finding in respect of the point because the Respondent's preferred solution is not the one for which service charges have been or will be demanded.

178. There was a dispute as to whether there work around the windows would be problematic in the event of the Respondent's preferred solution

but no finding as to that is required. The Tribunal's position was that there was a reserved matter in the earlier planning permission for the over-cladding. Mr Ward maintain that over-panelling would also ensure the frames and related metal would be waterproof and the solution would deal with the rusting by treating with zinc-rich paint, then over-cladding.

179. The Tribunal understands that Mr Ward and others have held strong views that over- cladding is the "best"- to adopt the term given by Mr Ward in cross-examination- solution and also that they have tried very hard to obtain that best solution, seeking to do so in the best interests of the lessees of the Flats in the Building. Nothing that the Tribunal says in this Decision is intended to criticise that. However, time has passed, years of it, without such over- cladding work materialising. There has to be a point at which a step back is taken and consideration be given to how to resolve problems currently- and for years to now- experienced at the Building, even if that may potentially not be the best of the potential solutions in the long term and notwithstanding that it will be expensive.

180. The Tribunal considers that the problem with water penetration, having continued for a significant time and leaving the Building generally and a number of Flats with notable problems, requires to be addressed without avoidable further delay. Necessarily, that requires an approach to be taken which can be funded now or in the near future. The Tribunal noted that in cross- examination by Mr Ward, who had queried why the Applicant's solution was considered to be the best one, Mr Timberlake said that based on the funds available, the state of the Building and the information received, it was the best option to enable repairs.

181. In contrast, whatever their potential merits may be, solutions which cannot be funded will not be attended to, at least not for a significant further time and then only as and when the funds are then available and have managed to increase to overcome not just the current shortfall but also the increase in cost over the years taken to accumulate the further funds. Such solutions that cannot be funded are not really solutions at all at this time. The Tribunal finds the over-cladding solution proposed by the Respondents to be one of those.

182. The Tribunal does not need to, and does not, reach any conclusion as to whether in principle the Respondent's proposed solution may be better than that of the Applicant, or not, in a perfect world where costs and funds were irrelevant and timing similarly, were no existing effects being suffered which required attention and planning permission would be granted- the Applicant argued that although planning permission had previously been granted for over-cladding work, it may not be granted now (including in consequence of the Grenfell Tower tragedy), although there was insufficient evidence on which to reach a conclusion as to whether the Applicant may be correct and it plays no relevant part in the determination required in any event. It may be, although the Tribunal makes no finding, that in such a perfect world the solution proposed by the Respondents would be the best of those available. However, the parties operate in the real world, so that the best solution in a perfect world is also not the

question to be answered, indeed it is some way from it. It matters not whether the Respondents might in those circumstances be able to demonstrate their approach to a better one, even the best one.

183. The merits of an approach which cannot be undertaken and which may not be able to be undertaken for a significant time, if at all, cannot sensibly be found to be so overwhelming as to preclude any other solution.

184. The Tribunal returns to the need to address the problems being experienced now and for the last few years insofar as currently practical and the reality of the funds available for work to deal with that. The Tribunal reiterates that it was satisfied on the evidence that the decision to choose to proceed with the MPS coating solution and works to attempt to deal with windows and reduce water penetration around those as far as practicable was a reasonable one for the Applicant to adopt. Although it would plainly be better if all, or at least many, of the windows were replaced in their entirety and the sealant to be applied is only a partial and short- term answer, that does not make the proposed major works unreasonable. None of the points made by the Respondents, whether individually or collectively, demonstrated otherwise. None of the criticisms laid by the Respondents at the feet of the Applicant's proposed solution demonstrated the approach not to be one which the Applicant could reasonably take.

185. The Tribunal identifies that the Applicant's proposed solution is not perfect. It does not remove the water which has already penetrated into the Building or prevent further damp seeping from the exterior into the Flats and it may not prevent all additional water penetration around the windows. Not all problems experienced by the Flats will be resolved. Those are not insignificant issues. However, the Tribunal accepts on the evidence that it will provide a significant improvement on the current position and avoid or significantly reduce further deterioration. As Ms Whiteman correctly identified in closing, no scheme of works which has been proposed addresses all of the problems with the Building.

186. As noted above, it is clear from the caselaw that it is for the Applicant to decide how to address the problems experienced by the Building and for the Applicant to determine the work to be undertaken, subject to that being one of what may be a number of reasonable approaches. Hence, with apology for repetition, the Tribunal is not judging the merits of one option against another, which would be to go way beyond the Tribunal's jurisdiction, rather the Respondents needed to demonstrate that the option chosen by the Applicant was not one which the Applicant reasonably could choose amongst those available to it- any given approach would only be one of the options available. The Respondents failed to.

187. The Tribunal determines having considered all of the above matters there was nothing unreasonable about the option taken. More particularly, the Tribunal determines that it cannot be unreasonable to opt for a solution to the current and long-standing difficulties which is achievable with a reasonable timescale and can be funded. The Tribunal was content

that the major works are an appropriate and reasonable approach for the Applicant to adopt.

<u>The consequent service charges</u>

188. The Tribunal was mindful that the fact that there is not only one cost of any given work which is reasonable and the lessee is not entitled to insist on the cheapest solution, is often highly relevant. In this instance that point was not relevant. The preferred solution for the Respondents was considerably more expensive at least in the short term.

189. The Tribunal determines that the service charges are an inevitable consequence of the works and the cost of the works and where the lessees are not facing a large immediate demand and so issues which often arise in cases before the Tribunal involving the marked contrast between a large service charge demand for the particular works and more modest charges in previous years are not relevant. Rather and as identified, the service charges have been demanded over a number of previous years by way of contributions to an accumulating reserve fund. That includes during the time in which Mr Ward, Mr Laing and Mr Papikyam were directors of the Applicant.

190. Mr Ward did not accept the amount of the future service charges in respect of the major works as put to him by Ms Whiteman. She said that those would be £45,000 per year (so the £90,000 per two years) and so an average of approximately £400 for each lessee, which she described as a significant saving. Mr Ward expressed the view that the figure does not include any costs of BLB ongoing involvement and that there would be other works required to the Building, not least the costs of replacement of the south elevation communal windows. As noted above that replacement, which was put at a cost of £4500 per floor (so to be multiplied by twenty-three, perhaps twenty- four) is optional in the documentation.

191. Whilst it may be that the exact figure for work within the current major works and related ongoing maintenance- the relevant matters for this application- may or may not be exactly the cost estimated by MPS or exactly the £90,000 mentioned and may or may not be added to by fees of BLB, whether in the same percentage as for the other works or not, the Tribunal has not been presented with determination of an exact figure Flat by Flat and does not consider it necessary to prescribe any specific figure in this instance.

192. Notwithstanding the way in which the Respondents' applications referred to service charge years, the Tribunal determines that everything flows from the dispute as to the reasonableness of the major works proposed. It is not, the Tribunal finds on the evidence presented, that the Respondents object to the level of the service charges in themselves but rather that they object to their application to the course of works planned by the Applicant.

193. In any event and given the cost of the major works, the need for those and the reasonableness of them and given the manner in which service charges have been demanded and have accrued year on year, the service charges for the years 2011 onwards and the future service charges to the extent required for works needed to meet any current shortfall in cost and to pay for the works required to maintain the guarantee are reasonable.

**Other matters**

194. The Tribunal observes, albeit not part of this Decision itself, that the windows to the Flats in the Building may be a matter of some relevance for the future and a matter which, although it did not change the answer to the questions to be determined in the event, did give the Tribunal some cause to consider whether it might. It therefore ought to be referred to at least briefly. The impression in the hearing was that the parties had previously proceeded on the footing that at least some part of the windows to the Flats (ownership of the communal windows plainly lay with the Applicant) form part of the Flats as leased and are the responsibility of the lessees for that reason. Although Mr Ward suggested the Respondent argued not during evidence on the third day, that seemed to differ from the written case. It appeared to the Tribunal from the documents that at least some of the Respondents and/ or other lessees believed that the windows as a whole were their responsibility and responses by or on behalf of the Applicant reflected a similar belief, as for example the Grummit Wade report had. The Tribunal consider that any belief that the windows form part of the Flats is not correct.

195. Mr Timberlake's statement says that responsibility for the repair of original frames and the integration into the building appears to be that of the Applicant, but the glass, catches and fastenings are the responsibility of the lessees. The Tribunal agrees with that in itself but considers that matters should be clarified. The Lease describes the Flats as including "all walls enclosing the flat (but in the case of an external wall of the buildings only the interior face of such wall)", so that it is clear that anything beyond the internal face of the wall is not part of the Flat. The reference in clause 3 to the lessee: "keeping in repair and replacing when necessary all glass in the windows and doors and window frame catches and fastenings............ and all other the Landlord's fixtures and fittings" does require the lessees to repair and replace but it does so because the glass and the other elements identified are part of the Applicant's fixtures and fittings and a specific responsibility is given in the Lease. The requirement to clean windows does not add anything relevant.

196. That does not make the glass, or any other element of the windows, belong to the lessee. There is no reference to windows, whether the glass or the frames or both, forming part of the demise of the Flats. The windows form part of the external walls owned by the Applicant. The fact that the lintel and window sill are embedded into the concrete and hacking out would be required to deal with that lends further support.

197. The Tribunal is mindful that numerous lessees have paid to change the windows to the exterior wall of their Flats- it was suggested 90% of windows had been replaced. However, it was not for them to do so and they would not have been entitled to do so unless permission had been given. Mr Ward said that the board had given permission and in doing so had adopted the windows, although he subsequently said that there is a concierge/ caretaker and that replacement could not happen without the board being aware. That is not quite the same as permission having been given- in effect, the board could have prevented but instead acquiesced. The Tribunal does not know to what extent there had been communications about permission in respect of change of windows, or indeed enclosure of balconies. The Tribunal finds none of that affects its above opinion as to ownership of the windows. They are owned by the Applicant, where original metal windows or later replacements.

198. Insofar as there may now be issues with the windows, whether by way of impact on the proposed major works or otherwise, it is for the Applicant to address those where difficulties may continue until such time as windows are replaced and any related appropriate work is undertaken. It has been said that MPS have agreed to work with any resident who replaces their windows during the contract works to help the installers and then re-seal. However, the hope of the Applicant, as expressed in the witness statement of Mr Timberlake for example, that the lessees will replace windows appears to the Tribunal to be misplaced given the ownership of the windows. The suggestion of Grummit Wade that the lessees could be required to replace sills and caps as a condition of window replacement even more so. The fact that it is for the Applicant to deal with the windows and related is plainly relevant to payment of the cost for such work, which will necessarily be funded by service charges.

199. Whilst there appears to the Tribunal to be no current plan to address the windows and trims, the Tribunal considers that such a plan will need to be formulated. Whilst it is said that the metal window trims will be removed in the future, that appears rather imprecise. There may be significant cost implications, not just in purchasing any windows themselves but to facilitate their appropriate installation in this Building and dealing with the Crittal trims and other elements. Any plan will need to address communal windows as well as those to the Flats. The Tribunal leaves the matter there as falling outside of this application. If that question of ownership of the windows to the Flats and works not to be undertaken to the windows had been central to determining this current case, a good deal even more would have needed to be said.

200. More generally in respect of the Building, it is abundantly clear that the works proposed inevitably have a finite lifespan, whatever that may prove to be, as any set of works would do. There will necessarily need to be further works undertaken in several years' time, whether as part of the long-term strategy to which Mr Timberlake referred or otherwise- although a coherent strategy would plainly be the preference. Given the nature of the Building, those works are bound to be expensive: the evidence available from the cost of the currently intended works and of the

various efforts made in recent years to attend to the problems experienced by the Building in other ways amply demonstrate that.

201. It is apparent that there has been a failure to adequately maintain the Building in the past, by which the Tribunal seeks to place blame on no particular person or set of people. Whilst there appear to be a number of reasons, quite possibly in combination, those include lack of funds. That failure has led to problems, to the need for solutions and to cost. Any temporary reduction in service charges which may arise at any future time because of a lack of expenditure on maintenance is likely to be at least balanced out by the additional costs incurred in addressing any deterioration of the Building thereby permitted. It is equally apparent and referred to above, that efforts to deal with those problems have been hampered by the considerable funds needed. The existing proposed works can be funded: other works of a more significant nature- such as the Respondents' preferred over- cladding solution, which the Applicant's written case asserts has not been ruled out for the future- still cannot (at least not without asking the leaseholders for a very significant immediate contribution which the Tribunal considers not to practical)- hence the current options are effectively this, or something like it, or nothing.

202. If there will need to be subsequent substantial works whether in ten years' time or within the years thereafter- or indeed in respect of windows or other elements in the meantime- those will not be possible unless a substantial pot of money has been built up. The significant expenditure likely at the given future date will need to be carefully planned for, such that at any point that the work may be required, it is possible for it to be undertaken because the necessary funds are to hand. Otherwise, it appears to the Tribunal that the Applicant will in ten or more years' time find itself in a position akin to that which it has done in recent years, namely with significant problems to address and inadequate funds to be able to address them, to the detriment of many and perhaps all of the lessees.

203. Realistically, the pot will not be built up swiftly. The Applicant may well need to start considering relatively soon what the later works will be, not only because of a need to plan those and ensure appropriate consultation insofar as possible, but also in order to identify the likely funds required. Consideration may be appropriate of the initial cost long-term and long-term cost- effectiveness and there may need to communication with lessee to obtain support. The Tribunal perceives that the Applicant may need to start accumulating that pot soon and continue to do so, service charges being demanded year on year in order to facilitate that. It may be that in the event that there is sufficient money for different solution to be found in the several years' time, that may then be able to last for a longer time than the current solution, whether that may be over-cladding or a different approach.

204. It is not apparent that the Applicant has given as much thought to that as it might and that the apparent current plan of only seeking to accumulate funds for the ongoing maintenance is appropriate. However, the Tribunal does not seek to pre-judge the reasonableness of any service

charges which may be demanded in the future over and above those forming part and parcel of these major works and related maintenance.

205. The Tribunal perceives that the lessees take pleasure from living in a notable building and one comprising flats which, if the Building were in the intended condition and to remain in that condition, are likely to increase in value beyond their current level and remain desirable. However, that will come at the ongoing cost of service charges sufficient to attend to any ongoing issues the Building both year by year and in the longer term. Any dissatisfaction with the latter might be hoped to be outweighed by the former. Equally, once issues are properly addressed, they should not return for a significant time and the subsequent service charges related to addressing the given element may be lower.

206. There was something of a side issue, which was clearly of concern to Mr Ward and/ or other Respondents as to payments made to BLB by the Applicant since Mr Ward had left the board but for earlier work- that which Mr Ward described galling. The clear impression was that Mr Ward and Mr Tunbridge had fallen out somewhat. Mr Papikyan also said that he had lost trust in BLB because they had originally refused to pursue the coating option they now supported and had proposed a panel option they now discarded. However, the Tribunal did not find any of that to go to the heart of any matter relevant to the solution adopted and the subject of this application. There is no determination for the Tribunal to make.

## Decision

207. The effect of the above findings and determinations is that on the one hand, the Tribunal dispenses with the Applicant's failure to fully meet consultation requirements and so the Respondent's ability to charge service charges is not limited for that reason.

208. On the other, the Tribunal determines that the major works to be undertaken are one of a number of potential reasonable approaches to addressing issues with the Building. The service charges rendered to meet the cost of those works and the related ongoing bi-yearly maintenance are payable and reasonable.

## Applications in respect of costs

209. As referred to above, applications were made by the Respondents that any costs incurred by the Applicant in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable by the Respondents pursuant to section 20C(1) of the Landlord and Tenant Act 1985. In addition, an application was made pursuant to paragraph 5A of the Commonhold and Leasehold Reform Act that the costs of the Respondents' application should not be recoverable as administration charges.

210. Section 20C (3) of the 1985 Act, provides "the ... Tribunal to which the application is made may make such order on the application as it considers

just and equitable in the circumstances". The Tribunal is given a wide discretion. The provisions of paragraph 5A are equivalent and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable is the same.

211. The provisions of section 20C were considered in *Re: SMCLLA (Freehold) Ltd's Appeal* [2014] UKUT 58, where the Upper Tribunal held that:

> "although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at paragraph 25), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances" (at paragraph 27).

212. In *Conway v Jam Factory Freehold Ltd*, [2014] 1 EGLR 111 the Deputy President Martin Rodger QC suggested that, when considering such an application under section 20C, it was:

> "essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make".

213. One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income (see e.g. *Bretby Hall Management Company Limited v Christopher Pratt* LRX/112/2016). That is similar to the position here. The Applicant's primary source of income is service charges. It is possible also possible that lessees who are shareholders could be required to make payment under the terms of the Applicant's articles of association which are not in evidence.

214. Whilst there is caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case.

215. The Respondents argued in the paper applications, as explained above, that they consider that the Applicant has two available funds- the service charge account and company funds. They asserted that the costs arising should not be charged to the service charge account, although they suggested that there is little difference as almost all lessees are equal shareholders in the Applicant but contended that company funds are the appropriate source. It merits noting that the argument identifies some difference in that not all lessees are equal shareholders.

216. The Respondents' other point was as to application by the Applicant as opposed to mediation. Mr Ward suggested in cross- examination of Mr Timberlake that the Applicant wanted to get its application to the Tribunal first. Mr Timberlake responded that some lessees did not wish to go forward with the Applicant's proposal and so it was sensible to apply. Ms Davey asserted that when she had invited mediation, she had been

threatened with financial consequences of not agreeing mediation, although in the resident's online forum and not available as since removed.

217. The Applicant referred to the later application by the Respondents- so that in relation to the Applicant's applications- by way of a document headed "Response to Section 20C Application". That identified that clause 4 of the Lease (see above) refers to "all fees, charges and expenses payable to any solicitor, accountant, surveyor ……… or other professional or competent advisor whom the lessor may from time to time reasonably employ in connection with the management and/ or maintenance of the building". The Applicant asserted that the costs in connection with these proceedings are such costs. The Applicant describes the lessees and shareholders as "essentially one and the same", hence not actually entirely one and the same, asserting that to be a reason not to prevent recovery of the costs.

218. The Applicant has not sought to charge the costs as either service charges or administration charges and no application has, rather inevitably, been made asserting such not to be payable or reasonable. The Tribunal has not made any determination as to whether the Applicant is able to recover any costs or as to any amount of such costs in the absence of an application before it. The Tribunal deals with the applications which are before it.

219. The other points made on behalf of the Applicant in the document, and expanded upon in oral submissions, were that the Applicant had not refused mediation, whereas the Respondents had failed to identify the issues said to be resolvable via mediation, but that in any event it was unlikely that there could have been agreement only with the Respondents, the point implicitly being made that they are only a portion of the cohort of lessees of Flats in the Building. It was said that the dispensation application was "an unfortunate result of the situation which the applicants (sic) find themselves in, namely having only one estimate for the proposed works" and that the Respondents' position has been "driven by seeking to achieve an alternative outcome that for panelling to be applied to the building".

220. The Tribunal considers it to have been very unlikely that the parties would have resolved anything of substance at mediation. The Tribunal does so very much mindful of observations made by higher Courts and Tribunals as to the many merits of mediation and the sorts of matters suitable for that and the lack of repetition of them here in no way seeks to detract from those. Equally with the benefit of hearing from the parties across three days this is not a case in which the Tribunal can identify either side as having been likely to reach a compromise in mediation.

221. The Tribunal notes that only one of the two competing approaches to the exterior of the Building could ever have been taken and that each side had strongly- held views about their preferred one. These were substantial works with a substantial cost in a dispute involving parties with very different positions. Although that is not necessarily a reason not to

mediate- indeed it may sometimes be just the reason to do so- the Tribunal considers as follows. Firstly, it is not clear that either side genuinely intended to engage in mediation with a view to achieving a compromise, if there was fault on one side in particular as to failure to mediate that is not clear so as to impact on the costs applications and in practice the Tribunal considers the over-whelming likelihood to be that a decision such as this one would have been required. There is nothing to affect the outcome of weighing the other factors

222. Taking matters overall, the Tribunal does not consider it to be just and equitable to grant the applications in light of the Respondent's lack of success in this matter and in light of the wider circumstances. The first element alone is not determinative, although it is never irrelevant. The Respondents were by no means ambivalent to the outcome and awaiting determination. Rather they asserted their position strongly and not only in opposing the Applicant's applications but in making their own.

223. The failure of Yann Thomas, a director and therefore officer of the Applicant company to meet the allegation and for the Applicant to ensure that he did so, cast something of a shadow over the Applicant's conduct of the process and these proceedings. The Tribunal considered carefully whether that ought to sound in disallowance of recoverability of costs as service charges or administration charges. By something of a narrow margin and after some thought, the Tribunal concluded that it was a factor to be put into the mix but not determinative. It merited some weight but where other factors weighed more heavily.

224. The Tribunal will always bear in mind the potential practical and financial consequences of the approach taken, albeit that is only one of a number of relevant considerations. It cannot be ignored that insofar as it may have been reasonable for the Applicant to incur costs, those will have to be met. They can only be met through service charges, or via demands to company members. The Tribunal does not consider that it is only appropriate for it to be the latter. If the Respondents' applications were granted, they would avoid meeting such costs, whereas those lessees who played little or no part in the costs being incurred in contested proceedings may bear a greater sum.

225. The Applicant has incurred what is likely to have been considerable expense in dealing with this application. The reasonableness of the amount of that in the context of charging it as service charges is a matter for another time, in the event of an application being made in respect of service charges demanded or to be demanded. It is not determinative at this juncture.

226. The section 20C and paragraph 5A applications are therefore refused.

## RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case by email at rpsouthern@justice.ogv.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28- day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

## Appendix of relevant legislation

### Landlord and Tenant Act 1985 (as amended)

**Section 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.

**Section 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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

**Section 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) [F2the appropriate tribunal].

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

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

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

(a)if relevant costs incurred under the agreement exceed an appropriate amount, or
(b)if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
(5)An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a)an amount prescribed by, or determined in accordance with, the regulations, and
(b)an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
(6)Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
(7)Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined

**Section 20 ZA 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.]

**Section 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 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 –.................................................
(ba) in the case of proceedings before the First-Tier Tribunal, to the Tribunal.
(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.

**Section 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.

**The Service Charges (Consultation Requirements) (England) Regulations 2003**

**Schedule 4**
**Consultation requirements for Qualifying Works other than Works under Qualifying Long Term or Agreements to which regulation 7(3) applies**

**PART 2**
**Consultation Requirement for Qualifying Works for which public notice in not re 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.