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Residential
Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

THE LANDLORD AND TENANT ACT 1985 (as amended) Sections 27A and 20C

Case Reference: LON/00AP/LSC/2006/0246

Premises: Queens Mansions, 59 Queen's Avenue, London N10 3PD

Applicants: (1) Jack Benson
(2) David Lapes
(3) Paul Wallder
(4) Aldenspring Limited

Respondent: Daejan Investments Limited

Appearances for Applicant: Ms F Dewar, of Counsel, instructed by K & L Gates, Solicitors

Appearances for Respondents: Mr S Jourdan, Counsel, instructed by GSC, Solicitors

Leasehold Valuation Tribunal
Miss A Seifert FCI Arb
Mr M A Matthews FRICS
Mr L G Packer MA, MPhil

Date of Decision: 11th March 2008

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACT 1985 (AS AMENDED) SECTION 27A

Ref: LON/00AP/LSC/2006/0246

Premises: Queen's Mansions, 59 Queen's Avenue, London N10 3PD

The Tribunal's decision

1. The Applicants applied under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination as to the payability of certain service charges particularised in their statement of case dated 26th October 2006. The Applicants sought a determination pursuant to sections 19(2A) and 19(2B) of the Act as to whether such service charges were reasonable / reasonably incurred. They also questioned whether the Respondent had complied with the statutory consultation procedure under section 20 of the Act in respect of the major works at the property which commenced in October 2006.

2. An order under section 20C of the Act, that all or any of the costs incurred by the landlord in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable, was also applied for by the Applicants.

3. Section 19 of the Act:

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

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

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

   And the amount payable shall be limited accordingly.

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

4. The Applicants are each long leaseholders of flats in Queen's Mansions, Queens Avenue, London N10 3PD ("Queen's Mansions"). The Respondent is

the freeholder of the Queen's Mansions and the landlord under each of the long leases.

5. There are a total of eight flats. The first Applicant, Jack Benson, is the lessee of Flat 1; the second Applicant, David Lapes, is the lessee of Flat 3; the third Applicant, Paul Wallder, is the lessee of Flat 5, and the fourth Applicant, Aldenspring Limited, is the lessee of Flat 6. Ms Geraldine Marks, the Chairman of the Residents' Association, has occupied Flat 3 with Mr Lapes since November 2003. The lease of Flat 3 was produced. The Tribunal was informed that all the long leases are for terms of 99 years, running from 22nd March 1984 and are on the same or similar terms.

6. There are four other flats at Queen's Mansions. The lessee under a long lease of Flat 4, Mr Gray, was not joined as a party to the application. Mr Prestell, the tenant of Flat 2, is not a long leaseholder. Flats 7 and 8 were unoccupied in February 2007.

The Hearing / representation

7. At the hearing Ms F Dewar of Counsel, instructed by K & L Gates, Solicitors, represented the Applicants. Mr S Jourdan of Counsel, instructed by GSC Solicitors, represented the Respondent.

8. Mr Terence Northwood BSc (Hons) FRICS gave expert evidence on behalf of the Applicants. He provided a Report dated 16th February 2007. Mr Lapes and Ms Marks, who also provided witness statements both dated 19th February 2007 and gave additional oral evidence.

9. Mr C M Martin MRICS, gave expert evidence for the Respondent. He provided a Report dated 2nd February 2007 including a schedule of photographs taken on 7th February 2006. Mr Shaun Harris MRICS, of Robert Edward Associates Limited, also gave expert evidence for the Respondents. He provided a Report date 31st January 2007 and a Supplemental Report dated 22nd March 2007.

10. Mr Mark Shelvin bSc (Hons), a Building Surveyor, employed by Highdorn Co. Ltd, trading as Freshwater Property Management, provided a witness statement and gave oral evidence at the hearing on behalf of the Respondent. Mr Stephen Adams BSc FRICS, Regional Controller, head of Residential Division of the Freshwater Group of Companies, provided a witness statement dated 12th February 2007. Both Mr Shevlin and Mr Adams gave additional oral evidence.

11. Both parties requested the Tribunal determine as a preliminary question the extent to which the Tribunal could take into account any increase in the extent and cost of the major works at the premises caused by the failure by the Respondent landlord to carry out cyclical repairs and maintenance to the

premises pursuant to the terms of the leases. A decision on a preliminary matter in these proceedings was made on 5th July 2007. Reference is made to the decision on the preliminary question later in this decision in connection with the effect of that decision on the claims relating to particular items of work. At the request of the parties, the time for appealing that decision was extended to coincide with the time limit for appealing the current decision.

12. This matter was heard over a number of days during 2007. A hearing was due to take place in July/August 2007 but this was adjourned due to the indisposition of Counsel for the Applicants.

The lease of Flat 3 ("the lease")

13. The lease included the following provisions.

Definition of Block

Part of Queen's Mansions, excluding the ground floor shops and basement, is defined in their respective leases as "the Block".

"Block: The block of flats known as Queens Mansions Queens Avenue Muswell Hill but excluding the ground floor shops and basement .."

The service charge

(1) Each of the Applicants covenanted as follows;

3.1 *To pay ... Service Charge promptly and without set-off.*

(2) Paragraph 4 of the Third Schedule to the lease makes provision for payment of the Service Charge. Paragraph 4.1 provides that the Lessee shall pay the Service Proportion of the Outgoings.

(3) The Service Proportion is defined in the lease as a specified fixed percentage.

Outgoings

(4) By paragraph 2 of Schedule 3 to the lease, it is provided that the Outgoings shall consist of the aggregate of the expenditure estimated by the Respondent as likely to be incurred in the Financial Year in question in connection with the Service together with an appropriate amount as a reserve as defined in that paragraph.

Services

(5) "Services" are defined in the Third Schedule.

THE THIRD SCHEDULE

... 3. The Services are:

3.1 The costs of and incidental to the performance of the Lessor's covenants contained in Clause 4 to Clause 4.8 (inclusive).

3.2 The costs of and incidental to the carrying out by the Lessor of any work to any part of the Block in pursuance of any requirement of any Act of Parliament or any competent local or public authority.

3.2.1 The cost of decorating the exterior of the window frames and of repairing of the same before such decorating if the same shall not have been properly repaired by the Lessee in accordance with Clause 3.5.1 hereof.

3.3 The amount of any rates taxes assessments and outgoings payable in respect of the Block or the Reserve Fund (if any) and paid by the Lessor.

3.4 The cost of employing maintenance staff cleaners gardeners and porters and other staff including the cost of uniforms bonuses national insurance contributions pensions gratuities and the cost of employing independent contractors if thought fit as alternative or in addition.

3.5 An amount equal to the fair rental value of any accommodation provided by the Lessor for its staff and the amount of any rates payable thereon and the cost of decorating it and keeping it repaired and all services provided thereto including without prejudice to the generality of the foregoing the cost of providing heating and hot water lighting and telephone but not so as to exclude any other items provided that the Lessor shall be under no obligation to employ staff who are resident in the building.

3.6 The cost of providing a lift service (if such be installed) in the Block.

3.7 The cost of periodical inspection, repair, replacement and insurance of any lifts boilers and other plant, machinery and other equipment in the Block.

3.8 The cost of maintaining and repairing boundary fences and party structures and roads whose use is common to occupiers of the Block and others and any garages included in the Block.

3.9 The cost of preparing estimates of accounts and certificates relating to the calculation of the Outgoings and Service Charge.

3.10 The cost of complying with any statutory obligation in connection with consultation with lessees of flats in the Block.

3.11 The cost of any other service or facility which the Lessor may in its absolute discretion provide for the comfort or convenience of occupiers of the Block.

3.12 The cost of employing managing agents for the Block to collect the rent and service charge to provide management and other service (including disbursements of out of pocket expenses) (but not fees payable in respect of the letting, or sale of the property) or (if the Lessor does not employ managing agents) a fee for the Lessor of 10% of the foregoing amounts plus disbursements and out of pocket expenses.

3.13 The cost of taking or defending any legal proceedings (including arbitration) in connection with the rights and obligations arising out of any lease or tenancy of the Buildings or any part of it where such proceedings result in a Judgment or Order in favour of the Lessor credit being given for any costs recovered by the Lessor form any other party to the proceedings in question.

3.14 The amount of any interest paid by the Lessor on monies borrowed by it in order to defray the cost of any services.

14. The lease included the following covenants by the Landlord.

... Repair

4.2 If (but only if) the Lessee pays the Service Charge to keep the Structure of the Block the Exterior of the block and the Common Parts in good repair except the doors door frames windows window frames and glass which form part of the Flat.

Decoration

4.3 If (but only if) the Lessee pays the Service Charge to decorate the Exterior of the Block and the Common Parts including the outside doors and door frames and (if considered appropriate by the Lessor's surveyors) the windows window frames and glass and balcony bounding the Flat in a good and workmanlike manner with appropriate materials of good quality [as often as in the] Lessor's surveyor's opinion is reasonably necessary.

Common Parts

4.4 If (but only if) the Lessee pays the Service Charge:

4.4.1 to keep the Common Parts clean and adequately lit;

4.4.2 to keep any furnishings and fittings within the Common parts in good condition and shall replace them as often as in its opinion is reasonably necessary.

4.4.3 and if and so long as there are any landscaped areas gardens or grounds within the Common Parts to keep them in good order.

Common Services

4.5 If the Lessee pays the Service Charge (but only if) to keep in repair any wire pipe sewer drain cable or flue within the Block and used or capable of being used by the Lessee in common with others.

Heating and Hot Water (if supplied)

4.6 If (but only if) the Lessee pays the Service Charge

4.6.1 to maintain a reasonable supply of hot water to the Flat;

4.6.2 during the winter months (to be determine by the Lessor) to supply a reasonably amount of hot water to the radiators which are at the date hereof in the Flat or Common Parts ...

Insurance

4.7.1 So far as possible to keep the Block incurred against loss or damage by any of the Insured Risks in any amount which in the opinion of the Lessor's surveyor is equal to the full cost of reinstatement (including the cost of all professional fees debris removal demolition and site clearance and the cost of any work which may be required by or by virtue of any Act of Parliament) making reasonable provision for the anticipated effect of inflation on such cost and any reasonable delays in re-instatement ...

... 4.9 Until the lessor has granted a Lease for a term exceeding 21 years of other flats in the said Block the Lessor will carry out in relation to such flats repairing and other obligations similar (mutatis mutandis) in nature to those contained herein in the part of the lessee so far as may be necessary for the reasonable protection and enjoyment of the flat.

The Inspection

15. The Tribunal inspected the property on the morning of 19th February 2007 in the presence of Mr Kennedy, Mr Northwood, Mr Lapes and Ms Marks. Queen's Mansions is a purpose built mansion block, constructed in 1901, over four floors, on the junction of Queen's Avenue and Fortis Green Road. It has a mansard roof and commercial units on the ground floor on the Fortis Green frontage. There are brick external walls with stucco rendered band courses and decorative stucco work around timber sash windows and doors. At the time of inspection it was undergoing extensive external repairs and re-roofing and there was scaffolding to the main elevation and over the roof.

16. The condition of the timber windows, stucco work and brick work to the main elevations was noted. To the north elevation there were some concrete balconies on each floor and there was evidence of repair works to these and to the external pipe work. The Tribunal was shown the basement area, down

some steep wooden stairs and noted its poor condition. There were some disused coal bunkers or stores as well as the basement area under the building.

17. Access to the block was from a main entrance on Queen's Avenue into a common staircase area. The condition of the main steps was noted and it was seen that the stone was cracked horizontally. Again the common staircase area was subject to repairs and decoration works. There was evidence of repair work in progress to the electrical lighting.

18. The inside of the roof space was inspected from the top of a ladder. The timbers and insulation were noted. The main roof was in the course of being re-roofed, and evidence of the 'Turnerising' of the previous covering was noted on brick chimney stacks and parapets. The domed 'pepper pots' on the roof had been stripped of their covering. The wooden boarding was visible.

Agreed list of issues

19. The parties agreed a list of issues as follows. Some of these issues were resolved during the course of the hearing and these are identified when the particular issues are referred to later in this decision.

(1) Was the Respondent entitled to include pest control in the service charge costs?
(2) Should charges for insurance, pest control, management fee and audit fee have been apportioned to the shops?
(3) Is there a basement flat?
(4) If so, should charges have been apportioned to the basement flat?
(5) Were the costs incurred on rainwater goods and drains in 1994, 1997, 1998, 2000, 2001, 2002, 2004, 2005 properly included in the service charge costs?
(6) Were the costs incurred on electrical repairs in 1995, 1998, 1999, 2000, 2003, 2005 properly included in the service charge costs?
(7) Were the costs incurred on masonry repairs in 1996, 1999, 2000, 2001, 2003, 2005 properly included in the service charge costs?
(8) Were the costs incurred on custom made guttering in 2002 properly included in the service charge costs?
(9) Were the costs of the window survey in 2003 properly included in the service charge costs?
(10) Did the landlord properly consult the Applicants in relation to the major works?
(11) Are the criticisms made by the Applicants of certain aspects of the major works justified?

(12) To what extent can the LVT take into account the fact that the extent and cost of the major works was increased by reason of the lack of previous cyclical maintenance?
(13) Are the lessees worse off financially than if cyclical maintenance had been carried out?
(14) If the LVT finds that costs were included in the service charges in the past which should not have been, what order should it make?
(15) How should the current major works be apportioned between the shops, the basement and the Block?
(16) Has the Respondent agreed to make a contribution to the major works?
(17) Has the Respondent agreed to phase the major works?
(18) In the light of the LVT's determination of the above issues, what sum (if any) is now due from the Applicants in respect of service charges?
(19) Should the LVT make a cost limitation order under section 20C?

Issues 12 and 13 were the subject of the Tribunal's decision dated 5th July 2007. At the request of the parties the Tribunal agreed that period within which that determination may be appealed runs from the date of the current determination.

The parties agreed that issues 18 and 19 should be considered by the Tribunal after it has issued its decision on issues 1 to 17.

Agreed Statement of the Experts

20. Mr C Martin, Mr S Harris and Mr T A Northwood prepared an agreed Statement of Experts signed and dated 21st February 2007.

Parties' claims in respect of the issues

Issue 1

Was the Respondent entitled to include pest control on the service charge costs?

21. Mr Jourdan submitted that the relevant service charge provision is contained in paragraph 3.11 of the Third Schedule to the lease.

... cost of any other service or facility which the Lessor may in its absolute discretion provide for the comfort or convenience of occupiers of the Block.

22. Ms Dewar said that the Applicants accepted that pest control falls within paragraph 3.11, and subject to any question of reasonableness of the charge, the Applicants accepted that it is recoverable through the service charge.

23. *The Tribunal's conclusions on issue 1:*

In view of the Applicants' concession, it was not necessary to make a finding on this issue

Issue 2

Should charges for insurance, pest control, management fee and audit fee have been apportioned to the shops?

24. In closing submissions Ms Dewar for the Applicants submitted that this question is no longer in issue and no determination is sought in respect of it.

25. In his note to the Tribunal dated 26th November 2007, Mr Jourdan submitted that the Applicants had not pursued the points they had raised in the statement of case in respect of management, insurance, audit fees and pest control. They had not conceded the Respondent's case, but had just not advanced their own case on it. The Respondents were content for the Tribunal to record that the Applicants did not pursue any points. No determination was necessary on this issue.

26. *The Tribunal's conclusions on issue 2:*

No positive case was advanced by the Applicants at the hearing on this issue, but the Respondent's position was not conceded. Ms Dewar indicated that no determination was now required on issue 2 for that reason.

Issue 3

Is there a basement flat?

27. The Applicants' position was that the basement had the potential to be converted for use as a flat. However, Ms Dewar submitted in closing that this question was only a matter of background in respect of apportionment. It was no longer a discrete issue in this application.

28 *The Tribunal's conclusions on issue 3:*

The Applicants now accept that there is not at present a flat, but only a space with potential to be converted for use as a flat. The Tribunal finds that there is not a basement flat at Queen's Mansions at present.

Issue 4

If there is a basement flat, should charges have been apportioned to the flat?

29. The Applicants' position was that:

(1) the basement is not part of the "Block" as defined in the lease; and

(2) Apportionment between the Block and the basement area is necessary in respect of the cost of services benefitting both.

This was no longer a discrete issue and is part of the apportionment question.

30. Mr Jourdan submitted that the basement is a potential flat but not an actual flat. Even if it were a flat, the lease is clear that the landlord can do what it wishes in parts of the building which are not included in the Block. The basement is not part of the Block. This was not a question in its own right but better regarded as part of issue 2.

31. *The Tribunal's conclusions on issue 4:*

See decision under issue 15 below.

Issue 5

Were the costs incurred on rainwater goods and drains in 1994, 1995, 1996, 1997, 1998, 2000, 2001, 2002, 2004 and 2005 properly included in the service charge costs?

32. The service charge statements of account showed the expenditure in the above years. The Applicants also set out a list of items of rainwater goods in issue in their statement of case.

33. The Service Charge statements of expenditure for the above service charge years were included produced. These showed the following expenditure.

Y/E 30.9.94 - Expenditure of £421 for renewing and clearing rainwater pipes and downpipes .

Y/E 30.9.95 and Y/E 30.9.96 - did not appear to show any expenditure incurred on rainwater goods and drains

Y/E 30.9.97- showed an expenditure of £126 for sealing around skylight and re-aligning gutter to outlet.

Y/E 30.9.98 - showed an expenditure of £177 for supplying and fitting new rainwater pipes.

Y/E 30.9.99 - showed an expenditure of £87 for renewing and re-lagging the cold water pipe to the tank and £38 for clearing a gully – the expenditure in this service charge year was not challenged.

Y/E 30.9.00 - showed an expenditure of £193 for renewing and clearing downpipes and clearing hopperhead and gulley.

Y/E 30.9.01 - showed no expenditure on rainwater goods and drains.

Y/E 30.9.02 - showed an expenditure of £176 for clearing gullies and drains and £84 for clearing and renewing a section of stack pipe. There was also a charge of £268 for carrying out a water risk assessment and providing a report.

Y/E 30.9.03 - There was no expenditure on rainwater goods and drains in 2003 and this was not a year subject to challenge for those items.

Y/E 30.9.04 - showed expenditure of £118 for drain clearance. There was also expenditure of £311 for "Breaking out Tarmac, Exposing and Clearing Out Gully and Fitting New Cover" (less one third deduction relating to shops).

Y/E 30.9.05 - showed expenditure of £173 for clearing out box gutters and rainwater pipes, renewing flashing under window sills and repairing valley to the roof. There was also a charge of £147 for a group of items including renewing a section of rainwater pipe, sealing joints and painting rainwater pipe, and £135 for clearing drains and gullies.

34. A number of invoices and other documents were produced in respect of the works carried out.

35. The Applicants' submission was that the work to the rainwater goods was not done to an adequate standard and that these costs were not therefore reasonably incurred for the purposes of section 19 of the Landlord and Tenant Act 1985.

36. Mr Lapes considered that the works carried out by the landlord in respect of the rainwater goods and drains was inadequate. He said that there had been repeated leaks and damp at Queens Mansions and submitted that these were caused by failures in the rainwater goods.

37. The Applicants produced photographs showing guttering and pipes at Queen's Mansions.

38. The Applicants submitted that the frequency of the works and their inclusion on the major works specification, and the problems with leakage and damp at the property, pointed to the works to the rainwater goods and gutters not having been carried out to an adequate standard. Ms Dewar said that it was accepted that a landlord may be entitled to elect to carry out ad hoc repairs rather than wholesale replacement, but if the former course is selected the repairs must still be to an adequate standard.

39. Mr Lapes said that water had been discovered escaping from the downpipe in the corner of the balcony. A small repair was made to replace the decayed cost-iron pipe. Only the section that had decayed was replaced (about 60cm). After a while the remaining part of the cast-iron pipe decayed further and another 60cm of cast-iron pipe was replaced. Each of these failures was only noticed after rainwater had penetrated the walls and damaged the internal walls and ceilings. Only the pipe was fixed and not the damage caused by the pipe.

40. He said that the gutters and rainwater pipes were poorly fitted and thus ineffective. The pipework running through the rear balconies is largely redundant or very aged with very unstable unsupported and corroded pipes at roof level. The expansion pipe from flat 2's hot water system rises through the rear balconies to roof level and where it passes the gutter it has split and leaked continuously. There have been a series of repairs all ineffective. The

rainwater pipe in the corner has been repaired several times as shown by multiple invoices. The repeated failure of this pipe has caused damage to the brickwork and causing damp and damage to internal decoration. Shortly after the scaffolding was erected he saw that many joints in the guttering were misaligned and had been for some time based on the dirtiness of the joint. In general the individual components of the system though old faded and dirty were not cracked or broken. He thought plastic guttering should last upwards of 30 years. Particularly bad was the gutter on the corner at the rear of the building. It was spilling over. The cast-iron drainpipe on the end elevation had been leaking from many joints for many years and this was evident from the staining and decay behind. The curved gutted over the tile shop has a downpipe that drains into the box gutter / balcony below. In general where additions or replacements have been made this has been poorly done with an odd selection of parts.

41 Ms Marks referred to a rainwater overflow pipe above the front entrance that she said has poured water from the first floor balcony down the wall and onto the ground below for many years. She considered a recent repair to be of an inadequate standard.

42. The Applicants alleged that the work that was carried out was haphazard, piecemeal and of questionable workmanship. From time to time small sections of pipe work and guttering have failed. This results in water penetration causing damage to the fabric of the building. The failed sections were replaced only for the adjacent sections of pipe to fail in close succession. Much of the guttering is currently defective. The pipe work should have been repaired by replacement. A broad part of the Applicants' case is to invite the Tribunal to draw inferences from the pattern of the work and repeated repairs. Even ad hoc repairs should not have been carried out at such frequency.

43. The Respondent submitted that the Applicants' case amounted to an allegation that the landlord should have carried out more extensive work and earlier than it did. The Respondent did not accept the allegations and contended that it dealt properly with the rainwater goods. The Respondent contended that it carried out repairs to the sections of rainwater goods as and when required.

44. Mr Jourdan submitted that this is an allegation that the landlord should have carried out major works to the rainwater goods and drains much earlier than it did. It is therefore covered by the Tribunal's ruling on the preliminary issue. If a tenant can prove that the Respondent was in breach of covenant by failing to replace the rainwater goods and drains earlier than it did, and in consequence the tenant has suffered loss, the tenant can bring a damages

claim. It is not the proper subject matter of a claim under section 27A of the Landlord and Tenant Act 1985.

45. Ms Dewar took issue with Mr Jourdan's submission that the Applicants' case in respect of rainwater goods (and masonry and electrics) is covered by the Tribunal's ruling of 5th July 2007 on the preliminary legal issue. The Applicants accepted that that ruling prevents them from relying on previous neglect in advancing a case that the individual's service charge bill was unreasonable. She submitted that the preliminary ruling does not affect the validity of the Applicant's case in respect of specific items included in previous service charge bills, the cost of which the Applicants allege to be irrecoverable.

46. Ms Dewar submitted that the effect of the decision on the preliminary issue does not prevent the Tribunal considering whether works undertaken in previous years and charged to the service charge were of a reasonable standard and whether the cost reasonable and reasonably incurred. This applied to issues 5, 6, and 7.

The Tribunal's conclusions on issue 5:

47. The Applicants' case on this issue was a combination of (i) a complaint that the landlord had failed to carry out its covenants to repair / maintain the rainwater goods and drains and should have carried out more / other work sooner, and (ii) a complaint that the items of work that were actually carried out was not of an adequate standard and the costs incurred were not reasonable or reasonably incurred.

48. The Tribunal considers that (i) is covered by the preliminary decision, but that it was open to the Applicants to advance a case on (ii).

49. However the Applicants' evidence was mainly addressed to (i) rather than (ii). Mr Lapes gave evidence which showed his dissatisfaction with the works carried out and that the landlord did piecemeal repairs. However no specific challenge was made to any particular invoice, and there was no specific evidence that any particular item of charge was unreasonable. The evidence adduced was insufficient to persuade theTribunal, particularly having regard to the limited amounts and the historic nature of some of the charges, that these charges were unreasonable or unreasonably incurred.

50. In the circumstances the Tribunal finds that the service charges for rainwater good as and drains in each of the service charge years in question were reasonable and reasonably incurred and the Tribunal makes no adjustment to these charges.

Issue 6

Were the costs incurred on electrical repairs in 1995, 1998, 1999, 2000, 2003 and 2005 properly included in the service charge costs?

51. The service charges statements of account showed the expenditure in the above years. The Applicants also set out a schedule showing expenditure on this item attached to the statement of claim.

52. The service charges statements of account.

Y/E 30.9.95 - £255 for electrical repairs and renewals to common parts lighting.

Y/E 30.9.96 – Repairing time delay switch.

Y/E 30.9.98 - £704 Electrical repairs and renewal to common parts lighting.

Y/E 30.9.99 - £25 Repairing time delay switch.

Y/E 30.9.00 - £96 Electrical repairs to common parts lighting.

Y/E 30.9.03 – It does not appear form the statement of service expenditure that there were any charges for electric repairs in this year.

Y/E 30.9.05 - £178 and £116 for various works.

53. Various invoices and other documents were produced in respect of the works.

54. It was the Applicants' position that the identified electrical work was not done to an adequate standard and that these costs were not therefore reasonably incurred for the purposes of section 19 of the Landlord and Tenant Act 1985. The repairs were short lived and often failed soon after. Ad hoc repairs by residents were often more effective. None of the requisite certificates were provided. In respect of the work carried out in 2005, it was unnecessary and is not recoverable for that reason. Further, the price was unreasonable for the work done.

55. Mr Lapes said that, barring repeatedly replacing switches and the occasional new lamp, the lighting has remained essentially unchanged. From time to time minor faults meant that the lighting did not function reliably – when these faults were reported and eventually attended to the repairs would be short lived and often failed soon after. No certificates have been shown for any electrical repairs.

56. Mr Lapes said that in July 2004 a letter was received outlining electrical refitting and rewiring of the common stairwell from Freshwater. He had replied immediately stating that the required repairs consisted of routine maintenance rather than wholesale replacement. Sometime later an electrician attended and replaced some switches. For this the charge was for over ten hours labour (see invoice form W Frost dated 28th October 2005). Also he

contended that one of the switches that was replaced had not been faulty. No NICEIC certificate is available for this work. In a letter dated 8th September 2004 the residents reported to Freshwater that the light on the ground floor was not properly fitted and did not work properly. Another visit was required to re-fix one of the fluorescent lamps – four and a half hours labour to rectify a fault that should have been fixed on the first visit. No NICEIC certificate was available for this work.

57. The Respondents disputed the Applicants' allegations and did not accept that there was any satisfactory evidence that the work was done to a poor standard.

58. Mr Jourdan submitted that the evidence produced by the Applicants was unsatisfactory. Mr Northwood did not give expert evidence on this. In so far as this is an allegation that the major works should have been undertaken earlier, this falls within the ambit of the decision on the preliminary issue.

59. The Respondent submitted that the Applicants had not provided any evidence that the electrical repairs undertaken were anything except of a reasonable standard. Electrical repairs are carried out as and when they are necessary.

60. Ms Dewar made similar submissions as made in respect of issue 5. The decision on the preliminary issue did not prevent the Applicants from challenging the standard of works carried out in previous service charge years or whether the costs incurred were reasonable or reasonably incurred for the work undertaken.

The Tribunal's conclusions on issue 6:

61. The Tribunal finds along the lines of the decision on issue 6, (i) that the complaints by the Applicants are a combination of complaints relating to failure by the landlord not to have carried out works sooner, and (ii) complaints about the standard and cost of the works actually carried out in previous service charge years. The question considered in the decision on the preliminary issue was the extent which the Tribunal could take into account any increase in the extent and cost of the major works at premises caused by failure by the Respondent landlord to carry out cyclical repairs and maintenance. In so far as the claims relate to (i), this is covered by the decision on the preliminary issue. The Applicants cannot in these proceeding rely on the landlord's failure to repair earlier as a factor pointing to the reasonableness or payability of the service charges. However the Applicant could still question whether the services provided or the cost of the works carried out was reasonable or reasonably incurred.

62. The Tribunal considered that evidence adduced by the Applicants did not show that the particular work carried out was not of a reasonable standard or

that the fairly modest costs of the work, carried out in previous service charge years, was unreasonable or not reasonably incurred. Where the amount of time spent on a job was challenged, no evidence was adduced to show that the particular work undertaken could reasonably have been obtained cheaper elsewhere.

63. In the circumstances the Tribunal finds that the actual expenditure in the service charges years in question was reasonable and reasonably incurred, and makes no adjustment thereto.

Issue 7

Were the costs incurred on masonry repairs in 1996, 1999, 2000, 2001, 2003, and 2005, properly included in the service charge costs.

64. The service charge statement of account showed the expenditure in the service charge years on this item. The Applicants also produced a schedule showing the charges challenged.

65. The statement of service charge accounts.

Y/E 30.9.96 - £51 expenditure shown for repairing the front entrance door steps.

Y/E 30.9.99 - £457 for re-rendering wall and painting.

Y/E 30.9.00 - £343 for re-building and painting brick pier and painting.

Y/E 30.9.01 - £3,299 for refurbishment works to front entrance steps and surrounding wall including rebuilding brick pier.

Y/E 30.9.03 - £3,319 for erecting scaffolding and removing dangerous and loose masonry (less one third applicable to the shops). Re-rendering and painting masonry at high level £576.

Y/E 30.9.05 - £148 for removing overhanging masonry to parapet, repairing roof and sealing around windows at high level.

66. Ms Dewar submitted that in respect of the works carried out in 2001, there was no consultation on the basis that the work was described as an emergency. However, the nature of the emergency is not clear from the documentation produced by the Respondent.

67. Mr Lapes said that since his arrival at Queen's Mansions in 1993 the front step has been cracked and falling away. He said that he has slipped on a number of occasions especially in icy or wet weather. The position has deteriorated over the years. In January 1996, Freshwater made a vain attempt to fill the crack but no attempt has been made to level the steps. In 2001 an order to reset the steps was placed with Essex & Anglia Preservation [A1/1/95] but this work was not carried out although it appeared to have been paid for.

68. Mr Lapes said that in April 2002 Luke Mullinger, son of one of the leaseholders, completed restoration off the brick piers by the front entrance during his spring vacation. This work was left unfinished by the original contractor who was paid by Freshwater prior to the work being completed. The original order had specified for the front step to be reset but it never was.

69. He said that there remains a two inch slope on the step and produced photographic evidence to support this contention. Mr Lapes described the step as treacherous and stated that he had slipped on it several times. There was and remains a substantial crack in the step seen on the inspection.

70. Mr Lapes said that in December 2003 the lessees received a letter informing them of emergency works carried out in the previous February. He wrote to Highdorn on 1st January 2004 requesting a detailed breakdown of the work carried out in regard to falling masonry during 2003. It was unclear what had been done and why it was considered an emergency. No reply was received until August 2004. The explanation was vague and the area treated was unidentifiable.

71. Ms Marks said that Freshwater were informed that a large slab of masonry was about to fall into the street and in this event it could kill someone. An emergency measure was taken by Freshwater to remove the lump before it fell. All the masonry is in a dreadful state and loads of bits have dropped off on a regular basis. There have been repeated piecemeal attempts over the years to remove or fill the masonry.

72. Generally the Applicants alleged that long - term neglect of the building and lack of inspections led to excessive damage to the stone and masonry of the structure. There has been no plan of preventative maintenance and the building has been in a dangerous condition for years. Repairs have been piecemeal and have only been carried out as emergency measures. On a number of occasions, large chunks of masonry have fallen onto the pavement below endangering the public. Planned maintenance and careful management would have prevented this situation.

73. Mr Jourdan submitted that this was also an allegation that the landlord should have carried out major works to the masonry much earlier than it did. It is therefore, covered by the Tribunal's ruling on the preliminary issue. What the lessees were saying is that the landlord should have done the works earlier and that works were unnecessary. This is covered by the decision on the preliminary issue.

74. Ms Dewar made similar submissions to those referred to above in respect of issues 5 and 6. She submitted that the decision on the preliminary issue did not prevent the Applicants from challenging the standard of works carried out

in previous service charge years or whether the charges for such works were reasonable or reasonably incurred for the work undertaken.

The Tribunal's conclusions on issue 7:

75. The decision on the preliminary issue does not prevent the Applicants from challenging the reasonableness of the standard of works or costs incurred in previous on individual service charge items in past service charge years.

76. Having considered the whole of the evidence, including Mr Lapes' photographic evidence and the Tribunal's own inspection of the front entrance to the property, the Tribunal finds that the 'refurbishment works to the front entrance steps and surrounding wall including the brick pier' in the year ended 30th September 2001 was not of a reasonable standard. The Tribunal reduces the service charge by the figure of £3,299 being the alleged cost of the works in the service charge year ending 30th September 2001.

77. Work had been carried out and charged for in 1999 and 2000 on the brick piers and the front entrance steps. Notwithstanding this and the works charged for in 2001, there remains a horizontal crack in the front entrance steps and at least one of the steps slopes downwards at an unacceptable angle.

78. The Tribunal does not consider that the evidence supports a reduction in any of the other service charge years challenged. In particular, the evidence of Ms Marks indicated that the masonry works in 2003 were urgent and necessary due to the risk of falling masonry and the Tribunal finds that the charge for that work was reasonable and reasonably incurred in the circumstances.

Issue 8

Were the costs incurred on custom made guttering in 2002 properly included in the service charge costs?

79. The statement of service expenditure for the year ended 30th September 2002 showed a charge of £6,798 (including administration fee) for the provision in respect of erecting scaffolding and supplying and fitting purpose made curved and profiled guttering to first floor level.

80. Ms Dewar submitted that the Applicants contended that this work arose for failing to maintain the previous gutter in a proper state of repair and that the work was performed because of complaints from the shop below about water ingress. The sum of £6,798 was an unreasonably high sum to spend on this work. Far less extensive work would have sufficed. This work appeared to be an improvement rather than a repair.

81. The Respondents position in respect of the Applicants' claims that:

(1) One third should have been apportioned to the shops.

(2) The work was "overpriced – lavish specification" and that it was an improvement.

(3) There was poor workmanship, as the gutter is currently leaking, the fixings are rusting badly, and the fascia was not prepared or painted.

was that in respect of (1) above, this work was done to the Block and no apportionment was therefore required and that allegations (2) and (3) were incorrect.

82. Mr Jourdan submitted that there was no evidence to support the Applicants' assertions. There was no evidence of poor workmanship and no evidence that the work was overpriced. He point out that Mr Northwood did not support this contention in his expert evidence.

The Tribunal's conclusions on issue 8

83. The Tribunal considered that there was insufficient evidence to support the Appellants' contentions that the work was not of a reasonable standard or the costs were not reasonable or reasonably incurred. The Tribunal finds that this work constituted a repair and that the cost was recoverable under the service charge.

Issue 9

Were the costs of the window survey in 2003 properly incurred in the service charge costs?

84. The Statement of service expenditure for the year ending 30th September 2003 showed a charge of £999 for surveyor's fees in respect of inspecting windows and providing a detailed schedule of repairs.

85. The Applicants challenged this charge on the basis that the window survey was carried out without informing the leaseholders that there would be a charge and that there was no mention that this would involve contracting a third-party surveyor.

86. Ms Dewar said that the residents had agreed that someone should have a look at the windows to see what should be done and estimate costs, but contended that the language and tone of the conversation indicated that this would be an informal, in-house walk-round, not an extensive and expensive external survey. The survey was unnecessary and never used and the costs of that survey are irrecoverable on that basis.

87. Mr Lapes said that on 2nd September 2002 a meeting was held with Mr Solomon and Mr Hall of Freshwater. It was recognised that significant item of expenditure would be the windows. As this was to be charged to each flat it was thought necessary to assess the work on a flat by flat basis. Freshwater said that they would get 'Martin' to have a look. The casual way they mentioned it led us to believe that this would be a Freshwater person not a third-party. Mr Lapes contended that no hint was given that this would incur a charge. All the residents had asked for was an outline of the relative cost; a rough estimate based on Mitre's tender of the time.

88. He disagreed that it was proposed at the meeting that a survey be carried out scheduling the repairs required. He said that he thought that what was being sought was an informal report by one of Freshwater's employees to give a breakdown on how tendered prices would relate to each flat, not an exhaustive report, but an indicative report. He considered that a moderate amount of time and expertise was required. It should have been part and parcel of preparing the specification of works. He said that he would expect the cost to be part of the administrative costs payable as part of the normal routine maintenance inspection. Neither he nor his wife was informed there would be a charge or the scale of it. He said that Mr Solomon's notes do not refer to any charge.

89. The Respondent contended that the £999 spent on the window survey in 2003 was a reasonable cost for the landlord to incur. It was below the section 20 consultation limit, and in any event, related to services rather than works so that section 20 did not apply.

90. Chris Hall, who is employed by Highdorn Company Limited as its Regional Executive Surveyor, said that he is responsible for overseeing major works on properties by that company and its various subsidiaries. The property is one of the premises that he is responsible for. Mr Hall stated that he had discussions with the residents of the property in relation to a window survey carried out by Hughes, Jay & Panter. In about September 2003 he attended the property and met with members of the Residents' Association. Mr Lapes, Ms Sealey (then Mr Lapes' wife), Mrs Mullinger and Mr Allder were there to the best of his recollection. At the meeting they discussed the proposed major works (both external and internal decorations) that the Respondent was proposing to carry out at the property. He met the residents with Mr Alan Solomon who was employed as the Area Manager for the property. Mr Solomon is no longer employed by Highdorn.

91. Mr Hall said that during the meeting the issue of the repair/replacement of the windows at the property was discussed. It was proposed that a survey be carried out scheduling the repairs required. This was to enable the repairs and costs to be clearly defined and allocated to each individual flat. The

residents agreed that a schedule be prepared and surveyors instructed accordingly. Mr Hall said that he informed the residents that the surveyors could charge for preparing this schedule and such charge would be a service charge item. Mr Hall said that on 3rd September 2002 he wrote to Mr M Gibbons of Hughes Jay & Panter in relation to the preparation of a detailed schedule of repairs. Mr Gibbons responded on 11th September 2002 with his quotation for providing the schedule. His quotation was accepted and he was then instructed to prepare the schedule which he did in January 2003.

The Tribunal's conclusions on issue 9

92. It was common ground that the carrying out of a window survey was discussed at the above meeting. The Tribunal accept the evidence of MrHall that the proposed survey would schedule the repairs required and that surveyors would be instructed to carry this out. The Tribunal also accepts Mr Hall's evidence that he informed the residents that the surveyors could charge for preparing the schedule and that this charge would be a service charge item.

93. The Tribunal consider that the costs of the window survey are reasonable and reasonably incurred.

Issue 10

Did the landlord properly consult the Applicants in relation to the major works?

94. The Applicants contended that they were not properly consulted in respect of the major works and that the consultation process was defective.

95. Section 20(1) of the Act

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

(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

96. Section 20(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 payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

97. Section 20(3)

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

98. Section 20(5)

An appropriate amount is an amount set by regulations by the Secretary of State ...

99. Sections 20(6) – 20(7)

Where an appropriate amount is set [under subsection 5] 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.

100. The relevant regulations made under Section 20 are the Service Charges (Consultation Requirements) (England) Regulations 2003 SI 2003/1987 ("the Consultation Regulations).

101. Under regulation 6 of the Consultation Regulations, for the purposes of sub-section (3) of Section 20 to the Act, the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250. Under Schedule 4, Part II of the Consultation Regulations (Consultation Requirements for Qualifying Works for which Public Notice is not required) the landlord must take various steps to comply with the requirements. Schedule 4 Part II is arranged in a number of paragraphs.

102. The process is triggered by a paragraph 8. The landlord serves a Notice of Intention telling the tenants of the landlord's intention to carry out qualifying works. It must describe in general terms the works proposed to be carried out and state the landlord's reasons for considering it necessary to carry out the proposed works. It must invite written observations from the tenants, to be sent to a specified address, and invite an estimate for the carrying out of the proposed works. The tenants have thirty days to respond with their written observations. Under paragraph 10, where within the 30 day period, written observation are made "the landlord shall have regard to those observations." The works need only to describe in general terms at this stage as the object is to allow the tenants to make observations on the general scope of the proposed works and nominate contractors to tender for the works.

Under paragraph 8(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;
(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.
(4) The notice shall also invite each tenant [and the recognised tenants' association] to propose within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for carrying out the proposed works.

103. Under paragraph 10:

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.

104. Paragraph 11 contains provisions for estimates and response to observations. Paragraph 11(2) states that where a nomination is made by only one of the tenants, the landlord shall try to obtain and estimate from the nominated person. Paragraphs 11(3) and 11(4) provide for what the landlord is to do if there is more than one nomination.

105. Under paragraph 11(5):

The landlord shall, in accordance with this sub-paragraph and sub-paragraph (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 estimates available for inspection.

106. Under paragraph 11(10) the landlord must give to the tenants a written notice which specifies the place and hours for inspection, the place and hours so specified must be reasonable; and a description of the proposed works must be available for inspection free of charge at that place and during those hours.

107. Paragraph 12 provides that:

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.

108. There is a final stage under paragraph 13, but it does not apply if the landlord enters into a contract with the contractor who submitted the lowest estimate and is not relevant in this case.

109. Mr Mark Shevlin, a Building Surveyor, employed by Highdorn Company Ltd, which trades as Freshwater Property management, since July 2005, gave evidence on behalf of the Respondent on this issue. Mr Shevlin is Area Building Surveyor Area number 11 offices, which manages a substantial number of buildings including Queen's Mansions. One of his functions was to deal with the administration of major works at the various properties managed by his area office.

110. Mr Shevlin said that on 6th July 2005, he sent a Notice of Intention to all the leaseholders at Queen's Mansions in which he identified the general terms of the major works (external and internal repairs and decorations) intended to be carried out. He explained that the major works were essential repairs and maintenance and invited both observations to be made regarding the proposed works and nomination of contractors to be included in the tender list. He asked for any observations and the name of any nominated contractor to be sent to the Area Office by Friday 5th August 2005.

111. He was aware that the residents of Queen's Mansions were already in consultation with Mr Shaun Harris of Robert Edwards Associates whom had been appointed as a surveyor for both Daejan and the residents, and that he was at that time preparing a specification of works the contents of which were being agreed by the Daejan's representatives and the residents.

112. Following the service of the Notice of Intention, Mr Shevlin said that he received correspondence from the residents nominating contractors and also providing some observations on the intended work. It later came to his attention that some observations had been sent directly to Mr Harris with whom the residents were in consultation over the specified works.

113. The specification of works was completed by Mr Harris and sent out to six contractors at the end of October 2005. Mr Harris confirmed in his letter dated 31st October 2005 to Chris Hall, Highdorn's Regional Executive, that he had taken into consideration some of the leaseholder's comments.

114. On 30th November 2005 Mr Harris provided his tender report, which set out the tenders he had received and his recommendations as to which contractor ought to be instructed to carry out the work.

115. On 14th June 2006, Mr Shevlin said he sent to all the lessees at Queen's Mansions a section 20 notice which set out the observations he had received from the lessees and identified two estimates that were received, Mitre Construction and Lambourn Construction. He confirmed that copies of the estimates supplied by each contractor were available for inspection at the location given in the letter, the Area Office, and that subject to any observations received, Daejan's intention was to instruct Mitre. The letter also set out the subsidiary fee payable for project management, planning supervision and administration.

116. It was noted that although the letter dated 14th June 2006, having stated that "your Landlord has received two estimates" (from Mitre and Lambourn) went on to state that "copies of the estimates supplied by each contractor are available for inspection at the location given at the end of this letter". No such location or address was provided.

117. On 6th July 2006, Ms Marks attended the Area Office to see the estimates referred to in Mr Shevlin's letter of 14th June 2006. Unfortunately not all the estimates were in fact available. Only the priced specification of Mitre and Mr Harris' tender report were available and they were inspected by her.

118. Mr Shevlin wrote to Ms Marks on 13th July 2006 confirming that he was arranging for the priced specifications of R R Trading, Rosewood and Lambourn Construction, who had all provided priced specifications, to be sent to the Area office so she could arrange to inspect them.

119. On 14th July 2006 Mr Shevlin received a letter from Ms Marks in which she set out the Resident's Association's observations on the documentations which she had inspected, namely Mitre's priced specification and Mr Harris' tender report. Mr Shevlin said that he did consider Ms Marks' comments carefully.

120. Mr Shevlin said that Ms Marks had rightly pointed out that his letter dated 14th June 2006 had not referred to all four tenders and that she had not seen all four tenders. He therefore decided to serve a further section 20 notice which did refer to all the tenders and which would give a further period for inspection of the tenders and observations on them. Mr Shevlin did not agree that it was necessary to resolve the dispute about whether the landlord was to make a contribution to the cost of the work or the size of the proposed administration charges before proceedings with the works. He did not agree that the specification was defective because it included provisional sums and prices for alternative materials and optional items. He thought that Mr Harris had prepared the specification in a sensible way. In respect of Ms Marks' contention that Mitre should not be instructed, he said he was guided by the recommendation made by Mr Harris in his tender report that Mitre should be instructed.

121. On 28th July 2006 Mr Shevlin sent out a further Section 20 Notice. This notice referred to the estimates received from all four tendering contractors. He said that this letter invited observations to be made and confirmed that the estimates could be inspected.

122. It was noted that the letter stated that "Your Landlord has received four estimates" (Mitre, Lambourn, Rosewood, RR Trading). It went on to state that " ...All contractors are independent of your Landlord. Copies of the estimates supplied by each contractor are available for inspection at the location given at the end of this letter. Subject to any observations that we may receive it would be our intention to instruct Mitre Construction to proceed with the works, but such instructions would not be given before Thursday 31st August 2006. The cost of this work, together with the project management fee and our administration fee will be included within the service charge." No address / location for inspection of the estimates were provided at the end of the letter. However, Ms Marks did subsequently attend the Area Office to inspect these.

123. Mr Shevlin said that unfortunately there was some difficulty and delay in arranging for all the price specifications to be sent to the Area Office. These were not available until 11th August 2006. Ms Marks did attend the Area Office and he recalled handing to her copies of all the priced specifications on that date. He said that he did give careful consideration to Ms Mark's observations on behalf of the Resident's Association but did not agree with most of them.

124. Mr Lapes said that during the time that Mr Harris was compiling his specification, he included a number of improvements into the specification. The Resident's Association through Ms Marks and himself agreed to their inclusion on the strict understanding that this was for the purposes of obtaining prices rather than an agreement to proceed with those works.

125. This was reiterated in Ms Marks' notes of their meeting on 20th October 2005. The agreement was only to price these works. It was always the wish of the Applicants that all of the internal works and also, the roof if feasible, be omitted from the specification, and therefore no item regarding the interior of the building, wiring, floor coverings , roof covering or domes was agreed.

126. Mr Lapes said that Ms Marks and he on behalf of the Applicants had made it abundantly clear on numerous occasions that they only agreed to the specification's scope for the purposes of pricing. This was on the express understanding that once the tenders were returned a full analysis could be made with a view to the final cost to lessees. This exercise would not have been possible without clear disclosure of the prices any contribution from Freshwater and the scope of the works.

127. He said that it was clear to him from the lack of correspondence that Freshwater had no intention of discussing or amending the scope of the work. This was one of the reasons that the Applicants believed that the landlord had not paid due regard to their observations.

128. Mr Lapes said that Mitre was nominated by Freshwater along with Lambourn and R R Trading. Rosewood was nominated by the Applicants as individual lessees and Bush Hill by the Resident's Association. Mr M Palumbo was nominated by Mr Gray. Since 1993 Mitre had been awarded the majority of larger contracts at Queen's Mansions. Mitre, Lambourn and R R Trading were all familiar with the building and were Freshwater's favoured contractors. Rosewood came on the direct and personal recommendation of Mr Harris. The other two contractors were not close to Freshwater or Mr Harris.

129. Ms Marks said that in her opinion there could be no doubt that Queen's Mansions required a large amount of work to bring it back to a reasonable and functioning standard. She considered that this work should have been undertaken many years ago. Ms Marks described the section 20 process as a shambles.

Submissions on the Section 20 issue

130. Mr Jourdan submitted that:

1] The initial notice was sent on 6th July 2005. It asked for observations and nomination of contractors to be sent in writing to the Area Office by 5th August 2005. There had been no suggestion that this notice was defective.

2] There were two letters containing observations in response to the initial notice: Ms Marks' letters to Mr Shevlin of 1st August 2005 and her letter to Mr Hall of 2nd August 2005. The observations in those letters were very similar and Mr Jourdan summarised them as:

(i) If additional work was carried out beyond that specified, it would be for the party instructing the additional work to bear the cost.

(ii) They were waiting for the specification from Robert Edwards Associates. They would require a reasonable amount of time to inspect the specification and comment.

(iii)They requested that the specification be divided into discrete cost areas.

(iv)They wanted a separate quotation for the internal works as they might require it to be phased to spread costs.

131. Mr Jourdan said that there then followed consultation about the specification which Mr Jourdan said was not required by the Consultation Regulations. On 30th August 2005, Mr Harris sent Ms Marks and Mr Lapes a draft specification.

Ms Marks thanked him for the care taken on it. During September 2005 she and Mr Lapes sent him comments and questions on it. On 20th October 2005 there was a meeting between Ms Marks and Mr Lapes and Mr Harris to go through the comments and questions. Ms Marks made a note of the meeting. One of the issues raised was phasing of the works. Ms Marks' note records Mr Harris discussing Mr Lapes suggestion that the project should be split into separate parts and each tendered separately. "SH stated that he recommended retaining the current structure".

132. Mr Harris' supplemental report at paragraph 26 says of this meeting:

> ... we had discussions on certain elements of the specification and I answered the queries and questions that arose. I answered each of these and where appropriate took them on board and where not I advised [Mr Lapes] and [Ms Marks] accordingly. Although they may not have liked the answer they were at least informed of what was going to be included and what was not.

Mr Harris was not challenged on that evidence.

133. Mr Jourdan submitted that the landlord's willingness to appoint Mr Harris at the Applicants' request and the detailed consultation by Mr Harris with the lessees about the specification were not required by the Regulations. He submitted that they show a desire by the landlord to consult with the lessees and involve them in the process going far beyond what is strictly required. He correctly submitted that this is relevant to any question any dispensation under section 20ZA.

134. Mr Jourdan said that it is clear the correspondence, and Ms Mark's evidence, and Mr Harris cross-examination that there was never any agreement to re-tender the project in phases after the initial estimates were obtained. Mr Hall said very much the same.

135. In respect of obtaining estimates, Mr Harris was told to include on the tender list all three of the contractors nominated by the lessees and did so. Under paragraph 11(4) the landlord's duty would have been performed if it had only tried to obtain and estimate form MM Palumbo and Rosewood.

136. The Applicants alleged that the tender period was too short. If there had been evidence that no reasonable building surveyor could have allowed only three weeks for the tenders rather than four weeks, and that the cost of the works would have been lower if a four week tender period had been alleged, then this allegation would support a complaint that part of the cost of the works had been unreasonably incurred under section 19(1) of the Act. However, there was no such evidence. Mr Northwood did say that he would have allowed four weeks. However, he agreed in cross-examination that three weeks is within the range of reasonable opinions on this issue. Further Mr Northwood

142. She submitted that the fundamental problem with the consultation process was that it was entirely disconnected from the production of the specification, the tendering process and the decision as the appropriate contractor. The individual responsible for the process was Mr Shevlin. He had confirmed in his oral evidence that when he drafted the first section 20 notice had had only very recently been employed by the Respondent and did not have a working knowledge of the Block, although he thought that he might have visited it once or twice.

143. Mr Shevlin confirmed that he did not have regular contact with Mr Harris during the process as he understood that Mr Harris had a separate role which was to produce the specification. He was not involved in discussions between the Applicants and Mr Harris or Mr Hall, he knew they had occurred but was unaware of their content. He was not involved in drafting the specification or with the tender process. Nor did he have any role in the decision making process as to the award of the tender. When discussing his letter dated 10th August 2006, he was unable to confirm whether or not his statement that the tender had been awarded was accurate. He added that if Mitre had been awarded the contract he would have been told by the Regional Area office.

144. Mr Shevlin had received Ms Marks' letter dated 14th July 2006 but had not referred to it in the list in the second section 20 notice in error. He said that the other three estimates were not available as they were in the regional office in Croydon. The priced specification for Mitre and a cost break down for the other three were available. He became aware of this on 6th July when ms Marks came to inspect them. She had made it clear that day that she wanted to see all the priced specifications. He had requested copies from Croydon and these were available on 11th August 2006. He had contacted the Croydon office once or twice in the interim. He did not know why it had taken so long to obtain these.

145. Mr Chris Hall also gave evidence in respect of the consultation issue. He confirmed the contents of his witness statement and gave additional oral evidence explaining the background to the Respondent's decision making processes for such considerations.

146. Mr Dewar submitted that Mr Shevlin was ill-equipped to conduct the section 20 process, both in terms of drafting and providing the requisite documentation and in terms of weighing and responding to observations from the Applicants received in the course of that process. He had inadequate knowledge of or involvement in the previous and ongoing process relating to drafting, tendering and awarding the specification.

147. Ms Dewar also submitted that the result of the above was that the consultation process was a shambles. In July 2005 a section 20 process was

did not say that the price would have been lower if four weeks had been allowed. Mr Harris said that three weeks was adequate (supplemental report para. 9 to para. 10). Mr Martin said in his supplemental report at para. 2.1 that "Three weeks is normal". The landlord did try to obtain estimates from the nominated contractors. The landlord instructed a building surveyor who had been chosen by the Applicants to include all the nominated contractors on the tender list, and he did so, allowing a tender period that is within the range of reasonable tender periods.

137. Mr Jourdan submitted that the complaint that the tender period is too short is not, in reality, a complaint about a defect in the consultation process. There is nothing in the consultation regulation to say that a four week tender period must be provided.

138. In respect of the paragraph (b) statement (see paragraph 11(5) of the Fourth Schedule to the Consultation Regulations), Mr Jourdan submitted that

(1) Paragraph 3 does not apply in a case of this kind. It only applies to works of which public notice has to be given.

(2) However, even of the reference had been to paragraph 10, it would only be necessary for the landlord to give a summary of observations received in writing, at the address stated in the initial notice, within the thirty day period specified in the initial notice.

139. Mr Jourdan submitted that the lessees were very fully consulted. Their views were not always accepted but were listened to. There was an administrative delay before they saw the priced tenders. However, they did have the tender report at an early stage. They were not prejudiced in any way by the delay in seeing the priced tenders at exactly the right time. He submitted that the landlord went well beyond what was required by the procedures. Consultation does not mean that all the lessees' requirements are complied with, especially when the landlord owns some of the flats.

140. Ms Dewar submitted that the Applicants provided observations on the specification for the works and estimates on the understanding that there would be later discussions in relation to the final scope and the question of phasing. It was anticipated that much of the internal work was likely to be removed from the final contractual specification of works. The Applicants were never therefore provided with an opportunity to make observations on the scope or price of these works, except in relation to what should be included in the exploratory specification for the purposes of pricing.

141. The Applicants believed that the item internal repairs and decorations was an area of the work in respect of which the consultation process was particularly meaningless.

initiated by Mr Shevlin. He was aware that the Applicants were discussing the specification with Mr Harris but took no steps to make sure that the observations were passed on to him. He was not aware of the discussions with Mr Hall. He explained this on the basis that he could only receive and respond to the observations sent to him at Area Office number 11. He was aware that Mr Harris had made some changes to the specification as a result of observations by the Applicants but was unaware of the details of these or any changes.

148. The specification was tendered on 24th October 2005. The Applicants submitted that the tender period was inadequate and that the Respondent failed to make adequate efforts to obtain tenders from contractors in accordance with its obligations under the Fourth Schedule to the Consultation Regulations.

149. Mr Shevlin served the first of the Stage 2 notices on 14th June 2006. The notice sought to summarise the leaseholders observations made in relation to the works during the relevant period and responses to this. The summary was no more than a list of correspondence. Mr Shevlin agreed in his evidence that this was an accurate description. This list set out in non-chronological order, a description of seven letters sent during the period and six sent prior to the relevant period. It is the Applicants' case that both in relation to observations and responses that the descriptions were wholly inadequate and failed to comply with the requirements of paragraph 22(5)(b)(i) of the consultation Regulations.

150. This failure was exacerbated by the failure of any attempt by Mr Shevlin to include in the June Notice observations made by the Applicants to Mr Harris. These failings prevented the Applicants from making fully informed observations on the estimates as they were each unable to tell what observations had been made to the Respondent and whether its response had been reasoned.

151. The June notice also failed to comply with paragraph 11(5)(b)(ii) of the consultation regulations in that it failed to describe the estimates received from either the contractor nominated by the Residents' Association or the contractor that had received the most nominations by the leaseholders. It was further inaccurate in stating that the estimates were available for inspection at the Area 11 office, as was confirmed by Mr Shevlin in his evidence. Mr Shevlin stated that the estimates were at the time in the Respondent's office in Croydon. He was unable to explain why he had not ensured that they were in the Area 11 office for inspection in accordance with the June notice.

152. Mr Shevlin was unable to explain why, when Ms Marks visited the Area 11 offices by appointment on 6th July 2005, the tenders were still not available or

why they were not made available until 11th August 2006. By this date the Applicants had already been informed by Mr Shevlin in writing that the contract had been awarded to Mitre. The Applicants submitted that this is a clear failure by the Respondent to comply with paragraph 11(5)(c) of the Consultation Regulations.

153. The failures in the June notice were drawn to Mr Shevlin's attention by the Residents' Association in correspondence. Mr Shevlin stated that in order to correct these errors he served a further section 20 notice dated 28th July 2006. The July notice corrected only the error in respect of the list of estimates. Mr Shevlin confirmed in his evidence at the hearing that the July notice still did not include any observations that had been made to Mr Harris and provided only a correspondence list of observations and responses. The July notice again stated that estimates could be viewed at Area Office number 11. This was still inaccurate.

154. Mr Dewar submitted that the above failures were indicative and causative of a failure on the part of the Respondent to have regard to the Applicants' observations in accordance with paragraph 10 Part II Schedule 4 of the Consultation Regulations. During the first stage of the section 20 consultation process the Respondent was keen to move to the tender stage and did not pay regard to the leaseholders' observations. Detailed discussion of the tender was deferred on the basis that a costing exercise would be carried out and then form the basis of discussion as to finalisation of the specification. This problem persisted throughout the process. Mr Shevlin stated that he did not reply to all of the observations received from leaseholders during this period and that he thought that he passed correspondence on to the Respondent's solicitors.

155. On 18th July 2006, Mr Shevlin received a letter from Mr Shapiro advising in relation to the section 20 process that "all you have to do now is make all the estimates obtained available for inspection". Mr Shevlin confirmed that that was the only outstanding obligation under section 20 of which he was aware at the time. He agreed that he did not anticipate any further meaningful consultation to take place after that date.

156. On 10th August 2006, despite the language of the July notice, Mr Shevlin informed the Applicants that the contract had been awarded to Mitre. Mr Shevlin suggested in his evidence that this might have been a mistake but also accepted that if it was, it was never corrected. Mr Lapes explained that he understood the letter to mean that the decision had been made and any opportunity to discuss that estimates had been entirely shut out.

157. Ms Dewar submitted that the failures in the section 20 process and the lack of integration between the section 20 process and the discussions on foot

between the Applicants, Mr Harris and Mr Hall, resulted in a process that was mis-timed and failed to provide a meaningful opportunity for the Applicants to make observation on either the specifications or the estimates. Mr Lapes thought that the first stage in the process would be entirely exploratory and solely for pricing purposes. He had understood that a contribution would be made by the Respondent towards the cost of the works. His belief that the scope was merely for costing purposes changed the observations that were made. He submitted that the leaseholders were unable to make fully-formed observations without knowing the extent of the costs to which they would be asked to contribute.

158. It was submitted that these problems were exacerbated by the paucity of and delay in providing information to the leaseholders. The draft specification was not received until 30th August 2005, nearly two months after the first section 20 notice. During the second stage of the consultation process the Respondent failed to make available to the leaseholders any priced specification other than that of Mitre. The Applicants were unable to make fully informed observations on either the specification during the stage one or the estimates during stage two.

159. In respect of the paragraph (b) statement, Ms Dewar submitted that this does apply and that the reference should have been to paragraph 10 not paragraph 3 for the provision to make practical sense and should be read as such as this was obvious.

The Tribunal's conclusions on issue 10

160. Having carefully considered the evidence and the submissions by both parties, the Tribunal prefers the submissions of Ms Dewar. The Tribunal finds that the Respondent has failed to comply with the Consultation Regulations in this case.

161. In respect of the paragraph (b) statement, the Tribunal considers that that reference to "(in accordance with paragraph 3)" in paragraph 11(5)(b)(ii) of Part II to Schedule of the Consultation Regulations is an obvious error and should be construed as reading "paragraph 10".

162. The Tribunal considers that the Respondents did not properly comply with the requirements of paragraph 11(5)(b)(ii) in that a summary of the observations, and the landlord's responses were not properly included. Further, the Respondent failed to comply with paragraph (5)(c) in a timely manner as all the estimates were not available for inspection as stated, and were only inspected on 11th August.

163. The second Section 20 letter dated 28th July 2006 told the residents that the landlord had in mind to appoint Mitre, subject to any observations received,

but that "such instruction would not be given before Thursday 31st August 2006". In a letter dated 8th August 2006 Ms Marks said that it had been stated at a pre-trial review hearing of this application at the Leasehold Valuation Tribunal, that "Mitre Construction had already been awarded the contract". Mr Shevlin responded to Ms Marks' letter by a letter dated 10th August 2006 (before all the tenders were inspected). He stated that: "I can confirm that Mitre Construction have been awarded the contract and they will not be instructed until 17th July 2006. This date has subsequently been revised following the serving of the consultation letter dated 28th July 2006. We will not be able to raise the order before Thursday 31st August 2006". This admission understandably led to the conclusion that further comment was futile.

Possible phasing

164. In her e-mail dated 20th February 2007, Ms Dewar said "Agreements to phase the works were made between Mr Hall, Mr Lapes and Ms Marks and between Mr Solomon; Mr Lapes and Ms Marks in or about January 2004."

165. The correspondence makes it clear that phasing was discussed, but Mr Gray of Flat 4 did not agree to it. The Tribunal agreed with Mr Jourdan's submission that unless all lessees agreed the landlord is obliged to do all the works it has agreed to do under the lease. Mr Gray would not agree as he wanted the inside done.

Possibility of landlord's contribution to costs

166. The landlord had discussed the possibility of making a contribution to the cost of the works as is noted under paragraph 16 below. An offer was made by the Respondent but was not accepted as referred below under paragraph 16.

167. *Tender period*

Mr Northwood said that he advised his clients that they will obtain reasonably competitive prices in four weeks. He considered that prices can be obtained in three weeks but they may not be so competitive. However, there was no evidence that lower prices would have been obtained if the tender period had been longer. There was no evidence that any of the work would not have been specified with a longer tender period. Mr Northwood accepted that there were a variety of reason views by surveyors on the appropriate length for a tender period. Mr Harris considered the period of three weeks to be normal. There is no requirement in the Consultation Regulations for any particular length of tender period.

Application for dispensation

168. The Respondents have stated that in the event of the Tribunal determining that there has been non compliance Consultation Regulations, that this was

inadvertent, that there had been substantial consultation with the residents, and that they will apply for and order for dispensation under section 20ZA. Such an application has been made by the Respondent and is due to be heard by that Tribunal. The practical consequence of the non-compliance with the Consultation Requirements is subject to the outcome of that application.

Issue 11

Are the criticisms made by the Applicants of certain aspects of the major works justified?

General

169. Following a meeting between the experts for the parties, the experts produced a statement of matters agreed on and not agreed on. Where a matter has been agreed by both experts it is normally regarded as no longer in issue. However, there are some items where Mr Lapes, based in his experience of living in the block, disagreed with the view taken by the Applicant's expert Mr Northwood and these are referred to below under the particular items.

170. The items remaining in dispute by the end of the hearing were as follows.

Pigeon deterrent [Item 92] [Spec. para 3.20 £1,320]

171. The Applicants initially contended that the costs of installing a pigeon deterrent are not recoverable under the terms of the leases, as being neither a "service" nor a "facility" for the purposes of para 3.11 of the Third Schedule. In any event even were it to be properly described as a service or a facility, the costs of its installation would not have been recoverable under paragraph 3.11 because there was no pigeon problem. It would have been an entirely otiose installation providing neither comfort nor convenience to the occupiers of the Block.

172. However, in the course of the hearing the Respondent indicated that this work was not being proceeded with. Ms Dewar submitted that the pigeon deterrent is no longer an issue if it is removed for the estimated service charge. She reserved her position to make submissions in relation to the section 20C application.

173. Mr Jourdan submitted that this was a legal issue. The Third Schedule entitles the landlord to recover a contribution to the *cost of any other service or facility which the Lessor may in its absolute discretion provide for the comfort or convenience of occupiers of the Block.* Steel spikes and a mesh to stop pigeons fouling the property falls within that paragraph.

174. However, the Respondent had decided not to carry out this work due to opposition from the Applicants. Pigeon deterrent was therefore no longer an issue in this case.

The Tribunal's conclusions on pigeon deterrent

175. This was no longer an issue as the landlords had decided not to proceed with the pigeon deterrent and it would be treated as removed from the specification. No decision was therefore required on this issue.

1st floor balcony soffit [Item 90] [Spec. para 3.16.26 – 28 1st floor balcony soffit. £738]

176. The Applicants' position was that the first floor balcony soffit is not part of the structure of the building, but was part of the demise of Flat 2.

177. Ms Dewar submitted that the cost of the work is only recoverable through the service charge insofar as the work is decorative work carried out pursuant to clause 4.3 of the lease. This is not decorative work and therefore is not recoverable.

178. Ms Dewar submitted that Clause 4.3 of the lease obliges the landlord to decorate the Exterior of the Block and the Common parts including the outside doors and door frames and (if considered appropriate by the Lessor's surveyors) the windows window frames and glass and balcony bounding the Flat in a good and workmanlike manner with appropriate materials of good quality [as often as in the] Lessor's surveyor's opinion is reasonably necessary.

179. She submitted that Clause 4.3 is subject to and implied test of reasonableness (*see Holding and Management Ltd v Property Holding & Investment Trust Plc & Others [1990] at 69D*) and is also subject to the reasonableness test in section 19 of the Act. There would be no breach of covenant if the landlord decided reasonably not to decorate. If the Respondent decides to undertake decoration that is unreasonably extravagant or inappropriate the cost of such decoration is not recoverable through the service charge.

180. Mr Jourdan submitted that this is a legal issue. The question whether the work to the soffit can properly be charged to the service charge is a question of interpretation of the lease.

181. The lease defines the extent of "the Flat in the First Schedule. It includes the interior and the fixtures and fittings, but not the Structure of the Block. This is defined in clause 1.1.7 as meaning *(i) the roof and foundations of the Block, (ii) the load-bearing walls and columns (excluding plaster or other decorative finishes); (iii) the floor structures (including beams joists and slabs but*

excluding floorboards floor screeds and floor finishes). Mr Jourdan submitted that the soffit of the first floor balcony is plainly not part of the Flat. It is part of the Structure of the Block.

The Tribunal's conclusions on the 1st floor balcony soffit

182. The Tribunal are not satisfied that the 1st Floor balcony soffit is property within the lease of Flat 2. This question was not addressed in the evidence. The Tribunal considers that this area falls within the definition of the 'Structure' of the Block.

183. The Tribunal considers that the work constitutes work of repair. If and in so far as it comprises decoration, that element is subsidiary to and part of the repair.

184. In the circumstances the Tribunal considers that the cost of the work is recoverable under the service charge and is reasonable.

Water booster [Spec. Para. 3.14.26 – 31] £19,650

185. The Applicants considered that a water booster is unnecessary and inappropriate and contended that there had been no consultation in respect of this part of the works. However, the Respondent later decided not to install this item.

186. Ms Dewar submitted that the water booster was not longer an item in issue provided it was removed from the estimated service charge. However she reserved the Applicants' position in respect of the section 20C costs application.

187. Mr Jourdan said that the water booster is not going to be installed as part of the major works. An alternative solution has been found. The Water board is going to install a new mains supply. The Water booster is no longer an issue in this case.

188. If the water booster had been required, because without it there will be inadequate water pressure, then it would have fall within para 3.11 Third Schedule.

The Tribunal's conclusions on the water booster

189. The water booster work is not going to be undertaken. An alternative solution had been found. It is therefore not necessary for the Tribunal to make a determination on this issue.

New floor coverings [Spec. Para. 3.13]

190. Ms Dewar said that the Applicants understand from submissions made by Mr Jourdan that the Respondent no longer intends to install the carpet as provided in the specification and will instead replace it with linoleum.

191. She said that the Applicants are unaware of the anticipated cost of this work, but their position remains that the original cost for floor covering provided in the estimate is unreasonably high. In his evidence Mr Harris accepted that the figure provided for the carpeting was probably on the high side.

192. Mr Jourdan said that the Respondent had agreed that no carpet would now be laid. The linoleum floor covering would be replaced by linoleum. The proposal to use carpet was withdrawn and was no longer an issue

The Tribunal's conclusions on new floor coverings

193. The Respondent is not proceeding with its proposal to lay carpet. The pre-existing linoleum floor covering will be covered with linoleum. The Tribunal considers that it is reasonable for the landlord to replace the floor coverings, and to do so with linoleum as now proposed and in principle accepted by the Applicants. However, the cost of the floor covering in linoleum has not been specified and the Tribunal makes no determination as to the reasonableness of such cost.

Internal joinery - hallway [Item 80] [Spec. para 3.10.6-7] £950

194. Ms Dewar submitted that the work specified was unnecessary and was neither repairs nor decorations within the meaning of the lease and is therefore irrecoverable. She submitted that work comprised improvements and the cost was not recoverable under the service charge.

195. Mr Harris referred to this item in paragraph 12 of his report as follows:

This item deals with the boxing in copper pipework and the inclusion of access panels. This item was discussed with Geraldine Marks and David Lapes during one of the walk around site visits that were carried out by me. They agreed that it would be a good idea to have this work carried out. In my view, the boxing in of the exposed pipework is sensible work to do, as it will improve the appearance of the hallway.

196. Paragraph 3.11 of the Third Schedule entitles the landlord to recover a contribution to the: *Cost of any other service or facility which the Lessor may in its absolute discretion provide for the comfort or convenience of occupiers of the Block.* Mr Jourdan submitted that this work falls within that paragraph. Boxing in exposed pipework to improve the appearance of an entrance hall improves the amenity of the hall and so provides for the comfort of the

occupiers of the Block. "Comfort" embraces the impact on the eye as well as on the ear or skin. Exposed pipes would not be expected to be seen in a quality mansion block.

The Tribunal's conclusions on the internal joinery - hallway

197. The Tribunal agrees with Mr Jourdan's interpretation of paragraph 3.11 and accepts the Respondent's 'visual comfort' submission. The Tribunal considers that this item falls within paragraph 3.11 of the Third Schedule and that the costs are reasonable and recoverable under the service charge.

Main Roof [Item 84] [Spec. para 3.15] [£57,600, £17,222, £3,500 (minus £7,213 – Canadian Slate)]

198. Ms Dewar submitted that the Applicants' position on the main roof is that the costs of the current works are not recoverable as they do not constitute repair. The roof, although aesthetically unattractive and reaching the end of its natural life-span was not in a state of disrepair. She submitted that the roof was water tight and effective.

199. Ms Dewar said that the Applicants accept the evidence of the experts that it might be considered a reasonable or prudent measure to repair a roof before it begins to leak, but such work is not a work of repair and is, on that basis, irrecoverable under the service charge.

200. The Applicants further submitted that it was unreasonable to include Welsh Slate in the tender. This was referred to in Mr Northwood's report. However, the Respondent has now agreed to use Canadian Slate.

201. Mr Lapes said that Flat 7 is the uppermost flat on the Queen's Avenue end of Queen's Mansions. The flat was unoccupied when he made his witness statement (February 2007). From the scaffolding it is possible to see into flat 7. Apart from a small piece of peeling papers there is no evidence of staining to the ceiling that would indicate leaks from the roof. He said that this indicated to him that this section of the roof performed adequately over the last ten years and did not show that it was in need of disrepair.

202. Flat 6 is the uppermost flat on the Fortis Green Road end of the building. It is occupied on a rental basis. The tenants had told him that they have had a couple of small leaks from the roof which have been attended to. He said that it seemed feasible to him that given the crippling costs of the overall work that it would be prudent to have exercised the warranty on the roof-turnerising through TRC, failing that to effect the localised repairs required to see the roof through to the next set of cyclical repairs. The roof-turnerising was completed at the end of February 1997 with a ten year guarantee that was in effect until the end of February 2007.

203. The Tribunal heard oral evidence from Mr Northwood who had dealt with this at paragraph 5.3.2 of his report. The Tribunal also heard form Mr Harris on this issue.

204. Mr Northwood's view in paragraph 5.3.2 of his report was that there was no evidence on inspection of water leaks through the slate roof. He said that "I accept that relying on a slate roof that has been 'turnerised' twice is not an ideal arrangement nevertheless it is not leaking". He thought that it would be prudent to delay replacing it for another four to six years.

205. In cross examination he was asked whether a surveyor who advised replacing the roof rather than leaving for another four to six years would be negligent. He refused to answer that question directly, but said that he would expect to see a considered report. Mr Northwood said that there will be roofs which are seriously decayed and would need replacement, and there will be roofs where a surveyor will recommend patching. Part of the assessment process relates to the history and frequency of repairs and also whether the roof was leaking. It was a matter of professional judgment. He would have expected the roof to last longer than the guarantee period. However he thought that roof replacement was a sensible thing to do in the long term.

206. Mr Harris dealt with the main roof at paragraph 16 of his report dated 31st January 2007 and also in his supplemental report at paragraphs 2 to 8. In his report at paragraph 16 he stated:

I inspected the main roof areas prior to preparing the specification. The roof was old, had been turnerised and was in poor condition. Replacement was, in my view, required and piecemeal repair was not a sensible option. He referred to the photographic evidence showing photographs taken in December 2004.

207. Mr Harris confirmed that he had not seen any evidence that the roof was no longer water tight. However, in his professional opinion, replacing the roof was the prudent and sensible course of action. Mr Jourdan submitted that it was not sufficient for the Applicants to show that, had Mr Northwood been in charge, the roof would have been left for another four to six years. It was for the Applicants to prove on the balance of probabilities that the cost of recovering the roof was not reasonably incurred; that no reasonable landlord could have made the decision to replace it. As the landlord acted on the advice of Mr Harris, that means that the Applicant's can only succeed if the Tribunal consider that his advice to replace the roof was one which no reasonably competent building surveyor could have given in the circumstances.

208. Mr Jourdan referred to documents to show that four surveyors recommended replacing the roof before the second turnerisation in 1997.

a. Valuation dated 15th March 1991 at Appendix A to Mr Northwood's report, describing the turnerising at that time as "a temporary expedient only".
b. Valuation dated 19th April 1992 at Appendix B to Mr Northwood's report: "Main block in very poor condition and slate roof is near the end of life and will need to be replaced in the near future".
c. Survey dated 16th April 1993 at Appendix C to Mr Northwood's report. At page 4 said that the turnerising "is regarded as a short term remedial measure and one which can lead to internal condensation. We recommend full replacement of the roof with new tiles or slates".
d. Survey dated 5th August 1993 by Daley and Hall. Recommended striping and recovering of roof.

209. The roof was not then recovered; rather a fresh turnerising coating was applied. By the time the major works were carried out, this second turnerising was 10 years old. Hr Harris considered it was time to recover the roof. When the Applicants commended on the draft specification, they commended on many aspects of the draft specification, but made no suggestion that the roof should not be re-covered or the lead roof coverings to the domed structures be replaced. On 22nd November 2004, Mr Spence, a Chartered Surveyor, wrote to Mr Gray. At paragraph 5 Mr Spence said, "The roof and rainwater goods are at the end of their useful life and any external works should include comprehensive re-roofing and renewal of rainwater goods".

210. Mr Northwood was not willing to say that Mr Harris' view was negligent; he was right. The suggestion that one should wait until a roof is actually leaking before recovering it is not a sensible one. Mr Jourdan submitted that there was no basis for a finding that the cost of recovering the roof was unreasonably incurred.

211. Mr C M Martin MRICS for the Respondents in his report dated 2nd February 2007 stated:

The roofs, domes, parapet gutters etc will have deteriorated on a building of this age to the point where their total renewal could be expected in any event at this time. The existing roof covering also appears to have been the subject of "turneries" type of treatment in the past indicating a significant level of maintenance in order to extend the life of the previous covering...

The need to replace 50% of the timber boarding to the first floor corner balcony soffit and for burning off existing coating prior to decoration is probably die to a considerable extent to the previous failure to repair the roof above.

212. Mr Jourdan submitted that it is not an "improvement" to replace an item with a better item in accordance with good building practice, even if that produces work which is superior to the original. He referred to *Postel Properties Ltd v Boots the Chemist [1996] 2 EGLR 60 as an example.*

213. In that case the landlord put in hand the replacement of the roofs over Milton Keynes shopping centre. An action was brought to determine the works chargeable to the tenants. The existing roofs, built in 1975-76 used 25mm insulation fibreboard. The landlord replaced this with 50mm polyurethane board because technology had advanced. It was possible to use 35mm polyurethane board. The extra cost of that last 15mm was £1.65 per square metre, a substantial difference in terms of the large areas involved (there were 7 acres of roof). 35mm would have given adequate support for the waterproof layers and the manufacturer's guarantee required no greater thickness. The reason for using 50mm was that 35mm gave an insulation factor four times higher than did the fibreboard but did not quite attain the insulation standard which applied at the time when the replacement began, but 50mm did. The Judge held that the landlords were entitled to use 50mm in accordance with good building practice as part of performing their covenant to "keep the common facilities and the covered square and foundations roofs main walls main structural columns of the demised premises in the Shopping Centre in good and substantial repair and condition."

214. Secondly, it was for the person who covenants to repair to decide how to carry out the work needed. In many cases, with a defective element of the building there is a choice between carrying out patching work and replacing. The person liable to repair can choose between those alternatives. Take a roof, for example. The landlord may choose to carry out patching works: *Dame Margaret Hungerford Charity Trustees v Beazeley [1993] 2 EGLR 144,* or he may replace the roof with a modern equivalent as in *Postal Properties v Boots the Chemist.* In both cases the landlord is properly complying with his obligation to repair. The choice is his. Unless the choice is one that no reasonable landlord could make, the cost will be reasonably incurred for the purposes of section 19(1) of the Act.

215. Mr Harris expressed a view open to a reasonably competent building surveyor. Even if other building surveyors might have reached a different view it was irrelevant, because Mr Harris' view was within the range of reasonable different options and views of reasonably competent building surveyors. Mr Northwood was not able to say that NO reasonable surveyor would take that view. Unless the landlord steps outside the range of reasonable options then the decision to do the work is reasonable.

The Tribunal's conclusions on the main roof

216. The Tribunal considers that the works carried out to the main roof constituted works of repair. The absence of leaks was not conclusive as to the state of repair of the roof. The photographs showed that the roof had previously been turnerised. Mr Northwood only inspected the roof by using binoculars from ground floor and balcony level.

217. The Tribunal considers that the decision to replace the roof was within the range of reasonable options and recommendations that could be reached by

a competent building surveyor. The landlords were advised that replacement was appropriate and were entitled to decide to replace the roof.

218. A letter dated 21st September 2005 from Ms Marks and Mr Lapes to Mr Harris referred to the roof works being anticipated to ensure the overall integrity of the structure of the building. No comments were made against the item "all roof coverings to be renewed" on the schedule of works / specification as compared to the comments made relating to the domed roofs.

219. The Tribunal considers that the cost of the roof works were reasonable / reasonably incurred.

G. *Domed Roofs [Item 96]*

[Spec para 3.15.20 – 23] £17,222

220. The Applicants contended that the cost of these works was not recoverable under the lease because the domes were not in a state of disrepair and the works did not therefore fall within clause 4.2 of the lease.

221. Mr Lapes said that as soon as the roof work started the roof covering was removed. He said that he then became fearful that Mitre would do the same to the lead domes. He asked the contract administrator Mr Harris what his view was and he said that he thought that they should be removed because of the likelihood of rotten timbers beneath.

222. Mr Lapes said that he felt so concerned that the removal of the lead was unnecessary that he inspected the domes himself gaining access to the roof via the loft hatch. The lead was old and painted green with thick bitumen of the type that was very flaky. This did not however appear to require any significant repair and simply looked tatty because of the flaking paint and the bitumen from the turnerising. Mr Lapes contacted Mr Harris' office, said that the domes appeared to be sound, and asked that a second opinion be sought from a specialist. He told Mr Lapes that this was unnecessary as they were confident of their views.

223. Mr Lapes told Mr Harris office that he would get a second opinion and asked Mr P Tubbs of Roofs, a local lead and roofing specialise, to view the lead work. Mr Lapes said that Mr Tubbs told him that each dome had only three very small (about 1 cm long) and easily repairable tears at the end of the rolls and said that this was where he would have expected to see damage, it apparently being common for lead to tear at the end of the rolls. Mr Tubbs also said that the lead was not particularly brittle and had not slipped. At the time Mr Tubbs said that the domes had a fifteen years life left and that he would not necessarily recommend re-covering them at this time. Mr Tubbs wrote a letter to confirm this.

224. It was Mr Lapes' view having consulted Mr Tubbs that replacing the lead on the domes was an unnecessary expense even taking into consideration the presence of the scaffold. Mr Lapes reported to Mr Harris about Mr Tubbs

opinion and his conclusion, to which he replied curtly that "The lead will be stripped". Mr Lapes said that when the roof was stripped there was no evidence of rot in any timbers although there were some water stains on some of the rafters and they could not judge their age. The sarking on the domes was completely intact and free from staining

225. The comment by the Applicants in respect of this item on the schedule of works / specification "Further check needed as they appear to be in good shape. Repairs only?"

226. Mr Northwood thought that, although not leaking, it was reasonable to assume that the lead on the pepper pots would require some measure of repair and that a judgment could have been made at that stage whether to undertake more works at cyclical repair time. Decay can occur underneath the lead where it oxidises. However he was not aware of such problems occurring in the domes. He said that different surveyors have different approaches.

227. Mr Harris accepted that he had not, prior to including this work in the specification carried out a detailed inspection of this area of the roof. Mr Harris dealt with the lead domes in his report at para. 29 and his supplemental report at para 4 and 5. Mr Martin dealt with it in para. 4.1 of his supplemental report. Mr Northwood dealt with it in para. 5.3 of his report. Mr Northwood agreed in cross-examination that this was an issue where different building surveyors could legitimately take different approaches. There is no evidence that Mr Harris' advice that the lead should be replaced was unreasonable. The fact that Mr Northwood might have given different advice is irrelevant.

228. In paragraphs 4 and 5 of his supplemental report Mr Harris said the following:

I considered the history of the building. The building had not been maintained very well for the last 20 years, the roof had been turnerised twice and was exhibiting signs of failure. In the circumstances, it was in my opinion prudent to recommend the replacement of the roof. With regard to the lead domes, my inspection , when I climbed up ... showed that the lead had sagged and the surfaced looked weathered and aged.

My colleague, Cliff Kennedy, the chartered surveyor carrying out the post contract administration of the works on site, carried out an inspection of the roof including the lead domes, once the scaffolding was up, and prior to stripping. Cliff Kennedy discussed the domes with me. He said that the lead was lifting and the slipping of the lead on the original fixings was evident. The concealed fixings (holding up the lead sheets) were at the point of failure. He said that the condition of the lead was such that replacement was required.

229. Mr Harris said that that Mr Kennedy had carried out a very close up inspection. It had been observed that the concealed fixings were at the point of failure. The lead looked malleable and was starting to split. Mr Harris considered that it was unlikely that there were only a few sections that were problematic and the problem would be more widespread. He said that on the

basis of his ten years experience as a Chartered Surveyor he considered it was necessary to replace the lead.

230. At paragraph 5.3 of his report Mr Northwood said:

It is my understanding that there was no evidence water leaking through the lead work covering the two pepper pots and that no investigations have been carried out to establish if they were in fact leaking either to inform the specification process or once the works commenced on site. It is understood that there was evidence of water from the valley at the base of the west pepper pot into flat 7. At my inspection on 28th November 2006 it was clear that there was no evidence of decay in the timber boarding lining both pepper pots.

231. Mr Northwood said that he had only been able to view the roof covering with binoculars from the ground floor level or from the balcony. He said that one of the valleys of the pepper pots at the corner of the building was leaking but that this had been rectified. He said that he would have considered it appropriate for there to be an allowance for work to the lead of the pepper pots. Both his report and the schedule of photographs produced by the Applicants showed pictures of the pepper pots.

The Tribunal's conclusions on the domed roofs

232. Mr Harris thought that there was a likelihood that the timbers beneath the lead were rotten. Mr Northwood had only viewed the roof form ground floor or balcony level. Mr Tubbs told Mr Lapes that he thought that repairs to the small tears could be carried out and that the lead had not slipped. However, Cliff Kennedy, a Chartered Surveyor, had inspected the domes when the scaffold was up and prior to stripping. He discussed his observations and opinion with Mr Harris. In his view the lead was lifting and the slipping of the lead on the original fixings was evident.

233. Based on these observations of Mr Kennedy and his own views, Mr Harris' advice that this work should be undertaken was within the range of reasonable advice from a competent surveyor. The Tribunal considers that the landlord's decision to undertake the works to the domed roofs was not unreasonable, and that the costs were reasonable / reasonably incurred.

H. Internal repairs and decoration [Item 94] [Spec. Para. 3.9, 3.11 and 3.12]

234. Ms Dewar submitted that the Applicants accepted that it was reasonable for the Respondent to carry out some internal repairs and decoration and that the costs are recoverable through the service charge.

235. However, she submitted that the sum allowed for the work was unreasonably high in the light of the condition of the common parts prior to the major works The Applicants relied on the lower estimates procured from alternative contractors at the time. The total price quoted by M Bailey on 29th November

2006 was £8,400 including all materials. The estimated dated 2th January 2007 from D Horsburgh Property Maintenance was higher.

The Tribunal's conclusions on internal repairs and decorations

236. The Tribunal notes that one of the alternative quotations was higher and one lower than then priced specification.

237. In the circumstances the Tribunal sees no reasons to disagree with the view taken by the Respondent in respect of this work and finds that the cost is reasonable /reasonably incurred.

Miscellaneous matters

236. *Item 86 – Roof lights.* This item had been agreed by the experts. It was agreed that replacement was needed and that the price was reasonable. However, Mr Lapes considered that the roof lights could have been reused. This item had been repaired previously. However, they were not in disrepair.

Roofs lights – conclusions: The Tribunal prefers the view of the experts and finds that the cost of this item was reasonable / reasonably incurred.

237. *Item 101 – Rear balconies.* The Applicants' position was that works in 2002 were defective. Mr Jourdan submitted that no defects had been identified. There was insufficient evidence to show that the work to the rear balconies in 2002 was defective.

Rear balconies – conclusions: The Tribunal finds that the charge in respect of this item was reasonable / reasonably incurred.

238. *Joinery and glazing repairs. [Spec. Para. 3.26].* Ms Dewar contended that the cost of these works is irrecoverable as the wholesale use of the Window Care system was not an appropriate method of repairing the windows in question.

239. Mr Northwood dealt with this in his report. Mr He said that the external joinery was in a very poor condition and had not been painted by the landlord since at least the 1980's. He considered that this had contributed significantly to the substantial level of decay that had occurred to the external joinery which he described as including the windows, doors, and fascia boards. As a result the major works included a substantial amount of remedial works to the joinery. He stated that he was concerned that the landlord had chosen to repair substantially decayed timbers using specialist filling materials rather than replacing the timbers or components in question. He also considered that the integrity of the repairs would be short lived.

240. In oral evidence Mr Northwood explained why he considered that the system was inappropriate to use on the timber damage he had observed at the Block. He said that specification described joinery work including replacement of timber sashes, glazed windows and timber window sills. However the work that was carried out involved the cutting out of decayed

timber and building up with a plastic material. Some of the bottom rails of the windows were decayed at least half of their thickness across the entire width so plastic material was being used to replace half the timber. The plastic material was being used in various areas in a patch repair capacity. He was concerned with the long levity of the repair.

241. In the Agreed Statement of Facts it was stated by the landlord's experts that they disagreed with the statements in Mr Northwood's report in respect of the joinery and glazing repairs. Mr Harris did not have the same concerns as Mr Northwood. The repairs, other than replacing timbers, were being done using a well-regarded and tested plastic repair system, Window Care, and he considered that the repairs undertaken were appropriate.

242. In his supplemental report Mr Harris stated that in his view the Window Care system was a sensible choice. He did not share Mr Northwood's concerns about the long term reliability of the repairs that had been carried out.

243. Mr Martin's view was that the Window Care restoration system was a well-proven and widely used repair system that has been in use for fifteen years. He provided details of the system in Appendix A to his report.

Joinery and glazing repairs – conclusions:

244. Both Mr Harris and Mr Martin were of the view that the Window Care system was an appropriate method of repair. Although Mr Northwood may have advised a different method, there was no evidence that a reasonably competent Building Surveyor would not have advised that the Window Care method should be used. It was open to the landlord to rely on the views Mr Harris and use this method of repair. Mr Martin also considered that this method was well proven and widely used.

245. The Tribunal notes that there is no provision for a Window Care system in the current specification. The Tribunal considers that the method of repair adopted was reasonable. However, the Tribunal makes no finding in respect of the reasonableness of the costs incurred, as the actual work undertaken was not specified and priced in the specification provided.

246. *Handrails, ladders, balustrade [Spec. Para. 3.22.1-5].* The Applicants considered that these works were over-specified and therefore irrecoverable. Mr Harris had confirmed that only £525 of the provided £2,525 is likely to be required to carry out the works.

Handrails, ladders, balustrade – conclusions: The Tribunal consider that in the context of the comprehensive overhaul of the Block this sum (£525) was not unreasonable.

247. *External vaults [Spec. Para. 3.22.6]* – It was admitted that the external vaults do not form part of the Block and the costs of these works were not recoverable under the service charge.

248. *Corner balcony [spec. Para. 3.19]* – the Applicants submitted that this work was neither necessary or reasonable at the time at which the specification was drawn up and it was therefore unreasonable to include a provisional sum for this item. Ms Dewar submitted that Mr Harris had now determined that no work was necessary.

Corner balcony – conclusions: The Tribunal considers that it was reasonable to include a provisional sum for this item in the estimate. The repairs were not needed and it is understood that the Respondent has or will take this sum out of the estimated charge.

249. *Internal strip out [Spec. Para. 3.8]*

It was agreed by the experts that this was a necessary part of the works. Ms Dewar submitted that the Applicants accepted that some level of strip out is necessary but only if it is reasonable to carry out the works in the areas to be stripped out.

Internal strip out – conclusions:

There was no separate costing for this in the specification. The Tribunal finds that where the works have been found to be reasonable the costs of associated stripping out works are also reasonable/ reasonably incurred.

250. *Roof insulation – [Spec. Para. 3.15.6-8]*

Ms Dewar submitted that the insulation installed was inappropriate and the costs of such insulation have not therefore been reasonably incurred. This point was dealt with by Mr Northwood and by Mr Lapes. Mr Lapes considered that the work was inappropriate as the existing insulation could have been patch upgraded between the joists.

When asked whether he agree that it was not unreasonable to install insulation to a modern standard, Mr Northwood said that he would not ignore the fact that installing the insulation was a wise thing to do. In the agreed statement of experts it was stated that "Agreed current Building Regulations ... require from 6th April 2006 upgrading of thermal insulation standards where total renewal of roof coverings take place."

Ms Dewar submitted that the cost provided in the specification is also unreasonably high because it provides for both insulation to the ceiling joists and to the rafters and submitted that Mr Harris had said in evidence that these were alternatives and the price should not have been aggregated.

Roof insulation – conclusions:

Ms Dewar's submission is incorrect. No cost for the new insulation between the joists was carried through to the tender and this has not been done. The Tribunal considers that it was not unreasonable to carry out the roof insulation as part of the comprehensive re-roofing.

The Tribunal finds the figure £4,980 and £4,200 for roof insulation to be reasonable /reasonably incurred.

251. *Electrical services [Spec. Para. 3.14.1 -24]*

Fire alarm

Mr Northwood expressed concerns about the fire alarm in his report and gave further explanations in his oral evidence. He thought that fire alarm and protection systems should be part of a package of measures. It was sensible to install a fire alarm but it should be done as part of a package of measures following a full risk assessment. It was stated in the agreed statement of the experts that:
"We agree that the alarm and detection are prudent measures but acknowledge that statutory obligations requiring such an installation are not well defined".

Fire alarm – conclusions:

The Tribunal considers that the fire alarm was prudent and reasonable in building of this type and was for the comfort and convenience of the residents. The costs of the fire alarm are reasonable /reasonably incurred.

Electrics

Ms Dewar submitted that the specification of other electrical work is excessive and in a large part unnecessary. Mr Northwood believed that far fewer lights than were provided for in the specification were necessary. Mr Harris said that not all the lights would necessarily be fitted.

Electrics – conclusions:

The Tribunal was informed that it had been agreed by the parties that the number of lights was reduced from fourteen to four. This cannot currently be reflected in financial terms, but it anticipated that an adjustment will be agreed to reflect this in due course.

252. *Scaffolding and Preliminaries, fees and administration charge*

Ms Dewar submitted that if items are removed from the specification then there should be a proportionate reduction in the above costs to reflect this.

Scaffolding and Preliminaries, fees and administration charge – conclusions;

The Tribunal agrees that where items have been removed for the specification there should be a proportionate reduction for the above items to reflect this.

Issue 12

To what extent can the Tribunal take into account the fact that the extent and cost of the major works was increased by reasons of the lack of previous cyclical maintenance?

253. This issue was the subject of the Tribunal's determination dated 5th July 2007.

Issue 13

Are the lessees worse off financially than if cyclical maintenance had been carried out?

254. This issue no longer arises in view of the Tribunal's decision on issue 11. No determination is required in respect of this item.

Issue 14

If the Tribunal finds that costs were included in the service charges in the past which should not have been, what order should it make?

255. The Applicants accepted that the Tribunal does not have jurisdiction to order the Respondent to make a payment to the Applicants. In respect of the disputed items in service charge bills which have been paid by the Applicants, the Applicants sought a determination from the LVT that the sums demanded for those items through the service charge were not in fact payable under the terms of the leases.

256. Mr Jourdan submitted that here is no claim to recover service charges paid by mistake, and if there were, it would be a restitutionary claim that could only be brought in the Court, where a limitation period would apply. The LVT has power to determine that certain costs were not properly included in the service charge costs, and that the amount payable by each lessee should have been calculated accordingly. It does not have power to order the repayment of any overpaid service charges.

The Tribunal's conclusions on issue 14

257. It is accepted by all parties and the Tribunal that it has no jurisdiction to make a money judgment of restitutionary order. The Tribunal has power to order that certain costs were not properly included in the service charge costs and that the amount payable by each lessee should be calculated accordingly.

Issue 15

How should the current major works be apportioned between the shops, the basement and the Block?

258. Mr Jourdan submitted that the Respondent's case was that any costs incurred in repairing or decorating that part of the building that is within the definition of

"the Block" form part of the service charge costs. Any costs which are incurred in repairing or decorating the shops or the basement, not included in "the Block" are not to be so included. Any costs that relate partly to the work to the Block and partly to work to the shops or basement must be apportioned on a fair basis.

259. Ms Dewar submitted that in the light of the above submission there did not seem to be any dispute between the parties on this issue.

The Tribunal's conclusions on issue 15

260. The Applicants accepted the Respondent's stated position above, and there is no need for a determination on this issue.

Issue 16

Has the Respondent agreed to make a contribution to the major works?

261. The Respondent had offered to make a contribution to the major works. However, in view of the continuing dispute between the parties this offer was withdrawn.

262. Mr Jourdan said that the Respondent had previously made an offer to credit the lessees with £50,000. That offer was not accepted. The Respondent had requested particulars of any agreement alleged by the Applicants including the consideration alleged given.

263. The response had been that the agreement was oral. The agreement for financial contribution was made between Mr Hall, Mr Lapes and Ms Marks on or about 28 June 2005. There was a meeting between Mr Hall, Mr Harris, Mr Lapes and Ms Marks on that date at which the issue was discussed. The note of that meeting was provided. This recorded Mr Hall saying that Freshwater would make a "contribution toward the neglect". A subsequent letter made it clear that this was subject to Board approval . An offer was made on 6 February 2007 but was not accepted.

The Tribunal's conclusions on issue 16.

264. Tribunal's view having considered the evidence was that that there was no agreement between the parties that the landlord would make a contribution to the major works. However, the Tribunal was informed that the Applicants no longer require a formal determination on this issue.

Issue 17

Has the Respondent agreed to phase the major works?

265. Ms Dewar was content that this issue is not determined except as an element under issue 10.

The Tribunal's conclusions on issue 17

266. The Tribunal was informed that the Applicants no longer required a formal determination on this issue.

Issue 18

In the light of the LVT's determinations of the above issues, what sum (if any) is now due from the Applicants in respect of service charges

267. The parties agreed that the determination of this issue was postponed until after the determination of 1-17 and then subject to further submissions in the absence of agreement.

Issue 19

What sum (if any) is now due from the Applicants in respect of service charges in the light of the Tribunal's determinations on the other issues.

268. The parties agreed that the determination of this issue was postponed until after the determination of 1-17 and then subject to further submissions in the absence of agreement.

Issue 20

Should the Tribunal make a costs limitation order under s 20C.

269. This issue was postponed until after the decision and subject to further submissions in the absence of agreement.

CHAIRMAN: A Seifert

DATE: 11th March 2008

Members of the Leasehold Valuation Tribunal:

Miss A Seifert FCIArb
Mr M A Matthews FRICS
Mr L G Packer MA, MPhil

LON/00AP/LSC/2006/02046

THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

Re: Queens Mansions, 59 Queens Avenue, London N10

The Tribunal's decision on the preliminary question

The issue to be determined

1. Both parties have requested that the Tribunal determine as a preliminary question, the extent to which the Tribunal can take into account any increase in the extent and cost of the major works at the premises caused by failure by the Respondent landlord to carry out cyclical repairs and maintenance of the premises pursuant to the terms of the lease. The decision on this issue will determine whether the evidence of Mr CM Martin, MRICS, the Respondent's surveyor, is required at the reconvened hearing of the case.

2. Both parties invited the Tribunal and the Tribunal agreed to extend the time limit for appealing against any decision it makes on this preliminary question, until after the Tribunal's decision in the substantive application. The Tribunal's reasons set out below are in summary form and further reasons will be provided as part of the decision in this case.

The Applicants' case

3. Miss F Dewar, of Counsel, represented the Appellants. She submitted that, as a matter of contractual interpretation, the Respondents are unable to recover through the service charge, any part of the cost of remedying the Respondents' previous failure to comply with its repair and maintenance obligations under the leases. She referred to such costs as "the Neglect Costs".

4. The Neglect Costs are those costs that are solely attributable to remedying a landlord's previous breach of covenant. For example, if a roof, that should have been repaired by a landlord in year one, is only repaired in year 3, the costs of repairing any damage to underlying timber that was caused in the intervening years by the failure to repair in year one, such as damage by exposure, are Neglect Costs.

5. Miss Dewar submitted that clause 3.1 of the lease provides the landlord with what is effectively an indemnity against the costs of fulfilling certain of his covenants under the lease. She submitted that this clause should not be construed in such a way as to allow the Respondent to invoke the indemnity in respect of the any of the costs

of remedying his previous breaches of those covenants. Accordingly, Neglect Costs are not payable under clause 3.1.

6. Miss Dewar submitted that it is a well-established principle of construction that a contract will be construed so far as possible in such a manner as to not permit one party to it to take advantage of his own wrong. She referred to *Alghuissein Establishment v Eton College* [1988] 1WLR 587, in which the House of Lords upheld the decision of Sir Nicholas Browne-Wilkinson V-C at first instance that the Appellants could not rely on their own breach to found a legal right under that contract. At 591D to 594A, Lord Jauncey of Tullichettle considered the authorities for this proposition and concluded:

"Although the authorities to which I have already referred involve cases of avoidance [of the contract] the clear theme running through them is that no man can take advantage of his own wrong ... A party who seeks to obtain a benefit under a continuing contract is just as much taking advantage of his own wrong as a party who relies on his breach to avoid a contract and thereby escape his obligations."

7. Miss Dewar submitted that the above principle of construction was applied to prevent the Appellant in that case invoking a proviso of a written agreement with the Respondent that entitled him to the grant of a lease. To invoke the proviso the Appellant would have had to rely on his breach of his obligation under the agreement to use his best endeavours to commence and proceed diligently with certain development works. To do so would have been to assert a legal right in reliance on his own wrong and the wording of clause 4 in that case was construed so as not to be exercisable by the Appellant in those circumstances.

8. In *Harmsworth Pension Funds Trustees Limited v Charringtons Industrial Holdings Limited* (1985) 49 P & CR 297, it was held that defects to the premises resulting from a tenant's breach of his repairing covenants under the lease should be disregarded in determining the rent payable under the rent review clause in that lease. The tenant could not rely on his own breach of covenant in order to depress the rent that would otherwise be payable as to do so would be to rely on his own wrong.

9. Miss Dewar submitted that in seeking to establish that Neglect Costs were reasonably incurred and can be recovered through the service charge, the Respondent is seeking to rely on its own previous breaches of covenant. Just as the tenant in *Harmsworth Pension Trustees Limited v Charringtons Industrial Holdings Limited* could only assert that a lower rent was due under the rent review clause by taking advantage of the depression in the value of the premises caused by his failure to repair, the Respondent in the current application can only invoke clause 3.1 in respect of Neglect Costs by taking advantage of the need for additional repair costs caused by his failure to repair.

10. Miss Dewar submitted that two questions should be asked when determining the amount of the costs of major works payable through the service charge under clause 3.1.

(1) In respect of which of those costs can the Respondent invoke its contractual indemnity under clause 3.1 ("the indemnified costs")?
(2) In what amount are those costs payable under that indemnity?

Miss Dewar submitted that the first question is a matter of contract to which the principle that a party to a contract cannot rely upon its own wrong is relevant. The second question is a matter of fact to which section 19(1) of the Landlord and Tenant Act 1985 as amended is relevant.

11. The first question requires the Tribunal to identify as a matter of contractual interpretation, the costs for which the Respondent is indemnified under clause 3.1. The Applicants accepted that the Respondent can invoke the indemnity in clause 3.1 in respect of all the costs it incurs in fulfilling its repair and maintenance covenants under the lease and providing services or facilities in accordance with the Third Schedule to the lease. However the Respondent is not entitled to invoke the indemnity in respect of the costs of remedying its previous breaches of its repair and maintenance covenants.

12. The second question requires the Tribunal to quantify the indemnified costs and is primarily an inquiry of fact into the costs that the Respondent has actually incurred in fulfilling those obligations and providing those services. The Respondent is entitled to recover the full amount of those costs, subject to question of reasonableness under section 19(1).

13. Miss Dewar submitted the Tribunal can only take into account the Respondent's failure to carry out cyclical maintenance and repairing obligations to the extent necessary to identify the Neglect Costs and exclude them from the indemnified costs.

14. The lack of cyclical maintenance is of no further relevance and the Tribunal should not take it into account in answering question 2. The Respondent is entitled under clause 3.1 to recover all of the indemnified costs reasonably and actually incurred. Whether this recovery is more or less financially beneficial to either the Applicants or the Respondent than other recoveries to which the Respondent might have been entitled under that clause had it carried out a different programme of maintenance and repair, has no bearing on the operation of the clause. Miss Dewar gave as an example a roof that should have been repaired by a landlord in year one, which was only repaired in year three. The only question for the Tribunal is what amount of costs of repairing the roof in year three is recoverable under the service charge. When interest rates, inflation, the cost of materials

and the value of the premises on which the roof sits, are all taken into account, the tenant of those premises might have gained or lost out financially as a result of his landlord's choice to do no works to the roof until year three. This can have no bearing on the proper construction of the terms of the lease. Neither can it have any bearing, in the absence of set off provisions, on the tenant's liability to pay all the sums reasonably incurred by the landlord for which that landlord is contractually entitled to be indemnified through the service charge.

15. Miss Dewar accepted that the Tribunal should follow the decision in *Continental Property Ventures Inc v White* [2006] 1 EGLR 85.

Respondent's case

16. Mr S Jourdan, of Counsel, represented the Respondent. He relied on *Continental Property Ventures Inc v White* and submitted that it is not relevant to the issues which the Tribunal has to determine, by what amount the cost of the works was increased by reason of the delay in carrying out the works.

17. Mr Jourdan's submissions can be summarised as follows:

1] He accepted that in general there is a legal presumption that it was not the intention of the parties to a contract that either party should be entitled to rely on his own breach in order to obtain a benefit under a contract. For example where there is a provision in a lease, which says that this lease will be void if works are not carried out, a party in breach cannot rely on his own default in order to treat the contract as at an end.

2] However, the way the service charge in the lease in this case works is not to confer a benefit on the landlord. There is no benefit in this case of the kind in *Alghussein Establishment v Eton College* or in any of the other authorities relied on by Miss Dewar.

3] The landlord does not benefit by an increase in the service charge costs due to its default. All the landlord can obtain is a partial recovery of the money that it has spent. Five of the seven flats in the building are let on long leases. Even if all the flats were let, the most that the landlord could recover is 100% of its costs.

4] Mr Jourdan illustrated his general submission that recovery of a landlord's costs under a lease such as that in the present case, does not constitute a benefit to the landlord. If the roof of a property is leaking and works to rectify this cost £1,000, but by the time the works are carried out they cost £10,000 because the problem is more extensive because of dry rot, this results in a financially neutral position for the landlord. If, for example, the landlord spends £10,000 on the works and gets back the same sum from the service charge, the position is financially neutral. However, on the same facts the tenants

could sue the landlord for £9,000, the sum equivalent to the increased service charges payable, as damages for breach of its covenant to repair and maintain the property. If this action is successful, the landlord is worse off and suffers a detriment as a result of the breach of covenant, not a benefit. If there was no damages claim the position of the landlord is still financially neutral as all it has recovered at best the costs incurred in carrying the works, and it has not obtained a benefit.

5] Mr Jourdan submitted that the landlord is not relying on its own wrong. What the landlord is doing is relying on its own rights under the Third Schedule to the lease. The landlord is seeking a contribution towards performing its covenants, not seeking a contribution towards breaching its covenants. This is a completely different situation from the facts of the cases referred to by Miss Dewar.

6] Mr Jourdan submitted that the approach proposed by the Applicants could have the result of over compensating the tenants. The Applicants' arguments do not put them in the same position, but potentially in a better position than they would be with a damages claim for breach of the landlord's repairing obligations. Mr Jourdan illustrated this argument in a number of ways. Where costs have increased because of failure to carry out cyclical external decorations and repairs, the tenants have not had to pay for such works through the service charge. For example, if the cost of cyclical repairs, if carried out, would have been £50,000, and the cost of one off major works is £100,000, the figure by which the one off major works has been increased due to failure to carry out the cyclical works, is £50,000. If Miss Dewar's argument is correct, the landlord would only be able to recover £50,000 under the lease. The tenants, not the landlord, would benefit from the works not being carried out sooner, as the tenants would not have had to contribute to the costs of cyclical maintenance as this did not take place. On Miss Dewar's case the tenants would not have to account for the possible financial benefit of not contributing to the costs of cyclical maintenance.

7] Mr Jourdan gave a further example to illustrate the Respondent's argument suppose that the costs of works rose from £10,000 to £100,000 over a period of years. If a lessee sold his lease at the end of the period, it is likely to be for substantially less than if the roof in the example had been properly repaired, because it will be anticipated by the purchaser that the works will take place soon and he will have to contribute to the costs. The outgoing lessee will sell the flat for a lower figure than if the works had been carried out earlier, and bring proceedings against the landlord for damages caused by the landlord's failure to carry out works. If Miss Dewar's argument is correct, the incoming tenant will obtain a windfall. He will benefit from the reduced purchase price and from the reduction for Neglect Costs in the tenants' contributions to the actual costs of the works.

9] The Applicant has conceded that there is no set off under the terms of the lease. This leaves the lessees free to claim damages for any loss suffered. The principle contended for by the Applicants would circumvent this.

The Applicant's response

18. Miss Dewar's response to Mr Jourdan's submissions can be summarised as follows:

1] It is no part of the case law that actual benefit is required. All that it required to engage the principle is that a party to a contract is trying to found a legal right or invoke a clause relying on its own breach of another clause in the contract.

2] The existence of a claim for damages by the lessees in respect of the landlord's breach of covenant is not relevant. The lessee in *Alghussein Establishment v Eton College* would also have had a claim for damages and this did not affect the principle.

3] If the Applicant's submissions are correct, there would be no double recovery by the lessees. In an action for breach of repairing covenants they could claim diminution in the value of the property and general damages for inconvenience, but could not claim damages in a sum equivalent to that part by which the service charge had increased as a result of the landlord's breach of covenant, because they would not have incurred such loss.

The Tribunal's decision

19. The Tribunal considers that the facts of this case are distinguishable from the facts in *Alghussein Establishment v Eton College*, and the other authorities referred to by Miss Dewar. As a result of the breaches of covenant in failing to carry out the its repair and maintenance obligations under the leases, the landlord has not incurred any benefit and the principle of construction submitted by Miss Dewar is not engaged. The position of the landlord is at best financially neutral, as illustrated by Mr Jourdan in his submissions. At worst the landlord is worse off as a result of the breaches.

20. The arguments put forward by Miss Dewar invite a construction of the terms of the lease, which prevent the landlord from recovering such part of the costs of the major works that she describes as the Neglect Costs. However, it is also part of the Applicants' case that, at the same time as inviting a construction of the lease with precludes the landlord from recovering the Neglect Costs, the tenants are under no obligation to give credit for any benefit they may have incurred as a result of the delay. Miss Dewar's approach avoids the necessity for the consideration of possible potential financial benefit to the tenants as a result of the landlord's breaches of covenant, which may be different

for each of the individual tenants, and could produce inequitable results.

21. For the above reasons the Tribunal concludes that it will not take into account any increase in the extent and cost of the major works at the premises caused by the failure of the landlord to carry out cyclical maintenance and repair at the premises pursuant to the terms of the leases. This determination is limited to the preliminary question and does not affect any other remedies which may be available to the tenants for breaches of the landlord's obligations under the lease. It does not affect the determination of whether the service charges have been reasonably incurred under the Landlord and Tenant Act 1985 (as amended).

22. The practical result of this decision is that neither party need call any further expert evidence at the forthcoming hearing.

CHAIRMAN: A Seifert

DATE: 5th July 2007

Members of the Leasehold Valuation Tribunal

Miss A Seifert FCI Arb
Mr M A Matthews FRICS
Mr L G Packer MA. MPhil