12240

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	(1) CHI/OOHY/LDC/2016/0056 & (2) CHI/OOHY/LSC/2016/0113
Property	:	Various Properties in Thomas Wyatt Road (Known as "Drews Park Estate) Devizes Wiltshire SN10 5FQ
Applicant	:	Aster Communities
Represented by	:	Simon Lane of Counsel
Respondent	:	Various Lessees (as listed in the Application)
Represented by	:	Drews Park Village Association
Type of Applications	:	(1) Landlord and Tenant Act 1985, section 20ZA (2)Landlord and Tenant Act 1985, section 27A
Tribunal Members	:	Judge M Davey Mr J Reichel, B.Sc. FRICS
Date and venue of Hearing	:	24 March 2017 Swindon Magistrates' Court
Date of Decision with reasons	:	08 May 2017

DECISIONS

The Section 20ZA application

The Tribunal grants dispensation to the Landlord, under section 20ZA of the Landlord and Tenant Act 1985, from the need to comply with the consultation requirements in section 20 of the said Act, in so far as the Landlord had failed to comply with those requirements.

The Section 27A application

The Tribunal determines that the service charge demand in respect of the major external decorative works in 2016-17 is the sum of £1,218.42 per Unit (as adjusted in line with the final account).

The contribution to the sinking fund for the year 2017-2018 shall be £554.47 for the single units and £1,108.94 for the double units.

The Section 20C application

The Tribunal makes an Order limited to the Applicant's costs incurred in connection with the section 20ZA application.

REASONS

The Applications

1. By an application ("the section 20ZA Application") dated 26 October 2016, Aster Communities ("the Landlord"), being the freeholder of the Drews Park Estate and the dwellings constructed thereon ("the Estate") 127 of which are held on 999 year leases, ("the Leases") applied to the First-tier Tribunal (Property Chamber) ("the Tribunal") for a determination under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act"). The Applicant seeks an order dispensing with some of the consultation requirements set out in section 20 of the 1985 Act and in the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations") in respect of a qualifying long term agreement ("QLTA") entered into in 2012 and extended for two years in 2016. The Respondents to the Application are the leaseholders of the 127 long leasehold properties listed in Appendix 2 to the Application. The Applicant is a Registered Provider of Social Housing. (The Estate also includes 21 social housing units that are not the subject of this, or the next mentioned, Applications).

2. By a separate application, of the same date ("the section 27A Application"), the Landlord applied to the Tribunal, under section 27A of the 1985 Act, for a determination (1) as to the payability and reasonableness of the service charge under the Leases of the long

leasehold dwellings for the service charge year 2016/2017 in so far as they relate to the cyclical repairs and decoration works programme carried out in 2016-17 and (2) in respect of sinking fund contributions, under the Leases held by the Respondents, for the year 2017/2018 and beyond.

3. By Directions dated 24 November 2016, Judge J Talbot directed that the two Applications were to be determined on the papers without an oral hearing unless any party objected. A number of Respondents did so object and, by Directions dated 21 December 2016, Judge E Morrison directed that the Applications were to be determined at an oral hearing

The Inspection

4. The Tribunal members, Judge Martin Davey (Chairman) and Mr Jan Reichel, inspected the Estate on the morning of 24 March 2017 in the presence of the parties to the applications, their officers and representatives. Following the inspection, the Tribunal conducted an oral hearing of the Applications in Swindon Magistrates Court on the afternoon of the same day.

5. The Estate is an old hospital site, constructed between 1849 and 1851 and closed as such in 1995, whose buildings, which are solid Bath stone walled, were converted to residential accommodation in or around 1999. The property is a Grade 2 listed building. The main buildings are two and three storeys. They are split into seven Courts plus a converted former gatehouse now known as Clock Tower Lodge. Some basement levels are available to two of these Courts. The units all have single glazed hardwood doors and windows.

The Leases

6. The leases of the long leasehold dwellings ("the Lease(s)") make provision for certain costs incurred by the Landlord to be charged to the long leaseholders.

7. There are two types of model Lease at Drews Park. Type 1 is that used for single unit dwellings and Type 2 that used for the double unit dwellings. The relevant provisions that are common to all Leases are as follows:

Definitions

Common Parts means the parts of the Buildings not included or to be included in the demise of any of the Units

Paragraph 1 of Part 1 of the First Schedule defines **the Unit** as including

2) all windows window frames doors door frames and all internal non-load-bearing walls

but excluding

all parts of the structure the roofs foundations of the Buildings the walls other than interior linings and surface finish which are load-bearing or enclose the Unit.

Particulars

The Service Charge: The Tenant's contribution to the Management Costs calculated and payable as set out in the Third Schedule

The Sinking Fund Contribution: the Tenant's contribution to recurrent costs and future renewals calculated and payable in accordance with Part IV of the Third Schedule.

Clause 5. Tenants covenants

5.1 to pay the Service Charge the Sinking Fund Contribution and the Interim Service Charge calculated and payable in accordance with the Third Schedule

5.6 to keep the Unit at all times in good and tenantable repair and decorative condition (but not to decorate any part of the exterior of the Unit including the exterior of external doors and windows of the Unit).....

Clause 6. Management Company Covenants

6.2 "to keep in good and substantial repair reinstate replace and renew the Common Parts the Estate Roads the Private Roads the Access roads the Visitors parking Areas and all Service Installations used in common by more than one Unit....."

6.3 "as often as reasonably necessary to decorate the exterior and the internal Common Parts previously decorated in a proper and workmanlike manner....."

The Third Schedule Part One (para (b))

provides that "'the Management Costs' in respect of each Accounting Year include without limitation the costs to the management company listed in part 2 and 3 of this schedule including interest paid on any money borrowed for that purpose."

8. The material difference between the two types of Lease lies in the Third Schedule Part 1 paragraph (c). In the Type 1 Lease, the service charge is defined as meaning 1/146th of the items listed in Part two of the

Third Schedule (estate costs) and 1/125th of the items listed in Part three of the Third Schedule (building costs). In the Type 2 Lease, these proportions are 2/146th and 2/125th respectively. The site had originally been planned for 125 leasehold units. However, this was changed to 127. So as not to over recover, the Applicant adjusts its service charges to 1/127th and 1/148th for the single units and 2/127th and 2/148th for the double units.

9. The expenses in Part Three of the Third Schedule include the expense of maintaining repairing decorating renewing amending cleaning repointing and painting the Common Parts.

The Law

10. The law is set out in the Annex to these reasons.

The Hearing

11. Mr Simon Lane of Counsel, who was instructed by Mr Clive Adams of Capsticks Solicitors, represented the Applicant at the hearing. The Drews Park Village Association ("DPVA"), which is the recognised residents association for Drews Park, was represented by its Chair, Mr Simon Evans. Mr Robin Mitchell and Mrs Genevieve Mitchell, who are leaseholders, appeared in person.

A. The section 20ZA Application.

The Applicant's Case

12. Section 20 of the 1985 Act provides that if the service charge contribution of any tenant in respect of costs incurred by the landlord under a qualifying long term agreement ("QLTA") would exceed £100 then the consultation requirements contained in the 2003 regulations must be complied with. If they are not, the contribution of tenants is limited to £100 unless, on application to the Tribunal under section 20ZA of the 1985 Act, the need to consult is dispensed with.

13. The consultation requirements differ according to whether or not public notice is required to be given of the relevant matters to which the QLTA relates. Where such notice is required, the relevant requirements are those specified in Schedule 2 to the 2003 Regulations and which are set out in the Annex to this decision.

14. In his witness statement and oral evidence, Mr Steve Greenhalgh, who is an Asset Surveyor employed by the Applicant, explained the nature and history of both a tendering process in respect of a QLTA entered into by the Applicant in 2012 and a major decorative works project carried out in 2016 at the Estate as follows.

15. On 7 October 2011, the Landlord served on the Respondents a notice of intention to enter into a QLTA for " painting, repairs and other associated works to the external fabric of the building" (i.e. Drews Park Estate). The notice stated: "This is to prevent deterioration in the building fabric." The notice invited written observations within the consultation period of 30 days and specified when the consultation period would end as 8 November 2011. The accompanying letter informed leaseholders that the works would be publicly advertised and therefore the leaseholders would not be able to make nominations of any interested contractors. For reasons unknown, this notice was subsequently withdrawn. On 12 October 2011 public notice was published in the Official Journal of the European Union ("OJEU").

16. On 2 December 2011 a letter (the Stage 1 consultation Notice) was sent to the Respondents, withdrawing the notice of 7 October 2011. The later letter informed the lessees of the Landlord's intention to enter into a QLTA for the cyclical external decorations and repairs contract at the Estate. The letter informed the Respondents that because the contract was being advertised within the European Union, residents were not invited to nominate a contractor whom the Association should approach to tender. However, by this time, as noted above, public notice had already being given - on 12 October 2011. It follows that because paragraph 1(2)(d) of Schedule 2 to the 2003 Regulations refers to the Stage 1 notice requiring a statement that public notice is *to be given* (emphasis supplied) the 2003 requirements had not been satisfied because that notice had already been given.

17. The tendering process was performed by Westworks, which is a consortium of Housing Associations and Local Authorities in the region, of which the Applicant is a member, that had collaborated to achieve best value through economies of scale on large contracts.

18. On 12 March 2012 the Applicant issued a Stage 2 consultation Notice to the Respondents. The letter was accompanied by a proposal which provided that it would be the Association's intention to enter into a framework agreement with the 13 parties named in the letter who would then be selected to perform individual activities based upon the results of a further mini competition. That proposal did not comply with paragraph 4 of Schedule 2 to the 2003 Regulations because it did not specify the unit costs, building costs, hourly rates or when such information would be available.

19. On 4 July 2012, contractors on the framework agreement were invited to tender for an internal and external decorating contract based on a set of archetypes. Tenders were sent out and returned on 23 July 2012. Six returns for the Wiltshire area were received, the cheapest being Bell Group UK for a price of £109,482.88, which was the tender accepted. The most expensive tender was for a price of £212,398.40. On 3 February 2016, the service contract between the Applicant and Bell Group was extended for a further two years in accordance with the contract.

20. On 25 April 2016, the Applicant served a notice under Schedule 3 of the 2003 regulations informing the Respondents that it was the Association's intention, to carry out works under an existing QLTA, namely necessary repair works to painted surfaces followed by cyclical redecoration, the work to be carried out by Bell Group under the QLTA. The overall cost of these works was assessed as being £196,000, making each leaseholder's likely individual contribution to be £1568.

21. It is the Applicant's case that it has sought to comply with the consultation requirements but it would appear that there were inadvertent errors, as outlined above, when so doing. The Applicant therefore seeks dispensation from the requirements insofar as the Applicant did not observe them.

22. Mr Lane, for the Applicant, drew the attention of the Tribunal to the decision of the Supreme Court in *Daejan Investments Ltd v Benson and Others* [2013] UKSC 14 ("*Daejan*"). He submitted that the Applicant's failure in the present case was what was described in *Daejan* as a "technical, minor or excusable oversight," as opposed to a "serious failing". Furthermore, he submitted that in any event the Applicant has undertaken a rigorous public tender and evaluation of the tenders received and it does not appear that any of the Respondents have identified any prejudice, which is necessary if dispensation is to be refused or granted on terms, caused by these technical failures. He therefore asked the Tribunal to grant dispensation.

The Respondents' case

23. DPVA made written and oral submissions to the Tribunal. The DPVA Committee, on behalf of its members, prepared the written submission. DPVA's Chair, Mr Simon Evans, presented its case at the hearing. Mr Evans stated that over 80% of leaseholders were members of DPVA. He said that all of the members to whom he had spoken supported the DPVA submission and 50 had written to say that they supported the case.

24. Neither the written nor oral submissions of the DPVA addressed the issue of whether or not the Tribunal should grant dispensation to the Applicant in respect of its admitted failure to comply completely with the consultation requirements. They focused instead on the Landlord's decision to enter into the QLTA, or at least extending that agreement, rather than putting individual contracts out to tender as and when the need for qualifying works arose. In so far as any allegation of prejudice to the leaseholders was concerned, the representations otherwise referred to the cost and quality of the 2016-17 external decorative project which was the subject of the section 27A application, as to which see below.

B. The Section 27A application

25. As noted above, on 25 April 2016, the Landlord sent notices under Schedule 3 of the Consultation Regulations to the Respondent leaseholders informing them that it was the Association's intention to carry out works under the existing QLTA referred to above, namely repair works to painted surfaces followed by cyclical redecoration. These works were carried out later that year, save for a small number of cases where access had yet to be obtained to 5 units in order to complete the project. The Landlord now seeks a determination that the costs were reasonably incurred and reasonable in amount and recoverable under the 2016-17 service charge.

26. The Landlord also asks the Tribunal to determine that proposed increases in the sinking fund contributions of the leaseholders for 2017-18 be determined as reasonable. Although the application relates to that year, the Landlord stated that if the sinking fund is to perform its function the Landlord intended to charge the contributions determined by the Tribunal as reasonable, for the foreseeable future.

27. The Respondents argue in response that the costs of the decorating works were not reasonably incurred or reasonable in amount and they also challenge the proposed new levels of sinking fund contributions.

The Applicant's case

28. In his evidence Mr Greenhalgh explained that a full exterior redecoration of the buildings on the Estate had taken place in 2009. However, because of outstanding decorative defects, apparently stemming from poor workmanship and materials, the Bell Group had carried out remedial decorative works in 2013. The cost of those works was £70,834.40 exclusive of VAT. Those costs were borne by the Applicant and not recharged through the Lease to the leaseholders.

29. In 2015 some leaseholders were complaining about paint starting to flake off their window frames and as a result the Applicant undertook an inspection in August 2015. Photographs taken at that time show degrading of the painted surfaces on the hardwood window frames, which were now showing signs of needing repairs.

30. On 16 January 2016 Rund Partnership was commissioned to carry out a stock condition survey. Rund carried out the survey and submitted a report to the Applicant dated 26 February 2016. As part of this process, on 9 February 2016, an Asset Surveyor from the Applicant inspected the Estate. That inspection revealed that some of the window frames, doors, fascias etc. were starting to deteriorate and would need to be repaired and redecorated.

31. Following the inspection on 9 February 2016, Akzo Nobel was asked to provide a site specification for Drews Park to be priced by the Bell Group Limited. The specification criteria were based on ensuring that the

decorated materials would be protected from the elements for up to 6 years. Akzo Nobel were chosen for this contract as their Dulux products were the product specified as part of the QLTA for the Wiltshire area, having proved to have been good quality products in the experience of the Applicants.

32. On 1 April 2016 Bell Group duly provided an estimate for the works amounting to £151,000 and this was specified in the Schedule 3 Notice sent to the Respondent leaseholders on 25 April 2016. The works began on 11 July 2016 and were expected to take three months. However, completion of the works was delayed by weather conditions and access difficulties with some residents. Throughout the contract there was regular monitoring of the quality of the work by a site supervisor from Bell Group and a dedicated contract manager from the Applicant, who had been liaising with the Bell Group from the outset of the QLTA. They held regular meetings and also had the benefit of reports by a representative of Akzo Nobel who, on 25 October 2016, had stated that the work was being carried out as per the specification. A report of 24 November 2016 mentioned the need for more preparation of painted surfaces. This was dealt with by the Bell Group's supervisor and the Applicant's contracts manager, to ensure that the work was being carried out properly and that any identified defects were dealt with.

33. A final account for the works was yet to be received because of the small number of outstanding works where access was required to the relevant units. At the hearing Mr Greenhalgh produced a spreadsheet of costs, which showed that the cost of the works to the sinking fund would be in the order of £160,563.48 including VAT. This is because it had been discovered that some of the costs in the original figure of £182,259.91, as specified in the spreadsheet appended to Mr Greenhalgh's supplementary witness statement, related to repair of windows. The Applicant accepted that despite having carried out those repairs, this was not its responsibility but that of the leaseholders. (The Lease places responsibility for repairs to doors and windows on the leaseholders, whilst the responsibility for their external decoration rests with the freeholder). The sums in question are £21,696.43 inclusive of VAT. The Applicant stated that it would pay these costs, which are not recoverable from the leaseholders. The problem is that a proper external decoration is often dependent on repairs to the window frames and doors.

34. With regard to the proposed sinking fund contributions, the Applicant explained that these were based upon the identified likely future costs of recurrent items contained in the Rund Report. Sums in the initial Report in respect of future roadway replacement were deleted from these costs at the request of residents, who considered that this requirement was unlikely to arise. The indicated costs are based on present day values with the Landlord applying regular updating indices to the costings to allow for inflation and changing construction trends.

35. The Applicant explained that the costs of the recent repair and redecoration project would exhaust the majority of the sinking fund that

has been built up in recent years. As a result the sinking fund as it stands will not be sufficient to finance repairs to the external fabric of the buildings that are also becoming necessary. In order to meet the anticipated costs of future works, to be financed from the sinking fund, the Applicant requests an annual contribution of £554.47 for the single units and £1108.94 for the double units. The Applicant acknowledges that these are significant sums but draws the Tribunal's attention to the fact that this is a grade 2 listed building, which is more expensive to maintain that a non-listed building. Furthermore, even if the works were to be paid for other than through the sinking fund, the leaseholders would still have to pay by way of a service charge when the works are carried out. The end result therefore is that leaseholders are still liable to pay for the works by the terms of their leases. The Applicant submits that funding these costs through the sinking fund is a better solution, thereby enabling leaseholders to spread these costs over a longer period rather than facing them in one lump payment at a time when such major works are carried out.

The Respondents' case

36. DPVA submits that the decorating contract "was not awarded in line with the normal section 20 consultation procedures, nor according to Aster's own proposed procedure." They also submit that in March 2016 the Applicant told them that only necessary works would be undertaken. DPVA argues therefore that because remedial painting had taken place in 2013 it was not necessary to repaint the whole building in 2016. That project, they submit, resulted in additional expenditure for no visible benefit.

37. DPVA pointed out that the painting contract is estimated to cost 47% more than the last time the building was decorated. Inflation since then has been less than 18%. They submit therefore that far from achieving economies of scale by using the QLTA procedure, the cost per property had risen substantially. They further state that residents have criticized the quality of the work. Many of those residents consider that the job could have been done at a cheaper price, possibly one half to two thirds of the contract price, had alternative quotes been obtained.

38. DPVA says that the Applicant has based its proposed sinking fund charge increases on the Rund survey, which the Respondents claim is an inconsistent survey. They say, for example, that it calls for expenditure on one off stonework repairs, on regular painting and on irregular work such as paving and tarmac. The previous Tribunal decision in 2015 contained a passage in which it was stated "that the level of monies held in the sinking fund was not excessive or disproportionate given the type of buildings being considered, the scale of the estate, its listed building status, and the matters contained within the lessor's covenants under the lease." That Tribunal had also commented critically on the Applicant's use of the sinking fund.

39. DPVA then produced a chart, which it had compiled, showing the balance of the sinking fund each year, between 2001 and 2017 and the expenditure out of the fund in each of those years. It calculated that to continue building up the fund at a similar rate in future would require contributions of £375 (for single units and double that for double units) from 2017-18. DPVA therefore asked the Tribunal to set the contributions at that rate. The DPVA also asked the Tribunal (1) to determine which items could be charged to the service charge and which to the sinking fund. (2) to increase the sinking charge fund charges at no more than the rate of inflation (3) to instruct the Applicant to supply the DPVA and all leaseholders with up to date information on the balance in the sinking fund and (4) to instruct the Applicant to consult with DPVA before any charges are made to the sinking fund.

40. Mr and Mrs Mitchell, of 9 Wyatt Court, made a number of submissions. They submitted that it was not necessary to include sums in the sinking fund to cater for roof repairs in future years. They considered that the roofs are in excellent condition and it was their understanding that the slates of all roofs had been replaced some 18 years previously. Mr & Mrs Mitchell suggested that, because the natural roof slates have a recognized lifespan of 60 years, it should not be necessary to include roof costs in the sinking fund, provide the slates are regularly checked and maintenance and repairs done when needed.

41. With regard to the Bath stone walls, Mr & Mrs Mitchell suggested that any structural damage was mostly surface erosion, the level of which varies from property to property and exposure to the weather. They disagreed with the recommendation in the Rund report that £88,000 be spent over the next five years on this item. They suggested that, as an alternative, £10,000 could be taken from the sinking fund to finance the treatment of a selected area of the building. They said that if this proved to be effective, further tranches could be taken from the fund in subsequent years, thereby enabling any necessary work to take place in stages over a period of time. However, DPVA and Mr & Mrs Mitchell also query whether it is necessary to include certain sums in the projected sinking fund costs for roofs and walls. DPVA submit that some of the stonework costs are for 'cosmetic improvements' that should not be in the long term plan. In similar vein Mr & Mrs Mitchell considered replacement of slipped and broken tiles to be minor matters, which should not be in the Sinking Fund contribution.

42. Mr & Mrs Mitchell also stated that it is essential for day-to-day maintenance and servicing of roads, roofs, pathways, lights etc. to be carried out promptly after being reported and not allowed to grow in scale until it becomes arguable that they should be remedied by using monies from the sinking fund. They considered that it was clearly sensible to have a healthy balance in the sinking fund, not just to cater for necessary outgoings but also to preserve the marketability of the units. However, they believe that steep increases in the sinking fund contributions would have the opposite effect and deter prospective buyers. Finally, they make

the points that many residents are elderly in their 70s and 80s and can ill afford steeply increased contributions to the sinking fund over the next 30 years, from which they will not get any benefits. They therefore supported an increase in sinking fund contributions to £350 for the single units and £700 pounds for the double units. They pointed out that even those sums would be a 40% increase on the present level of contributions.

43. Mr and Mrs Rowland of 8 Wyatt Court made a written submission identical to that of Mr and Mrs Mitchell. Mrs Christine O'Sullivan of 5 Clock Tower Lodge made a written submission proposing an increased contribution of £325 and £650 for the single and double units respectively. She also stated that she would like to arrange privately for the painting of her house. However, she also said that whilst she was satisfied with the painting of her property, she considered that from what she had seen the work across the Estate had overall been very shoddy.

Section 20C

44. The Respondents requested an order under section 20C of the 1985 Act preventing the Landlord from recovering its costs incurred in connection with the present proceedings by way of any future service charge demand.

45. The Applicant did not oppose such an order in so far as it relates to the costs of the section 20ZA application. However, it opposed such an order in respect of the costs relating to the section 27A Application which it says the Respondents chose to defend.

Discussion and determinations

General

46. It is clear from the evidence that the matter of service charge and sinking fund contributions payable under their leases by the long leaseholders at Drews Park has been a source of contention for some years. For the first three years of the Leases the sinking fund contribution was capped at £125 per annum for the Type 1 Leases and £200 per annum for the Type 2 Leases.

47. In 2009, at a time when the sinking fund stood at £76,425, the Landlord Association (then called Sarsen) applied to the [leasehold valuation] tribunal asking for a determination that the sinking fund contribution at that time be raised to £461. (It had initially asked for £668 or £584). The Applicant requested the increase to enable it to fully fund a proposed major decorative works project later that year. On 22 May 2009 the Tribunal refused to endorse the requested increase. (CHI/46UB/LSC/2008/0128). It said that the landlord should not fund current year's expenditure by way of sinking fund charges but by way of an interim service charge. The Tribunal agreed with the suggestion of the residents' association (DPVA) that the contribution be raised to £250. It said that if the painting works were spread over 2 years the new level of contributions would enable the costs to be met from the sinking fund. The

contributions could then continue on an annual basis to enable the fund to be built up again. The Tribunal was very critical of the then landlord and said that it had acted prematurely at a time when it had no proper estimates for the proposed work and had only just commissioned a stock condition survey from a company, Rand. (The landlord had obtained conflicting informal estimates from a builder and from Rand and the leaseholders had obtained an estimate from another contractor).

48. It is however clear, from the evidence of the parties in the present case that the decorating works went ahead in 2009-10. The works, carried out by a firm called Steele Davis, cost £116,301.28. They were clearly not a great success, because in 2013 remedial decorative works to a number of properties were commissioned from a new contractor, Bell Group, at a cost of £70,834.10 plus VAT, these costs being borne by the Landlord, rather than from the sinking fund or the residents, through the service charge.

49. In 2015 a further application was made to (what by now was) the First-tier Tribunal. (CHI/OOHY/LSC/2015/0006). The application was made by the five leaseholders under the Type 2 Leases, who challenged the level of sinking fund charges. The Respondent to the application was Aster Communities. The Tribunal held that as a matter of construction of the Lease the sinking fund contributions should be in the same proportions as the service charge contributions. Thus the leaseholders of the bigger units were required to pay a "double charge". (The Tribunal noted that the 2009 Tribunal only saw a Lease of a single unit and was not aware of the five type 2 Leases, which provided for double charges in the case of those units).

50. The Tribunal also recorded that on inspection they were surprised to learn that the buildings were scheduled for redecoration in 2016 under a 6 year cycle, given that they appeared to be in good decorative order. The Landlord's representative agreed and said that there was some question as to whether redecoration would be necessary in 2016 and that it would depend on an updating stock condition survey which was to be commissioned (i.e. the Rund survey).

51. The Tribunal concluded that the respondent leaseholders urgently needed to assess whether it was time to consider seeking an increased contribution to the sinking fund if future works were to be properly financed.

52. As is clear from the evidence, by 2011 the Applicant in the present case decided that rather than going straight to firms through an open market tendering process for decorating works at Drews Park, as it had done in 2009, it would seek to enter into a long term framework agreement – a QLTA - for external decorative works at its properties, including Drews Park. It did so through a consortium of Housing Associations, Local Authorities and Charities, based in the South and South West of England and Wales, known as "Westworks". "Westworks Procurement Limited" carried out the tender for the external decoration framework agreement

under the EU Procurement laws for open tendering. (The relevant regulations, which governed this process at the time, were the Public Contracts Regulations 2006). Where such a process is used, the 2003 Consultation regulations also apply where the agreement is a QLTA, but in this case the relevant schedule is Schedule 3. This process of framework agreements is not unusual for public bodies and housing associations.

53. As noted above the Schedule 3 procedure does not give the leaseholders who are consulted the opportunity to nominate a contracting party under the framework agreement. This is because the aim of the EU Procurement process is to benefit public sector bodies awarding contracts by improving efficiency and effectiveness and by allowing them to take advantage of modern procurement techniques in order to achieve value for money. By necessary implication the benefits would in principle accrue also to leaseholders where works are carried out for which they are obliged to pay. Hence, the absence of any nomination rights for the leaseholders. Despite this aim, the leaseholders argue that no such benefits have materialized for residents, who are faced with higher bills.

54. In the present case the Applicant concedes that it failed to comply fully with the requirements of schedule 3 first, because the public procurement notice was published before rather than after the schedule 3 Stage 1 notice was sent to leaseholders and second, because the schedule 3 Stage 2 notice, which informed leaseholders of the 13 parties to the proposed framework agreement, did not comply with paragraph 4 of Schedule 2 to the 2003 Regulations because it did not specify the unit costs, building costs, hourly rates or when such information would be available.

The Section 20ZA Application

55. However the Applicant seeks dispensation from this non-compliance under section 20ZA of the 1985 Act. The proper approach to the exercise of the Tribunal's discretion under section 20ZA of the 1985 Act was set out in the decision of the Supreme Court in *Daejan Investments Ltd. V Benson* [2013] UKSC 14 where Lord Neuberger stated that

> 'Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the [Tribunal] should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.

56. The Tribunal agrees with the Applicant that the respondent leaseholders have failed to demonstrate how *the Landlord's failure to comply with the two elements of the consultation requirements outlined above* resulted in them paying for inappropriate works or paying more than would be appropriate. It is important to remember that in the present case the Landlord's failure relates to the Schedule 2 process whereby as part of a Consortium it entered into a framework agreement with the 13 successful tenderers. It does **not** relate to the Schedule 3 consultation about the decorating contract at Drews Park awarded under that framework

agreement 5 years later. Even had the Landlord complied fully with Schedule 2 in 2011 the same 13 tenderers (6 of whom were for the Wiltshire contract) would have been selected and there is no evidence that the 2016 decorating project would have been cheaper or better value.

57. The DPVA opposition to the section 20ZA application focused more on the Landlord's decision to go down the framework agreement route. However, that decision was one for the Landlord to make, for the reasons explained by Mr Greenhalgh in his evidence. DPVA suggests that there should have been a mini tender in 2016. This is not surprising because in the Landlord's schedule 3 Stage 2 notice of 2 March 2012 there is a paragraph, which states

"As previously stated, services will only be carried out in your home if and when required. If this does happen then the works to be performed will be the subject of a further mini tender competition that will be held if and when required. Because the services to be performed are not known today, it is not possible to state at this time what level of financial contribution will be needed. You will be notified of any financial contribution needed after the further mini competition mentioned above, but in advance of the services being performed. It should be noted that a financial contribution will only be required if work is carried out your building."

58. Understandably residents interpreted this passage as meaning that the mini competition would take place shortly before the works commenced and not four years earlier, as was in fact the case. The Bell Group tender, which was accepted after the 2012 mini tendering exercise, was for £109,482.88. As we have seen the painting works at Drews Park did not happen until 2016-17 by which time the contract price had risen to around £196,000, which was obviously a matter of concern to residents.

59. However, when a framework agreement is in place, the consultation requirements in Schedule 3 of the 2003 regulations simply require the landlord to give leaseholders notification of its intention to carry out qualifying works under that agreement and invite observations, which Aster did in its notice of 25 April 2016. Thus this notice did comply with the statutory requirements. The Tribunal accordingly grants unconditional dispensation with regard to the Schedule 2 failures that had occurred.

The Section 27A Application

60. The Respondents question whether a full external decorating project was required in 2016, given the remedial works carried out in 2013 and they suggest that the whole building was painted for no visible benefit. The Applicant says that the Rund Survey Report of 26 January 2016 as supplemented by Revision A dated 10 March 2016 recommended redecoration of the whole (at an indicative cost of £147,865 plus VAT) and therefore the decorative works were reasonably incurred. It also says that the Bell Group's tender in 2012 was the most competitive, that the works have been carried out satisfactorily to the required specification and

therefore the costs were reasonable in amount. As noted above the works eventually cost leaseholders £160,563.48 including VAT, subject to any final account adjustment. The Applicant submits that the Respondents have not produced any contradictory evidence or provided any alternative quotes as evidence that the costs were unreasonably incurred or unreasonable in amount.

61. The Tribunal believes that a 6 yearly decorating cycle is reasonable. The last full decoration was in 2009-10 so it was reasonable, in the normal course of events, to expect a redecoration in 2016. The Applicant submitted in evidence a series of photographs taken in August 2015 and in 2016. These photographs indicate the need for repairs and a repainting of the buildings. It is true that parts of the Estate had been the subject of a remedial repairs and decoration programme in 2013 (the cost of which was borne by the Applicant). However, the Tribunal agrees with the Applicant that it would have been uneconomical for those parts to have been excluded from the 2016 decoration works because they would then need repainting in the middle of the next cycle. In a property of this kind cyclical redecoration is essential maintenance.

62. The Buildings were painted in 2016 to a specification provided by the paint manufacturers who inspected the work from time to time to ensure that the work was being carried out properly. The painting contract had been awarded to Bell Group in 2012 after a competitive tendering exercise and that firm had done work on other properties within the Applicant's ownership to a satisfactory standard before it was used for the 2016 works at Drews Park. When the Tribunal inspected the Estate on the day of the hearing the standard of external décor (save in a few cases where remedial work is required) appeared to be good.

63. DPVA submitted that residents, many of whom had commented that they could get a better painting job on their house at a lower price if they contracted the work privately, have criticized the quality of the work. DPVA said that they had not obtained alternative quotes but discussions with professional painters indicate that the building and ancillary structures could have been painted to the same or a higher standard for between a half and two thirds at the amount incurred by the Applicant. They submit that an estimated 47% increase in painting costs between 2009 and 2016 when compared with inflation of 18% over that period indicates that the 2016 costs are unreasonable.

64. It is of course impossible to say whether the work could have been done cheaper and to the same or a better standard by another contractor in the absence of alternative quotes based on the same specifications as provided to the Bell Group. In the absence of such evidence the Tribunal is unable to find that the costs incurred were unreasonable. It must be remembered that the job done in 2009 was poor and might have cost more had it been done to a proper standard and with better materials. Furthermore general inflation is not necessarily a reliable guide to building/decorating costs.

65. The Tribunal therefore determines that the costs to be charged to the

leaseholders, as set out in the spread sheet provided by Mr Greenhalgh to the parties and the Tribunal at the start of the hearing, are reasonable in amount and accordingly payable in so far as they are demanded in accordance with the terms of the Lease and the law. These sums are £160,831.34 (being £1,218.42 per unit) subject to any final account adjustment.

Sinking fund contributions

66. The Lease

Part Four of the Third Schedule to the Lease provides (so far as relevant) that

"In addition and together with the Service Charge the Tenant shall pay to the Management Company a reasonable provision..... towards the Management Company's anticipated expenditure during the Term in respect of

1.1 periodically recurring items whether recurring at regular or irregular intervals and
1.2 such of the Landlord's obligations set out in clause 6 as relate to the renewal or replacement of the items referred to there."

67. To be contrasted with sinking fund expenditure is the Service Charge expenditure, which is governed by the Third Schedule of the Lease. The items covered by the Service charge are specified in Parts Two and Three of the Third Schedule and include "2. The expense of maintaining repairing decorating renewing amending cleaning repointing and painting the Common Parts".

68. It is tolerably clear therefore that in so far as 'an item' occurs periodically at regular or irregular intervals or in so far as the Landlord's obligations to repair etc. in Clauses 6.2 and 6.3 relate to 'renewal or replacement' of a relevant 'item' the expense of dealing with that item fall under the Sinking Fund. Otherwise costs incurred in carrying out the obligations in Clauses 6.2 and 6.3 fall within the Service Charge.

69. These provisions are not ideally drafted and as can be seen from the submissions one might envisage circumstances in which it is necessary to determine whether an expense falls within the Service Charge or the Sinking Fund contribution. In the present case, *the level* of the proposed new sinking fund contribution has proved to be highly contentious. In 2009 the Tribunal rejected a proposed contribution of £461 on the basis that it had not been market tested. In its application to the Tribunal dated 26 October 2016 the Applicant proposed the sums of £742.63 and £1485.26 for single and double units respectively. However, in its statement of case dated 18 January 2017 these sums had been reduced to

£554.47 and £1,108.94, respectively.

70. The original sums claimed were based on the Applicant's 30 year planned maintenance projection. That projection was based on the figures in the Rund Report of 2016. This showed the costs (at 2016 prices) of maintenance items, which, it is alleged, are under the terms of the Lease, payable from the sinking fund to be £1,663,179.56 (excluding hard landscaping) and £1,480,890 in respect of hard landscaping over the period 2016 to 2045. From these figures the Applicant derived the sums of £419.99 per annum per dwelling (based on 127 dwellings plus 5 notional units) plus an average hard landscaping cost of £322.63 per annum per dwelling (based on an estate of 148 dwellings plus 5 notional units). It should be noted that the hard landscaping costs relate to the entire estate. The total sinking fund sums were therefore £742.62, with the double units paying double.

71. The reasoning for the reduced figures in the statement of case is set out in paragraph 30 of that statement. The Applicant removed from the projection, the hard landscaping costs of £895,570.00 for the period 2031 to 2035 and replaced it with the "routine annual maintenance figure for the walls outbuildings etc.". This had the effect of reducing that figure to £31,965. That means that the total 30 year annual hard landscaping figure would be reduced from £1,480,890 to £617,285. The annual sum per unit for hard landscaping then falls from £322.63 to £134.48 per annum. When added to the non-hard landscaping sum of £419.99 this produces a total of £554.47 for the single units and £1,108.94 for the double units. This exercise thus removed the costs of replacing the roadway in 2030 to 2035.

72. The Applicant concedes that its projected figures are not market tested with regard to works other than decorating costs, but says the allowances are obtained from the report of expert building surveyors utilizing "present day values". The figures also take into account the actual 2016 decoration costs, which the Applicant says was market tested.

73. DPVA by contrast suggests sinking fund contributions of £375 and £750 respectively. DPVA's methodology was to take what it said was the Rand Survey figure of £1,257,916 for 30 years maintenance at 2009 prices and increase that figure by inflation in the period between January 2009 and February 2016 (17.6%). That produces a figure of £1,479,309 for 2016. DPVA says that this equates to £375 (£750) per dwelling.

74. The contrasting projections are therefore £2,280,264 (Aster) (£1,633,179.56 maintenance excluding landscaping plus a reduced landscaping figure of £617,085) and £1,479,309 (DPVA). Insofar as the DPVA relies on the Rand Report as the basis on which to calculate levels of future contributions the Applicant says that in the light of experience – for example the actual 2016 decorating costs - the figures in that report are no longer current or reliable and that the projection in the later Rund Report more accurately reflects likely costs. The Applicant says that the sums suggested by DPVA are arbitrary and insufficient and not based on

any expert evidence.

75. The Tribunal agrees with the Applicant that it is not appropriate to take a figure, which, it was told by the Respondents, was contained in an earlier survey (Rand) that was produced in 2009 and has not been placed in evidence. The 2016 Rund survey is more likely to be an accurate guide to likely future costs. There is no other current expert evidence to contradict the findings in that Report. The Tribunal acknowledges that the proposed sinking fund contributions involve a steep increase but it would appear that the existing contributions, if continued, are insufficient to fund long term items of maintenance over the coming 30 years and. Uplift for inflation would not solve the problem. Thus the Tribunal accepts that the Applicant has followed good management practice in obtaining an up to date stock condition survey and a projection of future income streams on which to base their sinking fund charge calculations.

76. However, DPVA and Mr & Mrs Mitchell also query whether it is necessary to include certain sums in the projected sinking fund costs for roofs and walls. DPVA submit that some of the stonework costs are for 'cosmetic improvements' that should not be in the long term plan. It also criticizes the Rund survey as inconsistent, calling for expenditure on one-off stone work repairs, on regular painting and on irregular work such as paving and tarmac. In similar vein Mr & Mrs Mitchell and Mr & Mrs Rowland considered replacement of slipped and broken tiles to be minor matters, which should not be in the Sinking Fund contribution. They also proposed removing roof works from the projection and that a more limited solution to the problem of degrading Bath stone work be adopted. The projected cost of what the Applicant submits are current necessary repairs to the walls is £88,000.

77. The Tribunal agrees that the purpose of the sinking fund is to spread the cost of future major and cyclical works over a sufficiently long period of time. The Tribunal also finds that the 30 years adopted in the Rund Survey is reasonable given the nature of the building at the site. The Tribunal agrees with the Respondents that day to day maintenance is a matter for the service charge rather than the sinking fund. However, the matter of whether the cost of the decoration/repair/maintenance works identified in the Rund Report as being necessary at the outset of the 30 year cycle should be included in the sinking fund projection or in the service charge raises a difficult issue. They could be seen as one off costs or they could be seen as being necessary in order to enable the building to be kept in a state of good repair over the 30-year cycle and therefore as part of that cycle. These costs are considerable and if the works were to be carried out imminently would result in either an immediate charge to the sinking fund of around £120,000 or a service charge demand of the present leaseholders for the same amount. The Applicant says that it is more equitable to spread these costs over a period of time by charging them to the sinking fund, rather than imposing them on the owners for the time being.

78. The Tribunal agrees that the Applicant's proposal is a preferable solution.

It is always possible for leaseholders to seek a review of the sinking fund contributions in the light of future developments and it is also possible for them to challenge any works that are carried out, including costs debited to the sinking fund, if they consider the works in question to be unreasonably incurred or unreasonably expensive. The Tribunal therefore determines the sinking fund contribution for the year 2017-18 to be £554.47 for the single units and £1,108.94 for the double units.

79. The DPVA also asked the Tribunal to instruct the Applicant to supply the DPVA and all leaseholders with up to date information on the balance in the sinking fund and to instruct the Applicant to consult with DPVA before any charges are made to the sinking fund. The Tribunal agrees with Mr Lane's submission for the Applicant that the Tribunal does not have jurisdiction to determine these matters. This is because section 42 of the Landlord and Tenant Act 1987 implies a trust in respect of this fund and the Applicant has obligations which are enforceable in accordance with ordinary trust principles.

The section 20C application.

80. The Respondent leaseholders seek an order preventing the Applicant Landlord from recovering its costs incurred in connection with these Tribunal proceedings by way of a future service charge demand. The Landlord does not oppose that request in respect of the section 20ZA application but otherwise resists an order. Section 20C confers a wide discretion to make such order on the application as the Tribunal considers just and equitable in the circumstances.

81. In the present case the Landlord sought a determination with regard to the service charge for 2016 and the sinking fund contribution in 2017-18. It submits that if the leaseholders unsuccessfully defend that application the Tribunal should not grant a section 20C order in their favour. Judge Rich QC said in *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005: "so far as an unsuccessful tenant is concerned it requires some unusual circumstances to justify an order under section 20C in his favour."

82. In the present case the Applicant has succeeded on the section 27A application and there are no exceptional circumstances that justify a section 20C order in respect of the costs in respect of that Application. The Tribunal will therefore make an Order limited to the costs incurred by the Applicant Landlord in connection with the section 20ZA application.

83. However, whether the Landlord will be able to recover those costs by way of a future service charge demand will depend on the construction of the Lease as to whether this is permitted. If such a demand is made it will be open to any leaseholder to challenge its payability and or reasonableness by an application to the Tribunal under section 27A.

RIGHTS OF APPEAL

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

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

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

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

Martin Davey
Chairman of the Tribunal
08 May 2017

Annex: The Law

Section 18(1) of the 1985 Act defines a "service charge" as:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent:-

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs."

Section 19(1) of the 1985 Act, provides that:

"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".

"Relevant costs" are defined for these purposes by **section 18(2)** of the 1985 Act as "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

Section 20 provides that

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

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

(2) In this section "relevant contribution", in relation to a tenant and any

works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

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

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

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

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

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

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

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

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

The appropriate amount is set at £250. Thus if the landlord fails to comply with the consultation requirements the amount that a tenant is liable to pay is limited to £250 unless on application to the Tribunal under section 20ZA the need to consult is dispensed with.

Section 20ZA (2) defines "qualifying works" as "works to a building or any other premises."

Section 20ZA(1) permits the Tribunal to dispense with all or any of the consultation requirements in relation to any qualifying works where it is satisfied that it is reasonable to dispense with the requirements.

Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations")).

Schedule 2 of the Regulations provides that

"1 (1) The landlord shall give notice in writing of his intention to enter into the agreement

(a) to each tenant; and

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

(2) The notice shall—

(a) describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected;

(b) state the landlord's reasons for considering it necessary to enter into the agreement;

(c) where are the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works;

(d) state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom you should try to obtain an estimate for the relevant matters is that public notice of the relevant matters is to be given;

(e) invite the making, in writing, of observations in relation to the relevant matters; and

(f) 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.

Inspection of description of relevant matters

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

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

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

(2) If facilities to enable copies to be taken are not made available at the times

at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

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

Preparation of landlord's proposal

4.—(1) The landlord shall prepare, in accordance with the following provisions of this paragraph, a proposal in respect of the proposed agreement.

(2) The proposal shall contain a statement—

(a) of the name and address of every party to the proposed agreement (other than the landlord); and

(b) of any connection (apart from the proposed agreement) between the landlord and any other party.

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

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

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

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

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

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

(4) Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the relevant contribution to be incurred by the tenant attributable to the relevant matters to which the proposed agreement relates, the proposal shall contain a statement of that contribution.

(5) Where—

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

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

the proposal shall contain a statement of the amount of that estimated expenditure.

(6) Where—

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

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

the proposal shall contain a statement of that cost or rate.

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

(8) Where the relevant matters comprise or include the proposed appointment by the landlord of an agent to discharge any of the landlord's obligations to the tenants which relate to the management by him of premises to which the agreement relates, each proposal shall contain a statement—

(a) that the person whose appointment is proposed—

(i) is or, as the case may be, is not, a member of a professional body or trade association; and

(ii) subscribes or, as the case may be, does not subscribe, to any code of practice or voluntary accreditation scheme relevant to the functions of managing agents; and

(b) if the person is a member of a professional body trade association, of the name of the body or association.

(9) Each proposal shall contain a statement of the intended duration of the proposed agreement.

(10) Where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, the proposal shall contain a statement summarizing the observations out the landlord's response to them.

Notification of landlord's proposal

5.—(1) The landlord shall give notice in writing of the proposal prepared under paragraph 4—

(a) to each tenant; and

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

(2) The notice shall—

(a) be accompanied by a copy of the proposal or specify the place and hours at which the proposal may be inspected;

(b) invite the making, in writing, of observations in relation to the proposal; and

(c) specify—

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

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

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

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

Duty to have regard to observations in relation to proposal

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

Landlord's response to observations

7. Where the landlord receives observations to which (in accordance with paragraph 6) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations.

Supplementary information

8. Where a proposal prepared under paragraph 4 contains such a statement as is mentioned in sub-paragraph (7) of that paragraph, the landlord shall, within 21 days of receiving sufficient information to enable him to estimate the amount, cost or rate referred to in sub-paragraph (4), (5) or (6) of that paragraph, give notice in writing of the estimated amount, cost or rate (as the case may be)—

(a) to each tenant; and

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

Section 20C(1) of the Landlord and Tenant Act 1985 provides in so far as relevant 'that a tenant may make an application for an order that all or any of the costs incurred by the landlord in connection with proceedings before a court or tribunal.....are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."

Section 20C(3) provides that "The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."