11958

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BH/LSC/2016/0134**
Property	:	**104 Old Church Road, London E4 8BX**
Applicants	:	**Mr Gary Tonner and the other applicants**
Representative	:	**Aschlea Services**
Respondent	:	**London Borough of Walthamstow Forest**
Representative	:	**Head of Legal Services**
Type of application	:	**Liability to pay service charges**
Tribunal members	:	**Angus Andrew** **Hugh Geddes JP RIBA MRTPI** **Owen N Miller BSc**
Date and Venue of hearing	:	**14, 15 and 16 November 2016** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**25 January 2017**

DECISIONS

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Summary of conclusions and decisions

1. We set out below a summary of our conclusions and decisions.

2. A service charge of £9,906 was payable by Mr Tonner in respect of the cost of the 2004/05 refurbishment works:

   (1) The total cost of £131,397 was apportioned in accordance with the terms of the lease

   (2) The total costs were incurred within 18 months of the section 20B notice dated 12 September 2002.

3. In the absence of dispensation the Council may not recover more than £100 from each of the applicants in any service charge year under any one of the Breyer, Apollo, Aston and Osborne QLTAs:

   (1) The Council served the intention and proposal notices on the applicants

   (2) The intention and proposal notices did not allow 30 days for observations

   (3) The Council had regard to observations made by tenants

   (4) The Council responded to observations made by tenants

   (5) The Council prepared a proposal in respect of each QLTA

   (6) The proposal notice in respect of the Breyer and Apollo QLTAs included an "attached" summary of the proposal.

   (7) The proposal notice in respect of the Aston and Osborne QLTAs did not disclose a connection between the Council and Aston

   (8) The Council was not required in the Aston and Osborne proposal notice to disclose details of Aston's subcontractors

   (9) Substantial compliance with the consultation requirements does not negate the need for dispensation.

4. The Council responded to observations made in response to the door entry system upgrade and the fire risk assessment intention notices.

5. If the Council obtains dispensation in respect of the QLTAs it may recover the costs incurred in the door entry system upgrade, the fire risk assessment work and the communal electricity work:

    (1) The three section 20B(2) notices complied with the provisions of that section

    (2) All the costs were incurred within 18 months of the three section 20B (2) notices.

6. We extend time for applying for permission to appeal this decision.

7. We postpone the 20C application until the hearing of the dispensation application.

Definitions

8. In this decision the following terms have the following meanings:-

    "The other applicants" means: Mr and Mrs D Babb, Mr A Quereshi, Mr D Wilkin, Mr M Perez-Tomas, Mr P Kersey, Mr P Davis & Ms N Crocker, Mr G Poole, Mr & Mrs E Boosey and Mr J Belne

    "The 1985 Act" means the Landlord and Tenant Act 1985

    "The 2003 Regulations" means The Service Charges Consultation Requirements (England) Regulations 2003

    "Breyer" means Breyer Group PLC

    "Appolo" means Appolo in Partnership Limited

    "Aston" means Aston Heating Limited

    "Osborne" means Jeffrey Osborne Limited

    "QLTA" means a Qualifying Long Term Agreement

    "The Council" means The Mayor and Burgesses of the London Borough of Waltham Forest

    "Page no" refers to a page in the hearing bundles

    "The Council" includes also where appropriate Ascham Homes.

The application and directions

9. On 10 March 2016 Mr Tonner applied to the tribunal for a determination of his liability to pay the following service charges:

   (1) £9,906.46 in respect of refurbishment works demanded during the service charge year 2004/05.

   (2) A service charge in respect of the cost of a door entry system upgrade undertaken by Breyer.

   (3) A service charge in respect of the cost of fire risk assessment work undertaken by Breyer.

   (4) A service charge in respect of the cost of communal electricity works undertaken by Aston.

10. On 27 April 2016 Judge Dowell joined the other applicants to Mr Tonner's application.

11. On 2 May 2016 the tribunal issued directions and identified the following issues:

    (1) Whether the costs incurred in the refurbishment works were correctly apportioned in accordance with the terms of the leases

    (2) Whether the door entry system upgrade was carried out under a QLTA and if so whether the Council complied with statutory consultation requirements

    (3) Whether the communal electricity works were carried out under a QLTA and if so, whether the Council complied with statutory consultation requirements

    (4) Whether the Council complied with the requirements of section 20B of the 1985 Act when demanding a service charge in respect of the cost of the fire risk assessment works.

12. On 29 June 2016 the Council applied to the tribunal under section 20ZA of the 1985 Act for dispensation from the consultation requirements in respect of the QLTAs made between it and Breyer, Appolo, Aston and Osborne.

13. The application named all the residential long leaseholders in the London Borough of Waltham Forest as respondents. The application included also a request to stay the application pending this decision. On 5 July 2016 Judge Powell stayed the dispensation application *"until six weeks after*

issue of a decision in the current case LSC/2016/0134, unless the borough applies to lift the stay earlier". There has been no such application.

14. A case management hearing was held on 15 July 2016, at which further directions were given to bring Mr Tonner's application to a hearing.

Hearing and procedural issues

15. We heard Mr Tonner's application on 14, 15 and 16 November 2016. The applicants were represented by Anita Murphie of Aschlea Services, a property management company. The Council was represented by Andrew Arden QC, Andrew Dymond and Stephanie Smith, all of whom are barristers.

16. In preparing for the hearing it became apparent that each of the other applicants had submitted their own statements of case. Although most if not all of the other applicants supported Mr Tonner's challenge to the Breyer, Appolo, Aston and Osborne QLTAs they also disputed their liability to pay service charges in respect of a large number of other major works projects that were not identified in either Mr Tonner's application or the tribunal directions of 2 May 2016. At the start of the hearing we informed the parties that we were not prepared to consider the other applicants' challenges to the other major works projects for each of two reasons. Firstly because the other applicants had been joined to Mr Tonner's application. In such circumstances they cannot challenge their liability to pay other service charges without the tribunal's permission and such permissions had neither been sought nor given. Secondly because the number of major works projects challenged by the other applicants was so extensive that it would have been impossible to deal with the case within the three days listed for the hearing.

17. At the hearing both Mrs Murphie and Mr Arden accepted our ruling without any evident objection. However in her closing submissions Mrs Murphie indicated that the other applicants felt that they had been unfairly excluded from challenging the other major works projects. Consequently we made it clear to the parties that the other applicants are not prevented from challenging their liability to pay a service charge in respect of the other major works project save only in so far as any challenge relates to the Breyer, Appolo, Aston and Osborne QLTAs. If they wish to challenge their liability in respect of other major works projects they should simply make their own applications under section 27A of the 1985 Act.

18. During the hearing and with Mrs Murphie's permission we permitted the Council to introduce a small bundle of documents relating to the consultation process in respect of the four QLTAs. We did so because the Council had not understood that a number of the other applicants asserted that the intention and proposal notices had not been served on them and it was reasonable to give the Council an opportunity to respond to that challenge.

Background

19. In 2003 the Council established Ascham Homes and delegated its management responsibilities to that company. Ascham Homes was an Arms Length Management Organisation. Mrs Murphie had been employed by the Council for many years and she was the home ownership manager before being transferred to Ascham Homes where she was head of right to buy and leasehold services. She was made redundant in 2010. She now trades under the name of Aschlea Services. In that capacity she represents the applicants in challenging their liability to pay service charges in respect of the four disputed major works projects. As will be seen the challenges are all of a technical nature and relate to the processes and procedures adopted by Ascham Homes that in large measure were put in place when Mrs Murphie herself was in a senior management position. The conflict is such that had Mrs Murphie been bound by any recognised code of conduct she would have had difficulty in accepting the applicants' instructions.

20. In June 2015, following a public consultation exercise, Ascham Homes was disbanded and the Council took the management functions in-house. It seems that either Ascham Homes' records were in a state of disarray or the Council did not make appropriate arrangements to preserve those records. It is not entirely clear when Mr Tonner first instructed Mrs Murphie. Nevertheless it is clear that having received instructions Mrs Murphie requested Ascham Homes and subsequently the Council to provide copies of the notices and other documents relating to the Breyer, Appolo, Aston and Osborne QLTAs and the four major works projects. These requests included a number of subject access requests under the Data Protection Act 1998. Mrs Murphie was not satisfied with the responses that she received. She subsequently made a formal complaint to the Council on behalf of Mr Tonner. Although it seems that Mr Tonner's complaint was partially upheld he was not satisfied with the response and consequently he made his application to the tribunal.

21. Mr Ozer is the Council's current Home Ownership Manager. He gave evidence on behalf of the Council. He explained the difficulties experienced by the Council in giving disclosure of all the relevant documents. Those difficulties are perhaps best summarised in the tribunal's directions of 15 July 2016: *"the respondent has been unable to give full disclosure because a number of important documents are on a defunct server of the old arms length management organisation, the management of the respondent's housing stock having been taken in-house"*.

22. With the agreement of Mr Dymond the judge *"allowed the respondent a further 8 weeks to locate the missing documents after which time it will have to rely on such documents as may then be available"*.

23. It is apparent that by the hearing date the Council had been able to recover most of the generic documents and in particular the consultation notices

and the section 20B notices that were the main subject of the dispute although a number of flat specific documents were still missing.

Statutory framework

24. Landlords should consult with their tenants before either entering into a QLTA or undertaking qualifying works. It is common ground that the agreements with Breyer, Appolo, Aston and Osborne were QLTAs and that the door entry system upgrade, the fire risk assessment works and the communal electricity works were all qualifying works. As no consultation points were taken in respect of the refurbishment works the issue was not explored by either party.

25. The consultation requirements themselves are to be found in the 4 schedules to the 2003 Regulations. Schedules 1 and 2 relate to QLTAs: schedules 3 and 4 to qualifying works. It is again common ground that schedule 2 applied to the Breyer, Appolo, Aston and Osborne QLTAs because public notice of the proposed agreements had to be given in the Official Journal of the European Union. It is equally common ground that the requirements contained in schedule 3 applied to the door entry system upgrade, the communal electricity works and the fire risk assessment works because the works were completed under one of the four QLTAs to which we have referred.

26. Schedules 2 and 3 to the 2003 Regulations are set out in the appendix to this decision. It is nevertheless helpful to summarise the requirements.

27. In so far as schedule 2 is concerned the requirements are as follows:-

(1) The landlord must first give notice of his intention to enter into a QLTA to each tenant and any recognised tenants' association. This intention notice must invite written observations within *"30 days beginning with the date of the notice"* and must specify the date on which that period ends.

(2) Where observations are made the landlord shall have regard to them.

(3) The landlord must then prepare a proposal that must amongst other things, specify *"any connection (apart from the proposed agreement) between the landlord and any other party"*. The proposal must also include a statement summarising the observations received in response to the intention notices and the landlord's response to them.

(4) The landlord must then give notice of the proposal to every tenant and any recognised tenants' association. The notice must either be accompanied by a copy of the proposal or it may

specify the place and hours at which the proposal may be inspected. The proposal notice must again invite written observations within *"30 days beginning with the date of the notice"* and must specify the date on which that period ends.

(5) The landlord must have regard to any observations received in response to the proposal notice.

(6) Within 21 days of receiving an observation the landlord must inform the tenant who made the observation of its response.

28. The provisions of schedule 3 are somewhat simpler for the obvious reason that qualifying works will be undertaken pursuant to a QLTA that has already been the subject of a schedule 2 consultation process. The requirements are as follows:-

(1) The landlord must give notice of his intention to carry out the qualifying works to every tenant and any recognised tenants' association. The notice must describe the proposed works in general terms. It must also invite written observations within *"30 days beginning with the date of the notice"* and must specify the date on which that period ends.

(2) The landlord must have regard to any observations received in response to the intention notice.

(3) Within 21 days of receiving an observation the landlord must inform the tenant who made the observation of its response.

29. If a landlord fails to comply with these requirements then the amount that can be recovered through the service charge is limited by section 20 of the 1985 that commences in these terms:

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

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

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

30. If a landlord fails to comply with the consultation requirements before entering into a QLTA he can recover no more than £100 from each tenant in every service charge year. If a landlord fails to comply with the

consultation requirements before undertaking qualifying works the limit is £250.

31. Section 20ZA of the 1985 Act permits a landlord to apply to this tribunal for dispensation from the consultation requirements. Subsection 1 of that section provides:-

   "Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements".

32. The other relevant statutory provision in this case is section 20B of the 1985 Act and we set it out in full:-

20B Limitation of service charges: time limit on making demands

   (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

   (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under he terms of his lease to contribute to them by the payment of a service charge.

33. Although this section has been the source of considerable litigation and conflicting decisions nevertheless it is hopefully uncontroversial to summarise it by saying that a landlord cannot recover a service charges in respect of any cost incurred more than 18 months before a demand for payment unless it has within 18 months of the costs being incurred notified the tenant that those costs had been incurred and that the tenant would subsequently be required to contribute to them by payment of a service charge.

Issues in dispute

34. Mr Tonner challenged his liability to pay the demanded service charge in respect of the 2004/05 refurbishment work on two grounds. His first ground and the one set out in his application form was that the Council had not apportioned the total costs in accordance with the terms of his

lease. If the total cost had been correctly apportioned a lesser sum then that demanded and paid, would have been payable.

35. The second ground developed in his statement of case relied on section 20B. The demand had been issued more than 18 months after the cost had been incurred. The Council however relied on a notice that they said had been served on the person from whom Mr Tonner purchased his flat. In effect Mr Tonner disputed the service of that notice, for reasons that will become apparent. Mr Tonner took no consultation points in respect of the refurbishment work.

36. As far as the other three major works projects were concerned the applicants challenged their liability to pay service charges under three broad heads. Firstly they said that the Council had not complied with the schedule 2 consultation requirements before entering into the QLTAs. On that basis they asserted that the Council could not recover more than £100 from each of them in respect of any of the three major works projects that related to their flats. In fact the Council could not even recover that sum if it had recovered others costs through the service charge in the same service charge year under the relevant QLTAs. That point however was not taken.

37. Secondly they said that the Council had not complied with the schedule 3 consultation requirements before undertaking the three major works projects.

38. Thirdly they relied on section 20B. They said that the service charge demands had been issued more than 18 months after the costs had been incurred and they disputed the validity of the section 20B(2) notices served by the Council.

39. Mrs Murphie is not a lawyer and we intend her no disrespect when we say that it was difficult to identify the exact nature of the applicants' challenges from their discursive statement of case that included a number of generalised complaints about the Council's processes and procedures and in particular its failure to give full disclosure in response to the subject access requests to which we have referred. Consequently at the start of the hearing we identified what we understood to be the applicants' consultation challenges. We handed the parties a list of those challenges and having had the opportunity to consider that list Mrs Murphie confirmed, on the following day, that we had correctly identified all the applicants' consultation challenges.

40. The Council had consulted on the four QLTAs in two pairs. That is it undertook one consultation in respect of the Breyer and Apollo QLTAs and another in respect of the Aston and Osborne QLTAs. In respect of those consultations the applicants' challenges may be summarised as follows:-

(1) The Council had not served the intention and proposal notices on the applicants.

(2) The intention and proposal notices did not allow 30 days for observations.

(3) The Council did not have regard to the observations made by tenants.

(4) The Council did not respond to the observations made by tenants.

(5) The Council did not prepare a proposal in respect of any of the QLTAs.

(6) The proposal notice in respect of the Breyer and Appolo QLTAs omitted an "attached" summary of the proposal.

(7) The proposal notice in respect of the Aston and Osborne QLTAs did not disclose a connection between the Council and Aston.

(8) The Aston and Osborne proposal notice did not disclose a connection between the Council and various proposed subcontractors.

41. Mr Arden on behalf of the Council conceded that there had been two breaches of the consultation requirements. Nevertheless he said that there had been substantial compliance with the requirements and he argued that that was sufficient to negate the need for dispensation.

42. With regard to the three major works projects themselves the applicants' only consultation challenge was in respect of the door entry system upgrade and the fire risk assessment works. They asserted that the Council did not respond to observations made in response to the intention notices.

43. In the list of consultation challenges that we handed to the parties we also identified a challenge to the communal electricity works by Mr Perez-Thomas: that the Council did not serve the intention notice. However in preparing this decision we have reviewed the evidence and it is apparent that Mr Perez-Thomas acknowledges that he received the intention notice at page number D494 and consequently we do not deal with that challenge.

44. It is apparent from the above that the applicants did not dispute either the reasonableness of any of the costs incurred in the four major works projects or the quality of the work undertaken. All their challenges were of a technical nature and related mainly either to the Council's asserted

failure to comply with the consultation requirements or its asserted failure to serve valid section 20B(2) notices.

45. As was apparent from the applicants' statement of case these challenges derived mainly from the Council's admittedly inadequate responses to various subject access requests issued by the Mrs Murphie under the Data Protection Act 1998. The responses were inadequate because at the time the Council, for the reasons explained above, had been unable to access all the relevant documents on Ascham Homes' server.

46. For example, if the Council had been unable to provide a copy of an intention or proposal notice or a copy of a document said to be enclosed with one of those notices the applicants assumed either that the notice had not been sent or that the documents had not been enclosed.

47. In adopting this approach the applicants were to an extent attempting to reverse the burden of proof that would normally apply in a case such as this. In fairness to Mrs Murphie it should be said that when her attention was drawn to the copy notices and documents in the hearing bundle she withdrew a number of the applicants' challenges and accepted that the particular notices had indeed been sent and the documents included with them.

Reasons for our decisions relating to the refurbishment works

Background

48. Mr Tonner's flat (104 Old Church Road) is in a block that comprises six ground floor shops with six two storey flats above. The block is numbered 88 to 110 (even numbers) Old Church Road.

49. On 3 October 2001 the Council gave notice of its intention to refurbish the exterior of numbers 56-134 Old Church Road. The notice in respect of 104 Old Church Road was addressed to Ms B Stanley who then owned the flat. The subsequent chronology is set out in the following table:

Date Intention Notice	3 October 2001
Page number	D57
Estimated cost	422,450
Estimated property cost	16,900
Date 1st 20B(2) notice	12 September 2002
Page number	E562
Cost incurred	287,669.69
Property cost	Not stated
Date transfer to Mr Tonner	21 January 2004
Page no	D58
Date 2nd 20B(2) notice	4 June 2004

Page no	D70
Cost incurred	56,466.92
Property cost	Not stated
Date Final payment certificate	Not clear- Council concede that before 4 December 2002 (18 months prior to 2nd 20B(2) notice)
Date final demand	8 November 2004
Page no	D63
Statement of cost for 100- 110 Old Church Road	Sent with final demand
Page number	D65
Total cost	131,367.75
Cost for flats	59,693.97
Property cost demanded	9,906.46

50. Although the original estimate was given in respect of 56-134 Old Church Road the statement of cost clearly related only to 88-110 Old Church Road.

<u>That the total costs were apportioned in accordance with the terms of the lease</u>

51. Mr Tonner's lease, as with all the other long residential leases in the borough simply provides that the lessee must pay *"the due proportion"* of any costs incurred or estimated to be incurred by the Council. The term *"the due proportion"*, is neither defined nor further explained in the lease.

52. Until 2007 the Council applied a double apportionment to the block costs. It firstly apportioned the costs between the shops and the flats on a benefit basis. Having done that it then apportioned the costs attributable to the flats on the basis of their relative rateable values as at 1 April 1990. In 2007 the Council adopted a single apportionment apportioned method. Since then it has apportioned all the block costs on the basis of the relative rateable values of all the units in the block.

53. Mr Tonner's case was relatively straight forward. He said that the refurbishment costs should have been apportioned on the basis of the relative rateable values of all the units in the block. That is, the Council should have used the single apportionment method that it has used since 2007. The rateable value of Mr Tonner's flat was £340: of all the flats £2,050 and of the whole block £7,900. Mr Tonner argued that he should therefore only pay 4.3% (340/7900) of the cost of £56,466.92 being the cost identified in the second 20B(2) notice. Thus he was only liable to pay £1,010.30 rather then the £9,096.46 demanded.

54. Leaving aside the 20B point to which we shall return, Mr Tonner's argument is flawed. The lease does not require service charge costs to be apportioned on the basis of relative rateable values or indeed on any specific basis. Mr Tonner's mistakes were to assume firstly that the total block cost was£56,466.92 and secondly that the lease required the Council

to apportion that costs on the basis of the relative rateable values of all the units in the block. The block cost was in fact £131,367.75 and the lease only required the payment of a "due proportion".

55. It is apparent from the statement at page number D65 that the apportionment of the total block cost had been undertaken on an item by item basis with the costs of some items being wholly attributed to the shops. 46% of the total costs were attributed to the flats and given the relative size of the flats to the shops there is nothing to suggest that the apportionment was unreasonable.

56. Having completed the first apportionment the costs attributed to the flats were then apportioned between the flats on the basis of their relative rateable value. The approach adopted by the Council was logical, fair and consistent with both the Council's then standard practice and also the terms of the lease. It resulted in Mr Tonner paying a *"due proportion"*.

<u>That the total cost was incurred within 18 months of the S20B(2) dated 12 September 2012</u>

57. Mr Tonner purchased his flat from Ms Stanley on 21 January 2004. He said that his solicitor had not enquired about his potential liability for future service charges and the demand for £9,096.46 had come as a shock to him and had been paid by his mortgagee. The Council conceded that the demand for the service charge had been made more than 18 months after the costs had been incurred. Mr Tonner in his statement of case pointed to a section 20B(2) notice dated 4 June 2004 that had been sent to him with the service charge accounts for 2002/2003. The Council conceded that that notice had also been issued more than 18 months after the costs had been incurred. However they relied on an earlier section 20B(2) notice dated 12 September 2002 that they said had been sent to Ms Stanley with the 2001/2002 service charge account. The notice was printed on the back of the account, which appears to have been the Council's standard practice at that time.

58. We agree with Mr Arden that once a valid section 20B(2) notice is served time will stop time running against the landlord and the service of a subsequent invalid section 20B(2) notice will not invalidate the first notice so as to set time running again.

59. The Council were in some difficulty because they were unable to locate the service charge account and the section 20B(2) notice sent to Ms Stanley. Mr Ozer, who gave evidence on behalf of the Council, had however located similar accounts and notices sent to the owners of flat 106 and 110 Old Church Road. In addition he had located an e-mail sent by Mrs Murphie to the right to buy team to which was attached a list of long leaseholders with their addresses that was clearly intended to be used in any mail merge used at that time when documents were sent to the leaseholders. Ms Stanley's name and address was on that list.

60. Finally Mr Ozer's uncontested evidence was that Ms Stanley had paid the balancing charge thus indicating that she must have received the account with the section 20B(2) notices printed on the reverse side. Consequently and for each of these reasons we find as a fact that the 20B(2) notice was served on Ms Stanley and that notice stopped time running against the Council.

Conclusion

61. The refurbishment cost was apportioned in accordance with the terms of the lease and a valid section 20B(2) having been served on the previous owner of the flat, the service charge of £9,906.46 was payable by Mr Tonner.

Reasons for our decisions relating to the QLTA consultations

Background

62. The chronology to the two QLTA consultations is summarised in the following table:

	Breyer/Apollo	Aston/Osborne
Date of intention notices	3 April 2009	6 July 2011
Page numbers	E92 to E151	E209 to E234
Observations to be received by	2 May 2009	5 August 2011
Date of proposal notice	27 August 2010	30 November 2011
Page number	E153 to E 189	E236 to E262
Observations to be received by	26 September 2010	30 December 2011
Contract awarded	8 November 2010	1 April 2012
	E48	E53

The Council served the intention and proposal notices on the applicants.

63. Mr Tonner suggested that he had never received either the intention or proposal notices in respect of the Breyer/Appolo consultation. Three of the other applicants suggested that they had not received either the intention or the proposal notices in respect of the Aston/Osborne consultation. During the course of the hearing Mrs Murphie's attention was drawn to the copy notices included in the hearing bundles and we understood her to withdraw these suggestions. Nevertheless we will deal with the challenges briefly on their merits.

64. The applicants' evidence was far from conclusive. None of them stated categorically that they had not received the notices. They *"believed"* that

they had not received them. That belief was based on the Council's initial inability to provide copies of the notices in response to Mrs Murphie's subject access requests.

65. Copies of the notices addressed to the applicants having been included in the hearing bundle we are satisfied and find as a fact that were sent to the applicants and would have been received by them.

66. In any event we also accept Mr Arden's unchallenged submission that section 7 of the Interpretation Act 1978 creates an irrevocable presumption of service, the only issue being when the notices *"would be delivered in the ordinary course of post"* [Rushmoor BC v Reynolds (1991) 23 HLR 495 applied].

The intention and proposal notices did not allow 30 days for observations.

67. As observed above the notices must allow *"30 days beginning with the date of the notice"* for observations. Mr Arden conceded that the date of the notice is the date on which it is served on the tenant [applying Trafford Housing Trust Ltd v Rubinstein [2013] UK UT 0581 (LC)].

68. Mr Arden assumed that if a notice (as in the case of the Breyer/Appolo intention notice) was dated 3 April 2009 it would have been sent on that day by 1st class post and received *"in the ordinary course of post"* on the following day. On that basis he conceded that the time for responding to observations was only 29 days: that is, it fell short by one day.

69. As far as the other notices were concerned Mr Arden said that they all allowed exactly the required 30 days for observations.

70. In response Mrs Murphie said that none of the notices allowed 30 days for observations. She did not agree that notices had been sent by 1st class post and even if they had, she said that it could not be assumed that they had been received on the following day. She also maintained that weekends and bank holidays should be disregarded in calculating the 30 days observation period. In particular the observation period in the Aston/Osborne proposal notice straddled Christmas and she calculated that the tenants would in effect only have had 17 days within which to inspect the two proposals held at the Council's offices and make their observations.

71. Mr Gbadamosi gave evidence about the Council's posting procedures: at the relevant time he worked for Ascham Homes as a Right to Buy and Leasehold Officer. Mr Gbadamosi did not supervise the post room and his evidence was a little inconclusive. Post was usually sent directly to the tenants but sometimes an external mailing company would be used. Most post was sent by second class post but important post would be marked "first class" by the appropriate officer and would be sent by first class post.

He was reasonably confident that the consultation notices would have been marked "first class" and would have been sent by first class post.

72. Mr Gbadamosi said that the day's post was got ready and sent down to the post room by 5.30pm to be franked and put in *"the sack"*. Thereafter he could not say with any certainty what happened to the post although it is self evident that at some time it would have been delivered to or collected by the post office or possibly by the external mailing company.

73. Having heard Mr Gbadamosi we accept that it was more likely than not that all the notices were sent by first class post on the days on which they were dated and our decision proceeds on that basis.

74. We must then decide when the notices would have been delivered *"in the ordinary post cause of post"* to use the wording of section 7 of the Interpretation Act 1978. In asserting that the notices would have been received on the following day Mr Arden relied on Muscovite v 75 Worple Road RTM Company Ltd [2010] UKUT 3939 (LC). Certainly in Muscovite the President of the Upper tribunal assumed that a notice posted on 16 June 2009 would be deemed to have been served on 17 June 2009. However the point was not explored because even service on the 17 June 2009 did not save the notice under consideration.

75. Mr Arden also drew our attention to the fact that one tenant (who is not an applicant in this case) had made an observation on the day following the date of one of the notices. That was certainly evidence that one of the tenants had received one of the notices on the day after posting. However it would not be reasonable to extrapolate that evidence to find that all the applicants had received all the notices on the day after they were posted. As Mr Arden acknowledged, the days in which first class post guaranteed next day delivery are long gone.

76. We drew Mr Arden's attention to the civil procedure rules and he helpfully provided us with a copy of the relevant rules. Rule 6(14) deems a claim form to have been *"served on second business day"* after posting by *"First class post, document exchange or other service which provides for delivery on the next business day"*.

77. We accept that the civil procedure rules do not apply to this jurisdiction. Nevertheless we find them of some comfort in particular given the inconclusive nature of Mr Gbadamosi's evidence. If the courts consider it prudent to allow two days for service by first class post we consider it both proportionate and reasonable to adopt the same approach. Consequently we conclude and find that the notices would have been received by the applicants on the second day after posting. Mrs Murphie's assertions that the observations period should exclude Sundays and bank holidays is perhaps surprising given that when she was in charge of Leaseholder Services at Ascham Homes she took a contrary view and included Sundays and bank holidays in observation periods.

78. We agree with Mr Arden that unless the relevant legislation expressly excludes Sundays and bank holidays they are to be treated in the same manner as other days. Neither the 1985 Act nor the 2003 Regulations exclude Sundays and bank holidays from the observation periods and consequently they may be taken into account when calculating those periods.

79. The effect of these findings is that the observation periods in the Breyer/Apollo intention notices fell short by two days and the observation periods in the other three notices fell short by one day.

The Council had regard to observations made by tenants.

80. Mrs Murphie's assertion that the Council did not have regard to observations made by tenants was largely based on a board report of 21 November 2011 at pages numbers D160 to D164. The report deals with the letting of the Aston/Osborne QLTAs. The report at paragraph 4.22 lists key activities to be undertaken. The first is the issue of the proposal notice and responses to observations from late November to the end of December. The third activity is to confirm the award of the contract on 4 January 2012.

81. Mrs Murphie also relied on two letters to Aston and Osborne at page numbers D205 and D206 dated 19 December 2011. The letters, sent some 11 days before the end of the consultation period, inform both companies that subject to satisfactory conclusion of the statutory consultation the Council hoped to be able to confirm the award of the contract on 3 January 2012.

82. Mrs Murphie therefore assumed that because the contract was to be awarded a few days after the end of the observation period it would have been impossible for the Council to have regard to any observations made by the tenants. She argued that these documents demonstrated that the Council had made up its mind to award the contract to Aston and Osborne and that consequently it could not have had regard to any observations made by tenants.

83. We do not consider that the documents bear the weight that Mrs Murphie seeks to place on them. Whatever the original intention the contracts were not awarded until three months after the close of the observation period. The Council is obliged to respond to observations made in response to the proposal notice within 21 days and it is apparent that it was preparing and giving its responses as the observation period unfolded. As far as the letters of 19 December 2011 are concerned the sentence relied on makes it clear that the award would be subject to the satisfactory conclusion of the consultation and consequently the letters cannot, as Mrs Murphie suggested, amount to a premature award of the contracts. Consequently and for each of these reasons we reject Mrs Murphie's argument and find that the Council did have regard to observations made by the tenants.

The Council responded to the observations made by tenants.

84. Summaries of the observations in response to the intention notices are to be found at pages E185 to E189 and E259. The summaries are comprehensive and satisfy the requirement of the 2003 Regulations. Mrs Murphie's objection was again based on the Council's response to her subject access requests. When her attention was drawn to the summaries in the hearing bundle she accepted that they would have been sent with the proposal notices and indeed they are specifically referred to in the summary proposal.

85. If a landlord receives observations in response to a proposal notice it must respond to them within 21 days and on an individual basis. Mrs Murphie did not suggest that the Council had failed to respond to any observations made by the applicants. Indeed as far as we can ascertain none of the applicants made any observations. Mrs Murphie's assertion that the Council failed to respond to observations made by tenants within 21 days appears to be based on the Council's asserted failure to respond to observations made by two of the applicants in respect of qualifying works that were not part of this application. In the applicants' statement of case they simply say *"on the balance of probabilities therefore, it would seems likely that not all leaseholders who made observations in response to any notices they received... would have received replies"*.

86. In this context we prefer the evidence of Mr Ozer who had spent many days in tracing and investigating the documents held by the Council. He prepared a comprehensive witness statement. Mr Ozer had managed to locate a schedule of the observations received in response to the Breyer/Appolo consultation. The schedule is comprehensive and details the observations and Council's comments. It is at pages E195 and E196. The evidence records 29 observations and indicates they were responded to within the 21 days.

87. The limited evidence available supports Mr Ozer's evidence that the Council did respond to observations made in response to the proposal notices within 21 days and we accept his evidence to that effect. Consequently we find that the Council responded to the observations made by tenants in response to the intention and proposal notices.

The Council prepared a proposal in respect of each QLTA.

88. We start by explaining what the Council did. It sent to each tenant an explanatory covering letter, a summary of the proposal that runs to three pages, a summary of the tenants' observations in response to the intention notice and a schedule of frequently asked questions with replies. The covering letter explains that the proposals are available for inspection and the address, a contact person and telephone numbers are provided. Anyone inspecting the proposal would have found four lever arch files

including pre-tender documentations, quantities and pricing information including a schedule of rates and post-tender evaluative information.

89. Mrs Murphie's argument that the Council did not prepare a "proposal" appears to be based on the assumption that the word is a "term of art". It is not: "proposal" is not defined in the 2003 regulations.

90. The Council had done everything that could reasonably be expected of it. Indeed its conduct of the consultation exercise is exemplary and to the extent that Mrs Murphie put the relevant processes and procedures in place whilst working for Ascham Homes she can take some credit for them. It is difficult to see what more the Council could have done or what it is that Mrs Murphie considers that they failed to do. The summary proposals are in themselves fairly comprehensive and are sufficient to explain the nature of the proposed contract. In our experience only a few tenants respond to consultations of this nature and for those who were interested the Council made available all the relevant documents. It could have done no more and we are satisfied and find that the Council prepared a "proposal" within the meaning of 2003 regulations.

The proposal notice in respect of the Breyer/Apollo QLTAs included an "attached" summary of the proposal.

91. The suggestion that the summary of the proposal had not been included with the proposal notice and covering letter was again based on the Council's response to Mrs Murphie's subject access requests. As with similar objections it was withdrawn when Mrs Murphie's attention was drawn to the relevant documents in the hearing bundle. Had the objection not been withdrawn we would have found as a fact that the summary was indeed sent with the proposal notice, for the reasons previously given.

The proposal notice in respect of the Aston/Osborne QLTAs did not disclose a connection between the Council and Aston.

92. When the Council consulted on the Aston/Osborne QLTAs it was already in a contractual relationship with Aston. Mr Arden conceded that the existing contractual relationship amounted to a connection within the meaning of paragraph 4(2)(b) of the second schedule to the 2003 Regulations. Having regard to paragraph 4(3) the concession is at the first sight surprising. Nevertheless we agree with Mr Arden that the inescapable conclusion to be drawn from the words in parenthesise in paragraph 4(2)(b) is that any existing agreement or contract with the proposed contractor must be a connection that should be disclosed in the proposal.

93. The statement in the summary proposal sent to all the tenants is unambiguous *"there are no connections between Ascham Homes and the*

proposed contractors". Given Mr Arden's concession that statement is clearly wrong.

94. Mr Arden sought to persuade us that this error was rectified on two counts. First because buried away in the four files to which we have referred is a statement that Aston has a long-term relationship with Ascham Homes. Secondly because Mr Arden suggested that it must be common knowledge that Aston had a contractual relationship with Ascham Homes.

95. We are not persuaded by either argument. Few tenants took the opportunity to inspect the detailed proposal documents. The vast majority did not go behind the summary of the proposal and they were entitled to rely on it. Furthermore Mr Arden's suggestion that the existing contractual relationship was common knowledge was unsupported by any evidence. The previous contract had been granted in 2005 and in the interviewing six years many flats would have changed hands and there is no reason to support the assertion that the buyers would have any knowledge of the 2005 contract.

96. Consequently and for each of these reasons we find that the proposal notices did not disclose the existing connection between the Council and Aston.

<u>The Council was not required in the Aston and Osborne proposal notice to disclose details of Aston's proposed subcontractors.</u>

97. A document in the detailed proposal, referred to in the previous section of this decision, gives details of Aston's *"specialist supply chain"* and lists 18 companies under that head. The document is at page numbers D194 to D196. Mrs Murphie had alighted on this list and assumed that those companies together with Aston were a consortium. She criticised the Council for failing to include details of these contractors either in the proposal notice or in the summary proposal sent with it.

98. Mrs Murphie's objection is misconceived. There was no consortium. The listed companies are Aston's subcontractors. As far as the proposed QLTA was concerned the only contractor with the Council was Aston. The subcontractors did not have a connection with the Council: their connection was with Aston. The rule 2003 Regulations do not require a landlord to give details of the contractor's proposed subcontractors because they are not party to the proposed agreement. Indeed there is nothing in the 2003 Regulations that would prevent the successful contractor from using subcontractors that have not previously been disclosed. In that context paragraph 4(2)(b) cannot be stretched so as to require a landlord in the proposal notice to give details of the proposed contractor's intended subcontractors.

Substantial compliance with the consultation requirements does not negate the need for dispensation

99. Mr Arden submitted that *"substantial compliance"* with the 2003 regulations was sufficient and negated the Council's need to apply for dispensation in respect of the two acknowledged breaches. That is, one of the observation periods was a day short and that the Aston/Osborne proposal notice did not disclose the previous agreement with Aston. In making this submission Mr Arden relied on the leading judgment of Lord Steyn in R v. Soneji and others [2005] UKHL 49.

100. Soneji was concerned with the provisions in the 1988 Criminal Justice Act that permit trial judges to make confiscation orders against those convicted of a serious criminal offence. Put briefly such orders should be made before sentence but the trial judge may in certain circumstances postpone making the order for a period of up to 6 months. The trial judge may however make a confiscation order more than six months after the date of conviction if *"it is satisfied that there are exceptional circumstances".*

101. In Soneji the court had to decide if a postponement of more than six months precluded the trial judge from making a confiscation order, under the Criminal Justice Act 1988, against defendants who had been convicted of serious criminal offences. As Lord Steyn pointed out in his judgment *"Parliament has firmly adopted the policy that in the fight against serious crimes, apart from ordinary sentences, a high priority must be given by the courts to be making confiscation orders against defendants convicted of serious offences".*

102. We do not accept Mr Arden's argument that a decision made in the context of an overarching policy relating to the fight against serious crime can simply be transferred and applied to legislation relating to the payability of service charges by tenants.

103. The Criminal Justice Act 1988 envisages that there may be exceptional circumstances in which the trial judge may impose a confiscation order even if there has been postponement of more than six months. In contrast the section 20 of the 1985 Act provides for a separate dispensation application to this tribunal.

104. Although Mr Arden drew our attention to the decision of Daejan Investments Ltd v Benson and Others [2013] UKSC 14 in a different context the issue is put beyond doubt by paragraphs 47 to 50 of Lord Neuberger's judgment, in particular when he said:

"47. Furthermore, it does not seem to be convenient or sensible to distinguish in this context, as the LVT, Upper Tribunal and Court of Appeal all thought appropriate, between "a serious failing" and "a technical, minor or excusable oversight", save in relation to the prejudice it causes. Such a distinction could lead to an unpredictable outcome, as it would involve a subjective assessment of the nature of the breach, and could often also depend on the view one took of the state of mind or degree of culpability of the landlord. Sometimes such questions are, of course, central to the enquiry a court has to carry out, but I think it unlikely that it was the sort of exercise which Parliament had in mind when enacting section 20ZA(1). The predecessor of section 20ZA (1), namely the original section 20(9), stated that the power (vested at that time in the County Court rather than the LVT) to dispense with the Requirements was to be exercised if it was "satisfied that the landlord acted reasonably". When Parliament replaced that provision with section 20ZA (1) in 2002, it presumably intended a different test to be applied.

48. The distinction could also, I think, often lead to uncertainty. Views as to the gravity of a landlord's failure to comply with the Requirements could vary from one LVT to another. And questions could arise as to the relevance of certain factors, such as the landlord's state of mind............

49. I also consider that the distinction favoured in the tribunals below could lead to inappropriate outcomes. One can, for instance, easily conceive of a situation where a "minor or excusable oversight" could cause severe prejudice, and one where a gross breach causes the tenants no prejudice. For instance, where the landlord miscalculates by a day, and places a contract for works a few hours before receiving some very telling criticisms about the proposed works or costings. Or, on the other hand, where the landlord fails to get more than one estimate despite being reminded by the tenants, but there is only one contractor competent to carry out undoubtedly necessary works.

105. As Lord Neuberger points out the approach advocated by Mr Arden would result in uncertainty. It would also result in increased litigation. As in this case the landlord's first line of defence would be *"substantial compliance"* and if the line did not hold the landlord would then have to make a dispensation application.

106. It is also of some note that the wording of the original section 20(9) to the 1985 Act is not dissimilar to the wording of the Criminal Justice Act 1988. The first allows dispensation if a court is *"satisfied that the landlord acted reasonably"*; the second allowed the trial judge to make a confiscation order if *"satisfied that there are exceptional circumstances"*. However as Lord Neuberger points out, when Parliament replaced section 20(9) with section 20ZA (1) it presumably intended a different test to be applied.

107. Consequently and for each of the above reasons we are satisfied that substantial compliance with the consultation requirements is not sufficient to negate the need for dispensation.

Conclusions

108. Having found that the intention and proposal notices did not comply with the consultation requirements it follows that in the absence of dispensation the Council may not recover more than £100 from each of the applicants in any service charge year in respect of costs incurred under any one of the Breyer, Apollo, Aston and Osborne QLTAs.

Reasons for our decision that the Council responded to observations made in response to the door entry system upgrade and the fire risk assessment intention notices.

109. In their statement of case the applicants' case under this head was bound up with their case that the Council had failed to respond to observations made by tenants in response to the QLTA proposal notices. Our reasons for rejecting that case are identical to those given previously at paragraphs 85 to 87 above and we repeat them here.

Reasons for our decisions relating to the section 20B (2) notices in respect of the door entry system upgrade, the fire risk assessment works and the communal electricity works

Background

110. The chronology to the section 20B(2) notices is summarised in the following table:

	Door Entry 100-110 Old Church Road	**Fire Risk Assessment 100-110 Old Church Road**	**Electrical works and asbestos survey 100-110 Old Church Road**
Date Notice of Intention	24 October 2011	1 December 2011	9 August 2012
Page number	D212	D241	D248
Estimated block cost	£6,267.53	£8,501.94	£4,564.46
Estimated property cost	£1,164.23	£1,579.29	£847.88
Date 18 months before 20B(2)notice	5 January 2012	11 January 2012	5 May 2012
Date Payment	15 February 2012	22 December	25 January

"I have considered what a lessor should do if it knows that it has incurred costs but it is unable to state with precision what the amount of those costs was and it is concerned to serve a notice under section 20B(2) to stop time running against it. In my judgment, there is a clear practical course open to a lessor in such a case. It should specify a figure for costs which the lessor is content to have as a limit on the cost ultimately recoverable. In my judgment, a lessor can err on the side of caution and include a figure which it feels will suffice to enable it to recover in due course its actual costs, when all uncertainty has been removed. If a lessor states that its actual costs were £x that will be a valid notification in writing for the purposes of subsection (2) even though the lessor knows that it may turn out that the costs will be somewhat less than £x".

115. In this case the Council complied with Judge Morgan's guidance. It clearly considered that the costs incurred would indeed be somewhat less than original estimates. In such circumstances it was entitled to repeat those estimates in the S20B (2) notices. Indeed, the notices should have been of considerable comfort to the applicants and other tenants because the Council was effectively limiting its recoverable costs to the estimates given in the intention notices. The actual block costs in respect of the electrical works were just under the original estimate. The costs in respect of the fire risk assessment works were approximately 60% of the original estimate but we are satisfied that they were still within the parameters of Judge Morgan's guidance.

116. Somewhat surprisingly the Council has not yet issued final demands in respect of the door entry system upgrade. Mrs Murphie suggested that the Council could not now demand payment. We do not understand the basis of that submission because a valid section 20B (2) notice having been served the Council is no longer time limited. However when the demands are issued the recoverable block cost cannot exceed £6,267.53.

117. The Council does not appear to have demanded on-account payments in respect of the work and consequently the applicants are not in any event prejudiced. Even if on-account payments have been demanded their remedy is to apply to this tribunal for a determination of their liability to pay a service charge in respect of the actual costs incurred. (see Warrior Quay Management Co Ltd v Joachim LRX/42/2066).

118. In respect of the electrical works Mrs Murphie had a subsidiary argument. The section 20B (2) notice does not, in contrast to the other two notices, identify the project to which it relates. It simply refers to *"major works"*. We do not however consider that this assists Mr Tonner or any of the other applicants for each of the following reasons. Firstly, because it is apparent that the applicants understood that the notice related to the electrical works not least because it repeated the estimate in the original intention notice. They were neither misled nor prejudiced by the omission. Secondly because the section itself simply requires the Council to give details of any costs incurred in the previous 18 months:

there is no requirement to identify a particular project to which the costs relate.

119. Consequently and for each of the above reasons we are satisfied that the three notices complied with the provisions of section 20(B)(2).

<u>All the costs were incurred within 18 months of the three section 20B (2) notices.</u>

120. The section 20B (2) notice in respect of the electrical works was served within 18 months of the intention notice and it is therefore self evident that the costs must have been incurred within the 18 months period.

121. However the 18 month periods started after the intention notices had been served in respect of the other two major works projects and it is possible that costs could have been incurred before both periods commenced. If so those costs would not be recoverable. However, the evidence is against the applicants. Subject to the point that we consider below costs could not be incurred before the issue of payment certificates by those responsible for supervising the works. Mr Ozer's diligent investigations had unearthed the payment certificates and they are recorded in the above table. Only one payment certificate fell outside the 18 month period and that was the first payment certificate relating to the fire risk assessment work that was issued on 22 December 2011, some 20 days before the commencement of 18 month period. However on the back of each payment certificate relating to the fire risk assessment work was a detailed list of the properties to which the certificate related. None of the Old Church Road properties are listed on the certificate of 22 December 2011. The first reference to the Old Church Road properties is on the certificate of 18 January 2011. Consequently it is reasonable to conclude and we find that all the costs of both projects were incurred within the 18 month periods.

122. As indicated above Mrs Murphie had one other argument. Mr Ozer's evidence was that the QLTAs provide for monthly payments to cover the cost of general overheads that will be incurred during the contract period. The overheads include such diverse matters as tenant liaison officers and scaffolding and they are not specific to a particular project or task. Mrs Murphie said that these monthly payments were costs incurred within the meaning of section 20B. Consequently she argued that costs are incurred on a monthly basis from the inception of every major works contract. If she is right then it follows that costs would have been incurred more than 18 months before the section 20B(2) notices relating to door entry system upgrade and the fire risk assessment work.

123. We do not however consider that costs could be said to be incurred upon the payment of fixed periodical sums to a contractor under a complex QLTA. They would in effect be little more than payments on account. The payments would not amount to costs incurred until such time as they are

allocated to a particular project or task and Mrs Murphie did not suggest that there had been such allocation prior to the start of the 18 month periods to which we have referred. Furthermore Mr Ozer's unchallenged evidence, which we accept, was that the monthly payments are not allocated to the particular project or task until the accounts are finalised.

Conclusions

124. The Council having served complaint section 20B(2) notices and the costs having been incurred within 18 months of those notices the Council is entitled to recover the actual costs incurred in the three major works projects if it obtains dispensation in respect of the QLTAs.

Reasons for our decision to extend the time for applying for permission to appeal.

125. It will be recalled that the Council's application for dispensation had been stayed until six weeks after the issue of a decision in this case unless the Council applied to lift the stay earlier. In rejecting our invitation to deal with the dispensation application at the hearing Mr Arden frankly told us that he intended to take this case to the Court of Appeal. He considered that the dispensation application should be held in abeyance until the appeal process is exhausted. His primary reason was the potential cost to the council of dealing with a dispensation application to which all the Council's long leaseholders are respondents.

126. Mr Arden stance presupposes that he will be successful in his appeal. If his confidence is misplaced then, having gone to the Court of Appeal, the Council will have to reactivate its dispensation application that, for all we know, may also go to the Court of Appeal.

127. There is a cost to this litigation both in terms of resources and human stress. The Council having undertaken not to recover its costs through the service charge, its not inconsiderable legal costs will have to be borne either by the rental tenants (if paid out of the housing budget) or by its council tax payers. This tribunal and the Upper Tribunal are largely subsidised by the tax payer and the overriding objective requires us to have regard at least to this tribunal's resources. The human stress of this litigation to the applicants was apparent from Mrs Murphie's closing submissions.

128. In terms of proportionality it seems to us that the dispensation application should be dealt with by us before the matter is taken any further. That will bring this tribunal's jurisdiction to an end and any appeal points on either application can then be taken forward at the same time. Indeed it is not inconceivable that the dispensation decision will bring the litigation to an end.

129. We are not in any event persuaded that the disposal of the dispensation application will be the burden that Mr Arden suggests. We do not know the current number of the Council's long leaseholders but Mr Ozer's evidence was that in 2011 there were *"in the region of 1,800"*.

130. The cost to the Council of mailing out a copy of its dispensation application together with the tribunal's directions to its long leaseholders will not be excessive and it cannot be any greater than the cost of its annual mail-outs of service charge accounts and the like. This tribunal routinely receives borough wide dispensation applications in respect of proposed energy contracts were the gas or electricity is purchased on the wholesale market and the consultation requirements cannot be complied with. Objections from a relatively small number of long leaseholders are always received and yet the applications are dealt with expeditiously and economically usually at a short half-day hearing. We see no reason why the currently stayed dispensation application cannot be dealt with in a similar manner.

131. For each of the above reasons we consider that the dispensation application should be dealt with before any appeal of this decision is taken to the Upper Tribunal. Consequently we extend time for appealing this decision until the time for appealing the dispensation decision has expired.

Reasons for our decision to postpone the 20C application.

132. Finally we deal briefly with the applicants' 20C application for an order that the Council may not recover any of the costs of these proceedings through the service charge. At the hearing the Council, through Mr Arden, undertook not to recover such costs through the service charge. We are aware of observations in Upper Tribunal decisions to the effect that we should in any event make a determination. We are nevertheless minded to accept an undertaking from a reputable public body provided that it is committed to writing and we have the opportunity to approve it. It would in any event be sensible to deal with the issue of costs and any application for the reimbursement of fees at the hearing of the dispensation application. Consequently those applications are postponed and will be heard with the dispensation application.

Name: Angus Andrew **Date: 25 January 2017**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office before the time for appealing the dispensation decision in case number LON/00BH/LDC/2016/0064 has expired.

If the application is not made before the time for appealing the dispensation application has expired, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix to decision

SCHEDULE 2
CONSULTATION REQUIREMENTS FOR QUALIFYING LONG TERM AGREEMENTS FOR WHICH PUBLIC NOTICE IS REQUIRED

Notice of intention

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 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 he 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.
Duty to have regard to observations in relation to relevant matters

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 summarising the observations and setting 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.

SCHEDULE 3
CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS UNDER QUALIFYING LONG TERM AGREEMENTS AND AGREEMENTS TO WHICH REGULATION 7(3) APPLIES

Notice of intention

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

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

(2) The notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
(b) state the landlord's reasons for considering it necessary to carry out the proposed works;
(c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;

(d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure;

(e) specify—

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

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

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

Inspection of description of proposed works

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

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

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

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

Duty to have regard to observations in relation to proposed works and estimated expenditure

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

Landlord's response to observations

4. Where the landlord receives observations to which (in accordance with paragraph 3) 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.