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

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| **Case Reference** | **:** | CHI/00MS/LSC/2018/0063<br>CHI/00MS/LSC/2018/0058<br>CHI/00MS/LSC/2018/0067 |
| **Property** | **:** | Ocean Village Marina Estate, Channel Way, Ocean Village, Southampton, SO14 3GQ |
| **Applicant/Respondent** | **:** | 1) Mr A Stone and Mr D Hughes<br>2) Mr Patel and Mr Vaughan-Stanley (substituted for the Ocean Village Residents Association) |
| **Representative** | **:** | 1) Mr Stone<br>2) Mr Patel |
| **Respondent/Applicant** | **:** | 1) MDL Developments Limited<br>2) Ocean Village Marina Management Company limited |
| **Representative** | **:** | Mr S Allison (Counsel) – instructed by Clarke Willmott LLP |
| **Type of Applications** | **:** | 1) Section 27A Landlord and Tenant Act 1985 (service charges); and<br>2) To dispense with the requirement to consult lessees about major works<br>3) Section 20C and/or paragraph 5A of Schedule 11 orders |
| **Tribunal Member(s)** | **:** | Judge J F Brownhill<br>Mr R Wilkey |
| **Date and venue of Hearing** | **:** | Havant Justice Centre 6-8th March 2019 |
| **Date of Decision** | **:** | 8th March 2019 |

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## DECISION



1 Where numbers appear in square brackets [] in the body of this decision, they refer to pages of the bundle before the Tribunal.

2 The Tribunal had before it three substantive applications, made by the parties specified above; two applications by the Applicants for a determination of service charges payable pursuant to budgets for the 17/18 and 18/19 service charge years and a section 20C order, and the Respondent's cross application for dispensation of the consultation requirements.

3 The Tribunal had, in conjunction with the parties at a Pre-trial review (hereinafter referred to as the PTR) held on 17/12/2018 agreed the extent of the issues before the Tribunal. A copy of the Tribunal's directions notice appears in the bundle at [136A] to [136H]. This was used by the parties and the Tribunal to ensure each of the highlighted issues was discussed at the final hearing.

The Inspection

4 The Tribunal inspected the outside of the Ocean Village Marina complex accompanied by (Mr Patel, Mr Allison, Mr Stone, Mr Hughes, Mr Vaughan-Stanley, Mr Broadrib, Mr Beere and Ms Withers (of Clarke Wilmott Solicitors). Mr Boggis (a witness) though present initially did not accompany the Tribunal on the actual inspection.

5 Ocean Village Marina is a high quality complex comprising housing and flats sold on long leases together with. Leaseholders have the benefit of licences to use an associated berth and finger pontoon (residential finger pontoons). There are other pontoons and berths within the marina of varying size and specification which are referred to as the commercial pontoons. Some of these are let by the Respondents to others, and some were being used at the time of the Tribunal's inspection to display a range of high value boats for sale by a commercial company. The complex includes various commercial units including a hotel and retail / restaurant outlets as well as private and pay and display onsite parking. It was important that the Tribunal obtained an overview of the size, scope and character of the marina and in particular the interaction between the residential and commercial elements. Accordingly the Tribunal members walked the majority of the marina even though not all parts inspected were directly relevant to the application.

6 The Tribunal were provided with 4 plans at the start of the inspection which had been agreed between the parties. The plan marked (115) showed the configuration of the marina as at the date of inspection and the plan at (102) showed the previous configuration. Without trying to set out every item /

matter observed during the inspection, attention was particularly drawn by the parties to the following matters that would be discussed at the subsequent hearing:-

a. The pontoons and walkways, in particular of different sizes (including different widths of walkways; in places 4m and in others 3m in width) and different lengths and widths of berths over the complex and finger pontoons (some of which had piles and others which did not). The distribution of residential and non-residential/commercial pontoons across the marina. The Tribunal noted in particular that in places there was a mixture of non-residential (commercial) and residential finger pontoons (for example on Pier C)

b. The visible construction of the pontoons and walkways (floating structures consisting of polystyrene blocks supported by a piled metal/ concrete structure and a decking on top which allowed access on foot to the boats and berths).

c. The super yacht fingers (pier L on the plan at (115))

d. The delineation between the south and north basins of the marina

e. The hotel (situated between piers E and P on the plan at (115))

f. The security and access onto the different areas of pontoons and walkways. For example pontoons and walkways were only accessible by locked gates – it was not possible to obtain access to the water save through such security gates. The Tribunal were told that residents were not able to access all pontoons and walkways, only having access to those containing the residential finger pontoons (at piers A, B, C and D on the plan at (115));

g. The installation of bridges onto walkways;

h. The one remaining area of wooden decking on pontoons/ walkways (around pier E on the plan marked (115));

i. The new dock office (sited between pier P and pier E and in front of the hotel on the water, including the different configuration which had resulted from the recent works; and

j. The extentof specific parts of the estate visible on both the north and south basins of the marina – including the promontory between the marina and the tidal river (curved area of the plan at (115) behind pier A).

7 Reference was made by the Applicants to pooling of water on the top of the new composite decking. The Tribunal noted that it had been raining that morning. In the Tribunal's view such pooling of rainwater on the decking that was seen was de-minimis only.

8 The Tribunal also noted in particular the junction between old (wooden) and new (composite) decking. The old decking being wooden boards, which were noted by the Tribunal to be uneven, slippery, showing signs of decay and with

algae growth visible. In comparison the new decking, made of a composite material consisted of wider board, was firm, and appeared to the Tribunal to be less slippery at the time of inspection. The Tribunal heard from the parties during the course of the hearing that when icy the new decking had been particularly slippery causing signs to be put up warning of such and on occasion the pontoons and walkways having to be closed.

The hearing

9 In addition to those who attended at the inspection, all the individuals who had provided witness statements attended the first day of the hearing as well as Mr and Mrs Smart (the former being the treasurer of the Residents Association) and Ms Gray and Ms Prudence from MDL (the First Respondent) .

10 At the commencement of the hearing the Tribunal ascertained whether any of the witnesses who had provided witness statements would be cross examined on their evidence. Mr Allison on behalf of the Respondents indicated that he had no questions to put in cross examination to any of the Applicants' witnesses. As a result they were all released at the end of the first day. Mr Patel indicated that he had questions in cross examination for both of the Respondents' witnesses Mr Broadrib and Mr Beere.

11 The Tribunal agreed with the parties that each issue would be addressed in turn with each party providing their submissions and evidence (and cross examination) in relation a particular issue before the next was moved onto. Cross examination of witnesses would therefore be on each issue in turn. While this resulted in disjointed cross examination of the two witnesses for whom there were questions, the Tribunal considered that on balance, and given that the Applicants were in person, this was a preferable way to manage the hearing, and would allow all parties to take part and make their points most effectively.

12 The Tribunal highlighted to the parties a difficulty arising by virtue of the Residents Association being a party to the proceedings. The Tribunal confirmed with Mr Vaughan-Stanley (the secretary of the Residents Association) that the Residents Association was an unincorporated body.

13 The Tribunal referred the parties to the Upper Tribunal decision in Knapper v Francis [2017] UKUT 3, in particular at paragraph 8 of the decision;

"A preliminary point of some general significance arose concerning the identity of the proper appellants in this appeal. The application to the FTT and the appeal were both brought in the name of the Association. Although that was no doubt convenient for administrative reasons the Association is unincorporated and has no legal personality, it is therefore incapable of conducting legal proceedings."

14 It was of note that the only issue taken by the Residents Association in their application did not relate to the consultation process, but in effect came down to an issue concerning the construction of the lease. Nonetheless they were named as a Respondent to the dispensation application.

15 The Tribunal invited submissions from the parties as to how this issue could now be resolved, suggesting that a similar solution to that reached in Knapper

v Francis (ante) might be adopted. Mr Allison indicated that the Respondents had a difficulty with that approach as their dispensation application had only been served on the First Appellants (Mr Stone and Mr Hughes) and the Residents Association – as opposed to each individual residential leaseholder. Mr Allison indicated that this was because rather than a 'freestanding' application for dispensation it had been made in the context of a response to the First Applicants application. However both the First and Second Applicants were listed as Respondents to the dispensation application.

16 Mr Vaughan-Stanley told the Tribunal that he was not able to indicate or properly say that he had authority from each of the members of the Residents Association to deal with the Respondent's dispensation application. Indeed and rather surprisingly and despite the Residents Association being listed as a Respondent to the dispensation application, it appeared that the Residents Association had not drawn the dispensation application to its members attention nor had it sought instructions on that application from its members.

17 Mr Vaughan-Stanley indicated that he would not be able to quickly get authorisation from all the members of the Residents Associations members, as many lived abroad; indeed he indicated that in his view such a process might take months.

18 In the end, Mr Patel and Mr Vaughan-Stanley agreed with the Tribunal that they would, as individuals, be substituted as the Second Applicants in place of the Residents Association. The Tribunal therefore recorded this, and proceeded to determine the applications on this basis. The Tribunal discussed with all the parties that its determination would only bind those who were a party to the proceedings, and while the solution reached was not ideal (given the desire for consistency in judicial decision making) it was preferable in the circumstances given the 2.5 day listing, and the fact that the service charge determinations before the Tribunal concerned budgets only and the fact that the Residents Association do not as an entity pay service charges. However it is of note that a formal Residents Association is an entity specifically recognised under the provisions of the Landlord and Tenant Act 1985 (hereinafter referred to as 'the 1985 Act') and indeed those provisions require a landlord to provide details of proposed works (under the consultation provisions) to an recognised Residents Association (see section 20ZA(5) of the 1985 Act).

The general leasehold structure of the marina

19 Without intending to set out in detail the leasehold structure applicable to the marina and associated residential property the following is intended as a summary only:

a. MDL is the reversioner of the estate;

b. The freeholder is Marina Developments Limited (according to Mr Allison) or MDL Developments Limited (according to Mr Stone);

c. There is an overriding lease (the terms of which are not material) of the freehold land, held by Ocean Village Resorts Limited;

d. The overriding lease is subject to three headleases, each vested in the First Respondent;

    i. The residential headlease – this is a lease of the residential parts of the eastern docks, and includes all of the land relating to the residential properties of the Applicants;

    ii. A lease of the North marina – this includes the residential finger pontoons;

    iii. A lease of the South marina;

e. The residential long leases are granted out of the residential headlease. The residential long leases are tripartite being between, in effect, the leaseholder, the management company (OVMMCL), and MDL as the immediate landlord.

    i. Mr Allison indicated OVMMCL (the management company) was not a party to the Applicants' applications, but he was not in fact going to take a point on this.

    ii. In fact the Tribunal noted that OVMMCL were a named Respondent to both of the Applications [3][23], and had been named as Respondent in the Tribunal's directions notice of 17/12/2018 [136A].

f. The leasehold structure of the residential flats differed to the extent that there is a further lease under the head lease (which for ease of reference Mr Allison referred to as the superior lease). There was a superior lease of each of the four blocks of flats. The block management company is the immediate landlord under a residential flat lease, but both MDL and OVMMCL were also parties to the flat leases. There are direct covenants to MDL and OVMMCL concerning payment of the estate charge. The covenants concerning the estate charges are identical between the flat and house leases;

g. The Tribunal had identified at the PTR that it would refer to generic leases, being the house lease appearing at [161] (in fact this was Mr Stone's lease) and the flat lease appearing at [515];

h. Included as a schedule to all the residential leases (both in relation to houses and flats leases) is a copy of the management agreement (see [204][564]).

i. A supplementary management agreement appears in the bundle at [237] but this document:

    i. post-dated the grant of the residential leases (it is dated 09/07/2008);

    ii. did not form part of the residential leases; and

    iii. the leaseholders were not party to the supplementary management agreement.

j. The service charge provisions operate to provide for an interim service charge to be charged (via two equal interim payments) in accordance with a budget and then at the end of the service charge year once the actual spend is known for a balancing charge/final calculation to be undertaken.

20 A copy of the 2017/2018 budget appears at [323] with accompanying report at [325].

21 A copy of the 2018/2019 service charge budget appears at [353].

22 The Tribunal considered each of the issues in turn.

Issue 1: The change from timber decking to Dura Deck. Was a new section 20 consultation required.

23 The Tribunal emphasised to the parties that the First Applicant's application related to service charge demands pursuant to budgets drawn up for the 2017/2018 and 2018/2019 service charge years. While the actual accounts had become available in the period running up to the final hearing, this was not the subject matter of the dispute between the parties; the Tribunal would be dealing with the budgeted figures only.

24 Mr Allison submitted that as the Tribunal was considering budgets and the demands arising from such budgets for the service charge years, there was in fact no need for the Respondents to have consulted prior issuing the relevant demands (for interim service charges based on budgeted sums). The statutory cap (of £250) applied only to final sums payable/due and not budgeted sums. He observed that no part of setting a budget binds the landlord to incur such costs.

25 Mr Allison additionally referred the Tribunal to the Upper Tribunal decision in 23 Dollis Avenue v Vejdani [2016] UKUT 365, which dealt specifically with this issue (he produced a copy of the authority for all parties and the Tribunal overnight on the 6th March). At para 35 of the judgement, the Upper Tribunal state;

"We agree with Mr Adams that the limitation in s20 to the contribution payable by the tenant is referable to costs incurred by the landlord in carrying out the work rather than in respect of the work to be carried out in the future.

In our view therefore there is no statutory limit to the amount that can be recovered by way of an on account demand under the lease other than under section 19(2). It is in our view not necessary that there should be a valid consultation process before a sum in excess of £250 can be recovered by way of a service charge in respect of intended works."

26 Mr Stone submitted the contrary, namely that as leaseholders were being asked to pay a sum in excess of £250 in respect of a specific project/ works the consultation provisions applied. There was he said no explicit distinction made under the consultation provisions (either under the 1985 Act or the Service

Charges (Consultation Requirements)(England) Regulations 2003) between sums demands under a budget or pursuant to a final balanced account or balancing payment, and so the consultation requirements applied equally to both. In both situations the leaseholder received a demand for payment of an amount above the consultation threshold. He referred to the 3rd edition of the RICS code of practice, service charge residential management code in particular at paragraph 7.3.

27 The Tribunal agreed with and accepted Mr Allison's submissions in this regard: Nothing in setting a budget obliges a landlord to carry out the works and until they do the work there are no qualifying works. A budget is only making a reasonable provision. The relevant provisions of s20 of the 1985 Act do not require a landlord to undertake a consultation process prior to issuing a demand pursuant to a budget or an 'on account demand'.

28 In accordance with the provisions of their leases, sums had been demanded from the Applicants pursuant to budgets set for each of the service charge years under consideration. As is often the case such on account sums fell due pursuant to the lease provisions as two equal advance payments (an interim service charge)(due on 25/3 and 29/9) based on a budget for the service charge year. The Tribunal found there was no need for there to have been consultation pursuant to s20 on such budgetary figures in order for them to have fallen due.

29 However, given that the parties had prepared arguments on the validity of the consultation process, and given that the Respondents had made a dispensation application which was also before the Tribunal, the Tribunal continued to consider the validity of the consultation process and address each of the criticisms made by the First Applicants. In reaching the decision to proceed the Tribunal took into account the overriding objective and considered that it was proper, appropriate and in the interests of justice, to do so; the parties agreed to the Tribunal proceeding in this manner.

30 It serves at this stage to set out (in summary only) the relevant factual background and notices which formed part of the section 20 consultation undertaken:

a. Three sets of notices were served in relation to three sets of proposed works, in particular:

    i. the repair/ replacement of the marina infrastructure works (the pontoon works);

    ii. the corrosion protection works; and

    iii. the dredging works.

b. The First Applicants arguments take issue with the consultation process concerning the repair/ replacement of the marina infrastructure (the pontoon works), but in some respects all impact on all three set of consultations as will be seen below.

c. It should be noted at this stage, and as recorded in the PTR directions, that no issue arises in relation to the *residential* finger pontoon works which were covered by the lessees separate obligations under the leases.

d. The relevant stage one consultation notice for the pontoon works appears at [789] and is dated 13/01/2017. While Mr Stone states that in fact he and Mr Hughes did not receive a copy of this notice, he accepts that it exists and takes no specific point as a result of this. The notice provides that;

"The works to be carried out are as follows: Repair by replacement of the marina infrastructure, including pontoons and piles, within the northern part of the basin, namely piers A-E. Some piles on piers F-P will also be replaced and piers M&P will be repaired.

The works are necessary to replace marina infrastructure that is at the end of its economically serviceable life. The opportunity will be taken to reconfigure the berthing arrangements within the northern part of the basin to allow for likely future berthing requirements. The additional cost associated with the configuration will be met by OVMMCL, with only the relevant proportion of a like-for-like replacement being contributed by the residents. ....."

Observations were invited by 17/02/2017.

e. The relevant stage 2 consultation notice relating to the pontoon works appears at [801] and is dated 14/07/2017. The relevant parts of the notice recorded that no written observations on the proposals were received and no proposals for estimates to be obtained from specified contractors were received. Two estimates had been obtained in respect of the proposed works. These were set out in the notice in the form of a table reproduced below:

| Details of Contractor | Estimated cost of Proposed Works |
|---|---|
| Walcon Marine Limited | General (preliminaries) -£16, 445<br><br>Marina Infrastructure (inc pontoons, piles, services etc.) £1,444,215<br><br>Consultancy fee £25,000<br><br>Contingency fee £50,000<br><br>**Total £1,535,660 excluding VAT** |
| Intermarine Limited | General (preliminaries) - £133,566.00 |

| | |
|---|---|
| | Marina Infrastructure (inc pontoons, piles, services etc.) £1,950,361<br><br>Consultancy fee £25,000<br><br>Contingency fee £50,000<br><br>**Total £2,158,927 excluding VAT** |

The notice then stated at paragraph 5 "Each of the contractors listed at paragraph 4 hereof is a person wholly unconnected with the Reversioner and the Company."

At paragraph 6 it was recorded that all of the estimates would be available for inspection.

Written observations were invited in relation to any of the estimates, with such period ending on 16/08/2017.

f. The quotations obtained above were for the pontoons and walkways to be replaced with a system which included wooden decking (as existed at the time).

g. By letter dated 17/08/2017 the Respondents wrote to the leaseholders on headed note paper from Marina Developments Limited [782] stating "As you are aware Ocean Village Marina is undergoing a comprehensive reconfiguration during the autumn/winter 2017/2018. As part of this redevelopment MDL has taken the decision to deck the commercial pontoon berths adjacent to the hotel with an alternative product to the yellow balau hard wood that has traditionally been used in marina decking.

……..

In order to achieve a uniform appearance to the marina MDL would like to deck all new pontoons, including those in the residential area (piers A-D) with Dura Deck in charcoal grey. The additional cost of Dura Deck over timber will be met through MDL and only the cost of 'like for like' timber decked pontoons will be posted through the service charge and applied to individual residents' contributions for their own fingers.

This letter seeks to inform you of the proposed change and give you the opportunity to raise any concerns or queries… Any comments regarding this should be made directly to myself by close of business on Thursday, 31 August 2017."

h. No new consultation was carried out in light of the change from a system for the marina infrastructure involvement wooden decking and that which was eventually installed in Dura Deck.

i. The Tribunal were told by Mr Beere, the Respondent's Head of Consultancy and Technical Services [145] (in answer to Mr Patel's questions in cross examination) that the pontoon works contract was not signed until September 2017 (at around the same time as the soft launch for the hotel within the complex), with the variation to use Dura Deck being signed later.

31 Mr Stone indicated to the Tribunal that he did not make any comments in response to the letter advising of the proposed change to Dura Deck saying that he and Mr Hughes were "not around" at that time. He also told the Tribunal that he did not make any comments subsequently (after the period specified for comments to be received) in relation to the letter.

32 Mr Stone makes a number of criticisms of the consultation process, arguing that each renders the process fatally flawed. The Tribunal considered each in turn:

33 Mr Stone argued that the stage one section 20 notice served stated that the landlord was going to replace the pontoons like for like; therefore he said the new pontoons were to involve wooden decking. Mr Stone argued that once the Respondent decided it wished to use a composite system, Dura Deck, (as opposed to a wooden decking system), so that the work was no longer like for like it was required to formally reconsult on this proposal. As it did not do so Mr Stone argued that the consultation was fatally flawed.

34 Mr Allison argued that the notice did not, in terms, state that the decking on the new pontoons was going to be wood, or like for like. The reference to 'like for like' is in the third paragraph of the notice [789] and relates to the reconfiguration, with only the like for like reconfiguration being applied to the residential service charge. As can be seen from the various plans which had been submitted to the Tribunal the reconfiguration was substantial (see plans marked (115) and (102)). The existing residential pontoons and walkways (piers A-D) were shortened and new pontoons and walkways installed at Pier E (becoming Piers P (alongside) Pier P (south) and Pier P (north). The wording used in the notice does not specify what materials or system would be used on or for the replacement pontoons. The reference to 'like for like' must be read in the context of the whole paragraph.

35 The Tribunal found that the reasonable recipient (see Mannai Investments v Eagle Star Assurance [1997] 2 WLR 945) would have interpreted the notice as referring to a like to like **reconfiguration** as opposed to referring to a like for like use of wooden decking/ materials. Thus the position was, in fact that the notice made no reference to the materials to be used in the works. Even if the Tribunal are wrong about that (and that the reasonable recipient would have read the stage one notice as referring to like for like use of materials), for the reasons set out below, the Tribunal considered that this still did not aid Mr Stone's argument.

36 Mr Allison conceded that, even though his argument was that the stage one notice was quiet on the materials to be used in the works, the Respondent had in fact gone out to tender and sought quotes on the basis of wooden decking on the pontoon system. However it is important to note at this stage that the tender documentation was for extensive works including not only the decking of the

walkways and pontoons, but also the underwater element/the infrastructure and concrete floating system and frames; a very considerable amount of other works too [805].

37 The Tribunal were told that four companies had been approached to provide quotes for the works [154-55], two responded with tenders – based on a wood covering to the walkways and pontoons.

38 Mr Stone, in his skeleton argument before the Tribunal stated (page 2, second bullet point) that the 17th August 2017 letter "…did not invite or allow observation or comment". In fact, as noted above it did explicitly invite comments before 31st August 2017 [782].

39 It became clear during the course of Mr Stone's submissions that part of his argument was that changing the material for the decking was a material change and the leaseholders should have been reconsulted on this because they were denied the opportunity of obtaining quotations for the whole of the support system as well as the decking. Mr Stone argued that there might have been a contractor who could have provided a cheaper system (in composite), rather than the cheapest contractor for wood decking providing the composite decking. He further expanded his point arguing now that part of his complaint was that the Respondent had put composite decking on a system designed for wood and that this caused problems.

40 Mr Beere, in his evidence to the Tribunal, specifically addressed this issue refuting the suggestion that a composite decking system had been installed on a frame and system designed for wood. Mr Beere stated that in fact the system had been designed "from the ground up" after significant investigation. Pontoon manufacturers had been approached in the UK and one company in Italy. Mr Beere told the Tribunal "I don't agree that putting Dura Deck on the system [was a significant change]. The pontoon is polystyrene floats [covered in concrete], the decking can be anything as long as it meets our specification. Dura Deck is less bending (sic) than wood, …therefore [we used] more stringers. Bearers were needed to ensure that the span [of the boards] stays shorter. Dura Deck doesn't span as far as wood, a simple modification was required, each frame was fabricated, galvanised and stringers put on top. Dura Deck also expands more than timber so different fixing arrangements were used… the board sits in a groove and slides as it expands. The pontoon was designed specifically for Dura Deck installation."

41 Mr Beere referred to the Respondents having inspected Dura Deck systems installed in marinas elsewhere including Limehouse (in London) and investigating its performance in Dubai (in relation to UV degradation). Mr Beere also explained in his evidence to the Tribunal that bar one the Respondent had contacted all the pontoon manufacturers in the UK, and one outside the UK in Italy. The Italian manufacturer had, said Mr Beere, considered the project to be too big for it to undertake as its first ever UK project and so indicated that it would not submit a quote. There was one company which Mr Stone referred to and which the Respondents accepted that they had not approached. This was because, Mr Beere explained, of the Respondent's previous experience with this company on a different project and the difficulties that they had encountered in trying to get that company to return to site to fix

snagging and other problems. When answering questions from Mr Allison, Mr Beere discussed one of the other contractors referred to by Mr Stone, explaining that the Respondents had worked with them in the past, but that their expertise lay in the creation of the basin – and not pontoon installation; "We have done work with them in the past. Their part in the process is [the] creation of the basin. They will install pontoons but they buy in from elsewhere." In those circumstances it seemed entirely reasonable to the Tribunal that that company had not been approached in relation to the pontoon works. Mr Beere stated that he did not believe that any company, other than Walcon (the contractor which the Respondent had in the end used), had been capable of fulfilling the Respondent's specification for the new pontoons using Dura Deck and marina infrastructure. In exchanges with Mr Stone, Mr Beere repeatedly and explicitly denied that there had been a retro fit of Dura Deck to an infrastructure designed for wood, saying in terms that the system used had been designed "…from the ground up…".

42 Mr Stone had, earlier in proceedings and as part of the First Applicants' evidence referred to a system called Rotodock. During the course of the hearing Mr Stone emphasised that he was not recommending this product, nor suggesting that it would have suitable for the Ocean Village Marina, but stated that he had found it after a google search on the internet, and that, in effect, if he had found this system then there might be other systems available. Mr Stone had, unsurprisingly, been unable to obtain a comparable quote for the pontoon works from Rotodock – the works having now been completed. But he produced some material printed from the internet at [1092] and referred to a quoted price [50-35] for "…comparable but not identical finger pontoons…"[50-34], such figure did not include delivery or installations costs. This information appeared in a brief email appearing at [361]. The Tribunal considered that this was an insufficient basis on which to suggest or even conclude that suitable alternative pontoon systems were available and may have been cheaper.

43 As noted above Mr Stone accepted that he was a not an expert in this area and he was not able to say that the Rotodock system was suitable for the Ocean Village Marina conditions. Mr Beere by comparison was the head of consultancy and technical services at Marina Developments (part of the MDL Marinas Group) and a specialist engineer. His evidence was clear; Rotodock was not a suitable system for the Ocean Village site [155-64] and [156-65], giving technical reasons for this.

44 The Tribunal did not consider, on the evidence before them, that the Rotodock system was a viable alternative or a true comparator to the bespoke designed system which had been installed by Walcon Limited at the Ocean Village Marina. Further and in any event the Tribunal noted that a landlord is not obliged to accept the lowest quote for a project, provided that its decision to proceed with a more expensive option is reasonable.

45 Mr Patel also made submissions to the Tribunal in relation to this first issue, suggesting that the reason that the Respondents had not re-issued section 20 notices was because "…we think there was pressure on the manager to do it [the pontoon works] within a time line… as the hotel construction was ongoing there was pressure to get it sorted."

46 Mr Beere refuted such suggestions in his oral evidence, explaining that the contract for the pontoon works was signed on 11/09/2017 – at that stage the contracted being awarded was for the timber product. It took until approximately November 2017 "…due to the due diligence on it to proceed with a decision to go with Dura Deck. [There was a] variation to the contract." As noted above Mr Beere rejected the suggestion that there had been any pressure in this regard relating to the hotel, noting in particular that the hotel's soft launch had occurred in September 2017, before the Dura Deck contract variation was signed.

47 The Tribunal considered whether, on the facts before it, the Respondents were required, when changing the decking material from wood to composite to have undertaken a new, or fresh section 20 consultation.

48 The Court of Appeal authority of Reedbase Ltd v Fattal [2018] EWCA Civ 840 provides guidance in this regard, in particular at paragraphs 36 and 37 of the Judgement:

"It is sometimes necessary for a landlord to repeat stage 2 of the process required by the consultation regulations but neither the Landlord and Tenant Act 1985 nor the consultation regulations give guidance as to when this should be done. In my judgement, the relevant test, in the absence of any explicit statutory guidance, as to when a fresh set of estimates must be obtained, must be whether, in all the circumstances, the appellants have been given sufficient information by the first set of estimates. That involves, as both counsel submit, comparing the information provided about the old and the new proposals (and that comparison should be made on an objective basis). The difference is that the estimates produced at the second stage did not include an estimate for the additional cost of the appellant's preferred tiles or of the pedestal system for fixing them. But that difference was not the only relevant factor as it would not, as I see it, be right to conclude that there has been a material change in the information provided on the basis of that one factor. In my judgement, in the light of the statutory purposes expounded in Daejan, it must also be considered whether, in all the circumstances, and taking account of the position of the tenants who did not object to the changes, the protection to be accorded to the tenants by the consultation process was likely to be materially assisted by obtaining the fresh estimates.

…… It is a relevant consideration that the tenants who contend that there should have been a fresh tender knew about the change in the works (….) and approved it, and did so without contending at that point in time there should be a fresh tender. This is not a case where the landlord was seeking to ambush the tenants by doing some fundamentally different set of works from that originally proposed. Secondly, the changing cost was relatively small in proportion to the full cost of the works,…… The proposals remain substantially the same. Thirdly, it was on the face of it is likely to be unrealistic to think that contractors who are estimated for the full works but not obtained the track contract would be likely to tender all to hasten to tender for a small part of it (supplying the fixing of the tiles). (There was a single contract awarded for the works). There is no evidence that there would have been any saving in cost. No other contractor has been put forward by the tenants…..Fourthly, the re-tendering process would have less lead to a loss of time in completing the works, which might prejudice the other

tenants. Fifthly the appellants continue to have their protection under section 19 of the Landlord and Tenant Act 1985 against the inclusion of unreasonable costs in the service charge,…..".

49 While Mr Stone sought to argue that the case was of no use when considering the issue before the Tribunal as the facts were different, it was clear to the Tribunal, and as the Tribunal sought to explain to Mr Stone, that the Court of Appel had explicitly set out general guidance on the point, which was applicable and therefore was of specific note.

50 The Tribunal found that the Respondent had not been required to repeat the consultation process because of its decision to proceed with Dura Deck instead of wooden decking. In arriving at this conclusion the Tribunal took into account the following matters:

a. The information which had been provided by the first set of estimates as to the nature of the system for the new pontoons and walkways to be used. The Tribunal noted that the marina infrastructure remained based on a system of floating pontoons, situated in a metal frame using concrete covered polystyrene floatation devices – while the number of struts and a different fixing system was used to take account of the Dura Deck decking the fundamental system remained the same;

b. A sample portion of the Dura Deck could be viewed by the leaseholders;

c. A comparison of the properties of Dura Deck and timber was set out in the 17/08/2018 letter [782], including reference to trials conducted of the Dura Deck at another marina, which had resulted in the Respondent forming a view that it was superior to timber.

d. The Tribunal compared the information given in the notices and associated documentation which had been available for inspection. The Tribunal also noted that the letter at [782] invited comments

e. The Tribunal were informed that no notable observations had been received in relation to the first stage consultation notice. In relation to the stage two notice, while observations had been received these were not related to the materials to be used.

f. Mr Beere gave oral evidence that the Respondent had been asked to use Dura Deck by members of the Residents Association. He produced no documentary evidence in this regard, and the Tribunal noted that this was not something which had been referred to in his witness statement. Mr Stone, refuted entirely that any such request had been made by the Residents Association. Mr Beere then went onto clarify that he had received communication from individual residents, some of whom were members of the Residents Association, generally supporting the use of Dura Deck. He referred to two specific names and then added from memory that there were others. Mr Stone responded that "We are aware of some of those requests", referring to one of the named individuals having made her request 2 years previously and been 'pushed back', only to "re-raise it and ask for it"

i. In response to questions from the Tribunal Mr Beere later referred additionally to "…Mr Smart, on behalf of the Residents Association [being]… generally supportive, and one from Mr Patel accepting it [Dura Deck] and saying it was a good product."

ii. Additionally the Tribunal repeats paragraphs 54 to 59 below.

g. The letter of 17/08/2017 [782], made it clear that there had been significant investigation into the Dura Deck system. That the Respondents were going to install this on the commercial pontoons and that in order to achieve a uniform appearance wished for all new pontoons to be decked in this material.

h. It was specifically noted in that letter and subsequently that the increased cost of the use of Dura Deck would be met by the Respondents alone, with the leaseholders only being charged for a like for like wooden based decking system;

i. The actual difference in cost was in any event 'only' £32,000, which when seen in the context of the contract price as a whole was not significant (amounting to a 3% increase)

j. That there were, in the Respondent's view, specific significant savings to be made over the longer term by the installation of Dura Deck (which had a lifespan of greater than 25 years) while new wooden decking lasted for between 10-15 years

i. Mr Beere's oral evidence was that his experience was that currently available hard wood did not have the same durability as that installed 30 years previously; having a shorter life expectancy than wood used 30 years ago, arising from sustainability issues surrounding the use of hardwoods.

k. The Respondent having approached four companies had received only two tenders back for the works, one contractor / manufacturer of pontoons having been put off by the scale of the project;

l. That on the evidence before it, the Tribunal accepted the view expressed on behalf of the Respondents that a new tender process would have been likely only to result in the same contactors responding, and with the same result being reached albeit for a price some £32,000 more than that previously submitted – a cost which as noted above was not going to be passed on in any event.

m. The Respondents were, in any event and the normal course of events not required to accept the lowest tender as long as the decision to accept a higher costed quote was reasonable.

n. The leaseholders continued to have their protection under section 19 of the 1985 Act.

51 In the Tribunals view the fundamental proposals remained substantially the same; a concrete floatation system set within a metal frame supporting decking.

Realistically what changed was the material used for decking and an increased number of supporting struts.

52 Mr Beere told the Tribunal that the 17/08/2017 letter had been sent after the end of observations period detailed in the stage 2 notice as he considered that it might otherwise impact on the section 20 process if had been sent within the period designated for observations.

53 Mr Stone suggested that the reason he had not responded to the August 2017 letter referring to the use of Dura Deck was because he claimed that he expected that there would now be a new section 20 consultation. The Tribunal noted however that the August 2017 letter invited comments by 31/08/2017. It may have been Mr Stone's assumption there would be a new section 20 consultation run – but that was, in the Tribunal's view his own assumption and no more.

54 At this point the Tribunal should note that overnight, between day one (6/3/19) and day 2 (7/3/19), Mr Smart (the treasurer of the Residents Association) emailed the Tribunal, objecting to Mr Beere's "new unsubstantiated evidence, which must be merely hearsay" as to his comments on the change to Dura Deck, suggesting Mr Beere was "…either misinformed, forgetful or possibly unintentionally misleading the Court.". He requested that these comments be "struck from the record and the court ignore it". He attached as part of his email a copy of his email of 10/07/2017 to Mr Beere on the topic of the use of Dura Deck. It was clear to the Tribunal, given the date of Mr Smart's letter that even before the 17/08/2017 letter referring to Dura Deck members of the Residents Association knew of the Respondents intentions/ proposal to use Dura Deck and some leaseholders at least had felt able to comment on this to the Respondent's directly.

55 Copies of Mr Smarts email were provided to each of the parties on the morning of the 7/3/2019. They were given time to read it and their comments were invited. Mr Patel stated that the comments (of Mr Beere) should not influence the Tribunal and that this issue was not in fact one which had been raised by the Residents Association in their application. Mr Stone invited the Tribunal to refuse to go ahead with a decision on the issue before them. Mr Allison pointed out that Mr Smart was not a party, that Mr Beere had answered questions which had been asked of him, he reiterated that the nature of the Tribunal proceedings were relatively informal, and that Mr Beere had in fact been challenged by Mr Stone in relation to that bit of his evidence.

56 Mr Smart was given the opportunity to address the Tribunal, in particular he was asked whether he had anything further to add to his email. He sought to add context to his email of July 2017 stating that he hadn't wanted to obstruct the overall vision but rather make comments in conjunction with it, he stated his correspondence in July 2017 was trying to help progress matters and wasn't a demand that Dura Deck be used. He ended by stating he considered his note was clear. None of the parties had any questions for Mr Smart.

57 I can do no better at this point than set out the substantive parts of Mr Smart's email of 10/07/2017: "it has been brought to my attention that some time back there had been mention of GRP being an alternative to wood for the pontoon surfaces. Apparently, GRP is only 3% more expensive than wood and has a life

50% longer. This would seem a far better solution the (sic) that currently proposed. Also, no difference in appearance is easily discernible and I understand that there are no problems such as discolouration, splitting, splinters, etc. .....I cannot find any sign of a consultation from OVEMM on this. It has certainly not been discussed as an option at recent meetings we have had. On the face of it this would present a far more cost-effective solution in the long run. I would certainly opt for this when my pontoon finger eventually needs replacing and maybe other residents also would, as also for the whole basin being finished in this way."

58 The Tribunal explained to Mr Smart and the parties that it had no intention of striking Mr Beere's evidence in this regard from the record. It was a matter for the Tribunal what weight it gave to the evidence before it. The Tribunal now had the benefit of Mr Smart's contemporaneous email – which in the Tribunal's view in fact largely supported Mr Beere's recollection of events. Parties had been given the opportunity to ask Mr Beere questions in light of his evidence. Mr Stone had disagreed with this part of Mr Beere's evidence and the Tribunal had made a note of that.

59 In this regard the Tribunal found that while there had been no demand from the Residents Association to use a composite decking such as Dura Deck, the Respondent had received positive/ favourable comments from some residents in connection with the use of such a composite decking on the pontoons and walkways. The Tribunal also found that there was no need for the Respondents to have re-run the consultation process, or part of it, as a result of the change to using Dura Deck.

60 One other matter of note was that while there was reference by Mr Patel to one occasion when one of the four tenders had not been available for inspection at the dock office, he accepted that this missing tender had been provided the following day. Separately Mr Stone indicated that he had sought to inspect the tenders which had been received, but apparently had been told by staff at the relevant office that they knew nothing about this [935]. Mr Stone told the Tribunal that Mr Beere had apologised for this. When asked if he had sought to inspect the tenders subsequently he indicated that he had not, as the issue he had wanted to investigate by looking at the tenders had in fact been answered by Mr Beere (in relation to the contingency sum and the project management fees – for which see below). Having been given this information by Mr Beere, Mr Stone indicated that he had no other desire to inspect the tenders. Given Mr Patel's evidence on this point it was clear that the tenders were at the dock office, but it appeared that on one occasion when Mr Stone had requested sight of them there was an error in communication between the Respondent's staff. The Tribunal noted that this had not been a matter raised by the Applicants previously, despite other extensive criticism being made of the consultation process by them. In any event, the Tribunal was satisfied that the tenders were available for inspection for a sufficient period over the period in question. Any isolated default in this regard could be dealt with in connection with the dispensation application considered below.

Issue 2: Contingency and project management fees

61 The First Applicants raised another issue which it was argued impacted on the validity of the consultation notices. The format of the stage 2 consultation notices was as set out above. The same criticism was made of all three stage two notices, (covering the three different areas of works – pontoon works, erosion protection works and dredging works).

62 Mr Stone argued:

a. That a contingency figure was never appropriately included in section 20 notice;

b. That the contingency figure cited was not reasonable, it should have been a percentage of the overall value of the contract;

c. That the contingency figure had been set by the Respondents and not the contractors;

d. That the project management fee was to be paid to one of the companies in the Respondent's group of companies and the stage 2 section 20 notices made it look like this was a fee payable to a contractor.

e. That there had been no consultation on the project management fee.

f. Moreover, given that this sum was being paid to a company within the Respondent's group of companies, the statement at paragraph 5 of the notice [802] was incorrect, and this was fatal to the validity of the notices.

63 The Tribunal were referred to the letter at [938] dated 25/08/2017 from the assistant project manager in which he substantively addresses the points Mr Stone raises in this regard. Mr Beere' oral evidence to the Tribunal was that contingency sums are usually specified by the body which is going out to tender on a contract, and not arrived at by the individual contractors being asked to tender; otherwise if different contingency sums would be likely to be used, and then one could not compare quotes as like with like, and a contractor might seek to include a low contingency figure so as to appear to have the lowest bid. Mr Beere's evidence to the Tribunal was that the Respondents had not specified the contingency to be added within the tender documentation [805] and that "…we don't usually do it that way. What we did was add a fixed sum. The result is the same". Mr Beere's evidence in this regard was not directly challenged in cross examination by the other parties. The contingency figure was a sum set by the Respondent, not the contractor, and was added into the tender figures at the end in any event and detailed within the stage 2 consultation notice. Mr Beere was clear that his experience was that in projects of this sort, one would not use a contingency arrived at as a percentage of the tender figure – as again this would not allow a direct comparison of like with like.

64 The Tribunal asked Mr Beere how the contingency level specified had been arrived at. He explained that it was a matter of experience in dealing with these sorts of projects. The Tribunal noted that the contingency figure specified in relation to each set of works differed, adding weight to Mr Beere's explanation that the figure was set by reference to experience and consideration of where, in a particular project or set of works, the risks lay, so for example with the

pontoon works Mr Beere explained that in his view the biggest risks lay mainly in relation to the piling works though there may be other unforeseen risks. So:

a. At [799] the corrosion protection works had a contingency of £40,000;

b. At [801] the pontoon works had a contingency of £50,000; and

c. At [803] the dredging works, had a contingency of £19,304 added.

65 Mr Beere's evidence as to the figures he arrived at in relation to the contingency was not challenged by any of the parties in cross examination. The Tribunal accepted Mr Beere's evidence in this regard. The evidence before the Tribunal did not suggest that the contingency figures used in the consultation process were unreasonable; the Tribunal accepted that the specifying of such contingency figures was in reality a matter of experience. The Tribunal noted that specific challenge could be made by lessees on completion of the works and when considering actual figures incurred ; the challenge at that stage being made on reasonableness of sums spent. Whereas at the current stage the challenge could only be based on the question of whether the contingency used was a reasonable assessment taking into account relevant risks. The Applicants had not provided any meaningful evidence such as to allow the Tribunal to conclude such sums included as a contingency were not reasonable. Indeed, the evidence before the Tribunal, from Mr Beere, was that such sums were entirely reasonable.

66 The Tribunal also, using its own expert experience, noted that contingencies were not usually arrived at on the basis of percentages of a contract price.

67 Mr Stone's argument that the mere fact that a contingency figure had been specified in the section 20 notice rendered them invalid was also rejected by the Tribunal. Even if Mr Stone's argument that such figures shouldn't be included in a notice were correct (- which was not accepted by the Tribunal), the Tribunal rejected the view that this somehow invalidated the notice. The provision of further information that, on Mr Stone's analysis of the law, was not required did not nullify the notice. The various figures and their descriptions were clear. The reasonable recipient could see exactly how the various amounts separated out if they wished; the notice provided the reasonable recipient with the relevant information about the required costs. The notices set out the quotes provided by two contractors for each set of works.

68 In his submissions to the Tribunal Mr Stone stated "We don't deny a contingency is appropriate. It should usually be an element of the contractors bid". It was not clear therefore if, on Mr Stone's case a contingency sum was to be an integral part of a contractor's bid, whether he was then arguing that it should be stripped out before preparation of the stage two consultation notice and not referred to at all. In any event such arguments were rejected by the Tribunal. Mr Stone produced no authority for his propositions in this regard, and in the Tribunal's view they were incorrect as a matter of law given the statutory provisions.

69 Turning next to Mr Stone's argument about the project management fee: While the Tribunal acknowledged Mr Stone's point that the table contained within the section 20 notices did not clearly illustrate that the project management fee was

being paid to one of the Respondent's group companies, nor that the contingency was set by the Respondent's group companies, substantively, in the Tribunal's view, this made no difference. It certainly did not invalidate the notices. The reasonable recipient of the notices was able to identify the respective costs from the notices. That was what was required.

70 The Tribunal further rejected Mr Stone's submission that there should have been consultation over the project management fee. Mr Stone argued that the project management fee should have been consulted on under the section 20 procedure, and the contract should have gone out to tender, otherwise he said there was no cost comparison. When the Tribunal asked Mr Stone about whether in his view the project management fee amounted to qualifying works or a qualifying long term agreement (and therefore within the ambit of section 20), he answered "It is a discreet piece of work, to deliver a single project. Task based. Not contract based. Therefore it falls within the definition of qualifying works." Mr Stone also argued that it appeared that the project management fee was being paid to a dormant company.

71 Mr Patel, was given the opportunity to address the Tribunal on this issue but chose not to do so.

72 Mr Allison for the Respondents argued that the project management fee wasn't a section 20 issue. The project management fee was not 'works on a building or any other premises' – (section 20ZA(2) of the 1985 Act), nor was it is a qualifying long term agreement as it was not being entered into for a term of more than 12 months (section 20ZA(2)) of the 1985 Act).

73 In relation to the alleged dormant company, Mr Allison stated that the work was going to be done by MDL Marina Consultancy. The company Mr Stone referred to was a limited company of a similar, but not the same, name (MDL Marina Consultancy Limited). The company which was to do the work was not a limited company. The letter at [938] gave this detail. The Tribunal noted that this was a letter written on headed notepaper for Marina Developments Limited, but the body of the letter referred to the project management being undertaken by MDL Marina Consultancy. The Tribunal had sympathy with Mr Stone's position that is wasn't clear that different companies were being referred to; they did have very similar names. However the Tribunal considered: a) that this was not an issue specified in the PTR directions, and was being raised for the first time at the trial, and b) that in terms of what the Tribunal was actually being asked to consider, (the validity of the section notice 20 notices), it was of no material impact.

74 The Tribunal reminded itself that the amount and reasonableness of the project management fee could be addressed, if so desired, by the lessees when the actual figures were being considered. In the context of the dispute before the Tribunal, this was not something which in the Tribunal's view affected the validity of the section 20 notice(s).

75 Further the Tribunal preferred Mr Allison's argument as to the correct interpretation of the section 20 provisions: the project management fee did not

need to be specifically consulted on. It was not qualifying works, nor, on the facts, a qualifying long term agreement within the meaning of the 1985 Act.

76 Mr Stone's next point was that the wording on the notices was incorrect and misled the reader. He pointed to paragraph 5 on the notices, for example at [802], which stated "Each of **the contractors** listed at paragraph 4 hereof is a person wholly unconnected with the Reversioner and the Company" (emphasis added). The contractors were listed on the first page of the notice, for example at [801], having being laid out in a table. The notice at [801] listed Walcon Marine Limited and Intermarine Limited as the contractors.

77 Mr Stone's point was that because the consultancy fee (project management fee) was being paid to one of the Respondents' group of companies the statement at paragraph 5 was untrue.

78 However, the contractors listed in the notice are Walcon Marine Limited and Intermarine Limited. Paragraph 5 in the notice merely states that they are not connected to the landlord. That is correct. Paragraph 5 does not say that payments are not being made to the landlord's group of companies; merely that the contractors referred to are unconnected. That statement is not untrue. The Tribunal therefore reject Mr Stone's argument in that regard.

79 While the Tribunal were of the view that the detail of who the consultancy fee was being paid to was not clear from the notice, that did not have the effect of invalidating the notices nor did it amount to a deficiency in the consultation process.

Was Walcon Marine limited unconnected to the reversioner?

80 The next issue identified in the Tribunal's PTR direction [136D – para 6(a)(ii)(2)] was that Mr Stone sought to argue that Walcon Marine Limited and the Respondent's company who were to receive the project management fee were connected to the reversioner, thus invalidating the section 20 process.

81 The Tribunal have above considered, and rejected Mr Stone's argument concerning the payment of the project management fee to one of the reversioner's group companies detrimentally impacting on the consultation.

82 The remaining point made by Mr Stone, about directors of Walcon also being members of reversioner's group of companies and therefore not 'wholly unconnected' was withdrawn by him in the hearing. Mr Stone accepted that within the meaning of the 2003 Service Charges (Consultation etc) Regulations, the companies were not connected. In effect therefore Mr Stone withdrew this aspect of his argument from the Tribunal's consideration. Therefore neither Mr Patel nor Mr Allison made any further comment on this.

Reasonableness

83 Mr Stone's next point concerned the reasonableness of the cost of the pontoon works (set out in the PTR directions as an issue at [136D-(6)(a)(iii)]). The Tribunal reminded itself that in the context of this application it was only looking at the reasonableness of budgeted figures.

84 In summary Mr Stone's arguments in this regard were:

a. That a specialist composite material contractor would "…we think have been cheaper…" than the contractor who carried out the works and who had been the cheapest on a wooden decking quotation.

b. The pontoon works were done unnecessarily and had not been required.

85 In relation to (a), the Tribunal noted that there was no evidence before them on which it could properly be said that the cost of the pontoon works was unreasonable. The Tribunal repeats its comments above about the investigations undertaken by the Respondents about the use of the composite material decking, that the system had been designed specifically to the Respondents specifications, that they had approached at least 4 contractors to quote for the extensive works, only two of whom had responded and that the increased costs attributable to the use of Dura Deck was not being passed onto the leaseholders.

86 Mr Stone in his submissions to the Tribunal named other contractors which he said could have been appointed; including Solent Marine.

87 Mr Stone also referred the Tribunal again to the Rotodock system which he had found on the internet. The Tribunal did not accept that the Rotodock system was a suitable comparator; and indeed to be fair to Mr Stone, as he developed his argument he didn't actually claim that it was either. The Tribunal repeats its comments above in relation to the Rotodock system

88 The Tribunal found, on the basis of the evidence before them, that the budgeted figure for the pontoon works was reasonable. The Tribunal repeats its comments above that the increased cost associated with having the decking in a composite material, rather than wood, was met by the Respondents and was not charged through the residential service charge. The Tribunal further accepted Mr Beere's evidence that in fact the use of composite material would likely result in decreased costs in the future- Mr Beere referred to a saving of some £320,000 over the life of the composite decking (such figure being arrived at on the basis of his experience as to how frequently the timber decking would require replacing – after 10-15 years, and the known costs given size of decking, thickness of boards and known meterage (length). It was unlikely that the composite material would need to be replaced as frequently as wooden decking would have been. The Tribunal also took into account the evidence of both Mr Smart (and his email) and Mr Beere about the general soundings/views of *some* of the leaseholders concerning the use of composite decking as opposed to timber.

89 Mr Stone suggested to Mr Beere that there was no reason to think that wooden decking would have needed to be replaced earlier than the composite decking, especially given that the previous wooden decking had lasted for approximately 30 years. Mr Beere stated that in his experience hard wood used now was not as durable or long lasting as that used 30 odd years ago – he explained in his view this was likely to be in part due to the use of sustainable timber and the sustainable timber regulations. Mr Beere explained that in his evidence timber decking would require replacement within 10-15 years.

90 The Tribunal also noted the comments of an insurance loss adjuster at [766-5.2] in 2016 when discussing the existing system then in place at the marina

"During this design life period, it is expected that the hardwood decking will need to be replaced at least once."

91 In all the circumstances the Tribunal found, on the basis of the evidence before them that the budgeted cost of the works was reasonable.

92 The Tribunal turned next to the second part of Mr Stone's submissions in this regard, that the pontoon works were in fact unnecessary.

93 Mr Stone referred to the Respondents argument that the pontoon infrastructure had reached the end of its expected lifespan (some 25 years). However on that basis he said that the works were needed and replacement pontoon works should have been required in 2010.

94 Mr Stone pointed to the Mayhew Callum report [679], commissioned in around March 2014. The state of the pontoons was addressed at various places in the report, see [717][719][720] and it was said that "…with suitable ongoing maintenance and repairs where necessary, the pontoons may perform satisfactorily during the 0-5 year maintenance period but for the 5-10 maintenance period, it is recommended that they are replaced with new pontoons." – though Pontoon D was thought to perhaps have a longer life expectancy [720]. At Pontoon E [722] it was recommended that "…with the exception of the new Intermarine and relatively new section of Walcon Marine pontoon, they are replaced with new pontoons." Replacement pontoons at Piers M and P were not expected to be required within 10 years, [723], and at F, G, H and J that allowance should be made for some replacement, possibly 50% in the 5-10 year period and the remainder in the following 10 year period"[725]. See too [727] where replacement of the older Pontoons at K and L was required after the 0-5 year period.

95 The Tribunal reminded itself that the 5 year period would have expired in 2019 and it was considering the budget for the works as part of the 2017/2018 service charge.

96 Mr Stone argued that the report recommended a programme of maintenance for all of the pontoon infrastructure. Mr Stone alleged that there was no ongoing maintenance from 2014, which he asserted in his oral submissions to be a breach of the lease. The Tribunal clarified Mr Stone's argument in this regard with him; he was not saying that because there had been no ongoing maintenance the pontoon works were required by 2017/2018. He argued "Even though [there was] no ongoing maintenance [there was] still no need to replace [the pontoons] when it was done.". The Tribunal discussed the case of Continental Property Ventures v White [2006] 1 EGLR 85 with the parties and made it clear that the current proceedings were not about alleged breaches of the lease and noted Mr Beere's evidence that there was a rolling maintenance programme in place.

97 Mr Stone additionally referred to a further report completed in November 2014 [1071]. It transpired that this was an internal report completed by the Respondent's own technical services department. Mr Stone criticised this report, stating it was not a full inspection. Mr Beere's evidence was that the report referred to a full walkover of the walkways and piers and that this was in fact a more in depth report than that conducted by Mayhew Callum – who had

not looked at the pontoon frames. The November 2014 report looked underneath and at the entire structure. The Tribunal will not repeat the contents of the report here, save that some pontoons (M and P) were noted to be good for 5-10 years [1077], while others were said to require replacement in the next 12 months [1077][1079].

98 Mr Stone stated that that report did not recommend wholesale replacement.

99 Mr Stone then referred the Tribunal to a report, arising from a storm incident [759], completed by insurers in March/April 2016. The Tribunal noted in particular the conclusions set out at [765- 4] and [766-5]. He submitted that the report addressed "discreet bits of damage which were attended to and so that in itself didn't give rise to the need for wholesale replacement".

100 Mr Stone finally argued that the replacement pontoon works were driven by the need to reconfigure the marina and in his words "…the opening of the hotel in 2017 placed on the Respondent a need to deliver a five star marina and it couldn't do that with the configuration which existed or with the infrastructure." This was put to Mr Beere and Mr Broadrib in cross examination, and both explicitly denied the same, with Mr Beere pointing out that the hotel had had its soft launch in September 2017, before the pontoon contract was signed and before the variation to the contract for composite decking was signed. Aside from the Applicants' suspicions there was no substantive evidence which the Tribunal considered supported Mr Stone's assertion.

101 Mr Beere explained that having received the Mayhew Callum report in early 2014, the Respondent then undertook a more detailed report (completed by its own internal department) in November 2014, which looked not only at the walkways and decking of the pontoons but also at the underneath of these. Mr Beere stated that the Respondents "…commercial view was [that] the risk of operating a marina beyond its design life, 10-15 years beyond [was too great]. The insurers view was that it was uninsurable – if boats were damaged….". He explained that in 2010 (the end of the expected design life of the existing infrastructure) he understood the Respondent had been "…happy with the risks. I expect the insurers [would have] paid, but in 2014/2016 … they were taking a different view." And later "They say a residual life of 5-10 years. We were unhappy with the risk of that and having done an in-depth survey decided on replacement within 4-5 years. We did some maintenance within that."

102 Mr Beere was asked why, if the internal report carried more weight its proposals (replacement within 12 months) had not been actioned. Mr Beere explained that it was impossible to carry out such works within 12 months – the works and structures needed to be designed and planned, and approval obtained.

103 The Tribunal accepted Mr Beere's evidence, in particular given his experience both with the marina in question and the site specific conditions which needed to be taken into account but also given his experience of other marinas more generally. Further the Tribunal noted that:

a. The reconfiguration costs had not been passed to the leaseholders through the residential service charge

b. The increased cost of the composite decking was not passed onto the leaseholders through the residential service charge; and

c. In the Tribunal's view importantly, the leaseholders had been given an opportunity, through the stage 1 notice, and consultation process to comment on the need for the pontoon works and the extent of the same as well as the reconfiguration. The stage one notice made it clear that the marine infrastructure was to be replaced and the berthing arrangements were to be reconfigured [789]. The stage 2 notice made it clear [801] that no written observations were received in response to the notice of intention to carry out works dated 13/01/2017 [801]. That had been the appropriate stage at which the Leaseholders had had an opportunity to comment on the need for the works and the reconfiguration.

d. The Respondent had in fact left one area of timber decking unreplaced at pier E (to one side of the hotel), which seemed to be in a poor state of repair at the time of inspection (March 2019) with what appeared to be rotten and lifting boards, movement/ sagging of the boards and algae growth present. The Tribunal had been told this area had been left by the Respondents, and not replaced as it had been found to be a in better state that had been expected. Similarly another area of decking (pier D) had, although it had been removed, was also found to be a in better condition than had been expected and had been sold onto a third party (with the proceeds being credited to the service charge). There had therefore evidently been a critical evaluation of the parts of the marina where the replacement work was needed.

e. The Respondents had taken a view, based on evidence (the reports) and their own experience of an insurance claim in 2016 that they viewed the risk of continuing to operate with the old pontoons beyond 2016/2017/2018 was too great. While there might have been elements of pontoons with a longer life, it wasn't possible to separate those bits from others, as doing the decking works would have required later pulling up the decking to replace the infrastructure parts of the pontoon as and when required – resulting in an increased cost. It was, as Mr Beere told the Tribunal and the Tribunal accepted, more economical to do it in one go.

f. That the Respondent's assessment of the expected life span of the pontoons and the need for replacement was, in the Tribunal's view supported by the evidence from the insurer's report from 2016.

g. The service charge provisions and landlord's covenants within the lease required the Respondents to "…maintain cleanse and keep in good order and condition including renewal replacement and rebuilding where appropriate…"[182][183](clause 8(2)). It was not argued by the parties that the nature of the works which were sought to be recovered through the residential service charge were not within the ambit of renewal replacement and rebuilding where appropriate; as noted above the 'improvement' costs incurred by the use of Dura Deck and the reconfiguration costs were not charged to the leaseholders through the service charge.

104 Taking these factors into account the Tribunal found that the work to replace the pontoons and marine infrastructure was not unreasonable; the Tribunal accepted that there would be tangible benefits to having all of the replacement infrastructure works undertaken at the same time, including likely cost savings. Taking into account the reports before the Tribunal, and given its own inspection the Tribunal rejected Mr Stone's argument that the works were done unnecessarily. The Tribunal took the view that it was reasonable for the works to be undertaken.

105 The Tribunal repeats its comments above concerning the reasonableness of the product chosen to deck the pontoon frames and Mr Beere's evidence about how this was chosen, the investigations undertaken into the composite decking's performance, the design requirements needed to support the composite decking, and their decision to opt for an off the shelf thickness of board; as Mr Beere stated in cross examination when asked why he had not sought a thicker type of composite board "We went to market and selected a product. We could [have] tried to re-engineer that [the thickness of the board] and go bespoke but that would have increased the costs. [We made a] best value decision….".

106 The increased cost of using the composite, Dura Deck, product as compared to timber was £17,000. Given the size of the area being considered and given that that increased cost was not, in fact passed onto the residential service charge, the Tribunal again did not consider that this made the pontoon works unreasonable.

107 The Tribunal once more reminded itself that it was considering the reasonableness of a budgeted figure for the works and the service charge. As such the Tribunal could only take into account matters known by the date of the first demand and taken into account when drawing up the budget; Knapper v Francis (ante) at paragraphs 31, 32 and 38.

108 The first demand for an interim payment under the budget for 2017/2018 [323][324][325] was sent out to the leaseholders under cover of letter dated 13/04/2017. The pontoon works were referred to specifically at [328-3.15] in the sum of £2,021,435, including a £30,000 project management fee. The Tribunal noted that in fact the section 20 notice [801] used a figure for the project management fee of £25,000. The Tribunal considered that this difference in amount did not, given the circumstances, impact on reasonableness.

109 The Tribunal noted that the section 20 consultation reported that the tender process had resulted in two quotations which resulted in total estimated costs for this part of the works as £1,535, 660 and £2,158,927 [801]. Both the Walcon and Intermarine quotations are dated 17/02/2017 [805] [830] and so had been received by the time that the budget was set. In this context the budgeted figure for these works was, in the Tribunal's view, entirely reasonable.

110 The fact that the actual cost incurred varied from this, is something that can be examined when looking at the actual figures/ costs incurred and the reasonableness of the same. Mr Patel's questions in cross examination to Mr Beere about the costs of replacement piles being included in the budget and then not actually replaced when the works were carried out is an example of

such a matter. It was however not relevant to the issues before the Tribunal in the context of the current applications. Similarly Mr Stone's queries about the costs of timber decking sold and the proceeds credited to the service charge fund, as well as spending under the contingency figure would also be matters for any challenge to the actual costs incurred – not to the reasonableness of the budgeted figures.

111 Mr Stone sought to argue that there should have been a 'necessary adjustment' as referred to in paragraph 42 onwards in the decision of Knapper v Francis (ante). However, that part of the Upper Tribunal's decision relates not to consideration of budgeted sums, but rather the exercise to be undertaken when looking at actual sums spent. In developing his argument on this point though Mr Stone's submissions were "I am saying it was unreasonable because it didn't need to be done. They have been negligent in looking after the structure." The Tribunal has dealt with both those arguments above. At one point Mr Stone also stated that given that we now had access to the actual figures [1111] (though the application concerned budgeted figures only) and only £804,000 was spent on these works as opposed to the budgeted £2million odd, this showed that the budget was unreasonable. The Tribunal rejected such argument: Mr Stone was seeking to do what was specifically rejected by the Upper Tribunal in Knapper v Francis (ante). Works had been deferred, according to Mr Beere's evidence; that would be examined when considering the actual service charge figures (as opposed to budgeted ones).

112 The Tribunal therefore rejected Mr Stone's submission that the budgeted figures for the pontoon works were unreasonable.

The 2018/2019 service charge budget.

113 Mr Stone raised two substantive issues in relation to the budget for the 2018/2019 service charge [136D-6(b)]:

a. payment into reserve fund.

b. the financing contribution.

114 Mr Stone indicated to the Tribunal, during the course of the hearing, that he no-longer wished to pursue the argument he had previously raised in the relation to payment into the reserve fund. He explicitly withdrew the same and so it was no longer an issue between the parties or before the Tribunal.

115 In relation to the second point, the parties agreed that the financing contribution of £62,054 was not reasonably included within the 2018/2019 budget. It was therefore not an issue before the Tribunal on the current applications.

116 The Respondent's counsel indicated that the relevant sum had been credited back through the service charge on 15/01/2019. Mr Stone did not accept the figure which had been credited.

117 However, and for the purposes of the Tribunal's decision the sum of £62,054 was not reasonably included within the 2018/2019 budget.

The Construction argument.

118 The Second Applicants' application [21] was made solely on the basis of an issue of construction of the terms of the lease. This was expressed in the agreed PTR directions [136E-6(c)] as an issue as to whether the replacement costs of the commercial finger pontoons fell within the ambit of the residential service charge provisions. The Tribunal referred to this as the construction argument.

119 The principles of interpreting or construing a contract, including the service charge provisions within a residential lease, were considered by the Supreme Court in Arnold v Britton [2015] UKSC 1619. The following principles of interpretation summarise the principles to be applied in this regard and appeal from paragraph 15 of the judgment onwards:

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words, ……in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

……

First, the reliance placed in some cases on commercial common sense and surrounding circumstances (….) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. .....

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even {"pageset": "S0931 ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. .....

23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation."

120 The Tribunal heard extensively from both Mr Patel and Mr Stone on the construction argument (indeed the Tribunal heard from the Applicants for half a day on this point alone), including, cross examination of both Mr Beere and Mr Broadrib on this issue.

121 Mr Patel explained the Second Applicants argument in this regard in some technical detail and by reference to his skeleton argument; it was clear he had spent some time in considering the figures. Unfortunately these calculations did not always assist and were not already relevant to the exercise in interpretation which was required of the Tribunal. The Tribunal will not try to set out every detailed aspect of Mr Patel's argument, but the following is intended by way of summary only:

a. The leaseholders have a licence or right to use a berth. This is not subject to a separate lease. The residential leases provide for a berth to be allocated to a leaseholder, but this can be reallocated on notice.

b. Foot access to a berth (the area of water allocated for a boat) is via walkways and bridges from the land, linking to various pontoons (and finger pontoons). The marina complex consists of some areas where the pontoons (including finger pontoons) are not allocated to leaseholders, i.e. non-residential only (or commercial pontoons), and in other areas of the marina, residential finger pontoons sit side by side with commercial finger pontoons. For example on Pier C. In places it is possible to have one half of a finger pontoon as 'residential' and the other half of the same finger pontoon as commercial. A helpful colour coded diagram illustrating this was attached to Mr Patel's skeleton argument (headed Appendix A1).

c. The residential leases provide for leaseholders to maintain and repair the half of a finger pontoon associated with their allocated berth. These clauses appear (in the sample house lease) at clause 6(e)(i). The leaseholders are required to contribute 50% of the costs of "repairing maintaining and replacement the finger pontoons…" incurred by the Reversioner or the management company (clause 6 (e)(iv)) [173] if they carry out the works.

d. Mr Patel argued that it was 'unfair' [paragraphs 1 and 2 of his skeleton] to recover the costs of maintaining, repairing etc. the commercial finger pontoons (i.e. all pontoons not allocated to leaseholders) and walkways by which the pontoons are accessed from the leaseholders. He argued that leaseholders paid 50% of the costs of repair etc of their finger pontoons and approximately 33% of the estate charge. That 33% of the estate charge Mr Patel argued amounted to double recovery.

e. Mr Patel argued that the Respondents should be recovering the cost of maintaining and replacing the commercial finger pontoons from their commercial activities – i.e. from the price paid to the Respondent by the users of the commercial pontoons. It was therefore unfair, and amounted to double recovery by the Respondents to seek to recover such costs through the residential service charge. Furthering his argument about alleged double recovery, Mr Patel referred to paragraphs 1.5.7 and 4.7 of the RICS Commercial Property Code and to the Upper Tribunal decision in Sheffield City Council v Oliver [2017] EWCA Civ 225 in this regard.

    i. The Tribunal did not accept that there was double recovery whether as contended for by Mr Patel or otherwise. The Sheffield City Council v Oliver (ante) case did not assist the Tribunal on the current facts. In Sheffield City Council v Oliver (ante), there had been a specific amount of money or contribution received from a third party in relation to explicitly identified works. On the current facts, Mr Patel seemingly sought to argue that the Respondent was obliged to treat some element of the sums it received from third parties using the commercial pontoons as

necessarily involving an element for repair and replacement works. He was not able to point to any specific provision or evidence that substantiated that this was the case, other than his view that it was clear this should be the case and that this would be 'fair'.

ii. The Tribunal did not consider that there was 'double recovery' by the Respondents as contended for by Mr Patel. What he now, in light of the recent works, considered to be 'fair' or 'unfair' was not something which the Tribunal could properly take into account when interpreting and construing the lease provisions.

f. Mr Patel drew attention to the management agreement which was attached to and formed part of the residential leases [204]. However it is important to note that while the management agreed is part of the residential leases (the third schedule), it is a contractual agreement between the reversioner and the management company. The leaseholder is not a party to that contract. The inclusion of the management agreement as part of the lease does however ensure that there can be no question that at the time the residential lease was entered into the lessee didn't know about it or its terms or provisions.

g. Mr Patel argued that the management agreement included a definition of commercial premises [206 –(k)] which excluded the residential berths, and at [216 –(b)] that, still within the management agreement, the contributions to the total service charge expenditure were apportioned with a percentage to the commercial premises and a percentage to the residential premises. He argued that this supported his construction that the commercial finger pontoons were to be excluded from the residential service charge provisions.

h. The apportionment before 2004 was based on berth length. The lessees subsequently argued that this wasn't 'fair' and it should be done on the basis of a 'berthing tariff', or the potential income which could be generated by a berth. Mr Patel referred to the split between wet and dry costs as referred to in the 2004 apportionment.

i. The Tribunal had already specified in the PTR directions that the 2004 apportionment was not going to be 'opened' up in the current proceedings, but to the extent that parties wished to refer to it in developing their arguments on the construction point the same would be permitted [136E-c].

ii. The 2004 apportionment arose from the creation of the South basin within the marina. The Residents Association made representations as to the basis on which this apportionment was to be conduct (as noted above). A copy of the apportionment report written by the independent surveyor appears at [603]. The surveyor reassessed the percentages applied to the service charge contributions between the various parties. While the original lease provisions refer to Residents collectively contributing 48.5% of the total service charge expenditure [189], as a result of the

2004 apportionment this was reduced to 32.07% [605]. Meanwhile the reversioner, the yachtbroker and the yacht club were, at the time the lease was drafted contributing 51.5% of the total service charge expenditure (collectively), and as a result of the 2004 apportionment this was increased to 67.93%[605]. The surveyor expressly stated that in arriving at this apportionment, and in particular when he had considered the 'wet estate' (i.e. where he considered 80% of future costs over a 10 year period were expected to fall) that he had taken into account the income generating capacity of all berths.

i. Mr Patel went onto argue that the reapportionment of contributions undertaken in 2004 (and pursuant to clause 3 of the annexed management agreement [218]) had been completed without the percentages being explained to the surveyor and without the surveyor who undertook the apportionment having seen a complete copy of the lease:

    i. The Tribunal found that the surveyor who had undertaken the apportionment in 2004 had indeed seen a complete copy of the lease [604]

    ii. The Tribunal found that in arriving at the 2004 apportionment figures in particular in relation to the 'wet' estate the surveyor specifically took into account the "…income generating capacity of all berths…"[605]

j. He claimed that there was a difference in the definition of estate at [164].

k. Mr Patel argued that looking at clause 9 on [187] the lease did not say who was to pay, though he added "We accept the management agreement says the landlord must repair and replace the pontoons but it doesn't state who pays for that other than through the apportionment".

l. That not every item of cost referred to in the management agreement was recharged through the service charge – Mr Patel referred to an example of a purely commercial cost not being included in the service charge as the fuel used in the Respondent's tender vessel. He argued that there was "…some discretion from the Landlord as to what to put into the service charge…", he later refined his characterisation of this, in discussion with the Tribunal, as more akin to a forbearance shown by the Respondent.

m. He argued that when the Respondents had expanded the estate in the 1990s to include (or create) the southside (or southern basin) of the marina that none of the pontoon costs associated with that had been put through the residential service charge. Later in his submissions he developed his argument in this regard linking it to arguments of an estoppel by convention. He referred additionally to the costs of a new dock office in this regard too, saying "the residents were not led to expect they would be charged for commercial infrastructure".

1. It is of note that Mr Patel's point ""the residents were not led to expect they would be charged for commercial infrastructure" is different from a suggestion that they were positively led to expect that they would not be charged for commercial infrastructure.

ii. The Tribunal were clear that the matters pointed to by Mr Patel came no-where near to the level required to establish an operative estoppel by convention.

1. It was not made clear by Mr Patel, how the Respondent might have sought to recover the costs of creating the Southern basin in the 1990s and new associated pontoons under the terms of the lease – in order to then suggest that the Respondent's position in not doing so charging the leaseholders somehow gave rise to an estoppel by convention – which was, Mr Patel sought to claim even now continuing to exist .

2. Nor did Mr Patel explain how it was stated that the leaseholders had relied (to their detriment) on any such alleged communicated agreement/ assumption in order for it to be unconscionable to go back on it now.

n. Referring to [173] Mr Patel pointed out the repairing obligations but argued that no-where was there reference to leaseholders having to pay for commercial pontoons.

o. He referred to leaseholders having no ability to use the commercial finger pontoons [187] clause 9.

i. The Tribunal did not consider that such an argument assisted it in the interpretation exercise which the Tribunal needed to undertake. The Tribunal noted in particular that the leaseholders needed to use the floating walkways linking the pontoons to the land in order to access their individual finger pontoons.

ii. Arguments of the sort advanced by Mr Patel in this regard are often heard by Tribunals in service charge disputes albeit in other contexts. The amount of use an individual leaseholder might gain from an item did not assist with the contractual interpretation required to resolve this issue;

p. Mr Patel referred to another development of the Respondents' at Hythe, which was again a mixed residential and commercial marina. He stated that all of the leases (both for the Hythe Marina and the Ocean Village Marina) had been drafted by the same firm of solicitors, and that the Hythe Marina had three types of leases with similar provisions to those held by Ocean Village leaseholders. He accepted that the Hythe Marina did not include a hotel and was not on the same scale as the Ocean Village Marina. Mr Patel argued, by reference to the witness statements in the bundle, in particular that of Mr Boggis [141] that in 2015 the Respondents had similarly tried to put the costs of the commercial

pontoons through the residential service charge at the Hythe Marina, but that, in the face of opposition the chairman of the group of companies had relented and the costs were not put through the service charge. Seemingly this was done on the basis that it was "…without prejudice to our contention as to the true position pursuant to the leases and that the costs of repairing commercial pontoons ought properly to be included in the service charge calculations." [142-8]

i. The fact that on a neighbouring marina development a negotiated solution had been reached, between different parties, on a similar issue was not, in the Tribunal's view, of particular assistance in interpreting the specific lease provisions before them. There was no binding decision of a Tribunal or other entity on the construction of the leases before the Tribunal.

122 Mr Stone also made submissions on the construction argument. Again by way of summary only, he submitted:

a. [187] clause 9 set out the lessee's obligation to pay the service charge. The definition of 'the Premises' appeared at [164] clause 1(1)(e), and relates to the property demised. The property demised is in turn defined at [195] as the house. Mr Stone argued that there was no reference to the estate or marina pontoons.

b. He noted that [166] clause 1(1)(n) defined Berth, making specific reference to 'where the context so admits'.

c. He pointed out that under the management agreement the service charge paid to the management company comes from the developer, not the leaseholder [214] clause 2. He argued that he paid a service charge to 'the developer' and the "…developer pays something else to the management company as a service charge. They are different charges."

d. Mr Stone then referred to [201] and the second schedule to the lease, referring to the estate rentcharge, in particular paragraph 2 which reserves the service charge payable as a yearly rentcharge.

i. The Tribunal considered that the impact of this clause was to do no more than reserve service charge contributions so as to be recoverable as rent; this was often done in residential leases as it had implications in terms of recovery and also in relation to applicable limitation periods.

e. Mr Stone argued that the management agreement included a broader definition of infrastructure and placed on the management company an obligation to do something. The service charge was not, said Mr Stone, part of that.

i. When asked by the Tribunal how the walkways (by which the finger pontoons were reached) fell within his definition of 'the premises' and therefore within the service charge, Mr Stone replied "I say it doesn't. But that is another query to raise. Though not in this case."

f. Mr Patel and Mr Stone both pointed to [189] clause 9(4)(b) and the reversioner's share of the total service charge expenditure as 48.5% or such other adjusted proportion on reapportionment, in respect of the total residential lettable units. Mr Stone argued that the 48.5% appeared in both the house lease and the management agreement and "…represents the sum total of service charges which arise from the premises and the berth." Mr Stone argued that costs related solely to the house and land on which the house stood, going onto say that "…the finger berths and walkways they don't include the commercial infrastructure. The commercial infrastructure is picked up solely within the 51.5% which the developer covenants to pay." In answer to Mr Allison's question as to how then the car park outside Mr Stone's property would be paid for, Mr Stone replied it was a partial estate cost, and that he would pay 48.5% of the cost.

123 The Tribunal did not consider that either Mr Patel or Mr Stone's arguments resulted in or amounted to a proper construction of the service charge provisions of the lease. The Tribunal considered that the preferred or correct construction of the lease was that as detailed by Mr Allison. The Tribunal, after discussion and consideration, accepted Mr Allison's argument in this regard. This is set out, again in summary, below;

124 The starting point is clause 9 of the residential lease [187] which sets out the lessees covenant to pay the service charge to the management company.

"The Owner hereby covenants with the Reversioner to pay to the Company an annual service charge in accordance with the provisions of this Clause in respect of the Premises together with the Berth."

125 While Mr Stone argued that the defined references to 'the Premises' and the Berth mean that the service charge is restricted to only relating to those items, the Tribunal did not accept that that was the proper interpretation to be put on this clause of the lease; it is not in the Tribunal's view what the reasonably informed objective bystander would have understood clause 9 to mean. The Tribunal had to consider the wording of the entire clause, in the context of the lease. In the Tribunal's view the words used in that part of clause 9 did **not** restrict or limit the extent of the costs to be considered within the service charge only to those arising directly from the berth and the premises as defined.

126 The service charge is in fact defined at [189] clause 9(4). "The certified service charge shall in each service charge year be a sum equal to the specified proportion of the Reversioner's share of the total service charge expenditure in that year…". The total service charge expenditure is defined at clause 9(4)(a) as "…the actual costs and expenses incurred by the Reversioner and/or the Company in that year in providing all or any of the services and other matters set out in clause 8 hereof and otherwise complying with the Reversioner's and the Company's respective obligations thereunder…". The Reversioner's share in relation to the total service charge expenditure means "…48.5% or such other proportion as may be allocated to the Reversioner under the Management Agreement in respect of the total of the residential lettable units…".

127 So if the total service charge expenditure was, for example, £100,000, then the reversioner's share would be £48,500, of which the individual leaseholder would pay the specified proportion (i.e. the specified proportion of £48,500). The Tribunal will not give details here but included within the bundle was a breakdown of the specified proportion in relation to each residential unit. In the above example the remaining £51,500 of total service charge expenditure was be paid by the landlord alone and is governed by the management agreement and the supplementary management agreement. The Tribunal noted that while the 48.5% proportion is detailed in the lease, the reapportionment exercise undertaken in 2004 in accordance with the lease provisions [218] and in light of the newly extended ambit of the marina, resulted in a different proportion being applicable (the Tribunal was told that this was 32% residential, 64% to the landlord and the remainder being attributed to the yacht club and yacht broker's office – as these were currently vacant such cost was being met by the landlord.)

128 The 48.5% proportion (using the original percentages used in the lease) is the total of residential lettable units [190-(b)], defined at [190-c] to include the berth. That being different to the 'lettable unit' defined at [164], the latter excluding berths.

129 The next question, is 48.5% of what costs? At [189] clause 9(4)(a) explains that it is 48.5% of the costs incurred by the reversioner and/or the company, in complying with clause 8 and other obligations of the reversioner and company hereunder.

130 Clause 8 appears at [182] and is titled 'Company's covenants'. Without setting out verbatim the entirety of clause 8 the following obligations on the company are of note:

a. The company covenants to clean repair decorate and maintain in good and substantial repair and condition and where necessary renew rebuild reinstate replace or cultivate the Estate and the Amenity Areas but excluding the lettable units

    i. Of note again is the definition of lettable units as excluding the berth at [164].

b. The Estate, is defined at [164] paragraph (d) as the property from time to time comprised in Ocean Village Marina, the extent of which, at the time the lease was entered into, was shown edged blue [232], but of expressly provided to be subject to variations or extensions. It was, Mr Allison pointed out and the Tribunal accepted, important to note that the definition of estate which mattered was that contained within the residential lease, and not any different definition within the management agreement (which after all was a contractual agreement between different parties in a different relationship).

c. The Tribunal noted that the plan at [232](and therefore the definition at [164 -d] appeared to define estate as excluding the marina.

d. However, [164-f] needed to be read in conjunction with [164-d] and [232]. The definition at [164-f] provided: "In any covenant or proviso the expression 'the Estate' shall include inter alia where the context so admits all…. Walls and structures including the marina walls…. Roads walkways …. together with the water areas mooring berths pontoons promenades marina offices and facility building other than those exclusively servicing an individual lettable unit and allocated as the exclusive repairing responsibility of a tenant pursuant to the lease of any such lettable unit."

    1. The Tribunal therefore found that taken together the definition of estate within the residential lease included the 'wet' or 'water areas' of the marina.

    2. The definition of estate within the residential lease therefore specifically included the pontoons – **except** those covered by the leaseholder's own repairing obligation. As will be seen below, this means that the 'residential' finger pontoons are excluded from the definition of 'estate'.

    3. While it was unusual to have the estate defined in the way it was at [164] in paragraphs (d) and (f), the definition was nonetheless clear. The words used were, in the Tribunal's view, such as to allow the Tribunal to depart from the natural meaning of the words used (Arnold v Britton (ante)); the words used and their effect was, in the Tribunal's view clear. There were no 'drafting infelicities' in this regard so as to allow the Tribunal to depart form the words natural meaning. In the Tribunal's view the natural meaning of the words used is that the commercial pontoons, including commercial finger pontoons, fall within the definition of estate within the residential lease and therefore within the provisions of the residential service charge.

e. The residential finger pontoons were explicitly excluded from the definition of the estate within the residential lease as they were pontoons (residential finger pontoons) exclusively serving an individual lettable unit and allocated as the exclusive repairing responsibility of a tenant pursuant to the Lease of any such lettable unit pursuant to [173] clause 6(1)(e)(i) and (iv). The Berth, referred to at [173 -(i)], is a defined term at [166] clause 1(1)(n), as including the pontoon finger berths, piles and walkways.
    i. Therefore the Tribunal found that there was not double recovery in relation to the costs of repair/ maintenance of the residential finger pontoons. The costs of repair maintenance etc. of the residential finger pontoons are covered not by the service charge provisions under clause 9 but by separate covenant by the owner at [173]. The residential finger pontoon repairing etc. costs are covered by a separate charge and arise not from the reversioner's or the company's obligations under clause 8 but rather the

leaseholder's repairing covenant under clause 6. Such costs being excluded from clause 8 and 9 by the definition of estate set out above.

f. Mr Allison submitted that the ambit of clause 8 did not include improvements, so he argued if the respondents added extra pontoons they couldn't recover the costs of that through the service charge. Thus the fact that in the past such costs had not been put through the service charge didn't indicate any forbearance or give rise any form of estoppel as Mr Patel sought to argue, rather such practice was merely reflecting what was permitted under the lease provisions; such costs were not recoverable through the service charge. Mr Allison also submitted that the same view had been taken in relation to the current project, so that the cost of the additional pontoons involved in the reconfiguration had been stripped out and had not put through the service charge.

g. Mr Allison submitted that the existence of the management agreement and the fact that it was included as an appendix to the residential lease could assist with the construction argument to the extent that it illustrated fairness, and its inclusion within the residential lease would allow the objective reasonable observer to see that the terms were fair. He stated that without the management agreement, the landlord would be able to make a bigger and bigger marina passing 100% of the all the increased costs onto the leaseholders. But the terms within the management agreement at [204] required the manager to carry out a reapportionment ([218] clause 3(1)) so that in the event of a reconfiguration or a geographical extension (for example the creation of the south basin) the respective percentages attributed to the residential service charge would be looked at again. As they had been in 2004 when the residential service charge percentage had been reduced from 48.5% of the total service charge expenditure to 32%. Indeed Mr Allison stated that the Reversioner' position was that there was a need for a new reapportionment going forwards, under such provisions, given the reconfiguration works. This did not impact on the matters before the Tribunal as a reapportionment was not triggered before the works were carried out. The Tribunal noted;

    i. [218] clause 3(3) set out the matters the surveyor was to have regard to when carrying out the reapportionment exercise;

    ii. The management agreement which was part of the lease at the time it was entered into was part of the factual matrix existing at that time. It allowed a lessee to see that there was provision for reapportionment in the future. It also demonstrated on the balance of probabilities that there was, at the time the lease was entered into, some element of a commercial marina in existence at Ocean Village; this did not seem to be disputed by the parties;

    iii. While there was a supplementary management agreement, this was a subsequent document not in existence at the time the leases were entered into;

iv. The effect of the reapportionment provisions in the original management agreement and the 2004 apportionment was that the Reversioner (MDL) paid nearly 2/3 of the costs of the estate (see paragraph 127 above):

1. After the 2004 reapportionment, the estate costs were apportioned so that 32% were considered under the residential service charge provisions (as opposed to the original figure specified under the lese of 48.5%), 64% to the landlord and the remainder being attributed to the yacht club and yacht broker office – as these were vacant such cost was being met by the landlord.

2. Mr Patel in his closing argued that while the landlord may now (under the 2004 reapportionment) be paying 64% of the estate costs he considered that it had 78% of the marina (when considered by revenue). But this did not, change the Tribunal's view on the construction argument, taking into account the material before it and the matters highlighted as relevant to such interpretation exercise by the Supreme Court in Arnold v Britton (ante).

3. There was in the Tribunal's view no double recovery – the Tribunal found that the costs of operating a commercial business were not service charge costs, and nor were they sought to be recovered through the service charge as such.

131 The Tribunal's conclusion was that the cost of repair and maintenance etc of the 'commercial finger pontoons' did indeed fall within the ambit of the residential service charge provisions.

Dispensation

132 The Respondents had also made, in advance of the hearing, an application for dispensation from the section 20 consultation requirements [59] pursuant to section 20ZA of the 1985 Act. The application had, in effect two parts:

a. In the event that the Tribunal found that there were defects in the section 20 consultation process, to the extent identified by Mr Stone, the Respondents sought dispensation to the extent required in respect of the same; and

b. Mr Allison stated in his skeleton argument that the Respondents "…accept that they did not technically comply with the Regulations with respect to the dredging works." [paragraph 43 of Mr Allison's skeleton] and to that extent dispensation with the consultation requirements was requested.

133 The Tribunal reminded itself of the provisions of section 20ZA of the 1985 Act, that the Tribunal may dispense with all or any of the consultation requirements "… if satisfied that it is reasonable…". The Supreme Court considered the jurisdiction to grant dispensation in Daejan Investments Limited v Benson [2013] UKSC 14 [956]. The Tribunal had to focus on the extent to which

leaseholders were prejudiced by the landlord's failure to comply with the consultation requirements. Dispensation should be granted where the failure to comply had not affected the extent, quality and cost of the works. Compliance with the consultation requirements was not an end in itself, and dispensation was not to be refused simply by reason of a serious breach. The prejudice flowing from the breach was the main, and normally the sole, question for the Tribunal. The Tribunal could impose appropriate conditions on a grant of dispensation. Where the Tribunal was considering prejudice, the legal burden of proof was on the landlord, but the factual burden of identifying some relevant prejudice fell on the leaseholders. Once the leaseholders had shown a credible case for prejudice, it was for the landlord to rebut it.

134 As detailed above, the Tribunal considered that the issues raised by the First Applicants (Mr Stone and Mr Hughes) in relation to the consultation processes did not amount to defects in such processes. Therefore there was no need to consider the dispensation application in relation to any of those matters.

135 However, and for the avoidance of doubt the Tribunal wished to record that in its view the Applicants had not in fact established that they had suffered any prejudice in any event. The Tribunal accepted, and preferred the evidence Mr Beere in this regard. The Tribunal were not satisfied that the prejudice alleged by Mr Stone's was made out on the facts. Mr Stone argued that the Respondents had only approached companies who worked in timber decking and so characterised the relevant prejudice, in effect as "…we won't know and will never know if they [*or anyone else*] could have provided you with a cheaper system. It was a retrofit not designed from the ground up". Mr Beere denied such assertion, explaining, and as noted above, that the contractors did design the system 'from the ground up'. He did not accept that what the Respondents had done was to fit Dura Deck to a system designed to have wooden decking; he referred to the nature of the pontoons as polystyrene floats within a frame and that any sort of decking could be placed on the frames as long as it met the specifications. As detailed above he explained how the frames had been created to take account of the behaviour of the Dura Deck, with each frame being specifically fabricated. Further the Tribunal accepted Mr Beere's evidence that the Respondents had approached all UK pontoon manufacturers (save one – for which reasons as noted above were given) and in fact another company in Italy, and only two were prepared to provide a quote. He added "I don't believe any of the other companies could meet our specification…". The increased costs associated with the use of Dura Deck were, in any event, not being passed onto the residential service charge.

136 Mr Stone's assertion of prejudice was that there might have been a different cheaper system available; as noted above he was not suggesting that the Rotadeck system he had found on the internet was suitable, and he was unable to identify what suitable, cheaper system he might be available. It amounted to no more than an assertion of a potential for prejudice in the abstract.

137The Tribunal did not consider that the Applicants had discharged the factual burden of identifying some relevant prejudice, which under Daejan (ante) fell on the leaseholders.

138 During the course of the hearing, it became apparent that both Mr Stone and Mr Patel had experienced an issue viewing the tenders at the Respondent's offices (see paragraph 59 above). However, given Mr Stone's evidence that he had pointed out the difficulty he had experienced to the Respondents, received an apology and had his query answered (see letter at [939]), and that he had not therefore seen the need to actually go and inspect the tenders subsequently. Mr Patel commented that on one day, one of the tenders had been missing but that the issue had been rectified by the following day. This was raised as an aside by him; it was clear that once alerted to this fact that the matter had been remedied by the Respondents.

139 None of the parties alleged or claimed that any prejudice resulted from the minor errors which had occurred in relation to the availability of the tenders for inspection, and none was found by the Tribunal. Therefore, and to the extent required, dispensation is given in this regard in relation to the section 20 consultation processes (for all three sets of works – the pontoon/marina infrastructure works, the dredging works and the corrosion protection works). The Tribunal specifically record that the Respondents had expressly indicated, see paragraph 49 of Mr Allison's skeleton argument, that they would not pass onto the leaseholders the costs directly associated with the dispensation application. This is a condition of the Tribunal's dispensation.

140 The second part of the dispensation application relates to a defect in the consultation process identified by the Respondents themselves: Mr Allison points out the Respondents did not "…technically comply with the [*consultation*] Regulations with respect to the dredging works." (paragraph 43 of Mr Allison's skeleton). The defect with the process arose because while the Respondents did carry out a consultation exercise in relation to the dredging works, they did not include the company ML (UK) within that consultation; this was because they had very recently (in May 2017) already completed a tender exercise with ML (UK) and so had already obtained their figures in this regard (see the witness statement of Mr Beere at [152] and [153] paragraphs 38 to 48, and see the rates set out at [868] showing a further reduction in price negotiated in relation to the dredging works). Thus the figure included in the stage 2 notice for ML(UK) [803] had come from a previous consultation process.

141 None of the Applicants sought to argue that any prejudice arose from this defect in the consultation process. Indeed Mr Stone, candidly and entirely sensibly conceded that there was no prejudice arising from the defect identified by Mr Allison in the dredging consultation process. Mr Beere's evidence was clear that he could not see that there had been any prejudice [153-44].

142 Therefore and to the extent required, dispensation is given in this regard in relation to the section 20 consultation process concerning the dredging works. The Tribunal specifically record again that the Respondents have expressly indicated, see paragraph 49 of Mr Allison's skeleton argument, that the Respondents will not pass onto the leaseholders the costs directly associated with the dispensation application. This is a condition of the Tribunal's dispensation.

143 The Tribunal also emphasise that in relation to the dispensation application the only issue for the Tribunal is whether or not it is reasonable to dispense with the statutory consultation requirements. **The dispensation application does not concern the issue of whether any service charge costs will be reasonable or payable.**

Section 20C and litigation costs

144 Section 20C of the Landlord and Tenant Act 1985 allows a Tribunal to order that all or some of the costs incurred by the Respondent in connection with the proceedings before the 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 Applicants or any other person or persons specified in the application. A Tribunal may make an order under section 20 C if it considered it to be just and equitable to do so. The Applicants indicated that they wished to make an application for such an order [6][26].

145 The Applicants also applied for an order pursuant to paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act), which is a similar provision in relation to litigation costs. Again the Tribunal may make such an order restricting such costs it if considers it just and equitable to do so.

146 The Tribunal did not consider that it was just and equitable to make either a section 20C order pursuant to the 1985 Act or an order under paragraph 5A of Schedule 11 of the 2002 Act. In reaching this conclusion they particularly noted the following (non exhaustive) list of factors:

a. Save for one element of the First Applicants' challenge to the 17/18 and 18/19 service charge budgets (the point concerning the financing changes within the 18/19 service charge budget) the Applicants had been entirely unsuccessful.
b. The hearing had taken a full 2.5 days, only a small proportion of which was not related to the Applicants' applications.
c. The Respondent was represented by Counsel which, in the circumstances the Tribunal considered to be entirely appropriate especially given the construction argument which was before the Tribunal;
d. Large parts of the First Applicant's case related to budgeted figures, rather than actual service charge expenditure – there was therefore in that regard at least only a limited amount which could be achieved by the proceedings in any event;
e. The financing charge on which the Applicants had been successful was a minor part of their case, relative to the other items in dispute before the Tribunal;
f. The financing charge had been raised as an issue by the Applicants in their application notice, and yet it was only in the Respondent's skeleton argument that it had in effect been formally withdrawn from the matters before the Tribunal. Though the Respondents argued, (see paragraph 116 above), that the relevant figure had been adjusted in the service charge account in January 2019, this was after the PTR hearing in December 2018;

g. Mr Stone argued that the production of minutes had been delayed, that the Respondent had sent Mr Beere or others to attend meetings when they had no authority to agree the issues in dispute. While the Applicants complained of a lack of communication or response by the Respondents to their queries, it was clear that some of the Applicants points had been responded to (see for example [938] when questions which had been raised by Mr Stone about the project management fee and the contingency figure used in the budget were answered by the Respondents staff); albeit that the Appellants did not agree with or accept the Respondent's position in this regard.
h. There had been reference by both parties to a limited number of meetings, including attendance by Mr Beere at two AGMs on 27/04/2016 and 26/04/2017 where questions were taken after a presentation amongst other less formal meetings. Mr Beere described this meeting as 'becoming heated'.
i. Mr Beere referred to 'countless meetings' with Mr Stone, Mr Patel and Mr Smart (of the Residents Association) at offices in Hamble. Mr Stone argued that in fact the "vast majority of the meetings referred to were the same meeting covering various topics" and stated he had been to two technical meetings with Mr Beere in early 2017 and nothing since.
j. Mr Stone had become frustrated at, what he saw as the Respondent lack of communication and response to his queries;
k. However the Tribunal came to the view that a very major issue between the parties consisted of a fundamental disagreement between them as to the interpretation of the lease. It was clear that the parties were not going to be able to resolve their differences without recourse to the Tribunal – the Tribunal therefore had some sympathy with the view expressed by Mr Allison that if the parties were never going to agree there is little point continuing to discuss things further.

147 In all the circumstances the Tribunal did not consider that it was just and equitable to make either a section 20C order or an order restricting litigation costs pursuant to paragraph 5a of schedule 11 to the 2002 Act.

148 However, the Tribunal has not heard argument on whether, in fact, the residential leases permitted the recovery of such costs through the service charge or in relation to litigation costs; those points therefore remain undecided. It was not necessary to determine such issues in order to determine the matters before the Tribunal.

## Conclusions

149 The Tribunal therefore found:

a. Mr Stone's challenges to the section 20 consultation were unfounded.
b. The budgeted costs of the pontoon works, included within the 2017/2018 service charge budget were reasonable;
c. That the 2018/2019 service charge budget was reasonable, save that the £62,054 which had been included as a 'financing contribution' was **not** reasonably/ properly incurred;

d. That the replacement costs of the commercial finger pontoons fell within the ambit of the residential service charge provisions;
e. That, to the extent required dispensation of the limited defects of the section 20 consultation provisions was granted, in respect of:
    i. The dredging works; and
    ii. For all three sets of works for the period for which the tenders were available for inspection by leaseholders
f. That dispensation was given on the condition that the costs of the dispensation application were not to be recovered from the Applicants (or other leaseholders)
g. That no section 20C order nor an order pursuant to paragraph 5A of Schedule 11 to the 2002 Act would be made.

**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 within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, 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).

Judge J F Brownhill