FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/LSC/2020/0191**
HMCTS code	**:**	**V: VIDEO**
Property	**:**	**26B and 28A Minet Road, London SW9 9UA**
Applicants	**:**	**(1) Mr Nicholas Torbet (26B)** **(2) Ms Janet Crossley and Dr Dobajeet Choudhuri (28A)**
Representative	**:**	**Mr E Blakeney of counsel**
Respondent	**:**	**London Borough of Lambeth**
Representative	**:**	**Mr D Kilcoyne of counsel**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms Alison Flynn MA, MRICS** **Mr John Francis QPM**
Date and venue of Hearing	**:**	**Remote** **15 and 16 April 2021**
Date of Decision	**:**	**8 November 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing consented to by the parties. The form of remote hearing was VHS. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in a bundle of 868 pages, the contents of which have been noted.

The application

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of major works. The application referred to the estimated service charge demand for the service charge year 2018/19, now charged in 2019/20. It was agreed at the hearing that the service charges in issue were those relating to the major works described below, whenever demanded.

2. The relevant legal provisions are set out in the Appendix to this decision.

The properties

3. Numbers 26 and 28 Minet Road are adjacent terraced early to mid-nineteenth century grade II listed houses. Both are divided into a one bedroom basement flat and a three storey, three bedroom maisonette on the ground, first and second floors. 26B is the maisonette, 28A the basement flat in their respective houses. 28B is also subject to a long lease. 26A is occupied by a secure tenant.

The leases

4. The lease of 26B was granted in November 1987, and that of 28A in July 1998, in both cases for terms of 125 years. The lease plan and description of other properties in the lease to 26B were rectified in a deed made in 2012. Mr Torbet acquired the leasehold interest in 2012. Ms Crossley and Dr Choudhuri acquired that for 28A in 2015. The structure and terms of the leases are substantially the same, with one significant difference in relation to clause 4(A) (see paragraphs [14] to [16] below).

5. The tenants' covenants, including the repairing covenants, are in clause 2, and those of the Council in clause 3. Clause 4 relates to the service charge. Details of the demise are contained in the first schedule.

6. Sums owed for (inter alia) service charge are subject to payment of interest 14 days after they are due (clause 2(B)).

7. By clause 2(E), the tenant covenants to pay "all costs charges and expenses which may be incurred by the Council incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 whether incurred in or in contemplation of proceedings under section 146 or 147 of that Act."

8. The repairing obligations of the tenant are contained in clause 2(G)(i). The clause lists parts of the building that are the responsibility of the tenant, and those which are excluded from the covenant. The first list includes responsibility for the glass in the windows (but not the window frames), the doors and door frames, the entrance doors (including both internal and external surfaces), and "all conduits pipes and cables which are laid in any part of the building of which the demised premises form part and serve exclusively the demised premises". The second list excludes "all structural parts of the demised premises including the roof … any conduits and water tanks within the building of which the demised premises form part and which do not exclusively serve the demised premises and all external parts of the demised premises (other than the glass in the windows and the entrance doors of the demised premises)".

9. Clause 2(I) requires the tenant not to "make any alteration or addition whatsoever in or to the demised premises either externally or internally or to make any alteration … in the … architectural appearance" without the licence of the Council.

10. Clause 2(N) reads as follows:

> "At all times during the said term to comply in all respects with all Acts of Parliament and in particular with the provisions and requirements of the Town and Country Planning Act 1971 or any Statutory modification or re-enactment thereof for the time being in force and any regulations or orders made thereunder whether as to the permitted use hereunder or otherwise as during its continuances and to keep the Council indemnified against all liability whatsoever including costs and expenses in respect of such matters and forthwith to produce to the Council on receipt of notice thereof any notice order or proposal therefor made given or issued to the tenant by a planning authority under or by virtue of the said Act affecting or relating to the demised premises".

11. The Council's repairing obligations are contained in clause 3(E). The content of the obligation, in both leases, is "[t]o maintain repair and keep in good order and condition…". The subject matters of the obligation are "the exterior walls joists and ceilings and floor of the

building of which the demised premises form part (but excluding such parts thereof as are included in the demised premises) and the whole of the structure roof … window frames …".

12. By clause 3(F), the Council covenants to paint the outside, in accordance with its cyclical repainting programme.

13. Clause 4(A) contains the tenant's covenant to pay the service charge. The basis of payment is rateable proportion, and is not contested. It is in the description of what the service charge relates to that the only significant differences between the leases for the two properties occur.

14. The primary covenant is set as in the following terms. The difference between the two at this point is that the passage in square brackets occurs only in the lease for 26B:

> "The Tenant hereby further covenants with the Council to contribute and pay on demand a rateable proportion of the costs expenses outgoings and matters referred to in Clause 3 hereof [and any other works or matters affecting the demised premises and the building of which the demised premises form part that the Council in its discretion considers is reasonable or appropriate to carry out] which shall include not only those expenses outgoings and other expenditure hereinbefore described which have actually been disbursed incurred or made by the Council during the year in question but also such reasonable part of all such expenses and other expenditures hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) …".

The covenant, in both leases, includes provision for the payment of sums for anticipated expenditure payable in advance.

15. The primary covenant has no subordinate number. There follows four numbered sub-clauses, introduced at the end of the passage containing the primary covenant by the words "AND ALSO". Sub-clause (i) allows for the recovery of the fees of "any accountant solicitor or other professional person" in relation to auditing etc. Sub-clause (ii) relates to VAT or similar, and (iii) to the expenses of communal aerials and bins.

16. The final sub-clause is again differently worded in the two leases. The word in square brackets appears only in the lease for 26B:

> "(iv) All other expenses (if any) reasonably incurred by the Council in and about the maintenance [improvement] and management of the building of which the demised premises form part"

17. The third schedule contains certain rights reserved to the landlord by clause 1 (although the terms of the paragraph (2) in fact confer the relevant rights on other parties and non-parties).

18. Specifically, paragraph (2) confers the right to enter and remain on the premises on the council, its tenants and the owners and occupiers of adjoining properties to undertake works to "adjoining neighbouring or contiguous properties or any part of any building which the demised premises … form part … or any of the [services] serving the same".

19. The Council is entitled to add 10% of the total cost incurred by the Council and payable by the tenant in respect of clauses 3 and 4 for "general administration expenses" by clause 4(B).

20. The repairing obligations of the parties echo the details of the demise as set out in the first schedule.

The issues and the hearing

21. The Applicants were represented by Mr Blakeney, and the Respondent by Mr Kilcoyne, both of counsel. We heard evidence from the Applicants (Ms Crossley for the second Applicants) and their chartered surveyor, Mr Maunder Taylor. For the Respondent, Mr Dickson, the head of capital programme management, gave evidence.

22. In this Decision, under this heading, we first set out some preliminary matters – the background to the major works; the service charges in issue; and a note on cost figures. We then consider each of the following disputed issues in turn:

    (i) Whether the major works consultation required under section 20 of the 1985 Act was effective;

    (ii) Whether the first Applicant received a section 20B notice;

    (iii) Whether, and/or to what extent, expenditure on the following items was recoverable in the service charge:

        (a) Roof and parapet repairs/replacement;

        (b) Replacement of external doors;

        (c) Replacement of windows in 26B;

        (d) Replacement of windows in 28B;

(e) External decoration, rendering etc and other damage in respect of both houses;

(f) Rainwater goods;

(g) External wall works;

(h) Scaffolding;

(i) Aerial/dishes works; and

(j) Preliminaries, consultants fees and overheads and profits;

23. During the course of the hearing, the Respondent agreed that expenditure described as related to "concrete repairs" did not apply to the Applicants properties, and should not be charged in the service charge.

24. Rather than deal with issues relating to the construction of the lease in the abstract, we consider them as they occur in relation to specific issues in dispute.

Background: the major works

25. The houses in Minet Road were listed as grade II in 1981. The Respondent acquired the houses in 1985. The leases were granted when tenants exercised the Right to Buy provisions in the Housing Act 1985, in 1987 (26B) and 1998 (flat 28A).

26. As part of the Respondent's overarching Lambeth Housing Standards Programme, an initial stock condition survey of (among other properties) Minet Road was carried out in 2015 to 2016 by the Respondent's consultant, John Rowan and Partners. This provided the basis for the specific major works programme including the properties in Minet Road, among some hundreds of others. About 20 houses in Minet Road are owned by the Respondent and subject to the major works.

27. There was an initial section 20 consultation process in 2016, but, according to the Respondent, it became clear that the work could not be undertaken in a reasonable time, and the consultation, and the costs on which it was based, were abandoned.

28. The Respondent had entered into a qualifying long term agreement (QLTA) with Mears Group in February 2014. A consultation process under section 20 of the 1985 Act was undertaken at that time. The basis for pricing works under the contract was to use a schedule of costs for

specific works, with preliminaries and overheads and profit (OHP) set using percentages of costs. The appointment was made to contribute to the delivery of the overall Lambeth Housing Standards Programme.

29. The term of the contract was four years, with provision for its extension beyond that time. A question arose during the hearing as to whether the contract had been properly extended after February 2018, and we made provision for the Respondent to provide further material after the conclusion of the hearing. Once that material was provided, the Applicants did not contest the issue, and we say no more about it.

30. Prior to the major works with which we are concerned, the Respondent says that Mears conducted a "ground level survey", including the Minet Road properties, and that this was supplemented by a drone survey, which provided ariel pictures, some of which were produced in the bundle. The result of this work was a document setting out what the Respondent described as a finalised scope for the work – a schedule of proposed works and costs - in a document referred to before us as the AMT.

31. The Respondent then undertook a section 20 consultation, and, going beyond the statutory requirements, held public meetings with tenants. The Respondents state that at one such meeting, they were informed that not all tenants had received the section 20 document, and they were re-sent.

32. The Respondent's case was that the consultation took place in accordance with Schedule 3 to the Service Charges (Consultation Requirements) (England) Regulations 2003, made under section 20 of the 1985 Act.

33. The work on numbers 26 and 28 took place between November 2018 and January 2019.

34. As final accounts could not be completed within 18 months of the expenditure being incurred, the Respondent sent section 20B notices to the leaseholders in September 2019.

A note on cost figures

35. During the hearing, on a number of occasions it proved difficult to clearly ascertain the individual costs relevant to a disputed matter, as a result of the way in which costs were presented in the papers in documents produced for other purposes. We are also aware that in the period between the hearing and the date of this Decision, it may be that there have been developments in the parties' understandings of the costs as applied to the Applicants' service charges. In this Decision, where possible and appropriate we have sought to state the costs as we understand them to be.

36. Nonetheless, we appreciate that the specification of such sums may present difficulties for the reasons given. If the mutual understanding of the parties is that another sum is the correct outcome of our findings, then the parties are at liberty to substitute the agreed alternative. If one party considers the sum we state to be incorrect (and the other considers it correct), or if both consider our sum incorrect, but do not agree an alternative, one or both parties are at liberty to seek a review of this Decision under the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, Rule 55.

The service charges in issue

37. The initial sums specified in the aborted 2016 section 20 consultation were £24,584 for the first Applicant and £12,317 for the second applicant. In the second section 20 consultation, those sums rose to £78,991 and £41,584 respectively (invoiced in March 2019). The sums specified in the section 20B notices (September 2019) were £94,659 and £49,710.

The section 20 consultation

38. The Applicants argue that the section 20 requirements were not complied with. That the proper procedural steps were taken is not disputed. Rather, the Applicants argue that the conduct of the Respondent demonstrates that they had not properly had regard to the responses to the consultation. Mr Blakeney relied on a passage in *Waaler v Hounslow* [2017] EWCA Civ 45, [2017] 1 W.L.R. 2817, at [38] in which Lewison LJ considers the obligation on a landlord to "have regard to" the responses to consultation provided by tenants:

> "What this means is that the landlord must conscientiously consider the lessees' observations and give them due weight, depending on the nature and cogency of the observations. In the light of this statutory obligation to consult, it is impossible to say that the tenants' views are ever immaterial. They will have to be considered in every case. This does not of course mean that the lessees have any kind of veto over what the landlord does; nor that they are entitled to insist upon the cheapest possible means of fulfilling the landlord's objective. But a duty to consult and to 'have regard' to the lessees' observations entails more than simply telling them what is going to happen."

39. Mr Blakeney argued that, in the context of the four-fold increase in costs since the original consultation, the response provided by the Respondent to the Applicants' submissions to the consultation did not demonstrate that the Respondent had properly had regard to their views. The responses by the Respondent, he said, had cut and paste passages used in relation to both of the Applicants' submissions. And in respect of a number of points merely said "noted". In answer to a question from the Tribunal during his evidence, Mr Dickson said that,

as far as he was aware, there were no changes to the scheduled works as a result of comments by any of the tenants consulted.

40. Mr Blakeney put particular stress on the size of the service charges involved, which should have led the Respondent to appreciate that the charges were unaffordable (as stated by the Applicants in their submissions), and should have therefore considered staggering the work over a longer period (citing *Garside v RYFC Ltd* [2011] UKUT 367 (LC)). While there were payment plans, they were unsustainable in the face of service charges of these magnitudes.

41. Mr Kilcoyne said that the Respondent had undertaken a proper consultation exercise. He referred to the payment plans provided by the Respondent, which included non-interest bearing instalment plans and loans at interest, as showing the Respondent's sensitivity to affordability.

42. If, however, we were to find that that was not so, then Mr Kilcoyne argued that retrospective dispensation from the consultation requirements should be made under section 20ZA.

43. We do not think that the Applicants criticism of the consultation process are sufficient to satisfy us that the Council did not "have regard" to the tenants' responses, to the extent that that invalidated the consultation process.

44. In *Waaler*, immediately before the passage relied on by Mr Blakeney, Lewison LJ said

> "Although the duty to consult in this context is not a public law duty imposed upon a landlord (see the *Daejan Investments* case, at para 52) nevertheless the concept of what amounts to consultation is well developed in public law (see for example *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213)."

45. The criteria for a proper consultation set out in *Coughlin* are that

> "consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken" [108].

46. As Lewison LJ says, a section 20 consultation is not a public law duty. One important difference is that the procedural aspects of proper consultation – that is, all but the final *Coughlin* requirement – are covered by the requirements of the statute. If a challenge to the final

criterion is made in judicial review proceedings, an extensive review of the conduct of the public body concerned and of the policy context would be required; and the level of review appropriate to judicial review would be applied. We do not think that a challenge to whether a landlord has had "due regard" to the responses to a consultation under section 20 imposes a significantly lesser burden on an applicant. The matters relied on by Mr Blakeney do not, in our view, come anywhere near demonstrating that the Respondent's attitude towards the responses it received was such as to invalidate the consultation.

47. *Decision*: The Applicants have not shown that the consultation process was invalidated by a failure to have regard to the responses to the consultation.

The first Applicant's Summary of Tenants' Rights and Obligations

48. Initially, it was argued that the neither Applicant had received the summary of rights and obligations required by section 21B of the 1985 Act and Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 4(2), and the corresponding regulations (Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 and Administration Charges (Summary of Rights and Obligations)(England) Regulations 2007)).

49. In her evidence, however, Ms Crossley agreed that she had received the summary provided by the Respondent. Mr Torbet said he did not remember receiving the document.

50. In his closing submissions, Mr Blakeney acknowledged the difficulty Ms Crossley's acceptance of receipt presented.

51. The Respondent is a large local authority with a substantial portfolio of leasehold properties. We would expect it to generally adhere to the obligation to provide the summaries, in its own interests. No doubt mistakes may be made on occasion, but we do not think it at all likely that Ms Crossely would have received the summaries, but Mr Torbet would not. The only countervailing evidence was his lack of memory of receipt, upon which we can put little weight.

52. *Decision*: The Applicants have not satisfied us that the first Applicant did not receive the statutorily required summary of rights and obligations.

Roof and parapet repairs/replacement

53. A very significant element in the service charge was that for the replacement of the roof, and repair of the parapets at roof level.

54. We first consider the evidence as to the state of the roof.

55. There had been a roof leak in 2013/14 affecting the first Applicant's property, which had been successfully repaired by the Respondent.

56. It was a condition of listed building consent that the existing artificial tiles be replaced with more expensive Portuguese slates.

57. In its response to the Applicants statement of case, the Respondent justified the replacement of the roof in the following terms:

> "The roof was over 100 years old and beyond its reasonable life span for a roof of this type. The tiles contained asbestos that had started to break the surface of the tiles. This meant that continuing with repairs would scatter asbestos fibres and it was no longer safe to send workmen to work on repairs."

58. No evidence was provided as to the age of the roof. At the commencement of the hearing, we were told by the Respondent's solicitor that the Respondent no longer contended that there was asbestos in the roof tiles. The same information was conveyed to Mr Dickson when he joined the remote hearing. He had not been informed earlier.

59. In his skeleton argument, Mr Blakeney cited an email produced in the bundle in which a Mears' assistant site manager told Ms Crossley that an asbestos survey had been carried out and no asbestos had been found. The email is dated June 7, 2019. It is, however, not clear whether this related to the removed tiles or to some other survey.

60. We were supplied with copies of some of the aerial photographs of the roof taken during the drone survey. These are good quality colour photographs, which give a clear general view, albeit not of all parts of roof.

61. While there are references to other surveys (the initial stock condition survey and the "ground level survey"), no reports of surveys showing disrepair have been disclosed. It may, indeed, be that while the surveys fed into the specifications for the purpose of the contract with Mears, there was no separate reporting stage on the existing state of repair of the relevant elements of the buildings.

62. As to the age of the roof, nothing in the appearance of the roof suggested it was anything like 100 years old.

63. The Applicants procured two reports from Mr Maunder Taylor, an experienced chartered surveyor, and he gave evidence. In his oral evidence, Mr Maunder Taylor agreed that there came a time in the life of a roof when a decision had to be made about whether it was economic to make patch repairs when necessary, or to replace the roof. His view in general was that patch repairs were no longer sustainable if

there were persistently two or three new leaks over a large area of the roof a year (subject to the reported state of the roof by the builders engaged). Although the repairs history of the roof had been requested, no new material had been provided by the Respondent, and he was only aware of the 2013 leak.

64. We now turn to the leases. We have set out the repairing covenant and the related covenant to pay service charges in the two leases above, at paragraphs [11] to [16].

65. The first form taken by the covenant in clause 3(E) is to "maintain [and] repair". It was not argued before us that "maintain" imported a different requirement to "repair". If it had been, we would have held that such an obligation would, in the current context, have added nothing to "repair" – see the characterisation of "maintenance" in *ACT Construction Ltd v Customs and Excise Commissioners* [1981] 1 W.L.R. 49, 58, per Ackner LJ, approving counsel's formulation. In particular, there is no question here of a preservation function separate from repair, cf *Assethold v Watts* [2014] UKUT 537 (LC), [2015] L. & T.R. 15, [49].

66. We therefore consider whether the roof was in need of repair, as a matter of fact. As Mr Blakeney submitted, the concept of "repair" presupposes "disrepair" (see *Woodfall, The Law of Landlord and Tenant*, paragraph 13.029, and authorities therein cited).

67. The photographs of the roof show a small number of tiles out of place, but no evident disrepair. We note the lack of evidence of persistent failures in the roof, or any failure other than the one leak in 2013. We do not have any other material upon which to make a judgement, but in the absence of any alternative report of the state of the roof, it is not clear that the Respondent had any other objective evidence either. Our finding of fact is that there was no significant disrepair evident.

68. Mr Kilcoyne argued that in the circumstances, it was a matter for the Respondent to choose which form of intervention was required (we put it so, as the submission spans both repair and the other forms the covenant takes which are common to both leases – "… keep in good order and condition").

69. We agree that at a certain level of disrepair, it will become an appropriate form of repair for a landlord to replace a roof rather than to persist with patch repairs. But we do not consider that there is any basis for considering that stage had been reached in this case. We do not need to go as far as Mr Maunder Taylor's threshold for replacement (two or three new leaks over a large area every year) where there had only been one recorded patch repair.

70. This is a conclusion as to whether replacement could constitute "repair", given our factual finding as to the state of the roof. We note that the conclusion could equally well be formulated as a conclusion as to reasonableness. Even if the replacement of the roof came within the terms of the covenant, the state of the roof was such that replacement would not have been within the reasonable range of responses open to the Respondent.

71. We note the emphasis put on the putative asbestos content of the artificial tiles in the Respondent's case. The reference to the safety of workers indicates that (at least) part of the Respondent's decision was that patch repairs could not be relied on because undertaking such work would endanger the workers engaged upon it. That would have been a reasonable approach, had the factual pre-condition been made out, but it was not. Of course, the Respondent did not rely on this consideration to justify its approach before us, having at a late stage accepted that there was no asbestos present. Where the assertion of asbestos content originated from is not apparent, but the way in which the Respondent's case was put before the hearing indicates that it was at least an important, and probably a determinative, consideration.

72. The roof works more generally also included the repair/partial rebuilding of the parapet walls at the front and rear of the roofs, separating the properties laterally. There are two photographs specifically concerning the Applicants' properties. One is a photograph of the rear parapet of 26/28, and the other of the rear parapet of 28/30. Other photographs in the same series are captioned "typical condition front parapet 26-40 Minet Road".

73. The photographs of the parapets do indicate serious disrepair. The pointing on the top of the parapets had deteriorated to the point of being largely absent, that on the faces was defective, and some of the brickwork was crumbling.

74. The Applicants did not challenge the reasonableness of the work undertaken to repair the parapets. We also understood it to be agreed that the properties in each house were responsible for half of the parapets on each side, and that the cost, for each house, was £10,678.

75. So far, then, we conclude that the replacement of the roof did not constitute repair, for want of disrepair, but the work to the parapets did.

76. Mr Kilcoyne argued that the requirement to keep in good order and condition imposed a higher standard (he said "slightly" higher). He relied on *Welsh v Greenwich LBC* [2001] L. & T.R. 12. Although that case concerned a local authority secure tenant, not a long lease, Mr Kilcoyne argued that the Respondent was nonetheless a social landlord, and the approach in that case applied equally here.

77. Mr Blakeney, in this skeleton argument and his oral submissions referred us to the discussion of obligations to keep in good condition in Dowding and Reynolds, *Dilapidations: The Modern Law and Practice* (Sweet and Maxwell 2017), chapter 8, paragraphs 8.13 to 8.15. Although some authorities approached "good condition" as imposing a conceptually distinct obligation, in this case there was no difference of substance. The term was a product of "torrential drafting". The facts of *Welsh v Greenwich* – severe black spot mould growth – were far from the facts in this case.

78. We see no warrant for drawing a practical distinction in the context of *this roof on these properties* between an obligation to repair and an obligation to keep in good condition.

79. In *Welsh v Greenwich*, the mould meant that the state of the property was in poor condition, even if remedying that was beyond the scope of a covenant to repair, for the reasons set out in the judgment. Even if we were to accept Mr Kilcoyne's argument that, in principle, and in relation to this lease, "good condition" was conceptually distinct from "repair", to trigger an obligation on the landlord, there would have to be something other than "good condition" evident. Our finding of fact that the roof was not in disrepair, in this context, also amounts to a finding that it was not in other than "good condition".

80. Mr Kilcoyne further argued that the work was covered by paragraph (2) of the third schedule (see paragraph [18] above).

81. This provision confers on various parties and non-parties a right to enter the demised premises for the purposes of undertaking various works to property outside the demised premises – neighbours, other parts of the building, sewers and similar services. In form, it is a familiar term in many leases, the purpose of which is to allow access to the flat in emergencies, and other situations, so that necessary works can be carried out other than in relation to the flat itself.

82. Mr Blakeney submitted that the paragraph merely conferred a right of entry to the property for the purposes of undertaking works that must already have been within the power of that party to undertake.

83. We prefer Mr Blakeney's submission. The provision exists to facilitate work which is necessary for other reasons, and which the party facilitated must have a pre-existing right or obligation to undertake. It cannot operate as the source of such a right or obligation. If it did, then owners of adjoining property would have the same rights as Mr Kilcoyne contended it bestowed on the Respondent.

84. We further note that there is nothing in the provisions relating to the service charge that would allow such works to be recovered in the service charge in any event.

85. As we noted above at paragraphs [14] and [16], the lease for flat 26B included additional words in clause 4(A), which imposes the obligation to pay the service charge, to include "any other works or matters … that the Council in its discretion considers is reasonable or appropriate", and the subsequent amendment in sub-clause (iv) referring to "improvements".

86. In respect of the roof, we understood Mr Kilcoyne to be arguing that, even if we were against him in relation to his principal arguments, then these differences in wording would justify the replacement of the roof over number 26, albeit they were not available in respect of number 28. Indeed, it appeared at one point that Mr Kilcoyne was going further, and suggesting that these additional words – the only substantive differences between the leases – should be read as casting the provisions of the (earlier) lease in respect of number 28 in a similar light. We appreciate that Mr Kilcoyne did not, for obvious forensic reasons, put this argument in the foreground of his submissions in relation to the roofs, but it also featured in his case in relation to other elements of the major works, including replacement of doors and windows.

87. Mr Kilcoyne's argument was that taken together, these two additional sets of words amounted to a right to improve the building.

88. Mr Blakeney argued that the extra words in the lease of 26B should be read in context. Sub-clause (iv) related to subsidiary and corollary costs, akin to those referred to in sub-clauses (i) to (iii). The main covenant primarily related back to the Respondent's repairing obligations, and it was to that which any tenant who wanted to establish his or her liability under the lease would look, not to the subsidiary, added extra in this clause. The "improvement" wording was, he said, an example of "torrential drafting".

89. We do not consider that we can dismiss the relevant words as mere "torrential drafting". While we recognise the criticism of the drafting of some leases implied by this term, our primary duty in construing a lease is to identify the meaning of words in the lease, giving, so far as possible, each a distinct meaning.

90. The structure of the lease as a whole is, however, fundamentally important. The lease sets out a clear and express division of responsibilities between landlord and tenant for repair etc of the demised premises and the wider building. The purpose, or at least the primary purpose, of the equally clear and express provision for a service

charge is to provide the funding for the landlord to discharge its responsibilities.

91. Sub-clause (iv) sweeps up other expenses, coming after sub-clauses (i) to (iii), and, in drafting terms, is accorded the same numbering status. Those sub-clauses deal with professionals fees, VAT, and the expense of erecting communal television aerials. In the lease of 28A, the words in sub-clause (iv) remained tethered to the concepts of "maintenance and management". In that for 26B, they include "improvement", and we accept that this change must be intended to reflect the other change in the main part of clause 4(A), which broadens that which may be collected under the service charge to "other works" that the Respondent "consider it reasonable or appropriate to carry out".

92. Given this structure, we consider that the additional wording in both places amount to "widely worded provisions aimed at including within the service charge the cost of items not otherwise covered", in the words used to describe "sweeping up clauses" in *Woodfall's Landlord and Tenant*, paragraph 7.174. The passage goes on to state that the ambit of such clauses is a question of construction.

93. If the Respondent is right about the breadth of this clause, the implication is that the detailed provisions delineating the responsibilities of landlord and tenant, and relating those to the payment of service charge, are essentially unnecessary.

94. The leases in this case fall to be construed on their own terms and in their own contexts. However, there is at least a parallel with, for instance, the conclusion of the Court of Appeal in *Flour Daniel Properties Ltd and others v Shortland Investments Limited* [2001] 2 EGLR 103. In that case, clause 7(2)(a) allowed the service charge to cover expenditure on the landlord's performance of its "detailed" repairing etc covenant – the equivalents of the initial words in clause 4(A) and clause 3(E) in this case. Clause 7(2)(e) was a similarly broadly drafted provision as the additional words in clause 4(A) and clause 4(A)(iv), allowing collection through the service charge of expenditure on the "cost of carrying out of other work or services of any kind whatsoever which the Landlords may reasonably consider desirable for the purpose of maintaining or improving services in the Building …".

95. The landlord had relied on clause 7(2)(e), if certain works on an air conditioning plant were not covered by the repairing covenant (and thus clause 7(2)(a)). The Court found that clause 7(2)(e) "was not intended to cover matters, such as works to the air-conditioning plant, which are expressly and carefully dealt with in clause 6(1)(e) and are thereby covered by clause 7(2)(a)". Similarly, in this lease, the repairing etc obligations of the Applicants and the Respondent are set out in detail in clauses 2 and 3.

96. On this reading, it is both the additional words in clause 4(A) and the further addition in clause 4(A)(iv) that amount to a composite sweeping up clause. The nature of the added extra that they provide is coloured by the nature of the marginal matters covered in clause 4(A)(i) to (iii). These are small matters which might be covered by the extra words in the body of clause 4(A), or might be seen as being just beyond the border established by those words, and hence fall to be independently specified. They cannot have been intended to radically recast the parameters of the detailed repairing etc obligations set out in clauses 2 and 3, which would be the effect of us accepting the Respondent's submissions.

97. If, however, we are wrong, and clause 4(A) in the lease to number 26B is as broad as Mr Blakeney contents, we remain of the view that the Respondent may not recover the cost of replacing the roof under the service charge.

98. On this basis, Lambeth, like Hounslow in v *Waaler v Hounslow* [2017] EWCA Civ 45 | [2017] 1 WLR 2817, has an obligation to carry out repairs and keep in good condition, and a discretion to carry out improvements (at least without a stated purpose, which does not appear here, there can only be a discretion, not an obligation, to improve).

99. For the reasons given in *Waaler* [20], citing *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661, there is accordingly an implied term in respect of the discretion

> "that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose; and that the result is not so outrageous that no reasonable decision-maker could have reached it"

100. One form of public law irrationality is to take into account an irrelevant consideration. Since the decision was at least substantially affected, if not fully determined, by the erroneous belief that the tiles contained asbestos, that is what the Respondent did in this case. In this connection, we note again that no proper basis for that belief has every been advanced by the Respondent.

101. But even if that is wrong, we must nonetheless also apply the objective reasonableness test (cf the distinction discussed in *Waaler* at [21] and [22], citing *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304 and *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 W.L.R. 935) required by section 19 of the 1985 Act (*Waaler* [25] ff).

102. As we noted above in paragraph [70], our conclusion that, in the absence of disrepair, the replacement of the roof did not fall within the repairing etc obligation in the lease could alternatively be formulated as a conclusion as to reasonableness. The same conclusion would apply *mutatis mutandis* to the reasonableness of replacement of the roof as an improvement.

103. Finally, Mr Kilcoyne advanced an argument based on the listed building consent condition that the roofing material be replaced with Portuguese slate. There was evidence from Mr Dickson that the Respondent had a well founded fear that the planning authority (London Borough of Lambeth) would take enforcement action against the respondent (although no documentary support was proffered). Given that danger, the replacement of the roof with Portuguese slates became a matter of the proper management of the property, and was recoverable under the lease (we assume that the provision relied on would be clause 4(A)(iv), or possibly clause 4(B)).

104. We reject this argument. In the first place, the leases make detailed arrangements for the repair etc, as discussed above. The implication of Mr Kilcoyne's submission is that the cost of the work done to the roof can be properly charged to the service charge not as repairs etc, but, alternatively, as management costs.

105. We do not consider that this is a sustainable reading of the lease. The cost of physical work done to the roof cannot plausibly be described as "management". The direct cost of managing *those works*, would, of course, have been properly recoverable via the repairing etc covenants, had the work itself been covered by the covenants, but "management" cannot stand as an independent basis distinct from the repairing etc covenant for undertaking the work itself.

106. There is a broader point to be made in relation to the conditions attached to the listed building consent. The Respondent applied for permission to strip and renew the slate roofs on Minet Road. The planning authority imposed a condition – the use of Portuguese slates – on its grant of listed building consent to that proposal. We have concluded that it was not open to the Respondent to replace the roofs under the repairing etc covenants in the leases. In those circumstances, the Respondent cannot assert that the fact of the condition gave it the right to use the repairing etc covenants to replace the roofs. To do so is to turn the relationship between the leases and the application for listed building consent on its head.

107. It is perhaps worth noting that the roofs are not demised, so, in principle, it may have been open to the Respondent as freeholder to replace the roofs, should it be granted listed building consent, but if it did so, it was not acting under a covenant in the leases and was

correspondingly not entitled to recoup the costs of doing so through the service charge.

108. Mr Kilcoyne observed that the Applicants now had the benefit of the new, better quality roof. If this is a relevant consideration, which we doubt, we reject it. We do not consider that the fact that the non-demised roof is new would have any appreciable effect on the market price of the Applicants' properties.

109. *Decision*: The cost of the replacement of the roofs is not recoverable in the service charge. The costs of the works to the parapets is recoverable and was reasonably incurred.

Replacement of external doors

110. The external doors of both properties were replaced as part of the major works.

111. It was not contested that the external doors of both properties were demised to the applicants, that the applicants were responsible for their repair (clause 2(G)), and that they were thereby excluded from the Respondents' repairing etc obligations (clause 3(E).

112. For the Applicants, Mr Blakeney submitted that, demised as they were, they fell outside the Respondent's repairing etc obligations, and the costs relating to them could not be recovered in the service charge.

113. Mr Kilcoyne's argument was that works required as a condition of listed building consent amounted to management functions applied to the replacement of the doors. He also argued that recovery was possibly under the indemnity provided by clause 2(N).

114. We prefer Mr Blakeney's submissions.

115. The management argument fails for the reasons set out above.

116. We are similarly not persuaded by the submission in respect of clause 2(N). By the clause, the tenant covenants to comply with Acts of Parliament, and in particular planning requirements. In this case, the relevant requirement was the listed building consent condition. This was a requirement imposed not on the tenant, but on the Respondent. The indemnity element in clause 2(N) applies to the costs to the Respondent of a breach *by the tenant* of a relevant obligation. There has been no such breach alleged. Even if there had been an enforceable breach of listed building regulations by the tenant, there is no reason to suppose that it would have imposed costs on the Respondent, rather than the tenant, the party with the relevant proprietary interest in that element of the building. And in any event, a condition on an application

by the Respondent for listed building consent cannot possibly be construed as an obligation on the tenants, which they had breached.

117. More generally, we do not see how it can plausibly be contended that a condition to listed building consent can confer on a party a proprietary right that it does not otherwise enjoy.

118. *Decision*: The cost of replacement of external doors is not recoverable in the service charge.

Replacement of windows in the first Applicant's property

119. Two windows on the top floor of 26B were replaced as part of the major works. The other windows did not require repair or replacement, and nor did those in 28A.

120. Clause 2(G)(i) includes in the tenant's repairing covenant "the glass in the windows of the demised premises (but not the window frames)". Mr Blakeney argued that we should construe this provision as meaning that not only the glass itself, but also the glazing bars and members by which the glass is directly supported on each side were demised. In these sash windows, then, all the part that moved when the window was opened was demised.

121. We reject this submission. First, "glass", unambiguously, means glass. Secondly, the purpose of these common clauses is to prevent the freeholder's repairing obligation being engaged by the breaking of the glass in a window, a purpose which does not extend to the (in this case) wooden elements holding the glass.

122. Accordingly, the replacement of the windows was potentially within the Respondent's repairing obligation. We do not understand there to be any challenge from the Applicant to the necessity of replacing the window. In cross examination, it was put to the Applicants' expert, Mr Maunder Taylor, that the cost of the replacement windows, of the order of £1,800 (by reference to the document headed "26 Minet CVI") was reasonable. Mr Maunder Taylor accepted that it was, suggesting that the reasonable range would be between £1,500 and £2,000.

123. We endorse the reasonable range identified by Mr Maunder Taylor, which in substance appears to be agreed between the parties. The CVI document gives more than one exact figure for window replacements, all somewhat above £1,800.

124. *Decision*: The replacement of two windows in 26B was justifiable under the repairing etc covenant and was reasonable in amount, provided the exact figure remains under £2,000 per window.

Replacement of windows in flat 28B

125. The previous leaseholder of 28B, the maisonette above 28A, had at some time replaced all of the sash windows with uPVC windows. As will be apparent, he was not entitled to do so. As part of the major works, all of those windows have been replaced with new sash windows, a step required by a condition of the listed building consent. The Respondent now seeks to recover the cost of the new sash windows in the service charge for number 28.

126. Mr Blakeney submits that the proper course would have been for the Respondent to seek to recover the costs from the previous leaseholder, who had installed the windows in breach of the lease. There was no dispute that the Respondent would have a claim against the previous leaseholder, but Mr Kilcoyne submitted that it would have been impractical to have done so, because it would have meant further delay to the works, which had already been beset by delays, contrary to the interests of all the leaseholders and other residents affected by the major works, as well as the Respondent.

127. We prefer Mr Blakeney's submissions.

128. In the Respondent's statement in response to the Applicants' statement of case, the explanation given presupposes that the only choice open to the Respondent was to abandon the project so as to pursue the previous leaseholder, or to undertake the work and recover the cost through the service charge (paragraph 32, "The Respondent could not risk further wasted costs of abandoning the project again to enforce specific breaches of lease"). And no doubt replacement of the uPVC windows was a priority for those concerned with listed building consent at Lambeth.

129. There is no evidence that the Respondent considered at all whether it could both accept the replacement of the windows as a condition of listed building consent, and pursue an action against the pervious leaseholder. There was no suggestion that pursuing the previous leaseholder had been considered and rejected as a matter of litigation strategy. Indeed, the suggestion that it was possible (but undesirable) to abandon the project to do so assumes that it was not considered impossible or inappropriate to take action against him.

130. Simply assuming that the whole project must be delayed, or shelved, or action taken against the previous leaseholder demonstrates an unreasonable approach to the process per se.

131. Further, we do not see why it would not have been possible for the Respondent to have secured the replacement of the uPVC windows with new sash windows in a way that did not delay the rest of the works.

132. Two possibilities, at least, should have been explored. First, even with a condition in place, it may have been possible to have delayed only this element of the work while action was taken against the previous leaseholder. The nature of the work was such that it did not require to be fitted into a sequence with other work (aside from any requirement for scaffolding). Secondly, it is not evident that the work could not have been done in advance of a final determination of the dispute with the previous leaseholder. In either case, there might still have been some costs to be passed on to the leaseholders in the service charge at a later stage, but it would reasonably be anticipated that they would be substantially less than if the whole cost was passed through the service charge.

133. The outcome of these failures is that the service charge payers are liable for costs that should properly fall elsewhere, but are being imposed on them for the convenience of the Respondent.

134. *Decision*: The costs of replacing the uPVC windows in flat 28B were not reasonably incurred and a service charge referable to those costs is not payable by the second applicant.

External decoration, rendering etc and other damage

135. These related but distinct issues are conveniently dealt with together.

136. Both of the houses were redecorated externally as part of the major works.

137. In respect of number 28, the evidence was that, although the Respondent had not repainted the exterior of the buildings for some time, the previous leaseholder of 28B had painted at least the rear of that house in about 2017. Mr Blakeney submitted that further external painting of the rear was therefore not necessary, and the associated cost not recoverable.

138. We reject this submission. The Respondent is responsible for external decoration under the lease, and it was in our view clearly reasonable to redecorate at the same time as the other external works were carried out.

139. Mr Blakeney further submits that the total sums sought to be collected for the external painting were unreasonable. It was somewhat unclear what exact figure was being claimed. In his reports, Mr Maunder Taylor was using the figure of £10,069 for number 28 and £11,494 for number 26. The Respondent noted that these figures were not the current ones, and figures of over £11,000 and over £12,000 were mentioned in oral evidence.

140. Although characterising these figures as unreasonable in his reports, Mr Maunder Taylor did not, there, offer an alternative. In his oral evidence, Mr Maunder Taylor said that he would expect such costs to be in the region of £3,000 to £4,000 per house, on the basis that scaffolding was not included in that cost.

141. No detailed costings were provided to us by way of a defence of the sums claimed.

142. We agree with Mr Maunder Taylor, a very experienced chartered surveyor, that the costs sought to be collected were manifestly excessive. In assessing these costs, guided by our professional member, we bring to bear the Tribunal's expertise in relation to the normal costs of this kind of work, gained by general experience through acquaintance with such costs in London acquired over a period, and not the result of individually disclosable pieces of evidence.

143. On that basis, we consider that the top of the range of reasonable costs for external decoration of houses of this size and character, without scaffolding costs, would be £6,000 for each house.

144. These are costs that would be expected for a competent job. We have, however, been shown photographs, in Mr Maunder Taylor's report and in a separate email from the Applicants' representatives, which show that some of the work was certainly not at an acceptable standard. That that is the case has been accepted by Mr Dickson at a site visit (and repeated at the hearing), and it is therefore unnecessary for us to detail the defects, save to say that, in some cases, the photographs show work of a very poor quality indeed.

145. The Respondent's answer to this is that, at the time of the hearing, the defect liability period had not expired, having been extended as a result of the current pandemic. The defects would, therefore, be remedied by the contractor.

146. Although these defects arise primarily from the external decoration, they include other elements, including some internal damage done by the contractors. As we understand it, these all fall within the scope of Mr Dickson's assurances in relation to remedial work during the defect liability period.

147. We consider that it would be premature for us to consider the reasonableness of the charges affected by these defects until the Respondent has had the opportunity to remedy them, as described. It should be clear, however, that it is open to the Applicants to make a further application to the Tribunal if these defects are not satisfactorily remedied.

148. *Decision*: The maximum cost that would be reasonable for the external decoration of each house is £6,000. Any costs in excess of that are not reasonably incurred, and costs referable to them in the service charge are not payable.

149. Any challenge to the quality of works, including but not limited to external redecoration, after remedial work by the Respondent/the contractors should form the subject matter of a further application to the Tribunal.

Rainwater goods

150. As part of the conservation requirements, plastic rainwater goods were to be replaced with cast iron. It is not entirely clear to us whether this formally amounted to a condition of listed building consent, or was just offered, in the Respondent's Planning, Design/Access and Heritage Statement, as a commitment. The distinction is, however, immaterial. Nonetheless, there are also references in the papers to aluminium rainwater goods, and it at least appears that the contractor charged the Respondent £1,500 for replacing plastic rainwater goods with those fabricated in aluminium.

151. It is agreed that the rainwater goods were originally plastic. The Applicants contend that, following the works, the same was true.

152. Doing the best we could by looking at photographs taken to illustrate other things (principally in Mr Maunder Taylor's report), it looks to us as if the existing rainwater goods are, indeed, plastic. In his final submissions, Mr Kilcoyne owned that they did, indeed, look like plastic, but suggested that they might be new plastic, and there was no real evidence either way.

153. We must decide on such evidence as we have. There was by the end of the hearing no real dispute that the existing rainwater goods are, indeed, plastic. It seems to us that, on the balance of probabilities, Mr Maunder Taylor was right to say that they appear to be old, not new, plastic. In some cases, what look like old paint marks are evident, and they lack the shine of newer plastic. Even if Mr Kilcoyne were right that they were new plastic, the best that can be said is that the contractors installed new plastic rainwater goods while charging for aluminium (and that despite the specification, at some stage at least, of cast iron).

154. We conclude that no charge is reasonable for what is most likely to be existing plastic rainwater goods.

155. *Decision*: No costs were reasonably incurred in respect of the rainwater goods, and no service charge referable to such costs is payable.

External wall works

156. In respect of both houses, work on the external walls was identified. This comprised repointing and the use of a proprietary tying product – Helibars – to repair larger cracks. The charges for repointing and Helibar repairs for number 26 was £23,518 and £22,375 for number 28. A reference to "structural works" in the documents accompanying the section 20 consultation document sent to the first Applicant refers to the same set of measures, and includes an estimate for £1,849.

157. In his report, Mr Maunder Taylor noted that there had been "some areas of repointing" on number 26, but that brickwork requiring repointing had not been done at a higher level. His report in respect of number 28 does not cover the question in detail. His report is expressed as awaiting clarification "once the project manager/building surveyor's report is made available". As we have stated, no such reports have been disclosed.

158. In his oral evidence, Mr Maunder Taylor again noted that some pointing had been done, but that that could not account for anything like the sum charged. Had it been done properly, he said, such work would cost between £2,000 and £3,000.

159. In his closing submissions, Mr Kilcoyne conceded that £23,000 did seem "a bit high", but that we could take the view that it was not just repointing that accounted for this figure. Speaking shortly after conceding on behalf of the Respondent (for the first time) that the charge for concrete repairs was misconceived, he said that this was not in the same category as that.

160. We agree with Mr Maunder Taylor that the figure claim is far too high on any view. We accept his evidence as to the extent of repointing. We do not know the extent to which Helibar repairs were used. It is true that the document setting out the final charge asserts that Helibars were used to fix cracks, but that is the same document that asserted that "the condition of concrete was fully assessed and cracks were found. The Contractor was required to carry out repairs to the concrete that was affected by impact damage. If left un-repaired, deterioration would have continued causing defects to increase in severity." As Mr Maunder Taylor noted, and as the Respondent conceded, there is no, or virtually no, concrete at numbers 26 and 28 at all. We do not consider the text on this document to provide reliable evidence of fact.

161. Mr Maunder Taylor gives an upper limit to the cost of repointing of £3,000 (in doing so, he criticised the quality of the workmanship, but we understand that to apply primarily to the associated render repairs, a matter we consider falls under the section of this decision starting at paragraph [135] above). Mr Maunder Taylor said that there was no evidence that Helibar repairs had been made, but we note that neither Mr Maunder Taylor, nor as far as we know, anyone else, has

undertaken a close inspection of the work done to the wall, which may have been capable of determining whether Helibars had been used.

162. We are not prepared to entirely exclude the possibility of some work having been carried out, over and above the (limited) repointing that Mr Maunder Taylor reports. We further consider that Mr Maunder Taylor's estimate could be thought on the low side for the very top end of the reasonable range of charges for repointing with some Helibar repairs to larger cracks. We accordingly consider that a reasonable figure for the top end of the reasonable range would be £6,000 per house.

163. *Decision*: The maximum cost that would be reasonable for the re-pointing and repairs to the external walls of each house is £6,000. Any costs in excess of that are not reasonably incurred, and costs referable to them in the service charge are not payable.

Scaffolding

164. The scaffolding erected along Minet Road was charged to each house on the basis of that house's proportion of the overall cost of the scaffolding. It was not contested by the Applicant that this was an appropriate way of distributing the cost. The cost for each house was £6,310.

165. The cost of the scaffolding was based on the specification that the scaffolding be wholly freestanding, so as not to damage the listed buildings by tying the scaffolding to them. It is not contested by the Respondent that the scaffolding was not, in fact, erected in this way, and was tied to the houses.

166. Mr Kilcoyne, noting that at an earlier point, a figure of about £4,600 was quoted for scaffolding, and that Mr Maunder Taylor's higher estimate of the proper cost was £5,500, invites us to conclude that £6,310 was nonetheless reasonable.

167. We consider that the difference in cost between tied and freestanding scaffolding would be about 20%. Such a reduction takes us to about £5,000, which we consider reasonable.

168. *Decision*: The maximum cost that would be reasonable for the scaffolding as erected would be £5,000 per house. Any costs in excess of that are not reasonably incurred, and costs referable to them in the service charge are not payable.

Aerial/dishes works

169. A charge of £480 for number 26 and £550 for number 28 was made for the removal of "satellite/TV dishes" on the erection of the scaffolding, their location outside the scaffolding to allow for continued reception and subsequent re-fitting to the houses.

170. Mr Blakeney submitted that, as with the external doors, these aerials or dishes were demised, and so this treatment of them is not within the repairing etc covenant and should not have been undertaken. We do not understand there to be a separate challenge to the reasonableness of the costs.

171. We reject this submission. The temporary relocation of the aerials/dishes was merely an incident to the work requiring the erection of the scaffolding, not an independent repair relating to those elements themselves. It is, we consider, covered by the repairing covenant, and recoverable under the lease.

172. *Decision*: The cost of the temporary relocation and re-fixing of satellite TV dishes and TV aerials is recoverable under the lease and was reasonably incurred.

Preliminaries, consultant fees and OHP

173. The Applicants contest these fees. Each are charged on a percentage basis, as follows:

Preliminaries:	5.59%
Consultants:	4.25%
OHP:	9%

174. Mr Dickson's evidence was that the preliminaries and OHP percentages were set by the long term qualifying agreement agreed with Mears, the contractors. The Respondent's case was that the consultant's fees were reasonable for specification, contract administration and oversight.

175. Mr Maunder Taylor said that the percentage for preliminaries was too large for such a big project, on the basis that the need for the sort of infrastructure provided by preliminaries percentages did not increase proportionately to the cost of a large project such as these major works. On the other hand, he thought the percentage for consultants too small. He would expect the fee for proper management and administration by consultants of such a project to be of the order of 10%. He thought the OHP figure reasonable.

176. In his final submissions, Mr Blakeney relied on Mr Maunder Taylor's point about preliminaries, and effectively invited us to decrease the OHP figure on the basis that the work performed by Mears was substandard.

177. We appreciate that there is some power in Mr Maunder Taylor's point about preliminaries in the abstract. However, the long term qualifying agreement under which this work was undertaken was negotiated specifically to carry out the works required for Lambeth's Housing Standards Programme. The figure itself appears to us to be a moderate one in terms of industry standards, and we are not prepared to conclude that the Respondent negotiated a figure for preliminaries that is outwith the reasonable range as a result of the anticipated scale of the projects actually envisaged under that contract.

178. Ultimately, Mr Blakeney's position on OHP is a punitive one. The work was so badly conducted – and we might add, organised, reported and overseen – that the Respondent should be punished by reducing the proportion of their contractor's profits that they are entitled to recover from the service charge payers.

179. We do not consider that this would be an appropriate approach to the reasonableness of service charges within the terms of section 19 of the 1985 Act. Our function is to assess the reasonableness of specific items sought to be recovered under the service charge.

180. We note in passing, in sympathy with Mr Maunder Taylor's point about the consultancy fees, that had those fees been higher, and a better grip maintained on the work, then some of the problems with the project evident from this application might have been avoided.

Issue 5: Application for orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

181. Mr Kilcoyne said that the respondent did not intend to seek to pass on the cost of these proceedings in the service charge, or as administration charges against the Applicants. He reserved the Respondent's position should there be an appeal to the Upper Tribunal.

182. We accordingly make the relevant orders under the 1985 and 2002 Acts to secure that assurance. In doing so, we come to no conclusions as to whether the costs of these proceedings are in principal recoverable, either through the service charge or as an administration charge.

183. *Decision*: We order (1) under section 20C of the 1985 Act that the costs incurred by the Respondent in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicants; and (2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any liability of the Applicants to pay litigation costs as defined in that paragraph be extinguished.

Rights of appeal

184. 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 London regional office.

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

186. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

187. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 8 November 2021

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance , improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

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

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

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

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Section 20

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

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

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

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

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

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

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

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

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

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

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

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

determining the relevant contributions of tenants is limited to the appropriate amount.

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

Section 20ZA

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

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Section 20B

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

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court , residential property tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal4 , to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court.

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on [the appropriate tribunal]1 in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).