IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) AND

IN THE COUNTY COURT SITTING AT 10 ALFRED PLACE, LONDON WC1E 7LR

Case references	**:**	**(A) LON/00BK/LLE/2021/0005** **(B) LON/00BK/LSC/2020/0152** **(C) LON/00BK/LLE/2021/0004** **(D) LON/00BK/LDC/2023/0173**
County Court Claim Number	**:**	**(B) GO1YJ292**
Properties	**:**	**(A) The residential leasehold properties in Fitzroy Place, London W1** **(B) & (C) Apt 705, 5 Pearson Square, Fitzroy Place, W1T 3BQ**
Applicants	**:**	**Fitzroy Place Residential Limited (1), Fitzroy Place Management Co Ltd (2) 2-10 Mortimer Street GP Limited and Mortimer Street Nominee 1 Limited (3)**
Representative	**:**	**Bryan Cave Leighton Paisner LLP**
Respondents	**:**	**(A) Mr Angus Lovitt & 234 other long residential leaseholders in Fitzroy Place** **(B) & (C) Nueva IQT SL (a company incorporated in Spain)**
Interested person	**:**	**Fitzroy Place Residents' Association**
Type of application	**:**	**To determine the payability and reasonableness of service charges**
Tribunal	**:**	**Judge Sheftel** **Mr Stephen Mason FRICS** **Mr John Francis**
Date of Decision	**:**	**3 September 2024**

DECISION

Summary of Decision

(1) The Applicants' application for dispensation is granted on terms that:

(a) the Applicants are not permitted to recover their costs of the dispensation application; and

(b) the Applicants pay the Respondents' reasonable costs in connection with investigating and challenging the dispensation application.

(2) The tribunal determines that service charges in dispute for the years 2016-2020 are payable save to the extent as set out in the table following paragraph 88 below.

(3) In response to the challenge by Nueva, section 20B of the Landlord and Tenant Act 1985 does not operate to prevent recovery of the service charges in question.

The Applicants are directed to serve a copy of this Decision on all residential leaseholders, as well as any residential sub-lessee responsible for the payment of service charges by email, hand delivery or first-class post as soon as possible and in any event by 10 September 2024 and confirm to the tribunal that this has been done.

Introduction

1. This is the second substantive hearing in these proceedings concerning service charges at Fitzroy Place, London W1 (the "Development"). There is a long procedural history to this matter, much of which is set out in the tribunal's previous decision dated 9 March 2023.

The Development

2. The Decision of 9 March 2023 contains a description of the Development.

3. By way of brief summary, Fitzroy Place is a mixed used development of the site of the old Middlesex Hospital. The site is made up of private residential, affordable housing, an education facility occupied by a local school, a medical facility, commercial offices and shops and hospitality

venues. These are situated around a central communal square (although not all occupiers have direct access to this) and within the square is the historic Fitzrovia Chapel. There is a car park underneath the development in which some private residential occupiers have car parking spaces. There are 235 private flats and 54 shared ownership / affordable housing flats demised to Octavia who in turn have let 14 of the flats to individuals pursuant to shared ownership leases. The private residential occupiers have access to residents' amenities situated at 7 Pearson Square. These include a concierge team, lounge, private dining room, gym, cinema and workspaces. Within 7 Pearson Square is the estate office and security office.

Procedural history

4. In the Decision of 9 March 2023, the tribunal made findings relation to questions of payability, with the intention that all remaining issues, principally relating to reasonableness, would be determined at a subsequent hearing. One aspect of the Decision of 9 March 2023, regarding a point of contractual interpretation, was appealed with permission to the Upper Tribunal. That appeal was dismissed on 19 March 2024.

5. Accordingly, an 8-day hearing was convened on 24 June – 3 July 2024, to deal with remaining issues between the parties – although as it turned out only 6 days were required. The issues that were considered are set out in more detail below, but broadly concerned:

    (1) The Applicants' application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation from the section 20 consultation requirements;

    (2) questions of 'reasonableness' in relation to various heads of service charges under section 19 of the 1985 Act; and

    (3) a point raised solely in relation to proceedings concerning one Respondent, Nueva IQT SL ("Nueva"), as to the application of section 20B of the 1985 Act in respect of sums demanded,

which had been the subject of proceedings in the County Court, and which had previously been transferred to the tribunal.

6. The Applicants were represented at the hearing by Ms Katrina Mather of counsel and four distinct groups of active respondents were represented as follows:

   (1) Mr Neil Willis of the Residents' Association,

   (2) Mr Alejandro Camarero on behalf of Nueva IQT SL ("Nueva") for the first 5 days and Ms Ellodie Gibbons of counsel on 2 July 2024 in relation to section 20B,

   (3) Mr John Giret KC of counsel on behalf of Mr Blom (apartment 806, 7 Pearson Square) and Mr & Mrs Mambretti (apartment 804, 7 Pearson Square) and Mr Kay Puvanesam (the "Mortimer Court Respondents"),

   (4) Mr John Beresford of counsel on behalf of Octavia Housing.

   The active respondents had earlier provided updated statements of case and the tribunal is grateful to all parties for their assistance.

7. It should be noted that in advance of the hearing, a pre-trial review had been held on 29 April 2024, to try to narrow the issues for trial. One of the matters that came out of that PTR was that the 'Nueva issues' would be heard on 2-3 July for the reasons set out in the tribunal's order of 30 April 2024 (although as it turned out only 2 July 2024 was required). As had been made clear to Mr Camarero at the PTR, however, Nueva, as a respondent in the main action, would be bound by any findings in the main action and indeed Mr Camarero attended the majority of the earlier days and asked questions of witnesses by way of cross examination.

8. The representatives for the Residents' Association, and the Mortimer Court Respondents only attended on days 1-5 by which time the non-Nueva issues had been addressed; Octavia's counsel attended the hearing of the Nueva issues on 2 July 2024 only in a noting capacity, but participated fully in the first 5 days.

9. In advance of the hearing, the parties had provided a bundle totalling 3,182 pages. A further set of documents was provided by the Mortimer

Court Respondents on the first morning of the hearing. During the course of the hearing, we also received service charge accounts from 2016 and 2020 which had been omitted from the bundle as well as other miscellaneous documents. A separate bundle was also provided in respect of the Nueva issues comprising 300 pages.

10. The tribunal received skeleton arguments from the Applicants, Octavia, Nueva and the Mortimer Court Respondents.

Preliminary matters

11. Two preliminary matters were raised at the start of the hearing:

    (1) Nueva made an application dated 19 June 2024 raising questions as to who Mr Willis represented and also noting that the Residents' Association's statement of case did not contain a statement of truth.

    (2) In Octavia's skeleton argument, Mr Beresford raised an issue concerning the fact that shortly before the hearing, the Applicants had sent to the Respondents a further report by the Applicants' expert, Mr Pack, prepared in the context of discussions with Nueva, setting out the percentages that the Applicants intend to apply for the purposes of apportioning the Estate Service Charge between the various paying parties. Octavia raised a concern that it might end up paying a greater share under this proposed apportionment but in any event, contended that it would not be appropriate for the tribunal to consider the issue given that Octavia had not had the opportunity to instruct a surveyor to consider the report. Mr Willis took a similar view at the hearing.

These preliminary matters are addressed in turn.

(I) Nueva's application relating to the Residents' Association

12. We agreed that the statements of case should contain statements of truth and Mr Willis confirmed that the same would be added. Statements of

case with a statement of truth duly added were filed and served the following day.

13. Much of the complaint appeared to go to concerns as to whether every member of the Residents' Association was in fact supportive of the approach taken in the present proceedings. As to this wider point, it was not disputed that Mr Willis had the right to make submissions as chair of the Residents' Association and as a leaseholder. Further, as noted previously, 33 leaseholders had returned Reply Forms to the tribunal confirming that they wished to be represented by the Residents' Association as respondents in these proceedings. If there are issues regarding the internal workings of the Residents' Association and whether every member of that organisation was supportive of the approach taken, they are not a matter for the tribunal.

(II) Questions relating to measurements

14. It had always been envisaged that the present hearing would attempt to deal with all remaining points of difference between the parties. However, the proceedings must also be procedurally fair. Accordingly, we agreed with Mr Beresford that it would not be in accordance with the overriding objective for further expert evidence to be introduced at such a late stage on matters which had not been expected to be before us and concerning discussions to which the Respondents other than Nueva had not been party.

15. Linked to this issue, Mr Camarero also sought confirmation as to whether all other parties agreed to the flat measurements that had been put forward at the previous hearing, specifically the Plowman Craven 'as built' measurements contained in the hearing bundle for trial 1. It was said that Nueva could not determine its liability without the measurements for all other flats being agreed or determined. Unfortunately, as this issue had not been raised until shortly before the hearing other than in discussions between he Applicants and Nueva, it was not possible for all other parties (and indeed all other leaseholders) to agree or be in a position to make submissions regarding the final measurements.

16. Accordingly and for the avoidance of doubt, the tribunal is unable to and makes no finding on any actual measurements of flats at Fitzroy Place. However, in view of the agreement on the point of methodology as outlined below, this should hopefully enable the parties to agree the final figures. Moreover, it is hoped that any adjustments from the figures and consequently to the proportions and amounts of service charge to be paid would likely be negligible for individual flat owners in the final outcome.

17. There was, however, one point on which the tribunal considered that we could be of assistance. As explained by Ms Mather, in the course of discussions between the Applicants and Nueva, a point of difference had arisen as to the interpretation of a clause within the private residential leases that would have a bearing on the calculation of the amounts to be paid by the private residential lessees. Specifically, the question related to the definition of 'Lettable Areas' under clause 1.1 of the private residential leases (definitions section). This provides that Lettable Areas means:

> *(1) "The Apartments in the Blocks;*
>
> *(2) all car parking spaces and storage areas (as designated from time to time by the Landlord) within the Car Park;*
>
> *(3) the Commercial Buildings and all associated areas designated from time to time by the Landlord as being exclusively for the use of such premises;*
>
> *(4) the Health Centre; and*
>
> *(5) the Education Accommodation*."

18. The reason why this is important is because the basis of the apportionment for the Estate Service Charge under paragraph 6.1(b) of Schedule 6 to the private residential leases states:

> "*In respect of the Estate Service Charge it is (subject to paragraph 9 of this Schedule) to be calculated primarily on a comparison for the time being of the [gross] internal area (as defined in the Measuring Code) of the Premises with the aggregate net internal area of the* ***Lettable Areas*** *of the Estate from time to time."*

19. The dispute related to sub-paragraph (b): it was said that while the definition of Lettable Areas includes car parking spaces and storage areas within the Car Park, the position on the ground was that the car parking spaces are within the Car Park but the storage areas are located outside

the Car Park. According to the Applicants, since the storage areas are not 'within the Car Park', they do not fall within limb (b) of the definition of Lettable Areas so are to be excluded from the calculation. Under the private residential lease, therefore, the calculation of Lettable Areas should include the car parking spaces within the Car Park and exclude the storage areas as they are not 'within the Car Park' as per the definition.

20. Insofar as this involved a discrete matter of contractual interpretation, and for which no further evidence was required, it was considered that it would be of assistance to the parties for the tribunal to reach a view on this matter, while first giving the parties the opportunity to make submissions. However, as it turned out, after taking time to consider the point, Mr Camarero, Mr Puvanesan (this was not a point of which Mr Giret was instructed) and Mr Willis all confirmed that they agreed with the Applicants' interpretation that as the storage areas are not within the Car Park, they do not fall within limb (b) of the definition of Lettable Areas. Accordingly, as the matter is agreed, the tribunal does not need to say anything further on this issue.

21. Finally, for the avoidance of doubt as requested by Mr Beresford, we should stress that we make no finding in relation to the interpretation of any definition of 'Lettable Areas' within the Octavia lease.

The evidence before the tribunal

Evidence of fact

22. On behalf of the Applicants, oral evidence was provided by:

    (1) Emma Hares of the current managing agents, Rendall & Rittner;

    (2) Andrew Harding, the Managing Director of Qube, the previous managing agents of the residential parts; and

    (3) Richard Curnow, the Head of Partner Performance and Optimisation in the Property 7 Asset Management Department of JLL, the previous managing agents for the estate as a whole. His evidence was largely concerned with the procurement

processes undertaken by JLL and how this impacted on the questions of reasonableness and dispensation before the tribunal.

23. It should be stressed that there was little direct evidence of matters relevant to the period in question (2016-2020) that was specific to the Development. For example, Ms Hares's first hand knowledge of the Development necessarily post-dates the service charge years which are the subject of the application before us. Although she had discussions with the previous managing agents during a handover process, she fairly accepted that her knowledge of the relevant service charge years was second-hand. Similarly, it appeared that Mr Harding had limited knowledge of day-to—day matters at the Development and Mr Curnow had none – and indeed he has never visited Fitzroy Place. Further, with regard to JLL in particular, it became apparent during the course of cross-examination that certain employees of JLL who had signed contracts with service providers which were now the subject of a dispensation application, were still employed by JLL but had not provided witness evidence to the tribunal.

24. From the Respondents, oral witness evidence of fact was given solely by Mr Willis. As is set out in more detail below, Mr Willis had undertaken a thorough and extensive exercise seeking to compare the actual costs with what the Respondents contend ought to have been charged by reference to the SAY Plan (a service charge plan dated 5 April 2012 prepared by SAY Property Consultants, referred to in more detail below). Although Mr Puvanesan, who had adopted Mr Willis's analysis, was also willing to give evidence, the Applicants indicated that they did not wish to cross examine him.

25. Witness statements were also provided by Andrew Warman, an assistant director at Octavia, and five shared ownership lessees: Mark Bowerman, Angelika Portyratou, Abigail Condry, Swarnamali Galmangodage and Zahra Jessa. Mr Warman's statement confirmed that if Octavia received section 20 notices from the landlord, it would have passed these on to shared ownership leaseholders – although it was not disputed by the Applicants that shared ownership leaseholders ought to have been

consulted in any event. The evidence of the shared ownership lessees concerned questions of reasonableness and dispensation. This was necessarily high-level given that the witnesses had not been consulted and so much time had passed. However, they nevertheless set out how they would have responded if consultation had taken place. The Applicants indicated that they did not intend to cross examine any of these witnesses and they were therefore not called to give oral evidence.

26. Turning to the documents that had been provided, it was accepted on behalf of the Applicants that the documentary evidence, in particular contracts and invoices, was far from complete. Ms Mather acknowledged this but urged that tribunal to adopt a broad-brush approach to be able to fill in any gaps. In relation to the issues of reasonableness, the Applicants submitted that where works have not been the subject of competitive tendering or alternative estimates have not been obtained, a common-sense approach must be applied in determining what is a reasonable sum to be paid for the work or services. In support of this proposition, reference was made to the Upper Tribunal decision in *Country Trade Ltd v Marcus Noakes* [2011] UKUT 407 (LC), which we bear in mind:

> "13. It is an everyday occurrence for the LVT to be faced with an application relating to the reasonableness of various elements within a service charge of a detailed and factual nature frequently involving quite small sums of money relating to goods or services which are part of most people's broad knowledge and experience of everyday life. Frequently all or most of the adduced evidence will be from the landlord. The tenant, often in the absence of any comparative evidence, will be asserting that the costs are too high usually for a variety of interacting reasons the rate is too high, too many hours are claimed, the work was not done to a reasonable standard to justify the sum charged.
>
> 14. It is not in my judgment the effect of the above cited authorities that the LVT must accept the evidence of the landlord without deduction if there is no countervailing evidence from the tenant. The evidence required in these types of service charge disputes is quite different from the sort of complex largely non-factual evidence and issues addressed in cases such as Arrowdale.
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> 15. The LVT does not have to suspend judgment or belief and simply accept the landlord's evidence. It is entitled to robustly scrutinise the evidence adduced by the landlord (and, of course, the tenant) which after examination, it is entitled to accept or reject on grounds of credibility. The course of scrutiny is not just looking through the invoices or other documents, but identifying issues of concern and asking the landlord's (or tenant's) witnesses for explanations and observations. It is not necessary for each and every invoice to be minutely examined, but sufficient for them to be dealt with on a sample basis. It is only once this process has been gone through that the LVT will be able to reach any decision on the credibility of witnesses which will be based on the answers given and any other available evidence.

> 16. The difficulty comes where the LVT accepts that 'some' work has been done but does not accept the 'rates' or 'charges' claimed as reasonable are credible or justified but there is no other comparative or market evidence (in the form of estimates, or quotes or such like) of what those rates or charges might be. The LVT will not be able to reject the sum claimed because it has accepted that some work has been done to justify a charge, but will have concluded that the amount claimed is too high.
>
> 17. In those circumstances, the LVT is entitled to apply a robust, common sense approach and make appropriate deductions based on the available evidence (such as it is) from the amounts claimed always bearing in mind that it must explain its reasons for doing so. The circumstances in which it may do so will depend on the nature of the issues raised and service charge items in dispute, and will always be a question of fact and degree. In some instances, such as insurance premiums, it will be very difficult for the LVT to disallow the landlord's claim in absence of any comparative or market evidence to the contrary. In other cases, such as gardening, cleaning or such like, the position might be different where the nature and complexity of the work is fairly straightforward. It is only where the issue is finely balanced that resort need be had to the burden of proof."

Expert evidence

27. On behalf of the Applicants, evidence was given by Mr Graham Pack, who had been instructed by the Applicants at trial 1. Octavia and the Residents' Association jointly instructed Mr Bruce Maunder-Taylor, who had been instructed by Mr Puvanesan at the first hearing.

28. The parties made various submissions seeking to challenge and/or undermine the evidence of the opposing expert. It would be fair to say that the two experts adopted very different approaches in analysing the levels of costs incurred: Mr Pack focussed principally on base costs to try to reach a conclusion as to the reasonableness of the costs incurred. He compared the actual rates of pay against the London Living Wage. In contrast, Mr Maunder Taylor made use of Mr Willis's calculations based on the pre-completion estimates contained in the SAY Plan (referred to below) in setting out his views as to the reasonableness of the costs incurred. In this regard, he considered that the fact that costs had increased significantly from the pre-completion estimates was in part as a result of a discretionary decision on the part of the landlord to "improve and extend the level and cost of Services being provided without consultation". The respective approaches as applied to the matters before us are addressed further below.

The dispute in broad terms

29. Turning to the substantive dispute in the main proceedings, as mentioned above, the matters before us are historic, covering the service charge years 2016-2020. This end date is significant as it pre-dated the appointment of the current managing agents, Rendall & Rittner. Not only has this apparently had an impact on the availability of evidence that was before the tribunal, but the structure in place for the management of the Development for the service charge years in question was wholly different from what it is now. For the years 2016-2020, Qube were responsible for the management of the residential parts of the Development and JLL for the overall estate and the commercial parts. Now, Rendall & Rittner are responsible for the residential parts and the overall estate and JLL for the commercial parts. This change in structure has resulted in changes to costs which are addressed further below.

30. Although the present hearing involved consideration of whether to grant dispensation from consultation requirements and/or issues of reasonableness, it is fair to say that the matters have arisen against a background of numerous complaints being raised over a considerable period of time. It is also true to say that not all leaseholders have approached the matter in the same way. In this regard, and while making no criticism of any party, we note the Applicants' submission that they have been faced with differing requests and expectations from differing lessees. For example, one head of complaint was that the services provided were too limited and that the Applicants were following the terms of the lease rather than the more extensive services suggested by the sale and purchase agreement and marketing material, i.e. that the service was not the five star 'Raffles experience' that had been advertised. At the other end, different lessees suggested that levels of spending were too high and unnecessary.

31. Nevertheless, the general theme put forward by the (private) Respondents was that they had been badly served, typified by alleged poor levels of communication. As Mr Willis set out in para.46 of his second witness statement:

"The Applicants have been badly served by its / their agents, JLL and Qube, who have shown a cavalier attitude to their obligations and responsibilities under the lease and under the law. JLL, since inception, completely disregarded a fundamental provision of the lease at Sch6 Pt 1, para 6, a matter on which the Tribunal has already ruled; JLL have made numerous errors for which the Applicants have already agreed to compensate the Respondents; and now the Applicants are required to make this Application for Dispensation from QLTA consultation requirements, a direct consequence of another major failing by their agents JLL. There is clear evidence of a pattern of behaviour, behaviour which invariably causes prejudice to the Respondents. The Applicants failed in their duty to supervise their agents and the result is breach of the lease provisions and of their statutory obligations."

32. Similarly, Mr Giret opened his skeleton argument by submitting that throughout the relevant period Mr Puvanesan has repeatedly expressed dissatisfaction and concern over the disparity between the level of service and expectation that had been created during the sales process and the 'pitch' set out by the SAY Plan, and that actually provided. In his submission, there was mismatch between what the leaseholders expected in terms of the anticipated service and the reasonable expectation of the service which they had agreed would be provided and charged for, and the service that was provided.

The SAY Plan

33. It is worth pausing at this point to discuss this document as it featured so prominently in the Respondents' case. As noted above, the SAY Plan was a service charge plan dated 5 April 2012 prepared by SAY Property Consultants. According to Mr Willis it was prepared at a time the Development was being actively marketed and reservations being taken and formed part of the documentation that was provided to the purchasers' solicitors. No other relevant document was provided. The SAY Plan and contained an estimate of the service charge level across a range of services and proposed resourcing levels including management, concierge, security, residential services and staffing levels and cleaning. The budgeted service charge cost indicated by the SAY Plan was £6.50 per sq ft. It is common ground that as events unfolded, the SAY Plan proved broadly accurate as to some heads of service charge costs, but wholly inaccurate as to others. The result was that service charge for certain

categories of costs were significantly higher than anticipated in the SAY Plan, resulting in charges more than the £6.50 per sq ft originally indicated.

34. The question therefore arises as to whether or what extent the tribunal should use the figures contained in the SAY Plan as a form of benchmark so as to assess reasonableness of costs. As noted above, this was the approach applied by Mr Willis (who also made adjustments for CPI).

35. In our determination, however, it is misconceived for the SAY Plan to be used in this way. Determining whether costs were reasonably incurred for the purposes of section 19 of the 1985 Act must be done objectively – in other words the question is were the costs incurred reasonable in amount, not whether they were reasonable as compared to the SAY Plan. We reach this conclusion for the following reasons:

36. First, we note that the SAY Plan did not have contractual force and could not be relied on as establishing a contractual basis for levels of service charge. As set out in the prelude to the SAY Plan, it stated:

"*The draft service charge budget has been created in order to provide details concerning the projected estate, block, apartment and commercial unit costs, which will be incurred when buying or leasing accommodation at Fitzroy Place. The budget presents the current best estimate of both the scope of services and resulting service charge liabilities. The budget will be subject to amendment in advance of the completion of the development as, for example, specifications for the delivery of services are refined, contractors provide firm prices as part of a tender process.*"

37. In addition, each page of the SAY Plan that follows is headed:

"*Prepared subject to Contract and Without Prejudice [-] The figures in this budget will be subject to amendment in advance of the completion of residential sales and commercial letting*".

This is then followed by:

"*NOTE Figures and Apportionments are for budgeting purposes and are subject to amendment*".

38. Mr Willis submitted that the figures from the SAY Plan were 'embedded in the lease'. According to his witness statement at para.10:

"*In all of the leases there is a reference to the "Initial Interim Rate: in respect of (a) Block Service Charge £x per year; (b) Estate Service Charge £y per year. The aggregate of X and y is equal to the square footage of an apartment*

multiplied by £6.50 per sq ft (Exhibit 5). It is absolutely clear that the "Initial Interim Rate" contained in each lease was derived from the numbers contained in the [SAY Plan]."

However, insofar as the same is alleged, this does not mean that the SAY Plan has been *incorporated* into the private residential leases. Rather, as the Applicants submitted, all that appears to have happened is that the figures were used as the basis for the Initial Interim Rate of service charges. As the Applicants contended, given that the Development had not been up and running at that point when most flat leases were entered into, it is unsurprising that these figures were used as no other figures would be available. However, this does not mean that the leases incorporated the SAY Plan itself of gave any indication of or endorsement as to its accuracy.

39. Both Mr Willis and Mr Puvanesan asserted that they were entitled to rely on the SAY Plan in entering into their respective purchases. Mr Willis acknowledged that it was only a budget but contended that there should have been a maximum variance of 10% - far below what actually occurred for some heads of costs. His evidence was that had he known what levels of costs would ultimately be, he would not have proceeded with the purchase of his flat. Mr Puvanesan's third witness statement went even further and suggested that there had been an actionable misrepresentation, although it should be stressed that no question of legal misrepresentation was raised in submissions before us and in any event such claim would not fall within this tribunal's jurisdiction under the 1985 Act.

40. At paragraph 4 of his report, Mr Maunder-Taylor stated that:

"*I have formed my opinions on the assumption that, prior to making their purchase, each Lessee made their offer relying on the SAY Service Charge Plan. I acknowledge that it dates back to 2012 and that the copy provided to me "Service Charge Overview" is dated 05/04/2012. However, I have noted that that document (or the information contained therein) was said to be the same document as provided to each Lessee at the time of negotiating their purchase. It is therefore my opinion that expenditure at that level was common ground between both vendor and purchaser and that therefore there would be no prejudice by engaging security staff at a cost at or near to that level.*"

41. The difficultly with the above analysis, however, is that it ignores the express wording of the SAY Plan, which was explicit in stating that it was an estimate and did not have contractual force.

42. Secondly, we do not accept that the SAY Plan was an accurate forecast of costs to achieve the level of service promised. In particular:

    (1) The version of the SAY Plan relied on the by the Residents' Association is dated 4 April 2012 – this is several years before the Development had been completed. We agree with Mr Pack's view that the plan cannot be considered as the finished document but merely a guide as to the kind of services that will be provided and the likely costs, subject to amendment.

    (2) The SAY Plan does not include VAT on staff costs or pension costs.

    (3) The fact that the SAY Plan might have turned out to be accurate for some heads of costs does not mean that it was accurate for all.

    (4) We also accept the Applicants' submission that while CPI is a practical way to adjust for inflation, not all service charge costs rise with inflation. Mr Pack gave the examples of insurance and costs of building materials which have risen far higher than the rates of inflation in recent years. As such, although it was also accepted that some costs have broadly risen in line with inflation, we agree that the use of CPI to adjust for inflation should be approached with caution.

    (5) More importantly, the SAY Plan did not specify number of employees required to fulfil the services. For example, although the SAY Plan made reference to '24-hour security' it did not explain what was meant by that or what levels of staffing were envisaged.

    (6) This leads on to a more general point as to whether the SAY Plan was adequate to provide the level of services intended having regard not just to the terms of the lease by the wider marketing documentation. While Mr Willis maintained that it

was, and that the service levels could be achieved based on the figures in the SAY Plan – with a more rationalised workforce - Ms Hares disputed such assertion. For example, in relation to staff costs, she stated at paragraph 8 of her second witness statement that:

"*I can however observe that the budget prepared for SAY did not allow for the level of service which was to be in place at Fitzroy Place. For example, from the outset it was planned that there would be a 24 hour concierge but the budget line for that item was not enough to pay a 24 hour concierge minimum wage*."

In her oral evidence, Ms Hares noted that the SAY Plan did not identify the number or personnel required or indeed define what was meant by '24-hour security'.

Accordingly, while we in no way wish to diminish the work that Mr Willis has undertaken, we must prefer the evidence of Ms Hares as to the number of employees needed, noting not just her experience in property management generally but the fact that she has been involved in the running of Fitzroy Place for the past few years. We also do not consider any suggestion that staff should 'double up' to be realistic – for example, cleaning staff covering concierge or concierge staff covering cleaning. As Ms Mather submitted security staff, in particular, require distinct training and their work cannot be covered by non-trained staff.

43. This is not to say that the SAY Plan is wholly irrelevant – we also note the Respondents' contention about the limited evidence available to the tribunal and this is addressed further below. However, for the reasons above, we do not consider that it should be taken as a benchmark for levels of costs to determine either prejudice or reasonableness as advocated for by the Respondents.

44. Another aspect of the Respondents' case was that it was said that the lessees were never notified that service charge costs were going to increase significantly from what had been indicated in the SAY Plan. It appears that no variation was every provided to purchasers/leaseholders

prior to service charge demands for the higher sums. Mr Maunder Taylor stressed that it would have been good practice to update the leaseholders – in his view good property management should drive lessees away from an application to the FTT rather than towards one.

45. While we accept that such a notification might have been good practice and acknowledge the frustration that might have been felt by leaseholders by the increase in costs, the point is of limited relevance to the present issues before us. Certainly, it is of little application to questions of reasonableness where the sole question is whether the costs were reasonably incurred. Similarly, in instances where statutory consultation was required, we must determine whether (or what terms) to grant dispensation having regard to established principles.

46. With this conclusion as to the SAY Plan in mind, we turn to consider he specific applications before us.

Dispensation

47. During the course of the wider proceedings, on 27 June 2023, the Applicants made an application under section 20ZA of the 1985 Act, for dispensation from consultation requirements. Directions were given in respect of that application and it was considered that it should be determined at the same time as the arguments in relation to reasonableness.

48. The agreements in respect of which dispensation was sought and the grounds for the application were as follows:

    (1) *Provision of mechanical and electrical services by Skanska between 2016 and 2020*. According to the application, the previous management agents appear to have had a practice of dealing with contractors by way of 'Property Service Contracts' ('PSC') or annual purchase orders which state they are for a period of a year less one day. However, the PSCs appear to have been treated as more akin to rolling contracts as services prices were agreed post the commencement date of the specific contracts and services continued to be provided post expiry of

one year's contract and the start of the next. Therefore, while prima facie the agreements were for a period of one year, the Applicants are concerned that, when scrutinised by the Tribunal, these may be found to be QLTAs which should have been the subject of a consultation.

Dispensation is sought on the basis that on the basis that the lessees did not suffer any prejudice in the course of the provision of mechanical and electrical services by Skanska. While the previous managing agents did not carry out the statutory consultation exercise, they did complete a tender process and benchmark the costs of the Skanska offering against those incurred at other comparable properties

(2) *Estate security services provided by Vision Security Group Ltd ('VSG') between 2016 and 2020*. According to the application, there appears to be no formally executed copy of the framework agreement between JLL and VSG. Further, there are no PSCs which relate specifically or solely to Fitzroy Place. Dispensation is sought on the basis that the lessees did not suffer any prejudice in the course of the provision of estate security services by VSG. While the previous managing agents did not carry out the statutory consultation exercise, they did complete a competitive regional tender process before awarding the framework agreement for the area to VSG. As such, the lessees were not prejudiced by the lack of consultation.

(3) *Cleaning services provided by Interserve FS (UK) Limited) T/A Lancaster Cleaning & Support Services ('Interserve') between June 2015 and June 2018*. Interserve were appointed pursuant to a framework agreement entered into by the Second Applicant's previous managing agents, JLL, for the London area. The framework agreement was for a three year plus two-year period. There was a three-year PSC relating specifically to Fitzroy Place which was signed 22 November 2017 and said to be for a term of three years from 1st June 2015 to 1st June

2018. Dispensation is sought on the basis that the lessees did not suffer any prejudice in the course of the provision of cleaning services by Interserve. While the previous managing agents did not carry out the statutory consultation exercise, they did complete a competitive regional tender process before awarding the framework agreement for the area to Interserve. As such, it is said that the lessees were not prejudiced by the lack of consultation.

(4) *Cleaning services provided by Andron Facilities Management ('Andron') between July 2018 and July 2020*. Andron were appointed pursuant to a framework agreement entered into by the Second Applicant's previous managing agents, JLL, for the London area. There was an unexecuted one year PSC dated 1st June 2018 which purported to run until 31st May 2019 and a two year PSC relating specifically to Fitzroy Place which commenced on 1st July 2019. Dispensation is sought on the basis that the lessees did not suffer any prejudice. It is said that although the previous managing agents did not carry out the statutory consultation exercise, they did complete a competitive regional tender process before awarding the framework agreement for the area to Andron. Andron were chosen to replace Interserve due to (a) the belief they could offer an improved service and (b) Andron's positive performance in other regions.

(5) *Residential M&E services provided by Edmund Services Ltd ('ESL') between April 2018 and March 2021*. There is a written agreement issued on 27th March 2018 which states that the contract period is from 1st April 2018 "and shall be for the duration of three years reviewed annually with 30 days [sic] notice period at any time."

In this case, the previous managing agent, Qube, sent initial notices to leaseholders. One observation was received in response. There was a competitive tender process following which notice of proposals were sent to the leaseholders.

However, the managing agents chose not to contract with the lowest price tenderee following input from the independent M&E consultant who drafted the scope of services and managed the tender, and who did not regard the lowest tender received as realistic nor to completely meet all the needs of the tender process. Having reached that conclusion, it appears that the managing agent failed to send the final notice of reasons for their decision. Dispensation is sought on the basis that the lessees did not suffer any prejudice.

49. As set out above, there is no dispute that the consultation requirements were not complied with. In most cases, there was no consultation; in the final instance, the consultation was not complete. Specifically in relation to Octavia, it was also agreed that the shared ownership tenants ought to have been consulted in accordance with the Upper Tribunal's decision in *Leaseholders of Foundling Court and O'Donnell Court v Camden LBC* [2016] UKUT 366 (LC).

Were the agreements QLTAs?

50. The issue of whether the agreements were QLTAs gave rise to somewhat lengthy submissions by the parties. In part, this was due to the fact that the documentation evidencing the various contractual arrangements was far from complete.

51. Save for the agreements with Skanska (relating to maintenance and engineering), the other arrangements which are the subject of the dispensation application arose under framework agreements between JLL and the relevant service provider. It was explained by Mr Curnow that the framework agreements are in standard form and are for a period of 3 years with the option for an extension of a further 2 years. The service provider will then enter into a Property Specific Contract ("PSC") with the client, i.e. the landlord or management company for a particular property. The form of PSC was contained in the framework agreements.

52. Mr Beresford argued that the framework agreements were themselves QLTAs and that therefore the obligation to consult arose at the time the framework agreements were entered into rather than the PSCs. In

support of this proposition, he relied on the Upper Tribunal decision in *Kensington & Chelsea v Lessees of 1-124 Pond House* [2015] UKUT 395 (LC). In that case, a determination was sought as to whether framework agreements that established the terms under which a local authority would be able to engage contractors to carry out works were QLTAs. The housing stock was managed by a tenant management organisation (TMO) which it was argued was broadly equivalent to JLL in the present case. The definition of a QLTA in ss.20 and 20ZA of the 1985 Act and regulation 4 of the Service Charge (Consultation Requirements) (England) Regulations 2003, is an agreement entered into *by or on behalf of* the landlord or a superior landlord, for a term of more than twelve months where relevant costs incurred under the agreement for any tenant exceed £100 in any accounting period. Specifically,

(1) Pursuant to section 20ZA(2) of the 12985 Act:

> "*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*."

(2) Regulation 4(1) of the Consultation Regulations provides:

> "*Section 20 shall apply to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100*."

53. Thus, in *Pond House* there were two pertinent questions so far as the present case is concerned:

(1) Was the framework agreement entered into 'on behalf of the landlord' notwithstanding that the TMO was the contracting party?

(2) Were the relevant costs incurred under that agreement?

54. On the facts of the case, the Upper Tribunal found that the answer to both questions was 'yes'. This was so notwithstanding that under the terms of the framework agreement, the TMO was not obliged to award specific contracts to any of the four selected contractors (as set out at para.36 of Decision). Ultimately, the Upper Tribunal concluded as follows:

"*71. In this case we are satisfied that the Framework Agreements are long term, since they will be for a period of four years and that relevant costs may well exceed £100 for a tenant in any one accounting period. We accept Mr Bhose's submission that if a QLTA might result in more than £100 being payable in any period then it may be treated, for that purpose, as an agreement which is subject to the consultation requirements. It is not necessary for a landlord to establish that costs in excess of £100 will definitely be incurred nor is it necessary for a landlord to demonstrate which accounting period such costs might fall within.*

72. The most difficult question here is whether the costs under the Framework Agreement can be said to be incurred under the agreement. Mr Bhose submits that the word "under" should be given a simple "plain meaning" construction and that to approach the matter in any other way would be to introduce an unnecessary artificiality. For the following reasons we agree and consider that the costs in this case will be incurred under the Framework Agreements.

73. Firstly, we acknowledge that in order for costs to be incurred under an agreement there must be a sufficient factual nexus between the subject matter of the agreement and the works themselves. However, we do not consider that this means that the only agreements contemplated by section 20 are contracts for works to be carried out whether subject to public notice or not. In this case we have ample evidence to be satisfied that where works are carried out by one of the contractors identified under the terms of the Framework Agreement that such a nexus exists. That evidence can be found in particular in paragraphs 27 to 38 above. The fact that the applicant is not obliged to use any of the identified contractors does not detract from this conclusion. …

74. In our view the Framework Agreements in this case identify the works to be carried out with sufficient particularity to satisfy the test that the relevant costs are incurred in carrying out those works "under" the agreement. …"

55. Applying this analysis to the facts of the present case, Mr Beresford carefully went through the provisions of the JLL framework agreements to support the proposition that the works which are the subject of the dispensation application were indeed carried out under the framework agreements as opposed to the PSCs. In his submission, the test to be applied is whether there is a 'sufficient factual nexus' as per paragraph 73 of the Upper Tribunal's decision in *Pond House*. In this regard, he noted that

    (1) there were numerous prescriptive and specific provisions within the JLL framework agreements;

    (2) the framework agreements appended a template for the PSCs which contractors were obliged to use;

    (3) no PSC could be entered into without a framework agreement;

    (4) PSCs were in many cases not entered into until some time after the services had begun being provided (and were then back-

dated). As such, it was suggested that the services must have been provided under the applicable framework agreements because no PSC had been executed at the time services had begun to be provided.

Further, it was submitted that the fact that there was no obligation on JLL to use a framework partner for the carrying out of services was irrelevant and did not detract from the fact there was a sufficient factual nexus. Similarly, it was contended that it was irrelevant that the framework agreements had been entered into by JLL rather than the Applicants as it was said that this had been done *on behalf of* the Applicants.

56. In response, Ms Mather submitted that the issue of whether the JLL framework agreements were QLTAs had not been pleaded and was not one that was before the tribunal – the application for dispensation related to the PSCs. Without prejudice to this contention, she submitted that the framework agreements were not QLTAs, and sought to distinguish the facts of *Pond House* from those in the present case. In particular, it could not be said that in the present case, the framework agreements had been entered into by JLL *on behalf of* the landlord for the purposes of s.20ZA(2) of the 1985 Act. The framework agreements are necessary for a contractor to be placed on JLL's panel. However, they are not done 'on behalf of' any particular landlord. Moreover, the Applicants also submitted that the PSCs were not just akin to 'purchase orders' (or call-off in the *Pond House* case) as Mr Beresford had argued. Rather, they are detailed agreements which set out the contractual arrangements between the service providers and the landlord and have their own terms and conditions. In this regard, it was pointed out that it is possible for a landlord to terminate a PSC but not the wider panel appointment – the landlord after all is not a party to the framework agreement. Ultimately, Ms Mather submitted, it is the PSC which gives rise to the liability of the landlord to pay.

57. We agree with Ms Mather that the question of whether the framework agreements are QLTAs is not a point that has been pleaded: rather the application is for dispensation in respect of the PSCs.

58. However, even if we are wrong and this were an issue that was properly before us, we would have considered that the framework agreements are not of themselves QLTAs in any event. In particular, we would find it difficult to conclude that they were entered into 'on behalf of' the Applicants' for the purposes of s.20ZA(2) of the 1985 Act. Unlike in *Pond House*, where on the facts, the Upper Tribunal was satisfied that the applicable agreements were entered into on behalf of the local authority, in the present case there is not the same nexus: the framework agreements are between JLL and contractor for the purposes of being added to JLLs panel and we agree with Ms Mather that it is the PSCs, with their own terms and conditions that create the contractual arrangement between the landlord and the service provider.

59. Turning then to the PSCs and the application for dispensation itself, a difficulty arises from the incomplete nature of the documentation. As stated above, the Applicants suggest that the tribunal should adopt a common-sense approach so as to fill in any gaps. However, this must be considered against the fact that it is the Applicants themselves who have raised the issue of whether the agreements that are the subject of the application are QLTAs. It is not then satisfactory to ask the tribunal to determine that they are not by only providing part of the documentation. Moreover, in many cases, the PSCs that have been provided significantly post-date the start date of services, with the result that the precise nature of the contractual arrangement as at the date services commenced becomes far more difficult to ascertain. While Mr Curnow attempted to fill in the gaps, his evidence was necessarily limited to what *ought* to have happened as he could not speak first hand as to what *did* happen. Although it became apparent, as noted above, that certain of the JLL individuals who had signed PSCs were still employed at JLL, they were not called to give evidence despite the fact that this might have provided clarification as to what had happened.

60. In the circumstances, based on the evidence before us, we find as follows:

    (1) *Skanska agreements*: Although there was little discussion of these agreements during the hearing, as set out in the application, the Applicants accepted that although described as

being for a period of a year less one day, in reality they appear to have been treated as more akin to rolling contracts as services prices were agreed post the commencement date of the specific contracts and services continued to be provided post expiry of one year's contract and the start of the next. The evidence contained an incomplete set of PSCs, but included a PSC amendment agreement which purported to amend the term of a PSC to one year less one day. However, this is unexecuted and there was no direct evidence that it was ever entered into. Moreover, as the Applicants' concern that the arrangements were "treated as more akin to rolling contracts" was never challenged by direct evidence, we accordingly find that they were QLTAs.

(2) *VSG agreements*: The documentary evidence was again incomplete. The bundle contained a PSC said to commence on 1 April 2016 for a term of 364 days – although this was only executed in January 2017; and a PSC said to commence on 1 June 2018 for a period of 2 years. There are two PSC amendments agreements, dated 1 June 2018 and 15 June 2020 purporting to amend PSCs to a period of 1 year. However, neither is signed and there is no evidence that either has been entered into. Accordingly, save for perhaps the first PSC dated 1 April 2016, we again find that the arrangements were QLTAs.

(3) *Cleaning services provided by Interserve*: it is accepted that the PSC was for 3 years and accordingly this was a QLTA;

(4) *Cleaning services provided by Andron*: The bundle contained a PSC purporting to be for a term of two years. Although there was also a PSC amendment agreement which purported to amend the term of a PSC to one year less one day, this is unexecuted and there was no direct evidence that it was ever entered into. In the circumstances, we find that the services were provided under a QLTA.

(5) *M&E services provided by Edmund Services Ltd*: it is accepted by the Applicants that this was a QLTA.

61. For the reasons set out above and for the avoidance of doubt, we find that dispensation was required.

The legal test for granting dispensation

62. The relevant section of the 1985 Act provides as follows:

> "20ZA Consultation requirements
>
> (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."

63. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson* [2013] UKSC 14 and all parties referred to the decision in some detail. The purpose of the consultation requirements is to ensure that tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate. In summary, the Supreme Court noted the following:

- The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

- The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

- Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

- The Tribunal has power to grant a dispensation on terms as it thinks fit, provided that any terms are appropriate.

- The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).

- The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.

- The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

- Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

64. Looking the Supreme Court's decision in more detail, on the question of prejudice in particular, at paragraph 44 of *Daejan v Benson*, Lord Neuberger stated that:

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

65. As to whether the grant of dispensation should be subject to conditions, Lord Neuberger stated that:

> "65. Where a landlord has failed to comply with the Requirements, there may often be a dispute as to whether, and if so to what extent, the tenants would relevantly suffer if an unconditional dispensation was accorded. (I add the word "relevantly", because the tenants can always contend that they will suffer a disadvantage if a dispensation is accorded; however, as explained above, the only disadvantage of which they could legitimately complain is one which they would not have suffered if the Requirements had been fully complied with, but which they will suffer if an unconditional dispensation were granted.)
>
> ...
>
> 67. ... it is true that, while the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants. However, given that the landlord will have failed to comply with the Requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points. As Lord Sumption said during the argument, if the tenants show that, because of the landlord's non-compliance with the Requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice.

68. The LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so. For the same reasons, the LVT should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that LVT should uncritically accept any suggested prejudice, however far-fetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it. And, save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the Requirements.

69. Apart from the fact that the LVT should be sympathetic to any points they may raise, it is worth remembering that the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord."

Prejudice in the present case

66. Having regard to the language of Lord Neuberger that the tribunal should be ''sympathetic' to tenants, Mr Beresford submitted that this should be particularly so having regard to three features of the present case:

(1) The length of time since the contracts were entered into (in some cases as far back as 2015). It is very difficult to consider the counterfactual such a long time later: the lessees are at a disadvantage because they cannot now obtain evidence of what would have happened or what things might have costs in 2015;

(2) The tribunal (and the Respondents) do not have all of the documents – many are missing – which restricts the Respondents' ability to take points as to prejudice; and

(3) The nature of Fitzroy Place, being a substantial, mixed-use development, makes it much harder for lessees to obtain alternative quotes.

The result of all of this, in Mr Beresford's submission, is that it would be almost impossible now to produce alternative quotes with any evidential value as might be expected in a more typical dispensation application.

67. We agree with Mr Beresford that the matters identified create additional difficulties in the present case and bear this in mind in assessing the application.

68. Based on the witness evidence provided (including the shared ownership witnesses), we are satisfied that that had the Applicants consulted as required, they would have received representations from leaseholders in relation to the proposed costs. The difficulty is translating that into specific prejudice, i.e. to ascertain with any degree of precision what prejudice exists or how it would be quantified. Various suggestions were proposed during the hearing by different Respondents:

    (1) Mr Willis took the position that prejudice was the difference between the actual costs and those contained in the SAY Plan (as adjusted for CPI). While this on its face might seem an attractive and practical proposition, we have difficulty with accepting such proposal for the reasons set out at paragraphs 33-46 above;

    (2) Mr Beresford, bearing in mid the difficulties highlighted above, submitted that the tribunal could adopt a broad-brush approach. Nevertheless, he gave two specific examples of where prejudice could be identified:

        a. In relation to security, the cost of a security manager should be removed. This was something that Rendall & Rittner dispensed with when they took over management, and it was contended that lessees should not have to pay for the difference.

        b. Prejudice based on quality of services provided: Mr Beresford referred to various performance review documents contained in the bundle which had been prepared by JLL

> as a way of reviewing their framework partners. The analyses included a percentage grade for 'Quality of Service'. By way of example, Mr Beresford pointed to the fact that VSG (security) had been given a rating of 56% - a figure which Mr Curnow had agreed was 'not good enough'. In Mr Beresford's submission, the tribunal ought to apply such rating to the overall costs, such that, in this example, the Applicants ought only to be able to recover 56% of the costs incurred.

We agree with the Respondents' submission in relation to (a) as regards prejudice and that the costs are excessive. Our conclusions as to how this affects the amount of recoverable costs are set out in the table following paragraph 88 below.

In relation to (b), the difficulty with this approach is that the reports did not relate to Fitzroy Place or indeed any specific site. As such, it would not be appropriate to apply such a deduction to recoverable costs when there is no direct evidence that the grade given equates to the quality of services at the Development. More generally, there is no explanation as to how the marking scheme within the performance review documents is arrived at. The tribunal is effectively being asked to conclude that any grade below 100% would mean that the services could not be said to have been a reasonable standard and the costs reduced accordingly. The tribunal cannot adopt such a conclusion on the basis of the evidence before us.

It should be stressed that Mr Beresford also submitted that if dispensation was to be granted, it should be on terms that (i) the Applicants are not entitled to recover their costs and (ii) that the Respondents be entitled to their costs. In this regard, Mr Beresford cited paragraph 68 of *Daejan* as set out above. In

addition, he made reference to paragraph 73 in which Lord Neuberger stated:

> "*It might fairly be said that [the approach to dispensation] would enable a landlord to buy its way out of having failed to comply with the Requirements. However, that concern is, I believe, answered by the significant disadvantages which a landlord would face if it fails to comply with the Requirements. I have in mind that the landlord would have (i) to pay its own costs of making and pursuing an application to the LVT for a section 20(1)(b) dispensation, (ii) to pay the tenants' reasonable costs in connection of investigating and challenging that application, (iii) to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the LVT will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue.*" (emphasis added)

Ultimately, Mr Beresford stressed that the costs orders ought to be made irrespective of whether the tribunal finds prejudice. This submission is addressed further below.

(3) Mr Giret's primary position was that dispensation should not be granted, so egregious was the failure by the Applicants. Alternatively, he endorsed the proposals of both Mr Willis and Mr Beresford.

69. More generally, Mr Giret also raised the notion of wider prejudice beyond mere financial prejudice. Reference was made to the 5th Edition of *Services Charges & Management* at ¶11-55. Although it is said that 'relevant' prejudice appears to be limited to financial prejudice, according to the authors:

> "[it] *remains to be seen whether relevant prejudice is limited to 'financial' prejudice in terms of unreasonable costs or costs incurred in the provision of services, or in the carrying out of works, which fall below a reasonable standard. If so, these appear to be issues of reasonableness susceptible to challenge under Landlord and Tenant Act 1985 s.19. One must ask what, if any, additional protection Landlord and Tenant Act 1985 s.20 confers on a tenant. If financial prejudice is not so limited, other prejudice may be capable of being assessed in monetary terms. For example, if the inconvenience of a contract period overrunning can amount to "relevant prejudice" in circumstances where, had they been consulted, the tenants would have nominated a contractor with an excellent track record of completing works on time, the Appropriate Tribunal may grant dispensation on condition that the recoverable costs are reduced by an amount equivalent to damages for nuisance.*"

70. In support of the submission that prejudice can be viewed more widely, it was asserted that the Respondents were not getting what they thought they would be getting and that this could be reflected in terms of resale value of individual flats. There are two points to make in response. First, there is no authority as yet to support the proposition that relevant prejudice might extend beyond financial prejudice. Secondly, even if that were the position, we find that there is little evidence of any such prejudice in the present case arising as a result of any failure to consult before entering into QLTAs. In particular, and in relation to Mr Giret's submission, we have had no evidence as to how resale value might have been affected and insofar as it is suggested that this is a measure of prejudice as a result of a failure to consult in accordance with the Consultation Regulations, we reject the submission.

71. A further point regarding prejudice is that the parties generally used reference to prejudice (for the purposes of dispensation) and reasonableness (for the purposes of section 19 of the 1985 Act) interchangeably. In other words, in cases where dispensation was sought, it was frequently submitted that the extent to which relevant costs were considered to be unreasonable broadly equated to the prejudice suffered – provided this arose as a result of a failure to consult. While we understand the practicalities of such approach, it largely stems from the fact that it has been so difficult to establish prejudice in the present case. Moreover, we are mindful of the fact that conceptually, there is a difference between considerations of prejudice and reasonableness, and we are accordingly hesitant in applying the test for reasonableness to determining prejudice. However, given that there is a challenge to reasonableness before us which we must decide, the substantive challenges must still be addressed in any event.

Determination on dispensation

72. We grant dispensation in respect of the contracts referred to in the applications. However, we do not do so unconditionally. While there is no principle in favour of imposing a costs condition whenever an application for dispensation is made, we consider that it would be appropriate in its

nature and effect having regard to the circumstances of the present case. Specifically:

(1) the significant time that has elapsed since the agreements over which dispensation is now sought were entered into; and

(2) the inadequate documentary evidence that has been before us – exacerbated by the fact that the Applicants did not adduce oral evidence from witnesses who might have been able to assist.

Both of these factors have placed the Respondents at a significant disadvantage in terms of (i) being able to investigate what has happened; and (ii) being able to demonstrate and quantify financial prejudice.

73. Accordingly, we determine that dispensation be granted on terms that:

a) the Applicants are not permitted to recover their costs of the application; and

b) the Applicants pay the Respondents' reasonable costs in connection with investigating and challenging the dispensation application.

74. As regards any further reduction in the specific costs which have been incurred under the QLTAs which are the subject of the dispensation application, as set out above, we find that on the whole it has been very difficult to establish that the lessees were financially prejudiced as a result of a failure to consult (save that as already noted we agree with Mr Beresford's submission in relation to security costs at paragraph 68(2)(a) above).

75. On the Residents' Association's case, in a number of instances it was accepted that no prejudice had been suffered – largely because the costs incurred matched the SAY Plan. Such costs included, for example, maintenance and engineering costs. However, beyond these categories of costs, insofar as the case has been put before us that prejudice has been equivalent to costs not being reasonably incurred for the purposes of s.19 of the 1985, while conscious of the conceptual differences between to the

two as already explained, we address the challenges to the specific heads of costs, along with other costs where dispensation was not an issue, as set out below.

Challenges to reasonableness

76. There was little dispute between the parties as to the approach the tribunal must take in determining reasonableness. As set out in the Applicants' skeleton argument, the test of whether sums have been "reasonably incurred" under s. 19(1)(a) is wide. In *Waaler v Hounslow LBC* [2017] EWCA Civ 45 the Court of Appeal said that in the context of s. 19(1)(a) "reasonableness" had to be determined by reference to an objective standard, not by the lower standard of rationality. In summary, the landlord's decision-making process is a relevant factor but this must then be tested against the outcome of that decision. Where a landlord has chosen a course of action which leads to a reasonable outcome, the costs of pursuing that course of action will have been reasonably incurred even if there was a cheaper outcome which would also have been reasonable. The fact that the cost of the relevant works is to be borne by the lessees is part of the context for deciding whether the costs have been reasonably incurred. Whether costs are reasonably incurred also involves considering what method the landlord chooses to adopt in complying with its obligations. The question is whether the method was reasonable even if other reasonable decisions could have also been made.

77. There were various bases on which reasonableness was challenged by the Respondents, both in terms of the costs of works and the quality of services provided.

78. The parties helpfully prepared a schedule of issues, summarising their respective positions. This has been reproduced below with the tribunal's findings. For the avoidance of doubt, it appears that there was no challenge to the reasonableness of maintenance and engineering costs and accordingly, these costs are allowed in full.

79. However, before turning to the other individual heads of costs, it is worth first making several findings of general application:

80. First, although considerable reliance has been placed on the figures contained in the SAY Plan, for the reasons already given, the test that must be applied under section 19 of the 1985 Act is an objective one as to whether the costs were reasonably incurred, not whether they were reasonable as compared to the SAY Plan.

81. It appears that after Rendall & Rittner took over the management of the development, there was a reduction in costs to the lessees. According to the evidence of Ms Hares, a significant part of this was due to changes in structure: (i) Rendall & Rittner became responsible for both the estate costs and the residential costs whereas prior to their appointment Qube had been solely responsible for residential costs and JLL had been responsible for the estate costs; and (ii) cleaning and security staff were employed directly by Rendall & Rittner whereas such services had previously been contracted out.

82. On the issue of the changes in structure, the fact that something could be done more cheaply does not of itself mean that the costs under the previous management structure were unreasonable applying the test in *Waaler*. Likewise, the fact that under Rendall & Rittner, service providers were contracted directly does not of itself mean that alternative structures were necessarily unreasonable. As Ms Hares stated at paragraph 6(a) of her third witness statement:

> "*R&R's costs for security are not a comparable benchmark as, unlike JLL, we directly employ staff. Some staff from Mitie (the company in charge of security previously) were TUPE'd over at the time R&R took on the estate and therefore their salaries remained the same under R&R management*."

Similarly, the evidence of Mr Pack was that although this worked out cheaper for leaseholders, it might not always do so, He cited, for example, recruitment costs and HR costs should employees leave, which do not arise when services are contracted out.

83. We do not find that either (i) the structure for the management of the Development under JLL and Qube or (ii) the fact that staff were employed by third parties rather than directly, should of themselves mean that the costs were not reasonably incurred. We consider both to be within the range of reasonable approaches for the running and management of the

Development notwithstanding that in the event costs proved to be lower once Rendall & Rittner took over management. Instead, we consider each item of costs on its own merits as set out below.

84. This then leads on to the question of the levels of costs incurred. The evidence of Mr Pack was that JLL provided good value for lessees. This echoed the position of Mr Curnow who gave evidence as to the procurement process for the purposes of appointing framework partners. On his evidence in order to take advantage of the scale of their management portfolio and market position, rather than tender for each contract individually at each individual property they manage, JLL tender for regional framework partners. It was said that the framework partners offer more competitive rates because they are likely to be utilised across multiple sites. According to Mr Curnow, this approach showed "*an improvement in value for money of between 3-5% depending on the service line*". However, it should be said that when Mr Pack was pressed on this during cross examination as to the basis for such statement, his answer was essentially that JLL was a large company – and therefore the assertion does not take matters much beyond Mr Curnow's (of JLL) own claim. Mr Pack did attempt to draw comparisons with a nearby development, Rathbone Place – although as we had limited information with regard to that development, we must be cautious with regard to the extent to which any parallels can be drawn.

85. What Mr Pack did do was prepare an analysis of hourly cost of the workers (plus associated costs) as compared to the London Living Wage at the time. While this approach has its limitations as it does not give an overall cost but only hourly charges when coupled with Ms Hares's evidence as to what is required to run the Development, in particular as to number of personnel, we accept that it has value as a benchmark.

86. We also note that reference was made to a document entitled 'Fitzroy Place Staffing Costs', which had apparently been prepared by Rendall & Rittner. Although actual costs reduced once Rendall & Rittner took over management, they were still higher that those suggested in that document. Although that is of limited relevance given that Rendall & Rittner's management post-dates the service charge years before us, it

was nevertheless argued on behalf of the Respondents that this document could be used as an alternative benchmark for costs. However, Ms Hares explained that this would not be an accurate benchmark because it was prepared on the basis that staff were not inherited by Rendall & Rittner by virtue of the TUPE Regulations. As this is what actually happened, it was submitted that limited weight should be placed on this document and we accept Ms Hares's evidence in this regard.

87. Further, we consider that, on the whole, the approach is preferable to that adopted by Mr Maunder-Taylor. First, Mr Maunder-Taylor placed considerable weight on the SAY Plan, which we do not consider correct for the reasons set out previously. Secondly, Mr Maunder-Taylor was critical of the fact that the provision of services went beyond the bare minimum under the lease. Although this did not give rise to a submission that it meant that the costs were irrecoverable, the implication was that they were not reasonably incurred. However, we do not accept such suggestion without more. Having already determined that costs were recoverable under the terms of the lease, reasonableness must be considered having regard to the nature of the Development and expectations as to the levels of service.

88. With these overall considerations and conclusions in mind, we turn to the individual heads of costs. The three principal challenges in terms of evidence and argument were to cleaning costs, security costs and staff costs – although other items of expenditure were also disputed.

Issue	Applicants' position	Respondents' position	Tribunal determination
Security Costs	The costs incurred for security for service charge years ending 2015 to 2020 were reasonable. [Applicants' SoC dated 21.10.23, para 16]	RA – The security costs incurred were excessive. The Service Charge Plan was not followed and the costs were significantly exceeded and or increased or exaggerated by poor governance and procurement processes [RA Statement of Response to the Landlords Application, undated, internal pg 17-18]. Position may now be subject to the dispensation application [RA Updated SoC dated 25.07.23]. Nueva- considers that it is not necessary evaluate the reasonableness of the security costs in circumstances in which it has not yet been proven that the charges associated to those costs have been demanded in a contractually valid manner. If the security costs have not been demanded in a contractually valid manner it makes no sense to consider the reasonableness of those cost. This issue is subject to the contractual validity of the demands been first proved. MC – The Service Charge Plan costs were	Save in one respect, we agree with Ms Hares's assessment as to the number of security staff required to provide a 24-hour security service. We also note the particular features of the Development which make the provision of security more challenging, in particular the fact that it is open to the public. While we note Mr Willis's suggestion at the hearing that electronic forms of security could be employed, we have been provided with no evidence to assess the viability or cost of such proposal. However, we agree with the Respondents' arguments as set out above that the cost of a security manager was excessive. Not only was this position no longer needed once Rendall & Rittner took over as the responsibilities could be absorbed by the General Manager and Facilities Manager but, moreover, JLL's own pricing schedule shows both a 'manager' and a 'supervisor' which suggests the possibility for a degree of duplication of costs. In the circumstances and taking both factors together (as the former would not of itself necessarily render the costs unreasonable), we disallow the costs of a security manager. Calculating the amount this represents is

		exceeded. The costs incurred were unreasonable exceeded the first-year budget by one hundred percent and non-performing during the 2020 Covid lockdown [KP SoC dated 11.02.22, para 16]	challenging, not least because we only have the pricings for 2016 and 2018 and in any event, the figures are not always easy to follow or to reconcile. However, based on the information we have, we note the following: For 2016, the cost is £49,155.45 out of a total for security of £371,556.71 (p.2870 of the bundle) For 2018, the cost is £53,012.38 out of a total cost for security of £405,693.24 (p.2878 of the bundle) In both cases, this works out at approximately 13% of the total costs. Accordingly, and adopting a broad-brush approach, **we determine that the security costs should be reduced by 13% for each of the service charge years in question**. We consider the remaining costs to have been reasonably incurred.
Insurance costs	The costs incurred for insurance in service charge years ending 2017 to 2021 were reasonable. [Applicants' SoC dated 21.10.23, para 17]	RA – The insurance was underwritten by Aviva and no evidence has been supplied to show this was an arm's length transaction and competitive market quotes were obtained [RA Statement of Response to the Landlords Application, undated, internal pg 19]. Nueva – does not dispute the reasonableness of insurance costs [Nueva Respondents' SoC, undated, para 12]. KP – does not dispute the insurance	Although contained in the List of Issues, there was no challenge during the hearing to insurance costs. In the circumstances, **we find that the same were reasonably incurred**.

		costs [KP SoC dated 11.02.22, para 17]	
Cleaning costs	The costs incurred for cleaning in service charge years ending 2015 to 2020 were reasonable. [Applicants' SoC dated 21.10.23, para 18]	RA – The cleaning costs incurred were excessive. The Service Charge Plan was not followed and costs have recently been reduced by R&R [RA Statement of Response to the Landlords Application, undated, internal pg 19-20]. Position may now be subject to the dispensation application [RA Updated SoC dated 25.07.23]. Nueva – does not dispute the reasonableness of cleaning costs [Nueva Respondents' SoC, undated, para 13]. KP – does not dispute the cleaning costs for the years which are the subject of the application post 2020 Covid [KP SoC dated 11.02.22, para 18]	We agree with the Applicants as to the number of cleaners required and accept Ms Hares's evidence. We also accept that the level of costs was reasonable, noting Mr Pack's analysis of the base costs having regard to analysis of hourly rates plus associated costs as compared to the London Living Wage. Although the provider of cleaning services was changed from Interserve to Andron, we do not have sufficient evidence to make a reduction on the basis that the services were not of a reasonable standard. Similarly, although there was a suggestion that cleaning costs might have been higher due to the presence of food vans within the Development (at the instigation of the Events Manager whose costs it has previously been determined were not recoverable through the service charge) we are not satisfied on the evidence that this led to an increase in costs or provides a basis for reducing the costs recoverable. **In the circumstances, the costs are allowed in full**.
Management fees	The costs incurred for management	RA – The management fees were excessive, there was no justification for increasing the management fee by a	Notwithstanding that this is an issue which had been taken in the statements of case, there was

	fees were reasonable. [Applicants' SoC dated 21.10.23, para 19]	percentage of the service charge cost and no contractual justification has been provided for the costs [RA Statement of Response to the Landlords Application, undated, internal pg 21-22]. Nueva – does not set out its position [Nueva Respondents' SoC, undated, para 14]. KP – These were unreasonable. JLL should not have been paid on a percentage of service charge costs basis. As provided for by RICS since management fees should not be based on a percentage of costs as this is perceived to be a disincentive to the delivery of value for money. There is no contractual evidence supporting Qube's fees. QUBE's managing agreement refers to the term 'Commercial Manager' but does not refer to the term 'Estate Manager'. In essence, the term 'Commercial Manager' is synonymous to the commercial aspects of the developments and the service provided by QUBE was unsatisfactory and below standard. There is no contractual evidence supporting Qube's fees. [KP SoC dated 11.02.22, para 19]	little argument before us in relation to management fees in closing submissions. Mr Harding's evidence was that Qube charged a fixed management fee for the work that was done and according to Ms Hares, part way through JLL moved to a percentage fee. While this is not the preferred method of charging management fees under the RICS Code, there was little challenge at the hearing as to how it impacted on the overall level of fee. Although not every invoice has been provided, we are prepared to find that the costs were incurred. As to the standard of service, there was criticism of Qube: (i) Reference was made to an altercation with a member of Mr Puvanesan's family which Mr Harding accepted was unprofessional. (ii) It was also pointed out that there was a high turnover of building managers (iii)It took a long time to receive replies to queries, particularly in the case of Mr Puvansean. While we accept that there were grounds for specific complaints, having regard to the challenges of managing the Development and taking the period as a whole, we allow the management fees for the service charge years in question. **In the circumstances, we determine that the**

			costs are allowed in full.
Staff costs	The staff costs incurred in service charge years ending 2015 to 2020 were reasonable. [Applicants' SoC dated 21.10.23, para 20]	RA – Staff costs were too high, there were unnecessary add ons and the contractual basis for such costs has not been shown. There were excessive levels of staffing and staff were overpaid [RA Statement of Response to the Landlords Application, undated, internal pg 23-25]. The RA JLL provide the contractual basis e.g. their contract with the Applicants, to support the charging of staff administration fees. No contractual basis has been provided. The Respondents do not accept the Applicants' assertion that staff administration fees are properly chargeable. [RA Statement of Response to the Landlords Application 21 October 2021, para 15] Nueva – contests the reasonableness of the staff administration fees. It also says that the Estates Manager did not liaise with leaseholders and he has been his negligent in the performance of his job and should not be remunerated accordingly. The building coordinator was in position to deal with defects from the construction stage so should not be charged to resident. It accepts that if the lounge concierge is recoverable, it was a	We accept the Applicants' evidence as to the number of staff required. Indeed, although Mr Willis sought to argue that there had been excessive staffing, as noted above, we give considerable weight to Ms Hares's evidence as to the numbers of staff required from her experience in relation to the management of the Development. Indeed, questions put by Mr Camarero to Ms Hares during the course of the hearing raised suggestions that even the current levels of staffing might not be sufficient over lunchtimes when staff members are on breaks. One area of dispute was in relation to the lounge concierge, which arose due to the provision of a wine machine. Due to licensing regulations, this was required to be staffed with the result that 2 staff were allocated as lounge concierge. We accept that the provision of a lounge concierge was not an obligation on the part of the Applicants under the terms of the leases. Indeed since Rendall & Rittner took over management Development, the wine dispenser has been removed following a vote by leaseholders – although as Ms Hares stressed, while the majority voted to remove it, there were some who were strongly in favour of retaining it. In the circumstances, we do not find that the costs associated with the provision of a lounge concierge

		reasonable cost [Nueva Respondents' SoC, undated, para 10 & 15]. KP – These were unreasonable. JLL add on staff costs have no contractual basis. There has been duplication in management costs between JLL and Qube. There has been high staff turnover and overstaffing from 2016. [KP SoC dated 11.02.22, para 20].	were not reasonably incurred. We note that Rendall & Rittner do not employ a building manager: because they are managing the residential areas and the estate, they have a general manager and a facilities manager and they each work across both parts. However, although this change has worked out cheaper for leaseholders, we do not find that the structure that was in place during the management of JLL and Qube was of itself unreasonable or that these costs were not reasonably incurred. We consider that the structure adopted was within the range of reasonable methods to structure management of the Development having regard to the size and high-end nature of the Development and the levels of staffing required. As regards the staff administration fees, it has previously been determined that the costs were recoverable under the terms of the lease. The fact that R&R's staff administration fee is lower than JLL's does not of itself render JLL's fees unreasonable. As to Residents' Association's objections to staff costs and office costs, some time was spent in cross examination of Mr Pack as to what sums are recoverable under the terms of the JLL contract, although as the Applicants' submitted in closing, the issue before the tribunal is whether such costs were reasonably incurred. In any event, Mr Pack

			made reference to the provisions of Appendix 2 of the JLL agreement and while it is correct that the tribunal has not been provided with approvals for specific items of expenditure, the tribunal accepts Mr Pack's evidence and is able to reach a conclusion that the level of costs was reasonable. **In the circumstances and subject to one point, the costs are allowed in full**. The one exception is the reference to overcharging by JLL. According to Mr Willis's statement, the agreed errors by JLL totals £45,756. Mr Maunder-Taylor suggests that this has not been refunded but according to Ms Mather's skeleton argument it was credited in the 2020 accounts. The tribunal was not taken to the 2020 accounts. Although the tribunal was left unclear as to the true position, for the avoidance of doubt and insofar as the point is not agreed, such sums should not be charged to the leaseholders.
Estate office running costs	The costs incurred running the estate office in service charge years ending 2016 to 2020 were reasonable. [Applicants' SoC dated 21.10.23, para 21]	Nueva - does not set out its position [Nueva Respondents' SoC, undated, para 16]. KP – does not set out a position but adopts the Residents' Association response including that there has been an admission of error in the calculation of the JLL staff costs which has been accepted but no refund made. [KP SoC dated 11.02.22, para 21].	There was little reference to such head of costs during the course of evidence or submissions. **In the circumstances, the costs are allowed in full**.

		[The RA have withdrawn their objection to this item but had said: The estate office costs are unjustifiable. Had the Service Charge Plan been followed there would not have been separate Estate and Residential Managers. There is duplication of cost and the refurbishment of the estate office costs should not be recovered from leaseholders [RA Statement of Response to the Landlords Application, undated, internal pg 26-27]]	
Residential office running costs	The costs incurred running the residential office in service charge years ending 2016 to 2020 were reasonable. [Applicants' SoC dated 21.10.23, para 22]	KP – There has been a sharp increase between the 2016 budgeted cost and the actual cost [KP SoC dated 11.02.22, para 22].	There was little reference to such head of costs during the course of evidence or submissions. **In the circumstances, the costs are allowed in full**.
Fire safety costs	Building Safety Act 2022 and the Applicants will follow the requirements placed upon them by that Act. The Applicants do not consider this is a	RA – Costs incurred for fire safety concerns resulting from the construction should not be recharged to leaseholders [RA Statement of Response to the Landlords Application, undated, internal pg 29]. RA - Rendall and Rittner advised that Waking Watch and Other costs	It was confirmed by the Applicants during that hearing that (i) no such costs have been charged to the lessees and (ii) no such costs would be charged. **Accordingly, save for recording the Applicants' stated position, no determination is required by the tribunal.**

	service charge issue per se for consideration in the present proceedings.	associated with Fire Safety would not be charged.	
Weighting of Apportionments	Apportionment is within the landlord's discretion. Up to 2020, this was charged on a square foot basis by JLL. From July 2021, the R&R changed this to 70% commercial, 30% residential. During the first FTT hearing, the Applicants' expert, Mr Graham Pack, was of the view that, regardless of actual use, the loading bay is an estate element which all occupiers have an equal right to use. R&R had also established in practice that, over the previous 18	RA – The costs of the loading bay should be apportioned based on usage or the Applicant's should commit to keeping the charges at 70/30 split [RA Statement of Response to the Landlords Application, undated, internal pg 11 & email to Phil Spencer of BCLP dated 22.10.23]. The historic charges should be adjusted and all future charges made in accord with the weightings set out in paragraph 53 of Judge Sheftel's decision [RA Updated SoC dated 25.07.23]	There was evidence before the tribunal indicating that residents had been informed by JLL that they were not allowed to use the loading bay, even though it was accepted by the Applicants that this was incorrect. This is confirmed in Ms Hares's evidence, in which she stated at para.26 of her first witness statement that: "*From an early point in our management of the residential blocks, the RA said to me that they were told by JLL that residents cannot use the loading bay. In February 2021, before R&R took over management of the estate, JLL also told us that residents could not use the loading bay … We do not think that is correct and, since taking over estate management, have said residents can use it*." Ms Hares also confirmed that the original sales budget had a 70% commercial and 30% residential split – albeit this is not the default apportionment under the private residential leases for which the Applicants now argue. The bundle also contained two emails confirming that residents had been informed that they could not use the loading bay, albeit they are 2021 which post-dates period in question. Accordingly, for the years, 2021 and 2022, it appears that Rendall & Rittner applied a 70:30 apportionment which no

	months, residents did use the loading bay there. Therefore, in the 2023 service charge, R&R have reverted to the previous JLL approach. The same method is planned for 2024's service charge. The Applicants consider, especially now better data is available on actual usage by residents, that this is reasonable. Usage evidence can now be provided by R&R.		doubt reflects the confusion that arose. In the circumstances, and in light of the fact that residents had been told that they could not use the loading bay, **we agree that for the service charge years before us the residential leaseholders should only be liable to pay 30% of the total costs in respect of the loading bay**.
Christmas lights	The Applicants, having established in Trial 1 that the costs are recoverable in principle, will consider and submit further evidence for Trial 2 on the	RA – The costs of the Christmas lights are excessive and other developments spend less [RA Statement of Response to the Landlords Application, undated, internal pg 15-16; RA Updated SoC dated 25.07.23]. Nueva – does not dispute the Christmas light charges [Nueva Respondents' SoC, undated, para 9].	The Applicants had accepted that there ought to have been consultation in respect of the Christmas lights but this did not happen. Accordingly, they accepted a maximum figure of £100 per lease. This was not accepted by the Residents' Association on the basis that it was still too high an amount for many leaseholders. We also note the unchallenged evidence of shared ownership lessee, Mark Bowerman, who described the Christmas lights as "outrageously expensive and have got more

	reasonableness of costs		expensive since 2016, despite being mostly the same." According to Mr Hares's second witness statement, while Rendall & Rittner "currently operate a budget of £12,000 per annum for festive decorations" (her first statement suggested £10,000), as set out her first statement in relation to the period in question, the cost of the Christmas lights and decorations were provided under a 3-year agreement which cost £48,000 per annum. It was said that that a significant proportion of this cost related to the installation and removal of the lights and decorations as storing them during the year. While Mr Pack accepted that the costs were 'high', he nevertheless maintained that they were 'reasonable'. This is a difficult conclusion to justify given the budget allowed for by Rendall & Rittner which is substantially lower. **In the circumstances, we determine that the costs be reduced by 50% for each of the service charge years in question.**
Procurement fees	The Applicants consider these fees are reasonable	Nueva – disputes the reasonableness of procurement fees [Nueva Respondents' SoC, undated, para 10]. RA – fees are unreasonable and should be refunded in full [RA Updated SoC dated 25.07.23]	The tribunal has previously determined that such costs are recoverable under the terms of the lease. Mr Willis suggests at paragraph 34.2-34.4 of his witness statement that there is an inconsistency between the charges JLL say they levied and the charges the Applicants contend that they have been charged. However, this was explained by the Applicants on the basis that although Mr Atterwill had stated in his witness statement that it was

			agreed that the Applicants would pay a 10% fee for procurement, as set out paras.24-25 of Mr Curnow's statement, in the event that there was not an individual procurement exercise and the JLL framework partners were used, there was a cap on the procurement fees charged which resulted in a considerable saving at the Development. Mr Curnow also cites paragraph 4.1.3.2 of the RICS Management Code, which suggests that fixed fees are preferable to fees based on a percentage of costs. We accept Mr Curnow's evidence on this point and, not withstanding the objections raised, **we determine that the costs were reasonable in amount**.

Issues raised by the Mortimer Court Respondents

89. The Mortimer Court Respondents have raised three further discreet issues in advance of the hearing:

    (1) That service charge demands were invalid as they do not comply with sections 47 and 47 of the Landlord and Tenant Act 1987 insofar as although they name the landlord, the landlord is not the entity entitled to payment under the terms of the leases;

    (2) The Heat Network Regulations 2014 have not been complied with insofar as charges were not based on meter readings. The Residents' Association also notes that there has been a charging error as the wrong rate of VAT was charged;

    (3) Leaseholders have not been invited to become members of the management company.

90. However, at the start of the hearing, it was confirmed that none of these matters were being pursued in the present application. Accordingly, we make no finding on and say nothing further about the above matters.

Nueva issues

91. The Nueva issues arise out of County Court proceedings brought by the Applicants against Nueva as debt claims and which were subsequently transferred to this tribunal insofar as the issues raised fall within this tribunal's jurisdiction.

92. The principal issue before the tribunal by the time of the hearing was in relation to the operation of s.20B(1) of the 1985 Act.

93. It should be noted that in advance of the hearing, Nueva's statement of case had made reference to various invoices which it is said were issued more than 18 months after the costs were incurred. However, in response, it was suggested that there appeared to have been some confusion insofar as the accounting period end is not relevant to the calculation of time; the period starts to run from the point in time that the landlord became liable

to pay. It appears that this issue was no longer pursued by the time of the hearing and in any event, there was no argument before us on this point.

94. Instead, the principal objection raised by Nueva relates to the alleged invalidity of service charge demands. In particular, it is said that the service charge demands which were the subject of the County Court proceedings, were not demanded in accordance with the terms of the lease. In this regard, it should be noted that it has already been determined in trial 1, that the method of apportionment adopted by the Applicants was not in accordance with the terms of the private residential leases. As such, service charges due would need to be recalculated in any event.

95. However, this leads on to a more fundamental issue raised by Nueva, namely whether demands are effectively time-barred by virtue of section 20B of the 1985 Act. In particular, on the basis that it has already been held that the sums previously demanded were not demanded in accordance with the terms of the lease because (because the basis of apportionment was not correct – although at the hearing it was argued more widely than this), it was suggested that because all the demands sent to date are for costs which are more than 18 months old, the Applicants cannot serve new demands using the method of calculation permitted under the lease.

96. Section 20B of the 1985 Act provides as follows:

> "*(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.*"

The argument before us was solely in relation to the operation of s.20B(1).

97. On behalf of Nueva, reference was made as a starting point to the Court of Appeal's decision in *No. 1 West India Quay Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119 ("*No.1 WIQ*"). It was submitted that when considering section 20B(1), a demand had to be a valid demand in

accordance with contractual machinery within the lease. In that case, the Court of Appeal approved the earlier decision in *Skelton v DBS Homes (Kings Hill) Ltd* [2017] EWCA Civ 1139, in which Arden LJ stated:

"*18. Further, in my judgment, it is not enough under section 20B that the tenant has received the information that his landlord proposes to make a demand. As Morgan J held in [Shulem], para 53, there must be a valid demand for payment of the service charge. In that case, the landlord had served several different demands for payment but they were all invalid because they did not comply with the terms of the parties' contract. The content of the alleged demand did not comply with the service charge provisions of the lease. So there was no valid demand for the purposes of section 20B(1) of the 1985 Act.*

19. Ms Gourlay [counsel for the tenant] draws our attention to the fact that it follows from her submissions that, if, having received the demand but not the estimate, Mr Skelton had assigned his leasehold interest to a purchaser, the purchaser would become liable for the service charge when the estimate was served, subject to section 20B. Purchasers of leases will need to be mindful of this possibility, but, even if it is correct, it is not, in my judgment, a reason for holding that her interpretation of section 20B is wrong.

20. Ms Gourlay also draws to our attention that retrospective correction of a demand is possible in certain situations. Thus, in Johnson v County Bideford Ltd [2012] UKUT 457 (LC), the landlord had failed to comply with the requirement in section 47(1) of the Landlord and Tenant Act 1987 to provide his name and address. The Upper Tribunal held that, by serving fresh demands, the landlord had provided the information required by section 47(2) to validate the original demands. Section 47(2) allows for this possibility. Ms Gourlay submits that the Johnson case is about statutory validity not contractual validity. I agree. We have not been shown any authority for the proposition that as a matter of contract law the delivery of the estimate validated the demands in this case as of the date of the demand.

21. If in the situation in this case, the tenant receives a windfall, that is the result of the landlord not having complied with the terms of the lease for service of a valid demand."

98. Henderson LJ in *No.1 WIQ* concluded at para.31 that:

"*… it is clear that the endorsement by Arden LJ, in [18], of the principle stated by Morgan J in Shulem that "there must be a valid demand for payment of the service charge" forms part of the ratio of the decision.*"

99. *No.1 WIQ* concerned electricity charges, which had been demanded under the wrong provision of the lease. At paragraph 41 of that decision, the Court of Appeal stated:

"*…the charges could never have constituted a valid service charge demand, because there was no explanation of how they were calculated, nor was the burden of the charges divided rateably between the flats and other parts of the Building in accordance with the relevant service charge percentages. The charges have only ever been demanded (wrongly) as a utility charge pursuant to clause 2.2.3 of the Leases. In those circumstances, the argument that the*

Tenant was not prejudiced, because it had all the information it needed to possess about the charges, is in my judgment a hollow one."

100. It was submitted that in ascertaining whether there had been a contractually valid demand, there should be a broad reference to the contractual machinery, in the present case that set out at Schedule 6 to the lease.

101. Nueva, raised two areas where it was said that this had not happened:

    (1) Schedule 6 to the private residential leases provides for an interim service charge followed by preparation and service of a Certificate effectively setting out the final service charge. It was suggested that the provisions had not been complied with.

    (2) Given that the apportionments had not been calculated in accordance with the terms of the lease – as determined at trial 1. In Nueva's submission, this meant that there had not been a contractually valid demand.

102. As to the first ground, the Applicants' submitted that this had never been pleaded and could not be ascertained without evidence, which was not before the tribunal. We agree that this is the case – there was no application for an adjournment, nor would one have succeeded at such late stage. As such, we are unable to make any determination that service charge demands are time barred on this basis.

103. As regards the second ground, Ms Mather submitted that the facts of the present case were distinguishable from those in *No.1 WIQ*. Specifically, it was said that *No.1 WIQ*, concerned a demand for a payment (in relation to electricity charges) which was not recoverable within the service charge. It therefore was not and never could be a valid service charge as demanded. There was an alternative method the landlord could have used under the lease to charge the tenants but they had not demanded the sum in this way and more than 18 months had passed. In contrast, it was submitted that the present case does not concern items which are not recoverable (any issues on this point having already been determined by the FTT in trial 1); it is simply a matter of employing a different

arithmetic to that applied by the Applicants in the demands they have sent.

104. In support of this submission, the Applicants relied on the Upper Tribunal decision in *Price v Mattey* [2021] UKUT 7 (LC). In that case, as summarised in the Applicants' skeleton argument, the appellant was a leaseholder in a development of 31 flats. However, some of the individual blocks were run by right to manage companies and therefore not relevant to the landlord's demands. As such, it was only 24 flats which were liable to pay the landlord for their costs. The issue on appeal was the contractual validity of the demands. The demands simply stated the amount payable by the tenant and the period in respect of which it is demanded. The demands were for an amount equivalent to one twenty-fourth of the costs incurred by the landlord. It was accepted by the freeholder that under the terms of the appellant's lease they were only entitled to one thirty-first. The FTT accordingly reduced the appellant's share to one thirty-first. The appellant's case was that the demands were invalid because they did not comply with the lease in that they sought to charge her for a proportion different to that which she was liable to pay under the terms of her lease and relied upon the Court of Appeal decision in *Brent v Shulem B Association Ltd* [2011] EWHC 1663 (Ch) decision to support this argument. Indeed, at paragraph 40 of *Shulem B*, Morgan J stated as follows:

"*It is clear that the lessor must serve a demand under clause 2(6) on the lessee before the lessee comes under a present liability to pay a sum of money to the lessor. What are the minimum requirements of clause 2(6) as to the form and content of such a demand? In my judgment, it is clear that a demand must specify a figure which is to be paid by the lessee. Clause 2(6) simply will not operate if all that the landlord does is to ask the lessee to pay a proportion of the lessor's expenses without notifying the lessee of the figure which is said to be payable. As a matter of form, the demand must relate to the specified matters for which a charge may be made and a demand which on its face relates to other matters will not be valid in point of form, quite apart from the lessor having no entitlement to charge for those other matters. I can illustrate this point with an example. The specified matters include works to the building of which the flat forms a part. Accordingly, the specified matters do not included works to another building. If the lessee of a flat in building 1 was served with a demand to pay a proportion of the lessor's expenses of repairing building 2, in my judgment, that would not be a valid demand pursuant to clause 2(6) of the relevant lease and, in addition, the lessor would not be entitled to recover the expenses of the works to building 2 from the lessee of a flat in building 1.*"

105. The Upper Tribunal found that there was no formal invalidity on the face of the demands and, in spite of the fact that the demands sought a sum in excess of the liability under the terms of the lease, they were still valid demands.

106. In *Price v Mattey*, the Upper Tribunal also referred to paragraph 43 of the judgement of Morgan J in *Shulem B*, where it was stated that:

> "*The final point which arises in relation to clause 2(6) relates to the correct treatment of a demand which is for a specified amount which is in excess of the lessor's true entitlement under clause 2(6). The amount demanded by a lessor may be too high for any number of reasons. The landlord may have made a mathematical error in computing the amount of its expenses or the due proportion or the result of multiplying one by the other. The lessor may have included costs which are not recoverable under clause 2(6) although that fact does not appear on the face of the demand. If, for whatever reason, the figure specified in the demand is in excess of the lessor's underlying entitlement, is the demand formally invalid? This type of problem is likely to arise frequently. A typical case would be where a lessor serves a demand for a specified sum, the lessee does not pay all or any part of the demand, the lessor sues for the sum stated in the demand, the matter is investigated in court proceedings as a result of which it emerges that the lessor's entitlement is to a smaller sum. In such a case, does the court dismiss the lessor's claim because there is no prior demand for the smaller sum as determined by the court or does the court give judgment for the smaller sum? In my judgment, the court should give judgment for the smaller sum on the basis that the original demand was formally valid but cannot entitle the lessor to recover the specified sum unless the lessor has an underlying entitlement under clause 2(6) to that sum*." (emphasis added by the Upper Tribunal)

107. In relation to the above passage, the Upper Tribunal in *Price v Mattey* stated at paragraph 25:

> "*Again, the emphasis is mine, and the sentence I have emphasised exactly matches the case here. Mr Bradshaw says that the emphasised sentence refers only to arithmetical errors, but that is manifestly incorrect; it is a separate example from those given in the previous sentence. In this appeal there is no formal invalidity on the face of the demands. It can be seen from the budget calculations, and it is admitted, that in fact the sums demanded are too high. The demands seek payment of costs that are not recoverable under the lease, being in excess of the proportion for which the tenant is liable; they are valid demands, and the FTT had jurisdiction under section 27A to permit the landlords to recover only what the lease entitled them to*."

108. In the Applicants' submission, the present case is on all fours with *Price v Mattey* - it was just the apportionment that has gone awry. Moreover, it was said that to hold otherwise would be to require perfection because if the demand were too high due to a mathematical error, a landlord would

be barred by s.20B, an outcome which the Upper Tribunal was trying to avoid.

109. The Applicants' analysis was contested on behalf of Nueva, noting that *Price v Mattey* preceded *No.1 WIQ*. It was submitted that there must be dividing line between *Shulem B* and *Price v Mattey* and it was submitted that the present case fell on the other side of that line. On behalf of Nueva, it was stressed that the apportionment provisions in Schedule 6 to the private residential leases are part and parcel of the contractual service charge machinery and therefore where this had not been applied correctly there could not be a contractually valid demand. Further, it was submitted that the present case was more complicated than *Price v Mattey:* it is not just a straightforward percentage of a single cost head, but rather different percentages to different costs heads. However, as to this last point, the Applicants stressed that what we are concerned with is the estate service charge. It is not a case of sums being demanded under incorrect provisions in a lease as had been the case in *No.1 WIQ*. Indeed, the demands do not set out a methodology, they simply state an amount to be paid.

110. Having considered the parties' submissions, we find in favour of the Applicants on this point. We agree with Applicants' assertion by reference to *Price v Mattey*, that although the demands included costs that are not payable, being in excess of the proportion for which the tenant is liable, they are nevertheless contractually valid demands – as the Applicants submitted, it is just the apportionment that has gone awry. Indeed, it is difficult to see how the present case is distinguishable from *Price v Mattey* and we are unable to conclude that the fact that the lease provisions might be more complicated, even if that were the case, provides a justification for a different conclusion. We further agree with the Applicants that the case can be distinguished from *No.1 WIQ*, which, as set out above, concerned a demand for a payment was not and never could be a valid service charge as demanded.

111. In the circumstances, **we determine that the sums in issue are not time barred by virtue of section 20B of the 1985 Act**.

Resolution of Nueva matters

112. Insofar as the above deals with all matters that have been transferred from the County Court that are within the tribunal's jurisdiction, the matter could return to the County Court to deal with any residual matters including costs.

113. Ms Gibbons pointed out that the County Court claims also included administration charges relating to non-payment of service charges. However, insofar as it has been determined that the service charges had not been calculated in accordance with the terms of the lease, it was submitted on behalf of Nueva that those administration charges would fall away. We agree that this must be correct and the same was confirmed on behalf of the Applicants.

Section 20C

114. As indicated to the parties at the conclusion of the hearing, directions would be given for submissions to be made in relation to the applications under section 20C of the 1985 Act.

115. In the circumstances, it is proposed that the following directions apply:

    (1) The Respondents must provide any written representations in support of the applications under section 20C by **8 October 2024** to the Applicants and the tribunal;

    (2) The Applicants may respond by **29 October 2024**;

    (3) The Respondents may serve a brief reply by **12 November 2024**;

    (4) By the same date (12 November 2024), the parties should notify the tribunal whether they wish for the applications under section 20C to be determined on the papers or whether they wish for there to be a hearing.

Name: Judge Sheftel **Date:** 3 September 2024

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 should be made on Form RP PTA available at https://www.gov.uk/government/publications/form-rp-pta-application-for-permission-to-appeal-a-decision-to-the-upper-tribunal-lands-chamber

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).