FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AC/LDC/2023/0007**
Property	**:**	**27 Wendover Court, Finchley Road, London NW2 2PG**
Applicant	**:**	**Alberto Dal Ben**
Representative	**:**	**In person**
Respondent	**:**	**Wendover and Moreland Courts Ltd**
Representative	**:**	**Mr M Ranson of counsel**
Type of application	**:**	**For the determination of the reasonableness or liability to pay service charges**
Tribunal members	**:**	**Judge M Jones** **Mr S Mason FRICS**
Date and venue of hearing	**:**	**17 January 2024, 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**6 February 2024**

DECISION

Decisions of the tribunal

(1) The application is dismissed in its entirety.

(2) The Tribunal dismisses the Applicant's claim that the statutory consultation process was not followed correctly in relation to the major works in issue.

(3) The Tribunal determines that the statutory consultation requirements imposed by s.20 of the 1985 Act and the Regulations were complied with by the Respondent, and that service charges arising from the drainage works effected at Wendover Court in and around February to March 2023 are payable by the Applicant.

(4) The Tribunal makes the determinations as set out under the various headings in this Decision.

(5) The Tribunal declines to make orders under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(6) The Tribunal declines to make an order for reimbursement of the tribunal fees paid by the Applicant.

(7) Any applications in relation to costs shall be sent in writing to the Tribunal within 28 days of this Decision being sent to the parties.

The application and history of the case

1. By application dated 21 December 2022, the Applicant lessee seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("***the 1985 Act***") as to whether service charges are payable.

2. The Applicant also seeks orders (a) for the limitation of the Respondent landlord's costs in the proceedings under s. 20C of the 1985 Act, and (b) to reduce or extinguish the Applicant's liability to pay an administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("***the 2002 Act***").

3. While in section 7 of the application form the Applicant specified the service charges he sought to be considered by the Tribunal to fall within the years 2020-2027, the detail provided at page 10 of the form suggested that he sought consideration of service charges for the 8,933-year period from 1066 to 9999.

4. Directions were given on 12 July 2023, when amongst other matters the Tribunal directed the Applicant to provide details of the specific years

challenged, while confirming that no valid challenge to future years subsisted, where the major works in issue had been completed.

5. The extensive calendar contained in the application was then addressed at an oral case management hearing on 17 October 2023, at which the Applicant (as noted in the Decision at §(3)(a)) *"…made it clear that the application was strictly confined to his challenge to the major drainage works which were the subject of a section 20, Landlord and Tenant Act 1985 consultation exercise, as set out in his witness statement dated 13 September 2023…"* Consideration of that statement and exhibited documents reveals that the consultation and major works in issue in fact spanned the period 2022-2023, leading to drainage works that were carried out in and around February to March 2023.

6. The Applicant further confirmed at the case management hearing, as recorded in the Decision at §(3)(d) that, *"save for any issue relating to the recovery of legal costs under the lease, he relied exclusively on the statutory provisions relating to the consultation requirements, and not on any provisions in the lease, to make his case."*

7. The Respondent served a detailed narrative statement of case in response to the application, accompanied by a statement of legal submissions relied upon.

8. Each party served witness statements, the Applicant himself, together with Mr Christopher Reeve and Mr Alexander Sebba for the Applicant, and Mr Ivor Goddard for the Respondent. The Applicant then served a Supplementary Reply, and detailed written analysis of Mr Goddard's statement, containing a number of allegations of deliberate lies and falsehoods.

9. The parties each filed bundles in advance of the hearing. The Applicant's numbered some 159 pages, and the Respondent's some 964 pages.

10. Whilst the Tribunal makes it clear that it has read each party's bundle, the Tribunal does not refer to every one of the documents in detail in this Decision, it being impractical and unnecessary to do so. Where the Tribunal does not refer to specific documents in this Decision, it should not be mistakenly assumed that the Tribunal has ignored or left them out of account.

11. This Decision seeks to focus solely on the key issues. The omission to refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Not all of the various matters mentioned in the bundles or at the hearing require any finding to be made for the purpose of deciding the relevant issues remaining in this application. The Decision is made on the basis of the evidence and arguments the

parties presented, as clarified by the Tribunal in the hearing, and is necessarily limited by the matters to which the Tribunal was referred.

Background

12. The property which is the subject of this application is a flat situated within a purpose-built block of flats in north London named Wendover Court, comprising some 55 flats and a garage block.

13. Wendover Court is adjacent to a larger block of 90 flats named Moreland Court, that is also owned and managed by the Respondent company. The blocks are separated by the public highway known as Lyndale Avenue.

14. Neither party requested an inspection, and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

15. The Respondent company was incorporated on 10 February 2003 as the vehicle through which a number of lessees of flats within both Wendover Court and Moreland Court sought to acquire freehold title to the two blocks. The legal formalities for enfranchisement, which apparently commenced in around 2004, apparently took some time, so that the Respondent was finally registered as freehold proprietor to Wendover Court under title no. AGL195378 in or around 2007-8.

16. The participating leaseholders to the purchase became shareholders in the Respondent, as did their successors in title. Not all of the leaseholders in Wendover Court, and in Moreland Court are shareholders.

17. There are currently 3 directors of the Respondent. Each is a lessee of flats within the 2 blocks, and each are volunteers, receiving no remuneration for performing their office. They pay service charges for their own flats in precisely the same manner as all other lessees, and therefore (and insofar as is necessary, the Tribunal finds) they have an interest in ensuring the efficient and cost-effective management of the blocks.

18. The Respondent manages both blocks, while maintaining separate financial accounts for each, so that budgets and service charge accruals, for example, are kept separate.

19. The Applicant is the lessee of a flat in Wendover Court under the terms of a lease dated 16 August 1971, subsequently extended by a lease dated 28 April 2000, which made no material changes to the 1971 lease, other than to extend the term and provide for a peppercorn rent. The lease requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

The Issues

20. At the start of the hearing the parties identified the relevant issues for determination (besides costs, addressed below) as being whether the Respondent complied with its statutory consultation obligations pursuant to s.20 of the 1985 Act, based upon the Applicant's complaints regarding:

    (i) The specification of works put out to tender;

    (ii) The identification of the parties that were invited to tender;

    (iii) Alleged manipulation of the tenders received; and

    (iv) Improper conduct of the consultation exercise.

21. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Specific Background to the Works

22. The Respondent's director, Mr Goddard's unchallenged evidence was that during the process of seeking to renew the buildings insurance policy for both blocks in early 2022, the insurer required that the drainage systems serving both blocks be surveyed, as a condition of considering the provision of cover. It transpires that an earlier survey in 2016 had identified that a series of repairs were required at that point.

23. The Respondent accordingly instructed First Action Drainage Services (*"**First Action**"*) to survey the drains. First Action's 3 reports (one regarding Wendover Court and 2 for Moreland) were produced in June 2022, running to some 372 pages, and by way of the briefest summary identified a series of defects requiring remedial work, including in the rainwater system, high silt levels, blockages, root intrusion and gully defects affecting Wendover Court, and a series of similar, albeit more extensive defects affecting Moreland Court.

24. Upon receipt of the First Action reports to the effect that the drainage system for both blocks was in a poor state of repair with a number of blockages, the Respondent's directors were concerned that it would only be a matter of time before the problems would affect the leaseholders' flats. They considered that action needed to be taken sooner rather than later to prevent a serious problem occurring with the drainage system that might require emergency works, which would be more expensive and cause more disruption to leaseholders compared to remedial works being carried out right away. The board were also aware that, should the

Respondent not take action, it would potentially be in breach of its repairing covenants.

25. Consequently, the Respondent instructed surveyors, Harris Associates with a Mr Thatcher as nominated surveyor, as contract administrator to advise and assist its directors as to the scope of works to be carried out, the identification of suitable contractors, and necessary procedures to comply with the Respondent's statutory obligation to consult with lessees, where the scope of the anticipated works would inevitably result in charges of more than £250 for each flat.

26. At or around the same time, the directors of the Respondent instructed its managing agents, Trust Premier, to write to lessees in Wendover Court in the form of a Notice of Intention under s.20 of the 1985 Act, advising of their intention to carry out works in respect of which it was obliged to consult leaseholders. The Notice was in relation to the proposed drainage works, summarised as *"Surveying, repairing, relining, patching, cleaning and replacement of drainage piping and undertaking any other works deemed appropriate to rectify defects identified in the exterior drainage system."* A copy of the Notice dated 29 July 2022 was provided to the Applicant, and by its terms invited both his written observations and his proposal of a suitable contractor from whom an estimate might be sought.

27. The Applicant responded promptly: by letter to Trust Premier dated 31 July 2022 he made a series of complaints about past matters, raised a series of queries concerning the nature and scope of the proposed works, and without prejudice to his other contentions nominated 2 potential contractors, Elevations Limited (*"**Elevations**"*) and Chelsea Square, the latter stated to have an address at 276 West End Lane, NW6.

28. The Tribunal understands that another lessee nominated a further contractor, Knight & Day Drainage and Plumbing Ltd (*"**Knight**"*).

29. Harris Associates then sought tenders from a series of contractors, including (i) First Action, which had conducted the survey, (ii) Knight, (iii) Unbloc Drainage Engineers, (iv) Pro Drain, (v) Elevations and (vi) Chelsea Square. The latter, Chelsea Square could not in the event be contacted at the address provided by the Applicant: it later transpired that the business had moved its commercial premises.

30. It is agreed that no dedicated specification for the tender works was drawn up by Harris Associates: Mr Thatcher simply forwarded the 3 First Action Reports to the various contractors (besides Chelsea Square, which could not be contacted), and requested tenders for all necessary remedial work.

31. The identified contractors (besides Chelsea Square) were invited to submit tenders in relation to the works to be carried out at both Moreland Court and Wendover Court.

32. Responses to the tendering process were received from First Action, Knight (each dated 21 September 2022), Unbloc (22 September 2022), and Pro Drain (5 October 2022).

33. On 13 October 2022 Harris Associates provided the Respondent with its Tender Analysis and Report regarding the tender responses received at that time, while specifically recording that a response was anticipated from Elevations, which would be forwarded upon receipt.

34. Shortly thereafter, Elevations' response to the tender was provided, dated 14 October 2022.

35. On 15 November 2022 Trust Premier circulated a Statement of Estimates to lessees, including the Respondent, confirming that the estimates received could be inspected by prior appointment at its business premises in Colindale, NW9, and inviting written observations.

36. The Applicant responded by letter dated 19 November 2022 raising a series of complaints regarding the conduct of the tendering process, and requesting copies of the specification for the works (which only existed insofar as the First Action Reports were circulated to prospective bidders), and of the various estimates that had been provided. This prompted a series of email exchanges, by which the Applicant reiterated his desire to inspect the estimates.

37. The Applicant attended at Trust Premier's premises on 15 December 2022, in the company of Mr Sebba of Elevations, but was unable to inspect the estimates at that time because the staff were *en route* to their Christmas party, but was then able to inspect upon returning the following day.

38. By letter dated 7 February 2023, Trust Premier notified the lessees that First Action had been awarded the contract for the works, and that they were due to commence at Moreland Court on 13 February, moving to Wendover Court on 7 March 2023.

39. A JCT contract for the works was entered into between the Respondent and First Action in February 2023, and the Tribunal understands that work commenced as anticipated and has now concluded.

40. Mr Goddard in §24 of his statement states that the works were completed to a satisfactory standard so far as the Respondent is aware, and the works were certified by Harris Associates, which issued a Certificate for Payment dated 27 March 2023. The gross valuation of the First Action

work insofar as it related to both blocks was £59,070 plus VAT (subject to a small retention).

Legal Framework

41. Pursuant to section 18 of the 1985 Act, the Tribunal has the power to decide about all aspects of liability to pay service charges, which sums of money that are payable - or would be payable - by a lessee to a lessor for the costs of services, repairs, maintenance or insurance and the lessor's_ costs of management, under the terms of the relevant lease. The Tribunal has jurisdiction where the whole or part varies or may vary according to the costs incurred.

42. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable. Section 19 of the 1985 Act provides that a service charge is only payable insofar as it is reasonably incurred and works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges. The amount payable is limited to the sum reasonable.

43. The requirements in respect of consultation are provided in Section 20 of the 1985 Act and the related Regulations. While the 1985 Act refers to tenants, that does not mean tenants under short-term tenancies but rather lessees, the term adopted in this Decision, under long leases, in the position of the Applicant.

44. Section 20(1) provides that the "relevant contributions of tenants" will be:

"limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—(a) complied with in relation to the works or agreement, or (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal."

45. Section 20ZA(4) provides that the *"consultation requirements"* be prescribed by statutory instrument. These are, in turn, set out at Schedule 4 to the Service Charges (consultation Requirements) (England) Regulations 2003 (*"**the Regulations**"*). Reference in this Decision to Regulations will be to the relevant paragraphs of that Schedule.

46. The Regulations require, in the first instance, the lessor or other with relevant responsibility to serve a Notice of Intention to Carry Out Qualifying Works on each lessee.

47. The details which are to be included in a written notice of intention are identified in paragraph 1(2) and (3) to Schedule 4 of the Regulations.

Those require the lessor to, amongst other things, *"(a) describe, in general terms, the works to be carried out … (b) state the landlord's reasons for considering it necessary to carry out the proposed works; (c) invite the making, in writing, of observations in relation to the proposed works…",* (d) give other information about responding including the date by which the period for responding ends, and (e) invite lessees to propose the name of a person from whom the landlord should try to obtain an estimate for carrying out the proposed works.

48. The Tribunal considers that these requirements were complied with in the present case, by the circulation and contents of Trust Premier's Notice dated 29 July 2022.

49. The Regulations provide that where observations are received from a lessee, the lessor shall have regard to those observations, and paragraph 4 provides that where a contractor is nominated, the lessor shall try to obtain an estimate from that contractor.

50. The lessor must pursuant to paragraph 4, obtain estimates for the proposed works and must provide details of at least 2 estimates (including from the contractor nominated by a lessee (if one) and a summary of observations received (if any) and the lessor's response to them, also making any estimates available for inspection.

51. Finally, there must be a written notice provided to each lessee within 21 days of entering into a contract for the works (paragraph 6), stating reasons for entering into the contract and summarising any responses received to the estimates and the lessor's response to those.

52. Section 20(5) enables regulations to also provide for the maximum amount payable by a lessee if the consultation requirements are not complied with. The Regulations provide that where the lessor undertakes qualifying works with a cost of more than £250 per lease the relevant contribution of each lessee (jointly where more than one under any given lease) will be limited to that sum. That is unless the requirement has been dispensed with by the Tribunal, for which an application may be made retrospectively.

53. There are many reported cases providing relevant authority for the purposes of this Decision. A helpful resumé of the main points to be gleaned from the authorities is contained in the judgment of the Court of Appeal in *Waaler v Hounslow LBC* [2017] EWCA Civ 45, [2017] 1 WLR 2817.

54. As summarised in *Waaler,* in *Forcelux v Sweetman* [2001] 2 EGLR 173 it was held that there are two elements to the answer to the question of whether the cost of any given service charge item is reasonably incurred, namely:

i. Was the decision-making process reasonable; and

ii. Is the sum to be charged reasonable in light of the evidence?

55. In *Waaler* the Court of Appeal held that whether costs were reasonably incurred within the meaning of section 19(1)(a) of the 1985 Act was to be determined by reference to an objective standard of reasonableness, and the cost of the relevant works to be borne by the lessees was part of the context for deciding whether they had been so reasonably incurred; that the focus of the inquiry was not simply a question of the landlord s decision-making process but was also one of outcome; that, where a landlord had chosen a course of action which led to a reasonable outcome, the costs of pursuing that course of action would have been reasonably incurred even if there were a cheaper outcome which was also reasonable. Before carrying out works of any size the landlord was obliged to comply with consultation requirements and, *inter alia,* conscientiously to consider the lessees' observations and to give them due weight, following which it was for the landlord to make the final decision. The Tribunal, in deciding whether that final decision was reasonable, would accord a landlord a margin of discretion.

56. It follows that in respect of how a landlord addresses required works, the question is whether the method adopted was a reasonable one in all the circumstances. That is to say, one of what may be a number of reasonable courses, even if other reasonable decisions could also have been made. The correct answer to the question of works or tendering for them being reasonable is fact sensitive and can only be answered by considering all the relevant evidence in light of the surrounding circumstances.

The Hearing

57. The Applicant appeared in person at the hearing; the Respondent appeared in the person of its director Mr Goddard, and was represented by Mr Ranson of counsel.

58. Prior to the hearing the parties filed skeleton arguments, summarising each party's case. The Applicant's skeleton argument repeated and/or amplified the allegations of dishonesty and indeed alleged fraud on the part of the Respondent. Prior to commencement of the formal hearing, the Judge sought clarification from the Applicant of the findings that he was asking the Tribunal to make in this regard, and the Applicant confirmed that while he believed fraudulent conduct to have taken place, he did not seek specific findings of fact in relation to those allegations.

59. Oral evidence was given by the Applicant, and by Mr Alexander Sebba, in support of the Applicant's case. Oral evidence for the Respondent was given by Mr Ivor Goddard, director. The Tribunal also has regard to the

written statement of Mr Christopher Reeve of Knight, albeit that he did not attend to give evidence in person at the hearing.

60. Closing submissions were made by Mr Dal Ben, the Applicant, in person, and by Mr Ranson, counsel for the Respondent.

61. The Tribunal is grateful to all of the above for their assistance with the application.

Consideration

62. The Tribunal does not set out the parties' cases at length in advance of discussion of the relevant issues. The cases were set out in writing, supplemented by recorded oral evidence and submissions. The Tribunal refers to the relevant parts of the parties' cases in its consideration of the matters below.

63. There was no issue that the works proposed were the responsibility of the Respondent and fell within the repairing covenant provided by the lease. Neither was there any issue that the various notices were provided on or around the dates stated upon them.

64. The issues for determination, explained further below, were the assertions by the Applicant that the Respondent had failed to comply with its statutory consultation obligations.

Issue 1: Specification of the Works

65. Considered chronologically, the Applicant's first dispute related to the specification of the works put to tender, as set out in §§26 to 35 of his witness statement.

66. The Applicant's complaint, in summary, is that in the absence of a clear, defined, specification for the proposed works, the parties invited to provide estimates were each bidding against their own subjective interpretations of the First Action reports, and the consequential remedial works that may or may not have been necessary.

67. The simple point, as the Applicant puts his case, is that the invited parties did not know precisely what works they were being invited to provide an estimate for. He highlights the responses, which vary in the specific detail, but almost all of which (besides First Action, which had of course prepared the initial survey) suggest the need for further information and/or surveys, and each of which the Applicant contends proposes a more or less differing program of remedial works, summarised in the table annexed to §34 of his statement.

68. The Respondent's case, as explained by Mr Goddard in evidence that the Tribunal found to be credible, is that having retained Harris Associates it relied upon that entity's expertise to specify (or not to specify) whatever was required. The Respondent pointed to the fact that, notwithstanding any potential equivocation as to the scope of what was required, no fewer than 5 potential contractors were each prepared to provide an estimate.

69. The Respondent further relies upon the fact that, in relation to a Notice of Intention, what is required by Regulation 1(2) is to "*…describe, in general terms, the works to be carried out…*" This, however, relates to information to be provided to lessees: it does not define what is necessary to provide to potential *contractors*, being invited to bid for the work.

70. It is apparent that a considerable quantity of material was provided to the contractors invited to tender, in the form of the First Action reports, and that despite the limitations observed by some contractors with the material provided, this did not inhibit their ability to provide estimates, three of which (First Action, Pro-Drain and Unbloc) were within a reasonably narrow range of one another, as summarised in the Tender Analysis Report.

71. With the benefit of hindsight, it might have been better had Harris Associates drawn up a detailed specification of works, albeit that the Tribunal is mindful that that would be likely to have involved additional costs to be borne by the Respondent, and in due course by the lessees. As Mr Goddard explained matters in his evidence in response to cross-examination, the instructions were to repair identified defects, not a complete replacement of the entire drainage system.

72. In this regard, the Tribunal is mindful that the question in terms of the nature of the work which the Respondent sought to undertake is whether the approach was a reasonable one. It is not therefore a question of which the Tribunal considers to be the best one of a number of competing options. The Tribunal is not assessing the precise technical merits of one approach against another, at least not beyond the question of whether there is such a flaw in the approach of the lessor that it cannot properly be regarded as a reasonable approach to take of the available courses. The question is whether the work proposed is work which the lessor, in this instance the Respondent company, is properly able to consider appropriate.

73. Inevitably, the objectively assessed reasonableness of the Respondent's course will be affected by whether the Respondent sought appropriate advice and the nature of the advice received. If the Respondent sought such advice and undertook a course of action recommended by that advice, then unless that is significantly undermined, the Respondent is able to proceed in the given manner. The fact that another party might obtain advice recommending a different approach or otherwise propose

a different approach which may also be reasonable, does not compel the Respondent, or another in the equivalent position, to take that different approach.

74. Here, the evidence is clear, and so far as is necessary the Tribunal finds, that the Respondent did indeed seek appropriate advice, in the form of Mr Thatcher of Harris Associates. It was on his advice that the First Action reports were deployed for the purposes of seeking estimates. Put otherwise, the Tribunal is certainly not persuaded that the approach to be taken by the Applicant to seeking estimates for the drainage works on the basis of the defects identified in those reports is outside of the reasonable range of approaches which the Applicant is entitled to take on the advice sought and received by it.

75. The Tribunal therefore considers that the approach adopted by the Respondent was reasonable and, upon the advice of its surveyor, was that which many parties in a similar position would be likely to adopt. Consequently, the Tribunal finds no breach of the statutory consultation process by the Respondent in this regard.

Issue 2: The Parties Invited to Tender

76. The second issue of complaint raised by the Applicant relates to identification of the parties invited to tender for the works, as explained in §§11 to 13 of his witness statement. His complaint is that having nominated both Elevations and Chelsea Square, it was only upon receipt of the Tender Analysis Report that he was able to observe that Chelsea Square was not identified as a party that had been invited to tender. Upon further inquiry he learned that at an early stage in the tender process it was ascertained by the Respondent that Chelsea Square could not be contacted at the address in West End Lane, NW6 that had been provided. This was apparently because, at and around the relevant time, the business was in the process of being acquired by another company, named Dexters, which involved a migration of commercial premises.

77. The Applicant complains that it is not apparent that the nomination of Chelsea Square was passed on by the Respondent's managing agent to Harris Associates, and that the Respondent made no attempt to address its inability to contact Chelsea Square with him. Had it done so, his evidence is that he would have rectified matters so that Chelsea Square could have been invited to tender, as well as the other contractors.

78. Where, as here, tenants made nominations of 3 suggested contractors in response to the Notice of Intention, the Respondent's duty under paragraph 4 of Schedule 4 to the Regulations extended to trying to obtain an estimate from (just) one of the nominated persons.

79. Here, the Respondent went further than its minimum obligation, initially seeking to make contact with all 3 nominated entities (Elevations and Chelsea Square, as nominated by the Applicant, and Knight as nominated by a third-party leaseholder). The Tribunal considers that the Respondent is not to be criticised in respect of the failure to make contact with Chelsea Square. It forms no part of the Respondent's duty, whether by itself or through its agents to embark upon investigations seeking to track down the correct contact details for a particular business, where those provided transpired to be inaccurate. This is amplified by the fact that the Respondent did invite two of the three nominated entities (Elevations and Knight) to tender, and received responses from each of them.

80. By so doing the Respondent went beyond the statutory minimum required of it, and the Tribunal finds no breach of the statutory consultation process.

Issue 3: Alleged Manipulation of the Tender Process

81. The third issue raised by the Applicant, derived from his evidence at §§6 to 10 and 14 to 25 of his witness statement, relates to his allegation that the tender process was wrongfully manipulated by the Respondent, *"…to the point of falsifying its results…"* (ws §6).

82. The purpose and/or effect, as the Applicant puts matters, was that the Respondent *"…awarded the tender to their preferred contractor while explicitly ignoring both of [the Applicant's] nominations and sabotaging the nomination put forward by another leaseholder."* This, he contends, has involved additional expense where all the bids that he alleges the Respondent chose to ignore, manipulate or misrepresent were more competitive than the bid by the contractor that was ultimately selected, First Action.

Knight & Day Drainage & Plumbing Limited

83. Insofar as the Applicant makes complaint of the fact that the estimate provided by Knight was not taken into consideration, and thus did not appear on the Statement of Estimates circulated on 15 November 2022, the Tribunal has regard to the precise contents of the Knight response to the invitation to tender. This made it clear that Knight was not prepared to rely upon the First Action reports provided, and insisted, if it was to undertake the works, on conducting its own survey at a minimum cost of £5,910 plus VAT.

84. Knight provided estimated costs for the works of £54,600 plus VAT for both blocks/£18,970 plus VAT for Wendover Court, but specifically advised that these estimates were for budget purposes only, and was not willing to provide any cost certainty.

85. Further explanation of these matters was contained in the witness statement of Mr Christopher Reeve, director of the company. Mr Reeve did not, however, attend to give evidence in person and Mr Ranson for the Respondent was accordingly unable to cross examine him on the contents of that statement. The tribunal consequently attaches a limited degree of weight to the evidence contained in that statement.

86. As explained in Harris Associates' Tender Analysis Report, the refusal to provide cost certainty and insistence that all costs were contingent on carrying out its own survey caused Mr Thatcher to discount Knight from further consideration in the tendering process. That left three other contractors that had provided tenders, and as specified in the Report left the door open for the anticipated tender response from Elevations.

87. Even had Knight provided an estimate upon which the Respondent could rely with confidence, there was no obligation upon it to include the Knight bid in the Statement of Estimates, which contained details of 4 other contractors.

88. Indeed, when considering the estimated price for the works to both blocks, Knight's suggested figures were higher than two other contractors, Unbloc and First Action. Albeit that the sums specifically attributable to Wendover Court were the lower of the 5 estimates provided, these were subject to considerable extra over charges, so that Knight was not the lowest estimate, even were it to have been prepared to be bound by the estimate provided, which it was not.

89. Paragraph 4(5)(b)(i) of Schedule 4 to the Regulations requires a landlord to set out in a Statement of Estimates provided to lessees the detail of at least two of the estimates received. This the Respondent clearly did.

90. The other obligation upon the Respondent in this regard, by §4(8) of Schedule 4, was to include an estimate received from a nominated person. By including the Elevations bid (which had by then been received) in the Statement of Estimates, the Respondent complied with this obligation.

91. The Tribunal accordingly finds no breach of the statutory consultation process in relation to the treatment of the Knight bid.

Treatment of the Unbloc and First Action Bids

92. The Applicant then contends that the second lowest estimate for the works, provided by Unbloc, was falsified in the Statement of Estimates in order to appear higher than it actually was, where the estimate of £19,327 contained in its estimate of 22 September 2022 and in the Tender Analysis Report had been altered to £24,327 in the Statement of Estimates, an increase of £5,000. Notwithstanding that the Applicant

suggests (at §31 of his witness statement) that Unbloc was Harris Associates' preferred contractor, the effect as he alleges was artificially to raise Unbloc's bid above that of First Action, which he asserts was the Respondent's preferred contractor.

93. The Tender Analysis Report reveals that Unbloc was the second lowest bidder, but against concerns expressed regarding some aspects of the survey reports provided, and suggestions that excavation work would be necessary that was not priced in its estimate, a contingency of £10,000 was carried forward by agreement with Unbloc for the reported costs. The division as suggested in the Report was for £3,500 of those costs to be attributed to Wendover Court, and £6,500 for Moreland.

94. It is apparent to the Tribunal that between the Tender Analysis Report date of 13 October, and the Statement of Estimates on 15 November 2022, the £3,500 contingency attributable to Unbloc's bid for the Wendover Court element of the works had grown to £5,000, while the £6,500 attributed to Moreland Court had decreased, also to £5,000.

95. Against this, the First Action bid comprised £24,135 for Wendover Court, £33,460 for Moreland Court, and extra over costs of £5,000. These were explained in the Tender Analysis Report as being attributed (at that stage) in the proportions £1,500 for Wendover, and £3,500 for Moreland Court.

96. By the time of the Statement of Estimates, the First Action bid was reported as (just) £24,135 for the Wendover Court works, meaning that the entirety of the £5,000 extra over contingency costs had been applied to the Moreland Court bid by that contractor.

97. The Respondent's statement of case explains the general basis of apportionment of shared costs between the two blocks as usually being applied in a 2:1 ratio, with Moreland Court bearing the larger proportion, as befits its larger size. It is then explained that there may be occasions when that ratio is inappropriate, based upon peculiarities of specific works required at one building or the other. The statement of case goes on to address the specific treatment of the contingency costs in the case of the First Action bid, at b§§25-6, explaining that it was considered desirable to make such apportionment of the entirety of the contingency costs for Moreland Court due to the specific larger number of blockages and unknown items relating to that specific property.

98. The statement of case however says nothing about the specific issue of the Unbloc bid.

99. Further evidence on these points is contained in the witness statement of Mr Goddard, and in particular at §§18-21. He explains that had the 2:1 ratio been applied to overcost figures supplied by the contractors, the

Respondent would have been left in a situation where the cheapest contractor for Wendover Court would have been different from the one for Moreland Court. If the Respondent instructed different contractors for each block, the costs would increase for each piece of work. He accordingly consulted Mr Thatcher about this dilemma and sought his advice. Mr Thatcher explained the purpose of the "extra over costs" – to meet any unexpected contingencies that might occur during the course of the works, and, on reflection, he considered that a different apportionment was appropriate in the case of First Action.

100. Mr Goddard was cross-examined in great detail about these aspects of the matter, and gave evidence clearly and (the Tribunal finds) credibly, to the effect that the Respondent seeks where it can to employ the same contractor to effect works at Moreland and Wendover Courts more or less simultaneously, achieving what can be summarised as economies of scale, where contractors working independently on each site are not separately transporting plant and machinery, etc., and considerable costs savings would be expected against not having two sets of administrative costs in setting up processes, contract administration and so on.

101. It was put to Mr Goddard by the Applicant that First Action was not the cheapest contractor bidding for the Wendover works, and that by selecting it, the Respondent had placed leaseholders at a disadvantage. He denied this, stating that he was well aware of the s.20 consultation requirements, and that had the Respondent not elected to award the contract to First Action it would have to explain to leaseholders why it had not selected the cheapest contractor. As to the specific allegation that the Respondent had manipulated the contingencies, he replied that the board had gone to its surveyor, who reviewed how the contingency sums should be applied.

102. The Tribunal has considered this evidence very carefully. As at the date of the Tender Analysis Report, the First Action bid for Wendover Court was £24,135, and an additional £1500 for contingencies, a total of £25,635. The Unbloc bid was £19,327, plus £3,500 for contingencies, a total of £22,827. The difference between the two bids as there set out was £2,808.

103. By the time of the Statement of Estimates, the First Action bid was reported as £24,135, containing no additional provision for contingencies, while Unbloc was £24,327, including £5,000 for contingencies.

104. The Tribunal notes that this did not take place in a vacuum, where the Respondent had to consider tenders for works in both blocks. First Action was the lowest priced contractor for the works as a whole at £62,595 as against £63,619 from Unbloc, as set out in the Tender Analysis Report.

105. The Tribunal considers that seeing to instruct one contractor to carry out works to both blocks would self-evidently result in costs savings against having separate contractors working on each block, and accepts the Respondent's evidence in this regard. The Tribunal holds that seeking to consider the costs to both blocks simultaneously was within the range of reasonable considerations to be borne by the Respondent, and while it is clear that there was an adjustment of the contingency sums applied to the Unbloc and First Action bids prior to circulation of the Statement of Estimates, the Tribunal discerns nothing improper or unlawful in the process. The Tribunal takes particular notice, once more, of the evidence that the Respondent relied upon the advice of its surveyor, and considers it entirely reasonable to have done so.

106. Ultimately, the Tribunal dismisses the allegation of falsification of the contingencies, finding that the Respondent's surveyor did no more than apply his professional expertise to the proper attribution of contingency costs between the two buildings, an approach apparently borne out by the fact that the only additional charge that was in the event levied by First Action in conducting the Wendover Court works was for the elimination of a previously unidentified rats' nest discovered during the course of the works.

The Elevations Bid

107. The Elevations bid is dated 14 October 2022, one day after the Tender Analysis Report of 13 October. That its arrival was anticipated can be discerned by specific reference to it in §1.3 of the Report.

108. The Applicant's complaint regarding this aspect of the matter is that the Statement of Estimates failed to distinguish between Elevations' presentation of 3 separate options for the proposed works, where separate figures of £11,142 for what were identified as *'Grade A'* works, £95,517 for *'Grade B'* and £20,967 for *'Grade C'* were proposed, each net of VAT. To these figures further sums of £3,500 for project management and £11,500 for miscellaneous expenses were required, giving a grand total of £171,151.20 inclusive of VAT.

109. This figure (with additional sums for consultancy, administration and a consequential small increase in VAT) formed the basis of the £176,888.71 in the Statement of Estimates, which was substantially in excess of the estimates of the other 3 contractors recorded, First Action, Pro-Drain, and Unbloc, in the range £33,277.62 to £38,428.62.

110. This, the Applicant asserts, unfairly misrepresented the true contents of the Elevations bid which, if limited to the Grade C pipe replacement work, he asserts would be 'just' £23,084, allowing a 10% uplift for project management and miscellaneous items.

111. Comparing the scope of the Grade C work in Elevations' bid with the bids provided by the other contractors, the Tribunal is far from satisfied that this is a fair or reasonable comparison, where the nature and scope of the works estimated for by, for example, First Action and Unbloc seems to go considerably beyond Elevations' defined Grade C work.

112. Elevations' director, Mr Alexander Sebba gave evidence to the Tribunal. In cross-examination he candidly admitted that, once project management and miscellaneous costings contained in Elevations' bid were added in, even were the scope of the works to be done restricted to what he identified as Grade A, Elevations' bid would not have been the cheapest. He clarified this by stating that miscellaneous charges would differ between work costing £10,000 against work costing £100,000, but the Tribunal finds that it is not at all clear from the Elevations' bid what of such sums might be saved in the event the Respondent elected to proceed with just one or two of the identified categories of works.

113. The Tribunal also notes that if the Grade C works referred to by the Applicant as a yardstick in §15 of his statement, estimated at £20,967 were to be aggregated with the miscellaneous and project management costs of £15,000, the total of £35,967 is considerably more than the bids provided by other contractors.

114. These calculations, the Tribunal considers, are fatal to any suggestion of impropriety in respect of the Elevations bid. While the Tribunal will not engage in the business of cherry-picking which specific items in that bid should be compared with the First Action, Unbloc and Pro-Drain bids, it is apparent that Elevations was not on any analysis the cheapest of the bids provided.

115. While the suggestion that the inclusion of the full price quoted in the Statement of Estimates neglected to address the nuances of the different categories of work estimated for might have some limited force, the simple reality is that the lessees, and in particular the Applicant, can have suffered no discernible prejudice from the fact that the Respondent, perhaps misunderstanding the import of the fine detail of the Elevations bid, nevertheless elected to retain a contractor that was demonstrably less expensive in its bid.

Summary

116. The Tribunal accordingly rejects the contention, advanced in §18 of the Applicant's witness statement, that the Respondent awarded the tender to its own preferred contractor, while explicitly ignoring the Applicant's nominations and *"sabotaging"* the nomination (of Knight) of the other lessee.

117. The Tribunal accordingly finds no breach of the statutory consultation process in relation to the treatment of the various contractors' bids.

Issue 4: Alleged Failings in Conduct of the Consultation Process

118. The fourth substantive issue raised by the Applicant, set out in great detail at §§36 to 61 of his witness statement, relates to a series of allegations that the s.20 consultation process was conducted in a flawed manner, over and above the allegations that the Respondent provided no or no proper specification for the works and ignored the nominations he had made, both of which allegations the Tribunal has dismissed.

119. The substance of the Applicant's dispute with the Respondent may be summarised as:

(i) That the Respondent ignored issues raised by the Applicant in his letter of 31 July 2022;

(ii) That the Respondent ignored further issues raised by the Applicant in his letter of 19 November 2022;

(iii) That the Respondent deliberately prevented the Applicant from inspecting the tender documentation before the end of the consultation period; and

(iv) That the Respondent proceeded with the works, notwithstanding the Applicant's complaints, and the issue of the present application.

120. The Tribunals' decision in respect of these points can be expressed much more briefly than the matters addressed above.

121. By way of preamble, Regulation 1(2)(c) requires a landlord giving notice of intention to invite observation. Regulation 3 requires a landlord to have regard to any observations made pursuant to such invitation, and Regulation 4(5)(b)(ii) requires a landlord to set out a summary of such observations and its response to them. Finally, Regulation 5 requires a landlord to have regard to observations made by a tenant in relation to estimates obtained.

The 31 July 2022 Letter

122. This letter is summarised at §27, above.

123. By letter dated 4 August 2022 Trust Premier acknowledged receipt of the 31 July letter from the Applicant and, the Tribunal finds, provided a summary of its response (which, by necessary implication, included a

summary of the observations made) in compliance with the Respondent's regulatory obligations. This included, notably, confirmation that the nominations of Elevations and Chelsea Square had been passed to the contract administrator for inclusion when tender invitations were to be sent out.

124. The complaint that the 31 July 2022 letter was ignored, or (insofar as the allegation is axiomatic in consequence of the nature of the complaint) that the Respondent in any way breached its obligations under Regulations 3 or 4(5)(b)(ii) is dismissed.

The 19 November 2022 Letter

125. This letter is summarised at §36, above.

126. Insofar as the contents of the Applicant's letter constituted observations regarding the estimates obtained, the obligation of the Respondent was to have regard to them. The Respondent bore no obligation to be dictated to by the Applicant.

127. That the Respondent had regard to the Applicant's observations may be discerned from the detailed email dated 13 December 2022 sent to the Applicant by Rose O'Carroll of Trust Premier, providing a detailed response to the relevant points made.

128. The Tribunal finds that the Respondent acted in accordance with its obligations under Regulation 5.

Inspection of the Tender Documents

129. As was explained in the Statement of Estimates dated 15 November 2022, the consultation period within which the Applicant was invited to inspect the tender documentation and make written observations extended to 16 December 2022. Inspection was invited by prior appointment at Trust Premier's premises in Colindale.

130. The Applicant's uncontested evidence is that he physically inspected the tender documentation upon attendance at those premises on 16 December 2022.

131. While the Applicant evidently wished to have inspected the documents on an earlier date (and his letter of 19 November certainly demanded provision of copies to which the Tribunal finds he was not entitled), the Tribunal finds no breach of the Respondent's obligation to permit inspection of the estimates under Regulation 4. The Applicant was able to inspect, before the specified period elapsed.

Commencement of the Works

132. The final complaint is that the Respondent contracted with First Action, which then effected the works, while this application was pending and notwithstanding the Applicant's various complaints.

133. As the matter was put by the Court of Appeal in *Waaler v Hounslow LBC* [2017] EWCA Civ 45, [2017] 1 WLR, at [38]:

> *"In the light of this statutory obligation to consult, it is impossible to say that the tenants' views are ever immaterial. They will have to be considered in every case. This does not of course mean that the lessees have any kind of veto over what the landlord does; nor that they are entitled to insist upon the cheapest possible means of fulfilling the landlord's objective."*

134. The Applicant's rights are to be consulted, and to have his expressed views considered. This the Respondent did, and the Tribunal therefore holds that the Respondent considered the Applicant's observations to the extent required by the 1985 Act, and by the Regulations.

135. The fact that the Applicant's application to this Tribunal was pending acts as no bar upon the Respondent's ability to instruct contractors to proceed with works that it deems necessary, where all appropriate statutory consultation requirements had been complied with, which this Tribunal finds had been done.

The tribunal's decision

136. For all those reasons the Tribunal dismisses the Applicant's claim that the statutory consultation process was not followed correctly in relation to the major works in issue.

137. The tribunal determines that the statutory consultation requirements imposed by s.20 of the 1985 Act and the Regulations were complied with by the Respondent, and that service charges arising from the drainage works effected at Wendover Court in and around February to March 2023 are payable by the Applicant.

Application under s.20C Landlord and Tenant Act 1985

138. The Applicant also applies for an order that the Respondent's costs of the application are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by him (no other person having been specified in the application in section 9 of the application form).

139. The Tribunal has a discretionary power to make such an order. Following the guidance in *Bretby Hall Management Company Ltd v Pratt* [2017] UKUT 70 (LC) at [46], the overarching principle against which the discretion should be exercised is to have regard to what is just and equitable in the circumstances, which include the conduct of the parties, their circumstances, and the outcome of the proceedings.

140. The circumstances found by the Tribunal include:

(i) The Applicant has failed in his application.

(ii) The Applicant's conduct in the course of the proceedings, in continuing to allege deliberate dishonesty and fraud against the Respondent, which as a company must mean the directors through which it acts, until the day of the hearing (and then repeating such allegations in the course of the hearing) was entirely unjustified, and unreasonable.

(iii) The Applicant's conduct in initially seeking to challenge service charges for a duration of 8,933 years, against (*inter alia*) a prior settlement agreement dated 17 March 2018 settling all claims against the Respondent arising as and before that date, and raising substantial issues concerning disclosure was, again, unreasonable.

(iv) The Respondent is a lessee-owned company, managed by volunteer directors, with no source of income extraneous to service charges for management of Wendover and Moreland Courts.

(v) The application appeared to ignore the stark reality that there is nothing to be gained by the Respondent or its directors from engaging in the dishonest manipulation alleged.

141. The Tribunal having found no merit whatsoever in the application, finds it is neither just nor equitable to make a section 20C order in favour of the Applicant.

142. Given the background to the matter and the particular circumstances identified above, the Tribunal has concluded that the costs incurred by the Respondent in relation to the application are relevant costs which may be taken into account in determining service charges. It is entirely appropriate that the Applicant contributes to the costs that have resulted because of his application.

143. For the same reasons the Tribunal has concluded that it would not be just and equitable to make an order under paragraph 5A of Schedule 11

to the 2002 Act (an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs).

Refund of Fees

144. Consequent upon the foregoing, the Tribunal does not order the Respondent to refund any fees paid by the Applicant.

Costs

145. The Respondent raised the issue of costs at the conclusion of the hearing. The Tribunal directs that any application for costs must be sent in writing to the Tribunal within 28 days of this Decision being sent to the parties.

Name: Judge M Jones **Date:** 6 February 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 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).