IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

Case ref: LON/00BJ/LSC/0286

B E T W E E N:

THE MAYOR AND BURGESSES OF THE
LONDON BOROUGH OF WANDSWORTH

Applicant/ Landlord

and

VARIOUS LEASEHOLDERS OF
100 HIGH-RISE RESIDENTIAL BLOCKS
IN THE LONDON BOROUGH OF WANDSWORTH

Respondents/ Leaseholders

BUNDLE for HEARING of STRIKE-OUT APPLICATIONS

(Listed on 11th and 12th November 2019)

LEGAL MATERIALS

TAB	Document	Citation
1	Landlord and Tenant Act 1985	ss. 18 - 30 (incl.)
2	The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, Rule 9	2013 No. 1169
3	Civil Procedure Rules 2019, Rules 3.4 and 24.2	2019
4	*Three Rivers DC v Bank of England (No. 3)* § 158	[2003] 2 AC 1 HL
5	*Goldmile Properties Ltd v Lechouritis*	[2003] EWCA Civ 49
6	*Hughes v Colin Richards & Co.*	[2004] EWCA Civ 266
7	*LB Southwark v Lessees of Southwark*	[2011] UKUT 438 (LC)
8	*RB Kensington & Chelsea v Lessees 1-124 Pond House*	[2015] UKUT 395 (LC)
9	*R (Clarke) v Birmingham City Council*	[2019] EWHC 1728 (Admin)

Tab 1

Landlord and Tenant Act 1985

1985 CHAPTER 70

Service charges

18 Meaning of "service charge" and "relevant costs".

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a **[**F1dwelling**]** as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance **[**F2, improvements**]** or insurance or the landlord's costs of management, and

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

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

(3) For this purpose—

(a) "costs" includes overheads, and

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

Annotations:

Amendments (Textual)

F1 Word substituted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 1**

F2 Word in s. 18(1)(a) inserted (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 150, 181(1), Sch. 9 para. 7 (with para. 13); S.I. 2003/1986, **art. 2(c)(i)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(i)** (subject to Sch. 2)

Modifications etc. (not altering text)

C1 S. 18 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C2 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669 {art. 2(a)}

C3 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C4 Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C5 S. 18(1)(a): power to amend conferred (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 150, 181(1), Sch. 9 para. 13(a); S.I. 2003/1986, **art. 2(c)(i)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(i)** (subject to Sch. 2)

19 Limitation of service charges: reasonableness.

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

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

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

and the amount payable shall be limited accordingly.

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

(2A) F3 . . . . . .

(2B) F3 . . . . . .

(2C) F3 . . . . . .

(3) F3 . . . . . .

F4(4) . . . . . .

[F5(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.**]**

Annotations:

Amendments (Textual)

F3 S. 19(2A)-(3) repealed (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 180, 181(1), Sch. 14; S.I. 2003/1986, arts. 1(2), **2(c)(iv)**, Sch. 1 Pt. 2 (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(iv)**, Sch. 1 Pt. 2 (subject to Sch. 2)

F4 S. 19(4) repealed (1.9.1997) by 1996 c. 52, s. 227, **Sch. 19 Pt. III**; S.I. 1997/1851, **art. 2** (with Sch. para. 1)

F5 S. 19(5) added by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 2(b)**, but is repealed (*prosp.*) by Courts and Legal Services Act 1990 (c. 41, SIF 76:1), ss. 124(3), 125(7), **Sch. 20**

Modifications etc. (not altering text)

C6 S. 19 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C7 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C8 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C9 S. 19(1)(2) excluded by S.I. 1988/1283, art. 2, **Sch. para. 2(a)**

C10 S. 19(5) excluded by S.I. 1988/1283, art. 2, **Sch. para. 5**

F6[F6 20 Limitation of service charges: consultation requirements

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

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

(b) dispensed with in relation to the works or agreement by (or on appeal from) **[**F7the appropriate tribunal**]**.

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

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

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

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

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

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

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

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

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

which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

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

Annotations:

Amendments (Textual)

F6 Ss. 20, 20ZA substituted (26.7.2002 for E. for certain purposes otherwise 31.10.2003 and 1.1.2003 for W. for certain purposes and otherwise 30.3.2004) for s. 20 by 2002 c. 15, s. 151; S.I. 2002/1912, art. 2(c); 2002/3012, art. 2(c); S.I. 2003/1986, **art. 3(1)** (subject to art. 3(2)-(7)); S.I. 2004/669, **art. 2(d)** (subject to art. 2(d)(i)-(vi))

F7 Words in s. 20(1)(b) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 50** (with Sch. 3)

Modifications etc. (not altering text)

C11 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C12 S. 20 applied (E.) (31.10.2003) by The Service Charges (Consultation Requirements) (England) Regulations 2003 (S.I. 2003/1987), **reg. 4(1)**

F8 20ZA Consultation requirements: supplementary

(1) Where an application is made to **[**F9 the appropriate tribunal**]** for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

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

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

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

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

(b) in any circumstances so prescribed.

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

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

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

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

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

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

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

(6) Regulations under section 20 or this section—

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

(b) may make different provision for different purposes.

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

Annotations:

Amendments (Textual)

F8 Ss. 20, 20ZA substituted (26.7.2002 for E. for certain purposes and otherwise 31.10.2003 and 1.1.2003 for W. for certain purposes and otherwise 30.3.2004) for s. 20 by 2002 c. 15, s. 151; S.I. 2002/1912, art. 2(c); 2002/3012, art. 2(c); S.I. 2003/1986, **art. 3(1)** (subject to art. 3(2)-(7)); S.I. 2004/669, **art. 2(d)** (subject to art. 2(d)(i)-(vi))

F9 Words in s. 20ZA(1) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 51** (with Sch. 3)

Modifications etc. (not altering text)

C13 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

F10[20A Limitation of service charges: grant-aided works.

Where relevant costs are incurred or to be incurred on the carrying out of works in respect of which a grant has been or is to be paid under **[**F11section 523 of the Housing Act 1985 (assistance for provision of separate service pipe for water supply) or any provision of Part I of the Housing Grants, Construction and Regeneration Act 1996 (grants, &c. for renewal of private sector housing) or any corresponding earlier enactment**][**F12or article 3 of the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002 (power of local housing authorieses to provide assistance)**]**, the amount of the grant shall be deducted from the costs and the amount of the service charge payable shall be reduced accordingly.

[F13(2) In any case where—

(a) relevant costs are incurred or to be incurred on the carrying out of works which are included in the external works specified in a group repair scheme, within the meaning of **[**F14Part I of the Housing Grants, Construction and Regeneration Act 1996**]**, and

(b) the landlord participated or is participating in that scheme as an assisted participant,

the amount which, in relation to the landlord, is **[**F15the balance of the cost determined in accordance with section 69(3) of the Housing Grants, Construction and Regeneration Act 1996**]** shall be deducted from the costs, and the amount of the service charge payable shall be reduced accordingly.**]]**

Annotations:

Amendments (Textual)

F10 S. 20A inserted by Housing and Planning Act 1986 (c. 63, SIF 75:1), s. 24(1), **Sch. 5 para. 9(1)**

F11 Words in s. 20A(1) substituted (17.12.1996) by 1996 c. 53, s. 103, **Sch. 1 para. 11(1)**; S.I. 1996/2842, **art. 3**

F12 Words in s. 20A(1) inserted (19.7.2002) by S.I. 2002/1860, arts. 1(2)(b), 9, **Sch. 1 para. 2**

F13 S. 20A(2) added by Local Government and Housing Act 1989 (c. 42, SIF 75:1), s. 194, **Sch. 11 para. 90**

F14 Words in s. 20A(2)(a) substituted (17.12.1996) by 1996 c. 53, s. 103, **Sch. 1 para. 11(2)(a)**; S.I. 1996/2842, **art. 3**

F15 Words in s. 20A(2) substituted (17.12.1996) by 1996 c. 53, **Sch. 1 para. 11(2)(b)**; S.I. 1996/2842, **art. 3**

Modifications etc. (not altering text)

C14 S. 20A amended by Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C15 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C16 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

[F16**20B Limitation of service charges: time limit on making demands.**

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

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

Annotations:

Amendments (Textual)

F16 Ss. 20B, 20C inserted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 4**

Modifications etc. (not altering text)

C17 S. 20B amended by Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C18 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C19 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C20 S. 20B(2) modified by S.I. 1988/1283, art. 2, **Sch. para. 6**

[F17 20C Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court **[**F18, residential property tribunal**]** or leasehold valuation tribunal **[**F19or the First-tier Tribunal**]**, or the **[**F20Upper Tribunal**]**, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to **[**F21the county court**]**;

[F22(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;**]**

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

[F23(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;**]**

(c) in the case of proceedings before the **[**F24Upper Tribunal**]**, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to **[**F21the county court**]**.

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

Annotations:

Amendments (Textual)

F17 S. 20C substituted (1.9.1997 subject to saving in Sch. para. 1 of S.I. 1997/1851 and otherwise 11.8.1998 subject to art. 3 of S.I. 1998/1768) by 1996 c. 52, **s. 83(4)**; S.I. 1997/1851, **art. 2**; S.I. 1998/1768, **art. 2**

F18 Words in s. 20C(1) inserted (6.4.2006 for E. and 16.6.2006 for W.) by Housing Act 2004 (c. 34), ss. 265(1), 270, **Sch. 15 para. 32(1)(2)**; S.I. 2006/1060, **art. 2(d)** (with Sch.); S.I. 2006/1535, **art. 2(b)** (with art. 3, Sch.)

F19 Words in s. 20C(1) inserted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 52(a)** (with Sch. 3)

F20 Words in s. 20C(1) substituted (1.6.2009) by The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009 (S.I. 2009/1307), art. 5(1)(2), **Sch. 1 para. 177** (with Sch. 5)

F21 Words in s. 20C(2) substituted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 9 para. 52**; S.I. 2014/954, art. 2(c) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

F22 S. 20C(2)(aa) inserted (6.4.2006 for E. and 16.6.2006 for W.) by Housing Act 2004 (c. 34), ss. 265(1), 270, **Sch. 15 para. 32(1)(3)**; S.I. 2006/1060, **art. 2(d)** (with Sch.); S.I. 2006/1535, **art. 2(b)** (with art. 3, Sch.)

F23 S. 20C(2)(ba) inserted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 52(b)** (with Sch. 3)

F24 Words in s. 20C(2)(c) substituted (1.6.2009) by The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009 (S.I. 2009/1307), art. 5(1)(2), **Sch. 1 para. 177** (with Sch. 5)

Modifications etc. (not altering text)

C21 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

[F25 21 Service charge information

(1) The appropriate national authority may make regulations about the provision, by landlords of dwellings to each tenant by whom service charges are payable, of information about service charges.

(2) The regulations must, subject to any exceptions provided for in the regulations, require the landlord to provide information about—

(a) the service charges of the tenant,

(b) any associated service charges, and

(c) relevant costs relating to service charges falling within paragraph (a) or (b).

(3) The regulations must, subject to any exceptions provided for in the regulations, require the landlord to provide the tenant with a report by a qualified person on information which the landlord is required to provide by virtue of this section.

(4) The regulations may make provision about—

(a) information to be provided by virtue of subsection (2),

(b) other information to be provided (whether in pursuance of a requirement or otherwise),

(c) reports of the kind mentioned in subsection (3),

(d) the period or periods in relation to which information or reports are to be provided,

(e) the times at or by which information or reports are to be provided,

(f) the form and manner in which information or reports are to be provided (including in particular whether information is to be contained in a statement of account),

(g) the descriptions of persons who are to be qualified persons for the purposes of subsection (3).

(5) Subsections (2) to (4) do not limit the scope of the power conferred by subsection (1).

(6) Regulations under this section may—

(a) make different provision for different cases or descriptions of case or for different purposes,

(b) contain such supplementary, incidental, consequential, transitional, transitory or saving provision as the appropriate national authority considers appropriate.

(7) Regulations under this section are to be made by statutory instrument which, subject to subsections (8) and (9)—

(a) in the case of regulations made by the Secretary of State, is to be subject to annulment in pursuance of a resolution of either House of Parliament, and

(b) in the case of regulations made by the Welsh Ministers, is to be subject to annulment in pursuance of a resolution of the National Assembly for Wales.

(8) The Secretary of State may not make a statutory instrument containing the first regulations made by the Secretary of State under this section unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(9) The Welsh Ministers may not make a statutory instrument containing the first regulations made by the Welsh Ministers under this section unless a draft of the instrument has been laid before, and approved by a resolution of, the National Assembly for Wales.

(10) In this section—

"the appropriate national authority"—

(a) in relation to England, means the Secretary of State, and

(b) in relation to Wales, means the Welsh Ministers,

"associated service charges", in relation to a tenant by whom a contribution to relevant costs is payable as a service charge, means service charges of other tenants so far as relating to the same costs.**]**

Annotations:

Amendments (Textual)

F25 S. 21 (as substituted by s. 152 of the Commonhold and Leasehold Reform Act 2002 (c. 15)) substituted (1.12.2008 for E. for certain purposes and otherwise prosp.) by Housing and Regeneration Act 2008 (c. 17), ss. 303, 325(3)(b)(4), **Sch. 12 para. 2**; S.I. 2008/3068, **art. 4(6)** (with arts. 6-3)

Modifications etc. (not altering text)

C22 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

F26 21A Withholding of service charges

[F27(1) A tenant may withhold payment of a service charge if—

(a) the landlord has not provided him with information or a report—

(i) at the time at which, or

(ii) (as the case may be) by the time by which,

he is required to provide it by virtue of section 21, or

(b) the form or content of information or a report which the landlord has provided him with by virtue of that section (at any time) does not conform exactly or substantially with the requirements prescribed by regulations under that section.**]**

(2) The maximum amount which the tenant may withhold is an amount equal to the aggregate of—

(a) the service charges paid by him in the **[**F28period to which the information or report**]** concerned would or does relate, and

[F29(b) amounts standing to the tenant's credit in relation to the service charges at the beginning of that period.**]**

(3) An amount may not be withheld under this section—

(a) in a case within paragraph (a) of subsection (1), after the **[**F30information or report concerned has been provided**]** to the tenant by the landlord, or

[F31(b) in a case within paragraph (b) of that subsection, after information or a report conforming exactly or substantially with requirements prescribed by regulations under section 21 has been provided to the tenant by the landlord by way of replacement of that previously provided.**]**

(4) If, on an application made by the landlord to **[**F32the appropriate tribunal**]**, the tribunal determines that the landlord has a reasonable excuse for a failure giving rise to the right of a tenant to withhold an amount under this section, the tenant may not withhold the amount after the determination is made.

(5) Where a tenant withholds a service charge under this section, any provisions of the tenancy relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

Annotations:

Amendments (Textual)

F26 Ss. 21, 21A substituted (26.7.2002 for E. for certain purposes and otherwise prosp. and 1.1.2003 for W. for certain purposes and otherwise prosp.) for s. 21 by 2002 c. 15, **s. 152**; S.I. 2002/1912, **art 2(c)**; S.I. 2002/3012, **art. 2(c)**

F27 S. 21A(1) substituted (1.12.2008 for certain purposes and otherwise prosp.) by Housing and Regeneration Act 2008 (c. 17), ss. 303, 325, **Sch. 12 para. 3(2)**; S.I. 2008/3068, **art. 4(6)** (with arts. 6-13)

F28 Words in s. 21A(2)(a) substituted (1.12.2008 for certain purposes and otherwise prosp.) by Housing and Regeneration Act 2008 (c. 17), ss. 303, 325, **Sch. 12 para. 3(3)(a)**; S.I. 2008/3068, **art. 4(6)** (with arts. 6-13)

F29 S. 21A(2)(b) substituted (1.12.2008 for certain purposes and otherwise prosp.) by Housing and Regeneration Act 2008 (c. 17), ss. 303, 325, **Sch. 12 para. 3(3)(b)**; S.I. 2008/3068, **art. 4(6)** (with 6-13)

F30 Words in s. 21A(3)(a) substituted (1.12.2008 for certain purposes and otherwise prosp.) by Housing and Regeneration Act 2008 (c. 17) ss. 303, 325, {Sch. 12 para. 3(4)(a)}; S.I. 2008/3068, **art. 4(6)** (with arts. 6-13)

F31 S. 21A(3)(b) substituted (1.12.2008 for certain purposes and otherwise prosp.) by Housing and Regeneration Act 2008 (c. 17), ss. 303, 325, **Sch. 12 para. 3(4)(b)**; S.I. 2008/3068, art. 4(6) (with arts. 6-13)

F32 Words in s. 21A(4) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 53** (with Sch. 3)

Modifications etc. (not altering text)

C23 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** subject Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

[F33 21B Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.]

Annotations:

Amendments (Textual)

F33 S. 21B inserted (26.7.2002 for E. for certain purposes and otherwise 1.10.2007 and 1.1.2003 for W. for certain purposes and otherwise 30.11.2007) by 2002 c. 15, s. 153; S.I. 2002/1912, art. 2(c); S.I. 2002/3012, art. 2(c); S.I. 2007/1256, **art. 2**; S.I. 2007/3161, **art. 2**

Modifications etc. (not altering text)

C24 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C25 S. 21B applied (1.10.2007) by The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 (S.I. 2007/1257), **reg. 4(b)** (with reg. 2)

C26 S. 21B applied (30.11.2007) by The Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (Wales) Regulations 2007 (S.I. 2007/3160), **reg. 4(b)** (with reg. 2)

C27 S. 21B(3)(4) excluded (1.10.2007) by The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 (S.I. 2007/1257) {reg. 4(a)} (with reg. 2)

C28 S. 21B(3)(4) excluded (30.11.2007) by The Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (Wales) Regulations 2007 (S.I. 2007/3160), **reg. 4(a)** (with reg. 2)

[22 Request to inspect supporting accounts &c.

(1) This section applies where a tenant, or the secretary of a recognised tenants' association, has obtained such a summary as is referred to in section 21(1) (summary of relevant costs), whether in pursuance of that section or otherwise.

(2) The tenant, or the secretary with the consent of the tenant, may within six months of obtaining the summary require the landlord in writing to afford him reasonable facilities—

(a) for inspecting the accounts, receipts and other documents supporting the summary, and

(b) for taking copies or extracts from them.

(3) A request under this section is duly served on the landlord if it is served on—

(a) an agent of the landlord named as such in the rent book or similar document, or

(b) the person who receives the rent of behalf of the landlord;

and a person on whom a request is so served shall forward it as soon as may be to the landlord.

(4) The landlord shall make such facilities available to the tenant or secretary for a period of two months beginning not later than one month after the request is made.

[F34(5) The landlord shall—

(a) where such facilities are for the inspection of any documents, make them so available free of charge;

(b) where such facilities are for the taking of copies or extracts, be entitled to make them so available on payment of such reasonable charge as he may determine.

(6) The requirement imposed on the landlord by subsection (5)(a) to make any facilities available to a person free of charge shall not be construed as precluding the landlord from treating as part of his costs of management any costs incurred by him in connection with making those facilities so available.]]

Annotations:

Amendments (Textual)

F34 S. 22(5)(6) added by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 6**

Modifications etc. (not altering text)

C29 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C30 S. 22 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C31 S. 22 excluded by S.I. 1988/1283, art. 2, **Sch. para. 2(d)**

C32 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

23 Request relating to information held by superior landlord.

(1) If a request under section 21 (request for summary of relevant costs) relates in whole or in part to relevant costs incurred by or on behalf of a superior landlord, and the landlord to whom the request is made is not in possession of the relevant information—

(a) he shall in turn make a written request for the relevant information to the person who is his landlord (and so on, if that person is not himself the superior landlord),

(b) the superior landlord shall comply with that request within a reasonable time, and

(c) the immediate landlord shall then comply with the tenant's or secretary's request, or that part of it which relates to the relevant costs incurred by or on behalf of the superior landlord, within the time allowed by section 21 or such further time, if any, as is reasonable in the circumstances.

(2) If a request under section 22 (request for facilities to inspect supporting accounts, &c.) relates to a summary of costs incurred by or on behalf of a superior landlord—

(a) the landlord to whom the request is made shall forthwith inform the tenant or secretary of that fact and of the name and address of the superior landlord, and

(b) section 22 shall then apply to the superior landlord as it applies to the immediate landlord.

Annotations:

Modifications etc. (not altering text)

C33 S. 23 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C34 S. 23 excluded by S.I. 1988/1283, art. 2, **Sch. para. 2(d)**

C35 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C36 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

PROSPECTIVE

[F35 23A Effect of change of landlord

(1) This section applies where, at a time when a duty imposed on the landlord or a superior landlord by or by virtue of any of sections 21 to 23 remains to be discharged by him, he disposes of the whole or part of his interest as landlord or superior landlord to another person.

(2) If the landlord or superior landlord is, despite the disposal, still in a position to discharge the duty to any extent, he remains responsible for discharging it to that extent.

(3) If the other person is in a position to discharge the duty to any extent, he is responsible for discharging it to that extent.

(4) Where the other person is responsible for discharging the duty to any extent (whether or not the landlord or superior landlord is also responsible for discharging it to that or any other extent)—

(a) references to the landlord or superior landlord in sections 21 to 23 **[**F36and any regulations under section 21**]** are to, or include, the other person so far as is appropriate to reflect his responsibility for discharging the duty to that extent, but

(b) in connection with its discharge by the other person, section 22(6) applies as if the reference to the day on which the landlord receives the notice were to the date of the disposal referred to in subsection (1)**[**F37 and

(c) any regulations under section 21 apply subject to any modifications contained in the regulations.**]]**

Annotations:

Amendments (Textual)

F35 S. 23A inserted (prosp.) by 2002 c. 15, ss. 157, 181(1), **Sch. 10 para. 2**

F36 Words in s. 23A(4)(a) inserted (1.12.2008 for certain purposes and otherwise prosp.) by Housing and Regeneration Act 2008 (c. 17), ss. 303, 325, **Sch. 12 para. 6(a)**; S.I. 2008/3068, **art. 4(6)** (with arts. 6-13)

F37 S. 23A(4)(c) and preceding word inserted (1.12.2008 for certain purposes and otherwise prosp.) by Housing and Regeneration Act 2008 (c. 17), ss. 303, 325, **Sch. 12 para. 6(b)**; S.I. 2008/3068, **art. 4(6)** (with arts. 6-13)

Modifications etc. (not altering text)

C37 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

PROSPECTIVE

24 [F38] Effect of assignment

The assignment of a tenancy does not affect any duty imposed by or by virtue of any of sections 21 to 23A; but a person is not required to comply with more than a reasonable number of requirements imposed by any one person.

Annotations:

Amendments (Textual)

F38 S. 24 substituted (prosp.) by 2002 c. 15, ss. 157, 181(1), **Sch. 10 para. 3**

Modifications etc. (not altering text)

C38 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

PROSPECTIVE

25 Failure to comply with s. 21, 22 or 23 an offence.

(1) It is a summary offence for a person to fail, without reasonable excuse, to perform a duty imposed on him **[**[F39]by or by virtue of any of sections 21 to 23A**]**.

(2) A person committing such an offence is liable on conviction to a fine not exceeding level 4 on the standard scale.

[[F40](3) Subsection (1) does not apply where the person is—

(a) a local authority for an area in Wales, or

(b) a registered social landlord.**]**

Annotations:

Amendments (Textual)

F39 Words in s. 25(1) substituted (prosp.) by 2002 c. 15, ss. 157, 181(1), **Sch. 10 para. 4**

F40 S. 25(3) inserted (1.12.2014) by Housing (Wales) Act 2014 (anaw 7), **ss. 128**, 145(3); S.I. 2014/3127, art. 2(a), Sch. Pt. 1

Modifications etc. (not altering text)

C39 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C40 S. 25 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C41 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

26 Exception: tenants of certain public authorities.

(1) Sections 18 to 25 (limitation on service charges and requests for information about costs) do not apply to a service charge payable by a tenant of—

a local authority,

[[F41]a National Park authority **[**[F42], or**]]**

a new town corporation, [F43]. . .

[F43]. . .

unless the tenancy is a long tenancy, in which case sections 18 to 24 apply but section 25 (offence of failure to comply) does not.

(2) The following are long tenancies for the purposes of subsection (1), subject to subsection (3)—

(a) a tenancy granted for a term certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by the tenant or by re-entry or forfeiture;

(b) a tenancy for a term fixed by law under a grant with a covenant or obligation for perpetual renewal, other than a tenancy by sub-demise from one which is not a long tenancy;

(c) any tenancy granted in pursuance of Part V of the [M1]Housing Act 1985 (the right to buy) **[**[F44] , including any tenancy granted in pursuance of that Part as it had effect by virtue of section 17 of the Housing Act 1996 (the right to acquire).**]**

(3) A tenancy granted so as to become terminable by notice after a death is not a long tenancy for the purposes of subsection (1), unless—

(a) it is granted by a housing association which at the time of the grant is **[**[F45]a private registered provider of social housing or**][**[F46]a registered social landlord**]**,

(b) it is granted at a premium calculated by reference to a percentage of the value of the dwelling-house or the cost of providing it, and

(c) at the time it is granted it complies with the requirements of the regulations then in force under section 140(4)(b) of the [M2]Housing Act 1980 **[**[F47]or paragraph 4(2)(b) of Schedule 4A to the Leasehold Reform Act 1967**]** (conditions for exclusion of shared ownership leases from Part I of Leasehold Reform Act 1967) or, in the case of a tenancy granted before any such regulations were brought into force, with the first such regulations to be in force.

Annotations:

Amendments (Textual)

F41 Words in s. 26(1) inserted (23.11.1995) by 1995 c. 25, s. 78, **Sch. 10 para. 25(1)** (with ss. 7(6), 115, 117, Sch. 8 para. 7); S.I. 1995/2950, **art. 2(1)**

F42 Words in s. 26(1) inserted (1.10.1998) by 1998 c. 38, s. 129, **Sch. 15 para. 12** (with ss. 139(2), 143(2)); S.I. 1998/2244, **art. 4**

F43 Words in s. 26(1) repealed (1.10.1998) by 1998 c. 38, s. 152, **Sch. 18 Pt. IV** (with ss. 137(1), 139(2), 143(2)); S.I. 1998/2244, **art. 4**

F44 Words in s. 26(2)(c) added (1.4.1997) by S.I. 1997/627, art. 2, **Sch. para. 4**

F45 Words in s. 26(3)(a) inserted (1.4.2010) by The Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010 (S.I. 2010/866), art. 1(2), **Sch. 2 para. 60** (with art. 6, Sch. 3)

F46 Words in s. 26(3)(a) substituted (1.10.1996) by S.I. 1996/2325, art. 5(1), **Sch. 2 para. 16(3)**

F47 Words inserted by Housing Act 1988 (c. 50, SIF 61, 75:1), s. 140(1), **Sch. 17 para. 68**

Modifications etc. (not altering text)

C42 S. 26 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C43 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C44 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/699, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

Marginal Citations

M1 1985 c. 68.

M2 1980 c. 51.

27 Exception: rent registered and not entered as variable.

Sections 18 to 25 (limitation on service charges and requests for information about costs) do no apply to a service charge payable by the tenant of a **[**[F48]dwelling**]** the

rent of which is registered under Part IV of the [M3]Rent Act 1977, unless the amount registered is, in pursuance of section 71(4) of that Act, entered as a variable amount.

Annotations:

Amendments (Textual)

F48 Word substituted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 8**

Modifications etc. (not altering text)

C45 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C46 S. 27 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C47 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

Marginal Citations

M3 1977 c. 42.

[F49 27A Liability to pay service charges: jurisdiction

(1) An application may be made to **[**F50the appropriate tribunal**]** for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

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

(e) the manner in which it is payable.

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

(3) An application may also be made to **[**F51the appropriate tribunal**]** for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

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

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

(c) the amount which would be payable,

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

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

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

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

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

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

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

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

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

(a) in a particular manner, or

(b) on particular evidence,

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

(7) The jurisdiction conferred on **[**F52the appropriate tribunal**]** in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.**]**

Annotations:

Amendments (Textual)

F49 S. 27A inserted (E.W.) (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 155(1), 181(1); S.I. 2003/1986, arts. 1(2), **2(c)(i)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(i)** (subject to Sch. 2)

F50 Words in s. 27A(1) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 54** (with Sch. 3)

F51 Words in s. 27A(3) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 54** (with Sch. 3)

F52 Words in s. 27A(7) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 54** (with Sch. 3)

Modifications etc. (not altering text)

C48 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C49 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C50 S. 27A(3): power to amend conferred (E.) (30.9.2003) (W.) (30.3.2004) by 2002 c. 15, ss. 150, 181(1), Sch. 9 para. 13(b); S.I. 2003/1986, **art. 2(c)(i)** (subject to savings in Sch. 2); S.I. 2004/699, **art. 2(c)(i)** (subject to savings in Sch. 2)

28 Meaning of "qualified accountant".

[F53(1) The reference to a " qualified accountant " in section 21(6) (certification of summary of information about relevant costs) is to a person who, in accordance with the following provisions, has the necessary qualification and is not disqualified from acting.

F54[(2) A person has the necessary qualification if he is eligible for appointment as a [F55statutory auditor under Part 42 of the Companies Act 2006] .]

F56(3) . . . . . .

(4) The following are disqualified from acting—

F57(a) . . . . . .

(b) an officer [F58, employee or partner] of the landlord or, where the landlord is a company, of an associated company;

(c) a person who is a partner or employee of any such officer or employee.

[F59(d) an agent of the landlord who is a managing agent for any premises to which any of the costs covered by the summary in question relate;

(e) an employee or partner of any such agent.]

(5) For the purposes of subsection (4)(b) a company is associated with a landlord company if it is (within the meaning of [F60section 1159 of the Companies Act 2006]) the landlord's holding company, a subsidiary of the landlord or another subsidiary of the landlord's holding company.

[F61(5A) For the purposes of subsection (4)(d) a person is a managing agent for any premises to which any costs relate if he has been appointed to discharge any of the landlord's obligations relating to the management by him of the premises and owed to the tenants who may be required under the terms of their leases to contribute to those costs by the payment of service charges.]

(6) Where the landlord is a local authority [F62National Park Authority][F63or a new town corporation]—

(a) the persons who have the necessary qualification include members of the Chartered Institute of Public Finance and Accountancy, and

(b) subsection (4)(b) (disqualification of officers and employees of landlord) does not apply.]

Annotations:

Amendments (Textual)

F53 S. 28 omitted (1.12.2008 for certain purposes and otherwise prosp.) by virtue of Housing and Regeneration Act 2008 (c. 17), ss. 303, 325, {Sch, 12 para. 9} and repealed (prosp.) by Housing and Regeneration Act 2008 (c. 17), ss. 321, 325, **Sch. 16**; S.I. 2008/3068, **art. 4(6)** (with arts. 6-13)

F54 S. 28(2) substituted (1.10.1991) by S.I. 1991/1997, **Sch. para. 60(a)** (with reg. 4)

F55 Words in s. 28(2) substituted (6.4.2008) by The Companies Act 2006 (Consequential Amendments etc) Order 2008 (S.I. 2008/948), art. 3(1), **Sch. 1 para. 1(jj)** (with arts. 6, 11, 12)

F56 S. 28(3) repealed (1.10.1991) by S.I. 1991/1997, **Sch. para. 60(b)** (with reg. 4)

F57 S. 28(4)(a) repealed (1.10.1991) by S.I. 1991/1997, **Sch. para. 60(c)** (with reg. 4)

F58 Words substituted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 9(2)(a)**

F59 S. 28(4)(d)(e) added by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 9(2)(b)**

F60 Words in s. 28(5) substituted (1.10.2009) by The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (S.I. 2009/1941), art. 2(1), **Sch. 1 para. 64** (with art. 10)

F61 S. 28(5A) inserted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 9(3)**

F62 Words in s. 28(6) inserted (23.11.1995) by 1995 c. 25, s. 78, **Sch. 10 para. 25(2)** (with ss. 7(6), 115, 117, Sch. 8 para. 7); S.I. 1995/2950, **art. 2(1)**

F63 Words in s. 28(6) substituted (1.10.1998) by 1998 c. 38, s. 129, **Sch. 15 para. 13** (with ss. 139(2), 143(2)); S.I. 1998/2244, **art. 4**

Modifications etc. (not altering text)

C51 S. 28 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C52 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C53 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

C54 S. 28(1) applied (1.11.1993) by 1993 c. 28, **s. 78(4)(a)**; S.I. 1993/2134, **art. 5**

29 Meaning of "recognised tenants' association".

(1) A recognised tenants' association is an association of **[**F64qualifying tenants (whether with or without other tenants)**]** which is recognised for purposes of the provisions of this Act relating to service charges either—

(a) by notice in writing given by the landlord to the secretary of the association, or

[F65(b) by a certificate—

(i) in relation to dwellings in England, of the First-tier Tribunal; and

(ii) in relation to dwellings in Wales, of a member of the local rent assessment committee panel.**]**

(2) A notice given under subsection (1)(a) may be withdrawn by the landlord by notice in writing given to the secretary of the association not less than six months before the date on which it is to be withdrawn.

(3) A certificate given **[**F66under subsection (1)(b)(i) may be cancelled by the First-tier Tribunal, and a certificate given under subsection (1)(b)(ii)**]** may be cancelled by any member of the local rent assessment committee panel.

(4) In this section the "local rent assessment committee panel" means the persons appointed by the Lord Chancellor under the M4Rent Act 1977 to the panel of persons to act as members of a rent assessment committee for the registration area **[**F67in Wales**]** in which **[**F68the dwellings let to the qualifying tenants are situated, and for the purposes of this section a number of tenants are qualifying tenants if each of them may be required under the terms of his lease to contribute to the same costs by the payment of a service charge.**]**.

[F69(5) The Secretary of State may by regulations specify—

(a) the procedure which is to be followed in connection with an application for, or for the cancellation of, a certificate under **[**F70subsection (1)(b)(ii)**]**;

(b) the matters to which regard is to be had in giving or cancelling **[**F71a certificate under subsection (1)(b)**]**;

(c) the duration of such a certificate; and

(d) any circumstances in which a certificate is not to be given under subsection (1)(b).**]**

(6) Regulations under subsection (5)—

(a) may make different provisions with respect to different cases or descriptions of case, including different provision for different areas, and

(b) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Annotations:

Amendments (Textual)

F64 Words substituted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 10(2)**

F65 S. 29(1)(b) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 55(a)** (with Sch. 3)

F66 Words in s. 29(3) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 55(b)** (with Sch. 3)

F67 Words in s. 29(4) inserted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 55(c)** (with Sch. 3)

F68 Words substituted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 10(3)**

F69 S. 29(5) substituted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 10(4)**

F70 Words in s. 29(5)(a) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 55(d)(i)** (with Sch. 3)

F71 Words in s. 29(5)(b) substituted (1.7.2013) by The Transfer of Tribunal Functions Order 2013 (S.I. 2013/1036), art. 1, **Sch. 1 para. 55(d)(ii)** (with Sch. 3)

Modifications etc. (not altering text)

C55 S. 29 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C56 Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))
Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**

C57 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

Marginal Citations

M4 1977 c. 42.

[F72 29A Tenants' associations: power to request information about tenants

(1) The Secretary of State may by regulations impose duties on a landlord to provide the secretary of a relevant tenants' association with information about relevant qualifying tenants.

(2) The regulations may—

(a) make provision about the tenants about whom information must be provided and what information must be provided;

(b) require a landlord to seek the consent of a tenant to the provision of information about that tenant;

(c) require a landlord to identify how many tenants have not consented.

(3) The regulations may—

(a) authorise a landlord to charge costs specified in or determined in accordance with the regulations;

(b) impose time limits on a landlord for the taking of any steps under the regulations;

(c) make provision about the form or content of any notices under the regulations (including provision permitting or requiring a person to design the form of a notice);

(d) make other provision as to the procedure in connection with anything authorised or required by the regulations.

(4) The regulations may confer power on a court or tribunal to make an order remedying a failure by a landlord to comply with the regulations.

(5) The regulations may include supplementary, incidental, transitional or saving provision.

(6) Regulations under this section are to be made by statutory instrument.

(7) A statutory instrument containing regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this section—

"relevant tenants' association", in relation to a landlord, means an association of tenants of the landlord at least one of whom is a qualifying tenant of a dwelling in England;

"relevant qualifying tenant" means—

(a) a person who is a qualifying tenant of a dwelling in England and a member of the relevant tenants' association, or

(b) a person who is a qualifying tenant of a dwelling in England by virtue of being required to contribute to the same costs as a qualifying tenant who is a member of the relevant tenants' association;

"qualifying tenant" means a tenant who, under the terms of the lease, is required to contribute to the same costs as another tenant by the payment of a service charge.**]**

Annotations:

Amendments (Textual)

F72 S. 29A inserted (12.7.2016) by Housing and Planning Act 2016 (c. 22), **ss. 130**, 216(2)(b)

30 Meaning of "flat", "landlord" and "tenant".

In the provisions of this Act relating to service charges—

. . . . . **F73**

"landlord" includes any person who has a right to enforce payment of a service charge;

"tenant" includes

(a) a statutory tenant, and

(b) where the **[**F74dwelling**]** or part of it is sub-let, the sub-tenant.

Annotations:

Amendments (Textual)

F73 Definition of "flat" repealed by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), ss. 41, 61(2), Sch. 2 para. 11(a), **Sch. 5**

F74 Word substituted by Landlord and Tenant Act 1987 (c. 31, SIF 75:1), s. 41, **Sch. 2 para. 11(b)**

Modifications etc. (not altering text)

C58 S. 30 amended by Local Government Act 1985 (c. 51, SIF 81:1), s. 57(7), **Sch. 13 para. 24** (as substituted by Housing (Consequential Provisions) Act 1985 (c. 71, SIF 61), s. 4, **Sch. 2 para. 61**) and Housing Act 1988 (c. 50, SIF 61), **s. 79(12)**

C59 Ss. 18-30 modified (1.4.1995) by S.I. 1995/401, art. 18, **Sch. para. 10(b)**
Ss. 18-30 extended (5.7.1994) by 1994 c. 19, ss. 39, 66(2)(b), **Sch. 13 para. 23(b)** (with ss. 54(5)(7), 55(5), Sch. 17 paras. 22(1), 23(2))

C60 Ss. 18-30 modified (30.9.2003 for E. and 30.3.2004 for W.) by 2002 c. 15, ss. 102, 181(1), Sch. 7 para. 4; S.I. 2003/1986, **art. 2(a)**; S.I. 2004/669, **art. 2(a)**
Ss. 18-30B extended (30.9.2003 and 28.2.2005 for E. for certain purposes and otherwise prosp. and 30.3.2004 and 31.5.2005 for W. for certain purposes and otherwise prosp.) by 2002 c. 15, ss. 172, 181(1); S.I. 2003/1986, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/669, **art. 2(c)(ii)** (subject to Sch. 2); S.I. 2004/3056, **art. 3(h)** (subject to art. 4 (as amended by S.I. 2005/193, art. 2)); S.I. 2005/1353, **art. 2(h)** (subject to art. 3)

Tab 2

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169 (L. 8)

As in force on 1st September 2014

This document shows the Rules as amended by S.I. 2014/2128. It has been produced in order to assist users but its accuracy is not guaranteed and should not be relied upon. For the definitive Rules, users should refer to the original statutory instruments on Legislation.gov.uk.

CONTENTS

PART 1
Introduction

PART 2
General Powers and Provisions

Striking out a party's case

9.—(1) The proceedings or case, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or case or that part of them; and

(b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings or case if—

(a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;

(b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;

(c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;

(d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or

(e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings or case under paragraph (2) or paragraph (3)(b) to (e) without first giving the parties an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings or case, or part of them, have been struck out under paragraph (1) or (3)(a), the applicant may apply for the proceedings or case, or part of it, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party.

(7) This rule applies to a respondent as it applies to an applicant except that—

(a) a reference to the striking out of the proceedings or case or part of them is to be read as a reference to the barring of the respondent from taking further part in the proceedings or part of them; and

(b) a reference to an application for the reinstatement of proceedings or case or part of them which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings, or part of them.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent, and may summarily determine any or all issues against that respondent.

Addition, substitution and removal of parties

10.—(1) The Tribunal may give a direction adding, substituting or removing a person as an applicant or a respondent.

(2) If the Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.

(3) A person who is not a party may apply to the Tribunal to be added or substituted as a party.

Tab 3

Law In Force

[3.4— Power to strike out a statement of case

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out(GL) a statement of case if it appears to the court–

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

(3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.

(4) Where –

(a) the court has struck out a claimant's statement of case;

(b) the claimant has been ordered to pay costs to the defendant; and

(c) before the claimant pays those costs, [the claimant] [2] starts another claim against the same defendant, arising out of facts which are the same or substantially the same as those relating to the claim in which the statement of case was struck out,

the court may, on the application of the defendant, stay(GL) that other claim until the costs of the first claim have been paid.

(5) Paragraph (2) does not limit any other power of the court to strike out(GL) a statement of case.

(6) If the court strikes out a claimant's statement of case and it considers that the claim is totally without merit–

(a) the court's order must record that fact; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order.

] [1]

Notes

1 Existing rules 3.1 to 3.11 are moved under a new Section I entitled "Case Management" by Civil Procedure (Amendment) Rules 2013/262 rule 5(c) (April 1, 2013)

2 Word substituted by Civil Procedure (Amendment) Rules 2014/407 rule 6(a) (April 22, 2014 being the date on which 2013 c.22 s.17(1) and (2) come into force for all purposes)

Extent

Pt 3(I) rule 3.4(1)-(6)(b): England, Wales

Law In Force

[3.5— Judgment without trial after striking out

(1) This rule applies where–

(a) the court makes an order which includes a term that the statement of case of a party shall be struck out if the party does not comply with the order; and

] [1]

Notes

[1] Added by Civil Procedure (Amendment No.2) Rules 2004/2072 rule 9 (October 1, 2004)

[2] Words inserted by Civil Procedure (Amendment No.3) Rules 2005/2292 rule 26 (October 1, 2005)

Extent

Pt 23 rule 23.12(a)-(b): England, Wales

PART 24

SUMMARY JUDGMENT

Law In Force

24.1 Scope of this Part

This Part sets out a procedure by which the court may decide a claim or a particular issue without a trial. **[** (Part 53 makes special provision about summary disposal of defamation claims in accordance with the Defamation Act 1996). **] [1]**

Notes

[1] Word added by Civil Procedure (Amendment) Rules 2000/221 rule 12.(a) (May 2, 2000)

Commencement

Pt 24 rule 24.1: April 26, 1999

Extent

Pt 24 rule 24.1: England, Wales

Law In Force

24.2 Grounds for summary judgment

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if–

(a) it considers that–

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other **[** compelling **] [1]** reason why the case or issue should be disposed of at a trial.

(Rule 3.4 makes provision for the court to strike out(GL) a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)

Tab 4

Three Rivers DC v Bank of England (No. 3) § 158, per Lord Hobhouse:

158. This leads me back to the CPR. As previously noted, Part 1 adopts a philosophy similar to that enunciated in *Ashmore v Corpn of Lloyd's [1992] 1 WLR 446* . It is followed through into the new version of RSC Ord 14. It is Part 24. It authorises the court to decide a claim (or a particular issue) without a trial. Unlike Order 14, it applies to both plaintiffs (claimants) and the defendants. It therefore can be used in cases such as the present where the application for judgment without trial is being made by the defendant. The court may exercise the power where it considers that the "claimant has no real prospect of succeeding on the claim" and "there is no other reason why the case or issue should be disposed of at a trial". The concluding phrase corresponds to the similar phrase used in RSC Ord 14, r 3(1) and has not been relied upon in the present case. The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a "discretionary" power, i e one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made "findings" of fact. He did not do so. Under RSC Ord 14 as under CPR Part 24 , the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom line" is what ultimately matters. Part 24 includes provisions covering various ancillary matters, at what stage the application can be made (24.4), the filing of evidence (24.5) and supplementary powers of the court (24.6). The Practice Direction which was originally appended filled out some of what is in the rules.

> "4.2 Where a defendant applies for judgment in his favour on the claimant's claim, the court will give that judgment if either: (1) the claimant has failed to show a case which, if unanswered, would entitle him to judgment, or (2) the defendant has shown that the claim would be bound to be dismissed at trial. 4.3 Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order as described below."

The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality. The majority in the Court of Appeal used the phrases "no realistic possibility" and distinguished between a practical possibility and "what is fanciful or inconceivable" (ante, p 83h). Although used in a slightly different context these phrases appropriately express the same idea. Part 3 of the CPR contains similar provisions in relation to the court's case management powers. These include explicit powers to strike out claims and defences on the ground, among others, that the statement of case discloses no reasonable ground for bringing or defending the claim.

Tab 5

*1 Goldmile Properties Ltd v Lechouritis

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
29 January 2003

Report Citation
[2003] EWCA Civ 49
[2003] 2 P. & C.R. 1

Court of Appeal

(Sedley and Rix L.JJ.):

January 29, 2003 [1]

H1 *Landlord and tenant—Lease of business premises used as restaurant—Covenant of quiet enjoyment—Landlord's repairing covenant—Cleaning and repairs to exterior adversely affected restaurant business—Whether damages payable—Test to be applied—Whether reasonable steps by landlord to avoid disturbance or all possible steps*

H2. The appellant leased premises to the respondent which the respondent used for a restaurant business. Clause 5.1(a) of the lease contained a covenant for quiet enjoyment "except as herein provided" and cl.5.1(c) contained a landlord's repairing covenant. The landlord employed contractors to clean and repair the exterior of the property. The work required scaffolding and sheeting to be fixed to the outside of the building and took six months to complete. From outside, the restaurant appeared to be closed and inside it became dingy and frequently dusty. Consequently, the lessee's restaurant business was severely disrupted. The lessee claimed damages for loss of profit and disruption. District Judge Russell found for the landlord on the basis that all reasonable steps had been taken to minimise the potential risks. On appeal, H.H. Judge Tetlow reversed that decision, holding that the appropriate test was whether the landlord had taken all possible steps to avoid disturbance. On appeal to the Court of Appeal.

H3. **Held,** allowing the appeal, that the test applied by the district judge was right and conformed most nearly with what would have been apparent to the parties when they signed the lease; the test applied by the circuit judge was wrong. Where the provisions of any contract, including a lease, came into conflict, they were to be interpreted and applied so as to give effect, if possible, to both of them. Neither side contended that to do so was not possible in the lease before the court. The covenant for quiet enjoyment was not a guarantee against all disturbance and was expressly qualified by the phrase "except as herein provided". Conversely, the obligation to keep the building in repair had to co-exist with the tenant's entitlement to quiet enjoyment. This pointed towards a threshold, for disturbance by repairs, of all reasonable precautions rather than all possible precautions.

H4 Cases referred to:

(1) *Lyttleton Times Company Ltd v Warners Ltd [1907] A.C. 476, P.C.*

(2) *Owen v Gadd [1956] 2 Q.B. 99* ***2*** .
(3) *Saner v Bilton (1878) L.R. 7 Ch. D. 815* .
(4) *Southwark LBC v Tanner [2001] 1 A.C. 1; [1999] 3 W.L.R. 939; [1999] 4 All E.R. 449; (2000) 79 P. & C.R. D13* .

H5. **Appeal** by the defendant, Goldmile Properties Ltd, landlord of business premises, from a decision of H.H. Judge Tetlow given in the Manchester County Court. The learned judge upheld an appeal by the claimant tenant, Speiro Lechouritis, from a decision of District Judge Russell in the Stockport County Court and determined that where the performance of a lessor's repairing covenant impinged on the lessee's quiet enjoyment, it was not sufficient that the lessor had taken all reasonable steps to avoid disturbing the tenant. The lessor must take all possible precautions. The facts are stated in the judgment of Sedley L.J.

H6 Representation

Nicholas Dowding Q.C. and Edward Peters (Guillaumes) for the appellant.
David Berkeley Q.C. and Jonathan Rule (Gorvins) for the respondent.

Judgment

Sedley L.J.:

This is the judgment of the court.

The appeal

1. This is a second appeal. Carnwath L.J. gave permission for it to be brought because it raises a question of general importance: where the performance of a lessor's repairing covenant impinges on the lessee's quiet enjoyment, is it sufficient that the lessor has taken all reasonable steps to avoid disturbing the tenant or is he required to take all possible precautions?

2. It will be apparent from this formulation of the issue that neither party contends that one covenant simply trumps the other, and for the reasons which follow we consider this to be the correct approach.

The lease

3. The tenancy in question is a business tenancy held on a lease of just under twenty-two years of the ground floor and basement of a seven-storey building in Warrington at a rent of £16,000 per annum. The claimant, who was the lessee, conducted a restaurant business there. The lease, in familiar form (including the traditional eschewal of all punctuation, however convoluted the clause), contained the following provisions:

a) By cl.5.1, an express covenant for quiet enjoyment in the following form:

> "That the Tenant paying the rents hereby reserved and observing and performing the several covenants and stipulations on the Tenant's part herein contained shall peaceably hold and enjoy the Demised Premises during the Term without any interruption (except as herein provided) by the Landlord or any person rightfully claiming under or in trust for it"

b) By cl.5.3, the following covenant to provide services: ***3***

> "That [*sic*] subject to the Tenant paying the Service Charge to use its reasonable endeavours to provide the services specified in Part IIA of the Fifth Schedule hereto".

c) The material services as specified in para.1 of part IIA of the schedule:

> "Repairing cleansing maintaining renewing replacing amending decorating and putting keeping in substantial repair and condition the roof external and any party walls and other load bearing members of the structure of the Building and such other parts of the Building and the Common Parts as are not the responsibility of the tenants of the Building".

d) In para.2.3, provisions for payment by way of additional rent of a service charge, defined in part I of the fifth schedule to include the costs of structural repairs, apportioned among the tenants of the building.
e) In cl.6.1, a provision for relief from payment of rent where loss of user is caused by an insured event.

The works

4. In March 1997 the lessor brought in contractors to clean the external walls and windows of the building and to repair the seals between the frames and the walls. The work, which was completed within the six-month contract period, required scaffolding and sheeting to be fixed to the outside of the building. One consequence was that the tenant's restaurant business was quite seriously disrupted: from outside, the restaurant appeared to be closed; inside, it became dingy and frequently contaminated with building dust. These facts, which must be typical of many such situations, are not in dispute.

The claim

5. In this situation the lessee claimed damages in the Stockport County Court for loss of profit and disruption to his business. In a short and lucid judgment, District Judge Russell found for the defendant lessor. He concluded:

> "I accept that the work was carried out to meet, as far as possible, the claimant's requirements within the time scale of the contract period and I believe that the defendant has been as helpful as it can with regard to the reduction and the payment of the service charge. I accept that the defendant is entitled to repair only in such a way that the covenant for quiet enjoyment is not breached and in broad terms, given the extent and nature of the works undertaken by the landlord, I suppose it is inevitable that any tenant will suffer a measure of inconvenience during the duration of the works. There will have been noise; there will have been dust, and there will have been some diminution in the light to the premises as a consequence of the sheeting.
>
> "As I have indicated, I am satisfied that the landlord (the defendant) was necessarily carrying out a repairing obligation under the terms of the lease. In addition to being necessary, those works were extensive. I am satisfied on the ***4** evidence before me today that the defendant took all reasonable steps to minimise the potential risks. I am not satisfied that the defendant has breached the covenant for quiet enjoyment and in those circumstances I find for the defendant."

6. On the claimant's appeal, heard at Manchester County Court on April 30, 2002, H.H. Judge Tetlow reversed the district judge's conclusion because he rejected its legal premise. He held:

> "In the absence of any express provision in the lease, granting a landlord the right to do things which might otherwise breach the covenant of quiet enjoyment, such a right would have to be implied. There is nothing in the wording of the lease that I have been referred to which would give rise to such an implication or give rise to such a construction. …. Such a right cannot be unfettered. If it is fettered, is it a right subject to taking all [or] reasonable steps, or is it a right subject to taking all possible precautions? ….
>
> "I suppose it might be arguable that if the necessary works could not be carried out at all without some disturbance mounting to a breach of covenant, then licence *pro tanto* would be implied. However, that does not meet the situation here. The finding of all reasonable steps having been taken does not equate to all possible steps having been taken or that the works would be impossible without some nuisance. I decline to put the construction upon the lease asked for by the respondent."

7. For reasons to which we now turn, the question where the burden of proof of impossibility lies and the possibility of remission for further fact-findings do not arise. In our judgment the test adopted and applied by the district judge was right, and that adopted and applied by the circuit judge was wrong.

Construing the lease

8. It is axiomatic that where the provisions of any contract, including a lease, come into conflict, they are to be interpreted and applied so as to give proper effect, if possible, to both of them. Neither side contends that to do so is not possible in the lease which is before the court; their dispute is about how the fit is to be achieved.

9. The covenant for quiet enjoyment in the present lease is expressly qualified by the parenthetic phrase "except as herein provided". Nicholas Dowding Q.C., for the lessor, does not predicate his principal argument upon this, although he relies on it as putting his case beyond doubt. As he submits, the fit between the covenants would have to be achieved even if the proviso were not there. His principal argument is that the covenant for quiet enjoyment is not a guarantee against all disturbance: it guarantees against disturbance only of that which is demised, and the demise includes the lessor's obligation to use its reasonable endeavours to keep the building in repair.

10. This proposition is unexceptionable; but the lessor in turn must live with its converse—that the obligation to keep the building in repair has to coexist with the tenant's entitlement to quiet enjoyment of the premises he is paying rent for. This *5 by itself points towards a threshold, for disturbance by repairs, of all reasonable precautions rather than all possible precautions.

11. There are other pointers to the same conclusion. The repairing covenant is there for the tenant's as well as the landlord's benefit. It is of no advantage to the tenant to be running a restaurant in a dilapidated building, any more than it is in the lessor's interest to own the reversion to one.

12. Both parties seek to make use of the proviso in the covenant for quiet enjoyment. Mr Dowding, on the one hand, relies on it—as we have said—as putting his case beyond doubt. David Berkley Q.C. for the tenant, on the other hand, submits that it is there purely to preserve the contractual rights of entry and re-entry; so that, by making these express, the parties have excluded the admissibility of any other ground for disturbing the tenant's quiet enjoyment. The argument might be an effective one if the proviso were so limited; but in our judgment it is not. The ways in which the tenant's quiet enjoyment may be disturbed under the lease plainly include the execution of structural repairs and maintenance. It is now clear from the decision of the House of Lords in *Southwark London Borough Council v Tanner [2001] 1 A.C. 1* , that:

> "the covenant for quiet enjoyment is broken if the landlord or someone claiming under him does anything which substantially interferes with the tenant's title to or possession of the demised premises or with his ordinary and lawful enjoyment of the demised premises. The interference need not be direct or physical" (*per* Lord Millett at p.23).

13. And then what would be the outcome if the test preferred by the County Court Judge were adopted? Take the present case. Assuming for the sake of argument that the restaurant was closed on Mondays, it would have been possible, however unrealistic, to erect the scaffolding and sheeting each Monday morning, to work on the building for the day and to strike the scaffolding in the evening, repeating the process for perhaps eighteen months or two years. As Mr Berkley accepted, such a course, though possible, would not be reasonable, not least because it would greatly inflate the cost to be borne ultimately not only by the claimant but—with no additional benefit to themselves—by the other tenants of the building.

14. The district judge's construction in our view conforms most nearly with what would have been apparent to the parties when they signed the lease. It would have been apparent that the tenant's enjoyment of the demised premises might be made temporarily less quiet and less profitable by the carrying out of structural repairs. It would similarly have been clear that the lessor's rights and obligations were neither to ride roughshod over the lessee's entitlements nor to be unreasonably impeded by them.

Other decided cases

15. We have reached the foregoing conclusion without reference to authority, because no decided case which is binding upon us is directly in point. In our judgment, however, the approach taken by the district judge is more consonant with the reported decisions in this field than is the approach preferred by Judge ***6** Tetlow. In *Lyttelton Times Company Ltd v Warners Ltd [1907] A.C. 476* , an appeal to the Privy Council from New Zealand concerning a hotel which shared premises with a 24-hour print shop, with predictable consequences for the sleep of its guests, Lord Loreburn L.C. said:

> "Ought the fact that one of the parties was the grantor and the other the grantee of a lease to dominate the decision of the case? … if A lets a plot to B, he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. …. The fact that one lets and one hires does not create any presumption in favour of either in construing an expressed contract ….
>
> [Counsel for the plaintiff hotel] argued the case … as though the common intention was that the plaintiffs should have reasonably quiet bedrooms. If it was so, that was only one half of the common intention. The other half was that the defendants should keep on printing. One cannot bisect the intention and enforce one half of it when the effect of doing so would be to frustrate the other half."

The Privy Council's reasoning confirms our view that the two covenants must be construed and applied so far as possible so as to coexist on a basis of parity, not of priority, respecting the terms of both.

16. This approach sits comfortably, in our view, with the classic judgment of Fry J. in *Saner v Bilton (1878) 7 Ch.D. 815* that a lessor's covenant to do structural repairs carried an implied licence to enter for that purpose:

> "It is further said that the construction of the covenant, as carrying with it an implied licence to enter, is inconsistent with the lessor's covenant for quiet enjoyment. I do not think it is, and for this reason, that the covenant for quiet enjoyment, if read as absolutely unqualified, is as inconsistent with an entry on the warehouse for a single moment as it is with an occupation for a month or a year … I think the covenant for quiet enjoyment must be read as subject to the licence which I have held to be implied in the covenant to repair."

17. Our preferred approach also sits comfortably with the law of nuisance. There (in the absence of the contractual relationship which robbed the defendant of a defence in *Owen v Gadd [1956] 2 Q.B. 99*) the law as stated by Clerk and Lindsell (18th ed., 2000) , para.19–15, is that:

> "Noise and dust caused by demolition and rebuilding will not be actionable if the operations are reasonably carried on, and all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours."

Reasonableness

18. We have deliberately made no reference so far to an aspect of the case to which the district judge paid express attention in the passage of his judgment cited above. He found that the work had been arranged to meet the claimant's requirements as far as possible, and that the lessor had been helpful with regard to the reduction and ***7** payment of the service charge. It is worth explaining what he was referring to, because it illustrates what may make the difference between the reasonable and unreasonable execution of repairs which are going to disturb a tenant's quiet enjoyment. In brief, before embarking on the works the lessors had sent the lessee a copy of the full estimate which they proposed to accept, prices included. The lessee wrote back, strongly querying the price but also pointing out that the proposed start date would interfere with the restaurant's busiest period over Christmas. The lessors, having considered these representations, postponed the start of the works until March 1997 and agreed to spread the first instalment of the consequent service charge over a year. It can readily be seen why the district judge's view that the lessor had taken all reasonable steps to respect the lessee's contractual interests was not contested on appeal. It will always be necessary for reasonableness to be looked at on the facts and in the light of the legal considerations which we have set out above.

19. This lease, like many leases, makes limited provision to compensate the tenant for interruption of the enjoyment of the demise. It is perfectly possible, at least in principle, to make provision in a lease to cover the kind of disruption which

has occurred here. In its absence, while there is no obligation or necessity to reflect the disturbance of quiet enjoyment by remitting rental service charges, an offer to do so may well help in establishing the overall reasonableness of the lessor's intervention.

Conclusion

20. The appeal will therefore be allowed and the judgment of the district judge dismissing the claim restored.

Reporter—David Stott.

Appeal allowed and the order of District Judge Russell dated January 31, 2002 be restored. The respondent to pay the appellant's costs here and below, the amount of such costs to be determined in accordance with the Community Legal Services (Costs) Regulations 2000.

Footnotes

1 Paragraph numbers in this judgment are as assigned by the court.

Tab 6

Hughes and Others (By their Litigation Friend) v Colin E. G. Richards (Trading as Colin Richards & Co.)


Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
9 March 2004

Case No: A3/2003/1911

Court of Appeal (Civil Division)

Neutral citation no: [2004] EWCA Civ 266, 2004 WL 343829

Before : Lord Justice Peter Gibson Lord Justice Jacob and Sir William Aldous

Tuesday 9 March 2004

On Appeal from the High Court of Justice Chancery Division

Birmingham District Registry His Honour Judge Norris Q.C. (sitting as a High Court Judge)

Representation

Miss Nicola Shaldon ((instructed by Messrs Knight & Sons of Newcastle-under-Lyme) for the Respondents.
Mr. Alexander Hill-Smith instructed by Messrs CMS Cameron McKenna) for the Appellant.

JUDGMENT

Peter Gibson L.J.:

1.. When A contracts with B for B to perform professional services in connection with the establishment of a trust for the benefit of C and B is negligent in the performance of those services with the result that C receives no benefit from the trust, does A or C have a remedy in tort against B? That is the primary issue raised on this appeal. It arises because David and Alison Hughes (“the parents”) by one action and their infant children, Thomas, Stephanie and Charlotte Hughes (“the children”) as the beneficiaries under a trust created by the parents, by another action have sued the Defendant, Colin Richards, alleging negligence by him in connection with the establishment of a trust for the benefit of the children. Mr. Richards applied for the striking out or dismissal of the children's claim. His Honour Judge Norris Q.C. sitting as a High Court judge in the Birmingham District Registry, Chancery Division, on 30 July 2003 refused the application. Mr. Richards appeals with the permission of the judge.

2.. The application was brought under CPR 3.4 , alternatively under Part 24 . Although the latter application permits the court to take account of the evidence which has been filed, the judge said that the evidence had not been relied on before him and he proceeded on the footing that the facts alleged by the children in their pleadings were to be assumed to be true for the purposes of the application. The hearing before us has proceeded on the same footing. It is, however, not irrelevant to note that by his Defence Mr. Richards has denied many of the facts relied on by the children for their allegation that he owed them a duty of care in the respects pleaded by them.

3.. I now summarise the facts taken from the Amended Particulars of Claim and the allegations made therein.

The Amended Particulars of Claim

4.. Mr. Richards is a chartered accountant practising in Stratford-upon-Avon. He held himself out to the parents as experienced at providing tax and investment advice. The parents owned all the shares in Castle Oils Ltd. He acted for them on the sale by them of those shares for £550,000 and a royalty agreement under which they were to receive royalty payments totalling £100,000 before deduction of tax.

5.. Mr. Richards was informed by the parents that they wanted to invest the royalty payments to provide for the future funding of their children's education. He advised them in April/May 1990 to set up an off-shore trust fund for their children's education which would enable them to avoid income tax on the royalty payments; the royalty agreement would be assigned to the trust. He provided them with an explanatory document entitled Information Memorandum on Offshore Trusts. In reliance on that advice and that document the parents in May 1990 instructed Mr. Richards to proceed with the setting up of the trust. They retained him to act for them as a tax and investment adviser and as their agent in connection with the investment of the royalty payments, the retainer including (a) the provision of advice on that investment, on the setting up of the trust and on taxation matters arising from that investment, and (b) that he should act with reasonable skill and care (see para. 17 of the Amended Particulars of Claim, the retainer there outlined being called by the judge “the investment retainer”). Mr. Richards advised the parents that a Swiss trading company, the shares in which would be held by the trust, should be formed.

6.. Mr. Richards advised the parents that they must have no involvement in the direction or administration of the trust. They further retained him to act, after the setting up of the trust and the Swiss trading company, on their behalf as their agent in all further matters concerning the trust and the company and to provide advice and information with regard to the trust and the company and to provide advice and information with regard to the performance of the trust and the company, it being an implied term that he would act with reasonable skill and care (see para. 19 of the Amended Particulars of Claim, the further retainer therein described being called by the judge “the monitoring retainer”).

7.. The parents signed a Trust Deed on 11 June 1990 and the trust, called the Thedis Trust, was registered in Liechtenstein with a Swiss bank as trustee. Thomas Hughes, born on 24 August 1987 and adopted by the parents on 12 February 1988, and Stephanie Hughes, born on 17 October 1989, were named in the Trust Deed as beneficiaries of the trust together with any further children of the parents, and any such further child could be added as a beneficiary. Charlotte Hughes was born on 31 March 1993 and was added as a beneficiary.

8.. The parents transferred £30,000 to the trust in June 1990. On 12 July 1990 the Swiss trading company, Cedrus AG (“Cedrus”), was formed. Another Swiss company, Serconta AG, was to manage Cedrus. On 27 August 1990 the parents agreed with Cedrus to sell to it the benefits of the royalty agreement for £25,000. That sum, plus £1,000 interest, was paid by Cedrus to the parents in two tranches, one in September 1990 and the other in February 1992.

9.. The parents paid Mr. Richards in respect of his expenses £721.74 and £6,000 in June 1990 and £6,325 in respect of his fees in December 1990.

10.. Two royalty payments, each of £37,500 after deduction of £12,500 tax, were paid to Cedrus in October 1991 and 1992. The tax was not recovered nor, because of the Double Tax Convention with Switzerland, was it recoverable by Cedrus.

11.. No sums were paid out of the trust to or for the benefit of any of the children. On 7 June 1999 Cedrus was put into liquidation and on 5 July 1999 the trust was struck off the register. The £30,000 paid by the parents to the trust and the royalty payments were largely absorbed by the setting up costs, trustees' and directors' fees, administrative charges, accounting fees, bank charges and taxation liabilities.

12.. It is alleged in para. 20 of the Amended Particulars of Claim that Mr. Richards assumed a responsibility to the children as beneficiaries or future beneficiaries for the advice given on investment and taxation and the setting up of the trust and Cedrus and the services provided in relation to that setting up and the subsequent monitoring. It is pleaded in para. 21 that he owed the children a duty of care at common law to use reasonable skill and care in the performance of the investment retainer and the monitoring retainer. It is said in para. 22 that at all material times the parents, acting on behalf of and for the benefit of the children, acted in reliance on the advice of Mr. Richards in relation to the investment of the royalty payments in the trust and Cedrus, taxation matters and the performance of the trust and Cedrus.

13.. The children allege negligence by Mr. Richards. In para. 59 of the Amended Particulars of Claim the children set out particulars of negligence and breach of duty. These, as the judge said, boiled down to two complaints. The first, relating to the investment retainer, is a complaint that the scheme devised by Mr. Richards was unsuitable because it did not enable recovery by Cedrus of income tax from the royalty payments, and the establishment and running costs of the trust and Cedrus exceeded the income likely to be produced so that capital would be depleted by those costs. The second, relating to the monitoring retainer, is that Mr. Richards failed to monitor the performance of the trust and Cedrus failed to inform the parents of the erosion of capital by the charges and outgoings and failed to advise them that the trust and Cedrus should be wound up.

14.. It is further alleged in para. 60 of the Amended Particulars of Claim that, had the parents been properly advised, they would have been told of alternative investment schemes, the most appropriate of which would have been investment of the royalty payments in a range of unit trust accumulation units to be held by the parents on trust for the benefit of the children. Particulars are given of the loss and damage suffered by the children under two heads:

(a) had the £75,000 royalty payments been invested in 1991 and 1992 in accordance with competent advice, that sum would have increased in value to approximately £220,000–£225,000 as at 1 January 2002;
(b) alternatively, had Mr. Richards advised the parents to wind up the trust and/or Cedrus and transfer the assets to the parents for investment for the benefit of the children at any material time prior to the complete loss of the capital, the parents would have accepted that advice and the children would have retained the benefit of such part of the assets as then remained.

The first of those two heads has been referred to as the investment claim, the second as the salvage claim.

15.. The claim by the parents in their action commenced at the same time as the children's action is in very similar form, though there are some differences in the way the duty of care is said in the parents' action to be owed to the parents, and the heads of loss and damage suffered by the parents include not only the investment claim and the salvage claim but also three further claims:

(c) (as an alternative to (a) in para. 14 above) the parents claim the monies paid to the trust and Cedrus (but would give credit for the sums they received totalling £26,000 and for a further sum of £2,848 paid at Mr. Hughes' request in July 1993 to a named person);
(d) alternatively, the parents claim £64,000 paid by them in school fees for the children and £145,000 which they say will be paid in future fees; and
(e) the sums totalling £13,046.74 paid to Mr. Richards by the parents.

16.. In the Defence to the parents' claim limitation points are taken against the parents. We are told that they may form the subject of an application for a preliminary issue if the children's claim is struck out.

The judge's judgment

17.. The judge in his judgment noted the rival arguments of Mr. Hill-Smith for Mr. Richards in support of the application to strike out the children's claim or to have it dismissed and Miss Shaldon for the children, resisting the application. Mr. Hill-Smith relied in particular on two passages in the speech of Lord Goff in *White v Jones [1995] 2 AC 207* at pp. 262 and 265,6 and one in the speech of Lord Browne-Wilkinson at p. 276, suggesting that in relation to certain transactions inter vivos, in contrast to transactions involving testators giving testamentary instructions to solicitors, the third party beneficiaries intended to benefit under the transaction could not sue the solicitors who were negligent in carrying out the transaction.

18.. The judge expressed his conclusions thus:

> “56 I am not going to strike out the children's claim. First I regard Mr. Hill-Smith's submissions as extremely strong in relation to the investment retainer, and as in accord with orthodox learning. But I am impressed by Miss Shaldon's submission that all of the observations cited have been obiter, admittedly from the highest authority, but given at a time when the basic principles themselves were just being ascertained and established. There is no decided case drawn to my attention where these obiter observations have in fact been applied to defeat a claim.
>
> 57 Secondly, certainly part of the reasoning in *White v Jones* proceeds on the footing that it lies in the power of the donor to put right the intended gift which has failed, either because the original

> transaction has never effectively proceeded, or on the footing that if it has, the intending donor can, by proceeding against the solicitor, recoup the property and redirect it. It may make a difference that in the present case the transaction (the establishment of the trust) was an effective one and it is the nature of the investment (as it has been called) that has failed (ie the preservation of the capital). Or it may be that a court at trial would determine that the third party claim by the children should not in law depend on whether or not the parents as donors can afford to sue the solicitor to recoup damages and to make the gift which they originally intended.
>
> 58 I have reached the clear conclusion that it would be wrong on this summary application to express a concluded view on those difficult questions, particularly since I am satisfied that the “monitoring claim” is by no means straightforward, and that I cannot say in relation to that claim that there are no reasonable grounds for bringing it. The monitoring claim arises from a retainer entered into after the parents had disposed of the relevant property. It was a retainer, if established, which was for the benefit of the children. It seems to me that the decision of the *Court of Appeal in Dean v Allin & Watts [[2001] PNLR 921]* provides at least an apparent foundation for saying that where a retainer was intended specifically to confer a benefit on a third party, that third party may sue on it where the client has suffered no ascertainable loss. That seems to me to accord also with the decision in [*Woodward v Wolferstans 20 March 1997* , a decision of Mrs. Martin Mann Q.C. sitting as a deputy judge of the Chancery Division]. Since I am satisfied that that claim must go to trial, I see no advantage in striking out the claim based on the investment retainer. I shall therefore refuse the relief sought in the application ….”

19.. The judge required that the claims be amended to indicate that they were brought in the alternative. That has now been done, the children's and the parents' pleadings now stating expressly that their respective claims are brought in the alternative with the children's claim being the primary claim. The judge also required the question of representation to be addressed. He said that he gave no direction that there should be separate representation by counsel but he said that he saw difficulties at trial if claims were advanced in the alternative by different claimants through the same counsel. I return to that point later.

The rival submissions

20.. On this appeal Mr. Hill-Smith makes the following submissions which I summarise in my own words:

(1) the judge, while correctly accepting that the submissions made below on behalf of Mr. Richards in relation to the investment retainer reflected orthodox learning, failed to give effect to those submissions in refusing to strike out the children's claim;
(2) the judge should have struck out the children's investment claim on the basis that the loss was that of the parents who had provided the funds and not that of the children; the parents by their claim for damages could remedy the breach of duty by Mr. Richards;
(3) the judge erred in not giving effect to the obiter views of Lord Goff and Lord Browne-Wilkinson in *White v Jones* ;
(4) the right of the parents to recover damages in respect of the sums invested in the scheme is fully consistent with the principles governing the right of the promisee to recover damages in a building contract for the benefit of a third party; the fact that the promisee has transferred the property the subject of the contract does not prevent the promisee from recovering damages (see the decisions of the *House of Lords in Linden Gardens Trust v Lenesta Sludge Disposal [1994] 1 AC 85* and *Alfred McAlpine Construction Ltd. v Panatown Ltd. [2001] 1 AC 518*);
(5) the judge was wrong to treat the monitoring claim as subject to different considerations;
(6) the judge in exercising his discretion should have taken account of the fact that the children's claim is supported by legal aid; that it is in the public interest that a claim with little prospect of success brought on behalf of a legally aided claimant should not be allowed to proceed to trial, and that it is most unlikely that a costs order could be enforced against the children.

21.. For the children a Respondent's Notice has been filed, seeking to uphold the decision of the judge on additional grounds. Miss Shaldon makes these submissions:

(1) the judge has not been shown to have made any error in the exercise of his discretion or to have reached a decision falling outside the ambit of reasonable disagreement;
(2) the judge was right for the reasons which he gave to refuse to strike out a claim in an area of the law which is uncertain and developing when the facts have not been found;
(3) the judge should have held that the loss was that of the children, the parents by an effective transaction having divested themselves of the £30,000 paid to the trust and their right to the royalty payments; the loss was suffered by the failure of the investment which took place over a period of years, and the measure of damages claimed is the value of the fund which, if properly invested, would have been held on trust for the children.

Discussion

22.. I start by considering what is the correct approach on a summary application of the nature of Mr. Richards's application at this early stage in the action when the pleadings show significant disputes of fact between the parties going to the existence and scope of the alleged duty of care. The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see *Barrett v Enfield London Borough Council [2001] 2 AC 550* at p. 557 per Lord Browne-Wilkinson). Lord Browne-Wilkinson went on to add:

> “[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.”

23.. That further observation by Lord Browne-Wilkinson seems to me to be particularly pertinent to the circumstances of the present case. This case relates to what Steyn L.J. in *White v Jones* at p. 235 called “the interface of what has traditionally been regarded as the separate domains of contract and tort”. The general rule is that a professional adviser acting on behalf of a client owes a duty of care only to his client and, because the relationship will almost certainly be contractual, the adviser will owe such duty of care both in contract and in tort. In contract the general rule is that substantial damages can only be given for loss suffered by the claimant promisee. However the law has recognised limited exceptions to those general rules in specific areas. For example in cases involving carriage of goods where it is in the contemplation of parties to a contract concerning goods that the proprietary interest in the goods may be transferred from one owner to another after the contract has been entered into and before a breach causing loss or damage to the goods, the promisee is treated as having entered into the contract for the benefit of subsequent owners of the goods and is entitled to recover by way of damages for breach of contract the loss sustained by those for whose benefit the contract is entered into (see *The Albazero [1977] AC 774* at p. 847 per Lord Diplock). The principle of that exception has been extended to building contract cases by *Linden Gardens* , so that the promisee, contracting for work to be done on its property, but then, as was foreseeable, selling the property to a third party before the contract was breached, can recover substantial damages on behalf of the third party suffering from the defective performance of the contract. The minority view of Lord Griffiths in the House of Lords in that case, that the promisee had itself suffered a loss by reason of the breach of contract in that it did not receive the bargain for which it had contracted, was subsequently approved in *Alfred McAlpine* , though Lord Millett at p. 591 restricted the principle to building contracts and other contracts for the supply of work and materials where the claim was in respect of defective or incomplete work or delay in completing it.

24.. In *White v Jones* a further exception has recently been recognised: a contract between a testator and a solicitor for the solicitor to draw a will benefiting third parties as legatees may give rise to a tortious duty of care owed to the third parties. The House of Lords, impelled by a strong desire to do practical justice in a case where otherwise the only person who had a valid claim was the testator who suffered no loss and the only person to suffer loss had no valid claim, fashioned a remedy under the principle of *Hedley Byrne & Co. v Heller & Partners Ltd. [1964] AC 465* , by holding that the assumption of responsibility by the solicitor towards his client extended to the intended beneficiaries so that they could recover for their economic loss.

25.. The implications of *White v Jones* are being explored case by case. Thus, in *Carr-Glynn v Frearsons [1999] Ch. 326* this court extended the principle of *White v Jones* , so that where a testator had to sever a joint tenancy of a property to effect a testamentary gift of the testator's share, the solicitor was held liable to the intended beneficiary for the solicitor's failure to advise the testator of the need to serve a notice of severance.

26.. In *White v Jones* there was some discussion of whether in the case of an inter vivos gift the donee or the donor had the right to sue the solicitor advising on the gift if there was negligence. Lord Goff (*[1995] 2 AC at p. 262*) referred to the example of an imperfect gift, when the mistake comes to light during the donor's lifetime but the donor declines to perfect it in favour of the intended donee. Lord Goff expressed the view that the donee could not have any claim against the solicitor, it being enough that the donor is able to do what he wishes to put matters right. Again at p. 265 Lord Goff referred to another example, a gift directed to a person other than the intended donee during the donor's lifetime. He said that the donee would have no claim because the donor would either have been able to recover the gift from the recipient or, if not, he could have recovered the full amount from the negligent solicitor as damages. Lord Browne-Wilkinson at p. 276 said of transactions inter vivos that they take immediate effect and that the consequences of the solicitor's negligence are immediately apparent, and, when discovered, they can either be rectified by the parties or damages can be recovered by the client.

27.. Those remarks were, as Judge Norris observed, obiter. Further, it is not obvious that they covered an example corresponding to the circumstances of the present case where the gift was neither imperfect nor misdirected nor were the consequences immediately apparent, but only emerged several years after the scheme, which the parents intended to enter into, was implemented; only then was the loss of the investment discovered. The views expressed were not tested by consideration of what would be the position if the donor, the availability of a remedy to whom was the crucial factor in the views expressed, died or became bankrupt or was denied the remedy by reason of a limitation defence. In no subsequent case, again as Judge Norris observed, has there been an actual decision applying those remarks. However, it is right to note that in *Hemmens v Wilson Browne [1995] Ch. 223* , decided after this court's decision in *White v Jones* but before the decision of the House of Lords, His Honour Judge Moseley Q.C., sitting as a High Court Judge, held that the intended beneficiary under an inter vivos gift which, through the negligence of the donor's solicitor, gave the beneficiary no enforceable right, was owed no duty of care by the solicitor as the donor had a remedy against the solicitor. That is consistent with Lord Goff's subsequent comments on imperfect gifts. In *Gorham v British Telecommunications plc [2000] 1 WLR 2129* at p. 2140 Pill L.J. made a passing (but approving) reference to Lord Goff's example of the imperfect gift. In *Gorham* this court appears to have assumed that the death of a customer of an insurance company, which had given him negligent advice in relation to the provision of benefits after his death for his family, resulted in the customer's estate having no claim against the insurance company, and that only the family would have a remedy; accordingly the family was held to be owed a duty of care by the insurance company in respect of the advice to the customer.

28.. In the light of the authorities I would accept that Mr. Richards has a strongly arguable case that the parents and not the children are owed a duty of care in respect of the investment claim. However, I would not go so far as to say that it is certain that the children's claim will fail in the particular circumstances of this case. I have already referred to Miss Shaldon's submission based on the fact that the parents intended the particular transactions whereby they parted with the monies which went to the trust and Cedrus and that they were effective transactions.

29.. I would make similar comments in relation to the monitoring claim. It is not disputed on this appeal that the monitoring retainer was accepted by Mr. Richards after the parents had divested themselves of any interest in the assets transferred to the trust and Cedrus. However, I doubt if the decisions in *Dean* and *Woodward* to which Judge Norris referred can truly be said to provide a foundation for the children's claim, because they are distinguishable on their facts. In *Dean* solicitors had been retained by intending borrowers who intended that valid security should be provided by one of them to the lender. Through the solicitors' negligence no valid security was provided. This court held that the solicitors assumed responsibility to the lender in circumstances in which the solicitors' clients had suffered no loss. In *Woodward* the claimant purchased property on a mortgage taken out by her but guaranteed by her father. Solicitors were retained by the father to handle the conveyancing. They failed to advise her on the transaction and she found herself unable to pay the mortgage payments. The solicitors were found to owe her a duty of care in circumstances in which the father could not sue, but her claim was dismissed because even if properly advised she would have entered into the same transaction. Those decisions provide little assistance in a case such as the present where the persons who retained the professional adviser may have good claims against him.

30.. However, in any event the present case seems to me plainly one where the relevant area of law is still subject to some uncertainty and developing and where it is highly desirable that the facts should be found so that any development of the law should be on the basis of actual and not hypothetical facts. That is underlined by the fact that both the children and the parents

make claims for loss which, while partly identical, are not wholly so. I of course accept that it is a cardinal principle that there cannot be double recovery in respect of the same loss. It is not asserted otherwise by the children.

31.. As matters now stand there will be a trial on the parents' claim, which raises virtually the same issues as are raised in the children's action. To allow the children's action to go to trial is not likely to add significantly to the time of the hearing. Whilst I note the judge's view that the children and the parents may need to be separately represented, it is not clear to me why the same counsel could not properly argue the case in the alternative, as the pleadings now make plain is the intention, with the children's claim as the primary claim. Miss Shaldon has told us that she felt comfortable at representing both sets of claimants. If she does, the costs of trying the children's action with the parents' action will not significantly add to the costs which will be incurred on the parents' action.

32.. I can of course understand why as a matter of tactics Mr. Richards would like the children's action out of the way so that he can then deal only with the parents, who may have a limitation problem and who are not legally aided. But that is not a factor which should have weighed in the exercise of the court's discretion. I think it wrong in principle that the court should pay any regard to the fact that the children have public funding. That would discriminate against publicly funded litigants, contrary to s. 31 (1)(b) Legal Aid Act 1988 .

Conclusion

33.. This court cannot interfere with the exercise of discretion by the judge to refuse to strike out or dismiss the action unless the judge has erred in law or taken into account irrelevant matters or left out of account relevant matters or otherwise has gone plainly wrong. I am not persuaded that the judge has done any such thing. On the contrary, it seems to me that in the particular circumstances he was right to allow the children's action to go to trial. I would dismiss this appeal.

Jacob LJ :

34.. I agree with the judgment of Peter Gibson LJ. There is also, it seems to me, a narrower, arguable ground of liability. This is that in relation to both retainers the Defendant should be regarded as acting not only for the parents, but also directly for the children. After all they could not act for themselves — they were under age. Putting it another way, it is at least arguable that viewing the transaction as a whole, the defendant was advising both donors and donees. If that analysis is correct, then this would not be a case of a duty of care extended to a stranger intended to be benefited by a contract between two others. There would be a direct contractual duty owed to the children.

35.. The children's pleading (paragraph 22) covers this analysis, alleging as it does, inter alia, that the parents were “acting *on behalf of* and for the benefit of the claimants.”

Sir William Aldous:

36.. I agree with both judgments.

Order: Appeal dismissed; the appellant to pay the respondent's costs of the appeal, to be subject to detailed assessment on the standard basis if not agreed; respondent's costs to be the subject of a detailed assessment in accordance with the Community Legal Service (Costs) Regulations 2000.

Tab 7

London Borough of Southwark v Leaseholders of the London Borough of Southwark

Positive/Neutral Judicial Consideration

Court
Upper Tribunal (Lands Chamber)

Judgment Date
19 December 2011

Case Number: LRX/86/2010

Upper Tribunal (Lands Chamber)

[2011] UKUT 438 (LC), 2011 WL 6328774

Before: The President

Dated 19 December 2011

Tribunals, Courts and Enforcement Act 2007

In the Matter of an Appeal Against a Decision of a Leasehold Valuation Tribunal for the London Rent Assessment Panel

Re: All Leasehold Properties in the London Borough of Southwark

Sitting at 43–45 Bedford Square, London, WC1B 3AS on 17 October 2011

Representation

Philip Rainey QC and Simon Butler instructed by Director of Communities, Law and Governance , London Borough of Southwark, for the appellants.
Andrew Dymond instructed by Anthony Gold for the Leaseholders Association of Southwark.

The following cases are referred to in this decision:.

Auger v London Borough of Camden LRX/81/2007, 14 March 2008, unreported .
R v Soneji [2006] 1 AC 340 .

The following further cases were referred to in argument:.

Daejan Investments Ltd v Benson [2011] 1 WLR 2330 .
Eltham Properties Ltd v Kenny LRX/161/2006 .
Paddington Basin Developments Ltd v West End Quay Management Ltd [2010] 1 WLR 2735 .

Decision

George Bartlett QC

Introduction

1. This appeal concerns five major works agreements entered into between the appellants, the London Borough of Southwark, and five contractor companies. Under these agreements each contractor would carry out substantial repair and renewal works to the council's housing. The agreements are qualifying long-term agreements (QLTAs) within the meaning of section 20 of the Landlord and Tenant Act 1985 and are subject to the consultation requirements contained in that section and the Service Charges (Consultation Requirements) (England) Regulations 2003 . Failure to comply with those requirements has the effect of limiting to £250 the amount that any leaseholder must pay for works carried out under such agreement, unless dispensation has been granted by a Leasehold Valuation Tribunal under section 20Z A of the Act. The council's total annual budget for works to be carried out under the agreements is about £85 million, and properties to which the limitation would apply constitute about one-quarter of the 57,000 properties for which it has repairing obligations. If the limitation were to apply, therefore, the council would be unable to recover many millions of pounds spent on works carried out under the QLTAs.

2. Under paragraphs 4 and 5 of Schedule 2 to the Regulations the council were required to prepare a proposal for each proposed agreement and to give notice of the proposal to each tenant and any recognised tenants' association that represents some or all of the tenants. Paragraph 4 prescribes the information that the statement must contain. The council considered that they could not provide the information required, and they therefore applied to the LVT under section 20Z A for dispensation in advance of serving the notices of proposal. The LVT refused to grant dispensation, concluding that there was ample scope for the council to provide much clearer and more information to the leaseholders and that it might therefore in future be able to comply with the consultation requirements. The LVT granted limited permission to appeal on 24 May 2010. On 1 September 2010 I extended the permission so that it became unlimited, and I directed that the appeal should be determined by way of rehearing.

3. The hearing before the LVT was on 6–11 January 2010, and its decision was given on 22 March 2010. Before the decision was given, on 22 January 2010, the council served notices of proposal on all leaseholders, and on 11 June 2010 (by which time the LVT had given permission to appeal) they entered into the five proposed agreements with the contractors. Each agreement contained a clause making it terminable in the event of the present appeal being decided against the council. Works under the agreements began in November 2010 and have continued.

4. The respondents to the appeal are the Leaseholders Association of Southwark 2000 (otherwise known as LAS 2000), a company limited by guarantee which was formed to represent the interests of leaseholders in the London Borough of Southwark. There were a number of individual leaseholders who appeared before the LVT but none of these has chosen to respond to the appeal.

The three stages of consultation

5. The consultation requirements relating to QLTAs, for which (as with the present agreements) public notice is required, and to qualifying works (QWs) carried out under QLTAs comprise what for present purposes can be identified as three stages. At the first stage, under Schedule 2 of the Regulations, the landlord is required to give to each tenant and any relevant tenants' association notice of his intention to enter into the QLTA and to take into account any observations received. The second stage, also under Schedule 2 , requires the landlord to prepare a statement of proposal in relation to the QLTA, give notice of it to each tenant and any relevant tenants' association, take into account any observations received and respond to such observations. The third stage, under Schedule 3 , is that at which specific QWs are proposed. The landlord is required to give notice to each tenant and any relevant tenants' association describing in general terms the work to be carried out and the total cost; and again, he is required to take into account any observations received.

Notice of Intention

6. The council's Notice of Intention was dated 17 November 2008 and was served on all leaseholders shortly after that. It included the following statements:

> "The Council is proposing to enter into a long-term agreement with a number of contractors to carry out any major works required to properties across the borough over the next five years, with an option to extend the agreements for a further five years. Before going out to tender the Council is required to consult all leaseholders in properties where the Council has maintenance responsibility.
>
> The purpose of this Notice is to provide you with details of the scope of the contract and the reasons why the Council intends to enter into it, to enable you to make observations.
>
> Please note that you will only be affected by this agreement if your block is included in the major works contract which is carried out in the future by one of the contractors appointed in this agreement.
>
> What is this agreement?
>
> The Council is responsible for the repair and maintenance of the very large portfolio of council properties with a capital programme of about £85 million per annum. In order to make the most cost-effective use of the resources that are available to meet this responsibility, the Council has changed its major works delivery strategy.
>
> Following restructuring of the Council's investment delivery, it is intended that major works across the borough should be delivered through a long-term agreement with five contractors with one contractor delivering major works in each of four geographical areas, and a further contractor carrying out work to houses that do not form part of an estate. It is proposed that the long term agreements will be based on a schedule of rates tender whereby each potential item of work is priced in advance, but with a partnering arrangement which allows for the costs to be negotiated to reflect market conditions and any saving that can be made as a result of the arrangement…
>
> The work that could be carried out under this agreement would include any substantial repair and renewal work to the block, including repairs and the renewal of roofs, windows, doors, brickwork and concrete repairs, external decorations, repair and renewal to pipe work and rainwater goods. It may also include some mechanical and electrical work, such as district heating boilers, electrical mains, door entry systems where they are integral to a contract…
>
> Currently over thirty contractors work across the borough, largely on individually tendered contracts. The valuation of the contracts carried out across the borough have indicated that these individually tendered contracts do not take full advantage of the economies of scale and bulk purchasing power of such a large programme of work, and face competition from other large projects in both the public and private sector. In addition traditionally tendered contracts do not include an incentive to reduce costs in the course of the contract e.g. to react to changes in market conditions.
>
> The Council believe that developing a long-term relationship with a smaller number of contractors will seek to address all these issues. The new approach will help to attract the most competitive bids from contractors and offers an opportunity to work with the contractor to plan work over the longer term to effectively manage contract costs. It also offers an opportunity for contractors to work with both the council and residents in the long term, taking advantage of local knowledge and developing a relationship with residents on the estates where they are working by maintaining a consistent workforce."

Notice of Proposal: the requirements

7. Under paragraph 4(1) of the Schedule 2 to the Regulations the landlord is required to prepare, in accordance with the provisions of the paragraph, a proposal in respect of the proposed QLTA. Of particular relevance in relation to the present application are the requirements contained in sub-paragraphs (4), (5), (6) and (7):

> "(4) Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the relevant contribution to be incurred by the tenant attributable to the relevant matters to which the proposed agreement relates, the proposal shall contain a statement of that contribution.
>
> (5) Where –
>
> (a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4); and
>
> (b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of his expenditure under the proposed agreement,
>
> the proposal shall contain a statement of the amount of that estimated expenditure.
>
> (6) Where –
>
> (a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (4) or (5)(b); and
>
> (b) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters to which the proposed agreement relates,
>
> the proposals shall contain a statement of that cost or rate.
>
> (7) Where it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (6)(b), the proposal shall contain a statement of the reasons why he cannot comply and the date by which he expects to be able to provide an estimate, cost or rate."

8. Paragraph 5(1) provides that the landlord must give notice in writing of the proposal prepared under paragraph 4 to each tenant and, where a recognised tenants' association represents some or all of the tenants, to the association. Under sub-paragraph (2) the notice must be accompanied by a copy of the proposal or specify the place and hours at which the proposal may be inspected, and it must invite the making of observations in relation to the proposal within a specified period. Under paragraph 6 the landlord is required to have regard to any observations made within that period, and under paragraph 7 he must within 21 days give notice in writing of his response to any observations received.

9. Paragraph 8 provides:

> "8. Where a proposal prepared under paragraph 4 contains such a statement as is mentioned in sub-paragraph (7) of that paragraph, the landlord shall, within 21 days of receiving sufficient information

> to enable him to estimate the amount, cost or rate referred to in paragraph (4), (5) or (6) of that paragraph, give notice in writing of the estimated amount, cost or rate (as the case may be)–
>
> (a) to each tenant; and
>
> (b) where a recognised tenant's association represents some or all of the tenants, to the association."

The application for dispensation

10. Section 20ZA(1) provides that, where an application is made to an LVT for a determination to dispense with all or any of the consultation requirements in relation to any QW or QLTA, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements. The council applied to the LVT on 24 July 2009 for dispensation from the requirements of paragraph 4(4), (5), (6) and (7). They gave the following reasons for seeking dispensation:

> "The council cannot comply with paragraph (4) because individual service charge contributions cannot be ascertained until they have been surveyed and the packages of work drawn up and costed.
>
> The council cannot comply with paragraph (5) because the cost of work to individual blocks cannot be ascertained until they have been surveyed and the packages of work drawn up and costed.
>
> The council cannot comply with paragraph (6) because the unit costs for works to individual blocks cannot be ascertained until the packages of work have been drawn up. The unit costs will be based on the pricing model, that will take into account any variation to the elements of the individual blocks. The council does not believe that the pricing model itself will be sufficient to comply with the requirements of paragraph (6) but will of course be making the tenders available to leaseholders for viewing as part of the consultation process.
>
> The council cannot comply with paragraph (7) because the date by which the estimates will be available will depend on the availability of funding. It is probable that any dates given at the time of the notices of proposal will change, dependent on the availability of funding in future years."

The Notice of Proposal

11. On 23 December 2009 the council sent to each leaseholder a draft notice of proposal. They provided a copy to the LVT, and they relied on it in their case before the LVT. The notice of proposal that they subsequently served was in substantially the same form. It contained the explanatory material that had previously been included in the notice of intention, and appended to it were the observations that the council had received in response to that notice. The statement itself began as follows:

> "When entering into an agreement like this the Council is required to provide a statement of the tenders and costs, and a summary of leaseholders' observations. The following information is an abridged version of the statement. The statement itself is a very large document, which includes the priced information received from the contractor, and the proposed programme of work for the first two years of the contracts. The full statement is available for viewing at the Home Ownership Unit, 376 Walworth Road, London SE17 2NG, Monday to Friday between the hours of 10am and 4pm."

12. The statement summarised the work that could be carried out under the agreement in the way that the Notice of Intention had done, and it gave details of the tender process, identifying the five contractors who had been successful in the tender process and the areas of the borough to which each contract related. Under the heading "Details of costs" the statement said:

> "Under the terms of your lease you are required to pay your due proportion of the cost, carry out repairs, maintenance and renewal to your block and estate. You will only be charged if such works are carried out, and prior to the contractor for your area being given any such order, you will receive a further consultation notice giving you details of the works and costs and giving you the opportunity to make comments on the proposals."

13. The notice went on to say that the council as landlord were required under section 20 to notify each tenant of the estimated service charge for the contract, or the total cost to the block or other premises for the contract, or the current unit, hourly or daily rate for the works, or the date by which the council expected to be able to provide this information (ie the requirements under paragraph 4(4), (5), (6) and (7)). It said that the council did not believe that it had sufficient information to comply with any of these requirements, and so it had applied to the LVT for dispensation from that aspect of the consultation.

14. As far as the estimated service charge and the total block costs were concerned (requirements (4) and (5)), this was said:

> "The council will not be able to provide you with either an estimated service charge or total costs to your block for works which may take place under this contract until your block has been surveyed and the works specified and costed.

15. In relation to unit rates (requirement (6)(b)), this was said:

> "The full statement includes the pricing models and schedules of rates from which the cost of any work to your block or estate will be constructed. While these prices will not be increased until 31st March 2012, the Council hopes to be able to negotiate some reductions during this period. The prices will be subject to an annual appraisal starting in the financial year 2012/13. The contracts include a mechanism for increasing the prices by buildings inflation, following which each element will be negotiated to try to obtain a reduced cost. As the inflationary increase and subsequent negotiated price will not be known until the annual review, the unit rates that are currently available may not be the same as those used to construct your service charge even if your block or estate is included in the first phase of the contract. The Council does not believe that this is sufficient to comply with the legislation."

16. In relation to requirement (7) the notice said:

> "With regard to the date by which the information will be available, at this stage, the Council only has available a proposed two year programme. This is included in the full Paragraph 4 statement available for viewing at 376 Walworth Road. The blocks and estates affected are identified below. If your block is included on the programme, then the latest time that the council expects to be able to provide you with the cost information for your block is the end of the financial year that the work is programmed for. However, the Council will provide you with the relevant pricing information, including an estimated service charge, as soon as it becomes available, and prior to any order being given to the contractor, or work being started on your block.
>
> If your block is not included in the two year programme then the only date that we can give you by when we expect to be able to provide you with cost information is 31 March 2020. If your block is programmed for work under these contracts at any time, then the relevant pricing information will be provided prior to any order being given to the contractor and before any work is being started. However, at this stage the council cannot tell you when work is likely to take place and so can only confirm that if your block is programmed for work you will receive the cost information prior to 31 March 2020. Again, the council does not believe that this is sufficient to comply with the legislation, and have asked the Leasehold Valuation Tribunal for dispensation on this requirement."

Factual matters

17. The council lodged five witness statements. They were from David Lewis, the council's Head of Maintenance and Compliance; Martin Green, the Head of Home Ownership Services in the council's Home Ownership Unit; Louise Turff, the Service Charge Construction Manager in the Home Ownership Unit; Shaun Regan, the Finance and Performance Manager in the council's Housing Finance team; and Carla Blair, the Capital Works Manager in the Home Ownership Unit. Mr Lewis, Mr Green and Miss Turff were called and were cross-examined. There was little disagreement between the parties on the factual matters on which they gave evidence, and following the hearing an agreed statement of facts was prepared and agreed between the parties. What follows is derived from this agreed statement.

18. The council own and manage some 42,000 tenanted properties. They also manage a further 13,500 leasehold properties, as freeholder, and 1,500 properties sold freehold with service charge covenants. This housing stock represents a huge social resource for the borough. While the council have significant resources to invest in the stock, the investment need far exceeds them. The council therefore had to look at ways in which they could ensure that planned maintenance schemes were carried out to a high standard whilst providing value for money. They consider that partnering procurement is a key strategy in achieving these objectives.

19. Before the partnering procurement approach was adopted, the council commissioned Deloittes, one of the leading consultancies, to carry out an appraisal of the options available to improve major works procurement and delivery. Their views and recommendations helped to inform the new major works strategy. Previously, contracts were individually tendered on a scheme-by-scheme basis, which is highly inflexible. Each individual scheme had to be programmed 18 to 24 months in advance. The long delays in bringing schemes to fruition and the protracted process involved in specifying and managing

individual scheme processes were highly inefficient and built a high level of inflexibility into the programme. In addition the specification of individual schemes, with a wide range of design options, both increased the management costs of the individual schemes and created longer term maintenance problems for the council, because of the problems in sorting a wide variety of components. There was also no joining up of arrangements between contracts, even with the same contractor, so as to speed delivery, reduce costs or introduce added value benefits, such as community chests or apprenticeships. Resident satisfaction with schemes was relatively low.

20. The conclusion of the options appraisal was that performance could be substantially improved by moving to a new way of procuring and delivering contracts. The council was also encouraged to enter into partnering agreements to carry out major works to its housing stock across the borough as recommended in the Egan Report on Rethinking Construction (1998), which had been commissioned by the Government. The council's new strategy was to move to borough wide partnering contracts for up to 10 years (an initial 5 years with an option to extend). It was agreed by the council's executive in October 2008.

21. The council's desired strategic outcomes of the new procurement strategy were expressed to be to:

(i) introduce a longer term contract for procurement of major works programmes;
(ii) maximise investment outcomes by achieving best value in contracting arrangements;
(iii) maximise the positive impact of stock investment for residents and address the ongoing concerns expressed by residents about the quality and costs of major works;
(iv) increase residents' satisfaction with major works projects;
(v) provide an effective vehicle for delivering an effective asset management strategy;
(vi) reduce the number of major works contractors operating on estates to a minimum of 4 and maximum of 8;
(vii) introduce better controls for the supply chain and minimise the number of components used across the housing stock;
(viii) improve the perceptions of leaseholders as to the quality and value for money of major works; and
(ix) reduce the level and cost of internal resources committed to tendering.

22. Having considered the options the council concluded that the appropriate strategy was to enter into partnering agreements with five different contractors. Four of the agreements would relate to council estates in four separate areas of the borough ((1) Borough, Bankside and Woolwich; (2) Bermondsey and Rotherhithe; (3) Camberwell and Peckham; and (4) Nunhead, Peckham Rye and Dulwich). The fifth agreement would cover properties across the whole of the borough not situated on any estate (referred to as street properties).

23. Procurement of these new major works contracts commenced in December 2008. The Invitation to Tender was issued at the beginning of July 2009 for return at the end of August. Prices were evaluated using four main elements, namely, lowest price to deliver work to a pilot project (an actual live scheme needing refurbishment in each area); lowest price for term composite items (similar to a schedule of rates) and preliminaries; lowest percentage profit and lowest percentage for central office overheads.

24. Most partnering contracts use varying forms of schedules of rates and indeed the council have used them in two earlier partnering projects. The problem encountered with both previous projects, however, was that the rates were not sufficiently extensive to ensure on-going value for money. For this reason the use of pilot projects, where a contractor prices an actual scheme requiring works, ensured extensive coverage of schedules and rates, which are expected to attract discounts because works are packaged as a scheme rather than single items. In addition, composite rates were included to capture additional rates not covered in the pilot but which are expected to be encountered on other packages in the area. Contractors were also asked to provide rates for supplying multiple items and to set out how they will apply discounts to future orders. The overriding aim of this approach was to capture all costs and drive down prices (and costs to leaseholders) through capitalising on economies of scale. Pricing documents were separated into internal and external works, so that the costs to leaseholders could be easily and transparently assessed.

25. The result of this was the production of extensive and detailed schedules of rates, and these were included in the full paragraph 4 statement. An example of the schedule of rates (for Area 3) was included in the appeal bundle. Despite its extent and detail the schedule of rates does not cover unforeseen works or specialist works, for example a roof level fire exit. Non-standard items would arise. The schedules are as full as possible, but they do not cover every single item, and it would be difficult to have a full schedule of rates. The council consider that the schedule of rates does not cover all unit costs or hourly or daily rates as required by regulation 4(6)(b) . As Mr Lewis put it in his oral evidence, the schedule of rates is "comprehensive but not exhaustive".

26. The council consider that they have taken all reasonable steps to ensure harmonisation across the main contractors to ensure economies of scale to reduce prices. They intend to use their buying power to reduce prices. For example where contractors work for other local authorities, the council will use advantages from bulk buying to obtain the best possible prices.

27. The price framework consists of the rates secured from the pilot projects, the rates secured for the term composite items (all additional schedule of rates), profit allowance and central office overheads. It is expected that prices will remain without indexation until March 2012. This effectively means that prices will not increase over the first two years but have the potential to decrease. Where non-standard or unpriced items of work are identified, the council use a range of mechanisms to ensure value for money. These include obtaining three competitive quotes from other suppliers, using benchmark marketing data from partnering contracts elsewhere in London and using comparison data between existing contractors in the partnership.

28. The indexation to be used over the life of the contract is Building Maintenance Information (BMI), applicable from April 2012. It is the intention of the council to harmonise prices after the first two years as a way to achieve consistency, best value and a mechanism to drive down prices. After the first two years an annual review of prices will take place to examine how prices can be further harmonised and reduced. BMI will give a default position in the absence of any other agreements throughout the life of the contract. This will allow comparison with any reduced costs achieved through harmonisation. Contractors unwilling to participate in harmonisation will only receive 50% of BMI in a given year. This effectively serves as a disincentive not to participate. In addition contractors will be required to provide up-to-date information of prices offered by them in successfully tendered contracts for other organisations. This will allow an ongoing comparison of prices to ensure competitiveness and best value.

29. The notices of proposal that were served on all lessees on 22 January 2010 were accompanied by an abridged paragraph 4 statement giving abridged details of the tender process and the blocks included in the council's two year programme of works. The full paragraph 4 statements were kept at the offices of the home ownership unit at 376 Walworth Road until the observation period was closed. The statements consisted of all priced information from the tenders, including the price specifications for the planned pilot schemes and the full schedules of rates from each contractor, details of the tender process, details of the observations raised and responses sent from the notice of intention and details of the council's proposed two year programme of works containing the date by when the council expected to provide estimated service charge information to the individual leaseholders concerned.

30. The total budget estimate for the capital programme for the borough is currently £100,000,000 per annum. However the programme itself is indicative only and work will be carried out on the basis of need and available funding. Under the partnering agreements individual works packages will be constructed by the council and the contractor following surveys of individual blocks to identify the precise extent of the work required. These will then be priced by the contractor using the pricing model provided in the tender documentation.

31. The council cannot comply with requirement (4) because individual service charge contributions cannot be ascertained until the individual blocks have been surveyed and the packages of work have been worked up and assessed. They cannot comply with requirement (5) because the cost of work to individual blocks cannot be ascertained until they have been surveyed and the packages of work drawn up and costed. The council believe that despite the schedule of rates being available for inspection in accordance with paragraph 5 of schedule 2 , it was not reasonably practicable fully to provide the information required by requirement (6) because the unit costs for works to individual blocks cannot be ascertained until the packages of work have been drawn up. The unit cost will be based on the pricing model, but will take into account any variation to the elements of the individual blocks. The council do not believe that the pricing model itself was sufficient to comply with requirement (6). Further the pricing model is not a complete set of prices – for example, it does not cover unforeseen items and it does not cover non-standard or unique items which may only arise in respect of one particular property or block. The council therefore do not believe that the pricing model could be considered to cover all relevant matters to which the partnering agreement relates, which it believes to be an absolute requirement for compliance with requirement (6).

32. The council believe that they could not and did not comply with the date requirement (7) because the date by which estimates will be available will depend on the availability of funding. It is probable that any dates given at the time of the notices of proposals will change, dependent on the availability of funding in future years. The council are concerned that if a date was given based on an indicative programme only, that it would not be reliable for leaseholders, and in turn it would lead to a challenge on the validity of the notice alleging that the council did not really expect to be able to supply information by the date given. Given the high amount of service charge likely to be invoiced for works carried out on these contracts it is reasonable for the council to seek dispensation for this element of the regulations, in order to protect their fiduciary interests, as anticipated by the Government during the consultation on the Regulations.

33. In respect of those blocks included in the initial two year programme the notice of proposal gave as an expected date the end of the relevant financial year. In respect of those blocks not included in the initial two year programme the notice of proposal gave as an expected date the end of the term of the partnering agreements (assuming an extension to ten years), namely 31 March 2020. In order to ameliorate the effect of their inability to supply any more accurate data at the Notice of Proposal stage, the council will be writing to leaseholders on an annual basis to inform them of where their blocks and estates currently appear in the indicative five year programme, so that they will be aware of when they are likely to receive their Schedule 3 Notices of Intention.

34. The council will be obliged to serve the required Schedule 3 Notices of Intention as and when necessary through the course of the partnering contracts. The Schedule 3 notices will include details of the estimated service charge and provide the leaseholders with the 30 day observation period required by the Regulations. The council will also be obliged to give notice in writing in accordance with paragraph 8 of Schedule 2 once it is able to give estimated amounts, costs or rates.

35. At the hearing of the appeal LAS 2000 stated firstly that it considered that it was reasonably practicable for the council to comply with requirement (6) in that the tendering exercise has provided them with a detailed schedule of rates, which enables the council to identify “the current unit cost”; and secondly that it was reasonably practicable for the council to comply with requirement (7) since the agreements are of certain duration and, even though there is uncertainty as to the availability of funding for works, the council can specify the date of the end of the contracts.

The LVT decision

36. The case for the council before the LVT was that it was not reasonably practicable to provide the information to meet requirements (4), (5)(b) and (6)(b). The council provided details of two projects, “Lot 2 – St Saviour and Silverlock 3 – Part 3 Pilot Projects Internal Works” and “Lot 2 – Bermondsey and Rotherhithe – Part 4 composite items”. At the hearing they said that they had decided not to proceed with the latter project. Ms Turff said that the council did not consider that

the pilot scheme information complied with requirements (4) or (5) since the estimate might change and packages might be reconstituted. The basis of the LVT's refusal of dispensation appears from the following paragraphs of its decision:

> "122. Although the Tribunal recognises that as referred to in the decision by HHJ Huskinson in Auger v Camden LVC LRX/81 the information obtained through a tendering process should be sufficient to enable a landlord to comply with paragraph 4(6), that position has not yet been reached in this case.
>
> 123. The Tribunal does not agree with LAS 2000 that the Council already has available information which could comply with the provisions paragraph 4(4) (5) or (6), and considers that such a conclusion would be premature on the facts.
>
> 124. The Tribunal considered whether in respect of some properties to which works are contemplated in 2010–11 the Council might be able to comply with paragraph 4(4), (5) or (6) but considers that the evidence presented is too vague and plans insufficiently certain.
>
> 125. The Tribunal considered that the Council has not met the requirements of paragraph 4(7). It was noted the Council only sought dispensation from the requirements as to cost and rate. Ms Turf said that the Council can give a date for the purposes of paragraph 4(7) for the blocks in the proposed two year programme. For the rest, the date that can be given is 31st March 2020. However, the general picture presented was that there may still be still some doubt about the content and timing of the two year programme. Further, the Tribunal does not consider the date 31st March 2020, effectively the date at the end of contract, constitutes a 'date by which he expects to be able to provide an estimate, cost or rate' under paragraph 4(7)' as it is outside the range of a reasonable and sensible date within the purposes of the paragraph…
>
> 129. In reaching our conclusions the Tribunal had regard to the underlying purpose of the requirements in the Regulations to provide this information i.e. to give leaseholders better and more information than they might have expected pre-CLARA on matters likely to have significant consequences for their finances and or everyday lives. The Tribunal has had regard to the large number of leaseholders who would, in effect, have little chance of succeeding in challenging the reasonableness of costs under section 19 of the Act at a later date.
>
> 130. The Tribunal has had regard to the consequences for the leaseholders if they do not get the information, i.e. the possibility of a prolonged period of uncertainty. The lack of consultation, knowledge of proposed costs, knowledge of when works are to proceed, may seriously affect the ability of the leaseholders to plan their expenditure or sell their properties.
>
> 131. The Tribunal recognises that long-term agreements pose particular problems compliance with the consultation requirements and that its ability to grant dispensation may well have been held up by those promoting the legislation as a way of dealing with the problem. However, (a) dispensation should be resorted to when all other reasonable efforts to comply have failed. In this case the Council has knowingly adopted an approach which was always going to fail to comply; (b) whether or not it is reasonable to dispense should depend on scale and proportionality. It is one thing to dispense with a long term agreement affecting a limited number of leaseholder's properties for a limited category of works. In the current case the decision has the potential to affect leasehold properties across the borough for a wide variety of categories of work for possibly ten years. The Council referred to the legislation 'empowering tenants', whereas if the Tribunal was to grant the blanket dispensation requested, the leaseholders' position to influence events, which is already weak, would be substantially restricted or rendered non-existent.
>
> 132. There are undoubtedly advantages in using the regime of partnering agreements. However the Council contends that it cannot comply with the Consultation Regulations due to the nature of the partnering agreement. The supplementary provisions at paragraph 8 of Schedule 2 appear to envisage the supplying of information when available, which is consistent with the Tribunal's view

of paragraph 4 of Schedule 2, with its series of alternative options all pointing towards the achieving of a transparent but flexible consultation regime which will actually work with and compliment partnering agreements.

133. Overall, the Tribunal was persuaded that the granting of dispensation at this point would cause diminution or significant diminution in the protection afforded to the leaseholders by the Consultation Regulations. Based on the evidence presented, there is ample scope for the Council to provide much clearer and more informative information to the leaseholders. Mr Lewis in his evidence referred to the large amount of detail available, and this was supported by the documentation and accepted by Mr Dymond on behalf of LAS 2000. The Council may in future be able to comply with the Consultation Requirements, and seek to rely on dispensation in all the circumstances of this case, seeking an easy solution to avoid the challenges set by Parliament for all landlords to comply with.

134. Having considered the evidence as a whole, the Tribunal finds that it is not reasonable in all the circumstances of this case to grant the dispensation sought including that in respect of the TV aerials.

135. In the circumstances, the Tribunal makes no order for dispensation under section 20ZA of the Act."

The case for the appellants

37. For the council Mr Philip Rainey QC noted that there was no disagreement between the parties with the LVT's conclusion that it was not reasonably practicable for the council to comply with requirements (4) and (5)(b). The contention of LAS was that it was reasonably practicable for the council to have complied with requirements (6)(b) and (7) and that (6)(b) had in fact been complied with. Although initially Mr Rainey submitted that compliance with requirement (6)(b) was not reasonably practicable – because the schedule of rates was not exhaustive since unforeseen and non-standard items were not included – ultimately he asked for a finding that there had been compliance. Alternatively he asked for a finding that the council had complied with the requirement as far as it was possible to do so.

38. Mr Rainey submitted that where the application for dispensation was prospective the relevant date for the assessment of the operation of the "reasonably practicable" test was the date of the hearing (assuming that the landlord was then in a position to serve the Notice of Proposal shortly after the determination); and accordingly it was an error of law (or irrelevant to the reasonably practicable test) to find that the landlord might be able to provide information in future under paragraphs 4(4) to 4(6) by delaying entry into the QLTA.

39. In relation to sub-paragraph (7) Mr Rainey submitted the contract end date was a valid date. Alternatively he contended that a failure to provide an expected date as required by the sub-paragraph would not invalidate the notice. It was not a guaranteed date, and the information to be provided under paragraph 8 was not calculated by reference to any date stated under sub-paragraph (7). The requirement was thus not of such importance that failure to comply with it would give rise to invalidity. He relied on *R v Soneji [2006] 1 AC 340* . If, however, the effect of a failure to provide an expected date did give rise to invalidity, dispensation should be granted since the leaseholders' rights to further information under paragraph 8 would remain unaffected, as would their right to further consultation under Schedule 3 when their properties were included in a programme of works.

The case for the respondent

40. For LAS 2000 Mr Andrew Dymond said that the Association worked closely with the council. It was accepted that it was not possible for them to comply with sub-paragraphs (4) and (5), but the view was taken that there was compliance with sub-paragraph (6). The council had done as much as it possibly could. It was preferable if leaseholders could be told by the council that the statutory provisions had been complied with rather than that they had not, because it would then be much more likely that there would be a high level of response to the Notices of Proposal.

41. In relation to sub-paragraph (6) Mr Dymond said that no building contract could provide a schedule of rates which was exhaustive or which would never be the subject of variation. The fact that the schedule of rates was not perfect did not mean that it would not comply with sub-paragraph (6). The intention of sub-paragraphs (4) to (6) was not to provide tenants with information which was guaranteed to be correct in all future circumstances. The intention was to provide a degree of transparency; to provide estimates which enable the tenants to consider their possible future service charge liabilities. The council had made considerable efforts to make the proposal statement as comprehensive as possible, but no schedule of rates could ever be exhaustive. LAS's argument before the LVT had been that the application for dispensation was premature because by the time of the proposal sufficient figures would be available to enable the council to comply with sub-paragraph (6). That position had been reached. There was compliance with sub-paragraph (6) and therefore no need for dispensation.

42. If it was necessary to consider sub-paragraph (7), LAS's contention was that there had been compliance with its requirements. The notice of proposal listed the properties that were to be included in the first two years' programme under the partnering agreements, and in respect of those properties the “date by which” the council “expects to be able to provide an estimate, cost or rate” was the end of the programme. For other properties it was sufficient to specify the date of the end of the contract, which would not be a meaningless date. Specification of the date would provide the trigger for the landlord to comply with his obligations under paragraph 8.

Discussion

43. I begin with some general observations on the provisions of the Act and the Regulations:

(a) The requirements in sub-paragraphs (4), (5), (6) and (7) form a cascading sequence. If it is not reasonably practicable to make the estimate required by sub-paragraph (4), (5) must be complied with; if it is not reasonably practicable to make the estimates required by sub-paragraph (4) or (5)(b), (6) must be complied with; and if it is not reasonably practicable to make the estimate required by sub-paragraph (6)(b), (7) must be complied with.
(b) If it is reasonably practicable to make an estimate of part of the tenant's contribution (see (4)) but not all of it, the proposal does not have to state any estimate. The same goes for the estimate of expenditure under (5) and the ascertainment of the unit cost or hourly or daily rate under (6). It follows that if it is not reasonably practicable to provide what is required by (4), (5) or 6 the Notice of Proposal need only say why it is not and state the date when the landlord expects to be able to provide an estimate, cost or rate (see (7)).
(c) No question of reasonable practicability arises under (7). The requirements are absolute.
(d) When in due course the landlord does have information enabling him to provide an estimate, cost or rate, paragraph 8 requires him to give notice in writing of this within 21 days. The giving of such notice does not, however, give rise to any consequences. The Notice of Proposal (containing the statement under (7)) will have been given, and the tenant's opportunity to make observations on it, provided for by paragraph 5, and the landlord's duty to have regard to such observations (under paragraph 6) and to respond to them (under paragraph 7) will all have arisen and the time for observations will almost certainly have expired. The landlord may indeed have entered into the QLTA. The paragraph 8 notice creates no new opportunity to make observations nor any duty on the part of the landlord to take any observations into account or respond to them.
(e) An application for a determination of dispensation under section 20ZA(1) can be made before a Notice of Proposal is given as well as afterwards: see the decision of the Lands Tribunal (HH Judge Huskinson) in Auger v London Borough of Camden (LRX/81/2007, 14 March 2008, unreported) .
(f) On a prospective application for dispensation if it will be reasonably practicable for the landlord to comply with (4), (5) or (6) when he intends to give Notice of Proposal, it is inconceivable that the requirement to do so could properly be dispensed with. The question of dispensation could only arise in relation to (7).

(g) The distinction between the Notice of Proposal, to be served on all tenants under paragraph 5, and the proposal itself, the preparation of which is the subject of the requirements in paragraph 4, must be borne in mind. It is implicit that the proposal must have been prepared before the Notice of Proposal is served. The Notice of Proposal does not need to be accompanied by a copy of the proposal, provided it specifies where and when the proposal may be inspected. And it is relation to the proposal and not the notice that dispensation is being sought.

44. The application before the LVT was for prospective dispensation. Since the decision of the LVT, however, the Notices of Proposal, which were before the LVT in draft form, have been given. There is no dispute that the application should now be treated as one for retrospective dispensation, in respect (necessarily, it seems to me) of the proposal as it existed when the notices were given. The appeal, which was by way of rehearing, was conducted on that basis. I will deal with the issues that arise on the basis of the cases as presented at the hearing. Before I do so, however, I must consider the LVT's decision and the reasons that it gave for refusing the relief, bearing in mind, of course, that the approach to be adopted in determining an application for prospective relief will not necessarily be the same where the application is for retrospective dispensation.

45. The council's application as made and as pursued before the LVT was for dispensation from all the requirements in sub-paragraphs (4), (5), (6) and (7). That was surprising, because their contention was that it was not reasonably practicable to comply with any of requirements (4), (5) and (6) and not possible to comply with requirement (7). If it was not reasonably practicable to provide the information required by (4), (5) and (6), there was no failure to comply with those requirements and dispensation was therefore not needed. The LVT refused to grant what it referred to in paragraph 131 of its decision as “the blanket dispensation requested”. Its reason for doing so, however, was not that dispensation was not required, although it had found at paragraph 123 that it would be “premature on the facts” to conclude that the council already had available information which could comply with (4), (5) and (6). Its reason, it appears, was there was “ample scope for the Council to provide much clearer and more informative information to the leaseholders” and that it “may in future be able to comply with the requirements”.

46. It is unclear what the LVT had in mind when referring at various points to the “information” and to compliance with the requirements. Was it the statement of each tenant's contribution (requirement (4))? or the estimated total amount of expenditure on each building or other premises (requirement (5))? or the statement of the current unit costs or hourly or daily rates applicable to the matters to which the proposal was to relate (requirement (6))? They were, of course, alternative and not cumulative requirements. It could scarcely be expected that the detail required by (4) or (5) (of the contribution of every tenant or the expenditure on every building) could be given before these huge QLTAs were entered into. Inevitably such details would only be established as arrangements were in due course made for individual packages of work to be carried out under the agreements. It was realistically only (6) that fell to be considered.

47. The issues that the LVT needed to address, therefore, were whether on the facts it was reasonably practicable to provide the (6)(b) information; and, if it was not, whether it would satisfy (7); and, if it would not satisfy (7), whether dispensation should be granted in respect of those elements of (7) that were not satisfied. It concluded that compliance with (6) had “not yet been reached” but this conclusion was unexplained. It concluded that (7) would not be complied with because the end date of the contract would not constitute the date contemplated by the provision (a reason that was, in my view correct: I refer to it further below). It addressed dispensation in general, however, and not specifically in relation to (7), and its view that there was ample scope for the council to provide “much clearer and more informative information” was unspecific and was not explained in terms of the requirements of paragraph 4. Moreover it appeared to confuse what has to be contained in the proposal and what has to go into the Notice of Proposal and to assume that the latter must do more than state where and when the proposal can be inspected (one of the alternatives provided for by paragraph 5(2). A proposal for these huge QLTAs that satisfied the requirements of (6) (current unit cost or hourly or daily rates applicable to the extensive and varied works) would inevitably contain a very large number of pages with a very large amount of detail. There is no requirement to make it “clearer”, for example by summarising it, even if it were possible to do this. The information is that contained in the detailed schedules. Thus, it seems to me, the LVT's reasoning was inadequate. It should be said, however, that it cannot have been assisted in its task by the council's application for dispensation from all the requirements in sub-paragraphs (4),

(5), (6) and (7), which was inappropriate and confusing; and its failure to distinguish between the Notice of Proposal and the proposal itself was, I suspect, one that was present in the cases presented by the parties.

48. In deciding whether to grant dispensation it would, in my view, undoubtedly be open to an LVT to consider whether, although it would not be reasonably practicable for the landlord to make the estimate or ascertain the cost or rate at the proposed date of the notice, it could nevertheless be expected to be reasonably practicable at a later date; and to refuse dispensation if it appeared unreasonable for the landlord not to postpone the giving of notice to that later date. It appears to have been part of the LVT's reasoning in refusing dispensation (see above) that, while the council might not have been able at the time of the hearing to comply with any of the requirements, it might in future be able to do so. There was, in my judgment, no error on the LVT's part in approaching the matter in this way. What it failed to do, however, was to address the question of the time at which it would be reasonable for the council to give the Notice of Proposal, given their intention to enter into the QLTAs, or to identify, even in general terms, the information, as compared with that contained in the paragraph 4 statement, that it considered should be made available.

49. The issues that now need to be addressed are the same as those that needed to be addressed by the LVT, although they fall to be considered in retrospect, having regard to the proposal that was the subject of the Notices of Proposal given on 22 January 2010. The first question is whether the proposal as prepared complied with requirement (6). The notices said: “The full statement includes the pricing models and schedules of rates from which the cost of any work to your block or estate will be constructed.” LAS 2000 agree that the schedules are extensive and detailed, and an example of the schedule of rates for one area, Area 3, was included in the appeal bundle. In suggesting that what was provided nevertheless did not satisfy (6)(b) (thus bringing (7) into play), the council have advanced two different reasons. The reason advanced in the notices of proposal was that, as the inflationary increase and subsequent negotiated price would not be known until the annual review, the unit rates that were currently available might not be the same as those used to construct the service charge. That reason, however was misconceived. What is required under (6)(b) is the *current* unit cost or hourly or daily rate, so that the possibility of future increases for inflation or of negotiated variations is irrelevant.

50. The second reason, advanced in the council's evidence, is that, despite its extent and detail the schedule of rates does not cover unforeseen works or specialist works, for example a roof level fire exit. Non-standard items would arise, so that, while the schedules are as full as possible, they do not cover every single item, and it would be difficult to have a schedule of rates that did this. Sub-paragraph (6)(b) refers to “the current unit cost or hourly or daily rate applicable to the relevant matters to which the proposed agreement relates”. Regulation 2(1) defines “the relevant matters”, in relation to a proposed agreement, to mean the works to be carried out under the agreement. On a literal construction this would suggest that the unit cost or hourly or daily rate applicable to every element of the works must be stated. In relation to such QLTAs as this, however, such a requirement could never be complied with for the reason that non-standard items that were not covered would inevitably arise. To construe the Regulations so that this was their effect, however, would be effectively to defeat their purpose. The landlord would be able to say that it was not reasonably practicable to provide the sub-paragraph (6)(b) information and could then limit himself to specifying a date under (7), notwithstanding that a large amount of detailed information on costs and rates was available. However, given the purpose of the Regulations sub-paragraph 6(b) is in my judgment properly to be construed as relating to the costs and rates applicable to those works for which the proposed QLTA will provide costs and rates. It is this information that the landlord ought to be able to provide and is required to provide. There is no doubt in the present case that this information was provided by the council, and there is therefore no need for dispensation

51. Sub-paragraph (7) accordingly does not require consideration. I would say that I am inclined to agree with both counsel that, where it is not possible to specify a date that is earlier than the date of the end of the contract, that date is the date “by which” the information will be provided. I do not, however, express a concluded view on this.

52. I would add that all the arguments put forward by the parties were addressed to the question of compliance with sub-paragraphs (4) to (7) of paragraph 4, which relates to the preparation of a proposal and the statement that the proposal must

contain. The requirements relating to the Notice of Proposal to be given to each leaseholder are contained in paragraph 5. Neither party suggested that there had been a failure to comply with this provision, and they were right in my view not to do so. The requirements of paragraph 5(2) are that a copy of the proposal must accompany the notice or alternatively that the notice must specify where and when the proposal may be inspected. The notices, understandably in view of the volume of material contained in the proposal, adopted the latter alternative, but they also contained a substantial amount of explanation that was not required under the paragraph. This additional explanatory material (except to the extent that it suggested that the proposal failed to comply with the requirements of paragraph 4 – see below) can only have assisted leaseholders in understanding the nature of the proposal and its justification.

53. The council made its application for dispensation in an attempt to achieve assurance that it would not be visited with the ruinous consequences of failing to comply with the Regulations. There is no procedure that enables a landlord who is proposing to enter into a QLTA to put before an LVT its paragraph 4 proposal and to be granted a declaration that the proposal would comply with requirements. It has the choice of pressing ahead and giving notice of the proposal, risking a later finding that it did not comply with the Regulations and (in the absence of retrospective dispensation) the ruinous financial consequences, or applying to the LVT for dispensation and contending that the proposal would in fact fail to comply, hoping that its contention will in the event be rejected or that dispensation will be granted. This is clearly unsatisfactory, and I agree with the concern expressed on the part of LAS 2000 that for the council to claim that the information provided in the proposal statement fails to comply with the Regulations may well affect the number and nature of the observations made by leaseholders. I doubt, however, that there is any alternative procedure available. Mr Rainey suggested that in many cases the most convenient course would be for the landlord to apply under section 27A(3) for a prospective determination of compliance, but I doubt whether that procedure could encompass a case like the present, where no specific description of the works to be carried out to each of the many premises was available.

54. The result of my conclusion that the proposal statements complied with paragraph 4 is that there is no need for dispensation. The appeal is accordingly dismissed.

Tab 8

The Royal Borough of Kensington and Chelsea v Lessees of 1-124 Pond House, Pond Place, London SW23, Nicholas Hoexter, Brian Lanaghan, Marilyn Acons, Norman Dunne, Thomas Beaumont, Elizabeth Edema, Mr Hamill


No Substantial Judicial Treatment

Court
Upper Tribunal (Lands Chamber)

Judgment Date
21 July 2015

UTLC Case Number: LRX/30/2015

Upper Tribunal (Lands Chamber)

[2015] UKUT 395 (LC), 2015 WL 5037752

Before: Siobhan McGrath , Chamber President – FtT (Property Chamber) sitting as a Judge of the Upper Tribunal (Lands Chamber) and Mr P R Francis FRICS

Dated 21 July 2015

Tribunals, Courts and Enforcement Act 2007

In the Matter of an Application

Sitting at: 10 Alfred Place, London WC1E 7LR on 29 June 2015

Representation

Ranjit Bhose QC , of counsel, instructed by Miss C Vachino RBKC Legal Services for the applicant.
Lessees of 1-124 Pond House did not appear and were not represented.
Mr Nicholas Hoexter in person.
Mr Brian Lanaghan in person.
Mr Norman Dunne in person.
Miss Elizabeth Edema in person.

The following cases are referred to in this decision:

Daejan Investments v Benson [2014] UKSC 14
London Borough of Southwark v Leaseholder of the London Borough of Southwark [2011] UKUT 438
London Area Procurement Network v All Right to Buy Lessees (LON/00BF/LDC/2006/0078 & others
Auger, Associaton of Camden Council Leaseholders v London Borough of Camden LRX/81/2007

Decision

Siobhan McGrath

Introduction

1. This is an application under section 27A(3) of the Landlord and Tenant Act 1985 for a determination in respect of the liability to pay residential service charge costs to be incurred on behalf of the Royal Borough of Kensington & Chelsea ("RBKC") in respect of leasehold properties at 1–124 Pond House, Pond Place, London SW3 ("Pond House").

2. The Tribunal is asked to determine a number of issues about service charges for proposed works of maintenance and repair to the properties. In particular it is asked to decide whether the applicant has complied with its obligation to consult the Pond House lessees under the provisions of section 20 of the Landlord and Tenant Act 1985 and the associated Service Charges (Consultation Requirements)(England) Regulations 2003 . The applicant proposes to enter into a number of Framework Agreements with contractors, the effect of which is described further below. Briefly, the applicant seeks a determination that the Framework Agreements are Qualifying Long Term Agreements (referred to heareafter as "QLTAs") for the purposes of the consultation requirements and that therefore they are entitled to follow a restricted form of consultation with lessees before embarking on specified works of repair.

3. The consultation issue is important. In this case the value of the contracts for the works may reach £130 million over the next four to six years. Also, since procurement through Framework Agreements is a practice already adopted by a number of local authorities, clear guidance on what consultation is required is much needed. For the applicant it is said that the works of repair will be carried out under QLTAs and that therefore the consultation requirements are limited. However, the respondents contend that the Framework Agreements are not QLTAs and therefore the applicant's consultation has been and will be inadequate.

4. The application was made to the First-tier Tribunal on 15 January 2015 and on 27 February 2015 I directed that the case be transferred for determination by the Upper Tribunal in accordance with rule 25 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 .

5. The case was heard on 29 June 2015. At the hearing the applicant was represented by Ranjit Bhose QC. Although the respondents to the application were named as the leaseholders of Pond House, notice of the application was also given by the applicant at the direction of the Tribunal, to a number of leaseholders of other properties within the Borough, each of whom had made observations in response either to a statutory notice of intention dated 3 September 2013 or to the notifications of proposals dated 18 December 2014 (both notices are dealt with further below). As a result, a number of leaseholders of other properties within the applicant's ownership, were also joined as respondents. Although none of the lessees of Pond House itself responded to the application or made written representations, a number of the other leaseholders did so and four of their number attended the hearing and were able to make submissions. They were: Nicholas Hoexter, a leaseholder and the chairman of the Tregunter East Tenants Association; Brian Lanaghan, a leaseholder of two flats and secretary of the Chelsea Manor Court Tenants Association; Norman Dunne, a leaseholder and chairman of the Talbot House Residents Association and Elizabeth Edema, who is a leaseholder at Colville Road. Mr Lanaghan's submissions were made on behalf of himself and Marilyn Acons, a lessee and chairman of the Chelsea Manor Court Tenants Association.

Background

6. Pond House is an estate comprising six blocks of residential apartments located in South Kensington and it is bounded by predominantly residential apartment buildings. Altogether there are 124 flats. The block containing flats 1 to 32 was constructed in about 1906 and is "H" shaped in plan with a pitched roof. The remaining five blocks are matching in style but were constructed in the 1950s and have flat roofs. There is a community centre and other utility buildings.

7. The applicant is the freehold owner of the whole of Pond House. The blocks are of mixed tenure with thirty nine of the units held on long leases and the remainder being held on weekly secure tenancies. RBKC's total housing stock, which is

managed on its behalf by a Tenant Management Organisation ("TMO"), is made up of 9,467 units, 2,550 of which are held on long leases.

8. As part of its management responsibilities, the TMO deals with the maintenance and repair of the stock. So far as the lessees of Pond House are concerned, we were given a sample lease in which the repairing covenants are as follows:

> (ii)(b) The Lessors will at all times during the said term keep and maintain the external main walls foundations and the structural divisions between the flats and the structural parts of the balconies and any services areas or housings at the building and roof of the Building and the pipes … the main entrance passages landings staircases access balconies and lifts —- enjoyed or used by the Lessees in common with the lessees tenants or other occupiers of the other flats in the Building … and the boundary fences and walls of the Estate in good and substantial repair and condition…"
>
> ….
>
> (d) The Lessors will so often as reasonably required decorate the common main entrances staircases passages and balconies of and in the Building and the exterior wood iron stucco and cement work of the Building in the manner in which the same are at the time of this demise decorated or a near thereto as circumstances permit"

By clause 3(ii) of the lease there is a complementary covenant requiring the payment of a service charge which includes a percentage of the landlord's costs under clause 4.

9. The application to the Tribunal includes a schedule of proposed works to Pond House. This gives a general description of works said to be required to each of the six blocks in respect of chimney stack repairs, asphalt walkways, re-pointing, concrete repairs, painting and decorating, windows and scaffolding. In an estimate for the works produced in December 2014, the total cost of the works to the block with the pitched roof was put at roughly £170,000 and the share of those costs to the lessee of flat 3 was just over £6,000. This is dealt with in more detail below.

The Consultation Requirements

10. Sections 18 to 30 of the Landlord and Tenant Act 1985 include provisions which regulate the recovery of service charge costs by a landlord from a lessee. Section 20 of the Act provides that:

> "(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either –
>
> (a) complied with in relation to the works or agreement, or
>
> (b) dispensed with in relation to the works or agreement by (or an appeal from) the appropriate tribunal."

11. Qualifying works and qualifying long term agreements are defined in section 20ZA as follows:

> "(2) " *qualifying works"* means works on a building or any other premises, and *"qualifying long term agreement"* means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months."

12. Section 20 imposes a limit on the amount of service charges recoverable where the requirements have been neither complied with nor dispensed with, by reference to an appropriate amount which is defined in section 20(3) and (4) as follows:

> "(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
>
> (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement –
>
> (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
>
> (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount."

13. Regulation 4 of the Service Charges (Consultation Requirements)(England) Regulations 2003 applies section 20 to qualifying long term agreements (QLTAs) if:

> "(1) … 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."

And regulation 6 of the Regulations applies section 20 to qualifying works where the relevant contribution of any tenant is more than £250.

14. The consultation requirements themselves are set out in four schedules to the regulations. The application of each schedule is governed by regulations 5 (qualifying long term agreements) and 7 (qualifying works). So far as relevant regulation 5 provides:

> (1) Subject to paragraphs (2) and (3), in relation to qualifying long term agreements to which section 20 applies, the consultation requirements for the purposes of that section 20 and section 20ZA are the requirements specified in Schedule 1 .
>
> (2) Where public notice is required to be given of the relevant matters to which a qualifying long term agreement relates, the consultation requirements for the purposes of section 20 and 20ZA as regards the agreement, are the requirements specified in schedule 2 ."

So far as relevant regulation 7 provides:

> "(1) Subject to paragraph (5), where qualifying works are the subject (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA , as regards those works, are the requirements specified in Schedule 3 .
>
> (2) Subject to paragraph (5), in a case to which paragraph (3) applies the consultation requirements for the purposes of sections 20 and 20ZA , as regards qualifying works referred to in that paragraph are those specified in Schedule 3 .
>
> (3) This paragraph applies where –
>
> (a) …
>
> (b) under an agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, qualifying works for which public notice has been given before the date on which these Regulations come into force are carried out at any time on or after the date.
>
> (4) Except in a case to which paragraph (3) applies, and subject to paragraph (5), where qualifying works are not the subject of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA , as regards those works–
>
> (a) in a case where public notice of those works is required to be given, are those specified in Part 1 of Schedule 4 ;
>
> (b) in any other case, are those specified in Part 2 of that Schedule"

15. Hence the consultation to be carried out either for qualifying works or for a QLTA is more restricted if those works or agreement were required to be dealt with under a public notice. A public notice means a notice published by the Publications Office of the European Union and must be given wherever a public authority enters into an agreement including a framework agreement, where its value exceeds a specified limit, currently set at £4,322,012.

16. Furthermore the consultation to be carried out for qualifying works under schedule 4 is more extensive than the consultation under schedule 3 . A landlord may conduct the more restricted consultation under schedule 3 where the qualifying works are the subject of a QLTA.

17. In summary therefore consultation for qualifying works is either under Schedule 4 (Part 1) where public notice is required or Schedule 4 (Part 2) where no such notice is required. However, if qualifying works are the subject of a QLTA then the requirements are those specified in Schedule 3 . Furthermore even if the QLTA was entered into before the commencement of the Act (31st October 2003) then consultation on qualifying works is also under Schedule 3 , if the QLTA was subject to a public notice before that date and the works were carried out afterwards.

Framework Agreements

18. By 2013 the TMO had resolved to enter into framework agreements to support the delivery of repairs, maintenance and improvement works within the applicant's housing stock over the next four to six years. About £50 million of those costs are to be referable to external and communal works to buildings which include both tenanted and leasehold flats.

19. At the hearing and in the documents provided to the Tribunal a detailed explanation was given about the nature of Framework Agreements generally and these Framework Agreements specifically. The following is a summary of that evidence. As mentioned above where specified thresholds are reached for procurement purposes, contracting authorities (which include local authorities and TMOs) are required to comply with the Public Contracts Regulations 2006 [1] (the PC regulations) which regulate competition within the EU. The regulations implement Directive 2004/18/EC .

20. Framework Agreements are specifically recognised in the PC Regulations and are defined in regulation 2 as follows:

> "framework agreement" means an agreement or other arrangement between one or more contracting authorities and one or more economic operators *(ie contractors)* which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator might enter into one or more contracts with a contracting authority in the period during which the framework agreement applies."

21. Where an authority intends to enter into a Framework Agreement it must comply with PC regulation 19 which provides that:

> "(a) The contracting authority must follow one of the procedures prescribed in regulations 15-18. These include the restricted procedure (regulation 16) which is commenced by the publication of notice in the Official Journal inviting requests to be selected to tender and containing specified information;
>
> (b) The contracting authority must select an economic operator to be party to the framework agreement by applying award criteria set in accordance with regulation 30 which provides for the award to be made on the basis of an offer which is either "the most economically advantageous from the point of view of the contracting authority" ("MEAT") or offers the lowest price.
>
> (c) Where the contracting authority awards a "specific contract" under the terms of a framework agreement, it must comply with the procedures in regulation 19 and apply those procedures only to the economic operators who are party to the framework agreement. Neither the contracting authority nor the economic operator may include terms in the contract that are substantially amended from the terms in the framework agreement itself."

22. Therefore, what a Framework Agreement achieves is the identification by competition, of suitable operators who might be offered the opportunity of contracting with a public authority to carry out, in this case, works to buildings. Where a framework agreement is concluded with more than one economic operator (and there must generally be a minimum of 3) a specific contract may only be awarded by application of the terms laid down in the framework agreement or by re-opening the competition between the same economic operators. Importantly the contracts concluded with the economic operators must not be substantially different from the terms within the framework agreement itself.

23. The only notices required to be published in the Office Journal when a contracting authority seeks to conclude a framework agreement is the notice which is given to invite tenders from those who wish to be a party to the framework agreement, and the later Contract Award Notice. There is no additional requirement to publish public notice prior to the award

of specific contracts based on the terms of the Framework Agreement. So far as European law is concerned, the requirement for public competition had already been satisfied.

24. As will be seen later in this decision, the TMO gave the leaseholders notice of its intention to enter into Framework Agreements in September 2013. It had decided to follow the restricted procedure under regulation 16 of the PC regulations and the Contract notice was published on 6th February 2014

The Evidence

25. At the hearing, evidence was given by four witnesses on behalf of the applicant, They were: Shane Hughes of Savills who in May 2013 were appointed by the TMO as their procurement advisors; Peter Maddison who since January 2013 has been employed by the TMO as Director of Assets and Regeneration; Daniel Wood who since July 2001 has been employed by the TMO in a number of roles but who is now the Home Ownership Assistant Director, and by Alex Gould BSc (Hons) MRICS. For the respondents, oral submissions were made by Mr Hoexter, Mr Lanaghan, Mr Dunne and Miss Edema who had additionally provided a witness statement. From the evidence and from the supporting documentation the Tribunal was satisfied as follows.

26. On 2nd September 2013, the TMO gave all of the lessees in the Borough, notice of intention to enter into QLTAs under schedule 2 of the Service Charges (Consultation Regulations) . The notice asserted that the Framework Agreements would be QTLAs and that it was the TMO's intention to enter into up to four individual agreements for works with building contractors. The notice gave a description of the type of works that the contractors might be instructed to undertake and the intended duration of the agreements. Notice was also given of an intention to enter Framework Agreements for consultancy purposes. The notice asserted that the reasons that the TMO had decided to enter into Framework Agreement included considerations of value for money, partnership working to improve quality standards for end products and the delivery process.

27. In February 2014 the TMO followed the restricted procedure under regulation 16 of the PC Regulations and a Contract Notice was published. This informed economic operators that:

> "The Authority intends to enter into Framework Agreements with each of the successful service providers for a period of 48 months, although call offs may extend beyond that period. The form of delivery contract under the Framework Agreements will be a bespoke form of TPC2005 Term Partnering Contract (as amended). Details of the contracts will be set out in the tender documents.
>
> It is anticipated that the Authority shall instruct the works for the first two years of the Programme via a direct award equally between the top two-ranked Services Providers on the Framework. However, the Authority reserves the right to award works via a mini-competition between eligible Service Providers. Any work awarded by the Authority or any other contracting authorities shall be in accordance with the rules of the Framework Agreement".
>
> The notice also specified that the anticipated value of each work stream was: £40 million for internal works; £50 million for external works and £40 million for the council's Hidden homes initiative."

28. Forty-seven economic operators expressed an interest in bidding for the Framework Agreements and 17 subsequently returned the required Pre-Qualification Questionnaire. The responses were evaluated by a panel of TMO officers and following the evaluation exercise, eight companies were invited to submit tenders. The contractors were required to include detailed pricing with their tenders. In the Invitation to Tender TMO explained that it was their intention to appoint one contractor to undertake works in the North Area of the programme for the first two years and one contractor for the South Area, also for the first two years. A further two contractors would be appointed in a "reserve" capacity for the first two years. For the third and fourth year, works would be awarded via mini-competitions run between all of the eligible contractors.

29. In a further evaluation by a tender panel the submissions were evaluated in accordance with Price and Quality criteria set out in the invitation to tender documents. The ratio of Price to Quality scores was stated as 60%/40%. In the event four tenders were identified as successful, subject to the second stage of leasehold consultation. They were: Wates Living Space Ltd; Keepmoat Regeneration Ltd; MITIE Property Services (UK) Ltd and Mulally & Company Limited. The lowest acceptable

Tender for the North Area was that of Wates Living Space Ltd and for the South Area the lowest acceptable Tender was that of Keepmoat Regeneration Ltd.

30. On 15th December 2014, Savills issued letters to the successful Tenderers that details of their submitted tenders and prices were required to be disclosed to the leaseholders as a party of the second stage of statutory consultation. It was also stated that the letters were not intended to be formal contract award letters.

31. In his statement Mr Hughes gave a detailed explanation of the pricing requirements imposed on those tendering for the work. In broad terms the Price Framework was designed to identify the anticipated scope of works for each area in the first year of the programme against which the tenderer was required to price. It is not necessary to consider all aspects of that pricing save to note the following: The Price Framework is divided into North Area and South Area and PVC Windows (all areas) and is based on specific blocks that had been the subject of pre-tender surveys carried out within the last two years together with asset intelligence already known to the TMO. The tenders are detailed and extensive and include total costs broken down within schedules including unit costs for individual categories of works. Overheads (preliminaries) and profits were required to be shown separately. Tenderers were also invited to price “extra over” schedules of rates for exceptional items that might occur from time to time and not included in the basket rates. The pricing schedules also included scaffolding where required to access works at height. Additionally schedules of rates were required for typical elements of works that might be needed to blocks over the course of the programme but at pre-tender stage no firm quantities or volumes were known.

32. On 18th December 2014, the TMO served the lessees with notification of its proposal to enter into the Framework Agreements. The notification included an appendix headed “Observations made to the Notice of Intention and the TMO/ Landlord's Response.” This summarised the observations that had been made and was followed by a response to those observations. The notification of proposals invited observations by the end of 31st January 2015. In total 31 observations were received. Three lessees took up the invitation to inspect the Proposals themselves. Pond House leaseholders were sent additional letters on 19th December 2014, containing estimates of the works proposed to be carried out by Keepmoat in the first year of the Framework Agreements.

33. The schedule of works proposed to be carried out on Pond House and the estimates of costs were based on pre-tender surveys together with asset intelligence rather than a specific detailed survey of the properties themselves. The expert report prepared by Alex Gould was written on instructions by the applicant to inspect Pond House and to summarise the existing condition of the property in order to give his expert opinion on the need for the works to each block. He had been informed (and this was confirmed at the hearing) that the precise extent of the necessary works will be the subject of a final survey by the appointed contractor and other consultants. Mr Gould confirmed that he did not carry out an internal inspection of the property. It is not proposed to examine Mr Gould's report in detail but it will suffice to say that in a number of respects it did not support the schedule of works annexed to the application to the Tribunal. Most significantly, it was conceded by Mr Bhose that the proposed window replacement could not be justified without a detailed survey of each unit internally. Additionally, the extent of some of the other works, for example to the brickwork was put into question by Mr Gould who additionally identified other areas of concern that had not yet been addressed.

The Framework Agreements

34. The Framework Agreement included in the Tribunal's documents is the agreement to be executed with Keepmoat. It consists of the body of the agreement and a series of 9 schedules. Most of the documentation in the schedules was not included in the bundle and the Tribunal was told that these run to thousands of pages. Our attention was drawn to: Schedule 1 containing the mini-competition procedure, rules and model-form mini-tender; Schedule 2 which is the framework brief; Schedule 3 which are the framework proposals, Schedule 4 which are the framework price schedules (copies of those parts as they apply to the South Area were included) and Schedule 5 which comprises the form of ACA Term Partnering Contract TPC2005.

35. Following the execution of the four Framework Agreements, the TMO intends to enter into a Partnering Contract with Keepmoat for the South Area. Orders for external works (contributions towards the costs of which lessees may be liable to contribute) will not be issued until the outcome of this application. The process will begin with a “Task Pre-Commencement Order” which will include setting dates for formal and informal consultation with leaseholders and residents, mobilisation of labour, materials and site compounds, agreement project delivery protocols and conducting joint surveys to confirm the properties to be included in the programme and the scope of work. Following the satisfactory completion of the pre-construction activities, Keepmoat are to submit their Task Price for the works for approval by the TMO calculated from their tendered unit rates. Upon approval and subject to satisfactory consultation under schedule 3 of the consultation regulations, a task commencement order will be issued to start works. This process will apply to both the first and second year.

36. For later years the award of any works will be dependent on the outcomes of annual call offs and mini-competitions. Under the agreement contracts may be awarded either through Direct Selection or Mini-competition. It is important to note that the TMO is not obliged under the terms of the agreement to award the contract to any of the four selected contractors. Furthermore if works are carried out which go beyond the scope of the Framework Agreements, or if a different contractor is appointed, the usual rules for consultation under the regulations will apply.

37. Mr Bhose referred to a number of the terms of the framework agreement including:

(a) Clause 1.1 which includes the following definitions:

> "Works" means the refurbishment and capital investment forming part of the Framework Programme to be carried out by the Service Provider as part of any Project pursuant to any Partnering Contract as more widely described in thee Framework Brief and as amended in any Partnering Contract"
> "Project" shall mean any works instructed by the client pursuant to this framework agreement and to be carried out by one or more service providers pursuant to any partnering contract.

(b) Clause 5 provides that:

> "5.2 Where the client considers that it may require the carrying out of certain works comprising any project it shall select a service provider to carry out such project on the basis of direct selection or mini-competition"
> "5.4 As part of the selection process….the client shall specify:
>
> > 5.4.1 the scope of the works required for the project, in accordance with the Framework Brief and the Framework Proposals;
> >
> > …
> >
> > 5.4.5 the sum payable for the project, which shall be based on the Framework Price Schedule
>
> …
> 5.7 This agreement and each partnering contract shall be treated as complementary…"

38. In accordance with regulation 19(4) of the PC regulations when awarding a specific contract on the basis of a Framework Agreement neither the contracting authority nor the economic operator may include terms that are substantially amended from the terms laid down in the framework agreement.

The Applicant's Submissions

39. Although this application is for the determination by the Tribunal of the liability to pay future service charge costs, the main focus of the submissions by both the applicant and the respondents was on the section 20 consultation issues.

Framework Agreements

40. On behalf of the applicant, Mr Bhose said that the use of Framework Agreements in the public sector has been well established for a number of years. For example, he said, they were referred to in the 1998 report of the Construction Task Force to the Deputy Prime Minister, *Rethinking Construction* , chaired by Sir John Egan as one of the tools available to tackle fragmentation which may arise from more traditional contract based procurement and project management. Within the Executive Summary, Sir John recommended that "The industry must replace competitive tendering with "*long term relationships based on clear measurement of performance and sustained improvements in quality and efficiency…"* Mr Bhose said that the ongoing use of Framework Agreements was also recorded by Peter Gershon in his *Review of Civil Procurement in Central Government* (April 1999).

41. It was Mr Bhose's submission that at the time the Commonhold and Leasehold Reform Act 2002 received royal assent, Framework Agreements were firmly in the contemplation of the legislature. This is of importance because of the changes to the structure of section 20 introduced by that Act and associated secondary legislation. In particular he drew our attention to the Office of Government Commerce guidance issued in 2003. The OGC was established in April 2000 to work with government departments to improve their procurement capability and to secure better value for money. The guidance entitled Framework Agreements and *EC Developments* was issued when draft Directive 2004/18/EC was issued having been agreed politically at the Internal Market Council on 21st May 2002. Our attention was drawn specifically to the following passages:

> **"Introduction**
>
> The proposed new consolidated public sector Directive, which will replace the existing Directives covering public procurement of services, supplies and works, will include a provision on framework agreements for the first time….
>
> The current EC public sector Directives do not refer to framework agreements although their use is well established and has been recognised by the Commission….Much of the guidance below reflects the explicit provision for each framework agreements in the proposed new consolidated EC public sector Directive….These processes will take some time…..However, as the new Directive is, in this instance, simply making explicit what is already considered to be permissible under the existing EC rules, departments do not have to await adoption or implementation of the new Directive before making use of this guidance note.
>
> …
>
> The UK has always taken the view that the only sensible approach to such framework agreements is to treat them as if they are contracts in their own right for the purposes of the application of the EC rules. As such, the practice has been to advertise the framework itself in the Official Journal of the European Union (OJEU, formerly OJEC) and follow the EC rules for selection and award of the framework. This provides transparency for the whole requirement across the Community and it removes the need to advertise and apply to award procedures to each call-off under the agreement, on the basis that the framework establishes the fundamental terms on which subsequent contracts will be awarded.
>
> The European Commission has, during recent years, expressed some concerns about the approach. The main concern has been that, in making call-offs under a framework agreement, there should be no scope for substantive amendments, through negotiation to the terms established by the framework agreement itself.
>
> …
>
> Most importantly, the proposed new EC public sector Directive referred to above…includes an explicit provision (Article 32) on the application of the EC rules to these agreements. That provision…meets the UK;s need for greater clarify in this area compatible with current practice."

Article 32 of Directive 2004/18/E sets out the requirements for Framework Agreements set out in paragraph 19 above.

42. Mr Bhose explained that:

(1) Whilst a Framework Agreement is not an agreement where goods will be sold or supplied, services rendered or works undertaken, it exists so that specific contracts may be awarded under and in accordance with its terms, within which goods will be sold or supplied, services rendered or works undertaken;
(2) The award of specific contracts under the Framework is limited to one or more of the economic operators with whom the authority has concluded a framework agreement. The Framework Agreement is, he said, a necessary legal prerequisite for the award of any specific contract.
(3) Neither the award nor the terms of a specific contract is at large. Both the award and the terms of the contract are limited by the terms laid down in, or based upon, the Framework Agreement.

Accordingly, he said, one cannot view a Framework Agreement completed under regulation 19 , and a specific contract awarded under the terms of that same Framework Agreement, together with the requirements of regulation 19 , in isolation to one another, Together, they form a contractual whole.

Section 20 consultation

43. Turning then to the regulation of service charges under the Landlord and Tenant Act 1985 , Mr Bhose said that section 19 of the 1985 Act limits the payability of relevant costs to costs that have been reasonably incurred and where services are provided or works are carried out to the extent that they are of a reasonable standard. Section 20 and 20ZA impose an additional obligation to consult. However, he said that in the decision of the Supreme Court in *Daejan Investments v Benson [2014] UKSC 14* , Lord Neuberger had made it clear that section 20 requirements are not "an end in themselves". In Benson the Supreme Court was considering the proper approach to retrospective dispensation under section 20ZA(1) of the 1985 Act. Mr Bhose drew our specific attention to paragraph 43:

> "43. So I turn to consider section 20ZA(1) in its statutory context. It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The former purpose is encapsulated in section 19(1)(b) and the latter in section 19(1)(a) . The following two sections, namely sections 20 and 20ZA appear to me to be intended to reinforce, and to give practical effect, to those two purposes….
>
> 46. …The requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges to the extent identified above. After all, the requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them."

44. Mr Bhose reminded the Tribunal that the current sections 20 and 20ZA were included in the 1985 Act following amendments made by section 151 of the Commonhold and Leasehold Reform Act 2002 which came into force on 31st October 2003. The concept of the "qualifying long term agreement" was new in 2002. In particular the scheme of the previous section 20 did not accommodate arrangements where qualifying works would be carried out by an identified contractor or contractors under the auspices of an agreement which was "long term". For example, local authorities were entering into PFI contracts for refurbishment or maintenance works and were unable to comply with the old section 20 which allowed residents associations to nominate contractors from whom the landlord was required to seek an estimate for the works.

45. As to the structure of the consultation provisions Mr Bhose submitted that the element of competition is provided either by the giving of public notice or the obtaining of estimates but not both. For schedule 1 (QLTA) and schedule 4 part 2

(qualifying works), where public notice is *not* required, the element of competition is provided by the requirement that the landlord obtain an estimate from someone nominated by the tenants and the requirement to provide at least 2 estimates. For schedule 2 and schedule 4 part 1 , the element of competition flows from the giving of public notice which advertises the matter Europe-wide. Since tenants are told in the notice of intention that public notice is to be given, they could even draw this to a contractor's attention.

46. Mr Bhose submitted that Schedules 1 and 2 of the regulations envisage a situation under a qualifying long term agreement where a landlord is unable to estimate, as at the date of the proposal, what each tenant's relevant contribution attributable to the relevant matters will be. Paragraph 5(7)-(9) of schedule 1 and paragraph 4(4)-(7) of Schedule 2 make provision for a number of alternative steps to compliance in cascading sequence, based upon what is or is not reasonably practicable. In London Borough of Southwark v Leaseholder of the London Borough of Southwark [2011] UKUT 438 , the President was considering an application by the council for dispensation of the consultation regulations contained in paragraph 4 of schedule 2 . The council's concern being that as they did not have specific information to provide an estimate, cost or rates for proposed works, they would require section 20ZA dispensation. In the event, the President found that dispensation was not required because compliance had actually been achieved. He described the provisions as follows:

> "(a) The requirements in sub-paragraph (4), (5), (6) and (7) form a cascading sequence. If it is not reasonably practicable to make the estimate required by sub-paragraph (4), (5) must be complied with; if it is not reasonably practicable to make the estimates required by sub-paragraph (4) or (5)(b), (6) must be complied with; and if it is not reasonably practicable to make the estimate required by sub-paragraph (6)(b), (7) must be complied with.
>
> (b) If it is reasonably practicable to make an estimate of part of the tenant's contribution but not all of it, the proposal does not have to state any estimate. The same goes for the estimate of expenditure under (5) and the ascertainment of the unit cost or hourly or daily rate under (6). It follows that if it is not reasonably practicable to provide what is required by (4), (5) or (6) the Notice of Proposal need only say why it is not and state the date when the landlord expects to be able to provide an estimate, cost or rate (see (7)).
>
> (c) No question of reasonable practicability arises under (7). The requirements are absolute.
>
> (d) When in due course the landlord does have information enabling him to provide an estimate, cost or rate, paragraph 8 requires him to give notice in writing of this within 21 days. …The paragraph 8 notice creates no new opportunity to make observations nor any duty on the part of the landlord to take any observations into account or respond to them."

This demonstrates, said Mr Bhose, that QLTAs may have considerable degrees of complexity and recognises that works or services do not need to be determined when the QLTA is entered into; that a QLTA does not have to include "set" costs or prices for the works or services; that it is for the landlord to order or require works or services as it needs them and that there will, or may be, order or instructions or call-offs.

47. Mr Bhose submitted that:

(a) Firstly, it is clear that section 20 might apply to a QLTA such as this in one accounting period and not another because the costs under the agreement may fluctuate. A prudent landlord will consult with leaseholders if there is a possibility that one or more of them will be required to pay more than £100 for works to their property in any one period. Accordingly if a QLTA might result in more than £100 being payable in any period then it should be treated as an agreement which is subject to the consultation requirements;
(b) Secondly, there is no requirement that the terms of the QLTA must *oblige* the landlord to place or carry out works or services. Otherwise it would always have to be shown in advance that the landlord was obliged under the agreement to spend an amount which would trigger consultation. Accordingly, he said, there is no difference between a QLTA under

which the landlord is obliged to let works or services and one under which he is not so obliged but may do so. In either case the crucial question is whether section 20 applies at the point at which costs under the QLTA are incurred.
(c) Thirdly, the statutory provisions are not prescriptive as to the terms of the QLTA. Rather they recognise that it is a broad and flexible concept: the QLTA may be concerned with all or any of the works or services a landlord may provide; it may be for any length beyond a year; it may extend across the breadth of a landlord's stock without limitation on numbers or geography; it may be for values or works or services into the millions of pounds; there is no requirement that the works or services must be known or agreed when the QLTA is made nor is there any time limit within the duration of the QLTA when they must become known or agreed; and there is no requirement that a landlord must place works or services under the QLTA either at all or at any particular time during it. The statutory provisions do not, he said, prescribe the precise manner or mechanism by which an order or instruction or call-off is to be made. The provisions eschew technicality in keeping with the recognised breadth and flexibility of the QLTA.
(d) Fourthly, this Framework Agreement is a QLTA agreement made by the TMO on behalf of the applicant for a period of four years and is directly concerned with the performance of a core landlord function — namely repair and maintenance;
(e) Fifthly, this is a QLTA to which section 20 applies. When works are carried out, the costs will be incurred "under" the Framework Agreement. Mr Bhose contended that it is manifest that the Framework Agreement regulates the relationship of the TMO and Keepmoat. It creates a bundle of rights and obligations and when works are carried out they will have to be carried out and paid for in accordance with the provisions of the Framework Agreements. To hold otherwise would be to introduce a technicality that the statutory provisions neither require nor envisage. The fact that the works could also be said to be carried out in accordance with the Partnering Contract is, he said, legally insignificant since this contract is itself provided for by the Framework Agreement and could not lawfully be entered into save by direct reference to it. The applicant should succeed, he said on a simple "plain meaning" construction.
(f) Finally, he argued, it is highly unlikely that Parliament would have enacted amendments to the section 20 provisions which did not accommodate public sector landlords from entering into Framework Agreements when their existence and use was by that time, well established.

Proposed works

48. Mr Bhose submitted that the works proposed and set out in the schedule to the application to the Tribunal, fell squarely within the applicant's repairing covenants set out at paragraph 8 above. However, this was subject to a full survey being carried out in advance of further consultation with leaseholders. In particular there was some doubt about whether the condition of the windows was such that they required replacement.

Respondents' Submissions

49. All four of the leaseholders who attended the Tribunal submitted written statements of case and made oral submissions. To some extent, the submissions overlapped with each other and where that is the case, we have summarised the common points below without attribution.

The London Area Procurement Network case

50. A main part of the lessees' case relies upon a first instance decision by the (then) Leasehold Valuation Tribunal dated 5th March 2007, namely London Area Procurement Network v All Right to Buy lessees (LON/00BF/LDC/2006/0078 & others). In that case eight London local authorities, including the applicant in this case, applied under section 20Z A for dispensation from some of the consultation requirements of the 1985 Act. Together the applicant authorities had formed the London Area Procurement Network (LAPN). The application related to all of the leasehold properties within the network area estimated at about 33,000 units out of a total housing stock of 125,000 units.

51. The alliance known as LAPN had been formed to facilitate collaboration between the participating boroughs with a view to promoting efficiencies in the procurement of services and goods. It was resolved that the Network would enter into a series of Framework Agreements to which individual contractors would be appointed for a four year term. Call-off contracts would then be entered into by the individual local authorities. The Network was concerned that the nature of the scheme was such that it would not be possible to comply with the provisions of schedule 2 of the consultation requirements. In particular, since the framework agreements were in draft, it was not possible to identify the scope of works, the value of the works or the properties to which particular works and costs would relate. It was therefore decided to make an application to the Tribunal for dispensation from the requirements of the consultation regulations. The basis of the application was that the proposed

Framework Agreements would be QLTAs, that they would be QLTAs subject to public notice and therefore within Schedule 2 of the regulations and that dispensation from paragraphs 4(4)-(7) was required. It should be noted that the application was decided several years before the Southwark decision mentioned in paragraph 46.

52. The Tribunal rejected the application and decided that the proposed Framework Agreements were not QLTAs to which section 20 applied for the following reasons:

(a) The Framework Agreements were in draft and the Tribunal considered that it was unable to make a determination on agreements that had not been finalised;
(b) Under the proposed Framework Agreements no relevant costs were to be incurred by any of the parties; relevant costs were instead incurred under the individual call-off contracts;
(c) The Public Contract Regulations relied upon by the LAPN had been superseded;
(d) For the Framework Agreements, the relevant parties were LAPN and the contractors whereas the parties to the call-off contracts were intended to be the individual local authorities (or their management organisation on their behalf) and the contractors. The Tribunal therefore did not consider that there was sufficient nexus in these contracts for it to be satisfied that the relevant costs were "incurred under the agreement".
(e) The agency relationship between LAPN and the individual local authorities was such that the Tribunal did not consider that if costs were incurred "under" the agreement, that they would in any event have been incurred by a relevant landlord under the agreement.

53. Furthermore, the Tribunal decided that even if it was wrong and that the Framework Agreements were QLTAs within section 20 , it would not have granted dispensation. In particular it did not accept the evidence given on behalf of LAPN that it was not reasonably practicable to comply with paragraph 4(7) of the regulations. The Tribunal considered that the LAPN ought to have had good information on planned works, budgets and schedules of rates and, in the absence of this, dispensation would effectively give a blank cheque to LAPN. Also, the Tribunal was concerned that if dispensation was given then the limited consultation specified in Schedule 3 to the regulations would "remove many of the rights and security of the leaseholders with regard to the sums to be spent by the landlord". The Tribunal continued:

> "It is in effect not a consultation exercise but the provision of information to which the leaseholders have no right to object. They may raise observations to which the landlord must have regard but in real terms the contract has already been entered into, and the only recourse of the leaseholders is then to make an application to the Tribunal for a determination of their liability to pay under section 27A after the works have been carried out."

54. In this case the respondents rely on the reasoning of the LAPN Tribunal and in particular the finding that the proposed Framework Agreements were not QLTAs within the meaning of section 20 of the 1985 Act. The argument is summarised in paragraph 7 of Ms Edema's statement as follows:

> "7. The Respondent's reply is that an overarching FA is *not* a QLTA to which section 20 of the 1985 Act applies because the "relevant cost" will *not* be "incurred under" each of the 4 overarching FA Agreements: regulation 4(1) to the Consultation Regulations. The Notice of Intention and Notice of Proposal to award FA Agreements in compliance with Schedule 2 to the Consultation Regulations simply set out the terms and pricing framework for the work called off from these overarching FA Agreements but do not by definition commit either party to these Agreements to the carrying out of works. It is if and when an FA contractor is appointed to carry out Proposed Works that a contract is formed and the "relevant costs" will be "incurred under" the proposed call-offs: The Office of Government Commerce Guidance on framework Agreements in the Procurement Regulations 2008 ("OGC Guidance"). OGC Guidance 2.2 explains:

> "Such agreements (FAs) set out the terms and conditions for subsequent call-offs but place no obligations, in themselves, on the procurers to buy anything. With this approach, contracts are formed under the Regulations only when goods, works and services are called off under the agreement."

55. The Respondents also place reliance on the LAPN Tribunal's observations on how consultation may have been curtailed had dispensation been given in that case. As Mr Hoexter put it at paragraph 10 of his statement "Should the Applicant succeed in an 'in principle' determination by the Upper Tribunal favourable to them, this will allow them to drive a Trojan Horse, with its accompanying cart of obfuscation, straight through the protections for lessees for which section 20 was intended."

56. All of the lessees described historic incidents of poor management and excessive costs in the execution of works by the applicant. In his statement Mr Langahan gives a detailed account of the manner in which repairs were carried out to Chelsea Manor Court over a number of years. One example was the supply and fit of replacement windows and doors in 2003/4 which he said were 2 and 3 times more expensive than the prices of competitors and of such a poor quality that they failed within a couple of years. He also said that the lessees had started an action in the Leasehold Valuation Tribunal in 2009 against the applicant which was settled on the basis that significant sums of money were repaid to the lessees. He also maintained that the applicant is now in breach of its duty to maintain the decoration of Chelsea Manor Court and despite this being an urgent matter, could not understand why it was not prioritised in the proposals for the South Area.

57. Mr Lanagahan also referred the Tribunal to the case of Auger, Association of Camden Council Leaseholders v London Borough of Camden LRX81/2007. That case concerned an application for dispensation under section 20ZA of paragraphs 4(4) to (7) of Schedule 2 to the consultation regulations. The subject matter of the QLTA in that case was a partnering agreement rather than a Framework Agreement. At the time of the application for dispensation the partnering agreement had not been entered into by the local authority. His Honour Judge Huskinson decided that although there was jurisdiction to dispense in these circumstances, dispensation should not in fact be given. In particular he considered that if it was reasonably practicable for Camden to provide the information required in paragraph 4 of the regulations then it should not be excused, through a dispensation order, from doing so. In his view the application for dispensation was premature.

58. In this case Mr Lanagahan disputed the Applicant's submission that the matter was urgent and he said, by reference to the failure to carry out works at Chelsea Manor Court, that this was illustrated by the failure to carry out maintenance works in accordance with the relevant leases. He also argued that the price to quality ratio (explained in paragraph 29) was inappropriate and that greater weighting should have been given to price.

59. A further point made by Mr Lanaghan at the hearing was that the applicant had rolled together works so that it was inevitable that the financial limits imposed in European law would be exceeded. He questioned the applicant's motives in this respect and argued that the works should have been parcelled up into smaller units.

60. Mr Hoexter made similar points to Mr Lanaghan and said that the TMO had a very poor record of procuring and supervising works and applying due diligence when signing off payments to contractors both for major capital investment works and for maintenance. He also considered that the TMO had inadequate experience and manpower to oversee a capital investment works programme of up to £130 million. Mr Hoexter pointed out that by entering into agreements with a very limited number of providers for very large individual amounts of work, the chance of insolvency for any of them compounds the risks, including to the value of warranties for work signed off. Mr Hoexter also drew the Tribunal's attention to the fact that the TMO had been "somewhat naïve" in its dealings with past contractors several of whom were fined substantial amounts by the OFT in 2009 for improper tendering, including Apollo which was fined £2.15 million and which now forms the public contracting arm of Keepmoat.

61. Mr Hoexter cited a specific example of major capital works that were carried out on the Tregunter East properties in 2009/10 where, he said, the works proposed to be charged to lessees in the section 20 notice were excessive both in cost and scope and despite the provision of a detailed independent survey, they were proceeded with. Final accounts were not produced until four years after completion and the total came to significantly less than the estimate largely because of the reclassification of works as improvements and not chargeable to the lessees.

62. Mr Hoexter was concerned to highlight the fact that the "in principle" decision about QTLAs sought by the applicant would be applied to all such agreements of any scope and of any nature. He agreed that Framework Agreements can provide demonstrable benefits both to landlords and lessees. However, in this particular case he said that the Key Performance Indicators were inadequate to support proper supervision of such an extensive programme of works. He also pointed out that another London Borough had decided to adopt a different model of Framework Agreement where works were parcelled into six strands and five contractors were appointed for each strand. This, he said was a much more effective way of dealing with its housing stock maintenance. In common with the other leaseholders, Mr Hoexter considered that the applicant had failed to demonstrate that the Framework Agreement would provide quantifiable benefits to lessees and that instead they hope to "close the door" through a legalistic side route. He also contended that there was an insufficient nexus between the works to be carried out and the Framework Agreement for them to be considered to have been carried out "under" it. His experience was, he said, that the Framework Agreements would give the providers the dominant role in any partnership to the detriment of lessees' interests.

63. Mr Dunne reiterated the points made by the other lessees and also gave an example of poor management in the case of Talbot House which underwent cyclical redecoration. There was a failure, he said, to comply with section 20 procedures and the standard of work was so poor that the lessees made successful applications both to the County Court and to the Leasehold Valuation Tribunal in respect of the costs and consequential losses. Mr Dunne echoed the concerns about the competence of the TMOs and submitted that the framework agreement would be prejudicial to the interests of the leaseholders.

64. Finally Ms Edema submitted that the intention of the Secretary of State in enacting the consultation provisions was to safeguard the statutory rights of leaseholders and to limit a landlord's ability to recover if he does not comply with the consultation regulations. She too questioned the competence of the TMO and made the point, as did the other lessees, that it would be unreasonable that leaseholders as a last resort would have to face years of distress and the financial burden of applications to the First-tier Tribunal. She also gave an example of a previous failure to successfully undertake works to Colville Road in 2009.

65. The leaseholders also raised a number of issues about the actual conduct of the consultation process adopted so far. We deal with these below and as part of the discussion.

Discussion

66. It is important first to consider the scope of this application and the extent of the jurisdiction of the Tribunal. The application is made under section 27A(3) of the Landlord and Tenant Act 1985 . This provides for an application to be made to the Tribunal for a determination of the liability to pay costs "if costs" were to be incurred. It is therefore not an examination of whether costs have been reasonably incurred or whether works and services are of a reasonable standard. It may however, include a consideration of whether, at a particular point in time, the correct consultation has been carried out in accordance with the consultation regulations

67. In London Borough of Southwark v Leaseholders of the London Borough of Southwark , the question of how a landlord might seek a determination that it has complied with the regulations could be achieved. As mentioned above, that case decided that dispensation from the regulations was not required under Schedule 2 where, for the time being, a landlord is unable to provide the information set out in regulation 4 . At paragraph 53 of that decision the President noted that the council made its application for dispensation "in an attempt to achieve assurance that it would not be visited with the ruinous consequences of failing to comply with the Regulations." There is no power for the First-tier Tribunal or indeed this Tribunal to give declaratory relief. A suggestion was made in that case that the most convenient course would be for the landlord to apply under section 27A(3) for a prospective determination of compliance. In the Southwark case itself, the President doubted whether the procedure would be appropriate in a case where no specific description of the works to be carried out to each

of the many properties was available. In this case the applicant seeks a section 27A(3) determination on the basis that it has provided sufficient information on the works to be carried out.

68. The questions that this Tribunal has to consider were identified by Mr Bhose as follows:

(1) What works of repairs, decoration and maintenance are proposed to each block;
(2) Is the Applicant required (or permitted) by the leases of the individual Pond House lessees, to undertake these proposed repairs and maintenance;
(3) Has the Applicant complied, thus far, with its obligation to consult the Pond House lessees under the Act and the Service Charges (Consultation Requirements)(England) Regulations 2003 ("the Consultation Regulations");
(4) Would the estimated contribution of each Pond House lessee towards these proposed works be a reasonable sum to demand from them, on account?

69. The Tribunal will consider each of these issues but not in the same order. There is no doubt, in our view, that although this is a section 27A(3) application, the main purpose was to obtain a determination on the consultation issue. However, we are satisfied that the application under section 27A(3) was an appropriate way to secure such a determination and we consider that issue first.

70. In 2003, as described by Mr Bhose, substantial amendments were made to section 20 of the Landlord and Tenant Act 1985 by the Commonhold and Leasehold Reform Act 2002 . One of the changes was the introduction of the duty for landlords to consult about certain QLTAs. As we have seen, the definition of QLTA is contained in sections 20 and 20ZA of the 1985 Act and regulation 4 of the consultation regulations. Taken together a QLTA 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.

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. If the applicant used another contractor then they could not rely upon the Schedule 2 consultation already commenced. If the applicant carries out works which go beyond the works contemplated by the Framework Agreements, then again, they could not rely upon the Schedule 2 consultation already commenced.

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. We are reinforced in this view by the terms of the agreement itself, set out at paragraph 36 of this decision and by the requirement of regulation 19(4) of the Public Contracts Regulations 2006 which provide that when awarding a specific contract on the basis of a Framework Agreement neither the contracting authority nor the economic operator may include terms that are substantially amended from the terms laid down in the Framework Agreement. In that respect we accept Mr Bhose's contention that together, the Framework Agreement and the specific contract cannot be regarded in isolation from each other.

75. If further confirmation from the statutory provisions for this conclusion were required, we have also had regard to regulation 7 of the consultation regulations which provides that: "…where qualifying works are *the subject* (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements… as regards those works, are the requirements specified in Schedule 3 ." We consider the word "subject" to be even more open textured than "under" and an indication that a broad construction is appropriate. There can be no question but that the proposed works in this case are "the subject" of the Framework Agreements.

76. In reaching this conclusion we have had regard to the LAPN decision but consider that this is a very different case. In particular the agreements in the LAPN were very much in draft and the agency relationship between the Network and each individual authority threw into doubt whether or not there was a sufficient nexus between the Framework Agreements and the call-off contracts under which the works were to be carried out. We find that the Framework Agreements in this case are QLTAs for the purposes of section 20 of the Landlord and Tenant Act 1985 .

77. It is also significant that the basis of the LAPN application was the authorities' belief that they needed to obtain dispensation before they could proceed on a schedule 2 basis. As noted in paragraph 46 above, the Southwark decision displaces that assumption. The fact that the information required by paragraph 4 of schedule 2 to the consultation regulations is not available to be provided to the leaseholders does not mean that dispensation is required. All that is necessary is for the authority to provide the information when it is able to do so.

78. The consequence of that finding must also be considered. The Framework agreements relate to works whose total cost may be as much as £130 million. The works for which lessees in the Borough might have to contribute amount to some £50 million of that total sum. That figure far exceeds the financial limit for public notice. Although we acknowledge the lessees' argument that the works could have been divided into smaller parcels and public notice might not then have been necessary, we do not consider that to be a matter for this Tribunal. It is for the applicant to decide how to manage and carry out works to their housing stock. If, as a result of their action, charges are excessive or works of a poor standard then the costs will not be reasonable and will not be recoverable. We acknowledge the evidence given by the lessees of the previous failures by the TMO in the management of maintenance and repair contracts. However that cannot affect our decision on the issue of whether or not the Framework Agreements are QLTAs or not.

79. Although the Tribunal in the LAPN case were concerned that the rights of the lessees to be consulted would be abrogated if dispensation were to be given, we do not consider that this is relevant here. In particular the LAPN Tribunal was considering whether or not to exercise its discretion to dispense. Because of the Southwark determination there is now no issue of discretion. Either the QLTA is one to which the regulations apply or it is not. We have decided that the regulations do apply. The consequence therefore is that if works are carried out under a contract falling under the auspices of the Framework Agreements in this case, then consultation will be limited to that required by schedule 3 of the regulations. We acknowledge the lessees' real concerns in this respect. However, we are mindful of the fact that the vehicle contained in the amended section 20 and the process set out in Schedules 2 and 3 of the regulations was introduced at a time when public procurement both by partnering and by using Framework Agreements was well established. The introduction of Schedules 2 and 3 meant that public bodies, which previously were unable to comply with section 20 when they had entered into large scale arrangements

for works, were now able to do so. Furthermore we consider that although Schedule 3 consultation is less extensive than consultation under Schedule 4 , it is still consultation, albeit more limited in scope. Looking back, the Tribunal also speculated that when the right to buy was introduced for secure tenants in 1985, insufficient regard may have been given to the interaction between public procurement and the old section 20 and that the amendments made by the Commonhold and Leasehold Reform Act 2002 were intended to address that deficiency.

80. Finally, we think it important to consider the ambit of the Supreme Court's decision in Daejan v Benson . Mr Bhose properly drew our attention to Lord Neuberger's analysis of the relationship between section 19 and section 20 of the 1985 Act and his conclusion that section 20 requirements are not an end in themselves. However, Mr Bhose also acknowledged that Benson was concerned with an application for retrospective dispensation and must be read in that context. What Benson does not do is to change the requirements to consult. It remains the case that section 20 consultation must be complied with or dispensed with if a landlord wishes to recoup relevant costs.

81. As mentioned above, a number of points were also made by the leaseholders about the conduct of the section 20 consultation carried out so far. For the following reasons, we do not find any of the complaints to be substantiated:

(a) We are satisfied that the Notice of Intention dated 2nd September 2013 was served on every recognised tenants' association. The Tregunter East Residents' Association is not “recognised” for the purposes of section 29 of the 1985 Act. We are also satisfied that provision of the statutory consultation notices to the Chair of the Chelsea Manor Court Tenants' Association was sufficient compliance with the consultation regulations;
(b) We are satisfied that the Appendix i ncluded with the Notification of Proposals dated 18th December 2014 complied with paragraph 4(10) of schedule 2 to the consultation regulations;
(c) We do not find that the Framework Agreement had already been signed and Partnering Contracts issued to Keepmoat. We are satisfied on the evidence that the agreements were executed by Keepmoat on 22nd May 2015 and that as at the date of the hearing they had not been executed by the TMO;
(d) The place specified at which the Proposals could be inspected and the hours specified for inspection, were reasonable, within the meaning of paragraph 2 of schedule 2 to the consultation regulations.

82. Having found for the applicant on the section 20 issue, the Tribunal is nonetheless unable to find for it on the substantive application. In particular, although a schedule of proposed works was provided with the application, this has been significantly undermined in the evidence of Mr Gould. Section 27A(3) requires a Tribunal to make a specific determination of payability. Since a determination under section 27A(3) is made *before* works are carried out it cannot be determinative of the standard of the work when finally completed. However, precision as to the extent of the works, the duration of the works and the terms of the lease which support the obligation to carry out the work is still required to support a section 27A(3) determination. On the information before it, the Tribunal cannot be satisfied of any of those matters. Mr Bhose conceded that there was insufficient evidence to support the estimate in respect of window repairs. In our view Mr Gould's evidence put into doubt the detail of most of the proposed works. As a result it is impossible to say whether any of works fall under the terms of the lease and we certainly cannot be satisfied that the estimated costs are reasonable. Also, although the evidence of the leaseholders about the manner in which historic works had been carried out cannot be determinative about the conduct of future works, we think that the information is sufficient to give us pause and we would require very persuasive evidence before we could feel able to make a determination of payability. Evidence of that quality is simply not available in this case. Accordingly the application fails and the Tribunal declines to make the determination sought under section 27A(3)

83. No application by the lessees was made under section 20C of the Landlord and Tenant Act 1985 . This is because of the clear undertaking by the applicant that it would not seek to recover the costs of this application from any of the leaseholders in the borough. That undertaking was recorded in the directions order made by the Deputy President on 31st March 2015.

84. The application is dismissed.

Footnotes

1 Now replaced by the Public Contracts Regulations 2015

Tab 9

R oao Robin Clarke v Birmingham City Council

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
4 July 2019

Case No: CO/2600/2018

High Court of Justice Queen's Bench Division Administrative Court

[2019] EWHC 1728 (Admin), 2019 WL 02893992

Before: HHJ David Cooke

Date: 04/07/2019

Hearing date: 27 June 2019

Representation

The Claimant appeared in person.
Gavin McLeod (instructed by Birmingham Legal and Governance Department) for the Defendant.

Approved Judgment

HHJ David Cooke:

1. This is the hearing of Mr Clarke's claim for judicial review of a decision of the Cabinet of the defendant council made on 24 May 2019 to confirm its decision of 27 March 2019 approving an amended capital spending budget that included provision of some £19m (out of an anticipated total of £31m over three years) to fund the retro-fitting of sprinkler systems to all the tower blocks owned by the Council, in the wake of the fire at Grenfell Tower in London.

2. Mr Clarke considers that the decision to fit sprinklers is a waste of public money that could be better spent elsewhere, on the grounds, summarised broadly, that the Council has not investigated in any detail whether the Birmingham blocks are subject to any material risk of a catastrophic fire such as occurred at Grenfell Tower (he contends they are not) or for any other reason, such that any additional contribution to reduction of risk of such a fire that might be achieved by fitting sprinklers, over and above the protection afforded by existing measures already incorporated into their design and construction, would be worth the substantial additional cost involved.

3. He points out that although Birmingham has had a large number of such tower blocks in place for many years, during which time there have been numerous fires in individual flats, the existing fire protection measures have always been sufficient to contain those fires and prevent them spreading to the whole block or any substantial part of it, and contends there is no reason to think this will not continue to be so in future. In his view, the decision to fit sprinklers was a panic response by

politicians keen to be seen to be doing something in response to the Grenfell tragedy, when a more considered evaluation would have shown that it was not necessary or justified.

4. The decision challenged was preceded by a number of other relevant events:

i) On 27 June 2017, 13 days after the Grenfell Tower fire, a report was presented to the Council's Cabinet (bundle p 119) setting out a response to that event. It contained a summary of existing fire protection measures and risk evaluation procedures at Birmingham's tower blocks and, in a section headed "Future Investment", said:

> "In reviewing the safety of our tower blocks, we believe that the addition of water sprinkler systems would assist us in ensuring that residents of the tower blocks have the best protection in the event of fire that is currently available. It is estimated that this will cost in excess of £31 million to retro-fit.
> The leader of the Council has written to the leaders of the core city authorities asking for their support to lobby government to pay for fire suppressant measures. Regardless of the response from government however, it is intended to prioritise the Council's spending on a rolling programme of sprinkler installation and fire prevention measures from capital receipts. A programme of works will be developed once further specifications have been agreed with West Midlands Fire Service…"
> The recommended decision was that "Cabinet… notes and endorses the detailed action referred to in the report [and] supports the approach to Government to help to pay for the sprinkler systems and fire suppressant measures in all of the City Council's tower blocks as appropriate…". The report states that the "Reason for Decision" is "The measures outlined in this report ensure that residents in Birmingham City Council's tower blocks have the best possible protection in the event of a fire."

A separate public document (p 131) records that a decision was made in accordance with the recommendation.
ii) At that time, the Council's capital investment budget for housing stock for the three year period to April 2020 had already been set and of course included no specific provision for expenditure on fire sprinkler systems. On 27 February 2018 the Council adopted a revised overall budget for the next three years, including provision for the spending of £31 million on these fire protection measures. That would require an amendment to the existing capital investment budget, and accordingly on 27 March 2018 the Cabinet considered a document proposing a revised capital investment budget (p 133) to include this additional spending. It was noted (p 136) that this involved an increase in the budgeted expenditure for the 2017-8 financial year of some £7.2 million.
iii) That recommendation was approved. The decision of the Cabinet was subject to a "Call-In" procedure, by which any of a number of potentially interested organs of the Council could request that it be reconsidered by the Cabinet.
iv) One such body was the Housing and Homes Overview and Scrutiny Committee (referred to as the Scrutiny Committee). Two members of that committee, Councillors Henley and Leddy, made a request to it to call in the decision. A note of the Scrutiny Committee's consideration of that request is at p 149. I refer to this in more detail below; for present purposes I note only the resolution recorded as follows:

> "3.1 The Committee resolved to call in the decision for reconsideration by Cabinet, on the grounds that: *5. The Executive appears to have overlooked some relevant consideration in arriving at its decision* .
> 3.2 The Committee therefore formally asks the Cabinet to reconsider its decision; in particular that Cabinet carefully considers all the information and evidence available to assure itself that this large expenditure is wholly justified. An alternative approach might be to consider each case

> individually, and ensure each tower block has its own particular needs met in terms of safety and saving lives. "

The italicised words are evidently a recital of the fifth in a list of predetermined potential grounds for a call-in request.

5. When the Cabinet met on 24 May 2018 it considered a document entitled "Executive response to 'Call-In' [of] the decision made by Cabinet on 27th March 2018" (p 153). There was a discussion between the members of the Cabinet, the relevant sections of which are transcribed in the bundle at p 159, at the end of which the Cabinet unanimously resolved to confirm the decision it had taken on 27 March. It is that confirmatory decision that is now challenged.

6. Permission was initially refused on the papers by HHJ McCahill QC on 26 October 2018. However upon renewal at an oral hearing on 11 February 2019 Andrews J granted limited permission to proceed in the following terms:

> "1. Permission is granted, limited to the following grounds:
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> **Ground 1**
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> In reaching its decision of 24 May 2018, the Defendant's Cabinet failed to consider and/or take into account all relevant factors that might weigh against the decision, in particular the matters that were raised in the Scrutiny Report and itemised in paragraph 41 of the Claimant's Statement of Facts and Grounds, and the alternative approach identified in paragraph 3(b) of the Executive response to the 'Call-In' dated 24 May 2018
>
> **Ground 2**
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> Alternatively, if and so far [as] the Cabinet did take those matters into account in reaching its decision, it failed to give any or any sufficient reasons for rejecting those points, or for finding that they were outweighed by other relevant factors…
>
> 3. Permission is refused **on all other grounds** including, for the avoidance of doubt, irrationality, *Wednesbury* unreasonableness, taking irrelevant matters into account, breach of article 8 ECHR and procedural unfairness (failure to consult). "

7. The Scrutiny Report referred to in this order is the note of the consideration by the Scrutiny Committee mentioned above. That document notes the reasons for the request made by Councillors Henley and Leddy, by reference to the list of permissible reasons to call in a decision, as follows:

> "1. *The decision appears to be contrary to the Budget or one of the 'policy framework' plans or strategies* - the decision to spend the money on sprinklers leads to a £7 million overspend on the budget;

> 5. *The Executive appears to have overlooked some relevant consideration in arriving at its decision* - the scientific evidence supports the case that Birmingham's tower blocks are already safe, in accordance with Building Regulations, so the money could be better spent elsewhere;
>
> 7. *The decision appears to be particularly 'novel' and therefore likely to set an important precedent* - the proposal to retrofit sprinklers is novel, particularly as the requirements of the sprinkler system may render other fire protection methods (e.g. compartmentalisation) invalid;
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> 9. *The decision appears to give rise to significant legal, financial or propriety issues* - an additional spend of £31 million is significant;
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> 11. *The decision appears to give rise to significant issues in relation to a particular district* - the issue is one of significance for Brandwood ward, where there are a large number of tower blocks, many over 50 years old that have many issues (relating to size and maintenance)."

8. Paragraph 41 of Mr Clarke's statement of grounds set out these points, and certain others which are noted to have been points made in discussion by members of the Scrutiny Committee as follows:

i) "The evidence presented in the briefing note is not hard evidence, but a series of quotes from bodies with an interest in this area". This refers to a briefing note presented to the Scrutiny Committee but not included in the documents before me. I cannot tell therefore exactly what "evidence" it is referring to but I think a sufficient flavour of Mr Clarke's point can be seen from his argument that a statement from the Commissioner of the London Fire Service to the effect that sprinkler systems should be regarded as essential and not merely desirable should be seen as coming from someone interested in exculpating herself and her officers from blame.
ii) "There are many other fire protection measures in place in Birmingham's tower blocks and these have worked well in the past".
iii) "Scientific evidence from real fires and experiments in full-sized buildings has been included in the Building Regulations, which … do not require any retrofitting to existing buildings".

9. The "alternative approach" referred to in Andrews J's order was that which had been mentioned by the Scrutiny Committee, i.e. the possibility of considering the needs of each tower block individually. In the context of the Scrutiny Committee's request, it seems to me that is to be read as suggesting that there should be consideration in respect of each tower block whether fitting of sprinklers was justified at all in its particular case, not just subsidiary questions such as when and how they might be installed.

10. In his skeleton argument, aiming at the first of the grounds permitted by Andrews J, Mr Clarke set out 12 matters that he identified as material matters that might have weighed against the decision to retrofit sprinklers but which he said had not been addressed at all either in the document before the Cabinet on 24 May or in the discussion at that meeting. I will not set them all out. A number of them were matters that he had raised himself in an email sent on 25 June 2017 after the initial Cabinet decision had been publicised and in a letter before action threatening a judicial review claim sent on 20 April 2018. They included:

i) his contention that the compartmentalised structure of all or most of the Birmingham blocks meant that there was no risk of a widespread fire such as occurred at Grenfell Tower or the previous fire at Lakanal Tower in 2009;
ii) the disruption to tenants that would be caused during the fitting works, and the unsightliness of surface-mounted retrofitted sprinklers and pipes that would require to be installed in their flats;
iii) the greater desirability, as he saw it, of possible alternative uses the money;
iv) the imprudence, as he saw it, of the borrowing that might be required to fund the additional expenditure, and

v) the likelihood that many or all of the tower blocks might be demolished within a few years such that the expenditure on improvements would be wasted.

11. Mr Clarke also makes the point that, as he said Andrews J had observed in granting permission, all of the matters set out in the Executive Response document submitted to the meeting on 24 May were arguments in favour of fitting sprinklers and not points that might have been made against such a decision.

12. The Council's position in response is, in summary:

i) Mr Clarke's objection is in substance to the decision to retrofit sprinklers. That decision was taken by the Cabinet in June 2017 so he is out of time to bring and challenge to it now (his claim having been issued in July 2018).
ii) The decision challenged was only a technical one to adjust the capital investment budget to reflect the expenditure of the £31m approved in the overall budget in February 2018 (Mr Clarke not having challenged the decision to approve that budget and being out of time to do so). Considerations as to the merits of a particular item of expenditure included in that capital budget were irrelevant and not properly part of the process at the stage of approval of the adjusted budget itself, notwithstanding they had been raised by the Scrutiny Committee and to some extent entered into by the Cabinet.
iii) Alternatively, if such matters were properly for discussion at the stage of he budget adjustment decision, the Cabinet had given sufficient consideration to those that were "relevant" for legal purposes and, to the extent it was required to provide reasons at all, those were sufficiently apparent from the Executive Response document and recorded public discussion.
iv) In any event, even if the further matters relied on by Mr Clarke had been addressed directly, it was apparent from the discussion of the members of Cabinet that they would have come to the same conclusion, such that the court must refuse relief pursuant to s31(2A) Senior Courts Act 1981 .

13. I take the first two points together. Mr Clarke submitted that there had been no decision to install sprinklers in 2017 and the document referred to showed at most that the Cabinet had "noted and endorsed" a statement of belief that sprinklers would be desirable and/or action recorded as already taken. This in my view is an unrealistic interpretation of that document; para 5.5 plainly sets out not only a belief that sprinklers offered the best available fire safety but a proposal that they should be fitted, funded if possible by government but in any event by re-prioritising council spending. By "endorsing" that, the Cabinet was in my view clearly deciding to approve that proposal. The approval of an approach to government to pay or contribute to the costs of fitting sprinklers only makes sense if that work is going to be done.

14. That said, I do not accept that all questions of the merits or value of the proposed spending ceased to be proper matters for discussion by councillors or executive officers at that point, or the specific objection that such matters were not ones that could properly be raised and discussed in connection with a later budget decision. Any budget discussion in the real world involves consideration of allocation of limited amounts of money between competing spending priorities, and is not simply a matter as Mr McLeod suggested of funding all the items the Council had previously decided to approve as its objectives. It must therefore be proper for councillors to raise issues as to the value to be achieved by a particular item of proposed expenditure and argue that, for instance, it was less desirable than some other objective such that resources should be switched away from it, or that it was not good value for money and so should not be funded at all in order to keep down total spending. This is as much true of a proposal to "adjust" a budget as of one to set a budget in the first place.

15. If such matters were legitimate for potential discussion on the initial consideration of the revised budget (in this case at the Cabinet meeting in March 2018) it seems to me they must have been legitimate matters to be raised by bodies such as the Scrutiny Committee in a "Call-in" request. Nor would such discussion be academic; if hypothetically the Cabinet decided against funding a particular item, or to reduce the funding for it, council officers would not be able to pursue it except in accordance with the approved budget or to the extent they could properly reallocate expenditure themselves within that budget. In the context of a major item of expenditure such as this, if, as Mr Clarke would have hoped, the Cabinet on

reconsideration had decided not to provide £19m in the capital budget towards sprinklers, it must be doubtful whether the project could have proceeded either at all or until a significant re-appraisal of financial priorities had been carried out.

16. There is no doubt that the Cabinet's discussion on 24 May did not include specific consideration of the 12 matters that Mr Clarke puts forward as potential arguments against sprinklers, or even those of them that had by that date been identified by him as things he considered ought to be taken into account. Nor did it decide to commission an evaluation of these items, or of the more general consideration whether in the actual circumstances of the Birmingham blocks fitting sprinklers would lead to any appreciable increase in safety or, if it did, whether the extent of that increase would be worth the cost involved - the "value for money" issue.

17. Mr Clarke's argument under Ground 1 as permitted by Andrews J is that these matters were all "relevant" in law such that an error of law is committed if they are not addressed. He referred me to the decision of Carnwath LJ, sitting as a judge of the Administrative Court, in *Derbyshire Dales DC v Secretary of State for Housing, Communities and Local Government [2009] EWHC 1729 (Admin)* and to a passage quoted at para 27 from a New Zealand case in which Cook J of the New Zealand Court of Appeal said:

> "… in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act".

Mr Clarke's contention is that the specific points he raises, and/or the general question of whether the proposal to fit sprinklers represents value for money, are "obviously material" in this sense.

18. In fact I think the judgment in that case is against the proposition that Mr Clarke seeks to put forward. It must be borne in mind that it was a planning case, and therefore the discussion of whether particular matters were so important that any failure to consider them vitiated the decision took place against the background of the statutory nature of the planning process. The issue in that case was whether the authority was required to have regard to the potential that a particular development (wind turbines) could be sited at an alternative location. But the general principles can in my view be read across to a situation such as the one before me.

19. At paragraph 17, Carnwath LJ said this, following a citation from authority which I need not set out:

> "… the words 'relevant or at least permissible' and 'relevant and indeed necessary' … signal an important distinction, insufficiently recognised in some of the submissions before me. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.
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> 18. For the former category, the underlying principles are obvious. It is trite and long established that the range of potentially relevant planning issues is very wide… and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker… On the other hand, to hold that a decision-maker has erred in law by failing to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered him) to do so…

> 23. The principles by which a matter is to be deemed 'material' or 'relevant' have not been consistently stated in the cases or the textbooks. The passages from the Bolton MBC judgment … might suggest a relatively low threshold. It would be enough for the court to decide for itself that consideration of some factor … 'might realistically' have led to a different result. However that approach is not supported by the textbooks, nor, in my respectful view, by other authorities…
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> 26 … Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 2 All ER 680* [said]:
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> "If in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. … What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision… (emphasis added)"…
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> 28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'. "

20. It is not enough, therefore, that it would have been permissible for the Cabinet to consider the "value for money" issues Mr Clarke raises, and would not be enough even if I were to conclude that if it had done so it might realistically have agreed with Mr Clarke's points to the extent that it would have arrived at a different decision and excluded or materially reduced the proposed budgeted expenditure. It would not be enough if I were to conclude that some, or even many, people might have taken the view that Mr Clarke does, apparently shared by at least Councillors Henley and Leddy, that sums of the order envisaged should not be committed without a detailed analysis of the costs and benefits realistically conferred. It must be shown that there was some express or implied legal obligation on the Council not to proceed unless this was done.

21. Mr Clarke does not point to any express legal obligation, however arising, on the Cabinet to take these matters into account or commission a report. He has not, for instance, referred to anything comparable to the Public Sector Equality Duty or obligations to obtain environmental assessments that would require councils in all circumstances to investigate matters relating to the value for money of proposals they are considering, or to commission any internal or external report dealing with such matters before committing themselves to expenditure.

22. Short of such an obligation, it is in my judgment generally for a decision taker to determine what matters are potentially relevant to be considered, and what weight is to be given to each of them. Any challenge to its decision would as Carnwath LJ noted at para 28 cited above, have to be on grounds of irrationality.

23. Against that background, if one considers what was before the Cabinet on 24 May, it was that the Scrutiny Committee's request that the Council should "carefully [consider] all the information and evidence available to assure itself that this large expenditure is wholly justified". The Scrutiny Committee did not put forward either one or a number of specific points that

should be considered, but made a general request that the Council should investigate in more detail the evidential support for the potential benefits of sprinklers and any arguments that might go towards justifying or not justifying the expenditure.

24. What the Cabinet had to decide, therefore, was the question whether it should or should not enter into this more detailed analysis before proceeding to approve the budgeted expenditure. Mr Clarke's objection is in substance that the Council did not decide to conduct such an analysis, which implies that, as a matter of law, there could only ever be one proper answer to the question asked.

25. But that in my judgment is unsustainable. If it is assumed for present purposes that the Cabinet was obliged by its own procedural rules to address the question that had been put to it by the Scrutiny Committee in its "call-in" request, that cannot impose an obligation to answer the question in one particular way and actually conduct the analysis that the Scrutiny Committee had requested it to consider. In the absence of any express statutory obligation to consider such matters of detail, it is only if its decision not to do so could be considered to be *Wednesbury* unreasonable that it could be challenged. Mr Clarke however has been refused permission to bring a challenge on *Wednesbury* grounds.

26. Reading the transcript of the Cabinet discussion, it is in my view apparent that it does address the question asked. It could no doubt be said that much of the discussion is not particularly well structured, and some of the points made are not particularly coherent. But points were made about the statements made by Chief Fire Officers in London and the West Midlands that sprinklers ought to be fitted (such statements being sometimes described as "scientific evidence" and at other points as "expert advice"), about the possible lack of justification for a distinction between any new blocks in which sprinklers would be required by revised Buildings Regulations and older blocks in which they would not be required by law to be retrofitted, and about the Scrutiny Committee's concern that there had not been "a due process following scientific research to have got to [the decision to fit sprinklers]". The chair of the meeting put the matter to a vote with the concluding remarks "I would just reiterate that the advice from both the Fire Officer here in the West Midlands and indeed the Fire Commissioner in London is crystal clear, we cannot delay on this matter any further. So can I put the recommendation to Cabinet please, is that agreed?". There was then a unanimous approval.

27. The Cabinet therefore decided against instituting the detailed investigation that the Scrutiny Committee had requested it should consider, and which Mr Clarke would prefer it to have undertaken. It was in my judgment entitled to do so. It was a matter for its discretion whether the policy imperatives that it identified were outweighed by the advantages of longer or more detailed scrutiny of the balance between the safety benefits and the costs, and it plainly decided that they were not.

28. It follows that ground 1 as permitted by Andrews J fails. As to the alleged insufficiency of reasons, Mr McLeod submits that what the Cabinet was considering was a matter of the internal administration of the Council and not a determination of the rights of a citizen in which there might be a legitimate expectation that reasons would be given sufficient for the citizen to identify why a determination had been made against him. It was doubtful, he submitted, whether there could be any obligation on the Council at all to provide reasons in such a case. There is in my view force in such an argument. Many decisions in matters great or small must be made by councils and other bodies daily in the course of administering their affairs. It would be impractical for all of them to be subject to a requirement that reasons be identified or stated, whether or not the decision-making process takes place in a meeting to which the public has access (such as this decision) or is one that might be reached in the course of day-to-day operations by one or more individuals exercising their functions.

29. But even if it is assumed in favour of Mr Clarke that there was an obligation in the present case to identify reasons sufficient for a citizen potentially interested in challenging a decision to be able to determine what had been decided and why, it is in my view clear that such a standard was met. The Cabinet decided not to embark on the more detailed analysis that

had been suggested, because it considered that the reasons for proceeding without further delay identified in the "executive response" and referred to in the course of discussion outweighed the potential advantages of further investigation.

30. Mr Clarke does not agree with that decision. No doubt there might be others who would take the same view. But it was in my judgment a decision properly taken by the Cabinet in respect of which no legal error has been identified and the challenge to it must be dismissed.

31. In the circumstances the question whether there might realistically have been any different outcome does not arise. But in case the matter goes further I should say that if I had concluded that the Cabinet erred in declining to consider the "value for money" issue I would not have also concluded that doing so would not have made a difference. It may be, as Mr McLeod argued, that the Cabinet members at the meeting were minded to proceed regardless of what consideration might have led to. But it cannot be said, in my view, that if hypothetically they had decided to embark on a more detailed investigation, for instance by commissioning an expert report, that this could not have led to matters emerging that might have made a difference to their eventual decision.

32. I invite the parties to agree the order resulting. I will list a hearing at which this judgment will be formally handed down. If there are matters arising that can be dealt with on that occasion in 30 minutes or less I will take them; in any other case there need be no attendance and any matters arising will be dealt with at a later hearing, for which the parties should submit an agreed time estimate and dates of availability.