10854

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2014/0449**
Property	:	**Various flats on the Dickens Estate, London SE15 5LA**
Applicants	:	**See Appendix 1**
Representative	:	**Mr R Mehta, Counsel**
Respondent	:	**London Borough of Southwark**
Representative	:	**Mr S Evans, Counsel**
Type of Application	:	**For the determination of the liability to pay a service charge**
Also present	:	**Ms T Hamway, Ms E Ford, Ms D du Bruyn, Ms S Sahla-Jones, Ms D Landi, Ms F Adegbenro and Ms M Mehta-White (leaseholders). Mr R Muir of Avalon Built Environment. Mr T Kent (observer). Mr P Cremin (Southwark Legal Dept). Ms C Blair and Mr J Sheehy (Home Ownership Unit). Mr D Panormo (Enforcement Manager). Mr K Orford (Project Manager, Major Works). Mr D Spiller of Potter Raper. Mr J Ottley of Blakeney Leigh.**
Tribunal Members	:	**Judge P Korn (chairman)** **Mr M Mathews FRICS** **Mr P Clabburn**
Date and venue of Hearing	:	**11th to 13th March 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15th April 2015**

DECISION

Decisions of the Tribunal

(1) The estimated charges for the major works which are the subject of this application are payable in full.

(2) The tribunal declines to order that the Applicants be given an extended period within which to make payment.

(3) The Tribunal declines to make any cost orders against the Respondent or to make a section 20C order.

Introduction

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the reasonableness and payability of certain service charges charged to them.

2. Their challenge is to the estimated cost of the works specified in major works contract 13/070 and entitled Major Works for Dickens Warm Dry & Safe Works. The application specifies the renewal of the roof and associated scaffolding costs as being the particular points of challenge, although the Applicants' statement of case widens this to include works to doors and windows.

3. The relevant statutory provisions are set out in Appendix 2 to this decision. Included in the hearing bundle were copy leases from what are described as four representative properties, namely Flat 10 Tapley House, Flat 10 Copperfield House, Flat 17 Dombey House and Flat 5 Nickleby House. The Applicants are the current leaseholders of their respective flats.

4. During the course of the 3 day hearing a number of different points were raised, and the hearing bundle itself contains a large number of written submissions. Only those points considered by the tribunal to be most relevant will be specifically referred to in this decision.

Background

5. As explained by Mr Mehta at the hearing, the Applicants accept that works needed to be carried out to the Property. Their challenge to the cost of these works is based on the following contentions:-

    - that the works were partly necessitated by historic neglect;

    - that the Respondent did not comply with all of the section 20 consultation requirements;

- that the option chosen in relation to the roof was unreasonable; and

- that leaseholders should have been given more time to pay.

Mr Muir's evidence

6. Mr Muir is a chartered building surveyor and was commissioned by the Applicants to prepare expert reports on the roof coverings at Tapley House, Copperfield House and Dombey House. Copies of these reports were in the hearing bundle.

7. For each building Mr Muir recommended an intermediate repair option involving the replacement of defective or missing tiles with sound second-hand ones, the recoating (or, in the case of Tapley House, relining) of the parapet gutters, the provision of new abutment soakers and flashings and associated repairs. He estimated the cost of this work as being considerably less than the option selected by the Respondent.

8. Also in the hearing bundle is a joint report prepared by Mr Muir and Mr Ottley, the parties' respective experts on the roof issue. The joint report identifies areas of agreement and areas of disagreement between the two experts.

9. Mr Muir said at the hearing that his preferred option was the best option because many tiles had not yet reached the end of their serviceable life whereas the gutters had reached the end of their serviceable life. Therefore it made sense to remove the tiles abutting the gutters and any defective or missing tiles and to deal with the gutters so as to align the life cycles of the roof and the gutter. In his view it made sense to deal with immediate problem areas, minimise immediate costs and allow time to establish a sinking fund to help spread larger capital costs.

10. In cross-examination, Mr Muir confirmed that he had not inspected any of the buildings prior to 2013 and that he had not seen the repairs history for the Property. His inspection of Tapley House lasted 4 hours and he spent another 4 hours in aggregate on the other buildings. He did not have instructions to inspect Nickleby House. He saw 75% of the Tapley House roof at roof level, and from below he could see about two-thirds of it. The photographic evidence in his report focused on defects, and this was why there were no photographs showing large areas of undamaged tiles. He did not accept that there had been a large amount of delamination of tiles and of missing nibs and spalling.

11. Mr Muir did accept that there was a mixture of types of tile on each roof in that some of the tiles were metric whilst the others were imperial.

However, he did not accept that this by itself would have had a major impact on the efficacy of the roof. On a point of disagreement between experts, Mr Muir confirmed that he disagreed with Mr Ottley about the dormer structure in that he disagreed that the ingress of rainwater would have been due to the age of the dormer structure rather than a failure to carry out proper repairs.

12. Mr Evans noted Mr Muir's view that there had been an absence of routine maintenance to the roof and asked him the basis for this view. Mr Muir said that he had noticed a build-up of debris and said that in his view it was unlikely that this build-up of debris was recent. As to whether the alleged absence of routine maintenance had actually affected the buildings, Mr Muir was not able to say for sure but said that it could have done so; for example, he had seen a build-up of water and some of it was frozen.

13. As regards the practicalities of Mr Muir's preferred option, he denied that it would necessarily be expensive to put in a temporary roof covering and said that scaffolding would not necessarily be required. Mr Evans put it to Mr Muir that his preferred option – according to his own report – would not necessarily offer more than 10 years' life, at which point surely a full replacement would still be required. In response Mr Muir said that a full replacement would not necessarily be needed at that point; the position would need to be assessed at the time.

14. Mr Evans drew Mr Muir's attention to the fact that most of the leases did not entitle the landlord to require the tenant to pay into a sinking fund and asked him whether this did not make Mr Muir's conclusions less realistic, given that they seemed to assume an ability to build up a sinking fund in the future. Mr Muir was not in a position to comment directly on this point, but he said that his preferred option was the most viable in terms of getting the most out of the existing undamaged roof tiles. Mr Muir accepted, when it was put to him, that the Respondent's preferred option would provide the most longevity and would also (unlike his preferred option) come with a guarantee.

15. In relation to costings, Mr Muir said that his figures had been based on historic data using RICS costing methods.

Mr Ottley's evidence

16. Mr Ottley is a chartered building surveyor at Blakeney Leigh and was commissioned by the Respondent to prepare an expert report on the roofs at Dombey, Nickleby, Copperfield and Tapley Houses. He also prepared – in conjunction with others – a Feasibility Report relating to the Dickens Estate. Copies of these reports were in the hearing bundle.

17. Mr Ottley attended the Property for 4 to 5 days in order to prepare the reports and a colleague spent a similar amount of time.

18. On a specific point, Mr Ottley said that the warm roof has been installed but that the cost was not being passed on to leaseholders.

19. Regarding the roof inspection, from roof level he would have been able to see 50 to 60% of the roof, and he also took photographs from ground level and used binoculars. As to the mix of tiles, in his view the issue was not so much whether tiles are metric or imperial but the fact that they have different manufacturers. Regarding the issue of delamination, Mr Ottley said that there was clear photographic evidence of delamination, and he referred the tribunal to the relevant copy photographs in the hearing bundle. Regarding the need to waterproof the top of each building whilst carrying out Mr Muir's preferred repair option, in his view it was almost impossible to do this without putting up a full temporary roof.

20. In relation to the lifespan of the tiles, many of them had been there for 80 years, and in Mr Ottley's view it was reasonable to take the view that 80 years was their natural lifespan. Specifically as regards the disadvantages of Mr Muir's preferred option, it involved continuing maintenance as there could be a broken tile at any time. Also, it did not come with a guarantee, and if the roof needed to be replaced in 10 years' time then it would be out of sync with the replacement of the gutter. In his view, Mr Muir's option was possibly no better than the option of doing nothing other than improving the gutters.

21. In cross-examination it was put to Mr Ottley that he had not gained access to the roof area, unlike Mr Muir, but had instead relied on looking out of windows on to the roof and on looking at the roof from ground level. Mr Ottley said that the only way to gain access to the roof itself was to walk along the parapet gutter and he was strongly of the view that it was not safe to do so and that this would have been an irresponsible thing to do. He was confident that it had been possible to see 50 to 60% of the roof and 90% of the guttering by looking out of windows and that this was sufficient. He conceded that it could be argued that his conclusions involved extrapolating from the part of the roof that he was able to see and assuming that the remainder of the roof was in similar condition. He also accepted that in the case of Copperfield House there were no windows at roof level to look through and that in aggregate he probably spent no more than 4 hours looking at all of the roofs.

22. Mr Mehta put it to Mr Ottley that the Feasibility Report stated that all front entrance doors in Tapley House needed replacing and yet earlier in the Report it only stated that the majority of doors should be replaced. Mr Ottley accepted that there was an inconsistency here but said that the final conclusion was based on the fact that the

Respondent's building control department required doors to be replaced if below a certain standard for security reasons even if they technically met fire regulations. Mr Mehta also put it to Mr Ottley that his assessment as to whether certain doors offered adequate fire protection was at odds with the Respondent's 2010 Fire Risk Assessment report. He replied that the Fire Risk Assessment was just an opinion and was possibly out of date. He had been able to see all of the front doors from the outside, and he denied that the decision to replace all doors was made simply because it was easier to replace all of them rather than because they all needed to be replaced.

23. Mr Mehta asked Mr Ottley about the cause of leakages from the guttering and the issue of solar coating of the gutters. Mr Ottley disagreed with Mr Muir's contention that the leaks had been caused by previous poor repairs. The original gutter lining did not have a solar coating and in his view applying solar coating as an interim measure would not have helped. It had been a relevant consideration on Dombey House because a repair was carried out and the solar coating was applied to that repair, not to the original lining.

24. Mr Mehta put it to Mr Ottley that his statement (in the joint expert report) that the Respondent's preferred option was the most cost effective was being made with the benefit of hindsight, as the life cycle costings were calculated after the decision had already been made. Mr Ottley said that he stood by the validity of his view and that the life cycle costings simply strengthened the argument. On being re-examined by Mr Evans he added that he had seen the life cycle costings on a similar project prior to reaching his conclusion.

Mr Spiller's evidence

25. Mr Spiller is a chartered surveyor at Potter Raper Partnership and had given a written witness statement. He had been asked by the Respondent to do a life cycle analysis examining the cost for (a) a full renewal of the roof rather than repairs followed by a renewal at a later date and (b) a renewal with new tiles rather than one using existing and second hand tiles.

26. His estimate of the saving that would be achieved by re-using existing tiles was less than £20,000 as against the £75,000 asserted by Mr Muir. He was also of the view that the Respondent's preferred renewal option was the best long term option.

27. In cross-examination he accepted that the only life cycle costing carried out was one for Tapley House and that the Respondent did not have the life cycle costing in front of it when making its decision as to which was the best option. He also accepted that "Option 1.1" – this being the replacement of defective or missing tiles with second hand, relining of parapet gutters, new abutment soakers and flashings, and then the

complete renewal of the roof with new tiles after 10 years – was similar in terms of cost to the Respondent's preferred option.

Ms du Bruyn's evidence

28. Ms du Bruyn is the joint leaseholder of 23 Dombey House and had also given a written witness statement. The witness statement included some background information, her opinion on the state of repair of the Dickens Estate prior to the major works, her opinion as to the adequacy of the consultation process and her reasons for making the application to the tribunal.

29. Ms du Bruyn was not aware of the Respondent having carried out any assessment of her front door as to whether it needed replacing.

30. In cross-examination, noting the concerns expressed by Ms du Bruyn as to the adequacy of the consultation process, Mr Evans asked her what she understood the statutory consultation process to require the Respondent to do. She said that she did not think about it much at the time but was left with a general feeling that there had been no real consultation.

31. Mr Evans described to Ms du Bruyn the steps that had been taken by the Respondent, including serving a notice of intention, inviting observations, making copy documents available, notifying leaseholders of their ability to consult the Respondent to discuss concerns and providing details of answers to frequently asked questions. Ms du Bruyn accepted that she had received all of this information, but she added that she had received many section 20 notices and did not have time to respond to notices all the time. Whilst accepting that other section 20 notices had been served, Mr Evans put it to her that that the last section 20 notice specifically relating to the carrying out of major works was dated 5th June 2009 and so she had not in fact been overburdened with important notices to which she needed to respond.

32. In relation to the second stage of consultation, Ms du Bruyn accepted that she did not send through any specific observations of her own, but this was because by this stage she was part of a joint approach with other leaseholders.

33. In relation to the joint observations, Mr Evans put it to her that the Respondent responded promptly and in detail. However, Ms du Bruyn, commenting specifically on a letter from Mr Sheehy dated 15th November 2013, said that his letter did not explore alternative options, and nor did it take the leaseholders' concerns into account or provide any documentation. Mr Evans put it to her that, on the contrary, the letter contained a reasoned response to the concerns being expressed.

34. Mr Evans also put it to Ms du Bruyn that in the Applicants' statement of case the sole objection being advanced was that the Respondent failed to have regard to the Applicants' observations on the estimates.

35. After further questioning, Ms du Bruyn conceded that perhaps the Respondent had technically complied with its consultation obligations, but she was left with the feeling that it was not a proper consultation. She would, for example, had liked a proper assessment done at the beginning of the process, but Mr Evans put it to her that she could have sought this information and could have commented within the statutory time limit on the documentation with which she had been supplied.

36. Ms du Bruyn said that the Respondent had paid no regard to the financial burden and general effect on leaseholders of its preferred option, but Mr Evans put it to her that it was ultimately the Respondent's decision whether and when to do works under the terms of each lease.

37. There was some discussion about the Respondent's Hidden Homes works. The Hidden Homes Programme is an initiative which exists in a number of London boroughs to identify suitable vacant/underused convertible spaces for future residential use in existing housing blocks, and the Respondent had identified the Dickens Estate as a potential Hidden Homes site. In their statement of case, the Applicants had stated that they were unaware of the Respondent's intention to create Hidden Homes within the Dickens Estate until September 2013, approximately a month before service of the notice of intention in respect of the major works programme. In her witness statement Ms du Bruyn stated (among other things): *"It became clear that the Council's real aim was to build and benefit from the Hidden Homes investment, to use the excuse of repairs to the roof to adjust the roof to accommodate the Hidden Home".*

38. In cross-examination Ms du Bruyn accepted that the leaseholders were not being charged for the cost of the Hidden Homes and that Mr Sheehy for the Respondent had offered to provide, and then had provided, the Applicants with a specification for the Hidden Homes to enable them to understand the scope of the proposed works. She also accepted that the Applicants had not written to the Respondent to ask whether the Hidden Homes initiative was part of the reason for the major works. Ms du Bruyn asked whether the Dombey House scaffolding costs should all have been allocated as a Hidden Homes cost and therefore not recharged to leaseholders. Mr Evans, quoting Mr Sheehy's response to this objection in his letter dated 15th November 2013, replied that it was conceded by the Respondent that an element of the scaffolding costs benefited the Hidden Homes and that a reduction in the recharge to the leaseholders was appropriate and

would be applied, but the bulk of the cost related to British Gas works which were completely separate from the Hidden Homes works.

Ms Sahla-Jones' evidence

39. Ms Sahla-Jones is the joint leaseholder of 10 Copperfield House and had also given a written witness statement. The witness statement was very similar in structure to that of Ms du Bruyn. She said that in a letter dated 14th July 2009 from the Respondent to her solicitors prior to her purchasing her flat there was no mention of the proposed major works.

40. She was not aware of the Respondent having carried out any assessment of her front door as to whether it needed replacing, and she did not recall being consulted on that point. She was surprised by Mr Ottley's statement that he was able to see all front doors from the outside as there was a big gate in front of hers.

41. In cross-examination, Ms Sahla-Jones accepted that the notice of intention received by her in relation to the major works complied with the statutory requirements, but she felt that it should have highlighted more clearly the very major nature of the proposed works. Mr Evans put it to her that it was clear on the face of the notice that the proposed works were substantial in nature; Ms Sahla-Jones accepted this but said it was unclear what the cost would be, and in response Mr Evans said that the Respondent could only provide an estimate at a later stage once it had arranged for the works to be priced.

42. Ms Sahla-Jones said that she could not be expected to challenge every section 20 notice but Mr Evans put it to her that this was the first one that she would have received as she only became the owner in 2013. In any event, she did make observations in a letter dated 28th October 2013 but these observations were not about the cost except for a question about the proportion of refurbishment costs being born by the Respondent as freeholder and did not request that the Respondent explore options other than renewal of the roof. Furthermore, the Respondent provided a detailed response to all of her observations within 3 days. However, Ms Sahla-Jones' view was that the Respondent's letter merely contained a stock set of answers and showed no intention to engage properly with leaseholders.

43. With regard to Mr Sheehy's letter of 14th November 2013 to Ms Duke (in response to her own letter on behalf of herself and other leaseholders) Mr Evans put it to Ms Sahla-Jones that this letter could not be characterised as merely containing a stock set of answers; on the contrary, it was a 9 page detailed explanation as to the Respondent's thinking. In response, Ms Sahla-Jones said that it did not constitute consultation as it gave no evidence or alternative options.

44. Mr Evans drew Ms Sahla-Jones' attention to Ms Carla Blair's letter of 24th January 2014 to Ms Hamway in which she stated that the Respondent's position was not that the only option for the roof was renewal, and he put it to Ms Sahla-Jones that the Respondent had therefore not closed its mind to other options. Ms Sahla-Jones countered that this was written after the consultation period ended and therefore carried less weight.

Mrs Blair's evidence

45. Mrs Blair is employed by the Respondent as a Capital Works Manager and had also given a written witness statement. The witness statement dealt with the serving of the section 20 notices and summarised various responses to observations. In her view, the Respondent had gone further than merely complying with its statutory consultation obligations. She also believed that renewal of the roof was a reasonable option and pointed out that the Respondent offered a range of payment options to help to spread the cost of the works to leaseholders.

46. In cross-examination, Mr Mehta drew her attention to an internal note from the Respondent's Chief Executive dated 21st January 2013 recommending a change in approach to the Hidden Homes Programme. In particular the note quoted a recommendation from the Director of Legal Services to undertake consultation when proposals were still at a formative stage and to include sufficient reasons to allow interested parties to consider the proposals and to formulate a response. It also quoted a recommendation from the Head of Specialist Housing Services to have regard to the impact on existing leaseholders when assessing sites for the Hidden Homes Programme.

47. Mr Mehta drew Mrs Blair's attention to a letter to leaseholders dated 30th November 2006 giving an indication as to the major works planned for the Dickens Estate between 2006 and 2010 inclusive. This was updated in 1st December 2007 as to major works planned between 2008 and 2012 inclusive. This included, for 2009/2010, "Nickleby, Tapley, Copperfield and Dombey – Roofs, some windows and doors and internal works to Copperfield House and Oliver House". However, no further update was provided until 20th January 2012; this update related to the period 2011 to 2016 inclusive but contained no mention of the major works which are the subject of this application, and so this gave the impression that the major works previously planned for 2009/2010 had fallen away. In response Mrs Blair said that the Respondent had already started consulting on these major works and therefore did not see the need to refer to them again in the updated list of planned works, although she accepted with the benefit of hindsight that it might have been better to refer to them again.

48. Mr Mehta also took Mrs Blair through some of the copy correspondence and put it to her that there was no concrete cost

proposal or breakdown communicated to leaseholders until quite late on in the process. Mrs Blair said that this was unavoidable as a number of preliminary stages had to be gone through first. Mr Mehta also put it to Mrs Blair that it was not apparent from the cost of unitemised repairs to Tapley and Copperfield Houses between 2006 and 2013 that there were escalating problems with the roof.

49. Mr Mehta noted from Mr Sheehy's letter dated 21st October 2013 that the Respondent was looking to start work by the end of November and put it to Mrs Blair that this did not allow much time for adjustments to be made in response to observations, the deadline for which was 21st November. Mrs Blair said that it had been open to the Respondent to delay the start date if necessary. In relation to Mr Sheehy's letter of 30th October 2013, Mr Mehta put it to Mrs Blair that it did not contain any explanation as to the options available in relation to the roof. In response, Mrs Blair said that, on the contrary, Mr Sheehy referred to the option of doing patch repairs and explained why the Respondent did not believe this to be a workable option.

50. Mr Mehta put it to Mrs Blair that until January 2015 the evidence relied upon by the Respondent when forming its view was not before leaseholders. Mrs Blair countered that the Respondent provided details of the proposed works, the estimates and the observations received and generally provided such information as it believed leaseholders needed. Mr Mehta also put it to her that at the date on which the "Gateway 2" report on the proposed works was produced by the Respondent's Head of Works the decision to go ahead had already been made. In response, Mrs Blair said that it remained open to the Respondent to make amendments to the contract.

51. Regarding the work to windows, Mrs Blair said that the amount allocated to this represented a modest provisional sum for overhauling them and that there was some evidence (based on a walk-around) that some works of repair and/or overhaul were needed.

Mr Orford's evidence

52. Mr Orford is employed by the Respondent as a Project Manager and had also given a written witness statement. The witness statement dealt with the condition of the roofs, the compilation of "Gateway 1" and "Gateway 2" reports to seek approval for the tendering process and to approve the award of the contract to Standage & Co, the fire safety and drainage works and brief comments on the Feasibility Report. At the hearing he confirmed that he would have had sight of the Feasibility Report when preparing the "Gateway 1" report.

53. In cross-examination Mr Orford accepted that the "Gateway 1" report contained no mention of the financial impact on leaseholders of the recommendations. Mr Mehta put it to him that there was a change in

direction between Gateway 1 and Gateway 2 and that the change was due to the capital moneys that would be generated by the Hidden Homes Programme. Mr Orford disagreed with this assessment and said that it was common knowledge that the intention was not to generate capital profits by selling the Hidden Homes but instead to let them; this point had been well publicised locally.

Applicants' further submissions

54. Mr Mehta, by way of clarification of the extent of the application, said that the Applicants were seeking an order that the Respondent had failed to have regard to their observations and that their contributions should therefore be limited to £250, or alternatively that the cost of the works to the roofs, doors and windows and the scaffolding costs were not reasonably incurred and should be reduced, or alternatively that the manner of payment was not reasonable and that the Applicants should be allowed more time within which to pay.

55. In Mr Mehta's submission, the Applicants' dealings with the Respondent could be characterised as them repeatedly requesting information and not receiving it. By reference to *Daejan Investments Ltd v Benson and others (2013) UKSC 14*, he argued that the process through which the Respondent had gone was not consultation as its approach was formalistic, there was no attempt to explain the underlying basis for the Respondent's views and the various available options were not explained. In his submission *Daejan* showed that there was a purpose to the consultation process, namely that leaseholders do not end up paying for unnecessary works or services and do not pay more than necessary.

56. The Applicants had, in his submission, been given very limited information and evidence. They did not know about the existence of the Feasibility Report until very late, and in any event the Feasibility Report is a generic document. No further information was given to leaseholders between a meeting with the Respondent on 18th November 2013 and the end of the consultation period. In addition, the Respondent's own decision-making was without the benefit of life cycle costings.

57. In Mr Mehta's submission, the Respondent's proposed roof works constitute an improvement, not merely a repair, as there was very little evidence that it was necessary. He referred the tribunal to the Upper Tribunal decision in *Waaler v London Borough of Hounslow (2015) UKUT 0017* in which President McGrath defined improvements as *"works that go beyond what is required to effect a repair"*.

58. As in *Waaler*, Mr Mehta submitted that in our case a significant history of disrepair was followed by a rapid decision to expend large sums of money on the roofs, and the Applicants considered the Respondent's

preferred option to go beyond what was needed to repair the roofs. He also characterised the Respondent's evidence as being merely that it was not cost-effective to await later repairs.

59. In *Waaler* President McGrath said that *"an unexpected increase in service charges and the financial impact of such an increase may well be relevant considerations in a decision on how and when to effect repairs"*, and Mr Mehta submitted that this applied in our case. There was a total lack of notice as to the sort of expenditure anticipated and no account was taken of the potential financial impact on leaseholders. President McGrath made a specific point in *Waaler* regarding work which goes beyond repair, as follows: *"If a landlord decides to carry out a scheme of works which goes beyond what is required to effect a repair ... in my view he must take particular account of the extent of the interests of the lessees, their views on the proposals and the financial impact of proceeding"*. She also said, specifically in relation to improvements, that *"a landlord must consider a number of matters before proceeding. First the availability of alternative and less expensive remedy should be explored. Secondly, greater weight should be given to the views and the financial means of the lessees who will be required to pay for those works"*.

60. President McGrath also said the following in relation to the window and cladding works: *"The cost was very significant ... where works which go beyond works required to remedy disrepair are carried out, the financial impact of any particular course of action may have relevance to the question of whether costs have been reasonably incurred"*.

61. Mr Mehta said that no information was available on cost in the present case until October 2013, and there was no evidence that the financial impact on leaseholders had been taken into account by the Respondent. Regarding Mrs Blair's statement that different options were still open even after the end of the consultation period, the Applicants' position was that this was not apparent from meetings. Regarding the doors, it was unclear whether they did all in fact need replacing, and there was no evidence of a proper process having been gone through.

62. In Mr Mehta's submission the only intervening occurrence between September 2012 and October 2013 was the change of direction in the Hidden Homes Programme, and he suggested that this was a factor in the Respondent's decision-making process in relation to the major works.

63. In relation to the scaffolding, Mr Mehta submitted that no explanation has been given for the higher costs at Dombey House. In relation to doors and windows, the Applicants' position was that there was insufficient evidence justifying the Respondent's decision to bill for these amounts.

64. In arguing that there should be some form of equitable set-off to reflect the effect on costs of historic neglect of the Property, Mr Mehta said that either a serious problem was identified in 2009 and then by the time action was taken in 2013 there had been four unnecessary years of neglect or there was in fact no serious problem in 2009, in which case the scale of the major works was unreasonable.

65. Regarding the timetable for payment by leaseholders, Mr Mehta argued that the apportionment provisions in the leases gave the Respondent the ability to decide how to spread demands for payment and that it had to act reasonably in this regard.

Respondent's further submissions

66. In Mr Evans' submission, the Applicants were seeking more than statutory consultation. The reality was that the Applicants made very little effort to comment on the proposed works or to seek more information until they were given details of the cost despite being given a full opportunity to go to the Respondent's offices and to make observations. It was only at the second stage of the consultation process that they started to engage, by which time it was simply too late to express concerns about the nature of the works or the financial impact.

67. In relation to *Waaler*, President McGrath's comments on taking lessees' financial means into account related to improvements, not repairs, and in Mr Evans' submission these major works all constituted repairs, not improvements.

68. Mr Evans felt that the Applicants' case had ballooned from their original, more limited, statement of case, and this had made it harder for the Respondent to have available detailed answers to every new point raised. Particularly as regards consultation, the Applicants' original case was simply that the Respondent had failed to have regard to their observations.

69. Mr Evans said that the starting point of any analysis had to be the terms of the leases. Under the definition of each flat, neither the roof, nor the doors nor the windows formed part of the demise. Paragraph 2(2) of the Third Schedule set out the contractual service charge payment dates and paragraph 2(1) required the landlord to make a "reasonable estimate" of the service charge, which just meant an estimate which was reasonable. Paragraph 6(1) stated that the service charge payable is a "fair proportion" of the costs and expenses incurred by the landlord. Nothing contained in these provisions indicated that they were anything other than straightforward contractual provisions setting out when the service charge was payable and how it was to be calculated.

70. Paragraph 7 of the Third Schedule set out the categories of cost recoverable from the leaseholder and in paragraph 7(9) it included replacement of windows, albeit that the charge in this case was for overhaul, not replacement.

71. Mr Evans referred the tribunal to the recent First-tier Tribunal case of *London Borough of Southwark v David Charles Monaghan (LON/00BE/LSC/2013/0823)* in which reference was made in the decision to the definition of "repair" at paragraph 13.033 of *Woodfall.* That paragraph defined "repair" as *"restoration by renewal or replacement of subsidiary parts of the whole".* It also applied three tests to the question of whether something is a repair, as follows: *"(i) whether the alterations go to the whole or substantially the whole of the structure or to any subsidiary part, (ii) whether the effect of the alterations is to produce a building of a wholly different character and (iii) what is the cost of the works in relation to the previous value of the building".* In his submission, it was clear that the roof works (and other works) were merely repairs under this definition and test.

72. Mr Evans also referred the tribunal to the Upper Tribunal case of *London Borough Council v Griffin and another (2000) 2 EGLR 105,* which in his submission had very similar facts to our case. In that case the cost of the new roofs and windows was based on the lowest tender and the cost was held to be reasonable. The works did not go beyond repair as they were cheaper than the alternatives. Similarly in our case, the life cycle costing confirmed that the Respondent's preferred option was the cheapest one. Mr Evans considered it noteworthy that the *Griffin* case was not even referred to in *Waaler.*

73. The Applicants had provided no evidence for their assertion that the Respondent was not prepared to alter its view as to the best option in relation to the roof works, and in any event even Mr Muir accepted that the Respondent's preferred option was a valid option.

74. Regarding the doors, all doors were looked at by the Respondent to determine whether they were fire-compliant. Regarding the windows, a modest sum was included in the overall cost to cover an element of overhaul. Based on Mrs Blair's evidence he submitted that this was a reasonable amount to allocate, and the Respondent's position was that if any part of this amount is not in fact spent then it will be re-credited to leaseholders.

75. There was no evidence that the Respondent had changed its decision because of the Hidden Homes Programme. Also, the "change of direction" referred to by the Applicants in the internal note from the Respondent's Chief Executive dated 21st January 2013 was not what the Applicants had characterised it to be. It was clear from paragraph 1 of that note that the change in direction was the one referred to in

paragraph 20, namely a change in funding from self-financing to funding the build element from the Affordable Housing Fund.

76. Regarding the financial impact on leaseholders, the charges have been spread over three years, and resident leaseholders have been offered the right to enter into an extended interest free payment scheme. There are also discretionary service charge 25 year loans and discretionary voluntary charge loans allowing leaseholders to repay the debt when selling their flat.

Applicants' supplemental submissions

77. Mr Mehta said that Mrs Dart (one of the Applicants) had raised the issue of cost as early as 1st June 2013 in a written observation. Also, in response to the daughter of the leaseholder of 2 Tupman House (not one of the Applicants) the Capital Works Admin Officer wrote on 28th June 2013 that the Notice of Proposal would give a more detailed description of the work and the cost, implying (in Mr Mehta's submission) that observations in relation to cost issues should be made at that later stage.

78. Mr Mehta also referred to the Upper Tribunal case of *Garside and Anson v RFYC Limited and Maunder Taylor (2011) UKUT 367*, a case which concerned the reasonableness of the cost of certain works of repair. The leaseholders in that case argued that it was unreasonable to carry out the bulk of the repairs all at once and that the works should have been phased so as to spread the cost. The Upper Tribunal held that the financial impact of major works on lessees through service charges, and whether as a consequence works should be phased, was capable of being a material consideration when considering whether the costs have been reasonably incurred.

79. Mr Mehta also sought to distinguish our case from *Griffin* in that in our case no life cycle costings were done before the end of the consultation. Also, in *Griffin*, after the costings were done there was then a further consultation meeting. The Applicants also did not accept that the Respondent's preferred option was the cheapest option, and it was not reasonable for the Respondent to decide – for minimal benefit – to cause such a financial burden to leaseholders.

Tribunal's determinations

80. The Tribunal has also noted the parties' respective written and oral submissions and has taken them into account in reaching its decision.

Consultation

81. The first issue to address is whether the Respondent failed to have regard to the Applicants' observations in relation to estimates under paragraph 12 of Part 2 of Schedule 4 to the Service Charge (Consultation Requirements) (England) Regulations 2003. In cross-examination, Ms du Bruyn and Ms Sahla-Jones accepted (or effectively accepted) that the Respondent had technically complied with the consultation requirements. However, their feeling was that what took place was not true consultation. Ms du Bruyn said that the Respondent did not explore alternative options and did not take the leaseholders' concerns into account. Ms Sahla-Jones' said, in relation to one of the Respondent's letters, that it merely contained a stock set of answers and showed no intention to engage properly with leaseholders. In closing submissions, Mr Mehta said that the Respondent's approach had been formalistic, there had been no attempt to explain the underlying basis for the Respondent's views and the various available options had not been explained.

82. Having considered the copy correspondence and the parties' written and oral submissions, we prefer the Respondent's evidence on this issue. On the point in issue, the legislation only requires the landlord to "have regard to" the lessees' observations. Whilst it is not easy to prove whether a landlord has had regard to a particular observation in the absence of a change in approach, it is clear from the plain meaning of the words and from previous decided cases that a landlord can have had regard to an observation without having changed its decision as a result of considering that observation. The landlord must properly consider the observation and evaluate its merit. If, having evaluated it, the landlord judges it to have merit then it follows that the landlord should then consider whether its merit is sufficient to require or justify a change in approach when weighed against other relevant factors.

83. Our reading of the correspondence, combined with the oral evidence, is that the Respondent did have regard to the Applicants' observations. It responded promptly and in detail. The Applicants have argued that these responses were formalistic and did not address the specific concerns raised. We disagree; Mr Sheehy's letter of 14th November 2013 to Ms Duke, for example, was a 9 page detailed explanation as to the Respondent's thinking. It addressed the issues raised in a systematic way, going through what the general service charge covered, the problems with setting up a sinking fund, the reasons why the Respondent considered each category of the proposed works to be necessary including an analysis of the state of the roofs, the issue of repair versus improvement, the Hidden Homes issue, an analysis of various costs being challenged by the Applicants, an answer to the request that the Respondent bear some of the cost itself, payment options (including interest free payment periods) and the dismantling of scaffolding when no longer needed.

84. There are also many other letters from the Respondent to individual Applicants or to the Applicants as a whole. Mr Sheehy's letter of 30th October 2013 responded to questions on the breakdown of costs, enclosed a surveyor's report and explained various aspects of the Respondent's thinking. One of his letters of 31st October 2013 dealt with sinking funds, payment options, the cost split between leaseholders and tenants, administration costs, and the need for a project manager. His other letter of 31st October 2013 dealt with questions as to possible ways of reducing the cost and cost apportionment. There are many other letters and emails from the Respondent, and the pattern in our view is of the Respondent spending a significant amount of time considering the specific queries raised and doing its reasonable best to respond to them in detail.

85. The Respondent had served the requisite notices, invited observations, made copy documents available, notified leaseholders of their ability to consult the Respondent to discuss concerns and provided details of answers to frequently asked questions. The evidence indicates that the Applicants were very slow to engage with the process, and one consequence of this was that certain of their challenges were made outside the relevant consultation period. The Respondent cannot be criticised for this; the information that it sent out was clear and in compliance with the statutory requirements, and it was for the Applicants to take up the opportunity to make observations and/or seek more information at the relevant time. We do not accept, on the basis of the evidence, that the Applicants were so flooded with section 20 notices for major works that they could not have been expected to focus properly on the notice of intention for these works, nor do we accept that the Respondent should have highlighted more clearly that these proposed major works really were major works with significant cost implications. We agree that it would have been preferable for these works to be referred to in the January 2012 update, but Mrs Blair has explained why in her view this happened and it does not render the formal consultation process itself invalid.

86. We accept that in practice the Respondent did not change course in response to the Applicants' various observations, but the legislation does not require it to have done so. The impression given by the witness evidence is that the Applicants were in practice looking for more than the Respondent merely having regard to their observations. What they appear to have been seeking was a more interactive process in which the Respondent would offer a range of different options and would be persuaded by the Applicants to change course if in the Applicants' view a different option was fairer. We do not criticise the Applicants for seeking that greater level of involvement and influence, but in our view what they were seeking goes beyond the Respondent's statutory obligations. We do not accept that the Respondent's approach fell foul of the approach envisaged by the Supreme Court in *Daejan* because we do not accept the Applicants' characterisation of the Respondent's approach as formalistic.

87. There is an implication in some of the Applicants' evidence that they were only in a position to make informed observations on the stage 1 consultation notice after they had received the information arising out of the stage 2 notice. We understand why the Applicants might feel this, but the Respondent's obligations are limited to complying with the consultation regulations as they are, not as the Applicants would like them to be.

88. Therefore, in our view the Respondent complied with the statutory consultation obligations.

Roof works

89. The Applicants have argued that the costs in relation to the replacement of roof coverings to the four blocks of the Dickens Estate were not reasonably incurred. In their view, the reasonable course of action would have been to pursue what has been described as "Option 1.1", namely for relatively minor repairs to be carried out at this stage with further costs to follow in 10 years' time.

90. We note that the Applicants' own expert, Mr Muir, accepted that the Respondent's preferred option would provide the most longevity and would also (unlike his preferred option) come with a guarantee. His own preferred option was to deal with immediate problem areas, minimise immediate costs and allow time to establish a sinking fund to help spread larger capital costs. However, many of the leases did not give the landlord the power to require the leaseholder to contribute towards a sinking fund, and there was therefore a significant practical problem with this approach.

91. In relation to the differences of opinion between the experts on factual issues, both Mr Muir and Mr Ottley came across as competent witnesses. That being the case, both of their factual conclusions are ones which, in our view on the basis of the evidence, it would be reasonable for a suitably qualified professional to come to. It follows that Mr Ottley was entitled to come to the factual conclusion to which he came and for the Respondent to rely on this even though it was possible for another professional to come to a different conclusion.

92. Leaving to one side for the moment the issue of the financial burden, which is addressed later, was the decision to pursue the Respondent's preferred option a reasonable one such that the costs can be said to have been reasonably incurred? The potential benefits of the Respondent's preferred option seem clear and are not disputed by Mr Muir, namely that they would provide the most longevity and would also come with a guarantee. In addition, reliance on the setting up of a sinking fund is not realistic as many leases do not provide for sinking fund contributions and it would be impractical to rely on the goodwill

of all relevant leaseholders to choose to contribute towards a sinking fund even though not contractually obliged to do so.

93. It is not for the Respondent to have to demonstrate that its preferred option was the only option, merely that it was a reasonable one, such that the costs could be said to have been reasonably incurred. Therefore even if Mr Muir's option is also a reasonable one it does not follow that the Respondent's option is unreasonable, and Mr Muir came close to conceding this point whilst not using these exact words.

94. In his written and oral evidence Mr Ottley explained the thinking behind the Respondent's conclusion as to what roof works should be carried out, and there is also correspondence covering the point in response to leaseholder observations. It is not realistic to analyse each separate statement in detail, but in our view his evidence provides a plausible and sufficient explanation of the Respondent's thinking and the decision can reasonably be justified by that explanation, subject to any separate points which need to be made regarding the financial burden.

95. We accept Mr Ottley's evidence that he inspected as much of the roof area as it was safe for him to inspect and we accept as plausible and genuinely held his belief that Mr Muir's preferred repair option would have been almost impossible to carry out without putting up a full temporary roof. We also accept that it was Mr Ottley's reasonably held view that after 80 years the tiles had reached the end of their natural lifespan and that if the roof needed to be replaced in 10 years' time then it would be out of sync with the replacement of the gutter.

96. As regards costings, the evidence was slightly less clear. There is some evidence that the Respondent did not have the benefit of full life cycle costings when making its initial decision, the Respondent's argument being that it was a reasonable decision anyway and the full life cycle costings merely strengthened the case. It is unclear to us exactly why the full life cycle costings were not carried out first. However, ultimately the question is whether the costs were reasonably incurred, and if in practice they were reasonably incurred but in part only with the benefit of hindsight that does not in our view prevent them from having been reasonably incurred. Mr Spiller has given specific evidence on life cycle costings and we are being invited to rely on his evidence and conclusion as an expert and on the contents of his reports. This evidence and these reports all point to the Respondent's preferred option being the most cost-effective option. There is disagreement between Mr Spiller and Mr Muir on certain of the costings but in our view, on the basis of Mr Muir's evidence, the process gone through by Mr Muir in this regard was more of a rough calculation than an in-depth analysis. Accordingly, on the evidence provided and on the balance of probabilities we accept that the Respondent's preferred

option is the most cost-effective option and that the Respondent reasonably believed it to be so.

97. In conclusion, leaving to one side the issue of the financial burden which is dealt with below, the estimated roof costs have been reasonably incurred.

Doors

98. There is an apparent inconsistency in the Respondent's evidence as regards whether all or most doors need replacing. In cross-examination Mr Ottley explained the reason for this, and in our view this is a plausible explanation. We also note the large number of photographs of front doors and accept Mr Ottley's evidence that the Respondent's staff did not need to gain access to individual flats in order to assess the state of the front doors.

99. We also note that the doors issue was not part of the Applicants' original application and that therefore the Respondent was possibly less focused on providing detailed evidence on this issue.

100. Bearing in mind that these are only estimated costs and that therefore the Respondent only has to provide a reasonable estimate, and that the actual charges can be challenged at the relevant time if the Applicants wish to do so, we consider the estimated charges for the doors to be reasonable.

Windows

101. The evidence indicates that the estimated cost in relation to the windows is for overhaul, nothing more major. In our view the amount allocated is relatively modest and is reasonable in the circumstances. Again, we note that the windows issue was not part of the Applicants' original application and that therefore the Respondent was possibly less focused on providing detailed evidence on this issue.

Scaffolding

102. The Respondent's evidence is that the Applicants were given a credit for the element of the scaffolding costs that could be attributed to Hidden Homes and that the extra scaffolding costs for Dombey House related to some works carried out by British Gas which were properly recharged to leaseholders as service charges. In the absence of a stronger challenge the Respondent's evidence is preferred on this point.

Financial burden

103. The Applicants have not sought to argue that the cost of the roof works is irrecoverable as a matter of construction of the leases. Instead they have argued that the roof works constitute an improvement, not mere repair, and that even if they only constitute repair the tribunal is entitled to – and should – take into account the financial burden on leaseholders when considering whether the cost was reasonably incurred. Furthermore they argue that there is no evidence that the Respondent took that financial burden into account.

104. The Applicants have referred us in particular to the cases of *Waaler* and *Garside*. In *Waaler* the works included replacement of flat roofs with pitched roofs, replacement of wood-framed windows with new metal ones, replacement of exterior cladding and removal of underlying asbestos. In the context of the possibility that some or all of these works constituted improvements rather than repairs President McGrath states that in her view the approach to whether costs had been reasonably incurred under section 19 of the 1985 Act should be different as between repairs and improvements. She goes on to say *"if a landlord decides to carry out a scheme of works which goes beyond what is required to effect a repair ... he must take particular account of the extent of the interests of the lessees, their views on the proposals and the financial impact of proceeding ... It is not sufficient to rely on the right to recover the cost of improvements as a justification in itself for embarking on a scheme of very expensive works"*. Later she adds: *"Where as here, the cost of a scheme of works is high and the product of those works is a building, or part of a building which is wholly different than was the subject of the original demise, then ... a landlord must consider ... the availability of alternative and less expensive remedy ... [and] greater weight should be given to the views and the financial means of the lessees"*.

105. *Waaler* is therefore authority for the proposition that the financial impact on leaseholders is a relevant consideration in determining whether the cost of an improvement has been reasonably incurred. Are the works in our case improvements or repairs? Mr Evans referred us to the test set out in *Woodfall*, and in our view the effect of these works will not be such as to produce buildings of a wholly different character, and in addition the cost of the works is relatively low in relation to the value of each building. In relation to the windows, the evidence indicates that the proposed works are merely overhaul, not improvement, and the relatively modest sum allocated to windows supports this. In relation to the doors, if they do indeed need to be replaced for fire or security reasons there is no realistic way to deal with this otherwise than by replacement.

106. In relation to the roofs, it is common ground between the parties that they need to be repaired. The evidence indicates that the Respondent's

chosen option would provide the most longevity and would also (unlike Mr Muir's preferred option) come with a guarantee. The evidence also indicates – on the balance of probabilities – that the Respondent's option is also the cheapest medium to long term option. In our view the roof works meet the *Woodfall* test of repairs rather than improvements as the effect of the roof works will not be such as to produce buildings of a wholly different character and the cost of the works is relatively low in relation to the previous value of each building. In essence, the proposed roof works involve the replacement of a pitched roof covering with a new one due to failing materials.

107. Therefore, unlike in *Waaler*, the works are in our view all works of repair and therefore the decision in *Waaler* is not relevant to our case insofar as it requires a landlord to take the financial burden on leaseholders into account when looking to carry out improvements and fund these through the service charge.

108. In *Garside*, the Upper Tribunal held that the financial impact of major works on lessees through service charges, and whether as a consequence works should be phased, is capable of being a material consideration when considering whether the costs are reasonably incurred. In principle, no distinction seems to have been made in Garside between repairs and improvements, although President McGrath in *Waaler* commented that in her view *Garside* was limited in its ambit and that a lessee's financial means are usually irrelevant to the issue of whether the cost of repairs has been reasonably incurred, subject to the limited circumstance where an unexpected increase in service charges and its financial impact are relevant to a decision on how and when to effect repairs. Her Honour Judge Robinson also said in Garside that *"if repair work is reasonably required at a particular time, carried out at a reasonable cost and to a reasonable standard and the cost of it is recoverable pursuant to the relevant lease then the lessee cannot escape liability by pleading poverty"*.

109. In *Griffin*, which was an earlier Upper Tribunal decision but was not referred to in either *Garside* or *Waaler*, an approach was taken which was seemingly different to that in *Garside*. The facts in *Garside* are similar to the facts to our case. In that case the costs of the new roofs and windows were based on the lowest tender and the cost was held to be reasonable. Mr Norman Rose FRICS in giving his decision in Garside, quoted a test applied by Nicholls LJ in the Court of Appeal case of *Holding & Management Ltd v Property Holding & Investment Trust plc (1990) 1 EGLR 65* and took the firm view on the facts of *Garside* that the installation of a new flat roof and the overhaul of windows constituted repair if cheaper than the alternatives, and that a repair does not cease to be a repair simply because it also effects an improvement. Mr Rose makes the point that leaseholders benefit from repairs that will have a long-term impact on the quality of their building as *"when they ... wish to dispose of the unexpired terms of their leases ... the prices that they will then obtain will be influenced by the general*

condition of the block at that time, including its roofs and windows, and on whether substantial expenditure on those items is anticipated shortly".

110. In our view the present case is reasonably analogous on its facts to *Griffin*. For the reasons already given, we consider the works in our case to be repairs, not improvements. The works are similar in nature to those in *Griffin* and, whilst the Applicants do not accept the point, in our view the evidence indicates on the balance of probabilities that the Respondent's option in relation to the roof works is the cheapest option, that the replacement of the doors is the only way of remedying their failings and that the amount allocated to overhauling of windows is minimal. In addition, importantly, we do not consider the Applicants' preferred option in respect of the roofs to be a realistic one. It relies seemingly on the ability of the Respondent to create a sinking fund, which it cannot realistically do as so many of the leases do not provide for a sinking fund. In addition, apart from dealing with the guttering the Applicants' preferred approach does not in our view address the roof issues properly, and the Respondent is entitled to adopt an approach which will fully tackle the repair issue in a manner which it reasonably considers will end up being the cheapest and most effective.

111. To the extent that there is a conflict between the approach in *Griffin* and in *Garside* we prefer the approach in *Griffin*. In any event, applying *Garside*, it is not the case that the Respondent has given no thought to the financial burden on leaseholders, whether or not it is under a legal obligation to do so. The charges have been spread over three years, and resident leaseholders have been offered the right to enter into an extended interest free payment scheme (we were told at the hearing that the Respondent was not legally able to extend this scheme to non-resident leaseholders). There are also discretionary service charge 25 year loans and discretionary voluntary charge loans allowing leaseholders to repay the debt when selling their flat. Furthermore, even in *Garside* the financial burden on leaseholders is only one of various factors to be taken into account and in our view – looking at everything in the round – we are not convinced that a better and fully workable alternative was available.

112. In conclusion on this point, we do not consider that the estimated charges have been unreasonably incurred by reason of any failure on the Respondent's part to consider more carefully the financial burden of its proposals on leaseholders.

Hidden Homes

113. We note the parties' respective submissions on this issue and do not consider that the evidence supports the Applicants' contention that the

Hidden Homes Programme was the reason for the Respondent's chosen approach.

Equitable set-off

114. Whilst we appreciate that it is difficult for leaseholders to provide hard evidence of historic neglect and of its effect on the cost of maintaining a building, nevertheless it is incumbent on them at least to offer a prima facie case. In our view the Applicants' evidence on this point does not establish a prima facie case. Mr Muir's evidence on the point was largely speculation, and he was really not in a position to assert with any degree of certainty (a) that there had been significant relevant historic neglect or (b) that any neglect had had a demonstrable effect on the overall cost of maintaining the Property to the detriment of leaseholders and their service charge bills.

115. Therefore we do not accept that the Applicants have a right of equitable set-off on the basis of the evidence.

Manner of payment

116. There is an overlap between this point and the point regarding financial burden. To the extent that the financial burden on leaseholders is a factor which a landlord must take into account it might follow that a tribunal ought in similar circumstances to take that financial burden into account and – to the extent that it has the power to do so – could or should make an order reducing that financial burden by requiring easier payment terms.

117. On the facts of this case we have determined that the Respondent itself was not under a legal obligation to take into account the financial burden on leaseholders in relation to the specific works that it has chosen to undertake. The leases set out each leaseholder's contractual obligations in relation to payment. These leaseholder obligations are not qualified by any wording barring the landlord from enforcing the leaseholder's obligations under certain circumstances. In the absence of any express wording it is difficult to see on what contractual or statutory basis such a qualification could be implied and according to what criteria any such limitation on the landlord's powers could reasonably operate.

118. The Applicants note that section 27A of the 1985 Act gives the tribunal the power to determine (amongst other things) the date by which and the manner in which a service charge is payable and have invited us to consider whether this effectively gives us a power to override the contractual provisions of the leases. In our view it does not; the purpose of these provisions in our view is to give the tribunal jurisdiction to interpret the meaning of the leases on these points, not

to override that meaning by reference to what might be considered to be fair in (for example) the leaseholders' individual financial circumstances. In any event, even if we are wrong on this point our factual finding is that the works are ones of repair and therefore under *Waaler* and in particular *Griffin* it would not, in our view, be appropriate to take the financial burden into account so as to deprive the Respondent of its contractual entitlement.

119. In addition, as noted above, the charges have been spread over three years, and resident leaseholders have been offered the right to enter into an extended interest free payment scheme. There are also discretionary service charge 25 year loans and discretionary voluntary charge loans allowing leaseholders to repay the debt when selling their flat.

120. In conclusion on this point, we decline to make an order for different payment terms.

General further comments

121. None of the above analysis is intended to suggest that this application has been brought otherwise than in good faith. We accept that the Applicants genuinely feel that the Respondent has not engaged in a proper consultation process and that they have genuine concerns about some of the choices made by the Respondent. We also accept that they have real concerns about the financial burden of the cost of these major works. However, on the basis of the evidence and our interpretation of the law, we consider that these charges are payable in full and in the manner and at the times demanded.

122. On a specific point, whilst we note Ms Sahla-Jones' comments as to what her solicitors were told at the time when she purchased her flat, it is not part of our jurisdiction in the context of a section 27A service charge application to penalise the local authority for any alleged omissions in the letter to which she referred. In any event, we do not consider that the relevant letter demonstrates that she was misled by the Respondent such that her service charge should be reduced.

Cost Applications

123. The Applicants have applied for an order under paragraph 13(b)(ii) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the 2013 Rules**") that the Respondent reimburse to them their costs incurred in connection with this application. Such an order can only be made if the other party "has acted unreasonably in bringing, defending or conducting proceedings" and we do not consider that the Respondent has acted unreasonably in this regard, therefore we decline to make such an order.

124. The Applicants have also applied for an order under paragraph 13(2) of the Rules that the Respondent reimburse to them the application and hearing fees. As the Respondent has been successful on all issues and it has not in our view conducted itself unreasonably we decline to make such an order.

125. In addition, the Applicants have applied for a section 20C order, this being an order that the Respondent may not include in the service charge any costs, or a proportion of the costs, incurred in connection with these proceedings. We decline to make such an order. The Respondent has been successful on all issues and, on the basis of what we have seen and heard, it has conducted itself in a reasonable manner. It would therefore be inappropriate in our view to make such an order.

Name: Judge P Korn **Date:** 15th April 2015

APPENDIX 1

List of Applicants

Tapley House
Flat 3 – Michelle Sexton
Flat 5 – Patrick Spring
Flat 6 – Alys Mitchell
Flat 9 – Luke Baker
Flat 10 – Tanya Hamway
Flat 11 – Pradipkumar and Manisha Dattani
Flat 12 – Phil Hinchcliffe
Flat 16 – Adam and Mandana White

Copperfield House
Flat 6 – Kim Elledge
Flat 7 – Emily Ford
Flat 10 – Rhys Jones, Stephanie Sahla-Jones and Barbara Weber-Sahla
Flat 11 – Andrew Forbes
Flat 15 – Angelene Duke
Flat 19 – Florence Adegbenro
Flat 25 – Giorgia Garrett
Flat 28 – Olivia Guy
Flat 30 – Donatella Landi

Dombey House
Flat 17 – William Paley
Flat 23 – Diana du Bruyn and J.A. du Bruyn
Flat 25 – Andrew Watts
Flat 27 – Jacqueline Dart
Flat 28 – Tom Ryan
Flat 30 – Laura Pescarmona

Nickleby House
Flat 5 – DL and JE Dent

APPENDIX 2

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
   and the amount payable shall be limited accordingly.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited ... unless the consultation requirements have been either –

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

Section 27A

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

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

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

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

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

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Service Charges (Consultation Requirements) (England) Regulations 2003

SCHEDULE 4, PART 2

12. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.