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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAU/LDC/2012/0115**
Property	:	**Various properties throughout the London Borough of Hackney**
Applicant	:	**London Borough of Hackney**
Representative	:	**Mr R Bhose QC, Counsel** **Miss P Campbell, Senior Lawyer for the London Borough of Hackney** **Miss Angela Phillips, Directorate Procurement Manager** **Mr Martin Weaver, Head of Planned Maintenance for Hackney Homes Limited**
Respondent	:	**Long Leaseholders of London Borough of Hackney**
Representative	:	**Mr Andrew Dymond (Counsel)** **Miss R Blain (a Leaseholder)** **In addition various Leaseholders attended the Hearing**
Type of Application	:	**Decision of the Leasehold Valuation Tribunal on an Application Under Sections 20ZA of The Landlord and Tenant Act 1985 (The Act)**
Date of Application	:	**11th November 2012**
Tribunal Members	:	**Mr A A Dutton – Chair** **Mrs S F Redmond BSC (Econ) MRICS** **Mrs L L Hart**
Date and venue of Hearing	:	**24th June 2013**
Date of Decision	:	**15th July 2013**

DECISION

The Tribunal determines that the proposed agreement to be entered into between the London Borough of Hackney (the Council) and Hackney Homes Limited (HHL) is not a qualifying long term agreement (QLTA).

The Tribunal determines that dispensation should not be granted from the consultation provisions contained in the Service Charges (Consultation Requirements) (England) Regulations 2003 (the Regulations).

The Tribunal determines an order should be made under Section 20C of the Landlord and Tenant Act 1985 (the Act) so that the Council is not entitled to recover the costs of these proceedings as a service charge.

REASONS

1. By an Application dated 11th November 2012 the Council sought an application for dispensation from the Consultation Requirements under the Regulations pursuant to Section 20ZA of the Act.

2. It is appropriate to set out the background to this case which has been taken from the helpful introductions given by both Counsel.

3. It is the Council's intention to enter into a contract with HHL under which that company would undertake all works and services associated with the decoration of the external and communal parts of the Applicant's housing stock. The intention is that the proposed agreement should run for a term of three years with an option to extend for a further two years.

4. HHL is an "arms-length management organisation" (ALMO) established by the Council in 2006 pursuant to Section 2 of the Local Government Act 2000. ALMOs were introduced by Central Government towards the end of the last century as an option for local housing authorities that wished to inter-alia seek additional resources to invest in bringing their stock up to the "Decent Homes standard." HHL is a company limited by guarantee and which is 100% controlled by the Council. It is common ground that the Council is a statutory corporation and therefore capable of being a "company" for the purposes of the Companies Act 2006. Further that the sole membership of HHL is comprised of the Council which in turn has the ability to remove Board members. It follows and is accepted by the Council that under the Regulations (Regulation 3(1)(c)(i)) the Council is the holding company and HHL is a wholly owned subsidiary.

5. In or about 2005 the Council's then Direct Labour Organisation (DLO) had one contract to undertake the external decoration works to the housing stock. On the formation of HHL in 2006 the DLO employees were transferred to HHL under the Transfer of Undertaking Regulations (TUPE) and from then onwards HHL's own employees undertook these decorative works. That arrangement was to expire in 2011.

6. On or about 22nd October 2010 the Council placed an advertisement in the Official Journal of the European Union for a contract described as external communal painting programme and associated repair work. This advertisement gave a short

description of the works to be undertaken, the quantity or scope which at that time indicated that there were some 31,200 units of authority's affordable housing stock comprising 25,700 rented stock and at that time some 5,500 owned by leaseholders. This figure, we were told had, by the time of the hearing, risen to some 7,400 leaseholder units. The value of the contract was, excluding VAT, estimated to be £6 million based on a cost of £2 million per annum. The advertisement went on to say that it was envisaged that there would be five operators who would be invited to tender with the award criteria being based as to 70% of price and 30% on quality.

7. In due course a shortlist was formed which included HHL, Lake House, Breyer Group, Mullaley and Lengard. However, it appears that only HHL and Lake House went forward to tender. As a result of the procurement procedures which we will turn to later in these reasons, HHL was deemed to be the winning contractor, they providing a cheaper quote and also apparently succeeding on quality. It was the intention to contract with HHL that gave rise to the application before us.

THE ISSUES

8. It was recognised by the Council that in proposing to contract with HHL they would need to establish whether in fact this agreement constituted a QLTA. The reason for that concern rests with the Regulations and in particular Regulation 3, which under the heading "Agreements that are not qualifying long term agreements", contains the following wording:

3(1) An agreement is not a qualifying long term agreement
- *(a) if it is a contract of employment; or*
- *(b) if it is a management agreement made by a local housing authority and*
  - *(i) a tenant management organisation; or*
  - *(ii) a body established under Section 2 of the Local Government Act 2000 (or Section 1 of the Localism Act 2011 which came into force in 2012);*
- *(c) if the parties to the agreement are*
  - *(i) a holding company and one or more of its subsidiaries; or*
  - *(ii) two or more subsidiaries of the same holding company;*
- *(d) ... and (2) or (3) not appropriate*

(4) in paragraph (1):
"holding company" and "subsidiaries" have the same meaning as in the Companies Act 1985;
"management agreement" has the same meaning given by Section 27(2) or the Housing Act 1985; and
"tenant management organisation" has the same meaning given by Section 27AB(8) of the Housing Act 1985

It is noted that the Companies Act is now the Companies Act 2006 but the provisions relating to a holding company and subsidiaries remain unchanged. The question, therefore, we were asked to consider by the Council was whether or not the proposed agreement between the Council and HHL was a QLTA. If we found that it was, then there was no further involvement on our part and that in effect we would be invited to dismiss the application but in any event to give a reasoned written determination setting out our conclusion in accordance with the Upper

Tribunal decision of the *London Borough of Southwark and Leaseholders of the London Borough of Southwark* reference [2011]UKUT 438(LC).

9. If, however, we concluded that the proposed agreement was not a QLTA because of the provisions of Regulation 3(1)(c)(i) then we would be invited to make a determination on the application for dispensation to be granted from selected paragraphs within Schedule 2 and the provisions of Part 2 of Schedule 4 of the Regulations.

HEARING

10. Prior to the Hearing we were provided with four bundles by the Council and a bundle from the Respondents. The Council's papers contained the application, various directions and previous decisions by the Tribunal on procedural matters, documentation associated with the proposed agreement including the notice of proposal and a subsequent revised notice, tender documents and evaluation papers. We also had a copy of the memorandum and articles of association of HHL, copies of voluminous items of correspondence passing between the Council and the various Respondents and other Leaseholders, statements of case on behalf of both the Applicant and Respondent and an Applicant's reply. In addition for the Applicants there were witness statements from Miss Angela Phillips and Mr Martin Weaver.

11. In the Respondents' bundle apart from the statement of case on behalf of Rachel Francis (nee Blain) and certain other Respondents, there were a number of witness statements from some 37 Leaseholder who were also the Respondents in this application setting out their reasons why they objected to the proposed contract being placed with HHL.

12. During the course of the Hearing, we were supplied with a bundle of Applicant's authorities as well as the up to date service charge regulations which makes reference to the Localism Act 2011 but contains no other changes from the original regulations. We will refer to the documentation as necessary.

13. Both Counsel had submitted fulsome and helpful statements of case. At the start of the Hearing it was established that, save for Mrs Susan Benjamin and Miss Corrine Pierre, who wished to reserve their position and be able to make oral statements during the course of the hearing, the remaining attendees, of which there were 12 were happy to let Mr Dymond speak for them. We should record that Mrs Benjamin and Miss Pierre did not in fact seek to depart from Mr Dymond's submissions on behalf of the Respondents. Mr Brown, who attended in the morning on 24th June, said that he was representing his partner Sylvia Coombes who was unable to attend but had not at that stage produced any form of confirmation as to his involvement, although he had been in correspondence with the Tribunal prior to the Hearing. He did not attend the afternoon session.

14. Mr Bhose opened the case confirming that if we considered the proposed agreement between the Council and HHL was a QLTA no dispensation was required because the consultation requirements under the Regulations had been and will be complied with. However, if we did not consider the agreement was a QLTA we were asked to consider granting dispensation on terms that the Council complied with the consultation requirements under Schedule 3 of the Regulations subject to such

terms and conditions as may be appropriate. The Council's primary case, as advanced by Mr Bhose, was that dispensation was not required and that the proposed agreement will be a QLTA. He told us that he accepted that the Council was the sole member with power to dismiss Board members and that under the Companies Act therefore this was a holding company/subsidiary situation confirming that which was set out in the Council's written reply to the Respondents statement of case. He told us of the procurement process which involved a committee staffed by Miss Angela Phillips who was to give evidence, a Mr George McGee who was a resident in the Borough and apparently Vice Chair of the Clapton Neighbourhood Panel and experienced in building matters and finally Mr John Newton who was head of HHL's procurement department.

15. We were told that the tender was based on a pre-set schedule of rates and the contractors intending to proceed were invited to give reductions or in the alternative, increases over those rates. Those figures were evaluated by Mr Simon Theobold, Senior Finance Officer employed by the Council, but the overall decision as to the procurement of the proposed agreement rested with Miss Phillips, Mr McGee and Mr Newton. It appears that following these procedures the tender for HHL was some 22.25% lower than that for Lake House, giving as Mr Bhose put it, a "clear winner." We were taken to the notice of proposal and the summary of questions and answers that were raised by residents.

16. As a result of the Tribunal adjourning the matter in February of this year the Council took the opportunity to re-issue the notice of proposal for two reasons we were told, firstly that the leaseholder had not had reasonable access to the financial information and also that a number of leaseholders would not have had time to inspect such documentation had they so wished. A new notification was sent out from the Council on 26th February 2013. It should be noted that the original notification of the proposal was sent out on the 26th November 2012 but under the auspice of HHL with any response to be sent to HHL. This was amended in the subsequent notice requiring the responses to be sent to Hackney Service Centre.

17. We were told that there were some 150 observations out of some 7,400 leaseholders, a number of which were materially the same. Those observations were responded to by Miss Phillips on an individual basis, although as the observations contained a number of matters that were the same, the response tended to be in similar terms, save where they contained particular references to leaseholders' property which was referred to HHL for response. We read a letter from a Miss Fox dated 25th March 2013 which had prompted a reply by Miss Phillips on 11th April 2013 and by Mr Butterworth from HHL dealing with the specific matters relating to Miss Fox's property on 5th June 2013. These we were told were an example of the engagement that the Council had in dealing with the proposed agreement.

18. We were told that if the contract was awarded to HHL the performance would be monitored by a different and separate department of HHL through its planned maintenance section headed by Mr Weaver who had like Miss Phillips provided a witness statement and attended to give evidence. We were urged to accept that this was a QLTA but if it was not, then no relevant prejudice would be suffered by the leaseholders as a result of the advertisement in the European Union Journal, the fact that the cost of the works if done by HHL was over 22% cheaper than Lake House, that if the contract had been less than 12 months it could have been issued to HHL and that if Lake House had been the first contractor then it would be a QLTA.

It was suggested therefore by Mr Bhose that there had been full competitive procurement and that compliance with Schedule 3 would follow. The leaseholders he told us, of course had the backup of Section 19 of the Act as far as the works were concerned and it was also pointed out to us that 90% of the works would be taken from the scheduled rates. Finally, of the possible conditions to be attached to any dispensation following from the Supreme Court ruling in Daejan v Benson he confirmed that no costs would be sought from the Respondents in respect of this application but did not think it appropriate that there should be a condition for the Respondents' costs to be paid. The matter had only been brought before the Tribunal to seek confirmation.

19. After a short adjournment to enable us to read certain documentation, he called Miss Phillips and took her through her witness statement which was in the bundle at page 577. She told us that she was the Directorate Procurement Manager for the Council responsible for conducting, advising and signing off procurement activity across the Council in areas relating to construction, public realm and leisure services. She had been professionally involved in procurement for some ten years. She confirmed much of which was contained in the Applicant's statement of case and referred to by Mr Bhose in his opening, particularly relating to the formation of HHL and the placement of the advertisement in the European Journal and the subsequent steps taken leading to the recommendation to the Council that HHL was the company to proceed with. She told us that an evaluation process had taken place in November 2011 but it appears that TUPE information changed and it was necessary therefore to ask those five companies who had indicated a wish to tender of this change and invite them to resubmit their tenders by 1st March 2012. It was thought that the changes to the TUPE information may have made the tender more attractive to those contractors who had not proceeded.

20. However, it appears that it was only HHL and Lake House who submitted the tender for consideration. She told us that the tenders were evaluated by a panel consisting of herself, Mr Newton who we have indicated was the head of HHL's procurement department and Mr McGee the resident representative. Mr Newton we were told was used because of his experience in procurement matters. The evaluation panel concluded that HHL's tender was significantly better than Lake House and the recommendations were presented to the Cabinet Procurement Committee (CPC) for a meeting dated 17th April 2012. This recommended that HHL should be awarded the three year contract with an option to extend. The report's author was Mr Newton and it records that comments made by Mr Theobold and a Mr Eratt who is the Legal Procurement lawyer for the Council. Miss Phillips statement went on to deal with the proposal and its revision and also dealt with the observations received from various leaseholders to which she had responded.

21. Her statement set out at paragraphs 31 to 34 the reasons she felt the matter should progress with HHL, for if it did not then there would be the need to procure the works in different ways and to re-tender, the possibility that the rates subsequently agreed may not be as favourable as those by HHL and the costs implications of the Council's time and resources would be lost as a result of the procurement having to be abandoned. She was of the view, as set out in her statement, that the proposed agreement contained best value for the works and that it was the Council's only objective to ensure that leaseholders and the Council obtained value for money.

22. Mr Dymond for the Respondents asked Miss Phillips certain questions and elicited the response that although the arrangements with HHL for these works had, as we have indicated above, ceased in 2011, certain works were being carried out under what was known as the "Teckl exemption", although it seems little work if any had been done to leaseholders' properties in this period. We were told that in respect of TUPE matters HHL probably had something in the region of 20 employees being painters and administrative staff, although in documentation this figure appeared to be 23. When asked about the use of Mr Newton on the procurement panel and the possible scepticism that there might be from leaseholders, Miss Phillips told us that as she was chairing the panel and there was a resident also involved there would be no such bias. She said that Mr Newton had been used because he oversees procurement for HHL, has a great deal of experience in this field and in her view came with a very objective manner. She was asked to confirm the position with regard to the initial notice which appeared to emanate from HHL and required response to them and the subsequent notice that corrected this. She could understand that leaseholders might have found this off-putting. She also accepted that a number of the responses raised concerns about the connection between the Council and HHL. She did not, however, think from her experience of being involved in a number of consultations, that the number of objections was that high. It appears that no consideration had been given to employing an independent contractor to fulfil Mr Newton's role.

23. In re-examination she confirmed that the assessment of the tender as to price had not involved Mr Newton and that the report to the CPC was to elected councillors and a recommendation only which had to be approved by the Council itself. She also told us that Lake House had not taken issue with the make-up of the valuation/procurement panel.

24. After the luncheon adjournment we heard from Mr Weaver. Mr Weaver was employed by HHL as head of its planned maintenance section. He told us in his statement that the planned maintenance section was part of the building maintenance division which also had within its remit the direct labour organisation (DLO) who would be carrying out the works. He told us that his position as the Planned Maintenance Manager was in effect on the 'client's side' and responsible for ensuring that the works were properly carried out at the right price whereas DLO was on the 'contractor's side'. It became clear, however, in his evidence that the head of building maintenance division was responsible for both the planned maintenance department and the DLO. He dealt with, at paragraph 11, some concerns of the leaseholders as to how it is possible for HHL to "police" another part of the organisation. He set out there why he believed this was possible. He told us that his section had no responsibility or accountability for the financial performance of DLO and that his responsibility was to manage the various contracts and ensure the programmes and works were delivered "effectively and efficiently and that the budgets are well managed."

25. In further evidence he confirmed that his statement was correct and so far as costings he estimated that 90% of the cost of the works would be under the schedule of rates and that there had been an agreed maximum price which could not be exceeded. He was of the view, therefore, that the Respondents could be certain about the price. Insofar as the standard of works was concerned he told us that the clerk of works, who was in the decent homes team would be closely involved with the contract including random inspections and that the painting programme

manager would also inspect on a regular basis. He told us that they would treat the DLO arm of HHL in the same way as they would any independent contractor.

26. In cross examination he confirmed that resolution of any issues between the planned maintenance department and DLO would be settled by the Head of Building Maintenance.

27. For the Respondents Mr Dymond took us briefly through the statement that was contained in the bundles. He told us that the Council's submission that the proposed agreement was a QLTA was not correct. Schedule 3 of the Regulations would provide consultation requirements however, as he pointed out this gave no opportunity to the Respondents to propose their own contractors. He accepted, however, that if we found a QLTA did exist then the Council had complied with their requirements under Schedule 2 and the matter went no further.

28. He took us to Regulation 3 and confirmed that in his view as in fact conceded by the Council, HHL was a wholly owned subsidiary. So far as he was concerned that was an end of the argument as the Regulations prevented the arrangements between the Council and HHL from being a QLTA. Accordingly a proper construction of the Regulations covered the matter. The Council's arguments that the provisions relating to the creation of an ALMO were rendered otiose if we found that a QLTA could not be formed in these circumstances, was an irrelevancy. He was absolutely clear that this was not a QLTA. On the question of dispensation, he could not accept the Council's suggestion that the undertaking they would offer to, in effect consult as though the arrangements were a QLTA, was sufficient. He referred to the Supreme Court Case of *Daejan Investments Limited v Benson and others [2013]UKSC 14* and took us to certain paragraphs of the judgment of Lord Neuberger. He told us that the focus of prejudice was on the cost. The existence of a local authority as a landlord was not relevant for the purposes of dispensation and that the Daejan case was in respect of retrospective dispensation, not as in the case here, where prospective dispensation is sought. His view was that the Council sought not just dispensation but to re-write the Regulations. If this was not a QLTA there was no warrant for us to deal with dispensation. He then gave us examples of the formation of companies which clearly showed in his view that private landlord companies could not utilise their own subsidiary companies to carry out major works under a QLTA and that this was the intention of the Regulations. He told us that the 2003 Regulations did not prevent the Council from using HHL to carry out qualifying works but that it would need to proceed under the provisions of Schedule 4 part 2. He thought that the lack of the leaseholders' ability to nominate a contractor was a significant reduction in their rights. If we should, contrary to his assertions, be minded to grant dispensation, then he indicated it should be on terms that the Council complied with the provisions of Schedule 3 in relation to those works which was agreed, that the Council would not seek to recover the costs associated with this application through the leaseholders' service charges which was agreed, and finally, which was not agreed, that the Applicant should pay the Respondents reasonable costs which he told us were £4,800. He accepted that there appeared to be no power for the Tribunal to award costs if the Respondents won the case outright.

29. At the conclusion of Mr Dymond's submissions, Mrs Benjamin and Miss Pierre confirmed that they had nothing more to add and that they were content with that which had been said by Mr Dymond on their behalf.

30. Mr Bhose in the statement of case and reply had fully set out the Council's position. As we have indicated above, he accepted that the arrangements between the Council and HHL fell within the provisions of Regulation 3(1)(c)(i). However, he asked us also to consider Regulation 3(1)(b)(ii) which provided for an agreement between a local housing authority and a body established under then Section 2 of the Local Government Act 2000 not to be a QLTA. His argument was that if the Secretary of State had by these regulations intended to exclude from the definitions of QLTA any other agreements between a local housing authority and a body created under Section 2 of the 2000 Act, the regulations would have been so drafted. They were not. This he said strongly suggested the intention that other non-management agreements would be QLTAs. He went on to say that if the proposed management agreement was not a QLTA because of the requirements of Section 3(1)(c) it would follow that Section 3(b)(ii) was unnecessary and devoid of any substantive purpose because the management agreement between the Council and HHL would also fall within Regulation 3(i)(c). His submission was that Regulation 3(i)(c) was not intended to and does not apply to any agreements made between local housing authorities and a Section 2 body. In effect, therefore, as he said in the statement of case "*the regulations were not intended to apply where the holding company was also a local housing authority and that therefore for the purposes of this regulation it was submitted that the local authority was not a holding company.*" In the reply he then went forward to set out certain absurd consequences "that would follow" if the arguments put forward by the Respondents were accepted all of which were noted by us.

31. In addition to these written submissions Mr Bhose took us to some documents which had been submitted at the start of the Hearing which included the "revised procedure for consulting service charge payers about service charges" issued in August 2002, the guidance on "arms-length management of local authority housing 2004 edition", the Housing Act 1985 Section 27, the case report for *Paddington Basin Developments Limited v West End Key Management Limited* case under reference [2010]1WLR2735] where at paragraph 24 the Judge had considered the case of Ruddy v Oakfern Properties Limited and concluded that there had been bad drafting of part of the regulations and that it was possible for us to interpret those regulations to give effect to the proposition that he advanced.

32. As to dispensation he was of the view that any Schedule 4 consultation would not apply. As rates had been agreed, he thought there was an absence of prejudice and although he could accept concerns raised by the leaseholders as to the process and procurement which could have perhaps been dealt with differently, Mr Newton had no involvement in the evaluation of the financial data which made up 70% of the evaluation. The difference in price of nearly 23%, the fact that Lake House did not complain and that the final decision rested with the Councils elected members, meant that there was no prejudice. He pointed out that it would be possible for a subsidiary to do major works under Schedule 4 but not under a QLTA and that in his view the Council's request in these proceedings was merely to carry out what the regulations were intended to provide. He pointed out that in going to the European Journal every contractor in Europe had had the opportunity to provide a bid which was further evidence of the lack of prejudice caused to the Respondents. The Council he said, did not accept the arguments put forward by a number of Respondents in their statements as to the standard of works and pointed out that if there were complaints they had the procedures that the Council put in place to

handle those and also rights to apply to the Tribunal. There was no suggestion, he said, that HHL was any worse than any other contractors. Finally he submitted that the application was against some 7,400 Respondents all of whom had been supplied with the data and asked was it appropriate that we should therefore reject the Council's case and force different provisions and costings on that silent majority?

33. Insofar as the conditions for dispensation were concerned, he told us that if the Council were successful then they would be prepared to make a contribution of £3,000 towards the Respondents' costs.

THE LAW

34. The law relevant to this application is set out at the appendix attached hereto.

FINDINGS

35. The first and primary question we must answer is whether or not the proposed arrangement between the Council and HHL constitutes a Qualifying Long Term Agreement. The Council say it does, the Respondents say it does not.

36. If we concluded that this is not a QLTA then we are asked by the Council to proceed as though it were and to make conditions which are enforceable requiring the local authority to observe the provisions of Schedule 3 of the regulations as though a QLTA existed by way of, in effect dispensation under s20ZA of the Act.

37. The answer to the first question is that we do not accept that this is a Qualifying Long Term Agreement.

38. Our reasons for this are as follows. It is accepted by the Council that the Council is the holding company of HHL which is a wholly owned subsidiary. Accordingly the provisions of Regulation 3(1)(c)(i) clearly apply. On the strict interpretation of that regulation we find that it is not possible for the present proposed agreement to be a QLTA.

39. We are asked by Mr Bhose to in effect re-write the Regulations to provide that a local authority is not caught by the provisions of Regulation 3(1)(c)(i). In that regard he referred us to the revised procedures for consulting service charge payers about service charges issued in August 2002. He referred us to the introduction in particular paragraphs 6, 7, 8 and 11 which flagged up that the Secretary of State was aware of the potential difficulties with regard to long term agreements. It was said at paragraph 12 of the introduction that the "draft regulations are intended to address these difficulties." This document accepted that there were conflicting claims and that the regulations were intended to provide a reasonable compromise. That compromise in our findings is referred to in Chapter 3 "Consultation on long term contracts" paragraphs 1 to 4 but more particularly under Chapter 5 dealing with exemptions commencement and transitional provisions. The heading question 8 "Do you agree with the exemption where no service charge payers are available for consultation?" does not seem to be directly answered because the following is stated as being the answer. Paragraph 4 *"We would be grateful for views on how the consultation requirements should apply to contracts between connected parties. We do not wish to penalise landlords who have particular corporate structures for example many landlords have contracts with an associated company to manage*

their property portfolio. We propose to exempt contracts between a landlord and an associated company from the consultation requirements. However, any qualifying works subsequently done under that contract would not enjoy the exemptions from getting competitive estimates and nomination of contractors associated with other long term contracts. This reflects the fact that the work is an effect being done by the landlord, albeit through an associated company (see Regulation 4(1)(c) of the draft regulations)." Those draft regulations at 4(1)(c) mirror 3(1)(c) of the actual regulations. We conclude the Secretary of State's intention to be that he would exempt the ALMO arrangements as has been done under Regulation 3(1)(b)(ii) but not qualifying work to be carried out by that company. In our findings 'nomination' is confined as set out in the interpretation of the regulations to nominations put forward by leaseholders. Accordingly it seems to us quite clear that the intention of the Secretary of State was to allow for management agreements between Councils and ALMOs but that if that ALMO was to undertake qualifying works, it would require consultation under the provisions of Schedule 4 part 2 . We do not find it possible to interpret the regulations so as to exclude the local authority from the definition of holding company insofar as the provision of other contracts as contained in Section 3(1)(b)(ii). We do not see why a local authority which according to the Supreme Court, has no different status to any other landlord, should be entitled to make use of its own subsidiary to carry out works of the nature envisaged by the proposed agreement. We accept that HHL could do qualifying works but the Council would have to consult under Schedule 4 part 2. For those reasons we find that this proposed contract is not a QLTA.

40. We then turn to the secondary case of the Council that if finding it is not a QLTA we should nonetheless proceed as though it were and grant some form of dispensation to the consultation requirements under Schedule 3 and Schedule 4. We are not minded to do so. It seems to us that we cannot grant dispensation for something that does not in reality exist. Mr Bhose is asking us by the back door to allow the matter to proceed as though it were a QLTA when we have found for the reasons stated above it is not. Accordingly it would seem inappropriate for dispensation requirements to be invoked in respect of a non-existent agreement.

41. If we are wrong in our views expressed above with regard to dispensation we would say that in any event we would not grant dispensation for the following reasons:

(i) We are unhappy about the process leading to the recommendation that HHL should be the successful contractor. The use of Mr Newton, an employee of HHL on the procurement panel even accepting the Council's views as to his honesty and integrity, (he was not called as witness by the Council) in our finding leaves the leaseholders with a perception that matters are not being dealt with in an open and honest manner.

(ii) We are not happy about the post-contract management arrangements. Mr Weaver, the Head of Planned Maintenance sits in the same division as the DLO who will carry out the works, both of whom who come under the control of one officer, who is the Head of the Building Maintenance division. Again this could reasonably lead a Respondent leaseholder to question the independence of the planned maintenance division and the ability of the leaseholder to ensure that the cost of works and in particular the proper standard is ensured. Both these findings at 41(i) and (ii) could cause prejudice to the Respondents, both in the costs and the standard of works. We accept that the use of HHL could still proceed but the Respondents would be able to

invoke the rights contained in Schedule 4 which would be lost to them if the matter proceeded as a QLTA.

(iii) As a matter of comment we are also not wholly convinced that this one-size fits all arrangement for decorating is in the leaseholders' interest. The inability to nominate and effectively challenge which would be reserved under Schedule 4 is not to be disregarded. We also take into account the number of witness statements in which the performance of HHL over the years is questioned. This must relate to quality. Somewhat surprisingly Miss Phillips in responding to letters of observation, for example Miss Fox's referred to above, forwarded concerns by leaseholders as to HHL's performance to HHL for them to reply. There is a clear and close relationship between the Council and HHL, similar to that which may be found between private landlords and subsidiary companies who they may wish to use for carrying out qualifying works. This is specifically exempted from being a QLTA and it seems to us that on the evidence produced by the Council those close ties between the Council and HHL are wholly apparent and could justifiably give concern to leaseholders that they were not being dealt with on a proper arms-length basis. It is not unreasonable for the Respondents to consider that the arrangements had a realistic prospect of being prejudicial to them. It is also noted that although it was suggested that the number of complaints were not that great, in our experience 37 leaseholders being prepared to make statements and presumably to raise sufficient funds to discharge their legal costs of £4,800, shows that this is an organised objection to the Council's views and in our finding justifiably so.

42. We confirm that an order under Section 20C will be made. In the light of our findings it is just and equitable and in any event the Council have indicated they would not seek to pass the costs of these proceedings to the leaseholders. There does not seem to us to be any ability for a cost order to be made to the Respondents in the circumstances where they have won and no dispensation has been granted.

Andrew Dutton

Chairman: _____

A A Dutton

Date: 15th July 2013

S20ZA Consultation requirements: supplementary

(1) Where an application is made to a leasehold valuation 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