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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	**BIR/00FY/LSC/2014/0022** **BIR/00FY/LDC/2015/0005**
Property	:	**Longden Mill, Longden Street, Nottingham NG3 1JL**
Applicant	:	**Adriatic Land 1 Ltd**
Representative	:	**Mr Stewart Armstrong of counsel, instructed by J B Leitch, Solicitors**
Respondents	:	**John Philip Midgeley and Matthew Hunt as LPA receivers on behalf of Longden Mill Ltd appointed by Capital Homes Limited (1)** **Mr Bill Kundi (2)** **Sarunas Properties Ltd (3)** **Paul Long and Alan Murdoch as LPA receivers on behalf of Longden Mill Ltd appointed by Skipton Building Society (4)** **Northumberland and Durham Property Trust Ltd (5)**
Representatives	:	**Mr Paul de la Piquerie of counsel, instructed by Rosling King, Solicitors (for Respondent 1)** **Mr Carl Brewin of counsel, instructed by Bond Dickinson, solicitors (for Respondent 4)**
Type of Application	:	**Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985 ("the Act")**

Tribunal Members	:	**Judge C Goodall LLB** **Mr C Gell FRICS** **Mr D Douglas**
Date and venue of Hearing	:	**11, 12 November 2015 at Nottingham Magistrates Court and 14, 15 December 2015 at the First-tier Tribunal Hearing Centre, Centre City Tower, Birmingham**
Date of Decision	:	**9th February 2016**

DECISION

Background

1. This is a case about a roof. The Applicant wishes to renew the roof of Longden Mill at a cost of £200,443.93 (rounded to £200,500.00 in their application form), which would be shared between the owners of the leases of the 25 residential flats at Longden Mill. Some of the flat owners agree with this work. However, some do not. The objectors recognise repair work is required to the roof, but think patch repair is the reasonable course, at a fraction of the cost of complete recovering.

2. There are two applications with two case reference numbers. The first (ending 0022) ("the Main Application") was dated 17 November 2014, and is for a determination of the liability to pay and reasonableness of the cost of the proposed new roof). The second (ending 0005) ("the Dispensation Application") is dated 22 May 2015 and is for dispensation from consultation requirements in relation to the roof costs and the costs of some temporary fencing that had been erected. The Tribunal directed that both applications be heard together.

3. The case was heard over four hearing days on 11 and 12 November and 14 and 15 December 2015. The Applicant and the First and Fourth Respondents were represented. The Second and Third Respondents did not appear and have made no representations in this case. The Fifth Respondent supports the Applicant and it submitted a written statement of case. It did not appear at the hearing. On 11 November 2015, prior to the hearing, the Tribunal inspected Longden Mill from ground level.

The parties' interests in Longden Mill

4. Adriatic Land 1 Ltd is the owner of the freehold of Longden Mill (title number NT337512). It purchased the freehold interest in 2013. The freehold title is subject to twenty-five residential leases all commencing on 1 January 2006 for a term of 150 years. The actual grants however were in two phases, with 12 leases granted in 2006/07 ("Old Leases") and the remaining 13 leases granted in 2012 ("New Leases"). The terms of the leases for each phase are slightly different, but the Tribunal was told that all the Old Leases have the same terms in all material respects, as do all the New Leases.

5. For a number of flats, the current lessee is no longer in control of the flat as a mortgagee has appointed receivers of the flat under the Law of Property Act 1925 ("LPA").

6. The First Respondents are the LPA receivers of four flats, being numbers 1, 3, 18 and 21. All these flats are let on Old Leases.

7. The Second Respondent in the owner of flats 2 and 24. He has taken no part in these proceedings. Both of these flats are let on Old Leases.

8. As at the date of the hearing, the Third Respondent had no interest in any flats, having sold them on.

9. The Fourth Respondents are the LPA receivers of six flats, being numbers 10, 15, 17, 19, 20, and 22. These are also all let on Old Leases.

10. The Fifth Respondent purchased its flats in June 2015. It is the long leasehold owner of thirteen flats, being 4, 5, 6, 7, 8, 9, 11, 12, 14, 16, 23, 25 and 26. These flats are all let on New Leases.

The issues

11. The main issue in this case is the issue that is described in paragraph 1, namely whether it is reasonable for the Applicant to renew the roof now, or whether patch repairs should be carried out. Within the proceedings, a number of other issues were raised or emerged:

    a. If the Tribunal accepted the reasonableness of renewing the roof, did the First and Fourth Respondents have to pay for the cost of installing further insulation, as it was their contention this would be improvement work, and so not fall within the terms of their leases?

    b. Should the Applicant have sought payment for the roof repairs (whether patching or recovering) from NHBC rather than from the Respondents?

    c. Under the Dispensation Application, should the Tribunal grant dispensation from consultation for two elements of expenditure, being:

        i. The cost of fencing for the period 12 May 2014 to 12 May 2015 in the sum of £15,385.04;

        ii. For the eventual costs of recovering the roof, as even though the Applicant asserts it has complied with the statutory consultation process, the Respondents challenge this?

    d. Whether to grant an application under section 20C of the Act.

The relevant lease terms

12. Except in relation to improvements, there was no dispute that both the Old Leases and the New Leases oblige the freeholder to maintain the roof and the leaseholder to contribute towards the cost of so doing.

13. The Old Leases define Reserved Property as the main structural parts of the buildings forming part of the property including the roofs. In the Seventh Schedule, the freeholder covenants to keep the Reserved Property in a "good and tenantable state of repair decoration and condition ... including the renewal and replacement of all worn or damaged parts". The lessees have covenanted to "contribute and keep

the Lessor indemnified from and against a percentage share of all costs incurred by the Lessor in carrying out its obligations under and giving effect to the provisions of the Seventh Schedule...". There is no obligation in the Old Leases for the freeholder to carry out "improvements" or to "improve" the buildings.

14. The New Leases contain a covenant by the freeholder to "use all reasonable endeavours to provide the Services". The "Services" include "Building Services" which are defined in Schedule 4 as "the services specified in Part 2" of Schedule 4. Paragraph 1 of Part 2 includes "inspecting maintaining ... repairing improving rebuilding overhauling ... amending ... rebuilding replacing or renewing .. the Building". The Building is defined as "Longden Mill and registered under title number NT337512".

Description of the building

15. The exact age of Longden Mill is not certain. It was probably built in the latter part of the nineteenth century, and the Applicants surveyor gives a date of c1866. The property comprises two separate buildings constructed on three sides of an inner courtyard. The former St Lukes Hospital, a two storey building built in brick with a slate roof, is on the south west side and bounds Carlton Road. Longden Mill itself is an "L" shaped three storey building also constructed of brick with a slate roof. On the south east side it bounds St Lukes Road and the north west side bounds Longden Street. At the end of the north west side is an octagonal construction. In this decision, "Longden Mill" refers to both buildings.

16. At the inspection, the Tribunal was invited to view the roof from high level using access equipment provided by the Respondents attending the inspection. The Tribunal had not requested to be afforded this facility and the Applicant objected to the Tribunal inspecting with this equipment. It would not have been possible for the Tribunal members (or even just the surveyor member of the Tribunal) to inspect with the two surveyors at the inspection. The Tribunal decided not to use the high level access equipment.

17. It was clear at the inspection that the condition of the roof was not uniform. Some sections were in a greater state of disrepair than others. No work appeared recently to have been carried out to renew the roof. To explain in this decision what the Tribunal says and finds therefore requires identification of the different roof sections. These are identified as per the table below:

Roof section	Identified as
Southern side of the roof of St Lukes Hospital, running parallel with Carlton Road	Section A
Northern side of the roof of St Lukes Hospital, running parallel with Carlton Road	Section B
Eastern side of the roof of the building section running parallel with St Lukes Street	Section C

Western side of the roof of the building section running parallel with St Lukes Street	Section D
Southern side of the roof of the building section running parallel with Longden Street	Section E
Northern side of the roof of the building section running parallel with Longden Street	Section F
The octagon abutting the southern side of Section E	The Octagon

18. Using binoculars, the Tribunal inspected as much as the roof as was visible from the ground. The detail of the Tribunal's observations is given in the section in this decision on the Roof Condition.

The Law

19. The powers of the Tribunal to consider service charges are contained in sections 18 to 30 of the Landlord & Tenant Act 1985 (" the Act").

20. Under Section 27A(3) of the Act, the Tribunal has jurisdiction to decide whether a service charge would be payable and if it would be, the Tribunal may also decide:-
    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

21. Section 19(1) of the Act provides that:

> "Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –
>
> (a) Only to the extent that they are reasonably incurred, and
>
> (b) Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:
>
> and the amount payable shall be limited accordingly."

22. A service charge is only payable if the terms of the lease permit the lessor to charge for the specific service. The general rule is that service charge clauses in a lease are to be construed restrictively, and only those items clearly included in the Lease can be recovered as a charge (*Gilje v Charlgrove Securities [2002] 1EGLR41*).

23. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100*).

24. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

> "11. [Summarising counsel's argument] The Tribunal's task was to consider whether the ways in which the landlord decided to discharge its repairing and insuring covenants were reasonable decisions. If so, then regardless of whether there may have been cheaper or other reasonable alternatives open to him, the costs thereby incurred will be costs reasonably incurred for the purposes of section 19. ...
>
> 39. ...In determining the issues regarding the insurance premiums and the cost of major works and their related consultancy and management charges, I consider first, Mr Gallagher's submissions as to the interpretation of section 19(2A) of the 1985 Act, and specifically his argument that the section is not concerned with whether costs are "reasonable" but whether they are "reasonably incurred". In my judgement, his interpretation is correct, and is supported by the authorities quoted. The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> 40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence...

25. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

> "103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

26. And further clarification of the meaning of "reasonably incurred" has been provided by the Upper Tribunal in *London Borough of Lewisham v Luis Rey-Ordieres and others([2013] UKUT 014)* which said (at para 43):

> "...there are two criteria that must be satisfied before the relevant costs can be said to have been reasonably incurred:
>
> (i) the works to which the costs relate must have been reasonably necessary; and

(ii) the costs incurred in carrying out the works must have been reasonable in amount.

27. As the issue in this case is whether the roof of Longden Mill should be patch repaired or completely replaced, so that there are choices of method of repair, who is to make the choice? A number of authorities have confirmed that the choice is for the covenanting party (i.e. the Applicant here) to make (see Dowding & Reynolds on Dilapidations: The Modern Law and Practice 2013-14 para 10-07 and note 17).

28. In exercising its choice, a covenanting party is not obliged to adopt the solution that will result in the lowest cost to the tenant. But the decision to adopt any particular method must be reasonable in the circumstances. In *Plough Investments Ltd v Manchester City Council* ([1989] 1 EGLR 244) ("Plough Investments"), Scott J said:

> "If reasonable remedial works are proposed by the landlord in order to remedy a state of disrepair for the purposes of its ... obligations, the tenants are not, in my judgment, entitled to insist that cheaper remedial works be undertaken. [Counsel] accepted that the landlord's decisions had to be reasonable ones. The tenants, after all, have to pay for the ... repairs. But I accept [counsel's] point that the tenants are not entitled to require the landlord to adopt simply a minimum standard of repair. Provided proposed works of repair are such as an owner who had to bear the cost himself might reasonably decide upon and provided the works constitute "repairs" ... the tenant is not, in my judgment, entitled to insist upon more limited works or cheaper works being preferred."

29. In *Fluor Daniel Properties Ltd v Shortlands Investments Ltd* ([2001] 2 EGLR 103), the principle set out in *Plough Investments* was cited with approval, but Blackburne J then qualified the principle by saying that a landlord had to have regard to the tenant's interest and in particular to the length of the tenant's lease in the property.

30. In *The Lord Mayor and Citizens of the City of Westminster v Clive Fleury & Others* ([2010] UKUT 136), which also concerned the issue of repair or recovering of a roof, Her Honour Judge Alice Robinson expressed the question to be considered in this way (para 10):

> "... The question is whether the decision to recover the roofs was a reasonable one in all the circumstances, even if other reasonable decisions could also be taken. ..."

31. In that case, the landlord's surveyor had not seen the roofs until after they had been recovered, but recommended recovering. The tenants' surveyor conceded that a landlord's surveyor might make such a recommendation, but considered that opinion was "at the very far end of the range" of reasonableness. HHJ Robinson said it was open to a Tribunal, in considering what a reasonable decision might be, to take the view that even if the landlord's surveyor held a view at the extreme end

of reasonableness that a roof required recovering, it is possible to determine nevertheless that recovering was not a reasonable option.

32. In summary therefore, a landlord who makes the choice to carry out extensive work on his property even though a more limited scheme may have sufficed will not be prevented from recovering the cost of the work actually done provided that the work is within the lease covenant and the decision to carry it out was a reasonable one and had proper regard to the tenant's interest in the property.

The facts

33. Longden Mill was, as already said, built around the middle of the nineteenth century. In about 2006/7, work was undertaken to convert it into residential flats. Twelve flats were sold on a long leasehold basis in the form of the Old Leases between December 2006 and February 2007. These twelve flats were sold with the benefit of NHBC insurance policies. It is not known what work to the roof was undertaken (if any) during the conversion, save that it is probable that some velux windows were installed.

34. The remaining thirteen flats were not leased on long leases until October 2012. There were no NHBC insurance guarantees given relating to these flats. These thirteen flats were let on the terms of the New Leases.

35. When in May 2013 the Applicant purchased the freehold of Longden Mill, it appointed RMG as its managing agents. The person dealing with Longden Mill at RMG was Diane Humphries (then Diane Taylor) ("Mrs Humphries"). The Tribunal does not know the details of the contract of management that was entered into. In this case, however, the application has been managed by RMG, though the Applicant's representative has been J B Leitch, Solicitors.

36. In December 2013 there was a heavy storm. RMG were informed that there had been a leak though the roof into Flat 25. An insurance claim was made.

37. In connection with repairing the damage caused by the storm, RMG arranged for a survey of the roof to be undertaken by a roofing firm called Rescom Ltd ("Rescom"). This company had carried out work for RMG in the past and were on their list of approved roofing contractors. The instruction was given in the form of a purchase order dated 10 January 2014 requesting Rescom to "Please undertake a full roof survey ... as soon as possible as per your quotation dated 10 January in the sum of £1,854 plus VAT".

38. At some point between 10 Jan and 30 January, Rescom inspected the roof of Longden Mill using high level access equipment. They reported the results of their inspection in an email dated 30 January 2014 to Mrs Humphries. The report of condition itself was short and said:

"On our initial survey from ground level the roof appeared to be in relatively good condition, however upon closer inspection we found some major concerns: photographs will follow once our network is repaired. In the meantime please refer to the following:

1. All ridges seem unstable, with mortar clearly falling out
2. The slates on the eaves courses, both top and bottom, are falling out in several places
3. The main roofs show evidence of having been repaired previously, however slates have fallen out in a number of places
4. The Velux windows appear to be in good condition, however some of the windows have had repairs carried out around them with band flashing, which is not practical
5. The bitumen felt perished in the areas we were able to see
6. The roadside walkway is of serious concern. Slates are slipping and could easily fall, which is a potential threat to the public and any vehicles parked on the road in the vicinity
7. The octagon turret in the rear courtyard has been patched and flash banding applied around the top area: this appears to be unstable

As a result of our survey and our findings, it is our opinion that this building requires a complete re-roof."

39. The email then went on to give prices for re-roofing ranging from £100,800 to £118,800 plus VAT depending on the choice of roof tile. This overall cost included scaffolding at £31,200 plus VAT and upgrading of roof insulation at £12,000 plus VAT.

40. On 18 February 2014, loss adjusters in relation to the insurance claim inspected the roof using high level access equipment. It seems likely that they reported that there were loose tiles on the roof to RMG.

41. Later on 18 February 2014, someone at RMG rang Nottingham City Council to inform them of the danger of roof tiles falling from the roof at Longden Mill to the pavement below. RMG were advised by the Council to apply for an emergency licence to cordon off the building and then arrange for the building to be cordoned off. In the discussion with the Council, it was made clear that even if the Council cordoned off the building, the costs would fall to the building owners. The Council agreed to ask the Highways department to contact RMG about carrying out the work to cordon the building. A note to the email record then confirms that the Council confirmed that they would arrange to cordon off the building for a small charge.

42. On 19 February 2014, Mr John Teasdale from RMG emailed a request to Nottingham City Council for them to cordon off the building, accepting there would be a cost.

43. Also on 19 February 2014, RMG wrote to all flat owners to advise them of tiles falling off the roof, that an insurance claim had been made, and that the local authority had been requested to cordon off the building.

44. On 14 March 2014, RMG was informed by an email from the loss adjusters that insurers were unable to make any payment in respect of the insurance claim "as the damage has not been caused by 'Storm', but is the result of long term deterioration."

45. On 26 March 2014, Mr Teesdale contacted the Council again to find out what action was being taken in response to his email of 19 February 2014.

46. On 28 March 2014, Rescom supplied RMG with a hard copy letter, which is their survey and report following their contract to provide this referred to above. The contents mirror and do not add to their email of 30 January 2014, as above.

47. At around the end of March 2014, RMG became aware that the Council had not actioned the cordoning off of the Building and were not going to do so, arguing that it was the building owners responsibility.

48. At some point between about March and May 2014, a decision was taken by the Applicant to replace the roof, as on 9 May 2014 the Applicant (via RMG) served notice of its intention to replace the roof on the lessees of the flats in purported compliance with Stage 1 of the consultation requirements contained or referred to in section 20 of the Act. The notice invited representations and suggestions of contractors to approach by 12 June 2014. No representations or suggestions were received.

49. On 9 May 2014, RMG instructed Rescom to remove all loose slates lodged in the gutters around the perimeter of the building at Longden Mill at a cost of £874.44 plus VAT.

50. On or about 12 May 2014, RMG arranged for Rescom to cordon off Longden Mill to protect pedestrians from the risk of slipping slates falling onto the pavement.

51. At around this time, an application before the First-tier Tribunal by the Applicant for dispensation from consultation requirements in respect of works to the roof was progressing. This application was eventually withdrawn, but in connection with those proceedings, RMG informed a Bev Robinson at Scanlans that they had commissioned a detailed roof survey prior to obtaining competitive quotes for the works needed to the roof.

52. On 4 July 2014, a consulting firm called Trevaskis Consulting Ltd ("Trevaskis") was instructed by Mrs Humphries to inspect the roof of Longden Mill with a view to preparing a Specification of Works for any works found to be necessary. The inspection took place on 22 July 2014 and was conducted by Mr Ian Thompson BSc FRICS, who is a director of Trevaskis, and Mr Colin Baker MCMI ACIOB, who is employed by Trevaskis. As a result of that inspection, a Specification of Works was prepared, dated August 2014, for replacement of slate roof coverings at Longden Mill.

53. On 23 July 2014, RMG further instructed Rescom to check the roof above St Luke's School for loose/fallen tiles and arrange for them to be removed as 2 tiles were reportedly visibly hanging down. Rescom were then instructed to send those tiles to Mr Baker of Trevaskis.

54. The proposed roof works were put out to tender by Tevaskis on 15 September 2014.

55. On 10 October 2014, Mrs Humphries wrote to all lessees of Longden Mill flats. She provided an annual budget for the current service charge year (1 April 2014 to 31 March 2015) which included an allowance of £150,000 towards roof "repairs/replacement" and appears to have invoiced the lessees for their service charge contributions, including requiring their contribution towards the roof allowance.

56. The Fourth Respondent objected to the service charge demands and requested a building survey or structural engineers report and three quotes for the cost. Mrs Humphries decided, as a result, to request Trevaskis to provide something in writing to support the decision to replace the roof.

57. Trevaskis wrote to Mrs Humphries on 3 November 2014 to provide a letter or explanation in support. In the letter, (which was signed by Mr Thompson), the reason for replacement of the roof was explained as follows:

> "You have asked me to re-confirm the reasons why we are recommending that the roofs be recovered with new slate coverings. Those reasons are set out below:
>
> The roof coverings have come to end of their life and we recommend renewal. In locations, slates have slipped and are missing. They have slipped because the nail fixings have rusted. The process of rusting expands the metal, which in turn increases the size of holes in the slates through which the fixings are made. This is an ongoing process and further slippage of slates is inevitable. We also have a sample of slates to hand: they have delaminated due to old age.
>
> Furthermore, ridge tile bedding and pointing is loose and missing in locations.
>
> Whether overhauling works or complete roof recovery is carried out, scaffold access to all roof slopes will be necessary. Overhauling works would entail replacement of missing and slipped slates and re-bedding and pointing ridge tiles and attention to other detailing. Experience informs us that with slated slopes such as these replacing isolated slipped or missing slates causes dislodging of adjacent slates and so on. However, further overhauling works would be inevitable in the short term as other slates loosen and slip. In our view it is not cost effective to carry out repeated works of maintenance, involving as it does repeated erection of access equipment.

The present condition of the roof coverings is a product of their age: it is not the result of any underlying defect of construction, but wear and tear. They have reached the end of their serviceable life and we recommend replacement as the most cost effective long-term solution."

58. On the same day as this letter, Trevaskis reported to RMG on the outcome of the tender exercise for roof replacement. That report stated that five firms had been invited to tender, and three had replied. The report summarised the tenders received, the lowest being a tender from Rescom at a price of £165,244.60 plus VAT. Rescom had also identified an equivalent tile to that specified which resulted in a saving of £12,000. The costs include scaffolding and other access costs. They exclude professional fees. The report recommends acceptance of Rescom's tender.

59. On 14 November 2014, RMG were instructed to attend at Longden Mill to remove a loose tile from the car park side of the turret roof at a cost of £1,030.55 plus VAT and to check for slipped or fallen slates whilst on the roof.

60. On 17 November 2014, the Applicant made the Main Application to this Tribunal for a determination of the liability to pay and reasonableness of a proposed cost of £200,500.00 for recovering of the roof at Longden Mill.

61. Mrs Humphries had fact decided that the Trevaskis letter of 3 November 2014 may be insufficient to allay the 4th Respondents concerns, and she had therefore commissioned a full survey report on the roof from Trevaskis. This was provided and dated 27 November 2014. The author was Mr Baker, but in evidence Mr Thompson confirmed that he was also involved in its preparation and he had approved it before it had been issued. The report summarises the details of the inspection carried out by Mr Thompson and Mr Baker on 22 July 2014.

62. On 16 January 2015 the Applicant wrote to all lessees notifying them of the outcome of the tender exercise to seek prices for roof recovering, serving a Statement of Estimates in relation to Proposed Works, providing details of how the estimates can be inspected and inviting written observations by 20 February 2015. In the letter, the Applicant reminded the lessees that it had applied to the Tribunal for a determination of the reasonableness of the cost of the works and their liability to pay.

63. On 12 May 2015, the fencing around Longden Mill was removed at the insistence of the Council.

The condition of the roof

64. The Tribunal has found the First and Fourth Respondents' surveyors report containing 96 detailed photographs taken from high level, to be a very helpful record of the roof condition. Coupled with its own observations and the Applicant's surveyors written report and all

surveyors oral evidence, the Tribunal finds that the existing condition of the roof is as set out below:

a. Section A – There are two gables fronting this roof section. Though not strictly part of the roof, the masonry on the left hand gable was fractured and the adjacent verge slates had slipped. On the roof itself, approximately six slates have slipped or become dislodged from their original seating.

b. Section B – None of the surveyors identified any disrepair to this roof section, nor did the Tribunal notice any. Apart from the extreme eastern end, this roof can be observed reasonably clearly from inside the courtyard at Longden Mill. There is though some discarded debris and vegetation growth within the eaves gutter.

c. Section C – Cement mortar pointing to the majority of the ridge and hip tiles is loose and perished with substantial areas missing. Approximately twelve individual slates were noted to be either slipped or dislodged from their original seating position.

d. Section D – None of the surveyors identified any specific disrepair though the lead lined flat roof section and the verge detail was described as "weathered".

e. Section E –Cement mortar pointing to the ridge is generally weathered with notable sections missing, damaged and loose. Some twelve slates immediately adjacent to the ridge had slipped, and two or three in the row below had also. At the western end, it was apparent from photographs that at some time, probably in 2014, a slate had slipped and become lodged in the gutter. By the time of the inspection, it had been removed. Two under eaves slates to the eaves have slipped slightly and dislodged.

f. Section F - A number of slates (estimated 20 in number) have slipped or become cracked or become dislodged adjacent to the ridge. Ridge tile pointing is generally worn and weathered with large sections missing. A small section of slates at the eaves gutter to the left hand side were missing. Four velux type roof lights have been installed. Above one of them the roof has been covered with roof tape indicating the possibility of disrepair underneath. There are slipped slates to the right hand end at ridge level and above and to the right of the most westerly roof light.

g. The Octagon – The head course of slates on the turret section of the roof has slipped. Localised slipping of slates has occurred on each of the faceted slopes. There is weathered and worn cement mortar pointing. There is general evidence of slate slippage. Vegetation is growing in the top of the turret.

The surveyors' evidence

65. The Tribunal heard evidence from three surveyors. Mr Thompson and Mr Baker, both from Trevaskis, gave evidence for the Applicant and Mr Mancini, from Scanlans Consulting Surveyors LLP, for the First and Fourth Respondents. Both of the consulting firms had also produced a written report. Mr Thompson had also provided a witness statement.

Mr Thompson's evidence

66. Mr Thompson confirmed that he held a BSc in Building Surveying and the qualification of FRICS. He qualified in 1990 and is a director of Trevaskis Consulting Ltd.

67. His first involvement with Longden Mill sprung from a request received on 4 July 2014 from RMG to prepare a specification of works for Longden Mill. The request itself was not before the Tribunal, but Mr Thompson described it as a request to specify "any works that were found to be necessary". Mr Thompson said he was given a verbal briefing by Mrs Humphries about the state of the roof. She told him that the local authority had inspected the property and recommended the installation of protective fencing around the base of Longden Mill to protect the public. Mr Thompson said he was not told that the Applicant had already served a notice of intention to carry out works to recover the roof to the Respondents.

68. Pressed in cross-examination on the exact nature of his instruction in July 2014, Mr Thompson accepted that his instructions were to prepare a specification for re-roofing and carry out a tender exercise to identify a suitable contractor. He was not instructed to prepare a report on the necessity for re-roofing.

69. He visited Longden Mill on 22 July 2014 with Mr Baker. He and Mr Baker spent some 2-3 hours on site and inspected the roof using binoculars. He says that he and Mr Baker concluded at that inspection that the roof covering had reached the end of its useful life. He expressed this view in a report from his firm (the report authored by his colleague Mr Baker) dated 27 November 2014. He said Trevaskis did not prepare the report until then as he had not been asked to provide it before then. However, Mrs Humphries had requested it in November 2014 to assist her with her negotiations with the Respondents, as she had received objections to the proposed roof recovering. He confirmed that he had signed off the contents of the report, though it had gone under Mr Baker's name.

70. The report itself contains eleven photographs, eight of which were clearly taken from high level. These were supplied to Trevaskis by Rescom at some time between 22 July 2014 and 27 November 2014. The photographs show the state of the roof at the time they were taken, probably in January 2014. The report then sets out a conclusion - that the roof needs to be recovered – in the same words as those used in the 3

November 2014 letter from Trevaskis already quoted (see paragraph 57 above).

71. Mr Thompson produced two slates which he said had come off the roof of Longden Mill and had been kept by Rescom and provided to him in connection with his report in November 2014. He said that it was apparent on inspecting the slates that the nail holes had expanded and there was evidence of some delamination of the slates. In his view, the slates were not in a good enough condition to be reused.

72. Mr Thompson's greatest concern about the roof, though, was not so much the surface delamination of the slates, but the condition of the fixings. He said the slates were likely to have been fixed with ferrous nails. These have rusted over the years, and the roof is now suffering from what he described as "nail fatigue", which is an irreversible condition. He relied on one particular photograph (page 482) which had been taken by Rescom which showed a detail where there is a missing slate and some decayed roof felting. One of the nails has clearly disappeared, which in Mr Thompson's view has caused the slate to slip. A second photograph (page 852) also shows evidence of a failed nail.

73. Mr Thompson acknowledged that patch repair was a reasonable option in some cases. In his view, the condition of the roof of Londgen Mill was such that patch repair would be needed again and again. Nobody could say with certainly what the time between each patch repair might be, but Mr Thompson was certain that patch repairs would continue to be needed.

74. The other difficulty with patch repairs, Mr Thompson said, is the risk of breakages of adjoining slates by the operative. In his view, three times the number of slates as are needing repair are needed for a good patch repair job.

75. The cost of roof access was a major consideration when weighing up the choice between patch repair and recovering now. Mr Thompson considered that any access method other than full scaffolding was "a complete non-starter". Longden Mill was a high building. An operative has to use crawler ladders whilst carrying mortar, tools, and slates. This is inherently dangerous. A mobile tower is not a practical option, he said. There are real practical difficulties in using a mobile tower for Section D of the roof anyway as there is a stairwell at the base of that roof that would be extremely difficult, if not impossible, to bridge.

76. Mr Thompson was challenged on when and how he had formed the view that the roof needed to be recovered, bearing in mind that his written instruction (which was not before the Tribunal) had not asked him to give his opinion on that question, but had only asked him to prepare a specification for recovering of the roof, and the first time he had put anything in writing stating that he held the view that the roof required recovering was in November 2014. Mr Thompson's response was that as a professional surveyor, he would never allow a client to proceed with

works he felt were unnecessary. Had he taken the view that recovering was the wrong solution, he would have said so.

77. In connection with the adequacy of his inspection on 22 June 2014 from ground level, Mr Thompson said he formed the professional opinion that use of binoculars provided him with adequate visibility of the roof detail to form his professional opinion. He said an inspection of a roof from ground level is an accepted and reasonable mode of inspection, used by surveyors all the time.

78. On the question of why he had not seriously investigated the alternative solution of patch repair, Mr Thompson accepted he had not investigated alternative solutions as he considered that patchwork repair was the wrong way forward. His view was that the roof needed to be replaced now, as the fixings were deteriorating, and a patch repair solution only addressed parts of the roof that had already failed, and the whole roof was now in the state of potentially failing in the near future. Bearing in mind scaffold costs of some £40,000, patch repair is the wrong solution.

79. It was put to Mr Thompson that even if some slate holes had expanded, it was perfectly feasible to reuse them with two nails in the hole rather than one. Mr Thompson rejected this option robustly, as he said it is bad practice.

80. Mr Thompson was asked whether he had investigated the previous history of repair to the roof at Longden Mill. He said he had not. He agreed that the photographic evidence (page 848) showed the existence of some tingles which had been used previously to fix slates in position that might previously have slipped. He also agreed that tingles could be used to repair slipped slates, though he again pointed out the disproportionate cost of scaffolding if that option was pursued. He also said that it would be very difficult to quote for an overhaul of the roof as it would be impossible to estimate accurately how many slates would need to be replaced.

81. It was put to Mr Thompson that even if recovering of the roof in principle was accepted as being reasonable, there were aspects that were over specified. The first was the decision not to reuse any existing slates or sell them to defray some cost. Mr Thompson said the cost of stripping with sufficient care to retain the slates meant there was unlikely to be any real value in the existing tiles. He had considered the possibility of reuse, but again, the cost of carefully setting them aside, and finding matching slates was prohibitive. But the primary objection was the likely quality of the existing slates, which were likely to have an enlarged nail hole and which were almost certainly in excess of 50 years old.

82. The second consideration was whether to partially re-roof, particularly as some parts of the roof are in better condition than others. Mr Thompson said that had also been considered, but rejected because the best value from expenditure on the cost of scaffolding was to do all work conceivably required, including preventative work, and his judgment about the condition of all the roofs was that they were at the point of

requiring re-roofing now, even if disrepair had not yet started, because of the inherent problems with use of ferrous nails.

83. Mr Thompson explained to the Tribunal his view of whether the Applicant should have pursued NHBC to cover the cost of the remedial work to the roof. In his view, there was no liability upon NHBC, because the policy excluded damage caused by wear and tear. He believed that the existing condition of the roof was just that – wear and tear over possibly a period of around 50 years.

84. Summing up his conclusion that the roof required recovering, Mr Thompson accepted that a judgment is required balancing the two options. He described the decision making process as an art not a science, but his professional judgment was that renewing was the right decision for the reasons he had given. He had adopted a preventative approach rather than a reactive one as in his view the roof at Longden Mill is now inherently defective, it being just a matter of time before the nail fatigue results in more slippage of slates necessitating regular and ongoing costly repairs.

Mr Baker's evidence

85. Mr Baker confirmed that he is employed by Trevaskis as a surveyor. He holds the qualifications of Member of the Chartered Management Institute and Associate of the Chartered Institute of Building. He reports to Mr Thompson at Trevaskis. He said he was the author of the report prepared by Trevaskis dated 27 November 2014, but he said that it had been approved by Mr Thompson to whom he reported, and to whom, as an employee, he would defer.

86. Mr Baker confirmed that he had visited Longden Mill on 22 July 2014 with Mr Thompson and they had carried out a joint inspection. His professional view of the need to recover the roof at Longden Mill aligned with Mr Thompson's view.

87. Mr Baker was asked about the need for insulation to the roof and its inclusion in the specification prepared by Trevaskis. He said that he believed building regulations would require insulation and a provisional allowance for it had been included in the tender document produced for contractors to price.

88. Asked about the purpose of the report of 27 Nov 2014, Mr Baker confirmed that it had been prepared for RMG to be used to explain the need to recover the roof to the Respondents. It had not been prepared as an expert's report to the Tribunal. With hindsight, he might have done the report differently by giving more detail and including alternatives to complete recovering, including possibly repair options.

Mr Mancini's evidence

89. Mr Mancini gave evidence for the First and Fourth Respondents. He confirmed that he worked for Scanlans Consultant Surveyors LLP as a

surveyor and he holds the qualifications of MSc and MRICS. He had prepared a written report for these proceedings dated 26 March 2015, and he confirmed he continued to hold the opinions expressed in that report.

90. The broad conclusion of his report was that the roof at Longden Mill is not in such a state of disrepair that recovering is necessary.

91. Mr Mancini's report is critical of the Trevaskis report dated 27 November 2014. He comments on the delay in the production of the report, as the inspection was on 22 July 2014. He says the photographs, which appear to have been taken by others, do not provide a full view of the condition of the roof. He says that in his view the evidence in the Trevaskis report is inadequate as a basis upon which to form an opinion that the whole roof requires recovering at substantial cost.

92. Mr Mancini then set out details of his own inspection of the roof, which took place on 26 November 2014. He was able to inspect at high level using an articulated truck mounted hydraulic platform. There is little dispute about the condition of the roof, and the observations made by Mr Mancini are covered in the above section of this decision on the roof condition.

93. There is an acceptance in Mr Mancini's report that the Octagon roof requires more substantial work as there is damage to the cement mortar joints and a requirement to renew the mineral felt flashing detail around the perimeter edge of the turret.

94. Mr Mancini's conclusion about the appropriate method of dealing with the disrepair that does exist, is that in respect of all parts of the roof except for Section B, the slates themselves are satisfactory, in that there is no evidence of any substantial cracked, slipped or damaged slates which would suggest that they have reached the end of their physical life expectancy. Section B, he says, needs no repair work at all, except for removal of debris in the gutter. He says that the individual areas of disrepair that do exist are capable of localised repair. Necessary repair works can be carried out on an isolated and individual basis and access can be by high level mobile tower scaffold. A substantial overhaul of this nature would, in his opinion, remove the need for a further substantial overhaul for another five years. Recovering now is not necessary and is not within a range of reasonable responses to the existing roof condition.

95. A quotation was obtained by Mr Mancini for a roof overhaul, to include replacement of slipped and missing slates, raking out and repointing of the mortar joints to all lead flashings, removal and rebedding of all loose ridge and hip tiles, replacement of unsound lead valleys, removal of all debris and vegetation, and the securing or replacement of all slipped or missing tiles to the Octagon, access to be by mobile tower, all for the sum of £18,785 plus VAT.

96. On costings, Mr Mancini comments on the tender costs received for recovering of the roof and says that in his opinion they are too high. He

cites the BICS tender indices as an index that gives a mean cost of £69 per sq m for roof recovering against £101.83 per sq m for the Rescom quote.

97. Mr Mancini also states in his report that he understands there are NHBC guarantees in existence, and this gives rise to a duty upon the managing agents to pursue a course of enquiries with NHBC to establish whether any necessary roof works would be funded by them, and that the Applicant has failed to comply with this duty.

98. At the hearing, Mr Mancini expanded on the liability of NHBC to cover the roof costs. He said that if NHBC cover is granted, it is on the basis that the roof will have a life span of 60 years. As the roof was exhibiting signs of a need for an overhaul well within that period, he believed there was a strong case for a claim against NHBC.

99. On the use and cost of scaffold, Mr Mancini's view was that it was not reasonable or necessary to fully scaffold the whole of Longden Mill for a roof overhaul. He would propose a tubular aluminium mobile scaffold which would have foot supports and be anchored to the building. The only difficult area to access was the roof Section D because of the internal lightwell in the courtyard area, but in his view these difficulties would be overcome if the mobile tower was designed and constructed appropriately. He disagreed with Mr Thompson's view that it would never be appropriate to use a mobile scaffold and cited guidance from the Health and Safety Executive in support. The Tribunal was referred to the Working at Height Regulations 2005 which confirm an employer's obligation to ensure that work at height is carried out in a manner which so far as practicable is reasonably safe, there being a duty on an employer to take suitable and sufficient measures to prevent any person falling a distance liable to cause personal injury.

100. Mr Mancini also disagreed with Mr Thompson about the appropriate method of overhauling a roof where some slates have enlarged nail holes. His opinion was that this did not make the slate unusable. The solution was to insert a second nail into the nail hole to fix the slate. He did not regard this as bad practice, but as an appropriate repair solution.

101. There were, Mr Mancini said, around 70 to 80 slates on the whole roof of Longden Mill that were visibly in disrepair. He accepted that it would be necessary to accept that some more slates would be damaged by the repair process so that replacement of more than that number would be needed for an overhaul, but the overall number would still not be large when measured against the total area of the roofs, on which he estimated there were some 10,000 slates.

102. It was put to Mr Mancini that deterioration to the roof would continue because of the inherent problem with the use of ferrous nails. Mr Mancini did not disagree with the proposal that there would be continuing deterioration, but he said that the extent was not possible to predict. He pointed out that during the conversion work in 2007, it was possible that areas of the roof had been overhauled with the use of non-

ferrous nails. He also said that apart from the one report of water penetration in December 2013, there had been no other reports of failure of the roof. He also said that at the time of hearing in Nov/Dec 2015, there had been very little evidence of any deterioration since the Rescom inspection in January 2014 and the Trevaskis inspection in July 2014. The recent evidence did not support the proposition that the roof was deteriorating so quickly that it had to be replaced now. The lack of any serious deterioration in nearly two years supported the economics of carrying out an overhaul now at a fraction of the cost of a complete roof renewal.

103. On insulation, Mr Mancini said that the Applicant's case for requiring insulation because it would be a requirement of building regulations was misconceived. He said that the combination of Regulation 23 of the Building Regulations 2010 and paragraph 2.1 of the Approved Document L1B produced under the Building and Approved Inspectors (Amendment) Regulations 2010 meant that insulation would only be required if it was "technically, functionally and economically feasible". What was required was a negotiation with the local building inspector to establish whether (s)he would require insulation. If not, installation of insulation would be an improvement and would not be payable by the Respondents holding Old Leases.

104. In his report, Mr Mancini had analysed the Applicant's compliance with the consultation requirements arising from section 20 of the Act and had formed the view that they had not been complied with in respect of the proposed works to recover the roof. At the hearing though, he accepted that the Notice of Intention dated 9 May 2014 was a valid notice of intention as required by paragraph 8 of Part 2 of Schedule 4 to the Service Charges (Consultation etc) Regulations 2003 ("the Consultation Regulations"). He also accepted that the Statement of Estimates dated 16 January 2016 was a valid paragraph (b) statement as required under paragraph 11 of Part 2 of Schedule 4 of the Consultation Regulations. Mr Mancini therefore accepted that the Applicant had complied with the Consultation Regulations in respect of its proposal to recover the roof.

Mrs Humphries' evidence

105. As well as the three surveyors, the Tribunal also heard evidence from Mrs Humphries, who was the manager at RMG handling the management of Longden Mill from about May 2013 until January 2015 when her portfolio of properties changed.

106. Mrs Humphries' two witness statements dated 11 November and 10 December 2015 broadly confirmed the facts as set out above.

107. On the initial question of the decision to replace the roof, Mrs Humphries confirmed this was taken on the basis of the Rescom survey in January 2014 (written report provided in March 2014). As a result of this report, her client believed it was necessary to replace the roof and that carrying out repairs in the meantime would not be cost effective.

108. Mrs Humphries was asked way she had asked Mr Thompson to prepare his reports dated November 2014. She said that the Respondents were raising concerns about the cost of the roof works and she wanted a report to enable her to placate the Respondents. She accepted that she had not commissioned a detailed report and confirmed that the purpose of the 27 November 2014 report was not to present it as an expert's report to the Tribunal but to assist her in her negotiations with the Respondents.

109. In her written statement on this point, Mrs Humphries tellingly states that her decision to seek a report from Trevaskis to justify replacement of the roof was taken in October 2014 as an alternative to relying on the Rescom survey. There is no suggestion in her statement that she placed any reliance on the fact that Mr Thompson had inspected in July 2014 and not challenged the decision to re-roof.

Submissions

First and Fourth Respondents

110. Mr de la Piquerie said that the following were reasons why the Applicant's decision to recover the roof at this stage was not a reasonable decision;

    a. It was not based on any written professional opinion in support prior to the provision of the 27 November 2014 Trevaskis report

    b. That report was not based on an adequate survey as Mr Thompson and Mr Baker had failed to carry out a proper high level inspection of the whole roof

    c. Their street level inspection of the roof with binoculars only allowed about five eighths of the roof to be viewed at all

    d. There had been no attempt to inspect the roof from the inside

    e. The report included photographs which were taken by others at times unknown to Mr Thompson and Mr Baker

    f. There has been no attempt to reconstruct any history of past roof repairs, including what work was carried out during the 2006/7 conversion, and assess whether they have been successful

    g. There has been no analysis of alternatives to complete recovering or any attempt to look at the cost benefit of repair/overhaul versus recovering

111. Both Mr de la Piquerie and Mr Brewin stressed that Mr Mancini's view was that no reasonable surveyor could have decided it was reasonable to recover the roof on the basis of what Mr Thompson and Mr Baker had seen.

112. Mr Brewin pointed out the relative absence of deterioration in the two years since the report of the water leak that had triggered this case.

113. The Respondents also challenged the reliability of the Trevaskis report as an expert's report, citing the acceptance by Mr Thompson and Mr Baker that the report was not written to assist the Tribunal but to seek to persuade the Respondents to the Applicants view.

Applicant

114. Mr Armstrong reminded the Tribunal that the question for it to determine was whether the decision to recover the roof was a reasonable decision. The core of his case was that it was, because it was based on the evidence of a competent and careful surveyor, who, on inspection, thought the roof had reached the end of its useful life. He rejected the criticisms of the Trevaskis report and the evidence of the Applicant's witnesses.

115. On the question of a cost benefit analysis, he said that the evidence was that Mr Thompson had considered alternatives, only to reject them because he held the view that the existence of nail fatigue meant there was only one option for this roof.

116. Responding to the challenges concerning the methodology of Mr Thompson's and Mr Baker's inspection, Mr Armstrong said the surveyors were entitled to form a proper professional opinion from a street level inspection that the roof was old and in need of recovering, because that was apparent to them from street level. This case was about an old roof needing to be replaced and that could be concluded from their inspection.

117. Mr Armstrong suggested there was a flaw in the argument that the roof should be patched rather than repaired. Patching would probably resolve problems with the area patched for a period of time, but the problem with this roof is that it is impossible to know when the next slippage in an area not patch repaired will next occur, and Mr Thompson was entitled to conclude that in his experience future problems are inevitable with an old roof such as the one in this case. He said that Mr Mancini had not carried out a cost benefit analysis; he had merely provided a quote for patch repairs. Proper cost benefit analysis required consideration of the need for more repairs in the near future on unrepaired areas of the roof, and that was pure guess work. It would be better to replace the roof now.

118. Mr Armstrong also said the Tribunal should take into account the cost of scaffolding when considering whether the Applicants decision was reasonable. It should also take no account of the criticism that there was no investigation of the history of roof repairs, as that had no relevance to the decision now, and in any event, if that was important, Mr Mancini could also have carried out investigations but did not.

119. Finally, Mr Armstrong expressed a concern about Mr Mancini's independence, as his employer is part of the same group as two of the receivers. The motivation for the First and Fourth Respondents to challenge the Applicant in this case is that they are LPA receivers anxious to avoid long term expenditure.

Fifth Respondent

120. The written submission of the Fifth Respondent is dated 24 August 2015 and it was prepared by their solicitors, Bond Dickinson. In summary, their position is that they support the application in respect of the undertaking of major repairs to the roof at Longden Mill. They are satisfied that the roof requires a major overhaul on account of "nail rot" and other problems and wish for the work to be undertaken as soon as possible. They note that the objecting leaseholder are LPA receivers and could have short term commercial reasons for wishing to avoid or delay the incurring of costs at Longden Mill.

121. The submission points out that the Fifth Respondent owns thirteen (i.e. a majority) of the flats.

Discussion and determination

The roof

122. The Tribunal's task is to determine whether the Applicant's decision to recover the roof is a reasonable decision. "Reasonable" is a word with a very broad meaning, but to the Tribunal it has connotations of making a sound and rational judgment. Having reflected very carefully on the extensive evidence and detailed submissions in this case, the Tribunal's conclusion is that the Applicant has not persuaded the Tribunal that its decision to replace the roof at Longden Mill was a reasonable decision.

123. The reasons for reaching this conclusion are these:

    a. We find the decision to replace the roof was taken at some point between January 2014 and 9 May 2014, when the Applicant served its Notice of Intention under the Consultation Regulations. That notice speaks for itself as a communication of the decision taken to re-roof. At that point, the only evidence the Applicant had on which to base that decision was the Rescom report contained in the email dated 30 January 2014, which was confirmed in the letter dated 28 March 2014.

    b. Even on the indicative figures contained in the Rescom correspondence, it was clear that recovering the roof would cost a substantial sum. The Tribunal has in mind the injunction in *Plough Investments* that the Applicant needs to consider whether, if it had to bear the costs itself, it might reasonably decide to carry out the works. A sound and rational decision, in the light of this test, surely requires stepping back and addressing questions such as:

- Are there any alternatives and if so how much would they cost?

- Is the report on which the decision to replace the roof was taken sufficiently detailed and comprehensive and does it contain the clear evidence needed to justify its conclusion?

- Is the evidence in support of the decision sound enough to withstand challenge?

- Might the contractor who is recommending the spending of a large sum have a conflict of interest in recommending this work?

c. The Tribunal's view is that as at 9 May 2014, when it notified the Respondents of its intention to replace the roof, the Applicant did not have a sufficient evidential basis to support the reasonableness of that decision, as the questions raised above had simply not been addressed and they needed to be.

d. The Tribunal then considered whether the instruction of Trevaskis, and the carrying out of the inspection on 22 July 2016, cured that deficiency, as Mr Thompson said he would not have let his clients continue on the path of recovering the roof if he had not considered that was a proper professional course of action.

e. There are three reasons for the Tribunal to have reached the view that the failure of Mr Thompson to recommend the halting of the preparatory work for re-roofing in July 2014 (which he says he would have done if he had not thought the recovering reasonable) does not persuade the Tribunal that the Applicant's position at that point became reasonable.

f. The first is that the Tribunal was not given any evidence that Mr Thompson's brief was to consider the reasonableness of the decision to re-roof. The actual document instructing him was not provided, but the oral evidence is that he was instructed in July 2014 to prepare a specification and tender document for a new roof, not to survey the roof to determine whether it needed replacing.

g. The second reason is that Mr Thompson and Mr Baker did not carry out a high level inspection of the roof, but relied only on binoculars. That may have been satisfactory for the purposes of preparing a specification, but whilst the Tribunal accepts that surveyors do use a street level survey with binoculars for certain tasks, this inspection concerned expenditure of over £200,000 on a complicated roof only part of which could be surveyed from street level. The Tribunal's view is that if the task Mr Thompson and Mr Baker were undertaking on 22 July 2014 really was focussed on determining the necessity for a completely new roof, the inspection would have been at high level and more thorough.

h. The third reason for the Tribunal being concerned about accepting that Mr Thompson would have intervened had he thought it necessary, is that there is no evidence that Mr Thompson in fact intervened to bring to the Applicant's attention other matters that in the Tribunals view were obviously necessary. A surveyor having a concern to make sure his client was taking the right and necessary action should, in the Tribunals view, have brought to the attention of the Applicant both the poor condition of the Carlton Road pediments and the deterioration of the decorative finish of the external high level woodwork. The necessity for work on these elements of the building would have undoubtedly have been noticed by a surveyor, yet these were not brought to the Applicant's attention. Mr Thompson asked the Tribunal to accept that he would have told the Applicant that re-roofing was not necessary had he believed that, even if his brief had not required this action. If the reality was that he would have drawn the Applicant's attention to issues not in his brief that were evident to him as a professional surveyor, why did he not raise the other obvious problems the Tribunal has identified?

i. Even if the rationale for recovering the roof was still insufficient as a result of the July inspection, do the letter of 3 November and the report of 27 November 2014 from Trevaskis give a sufficient explanation to show that the decision to re-roof had a sound and rational basis? The Tribunal has not been persuaded so. Principally this is because the report was not intended to be an objective review into the necessity or recovering the roof. Its purpose, from the evidence of both Mr Thompson and Mrs Humphries, was to provide a better rationale for a decision that had already been taken. It was to "assist in negotiations" and to "persuade the lessees to agree to the proposed works". It was therefore to support a pre-ordained conclusion rather than to consider the issue anew and afresh.

j. By November 2014 it was approximately seven months since the decision to re-roof had been taken. A specification has been prepared and sent out to tender. Tenders have been received and reported on. The process was already underway, and the Tribunal considers it would have been difficult to revisit the question objectively at this point. The report is based on an inspection some four months earlier; the authors did not revisit to look at the roof again; and the report failed to consider alternative solutions to the roof problem. It is a short report, dependent upon photographs that were not taken by Trevaskis. The Tribunal's clear sense of the letter and report is that these were written to justify a decision that had already been taken, rather than being objective and independent considerations of the need to recover the roof at all. Taking these points into account, the Tribunal did not find the letter or report to be sufficient to show the decision to re-roof was reasonable.

124. To be clear, the Tribunal's conclusion above does not mean that it would be impossible for the Applicant to show that it would be reasonable to recover the roof now. The evidence that the Tribunal has

considered has not persuaded us that it would be reasonable to do so. But the First and Fourth Respondents have equally not persuaded the Tribunal that the only reasonable option is patch repair. The Tribunal notes that the Fifth Respondent supports re-roofing. This decision does not resolve the question of exactly what remedial work to the roof should now be undertaken; only that the evidence before the Tribunal in this case has not been sufficient to justify re-roofing now on the basis of that evidence.

125. The issue of scaffolding cost deserves separate consideration. Mr Thompson suggested that it has considerable significance in determining the reasonableness or otherwise of re-roofing because, at a cost in the region of £40,000, there would be considerable wastage if scaffold was used for patch repairs, only for the building to have to be scaffolded again when the roof (as was inevitable) were eventually replaced. Mr Mancini countered this argument by suggesting that scaffolding cost would not have such a significant impact if mobile scaffolding were used.

126. The Tribunal considered the evidence adduced on the Working at Height Regulations 2005 and HSE Guidance on the issue. The Tribunal did not accept Mr Thompson's view that it must be inappropriate to use mobile scaffolding for a patch repair, which it appears is considerably less costly. In none of the statutory material considered was there a clear prohibition of mobile scaffolding. It is clear that safety policy is to be a risk based decision to be taken by the contractors and advisers undertaking the work at height. Mr Mancini had identified a contractor who would carry out patch repairs using a mobile scaffold. If the Applicant does in fact decide to investigate the carrying out of patch repairs, it will no doubt obtain estimates from competent roofers aware of health and safety needs and capable of assessing the risk properly, alongside the appropriate professional advisers responsible for the contract. Should the Applicant be unable to source a contractor willing to carry out patch repairs without charging a disproportionate amount for scaffolding, this will no doubt be a further factor in its final decision about how to deal with the roof disrepair issue.

127. In paragraph 11 above, subsidiary issues were identified. As the effect of the Tribunal's conclusion on the roof issue reduces the relevance of some or all of these issues, the Tribunal will deal with them below, but rather more briefly.

Improvements

128. Mr de la Piquerie argued, somewhat optimistically, that the proposed works to the roof as a whole would constitute an improvement. Mr Brewin suggested that replacing slates, when the existing slates could be reused, and the provision of insulation where none was now present would constitute improvements. It was common ground that if these items were improvements, the First and Fourth Respondents would not have to pay for them under the terms of the Old Leases.

129. Mr Armstrong suggested that the position was that the Applicant is "...entitled to install something which differs from the original, so as, for example, to comply with legislation or regulations, comply with good practice, take advantage of more modern design or technology, prevent the original defect from occurring, or because that is what a sensible and practical surveyor would advise" (part of paragraph 10-12 of *Dowding & Reynolds, Dilapidations: The Modern Law and Practice, Fifth Edition (2013)*).

130. Mr Thompson's tender document included a provisional sum of £8,000 for the provision of roof insulation.

131. The Tribunal's view is that if the Applicant does in the future establish a reasonable case for re-roofing, the work needed to replace and refix the slates would fall within the definition of keeping the roof in "a good and tenantable state of repair decoration and condition .. including the renewal and replacement of all worn or damaged parts". If it were economic at the time to salvage slates which were in good enough condition to reuse or sell, taking account of the additional cost of taking them off carefully enough to be assessed for reuse, it would not be reasonable to fail to take advantage of that economic benefit.

132. Whether the insulation works were an improvement would depend on the extent to which evidence showed that the insulation was a legislative requirement or otherwise fell within the ambit of being a modern equivalent, or falling within accepted practice at the time. The Tribunal accepts Mr Mancini's evidence that it would be possible to argue that insulation may not be required under building regulations because it would not be technically, functionally and economically feasible to install it at that time. The Tribunal declines to determine anything further on this point in this decision as insufficient evidence was presented to enable it to reach a conclusion on the key questions posed in the opening words of this paragraph.

NHBC

133. Flats at Longden Mill let under Old Leases have protection under NHBC guarantees. The documentation supplied to the Tribunal indicates that the cover lasts for a ten year period from 18 May 2007 to 17 May 2017.

134. Each policy is issued to the individual flat owner for each flat. The Tribunal has not been supplied with any documentation evidencing any policy issued over the common parts, or issued to the builder or freehold owner of Longden Mill.

135. NHBC cover is known as "NHBC Buildmark". An NHBC Buildmark document describing the warranty and insurance cover provided by NHBC for converted properties was provided to the Tribunal. It clarifies, in section 3, that NHBC will pay to put right any physical damage caused by a defect in the tile and slate roof coverings to pitched roofs.

136. A defect has a specific meaning, which is "a breach of any mandatory NHBC requirement by the builder". Mandatory requirements are published in NHBC standards.

137. In a document described as "Standards for Conversion and renovations", standard R3 requires that "the structure of the home shall, unless specifically agreed otherwise in writing with NHBC, have a life of at least 60 years". Standard R6 is headed "Survey requirement of conversion and renovations". It requires that a detailed survey should be carried out by a competent and qualified person with relevant knowledge and experience (e.g. an RICS building surveyor) whose status (including professional indemnity insurance) is accepted by NHBC". Paragraph C1 of the Booklet also requires a survey to be carried out to establish the current condition of the building.

138. The NHBC Buildmark document contains exclusions stating that NHBC will not be liable for (inter alia) wear and tear. It clarifies, in section 3, that NHBC will not pay any cost where the cost is £1,000 or less, indexed (which means that sum is increased by the effects of inflation since 1 October 2004).

139. A successful claim against NHBC to cover any costs for repair or replacement to the roof therefore requires:

    a. The cost (which the Tribunal assumes is per flat as each flat has its own policy) being more than £1,000 indexed per flat;

    b. Establishing what reports, surveys and correspondence took place in 2007 about the extent of the work on the roof and in particular whether NHBC imposed any restriction upon their cover, as they were entitled to do;

    c. Countering the possibility that NHBC might take the view (which is held by Mr Thompson) that any defect is the result of wear and tear.

140. Perversely of course, if it were possible to establish that NHBC have a liability in respect of the Old Leases, patch repair would almost certainly not be covered because the cost would be too low (if Mr Mancini's quote is at about the right level), whereas complete recovering would be.

141. Whether the cost of repair could be recovered by NHBC was introduced as an issue by the First and the Fourth Respondents who argued that a lessee should not be charged under a service charge for a cost that was recoverable from a third party.

142. In this case, the Tribunal is not able to say whether the cost of the eventual works to the roof are covered by NHBC as this depends on the issues identified above. It is able to say though, that in its view, those Respondents who have the benefit of an NHBC policy are free to pursue their remedy direct against NHBC if they wish. They own their policies,

which provide them with insurance protection. The Tribunal does not accept that there is any obligation upon the Applicants to pursue the Respondents' remedies for them under the service charge provisions. The Applicant itself has no remedy available against a third party. The Tribunal therefore does not consider, whatever works are eventually done on the roof of Longden Mill, that there are grounds for requiring the Applicant to recover the costs from NHBC rather than from the Respondents. The Applicant and its managing agents should of course assist and co-operate in that claim, but it does not seem to the Tribunal that it is their duty to pursue it.

Section 20ZA and dispensation from consultation

143. As identified in the description of Mr Mancini's evidence, in respect of the consultation on the roof recovering costs, the Respondents now accept that the Notice of Intention dated 9 May 2014 and the Statement of Estimates dated 16 January 2015 are adequate to comply with the Consultation Regulations. That being the case, there is no need for any dispensation request to be granted in respect of those works. The effect of this decision is of course that the Applicant is unlikely to proceed with its proposal to recover the roof as it presently exists anyway. When the Applicant has decided what action it now intends to take, it should, in the view of the Tribunal, carry out a consultation on that proposal in the normal way.

144. The second issue arising from the Dispensation Application is whether to grant dispensation in respect of the expenditure on the fencing. The fencing was in place from 12 May 2014 until 12 May 2015. It is said to have cost £15,385.04 as at 27 March 2015. The Tribunal is unaware of the final cost.

145. The First and Fourth Respondents say there has been no consultation on this cost, so that it is capped at £250. The Applicant says that no consultation is required because the use of fencing is not "work on a building or any other premises".

146. Section 20(1) of the Act provides that the contribution of a tenant towards qualifying works is limited unless the Consultation Regulations have either been complied with or dispensed with. The current limit is £250 per flat (under paragraph 6 of the Consultation Regulations). It is not necessary to go into any further detail about what the Consultation Regulations are.

147. An application for dispensation is made under section 20ZA of the Act. This section provides that where an application is made to dispense with the requirements of the Consultation Regulations in relation to qualifying works, the Tribunal may dispense with those requirements if it is reasonable to do so. "Qualifying works" are defined as "works on a building or any other premises".

148. Put shortly, the Tribunal agrees with Mr Armstrong that the provision of fencing was not "works on a building". The fencing was erected, the

Tribunal considers, in order to protect the public from the risk of falling slates. It was not necessary in order to prepare for works, as might sometimes be the case when a contractors working area is being fenced off. It involved no contact with the building which remained untouched. The installation of fencing was not "works on a building" and was therefore not subject to the statutory requirement to consult under section 20. Whether it was a cost that was reasonably incurred (as was the gist of the Respondents arguments) is a quite separate matter, but this was not a matter before the Tribunal in this case.

149. In respect of the two issues raised in the Dispensation Application, the Applicant has established that it in fact complied with the Consultation Regulations in respect of the roof, and that it had no obligation to consult in respect of the fencing cost. As it therefore turns out, there was no need to apply for dispensation and the Tribunal dismisses the application. To reach this point though, the Applicant has had to succeed in rebutting the arguments of the First and Fourth Respondents.

Section 20C application

150. Under section 20C of the Act, the Tribunal can make an order that the Applicants costs should not be regarded as relevant costs for the purposes of determining the amount of any service charge payable by a tenant.

151. The First and Fourth Respondents applied for an order, the effect of which would be that none of the Applicant's costs in these proceedings could by charged to them as part of the service charge.

152. A section 20C order is not necessary if the Applicant has no legal right to charge its costs under the lease in any event. If that is the case, there is no contractual basis for the landlord to ask tenants to pay its own bills anyway.

153. Mr Armstrong conceded that the Old Leases did not allow the Applicant's costs to be re-charged to tenants. On the making of that concession, Mr de la Piquerie and Mr Brewin confirmed that this was sufficient confirmation for their purposes, and they did not pursue the making of a formal order.

Summary

154. In case number BIR/00FY/LSC/2014/0022, the Tribunal determines that it would not be reasonable for the Applicant to incur costs of £200,500 on works to recover the roofs of Longden Mill, Nottingham.

155. In case number BIR/00FY/LDC/2015/0005, the Tribunal dismisses the application.

156. The Tribunal makes no order under section 20C of the Act in respect of costs as the Applicant has conceded in favour of the First and Fourth

Respondents that the Old Leases do not allow contractual recovery of the Applicant's costs in any event.

Appeal

157. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)