FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LDC/2019/0132** **LON/00BG/LSC/2019/0309 V:CVP**
Property	**:**	**One West India Quay, 26 Hertsmere Road, London E14**
Applicants	**:**	**(1) No.1 West India Quay (Residential) Ltd (both applications)** **(2) West India Quay Development Co (Eastern) Ltd (first application only)**
Representative	**:**	**PM Legal Services** **Mr Justin Bates, counsel**
Respondents	**:**	**The 158 long lessees of the residential apartments comprised within the Property**
Representative	**:**	**1 West India Quay Residents' Association for various lessees** **Andrew Boorman (Apt 13.05) representing himself**
Type of application	**:**	**To dispense with the requirement to consult lessees about major works and liability to pay service charges**
Tribunal	**:**	**Judge Sheftel** **Ms Bowers** **Mr Gowman**
Date	**:**	**24 March 2021 (following a hearing on 8-11 February 2021)**

DECISION

We exercise our powers under Rule 50 to correct clerical mistakes, accidental slips or omissions at paragraphs 10, 30, 57 and 71 of our Decision dated 24 March 2021. Our amendments are either struck through or made in bold and underlined. We have corrected our original Decision following a letter from the Applicants dated 24 March 2021. Mr Boorman provided a response dated

14 April 2021. There was also a response from One West India Quay Residents Association dated 20 April 2021.

Signed: Judge Sheftel

Dated: 22 April 2021

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V:CVP. A face to face hearing was not held because it was not practicable. The documents that the tribunal was referred to are in a bundle prepared by the Applicants of 1033 pages, together with a bundle prepared by Mr Boorman totalling 179 pages and a bundle prepared by the Residents' Association of 1259 pages as well as 17 videos of parts of the premises. The order made is described at the end of these reasons.

The applications

1. Two applications are before the tribunal:

    a) An application under section 27A(3) of the Landlord and Tenant Act 1985 (the "1985 Act") for a determination that should the proposed scheme of works carried out, the leaseholders will in principle be required to contribute to the costs through the service charge; and

    b) An application under section 20ZA of the 1985 Act to seek dispensation from consultation requirements associated with the proposed works.

2. The proceedings relate to the property at One West India Quay, 26 Hertsmere Road, London E14 ("1WIQ"). 1WIQ is a prestigious 33-storey block close to Canary Wharf. The lower part of the block (floors 1-12) is used as a hotel. The upper floors consist of 158 residential apartments and common parts.

3. According to the Applicants, the building was developed by the Second Applicant which is still the freeholder along with Number One West India Quay (Commercial) Ltd. In August 2004, the Second Applicant granted a head lease of the residential parts to the First Applicant which, in turn, granted occupational underleases to the residential leaseholders.

4. The Respondents are the residential lessees of 1WIQ.

5. The applications before the tribunal concern utility metering, in relation to which there is a substantial history of problems at 1WIQ, going back a number of years.

6. As set out in the Applicants' statement of case, the basic metering layout at 1WIQ is as follows:

   a) gas, water and electricity are supplied to the whole building by commercial utility companies and are recorded against for bulk meters which measure consumption from the whole building.

   b) There are sub-meters throughout the building to measure consumption of utilities in different areas (i.e. the hotel, the common parts, flats).

   c) Each of the flats has 4 meters intended to measure the heating, cooling, electricity and domestic hot water consumption.

   d) There are no meters to measure the consumption of cold water in the flats.

7. According to the Applicants, numerous problems with the metering have been identified, including the fact that: some meters cannot be found, meters are defective (e.g. record no consumption or record absurdly high consumption), and there are issues with the Modbus system, which reads all the meters, and has in turn led to significant difficulties with producing accurate or reliable utility bills for the building.

8. There has been litigation before this tribunal and Upper Tribunal going back several years and it appears that a number of surveys/investigations have been commissioned over time. It is apparent, however, that the problem remains unresolved and the present situation is wholly unsatisfactory. As a result, the Applicants have brought the present applications to the tribunal, relating to their proposed works to the metering at the building. Both applications are opposed.

9. A four-day hearing commencing 8 February 2021 took place by video conferencing. Mr Justin Bates (counsel) appeared on behalf of the Applicants, Mr Graham Dixon represented the Residents' Association and Mr Andrew Boorman represented himself. In addition, Ms Jane Hewland, another member of the Residents' Association, who had provided a witness statement, also made submissions.

10. Written expert reports were provided by Mr Andrew Wilkes on behalf of the Applicants and Mr Tapley on behalf of the Residents' Association. They also prepared a joint report. However, Mr Tapley did not attend the hearing and so oral evidence was provided by Mr Wilkes alone. The tribunal was informed that Mr Tapley's non-attendance was due to ill health. However, following a discussion of the implications of this with regard to his evidence as there would be no opportunity for the Applicants to cross examine Mr Tapley, Mr Dixon confirmed that no adjournment was sought and that the Residents' Association was content to proceed. Similarly, although Mr Boorman was critical of the Applicants with regard to the preparation and service of the bundles, he

was likewise content to proceed and did not seek an adjournment. In the tribunal's view, ~~notwithstanding the fact that Mr Wilkes had not been able to carry out a physical inspection of the building)~~ Mr Wilkes was an impressive witness: he explained his own conclusions and opinion but was also fair in acknowledging counter-arguments put forward by Mr Tapley in his report.

11. The tribunal is grateful to all parties for their assistance and the way that the hearing was conducted, recognising that this case and the issues relating to metering have given rise to strong and understandable frustrations.

The 27A(3) application

12. The scheme of works in question have not yet been carried out and therefore the Applicants seek a determination in respect of prospective costs.

13. In this regard, section 27A(3) of the 1985 Act provides that:

> "An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
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> (a) the person by whom it would be payable,
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> (b) the person to whom it would be payable,
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> (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."

14. In other words, the tribunal is concerned only with whether the proposed costs *would* be payable if the work were to be carried out. If the works were not subsequently completed to a reasonable standard, this could of course be the subject of separate challenge by leaseholders in response to a future claim for service charges.

The proposed scheme of works

15. In summary, the Applicants' proposed scheme of works, which were identified in a Notice of Intention letter dated 10 May 2018, comprises the following elements:

    a) replacing the electricity meters for each of the 158 flats;

    b) installing new meters to record common parts electrical supply;

c) installing energy meters on the chilled water, heating water and domestic hot water circuits, so as to record consumption required for producing those services; and

d) replacing the data network (Modbus) and billing platform, to ensure accurate data is collected from the new meters.

There are also associated building works, commissioning and testing costs.

16. According to the Applicants, similar works are also to be carried out the hotel to ensure that there is a replacement system for the whole building. However, the hotel works are not within the scope of these proceedings. Mr Bates also explained that the Applicants had previously proposed to replace every meter in each flat (i.e. to include utilities additional to electricity. However, on the Applicants' case, there were objections from leaseholders with the result that the present, more limited proposal has been adopted, which excludes the flow and thermal meters. As a result, the proposed works which are the subject of the application to the tribunal have been described as 'Phase 1'.

17. It is worth recording that there had been some confusion over precisely what was being proposed by the Applicants by way of the intended works. Mr Boorman noted that there had been a previous s.20 consultation in 2014, which had provided for more extensive works, and it had never been clear that the 2014 consultation had been abandoned and the new proposals adopted as an alternative.

18. Further, the fact that the current works are described as 'Phase 1' caused alarm for Ms Hewland in particular. She submitted that as the present application could have wider implications for future works, this is a point which must be considered by the tribunal. In addition, she stressed the limitation of the present works, noting that despite the large sums of money involved, leaseholders would still be left with estimated billing, save in relation to electricity. Mr Wilkes's evidence was that if any further "in flat" meters are installed at a later date (i.e. in a subsequent 'phase' of works), then those new meters could be added without further difficulties in terms of compatibility, albeit the costs would not be insignificant.

Legal basis for the application

19. Turning to the Applicants' proposals in these proceedings, there did not appear to be any significant dispute that the works can be done under the terms of the leases.

20. An issue was raised as to whether the works constitute repair or improvement given that some meters are apparently missing and might not have ever been installed since the construction of the building. Mr Tapley commented in the joint report that the Applicants' proposals

regarding bulk metering would amount to an enhancement to the system.

21. With regard to the legal question of repair or improvement, in the Applicants' submission, this is not a lease which has the "repair/improvement" distinction. For example, paragraph 1 of Part C of Schedule 4 allows for:

> "Inspecting maintaining overhauling cleaning servicing renewing repairing insuring operating and (wherever the Lessor properly regards it as necessary in order to comply with an obligation to repair) replacing any elements of the Residential Common Parts…".

22. Similarly, paragraph 10 of Part C of Schedule 4 makes reference to:

> "Any other services relating to the Residential Premises or any part of it provided by the Lessor from time to time during the Term on the basis of good estate management and/or which the Lessor acting reasonably shall think proper for the better and more efficient management or upkeep of the Residential Premises and/or the convenience of the Lessees or occupiers of them and not otherwise mentioned or referred to in this Underlease."

23. Moreover, from a practical perspective, Mr Wilkes's evidence was that unless such meters are added, it is impossible to produce an accurate allocation of costs between the commercial and residential parts with the result that there is justification for the costs.

24. In the circumstances, the tribunal is satisfied that the costs are recoverable under the terms of the leases.

25. As to the question in section 27A(3)(c) of the 1985 Act, i.e. "the amount which would be payable", the Applicants submit that given that there has been a full tendering process it is hard to see how the figures are not *prima facie* reasonable. This is particularly so given that the Metromec tender was the cheapest of those provided.

Areas of agreement and disagreement on the works themselves

26. Although the Respondents did not agree with the Applicants' proposed course of action for a number of reasons which are addressed below, there appears to have been broad agreement in principle on aspects of the proposed plans. For example, there appeared to be agreement on the need for the replacement of electricity meters in individual flats (i.e. limb 'a' in paragraph 15 above. One possible exception was whether this necessarily extended to the penthouse flats. However, in the tribunal's view a building-wide solution proposed by Mr Wilkes, involving a complete replacement of all in-apartment meters, would not be an unreasonable proposal.

27. Similarly, as regards limbs (b) and (c) (i.e. installing new meters to record common parts electrical supply and energy meters in the chilled water, heating water and domestic hot water circuits, so as to record

consumption required for producing those services), insofar as this would have the effect of apportioning usage between the residential and commercial parts of the building, the issue of apportionment had in fact been identified as a key area of concern by Mr Dixon in particular.

28. The most significant area of difference between the parties in respect of the generic heads of works themselves, was in relation to limb (d), i.e. to replace the data network (Modbus) and billing platform, so as to ensure accurate data is collected from the new meters.

29. Broadly, while there appeared to be agreement in principle that a new billing platform would be required, the Applicants' position had been that the system should be replaced in its entirety. In contrast, Mr Tapley's proposal had been that further investigation be carried out *before* any works are commenced. The investigation would principally allow it to be determined whether parts of the existing cabling can be re-used.

30. Mr Tapley's view was that that carrying out investigative work first could lead to significant saving. In this regard, the tribunal notes that according to the **original 2019** tender analysis, approximately 35% of the works costs relate to the replacement of the Modbus (item 10 of the works on page 196 of the bundle totalling approximately £423,630 against sub-total of £1,203,950 on page 197). Further, as Mr Dixon submitted, if it is not known why the Modbus failed in the first place, it is not possible to be sure that the same problem will not occur again.

31. The Applicants' pleaded case was that replacement is the best way to proceed. They rely, in part on a report from April 2014 produced by SVMA, which recommended replacement of the Modbus. According to the Applicants, the report considered patch repair as a solution but determined that it would be less effective and more expensive. As was pointed out by Mr Dixon, it is worth stressing that so far as the Respondents are concerned, the position was not one of repair versus replacement. Rather, they maintain that the Applicants' proposals should be rejected on several grounds as further set out below.

32. Overall, the Applicants maintain that even if it is possible to carry out a programme of works which involve some repairs, that does not affect the reasonableness of the Applicants' proposals nor does it affect the service charge recovery. In their submission, where there is a choice of methods of achieving a legitimate end, then the choice is for the covenantor, provided that choice is within the range of reasonable decisions. They submit that section 19 of the 1985 Act requires the tribunal to perform a review function in which it checks the decision-making process of the landlord rather than make its decision based on what it would do if it owned the building. As set out by the Court of Appeal in *Waaler v Hounslow London Borough Council* [2017] EWCA Civ 45, at paragraph 37:

> "That said it must always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a

> problem in the physical fabric of a building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable. I agree with [counsel] that the tribunal should not simply impose its own decision. If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable."

33. For the avoidance of doubt and in accordance with the Upper Tribunal's decision in *Waaler*, the tribunal accepts the general proposition that it is not the tribunal's role to select or determine the best or most appropriate scheme – or indeed to mandate that the parties sit down to work out an agreed approach, something which the Respondents frequently cited as a desired outcome. While the Respondents' frustration with the Applicants and what has happened was clear, the tribunal cannot force the two sides to meet and agree a way forward. Rather, the tribunal's jurisdiction is limited to determining whether the proposed scheme of works is reasonable having regard to section 19 of the 1985 Act.

34. Returning to the Applicants' proposals, when giving oral evidence at the hearing, Mr Wilkes's position altered from what had been his original position in his report. He accepted that it would be appropriate to carry out the investigative checks to determine whether parts of the cabling could be re-used as suggested by Mr Tapley, albeit he was of the view that this was unlikely to prove to be of significant benefit or would lead to much or indeed any saving.

35. Mr Wilkes also raised the issue of whether reusing parts of the existing cabling would affect any warranty which might otherwise be given if an entirely new system were installed – although during the hearing he accepted that it might be possible to obtain some form of warranty in any event. To this point, Mr Dixon and Mr Boorman questioned what such warranty would be worth in any event given their wider concerns about the proposed contractor. However, Mr Wilkes responded that ordinarily a warranty would be backed by an insurance policy.

36. In any event, as was accepted by Mr Bates, such a course of action would be different to what is envisaged by the existing tender and the Applicants accepted that they would need to amend their proposal to reflect this recommendation.

37. Crucially, and in contrast to Mr Tapley, Mr Wilkes considered that the additional investigative works could be done as part of the existing contract rather than a separate stand-alone investigation prior to any works being commenced. On this issue, subject to the caveat (addressed below) that the tribunal has received little if any evidence as to how carrying out an investigation as part of the tender works would impact the overall price, the tribunal is bound to conclude that the Applicants' revised proposal would not be an unreasonable course of action, particularly in light of how long the overall problems of

metering have affected 1WIQ and due to the fact that it appears from the bundle that there have already been several reports and studies in relation to the building – a point highlighted by Mr Boorman in particular. The tribunal accepts Mr Wilkes's evidence that on-site checking could be achieved and that given that there is a longstanding need for this work and at least *some* of it is agreed between the parties, there would not seem to be a sound reason for further delay.

38. As noted above, the existing tender contains nothing on the issue of how the investigation would be conducted, by whom, what safeguards would be in place or what the costs would be. Mr Wilkes estimated £50-60,000 at the hearing – although this would be offset by savings if parts of the cabling can be re-used and, as noted above, this part of the proposed scheme comprises a considerable part of the overall tender. However, as a general proposition, the Applicants are correct that so long as the tribunal is satisfied that the scheme of works is within the range of reasonable decisions open to a landlord, ultimately, the choice as to how to proceed is for the Applicants (subject to requirements to conduct consultation), not the tribunal nor the leaseholders. Further in this regard, it is not open to the tribunal or the leaseholders to mandate the terms of a contract that will be between the landlord and the contractor.

39. Finally, it is also worth noting that earlier reports had suggested a wholly different approach, such as installing a wireless system. However, it did not appear that either expert was advocating such approach in this case and indeed potential difficulties with a wireless system were identified in the expert reports. At the hearing, Mr Dixon and Ms Hewland also raised the possibility of works to split the residential and commercial utilities entirely. Mr Wilkes commented that this could be very costly but, in any event, there was no detailed evidence provided as to how it could work, or which might have allowed the tribunal to consider this as an alternative proposal. Moreover, the Applicants' position was that even if the problems of metering could be resolved in different ways, that did not of itself mean that the Applicants' proposal not a reasonable one.

The Respondents' wider objections

40. The Respondents agree that the current system is inadequate. However, they do not agree with the Applicants' proposals and raise numerous objections in addition to the difference in the experts' positions as set out above. It is clear that there has been a breakdown of trust between the parties and the tribunal accepts that the Respondents' beliefs and concerns are genuinely held. The question is whether they provide grounds for refusing the present application.

41. In general terms, the Respondents assert that the Applicants have allowed the state of affairs to continue for over ten years and maintain that the proposal is "not recognised as a just or reasonable solution to the metering systems problems of [1WIQ]".

42. While the Residents' Association accept that all the in-apartment electricity meters need to be replaced (although not the top-floor penthouses as they have a different metering arrangement), they do not accept that there is a systematic failure rate in the other in-apartment meters. Ultimately, they conclude in their response to the Applicants' statement of case that:

> "The Applicant's decision to replace without correcting the metering systems problems at 1WIQ is neither sensible nor reasonable. It specifically excludes the necessary hotel works; it fails to separate the Commercial and Residential utility supplies; it fails to provide a third party billing and maintenance solution (as recommended in the SVMA report and in FTT rulings) that can be trusted; it introduces a new metered charge for cold water that has always been billed within the Service Charge; and it calls for replacement of the Modbus without considering whether it can be repaired or determining why it has failed."

They criticise the Applicants' decision-making and suggest that notwithstanding the substantial previous litigation, the Applicants have made no attempt to address the fundamental problems with the metering systems. At the hearing, Mr Dixon also sought to allege that the Applicants have failed to engage with the leaseholders, have not been transparent or provided sufficient information to the leaseholders. In his submission, this extended to the way that proceedings had been conducted and gave rise to a general perception of having been treated unfairly. The Respondents maintained that they had been willing to go to mediation to try and resolve the dispute.

43. Mr Boorman broadly agrees with the Residents' Association, noting that without proper, accurate schematics, the Applicants are not able to know which meters measure what, which are working and which not and why? On that basis it cannot be possible to know what the most reasonable and cost-effective approach is to fix the system's faults and produce fair and accurate billing. He made various submissions, including that the Applicants did not carry out recommended maintenance of systems, and that this contributed both to the faults that exist today and to the long delays in bringing forward proposals to fix these. Mr Boorman also pointed to the fact that there have already been numerous investigations which have generated costs, although if it is felt that such costs have been wrongly charged to leaseholders, that is not something that the tribunal can determine in these proceedings.

44. There was also a suggestion that due to criticisms of the competence of the Applicants, the maintenance of the metering system should be removed from the landlord altogether going forward. Again, however, it should be stressed that this is not something which they tribunal can consider in an application such as the present.

45. More specifically, objections by the Respondents included the following themes.

Historic neglect/set off

46. A key theme of both Mr Dixon's and Mr Boorman's submissions was that there had been a long history of failure on the part of the Applicants to maintain or repair the metering. Mr Dixon referred to documents going back as far as 2007 identifying problems with the metering within the building. It was also alleged that no planned maintenance had or had properly been carried out. Mr Boorman also pointed to correspondence identifying problems with the metering going back to 2013 – shortly after he purchased his flat. Further, Mr Boorman alluded to the fact that he has suffered actual losses as a result of the problems with the metering at the building.

47. While Mr Bates sought to contest the picture painted by the Respondents, his principal point was that the question of historic neglect is not a matter for these proceedings. He submitted that consideration of *how* or *why* the need for work arose is not a relevant matter under section 19 of the 1985 Act, as this would properly be the subject of a breach of covenant claim.

48. As set out in *Continental Property Ventures Inc v White* [2007] L. & T.R. 4, at para.11:

> "The question of what the costs of repairs is does not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning depend upon how the need for remedy arose."

49. In addition, in *Daejan Properties Ltd v Griffin* [2014] UKUT 0206 (LC), the Upper Tribunal stated at para.88:

> "As the Lands Tribunal (HH Judge Rich QC) explained in *Continental Ventures v White* [2006] 1 EGLR 85 an allegation of historic neglect does not touch on the question posed by s.19(1)(a), Landlord and Tenant Act 1985, namely, whether the costs of remedial work have been reasonably incurred and so are capable of forming part of the relevant costs to be included in a service charge. The question of what the cost of repair is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring the cost of remedial work cannot depend on how the need for a remedy arose."

50. Where a leaseholder has a claim for breach of covenant, such a claim *can* be advanced by way of set-off against a claim for service charges. However, the difficulty in the present case is that there is not a claim for arrears of service charges against any specific leaseholder. A s27A(3) claim is prospective; it can also be described as a 'class' claim, i.e. against all leaseholders. Moreover, each leaseholder is likely to have different losses over potentially different periods in a breach of contract claim.

51. In the circumstances the tribunal makes no findings on whether the actions of the Applicants could give rise to a set-off or damages claim, save to restate that the Respondents should not be precluded from raising such arguments in future proceedings.

52. This also applies to the related argument, advanced by Mr Boorman in particular, on the question of whether the Applicants could or ought to have taken advantage of any guarantee or indemnity or insurance policy given the length of time during which problems have been identified.

53. Mr Bates referred to the fact that Mr Boorman had provided a copy of the front cover and one other page of the NHBC policy for his flat. It was submitted that this did not show who the insured party was (although it was likely to be the leaseholder), what was insured or had any relevance to the present case. While this might be true so far as that particular policy is concerned, it does not address the question of whether the *Applicants* had a policy or guarantee or indemnity, which they could have claimed under. This is not something the leaseholders would necessarily have known about or had access to – particularly in the case of a contractual claim against the original contractor. Nothing has been disclosed by the Applicants and no evidence denying the existence of such policy or guarantee.

54. In the circumstances, although the Applicants sought a finding that no such policy existed, the tribunal is not prepared to make such finding. Instead, the tribunal determines that notwithstanding its overall decision in relation to the reasonableness of the proposed scheme of works, such decision is subject to any defence that the Respondents may wish to raise in future proceedings that the Applicants might have been able to take advantage of an indemnity or guarantee or insurance policy.

Conflict of interest

55. The Residents Association asserted that there was a conflict of interest on the part of the Applicants with regard to the operation of the hotel. No documentary evidence was provided in support of this, but the general submission was that it suited the Applicants if costs were allocated exclusively to the residential leaseholders rather than being apportioned as between the residential leaseholders and the commercial parts, i.e. the hotel.

56. Even if the assertion of a conflict of interest were correct – and the tribunal does not find that there was any evidence to support it – it does not give rise to an argument against the Applicants' proposal in these proceedings. A central plank of the current proposals is to install communal meters for the specific purpose of being able to allocate costs between the residential and commercial parts of the building. In other words, the proposal aims to remove the very problem of how costs are allocated between the residential and commercial areas (at least with

regard to metering) and aims to ensure that this will be done accurately and measurably going forward.

57. Also, with regard to the proposed works themselves, the 2019 **and 2021** tender **analyses** ~~analysis~~ gave details of the breakdown and allocation of costs between residential, hotel and shared areas so it was clear what were the pure hotel costs (notwithstanding that the hotel costs are outside of the scope of the present application).

Procurement and the proposed contractor

58. A key area of objection for the Respondents related to the procurement process itself and the identity of the Applicants' consultant (Maleon) and chosen contractor (Metromec).

59. Part of the concern stemmed from a general criticism and distrust of the Applicants' management and maintenance of the building. Mr Dixon, in particular, sought to put the present exercise in the context of the specific circumstances of the building. Aside from allegations of historic failure to maintain or to gain the trust of leaseholders , he also raised previous instances (unrelated to the present case) – where costs, at least initially, would have been wrongly allocated, for example in respect of works at the loading bay. Further, the Respondents highlighted the fact that the Applicants have a monopoly of supply of utilities to the building – it is not open to leaseholders to switch energy supplier – with the result that there is much at stake for the leaseholders in ensuring that the proposed scheme is the right one. While this is correct, as Mr Wilkes pointed out, it is not uncommon for this type of building.

60. As to the procurement process itself, the Residents' Association submitted that there was no evidence of any, or any adequate due diligence undertaken on the proposed contractors or their suitability to carry out the works. They asserted that neither Maleon nor Metromec had the necessary expertise, resources, governance structure or financial standing to carry out a project such as the present.

61. From the tribunal's perspective, whether or not the Respondents are correct does not impact on our decision in an application such as the present. As noted above, it must be remembered that ultimately any contract for the carrying out of the works will be between the landlord and the chosen contractor and there is nothing in the 1985 Act that allows leaseholders the right to have a veto over the terms of such contract. In any event, as noted above, on the question of the value a warranty, Mr Wilkes's evidence was that ordinarily a warranty would be backed by an insurance policy. Of course, were the contractor not to carry out the works satisfactorily, this would provide a defence to any subsequent claim for service charges brought by the Applicants against the leaseholders. However, with regard to the application before us, the issues raised by the Respondent do not negate the reasonableness

of the proposals or lead to a finding that the proposed scheme of works (as amended) is not reasonable.

62. Accordingly, subject to the caveats highlighted above at paragraphs 51 and 54, the tribunal is prepared to grant the section 27A(3) application.

The 20ZA application

63. The statutory consultation process commenced on 10 May 2018 and identified the five categories of work outlined above at paragraph 15. The second statutory consultation notice was sent on 2 May 2019. It gave details of four entities who had been asked to tender for the works (including one suggested by the Residents Association) and the tender prices received from three of them.

64. The accompanying tender analysis notes that Metromec had provided the lowest tender. Moreover, Metromec was the only bidder to submit all the requested tender information. The analysis concluded that the Metromec tender was robust, complete and capable of acceptance – a conclusion which is contested by the Respondents as noted above.

65. The Applicants maintain that the section 20 consultation process was valid. Their reason for seeking dispensation is that is that due to the passage of time, there has been an increase in tendered costs – although the Applicants note that Metromec are the cheapest contractor. The Applicants maintain that a small increase in price – of approximately 7.3% since the consultation was carried out – does not invalidate the consultation process and does not mean they need to repeat it. However, they seek dispensation in case they are wrong on this point.

66. In the tribunal's view, this general concern, that the cost has increased due to the passage of time, is further amplified in view of the modification to the Applicants' proposals arising from Mr Wilkes's evidence as set out above. In other words, in light of the variation to the proposed scheme to include an investigation to determine whether parts of the Modbus cabling can be re-used as part of the works, what is now being proposed differs from what was consulted on not just in cost but in substance.

67. However, notwithstanding this change in the proposed scheme of works, Mr Bates submitted that further consultation was still not required. In support of this submission, the Applicants rely on the Court of Appeal's decision in on *Reedbase Ltd v Fattal* [2018] EWCA Civ 840. Paragraphs 36-37 provide as follows:

> "36. It is sometimes necessary for a landlord to repeat stage 2 of the process required by the Consultation Regulations but neither the Landlord and Tenant Act 1985 nor the Consultation Regulations give guidance as to when this should be done. In my judgment, the relevant

> test, in the absence of any explicit statutory guidance, as to when a fresh set of estimates must be obtained, must be whether, in all the circumstances, the appellants have been given sufficient information by the first set of estimates. That involves, as both counsels submit, comparing the information provided about the old and the new proposals (and that comparison should be made on an objective basis). The difference is that the estimates produced at the second stage did not include an estimate for the additional cost of the appellants' preferred tiles or of the pedestal system for fixing them. But that difference was not the only relevant factor and it would not, as I see it, be right to conclude that there had been a material change in the information provided on the basis of that one factor. In my judgment, in the light of the statutory purpose, as expounded in *Daejan*, it must also be considered whether, in all the circumstances, and taking account of the position of the other tenants who did not object to the changes, the protection to be accorded to the tenants by the consultation process was likely to be materially assisted by obtaining the fresh estimates.
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> 37. In my judgment, the answer to the question I have posed is clearly no, taking a realistic view of the circumstances of this case, for several reasons. First, as the judge recognised, it is a relevant consideration that the tenants who contend that there should have been a fresh tender knew about the change in the works (including the need for a pedestal system of shims) and approved it, and did so without contending at that point in time that there should be a fresh tender. This is not a case where the landlord was seeking to ambush the tenants by doing some fundamentally different set of works from that originally proposed. Second, the change in cost was relatively small in proportion to the full cost of the works, especially when account is taken of the fact that the increase in cost due to the appellants' choice of tile was primarily for the appellants' sole enjoyment, and yet was being borne by the service charge. As Mr Chew put it, the proposals remained substantially the same. Third, it was on the face of it likely to be unrealistic to think that contractors who had estimated for the full works but not obtained the contract would be likely to tender or to hasten to tender for a small part of it (supplying and fixing the tiles). (There was a single contract awarded for the works). There is no evidence that there would have been any saving in cost. No other contractor had been put forward by the tenants. Nor indeed was there any suggestion that it would be best practice to seek fresh tenders in these circumstances. Fourth, the retendering process would have led to a loss of time in completing the works, which might prejudice other tenants. Fifth, the appellants continued to have their protection under s.19 of the Landlord and Tenant Act 1985…"

68. Applying the above analysis, the Applicants submit that: the change to the proposed scheme is not sufficiently material to require the consultation process to be repeated; this not a case where the landlord is seeking to ambush the tenants by doing some fundamentally different set of works from that originally proposed; and that re-tendering would take further time when, although the works are not urgent, there is a longstanding need for them to be done.

69. In the tribunal's view, this issue is particularly finely balanced. While the revised scheme clearly amounts to a change, it is determined that it is not so great a change as to amount to a different scheme of works or to necessitate a further consultation. Rather, although the revised works must include the costs of the investigation (which is as a result of the Applicants acquiescing to Mr Tapley's views), they also allow for the possibility that costs overall might be cheaper if some cabling can be re-used – and as noted above the tender documentation indicates that the works the Modbus replacement are expected to be approximately 35% of the total.

The Respondents' objections

70. Turning to the Respondents' specific objections in relation to the dispensation application, the Respondents did not identify a failure to comply by reference to a specific provision of the legislative consultation requirements set out in the Service Charges (Consultation Etc) (England) Regulations 2003. Rather, their argument was a broader one and comprised various elements.

71. As noted above, concerns were raised as to the entities involved (Metromec and Maleon). With regard to the dispensation application, a specific issue was whether the tender process itself was defective. The Respondents highlighted that Metromec was the only one the parties asked to tender to have returned all information required under the tender and it was suggested that the Applicants ought to have chased this information from the others. Questions were also raised due to the fact that TF Tull, as well as providing a quote in their own right, were also identified as the specialist sub-contractor by Metromec and ~~Grosvenor~~ **Cadogan Building Services** (another party who provided a quote).

72. In conclusion, they argued that dispensation should not be granted. Reference was also made to the possibility of imposing conditions, largely with the general aims of ensuring the Respondents' agreement to any proposed works or the identity of any entity who might carry out an investigation as to what was is required or indeed the works themselves prior to any contract being awarded.

73. Whilst the tribunal does not doubt the genuineness of the Respondents' concerns, their difficulty is that what is required for a section 20 consultation is prescribed in the legislation, which does not go as far as the Respondents would wish. Ultimately, even if it can be legitimately argued that aspects of the process might have been done differently, the Respondents did not identify a specific breach of the 2003 Regulations.

74. During the hearing, it was submitted by the Respondents that the Applicants did not have regard to the lessees' representations, as required by paragraph 10 of Part 2 of Schedule 4 to the 2003 Regulations. However, while it is clear that the Applicants did not adopt the Respondents' observations and representations, the tribunal

does not find that they did not have regard to them. In particular, the tribunal notes various correspondence from the managing agents, including letters dated 7 September 2018 and 26 October 2018 (with a detailed appendix), attempting to address representations and observations raised by leaseholders. A further letter dated 26 July 2019 also seeks to address concerns raised by the Residents' Association regarding the proposed works following the stage 2 notice.

75. Further, the evidence does not substantiate an assertion that the consultation was a sham or pre-determined. While the Respondents are correct that TF Tull were shown as the specialist sub-contractor on the bids by two of the bidding contractors as well as providing a bid in their own right, it is not clear why this should invalidate the process or render it non-compliant with the legislation.

76. As the Supreme Court noted in *Daejan v Benson* [2013] UKSC 14, the purpose of consultation is to protect leaseholders from inappropriate works and inappropriate amounts of costs. According to Lord Neuberger on the question of the proper approach to dispensation:

> "It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The former purpose is encapsulated in section 19(1)(b) and the latter in section 19(1)(a). The following two sections, namely sections 20 and 20ZA appear to me to be intended to reinforce, and to give practical effect to, those two purposes. (para.42)
>
> Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the [tribunal] should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements. (para.44)
>
> Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be – i.e. as if the Requirements had been complied with." (para.45)

77. Further, in relation to the Respondents' general criticism of a lack of transparency, at para.52 Lord Neuberger stated that:

> "I do not agree with the courts below in so far as they support the proposition that sections 20 and 20ZA were included for the purpose of "transparency and accountability", if by that it is intended to add anything to the two purposes identified in section 19(1)(a)(b)."

78. It is true that *Daejan v Benson* was concerned with an application for dispensation after works had been completed. As such, it is easier to identify and measure prejudice to a leaseholder if, for example, a leaseholder can point to the fact that if proper consultation had taken place, they would have had the opportunity to nominate a specific contractor who might have done the job more cheaply. Here, however, the lessees have had that opportunity because a consultation process has already taken place. Mr Boorman submitted, having regard to the Upper Tribunal's decision in *Aster Communities v Chapman* [2020] UKUT 177 (LC), that although the factual burden of establishing prejudice is on the lessees, this may be discharged without necessarily calling evidence. He also stressed that the tribunal may attach conditions to the granting of dispensation. However, while it is correct that the tribunal can attach conditions to dispensation, in the present case, the tribunal does not accept that it would be appropriate to do so or that prejudice of the kind identified by *Daejan v Benson* has been established. The consultation process gave opportunity to the Respondents to make observations and nominate a contractor as required under the legislation. Further, the process does not give the right for the lessees to determine the ultimate contractor or the terms of any contract entered into between the landlord and contractor. Accordingly, to the extent that it was argued that there had been a breach of consultation requirements or prejudice suffered as a result of a failure by the Applicants to agree to leaseholder proposals for the carrying out of the works, or indeed for both parties to meet and agree a way forward, such argument cannot be sustained.

79. Ultimately, even if it can be argued that aspects of the process might have been done differently, the tribunal comes back to the fact that no breach of the 2003 Regulations has been established. The tribunal finds no evidence that the process was a sham and, given that the Metromec quote was the cheapest, it cannot be said that the tender price was not reasonable.

80. In conclusion, for the reasons set out above and in light of the tribunal's finding that the change in the scheme of works does not necessitate a further consultation exercise, insofar as it is necessary, the tribunal is prepared to grant dispensation under section 20ZA of the1985 Act.

Conclusion and decision

81. For the reasons set out above, the tribunal grants the Applicants' application (as amended) under section 27A(3) of the 1985 Act, subject to the caveat that leaseholders are not precluded from raising a defence in any future proceedings for the recovery of service charges of historic neglect or that the Applicants might have taken advantage of a

guarantee/indemnity or insurance policy (or from bringing a claim for damages for breach of covenant).

82. Subject to the above qualification, the tribunal finds that the costs would be recoverable under the terms of the lease and that the costs would be payable, noting that the chosen tender was the least expensive and in light of the tribunal's finding that there has not been a breach of the Consultation Regulations.

83. As to the dispensation application under section 20ZA, although there has been a change to the Applicants' case conceding that the works should include investigation as to whether parties of the cabling can be re-used, for the reasons set out above, the tribunal grants dispensation insofar as is necessary.

Consequential directions

(1) If the Respondents wish to make an application under section 20C of the 1985 Act for an order that that all or any of the costs incurred, or to be incurred, by the Applicants in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge, they should do so within 28 days of the date of this decision setting out the reasons which it would be just and equitable to make such an order.

(2) The tribunal will then issue direction to allow the Applicants to respond.

Name: Judge Sheftel **Date:** 24 March 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).