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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0021/06/14

In the matter of 95 - 97 Cathedral Road, Cardiff CF20 4DZ
In the matter of Applications under Sections 27A, 20ZA and 20C of the Landlord and Tenant Act 1985

Tribunal	David Evans LLB LLM Kerry Watkins FRICS
Applicants	Mr Brynley Gwynne Llewellyn Morgan and Ms Julia Claire Morgan
Respondents	Mr D Fletcher, Mrs C Jarrett, Mr P Mackenzie and Ms A Robinson, Rev A and Mrs K Kettle, Ms A Cartledge and Mr M Lemkey, Mr and Mrs G Fairclough

DECISION

Background

1 On the 15th and 16th September 2014, we heard an application brought by the Applicants, who are the freehold owners of two adjoining semi-detached houses in Cathedral Road Cardiff (the Building), to determine the amounts payable by way of service charge by each of the Respondents who are the lessees of 6 of the 8 flats which comprise the majority of the Building. The remaining two flats are owned in some capacity by the Applicants. In addition there is a dental surgery on the ground floor of number 97 and a dental laboratory in the basement below the dental surgery. The application relates to service costs incurred between:
- 4th April 2012 and 28th September 2012 totalling £7,146.02 (2012 costs);
- 29th September 2012 and 24th March 2013 totalling £1,535.84 (2013 costs);
and estimated service costs to be incurred between:
- 25th March 2013 and 24th March 2014 totalling £61,346.57 (2014 costs).
The 2012 costs technically fall into the financial year ending 24th March 2013, but that is not an issue for us. The application in respect of the 2012 costs originally only related to Mr Fletcher. However, at a pre-trial review held on the 15th July 2014, the Rev and Mrs Kettle and Mr and Mrs Fairclough asked for permission to be joined as Respondents in respect of this demand as they wished to question the payability of an invoice for roofing work, which was Mr Fletcher's only objection .Mr and Mrs Fairclough also asked that they be permitted to challenge the electricity costs for 2012. The Applicants confirmed through their Solicitor that they

had no objection to this and so we have directed accordingly. Mr and Mrs Fairclough and the Rev and Mrs Kettle have raised other issues in respect of the 2013 costs and we shall refer to these later in this decision. The applications in respect of the 2013 costs and the 2014 costs concerned all the Respondents.

2 The relationship between the parties has for many years been somewhat troubled. We shall not go into the details of the many and varied disputes save to say that the basic problem is, what the Respondents regard as, the inequitable allocation of the service costs. The Respondents are paying 1/6th, 1/8th and 1/12th of those costs, whilst the Applicants as owners of the two largest flats only pay 1/32nd and 1/96th. In addition, the Applicants are entitled to receive 15% of those costs as a management charge. The combined effect of the apportionment of the service costs and the management percentage is that the Applicants pay nothing towards the service costs, despite owning the two largest flats, and receive a net management percentage of nearly 11%. An application to vary the percentages was overturned in the Upper Tribunal.

3 The issues which we have been asked to resolve relate to the following:

(a) whether certain Respondents - Mr Fletcher (flat 3), the Rev and Mrs Kettle (flat 6) and Mr and Mrs Fairclough (flat 8) - should be required to contribute to the cost of work carried out to the roof of number 97 Cathedral Road by Martin Roofing Contractors (MRC) and described in an invoice dated the 24th September 2012 as "replace lead work", the cost of which is stated as being £1,440.00 inclusive of VAT. The cost also includes the replacement of some damaged slates.

(b) whether certain Respondents - in particular, Mr Fairclough - are required to contribute to the cost of insuring the Building under the terms of their respective leases.

(c) whether certain Respondents - in particular Mr Fairclough and the Rev and Mrs Kettle are required to contribute to the cost of the communal electricity, fire extinguisher service and fire alarm/lights service under terms of their respective leases.

(d) whether the Respondents should be required to contribute to the costs charged by Roger North Long and Partners , Chartered Surveyors (RNL), in respect of an invoice for £695 inclusive of VAT in respect of and arising from the statutory consultation carried out on the Applicants' behalf relating to certain building works to be carried out at the Building.

(e) the amount which the Respondents should be required to contribute on account of those building works and to RNL's fees for supervision.

It will be necessary for us to determine these issues before we are able to address the detail of the amounts payable by each Respondent.

The Leases

4 One of the difficulties in this case is that the leases are not all the same. We were provided with copies of leases for Flat 3 (Mr Fletcher), Flat 6 (Rev and Mrs Kettle) and Flat 8 (Mr and Mrs Fairclough). We did not have copies of the leases for Flat 95A (Mrs C Jarrett), Flat 1 (Mr MacKenzie and Ms Robinson), Flat 4 (Ms Cartledge and Mr Lemkey). At the conclusion of this decision we shall refer the

application back to the parties for them to seek agreement as to the actual amounts payable with liberty for any party to apply to us in the event that they are unable to agree. We shall refer to the lease of Flat 3 as "the Fletcher Lease", Flat 6 as "the Kettle Lease" and Flat 8 as "the Fairclough Lease". Mrs Fairclough has, in addition, a lease of the restricted attic space above Flat 8. No issue arises concerning this.

5 In respect of the Fletcher Lease, the Kettle Lease, and the Fairclough Lease, the Lessors are Rowland Vaughan Jones Morgan and Anita Clare Morgan. The leases are for 99 years from the 25th March 1989 in consideration of differing premiums and at differing ground rents. The relevant clauses referred to in this application are:

The Fletcher Lease - Flat 3

Date - 14th December 1990
Premium - £36,000
Ground Rent - £100 pa

Premises (First Schedule)

ALL THAT First Floor Flat…ncluding the ceilings and floors and the window frames of the said flat …PROVIDED there shall be excluded from this demise the main structural parts of the [Building] including the roof foundations and external walls but not the window frames of the said flat and the glass therein nor the interior faces of such of the external walls as bound the said flat.

Retained Parts

The main structure and other parts of the [Building] comprising all parts not demised by the Flat Lease or any other Lease of any part of the [Building] including the roof foundations and external walls (but not the glass of the window of the flat nor the window frame…) and the common use areas (if any) and walls around part thereof and such other parts of the Property which shall not be demised as aforesaid

Lessee's covenants

Clause 2(ii) - To pay one eighth of the Service Charge (as hereinafter defined) which shall from time to time be prescribed by the Lessor relating to matters specified in the Third Schedule.
Clause 2(iii) - To pay on demand and on account of the said contribution to the Service Charge such proper sum as shall reasonably be specified by the Lessor's surveyor or auditor (whose decision shall be final) as being the estimated amount due from the Lessee in respect of the period specified in the notice requiring payment on account which shall not exceed twelve months and shall not overlap the period in respect of which any previous notice has been served.
Clause 3(b) - To pay and discharge all rates taxes assessments and outgoings and impositions whatsoever (whether parliamentary or otherwise) which are now or may at any time hereafter during the term be assessed charged or imposed upon the demised premises or upon the owner or occupier thereof.

Clause 3(c) - In the fourth year of the said term and also in the last year thereof to paint colour wash or otherwise treat as the case may be the entry door and window frames and interior surfaces of the demised premises usually painted papered coloured washed or otherwise treated including ceilings all in a proper and workmanlike manner.
Clause 3(d) - From time to time and at all times during the said term well and substantially to repair cleanse and keep in good and substantial repair and condition the demised premises including for the avoidance of doubt all additions thereto and all glass in the windows the window frames…and to replace and renew all such items as and when necessary

Lessors' covenants

Clause 4(i) - To carry out the works of repair and maintenance and care of the Retained Parts of the [Building] and all other matters and obligations referred to in the Third Schedule hereto
Clause 4(ii)(a) - To insure and keep insured the [Building] throughout the said term in a sum equal to the full reinstatement value

Lessors' obligations in respect of which the Service Charge is made (the Third Schedule)

Paragraph 1 - The insurance premium referred to in Clause 4 sub-clause (ii) of this Lease shall form part of the Service Charge
Paragraph 2 - To pay and discharge or cause to be paid or discharged all rates taxes assessments outgoings and impositions whatsoever (whether parliamentary parochial or otherwise) which may at any time hereafter be assessed charged or imposed on the Retained Parts or any other part of the [Building] which is not for the time being comprised in any Lease or imposed on the owner or occupier in respect thereof.
Paragraph 4 - To paint from time to time all the outside wood and metal work of the [Building] and any other parts of the [Building] usually required to be painted
Paragraph 5 - To keep the external walls and stonework of the [Building] in good decorative repair and condition
Paragraph 9 - Generally to manage the [Building] for the common good of the Lessee and the Lessor and to employ and pay such servants managing and other agents Surveyors….as may be appropriate and all fees and disbursements expenses and costs together with VAT thereon paid to any such person or persons shall form part of the Service Charge element. So long as the Lessor does not employ Managing Agents the Lessor shall be entitled to add the sum of 15% of all costs and expenses incurred by the Lessor hereunder
Paragraph 11 - To pay any costs or expenses incurred by the Lessor in exercising his rights or carrying out his obligation hereunder or in doing works for the improvement of the [Building] or in providing services for the Lessee including any expenses required to comply with the provisions of any enactment and the costs and expenses of enforcing covenants or obligations in the Flat Lease.

The Kettle Lease- Flat 6

Date - 27th October 1995

Premium - £50,000
Ground Rent - £50 pa

Premises and Service Rent Fraction (Fifth Schedule)

Flat 6 on the first floor
Service Rent fraction: one sixth

Clause 8(iii) - …a flat on the first or second floor includes the floor and ceilings of the flat and the internal and external walls of the flat between the same levels.

Service Rent

Clause 1 - …YIELDING AND PAYING…secondly by way of service rent the sums payable under clause 2 hereof at the times and in the manner therein provided.
Clause 2(i) - The service rent shall consist of the fraction mentioned in the Fifth Schedule hereto of the costs expenses outgoings and matters mentioned in Part I of the Fourth Schedule hereto (hereinafter called "the service expenses"). Part II thereof shall be incorporated in this lease.
Clause 2(ii) - The service expenses for each year shall be estimated by the Lessors' managing agents (hereinafter called "the managing agents") or if none the Lessors from time to time and the Lessee shall pay the estimated contribution by two equal instalments on the 25th day of March and the 29th day of September in that year

Lessee's covenants

Clause 4(i)(b)- To pay all rates taxes assessments charges impositions and outgoings which may at any time during the said term be assessed charged or imposed upon the demised premises or the owner or occupier in respect thereof and in the event of any rates taxes assessments charges impositions and outgoings being assessed charged or imposed in respect of premises of which the demised premises form part to pay a proper proportion of such rates taxes assessments charges impositions and outgoings attributable to the demised premises.
Clause 5(i) - To keep the demised premises and all walls party walls sewers drains pipes cables wires and appurtenances thereto belonging (other than the parts thereof comprised and referred to in paragraphs (c) and (e) of Clause 6 hereof) in good and tenantable repair and condition
Clause 5(ii) - …to paint with two coats of best quality paint paper and distemper in a good and workmanlike manner all the inside parts of the Flat respectively heretofore or usually painted papered or distempered.

Lessors' covenants

Clause 6(c) - That (subject to contribution and payment as hereinbefore provided) the Lessors will maintain repair redecorate and renew (i) the roofs main structure and foundations of the building; (ii) the boundary walls fences gutters and rainwater pipes of the building; (iii) the gas and water pipes drains and electric cables and wires in under and upon the building other than those serving only one flat in the building.

Clause 6(d) - That the Lessors will at all times during the said term insure and keep insured the building…against loss or damage by fire and such other risks (if any) as the Lessors shall from time to time think fit.
Clause 6(e) - That (subject as aforesaid) the Lessors will so often as reasonably required decorate the exterior of the building…heretofore or usually painted .

Costs Expenses and Outgoings and Matters in respect of which the Lessee is to contribute (the Fourth Schedule)

Paragraph 1 - The expenses of maintaining repairing redecorating and renewing (a) the roofs main structure gutters rainwater pipes communal entry phone and television aerial system or systems (other than the wires of such system or systems serving only one flat in the building) of the building; (b) the water and gas pipes drains electric cables and wires in under and upon the building serving the whole or part or parts of the building (other than those serving only one flat…in the building) and (c) the entrances halls landings and staircases of the building leading to the flats.
Paragraph 2 - The expenses of decorating the exterior of the building…heretofore or usually painted.
Paragraph 4 -The cost of insurance in carrying out their obligations under clause 6(d) and against third party risks and public liability in respect of the building if such insurance shall in fact be taken out by the Lessors.
Paragraph 10 - So long as the lessors do not employ managing agents they shall be entitled to add the sum of Fifteen per cent to any of the above items for administration expenses.

The Fairclough Lease - Flat 8

Date - 8th April 1993
Premium - £38,000
Ground Rent - £50 pa

Premises and Service Rent Fraction (Fifth Schedule)

Flat 8 on the second floor
Service Rent fraction: one sixth

Clause 8(ii) - …a flat on the top floor includes the floor of the flat the internal and external walls of the flat above the same level and the roof of the building so far as it constitutes the roof of the flat

The other terms of the Fairclough Lease are in identical terms to those of the Kettle Lease except for paragraph 4 of the Fourth Schedule which reads as follows:
Paragraph 4 -The cost of insurance against third party risks and public liability in respect of the building if such insurance shall in fact be taken out by the Lessors.

The Original Hearing

6 The application was originally listed for hearing on the 6th August 2013. Mr Morgan attended and the Applicants were represented by Mr Phillip Evans, Solicitor. Mr Fletcher, Mr Fairclough (representing himself and Mrs Fairclough) and Mrs Kettle (representing herself and the Rev Kettle) also attended. We shall refer to these Respondents as Participating Respondents. The Applicants' Solicitors had, as directed, prepared a bundle of documents to which further documents have been added for the purposes of the later hearing.

7 During the course of the first day, the Applicant's Solicitor conceded that he had not fully considered the implications of the decision of the High Court in Phillips and Goddard -v- Francis and Francis [2012]EWHC 3650 (Ch) (Phillips -v-Francis) (since overturned on appeal). The Applicants thereupon completed and filed an application under s20ZA of the Landlord and Tenant Act 1985 (the Act). The Participating Respondents did not object to this. On the morning of the 7th August, Mr Morgan and the Participating Respondents, together with Mr Evans, conferred at length and came to an agreement (the Agreement) as to how to deal with nearly all the issues raised in the two applications as well as other issues and the question of costs (s20C of the Act). The terms of that Agreement were recorded in a document and Mr Morgan, Mr Fletcher, Mr Fairclough and Mrs Kettle signed the Agreement on behalf of the Applicants and the Participating Respondents. The parties present recognised that there may still be other issues which may need to be determined by the Tribunal. We shall refer to this later.

8 There were two issues which we were asked to determine at the original hearing:

- the Respondents contended that notwithstanding the fact that the leases stated the proportion of service costs payable by the Respondents, the Tribunal had a discretion under section 27A of the Act when determining "the amount which is payable" to determine an amount less than the proportion prescribed in each lease;
- the Respondents also contended that it was not reasonable for the Applicants to charge administration fees of 15% of the cost of the works proposed at the Property and on the surveyor's fees.

After hearing the evidence and the arguments of both parties, we concluded that we had no power to determine as payable an amount less than the individual lessee's proportion of the service costs as defined by the lease. We also determined that the Applicants' fees for managing substantial building works which were in effect being supervised by a Chartered Surveyor were not reasonably incurred.

The Second Hearing

9 At the request of the Respondents, the matter was relisted. Directions were given at a pre- trial review on the 15th July 2014. Neither the Applicants nor their Solicitor attended. The hearing was arranged for the 15th -17th September 2014. The Applicants' Solicitor advised the Tribunal that on economic grounds, he would not be attending. He also informed the Tribunal of the Applicants' decision to defer the carrying out of certain controversial works to the car park at the rear of the Building and to withdraw the projected cost of that element from the 2014 costs. The

Tribunal asked for confirmation that the Applicants and their experts would nonetheless attend. The Tribunal was informed that they would not. No disrespect was intended.

10 We inspected the Building prior to the hearing on the first day. Mr Fletcher, Mrs Kettle and Mr Fairclough on behalf of the Participating Respondents attended, but neither of the Applicants did so. We were able to access the exterior of the Building and the internal common parts - hall, stairs and landings - as well as Flat 8 (Mr and Mrs Fairclough) which is currently tenanted. We were able to note the extent of the damp penetration in Flat 8 and, from ground level, the condition of the coping stones on the parapet above Flat 8 and the fact that the kneeler block had moved.

11 Under the terms of the Agreement, a report had been obtained from Mr Andrew Ball MRICS FFB DipArb dated 25th June 2014. The report appears at page 365 of the Hearing Bundle. We shall refer to this later in this Decision. We have also considered the following documents written on behalf of the Applicants (the Applicants' documents):
- Letter dated 9th July 2014 from LG Williams & Prichard
- Letter dated 28th July 2014 from LG Williams & Prichard
- Letter dated 1st September 2014 from LG Williams & Prichard containing the Applicants' submissions
- E-mail dated 11th September 2014 from LG Williams & Prichard
- Letter dated 26th September 2014 from L G Williams & Prichard
- Letter dated 11th November 2014 from L G Williams & Prichard.

When giving evidence and in making their arguments and submissions, the Respondents were invited to deal with points raised in the Applicants' documents. We also considered e-mails from Mr Fairclough dated the 29th September 2014 and the 19th November 2014.

12 Whilst we are accustomed to situations where parties are unable to continue to fund the cost of legal representation, it is very rare that a party to an application who has been actively involved does not attend the hearing. It is almost unheard of that the absenting party is the one seeking the determination. Whilst we appreciate that no disrespect is intended, such absence can and does cause the Tribunal considerable difficulties in conducting a fair and balanced hearing and in making "proportionate decisions on the conduct of the case" (see Red Kite Community Housing Ltd -v- Robertson [2014]UKUT 0134 (LC)). Consequently, in view of the unfortunate history, we have determined certain issues of principle but felt it necessary to refer back to the parties inviting evidence and submissions so that if they are unable to agree on the application of the principles, we will be able to reach a determination taking into consideration such additional evidence and submissions.

The Agreement (p.362)

13 Before we proceed further with this application, we have to consider the effect of the Agreement. It was negotiated on the second day of the original hearing at a time when the parties recognised that to contest all the issues would be a long, laborious and costly exercise which would do nothing to improve the relationship

between them. The Agreement was intended to be comprehensive and also dealt with issues which were not part of the proceedings before this Tribunal. It is apparent from the correspondence that some of the items contained in the Agreement have been carried out. It is equally apparent that disagreements have arisen concerning some of the other issues.

14 In their letter of the 9th July 2014, the Applicants' Solicitors suggest that the Agreement has been fulfilled with the exception of the issue of the car park. As the Applicants have withdrawn the cost of the work to the car park - the only contentious issue - the Agreement could now be regarded as being executed and there was nothing further for the Tribunal to consider. They indicated that they would not therefore attend the pre-trial review on the 15th July 2014. At paragraph 39 of their submissions, the Applicants' Solicitors (when considering whether or not they are able to seek costs) suggest "whether the Agreement still subsists … is a moot point."

15 The effect of an agreement resolving issues between contesting parties has recently been considered by HH Judge Gerald in the Upper Tribunal in the case of The Jam Factory Freehold Ltd -v- Bond [2014] UKUT 0443 (LC)(the Jam Factory). In his decision, he referred to the case of BCCI -v- Ali [2001] 1 AC 251 (BCCI) and in particular to the passage in the speech of Lord Bingham as follows: "In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course enquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."

16 Each case must depend upon its own facts. Where there are comprehensive agreements involving a number of inter-related points, it is a question of fact and degree whether the breach of any particular point entitles the other party to insist on full performance of the terms or whether the non-offending party is entitled to tear up the agreement so that the parties are then absolved from further performance of their outstanding obligations. This aspect is particularly important because under paragraph 2 of the Agreement the parties agree that Mr Andrew Ball, a Chartered Surveyor, shall "determine" whether certain works were "defective" and because in paragraph 11 of the Agreement, the parties agreed that:
"On the basis of the above agreement the leaseholders will raise no issues in relation to the actual expenses for the period 29.9.12 to 24.3.13"
We therefore need to consider whether, under paragraph 2, the Respondents are bound by Mr Ball's determination and whether, under paragraph 11, they are precluded from seeking a determination that the 2013 costs were reasonably incurred since the costs have "been agreed or admitted by the [Respondents]" (s 27A(4)(a) of the Act). On the first point, the Applicants argue that the Respondents are bound by Mr Ball's finding that the MRC works were not defective. The Respondents, on the other hand, argue that, notwithstanding Mr Ball's opinion, the MRC works were in fact defective and in his e-mail dated 19th November 2014, Mr Fairclough reminds the Tribunal that its jurisdiction cannot be avoided (section 27A(6) of the Act). The Applicants' Solicitors have not taken that argument further.

With regard to the second of the issues (paragraph 11), we felt that s 27A(4)(a) of the Act had not been considered by the parties and so we invited them both to submit their written representations on this point.

17 In their letter of the 11th November 2014, the Applicants' Solicitors note the similarities between this case and the Jam Factory case. They draw the Tribunal's attention to the matters identified in the Agreement. The first matter relates to the MRC works. The second sets out the process for determining the dispute relating to the car park works. Mr Fairclough was supposed to provide "detailed submissions" relating to the car park works, but he did not. Accepting that this issue was still contentious, the Applicants decided to remove it from the scheduled works so that the remaining items could be carried out without any dispute. Next, the parties agreed that the Respondents would raise no issues as to the 2013 costs. This meant that they would raise no question as to the amount or reasonableness of the charges or the Respondents' obligation to pay them. In the Applicants' view that constitutes an agreement for the purposes of section 27A(4)(a) of the Act and the Respondents cannot therefore raise the 2013 costs in these proceedings.

18 Mr Fairclough responded by e-mail dated 19th November 2014. His views were supported by the Rev and Mrs Kettle in a letter dated the 18th November 2014 sent to the Applicants' Solicitors and forwarded to the Tribunal by e-mail on the 19th November. Mr Fairclough raises a number of points. Firstly, paragraphs 1 and 13 of the Agreement specifically allow for either party to return the application to the Tribunal. Further paragraph 5 of the decision dated 15th August 2013 also allows for this to be done. Paragraph 5 of that decision reads: "the Applicants and the Participating Respondents having agreed terms as set out in a document signed by them and lodged with the Tribunal, the Applications under sections 27A, 20ZA and 20C of the Landlord and Tenant Act 1985 are adjourned with liberty to any party to apply for further directions or a hearing."

19 Paragraph 11 of the Agreement starts with the phrase "on the basis of the above agreement". In Mr Fairclough's view this means that the agreement relating to the 2013 costs was conditional upon the Applicants' carrying out their obligations as set out in paragraphs 1-10 of the Agreement. It is necessary to look at the contract as a whole. In paragraph 9.3 of the Agreement, he was required to put a detailed submission to RNL in relation to the extent of the car park works, "the drainage detail, the cost of the works, and such other matters as he shall consider relevant and RNL shall respond fully to the submission". Although Mr Fairclough was late in submitting this information, about which no point has been taken, RNL indicated that it would respond "if instructed by Mr Bryn Morgan…" According to Mr Fairclough, if RNL had responded either justifying the invoice for £695 or carrying out the work charged for, the Respondents would not have raised the issue again. As it is, RNL did not respond. In his view, it follows that the basis of the agreement not to raise issues relating to the costs "is rendered void". The Applicants' Solicitors' letter of the 14th September 2014 acknowledges his comments on the reduction of the car park specification. The Applicants have not fulfilled their obligations under the agreement.

20 Mr Fairclough also suggests that even though the Applicants have set out their interpretation of the Fairclough Lease relating to the payability of the electricity

charges, they have not opposed his "contention of these costs, or make any reference to the agreed terms under discussion". Again, the Applicants "do not appear to oppose [the Respondents'] contention to the electricity costs" although they make reference to them in paragraph 14 of their Solicitors' letter of the 1st September 2014.

21 He cannot see the relevance of section 27A(4)(a) of the Act as the lessees are Respondents and did not make the application. In any event under section 27A(6) "an agreement (other than a post dispute arbitration agreement) is void insofar as it purports to provide for a determination in a particular manner of any question which may be subject to an application

22 Although the Applicants' Solicitors state that the Applicants would wish to follow the agreement as far as possible, they have not done so. Mr Ball's report was only issued after the case was relisted - 10 months after the Agreement was made. The purpose of the report was to find the source of the ingress of water into flat 8.The Applicants abandoned the works to the car park days before the second hearing. The vans remain on site and are to do so until after the car park works are completed. If the Applicants are not required to abide by the terms, Mr Fairclough argues, the Respondents should not be bound either. Paragraph 11 of the Agreement only relates to the 2013 costs and makes no reference to the 2012 costs.

Determination

23 In BCCI, Lord Bingham instructs us to treat agreements such as this in the same way as any other agreement. The approach is that generally referred to in the speech delivered by Lord Hoffman in Investors Compensation Scheme Ltd -v- West Bromwich Building Society [1998] 1 WLR 896 at 912-913 (West Bromwich). We are to ascertain the meaning which the clause, or in this case the Agreement, would convey to a reasonable person having all the background knowledge reasonably available to both parties. To do so we must give the words used "their natural and ordinary meaning in the context of the agreement". It is an objective judgment. We do not enquire into the parties' subjective states of mind. Nor do we consider pre-contract negotiations (see West Bromwich and Chartbrook v- Persimmon Homes Ltd [2009] UKHL 38). We must take into consideration that the Agreement is a practical document. It was drafted with the intention of resolving a wide range of issues, some of which were not matters for the Tribunal. We should therefore adopt a "commercially sensible construction" (per Lord Steyn in Mannai Investment Co Ltd -v- Eagle Star Life Assurance Co Ltd [1997] AC 749 at 771). We should not apply "technical interpretations" or place "undue emphasis on niceties of the language". As Lord Diplock commented in The Antaios [1985] AC 191, "if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion which flouts business common sense, it must be made to yield to business common sense".

24 We are satisfied that the Agreement was entered into freely by both parties and was intended by both parties to provide a way forward in resolving many of their differences. The Agreement deals with a number of issues:

- The Participating Respondents consent to a section 20ZA application relating to matters in the 2012 costs and 2013 costs.
-The parties agree that Andrew Ball is to be instructed to determine whether the MRC work is "defective". The cost of the scaffolding for the inspection will be borne by the Respondents. If the MRC work is defective, the Applicants will accept the costs for the MRC work and the cost of its removal. The Respondents will arrange for quotations for remedial work. Upon receipt of the quotations, the parties will need to agree the contractor and if possible the price.
- Work to the frontage of 95 and 97 is to go ahead with any additional work to 97 to be carried out at the same rates as for 95.
- Way forward in relation to car park and pathway repairs. If the parties cannot agree, any party may ask for the case to be re-listed.
- The Applicants are to pay for any outstanding consultation by RNL relating to car park and pathways.
- Respondents will not raise any issue in respect of the 2013 costs.
- Way forward in respect of the internal decoration.
- Applicants will arrange and pay for construction of velux light in roof of flat 8.
- Applicants to pay £250 to Mr Fairclough in respect of damage to flat due to water ingress.
- Way forward relating to removal of grassed area in front of the Building.
- Applicants will not charge the Respondents the costs of these proceedings.
- Way forward regarding the vans in the car park.

25 The first thing to note about the Agreement is that it covers such a wide range of topics. The paragraphs are not drawn with the sort of precision generally found in a legal document. Some are vague and the consequences of failure to comply are not always clear. For example, Mrs Kettle agreed to obtain and submit estimates for the removal of the grassed area at the front of the Building. There is no consideration given as to what happens if she does not. The last of the paragraphs refers to the removal of derelict vans which are taking up room in the car park. The Applicants agreed to locate the owner and request the removal of the vans. They have done so but the vans are still there. There is no obligation on the Applicants in the Agreement to do anything more - only if the owner cannot be found. At paragraph 14, the Applicants agreed to replace the roof light installed in Flat 8 "upon undertaking the s 20 works". With the delay in carrying out these works, the roof light has not been replaced and is still leaking.

26 Then there is the question of whether MRC work was "defective". The consequence of its being so is that the Applicants will bear the cost of the MRC invoice as well as the cost of removing the MRC work. The Agreement does not state what happens if the MRC work is not "defective", as Mr Ball determines. It does not even make it clear what is meant by "defective" in the context of the Agreement. We shall deal with this aspect later in this decision. To confuse matters somewhat, the proposal for works to the car park has been abandoned by the Applicants for the purpose of these proceedings. They considered this to be the only contentious issue and by abandoning it, they have eliminated the areas of dispute. They have effectively conceded the point. It is clear that viewed objectively, some parts of the Agreement have been fulfilled, some have been delayed and some have been rendered unnecessary. Some are a matter of dispute.

27 Section 27A(4) of the Act states that no application to determine service charges may be made in respect of a matter which "(a) has been agreed or admitted by the tenant, (b) has been … referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party…". Subsection (5) qualifies this by adding that payment is not to be taken as agreement or admission and subsection (6) makes it clear that "an agreement by a tenant of a dwelling (other than a post-dispute arbitration agreement) is void insofar as it purports to provide for a determination (a) in a particular manner, or (b) on particular evidence, of any question which may be the subject of an application.

28 The issue of the MRC work is whether the costs were reasonably incurred and whether they were of a reasonable standard (s 19(1) of the Act). Mr Ball has said that the works are not defective. That is his opinion of the work as a job in isolation. It is not a determination of the issue as to whether the cost of the work was reasonably incurred. He was not asked to determine that. He has concluded that what was done as a job was not defective (although the Respondents have a different view on this). If he had concluded that the MRC work was defective, then the Applicants accepted that they could not ask the Respondents to pay for it. However, this Tribunal has to look at the issue in much wider terms and ask whether the costs were reasonably incurred. His observation that the work was "almost if not completely pointless", might indicate that it was not, but that is not a matter for consideration at this stage.

29 We must also consider what the parties meant by "defective" in the context of the Agreement. Mr Ball has interpreted the word "defective" in a somewhat restrictive manner, namely, does the work have some inherent defect? The Respondents have taken a broader view, namely, whether the work fails to achieve its purpose, to cure the damp in flat 8? Chambers' Dictionary defines "defective" as "having defect, wanting in some necessary quality, imperfect, faulty, insufficient…" The Oxford English Dictionary on-line adds "flawed… inoperative, not working unsound". In the context of the agreement, the word "defective" must go to the effectiveness of the work in curing the damp problem. If it did not, it was "wanting in some necessary quality" or "imperfect" or "insufficient". It was certainly "not working". In fact, it is arguable that it was defective as the photograph on page 372 clearly shows.

30 From the point of view of both parties, the purpose of this part of the Agreement was to establish that the Applicants would pay if the MRC work was not satisfactory. It did not and was never intended to commit the Respondents to paying for the MRC work if Mr Ball were to regard the work as not being "defective". Such an arrangement would have been an attempt to avoid the Tribunal's jurisdiction and would fall foul of s27A(6). The Applicants' Solicitors would have been well aware of this when the Agreement - whatever its deficiencies - was drawn up. The Applicants have not sought to raise any further submission on the point.

31 Section 27A(6) does not apply to post-dispute arbitration agreements. Neither party has suggested that the Agreement was a post-dispute arbitration agreement. In our view, it cannot be. Arbitration is a formal process. Instructing Mr Ball to profess an opinion as to whether the MRC work was defective is not arbitration. Whilst it was intended to facilitate a settlement, it was never intended as a binding

determination. There was nothing "judicial" about the procedure. Section 33 of the Arbitration Act 1996 states that the arbitrator shall:
(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
Mr Ball did not request and the parties did not prepare submissions. No consideration was given as to the interpretation of the Agreement or indeed as to the statutory questions that needed to be dealt with. Nor did Mr Ball seek to determine whether the costs were payable by the Respondents. Mr Ball was simply asked for his professional view of the particular task carried out by MRC.

32 The Agreement is not an arbitration agreement and therefore cannot displace the Tribunal's jurisdiction. It cannot preclude us from considering whether the costs of the MRC work were reasonably incurred. As we have stated above, it does not seek to do so. The Agreement states that the Applicants will pay if the work is "defective". It does not say that the Respondents will pay if it is not. We shall of course give due weight to Mr Ball's report. We will however regard it as evidence and not as a determination as to the payability or otherwise of the costs of the MRC work.

33 The other issue is the nature of the agreement contained in paragraph 11. Without the reference to "the basis of the above agreement", the words "the leaseholders will raise no issues in relation to the [2013 costs]", looked at objectively, can only mean that the Respondents admitted and agreed to pay the 2013 costs. If it was not intended to convey that meaning, there was no point in putting it in the Agreement. The question is whether and to what extent the preamble "on the basis of the agreement" modifies or negates that agreement. Inevitably, the parties take opposite views. For the Applicants, their Solicitors argue that whilst all the matters in the Agreement have not been concluded, by signing up to the agreed terms, the Respondents would accept the 2013 costs. The Respondents' view is that this was conditional upon the parties fulfilling their obligations in paragraphs 1-10 of the Agreement. If the Applicants failed to fulfil any of their obligations, the Respondents were not obliged to fulfil theirs. Mr Fairclough refers particularly to paragraph 9.3 of the Agreement (paragraph 4 of his e-mail of the 19th November). His argument is that because Mr Morgan failed to instruct RNL to respond or RNL chose not to respond to his letter of the 14th October 2013 (p 388), the Applicants had not abided by the terms of the Agreement. The Respondents were therefore entitled to withdraw from the agreement not to challenge the 2013 costs. In particular, Mr Fairclough points out that he mentioned the disputed RNL fee of £695 in his letter of the 14th October 2014 (at p 390). If RNL had responded either justifying the fee or by carrying out the work billed, the Respondents would have raised no issue.

34 Looking at the Agreement objectively, the purpose of paragraph 9.3 of the Agreement was to give the Respondents an opportunity to put forward an alternative scheme for the car park. Item 9.03 of the specification is the detailed structure of the car park proposed by RNL. Under paragraph 9.3 of the Agreement, Mr Fairclough was required to put a detailed submission to RNL in respect of that item. With all due respect to Mr Fairclough, that is not what his letter of the 14th October 2013 does. It

is over 5 pages long (pp 388 to 393) and mentions the car park at the bottom of page 391 under numbered item 1 and the footpath on page 392 under numbered item 5.In each case Mr Fairclough refers RNL to its condition report. Under item 11.00 of that report (at p 97), there is reference to "the tarmacadam areas to the rear are worn and uneven" for which the remedial work of "relay tarmacadam" is costed at £6,000. Since the Respondents' argument was in relation to the specification - in particular to the depth of levels of each course - it is reasonable to conclude that the "detailed submission" would make reference to alternative depths of the levels of the various courses. We can understand that Mr Fairclough may not have wanted to assume a legal responsibility should his suggestions prove inadequate, but the least that could be expected would be his argument as to why the specification was more than was required with some reference to the type of specification (and cost) which would be have been acceptable. The generalised comments in past discussions about "a supermarket car park" or a "Rolls Royce" job take the matter no further. Going over old ground was not what was required. The Agreement was an attempt to move the debate forward. In our view, Mr Fairclough must share some of the responsibility for the difficulty. If he had felt unable to be specific in his submission, there was no reason why the Respondents could not have instructed their own surveyor.

35 Paragraphs 9 and 10 of the Agreement envisaged some dialogue or consultation. The Respondents agreed to pay the RNL charges on the assumption that this would take place. The Applicants agreed that that there would be no further cost to the Respondents for that dialogue or further consultation. The words in paragraph 11 "on the basis of the above agreement" are quite specific. They cannot refer to the entirety of the Agreement as it refers to "the above agreement", an agreement which is earlier in the document. "Agreement" is also singular. It must therefore refer to a single issue. That issue could, of course, involve an obligation to do several things. Mr Fairclough considers that it refers to paragraph 9. However, that clause lists a set of tasks which RNL and Mr Fairclough are to carry out. It is not in itself an agreement. At its highest, it is arguable that it is an undertaking by the Applicants to ask RNL to comment upon the matters raised in paragraph 9. However, such an interpretation does not fit the sense of what the Respondents were trying to achieve. It is too uncertain. To forgo their rights to dispute the 2013 costs, the Respondents would need to have something tangible. Simply requiring the Applicants to ask RNL to respond would be of little value.

36 In our view, the only way to make sense of the expression in the context of the Agreement is to link paragraphs 10 and 11 together. In other words, on the basis of the Applicants' agreeing that there will be no further charges in respect of dealing with the issues mentioned in paragraph 9, the Respondents will not dispute the 2013 costs which are those which include the RNL consultation charges. The Respondents have been billed for them once; they are not to be billed for them again. In their letter of the 11th November, the Applicants' Solicitors argue that "whilst all aspects of those matters referred to in the Agreed terms have not been concluded…t is the Applicants' position that as a consequence of the signing of the Agreed terms, the Respondents would 'raise no issues in relation to the [2013 costs]'.

37 With respect to the Respondents, the Applicants' Solicitors are correct. There are still matters covered by the Agreement which are "work in progress". It is not

open to any party to an agreement to pick and choose which terms it abides by. Unless performance is waived or becomes impossible, all the obligations should be performed. If there is a breach by one party, the innocent party does not have an automatic right to suspend the operation of the rest of the agreement. It is only where there is a breach of a term which is fundamental to the agreement that the innocent party may choose to regard the agreement as at an end and performance of all the remaining obligations is no longer required. Damages may be awarded for the breach or non-performance of an obligation, but the ability to terminate the Agreement will depend on the nature and extent of the breach alleged.

38 Mr Fairclough's argument that the Applicants have failed to comply with the terms of paragraph 9 must be looked at in the context of the whole agreement. It is however difficult for him to argue that the Applicants have failed to respond when he himself did not "put a detailed submission" as envisaged by the parties at the time of the making of the Agreement. The Applicants' obligation to respond was based on the assumption that the Respondents would provide the submission to which they were required to respond. No submission; no response required. That will remain the case until such time as Mr Fairclough, either by his own efforts or by the Respondents' employing their own expert, provides some constructive counter proposal for RNL or the Applicants to consider. The purpose of paragraph 10 was to ensure that the Respondents were not charged for any further consultation. It was a protection against additional costs. By failing to put in his detailed submissions, Mr Fairclough has rendered that additional consultation unnecessary. In fact the Applicants have abandoned the scheme for the moment. However, the schedule of works required some amendment and a revised tender was sought and considered (see the letter from the Applicants' Solicitor dated 9th July 2014). There are no additional costs. The purpose of paragraph 10 has been achieved. The Respondents are not being presented with a further bill. The Respondents may well have assumed that the purpose of the consultation was to persuade the Applicants to adopt a lesser specification, but that could never have been taken for granted. One of the possible outcomes of the further consultation was that the car park works might be postponed or abandoned. That is what has happened. After all, the car park is still usable even if it is not totally satisfactory. Indeed in his letter of the 5th November 2012 to RNL (p 247), Mr Fairclough suggests that "small scale localised repairs to pothole(s) will be sufficient to extend the life of the car park without the need of completely resurfacing the entire area" (p 248).

39 Even if Mr Fairclough's communication of the 14th October 2013 (p 388) were to be regarded as a "detailed submission", the Applicants' failure to enter into dialogue with him cannot entitle the Respondents to treat the Agreement as at an end. The various obligations on both sides are steps in a process. It cannot be said that some terms are of such weight or value that a breach would be so serious as to amount to a repudiation of the Agreement. A frequently adopted test is that adopted by Diplock LJ in Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] EWCA Civ 7, namely, whether what has happened deprives the party who has further undertakings to perform of substantially the whole of the benefit which it was intended that party should receive. We must look at the event which has occurred, namely the failure to respond, and decide if this deprived the Respondents of the benefit of other parts of the Agreement. The Respondents are not being charged for any further consultation. Mr Fairclough has received his compensation of £250. the

owner of the vehicles has been located, although the vans had not been moved. Steps have been taken to deal with other issues. We are satisfied on the basis of the above that the Respondents have not been deprived of substantially the whole of the benefits they expected to receive. We cannot accept the Respondents' argument that they are entitled to treat the Agreement as at an end any more than we would regard the Applicants as entitled to do so on the grounds that Mr Fairclough has failed to perform his obligation to submit a detailed submission.

40 We appreciate that the Respondents were giving up the right to challenge the RNL costs. However, the 2013 costs were relatively low when compared with the costs incurred in other periods. Mr Fairclough was also giving up his right to argue that under the terms of his lease, he was not required to pay electricity charges. The Respondents were giving up a finite amount - just over £250 for those paying 1/6th of £1,535.84 or £116 if one only considers the RNL fee of £695 - against the risk of paying an indeterminate amount plus the associated costs of arguing the issue before the Tribunal. With regard to Mr Fairclough's point that the lessees are not the applicants, we respectfully point out that s 27A(4) states that "no application…may be made". It does not say by whom. Once the liability for the amount "has been agreed or admitted by the tenant" as we find it has, we have no jurisdiction to determine the amount payable.

41 The Agreement may have been framed that "the leaseholders will raise no issues in relation to the [2013 costs]", but the meaning is clear. If the Respondents agree not to raise any issues, they must be taken as agreeing those particular costs. The only other possible interpretation would be that they agreed not to oppose an application in this Tribunal for a determination that the costs were reasonably incurred. This would be pointless as the whole purpose of the Agreement was to remove the necessity of a Tribunal hearing. In the context of the Agreement, we have concluded that the 2013 costs were agreed and the parties are no longer entitled to seek a determination by this Tribunal.

MARTIN ROOFING CONTRACTORS- 2012 Costs - £1,440 (incl VAT)

42 The first issue, therefore, for us to determine relates to MRC work carried out to the parapet above Flat 8 in an effort to stop the ingress of water into flat 8 about which there was no issue and which was plainly evident from our inspection. The invoice which appears on page 45 of the Bundle describes the work carried out as follows:

1. Erect Scaffold to front and side of property to gain access.
2. Replace lead work to abutment wall of property to match existing.
3. Supply and fit missing and damaged slates to front slopes.

The total cost of the work was £1,440 including VAT, a figure which required a payment of £240 from those obliged to contribute 1/6th of the cost. As the Respondents pointed out, this is just below the threshold of £250 the point at which the Applicants would have been required to carry out the statutory consultation process as set out in the Service Charges (Consultation Requirements)(Wales) Regulations 2004 (the Regulations).

43 The invoice was included as part of the 2012 costs (p 8). In his Answer to the Application, Mr Fletcher alleged (p170) that the roof work on number 97 had

been deliberately separated from other work to the chimney above number 95 so as to avoid consultation, an objection also voiced by Mr and Mrs Fairclough (p 35). Mr Fletcher also complained of the poor quality of the work (p 170). Mr and Mrs Fairclough stated (p 35) that the water ingress remained unresolved. Mr Fairclough had referred to this problem in earlier correspondence (see pp 84, 85 and 88). Mr Morgan's Response on behalf of the Applicants refers at paragraph 37 (p 143) to "on-going problems" which "will have to be investigated and addressed." He refers to "various meetings with the roofer when questions as to the work were raised but at that meeting no complaint was made about the work that was undertaken. I do not propose to comment further on this matter as it may be that further works may be required in due course."

44 The issue was to have been considered at the original hearing, but as mentioned in paragraph 7 above the Applicants and the Participating Respondents entered into the Agreement which in part dealt with the MRC invoice. As a result, Mr Ball was instructed to undertake a survey of the front parapet of 97 Cathedral Road to identify the source of water ingress to Flat 8 and to comment upon the repair undertaken by Martin Roofing.

45 Mr Ball's report is dated 25th June 2014. At paragraph 6.10 he states that "on entering the lounge/dining room of the second floor flat, it was apparent from simple observation that the front elevation was subject to damp penetration the surface of the wall being in parts damp to touch." When inspecting the roof externally by way of ladders and scaffolding, he noted at paragraph 6.03 that "it was apparent that the coping stones to the gable end had become displaced and the joints were badly weathered with sections of mortar having become displaced. Minor lateral displacement of the coping stones has taken place, the kneeler block having been subject to outward movement. Whilst the condition of the mortar joints to the lower sections of coping stones is poor, the amount of downward movement is relatively small." The point is illustrated by his photograph numbered 2 on page 6 of his report next to which he adds: "the chaffered [sic: chamfered] back face of the block should align with the coping". Three other photographs on page 7 of his report show "displaced mortar joints". The commentary on photograph number 3 (actually referred to as a second number 2) adds: "downward movement of lower coping stone exposes the matrix of the wall structure. Water will therefore enter the top of the wall and behind the lead flashing to the roof." At paragraph 6.04, Mr Ball states that " regardless of what works are undertaken by the roofing contractor moisture will enter the body of the wall and percolate down through structure so as to become apparent to the room to the upper floor."

46 Mr Ball described the MRC work as "the installation of new lead work to the back face of the parapet and the lead is held in place by way of white plastic strip which has been fixed to the back wall by way of simple screw fixings, some of which have distorted or cracked the plastic. In addition the trim is sealed to the wall by way of silicone." To illustrate this, photograph number 7 shows a section of the plastic trim with a crack extending across its entire width with the comment "defective fixing of uPVC section retaining lead flashing". In paragraph 6.07 of his report, Mr Ball refers to the recommendations of the Lead Development Agency (now superseded by the Lead Sheet Association) which are that "the lead work should be dressed into the wall structure by a minimum of 25mm and held in place by way of lead wedges at

about 500mm centres". He adds that "the use of plastic trim…is not a practice which I have previously experienced. As indicated whilst the purpose of lead work is to prevent the ingress of moisture the work does not perform a function if moisture is entering the top of the wall by way of defects in the coping". Referring to whether the MRC works were "defective", he comments at paragraph 7.01: "The works as undertaken are innovative in terms of the use of uPVC as a means of supporting lead work, but the works themselves are not considered defective." He continues, however: "the long term performance of the system is not known and it is considered that in such a location the application of more conventional methods may be deemed to be more appropriate". He concludes that MRC would "as a competent contractor have identified that the coping stones to the gable end were substantially defective and almost regardless of the what work was undertaken to the lead flashing, without ensuring that the defects in the coping were remedied the works to the lead were almost if not completely pointless if the intention of the works was to prevent the ingress of moisture to the front elevation of Flat No 8 immediately below."

47 The pre-trial review on the 15th July 2014 recorded that Mr Fletcher's case was that the cost of the MRC work was not reasonably incurred because:

(a) It was not carried out in accordance with good lead working practice as referred to in Mr Ball's report;

(b) The MRC invoice refers to replacing "lead work to abutment wall of property to match existing". In fact, MRC replaced lead work with a white plastic strip secured by way of simple screw fixings some of which have distorted or cracked the plastic.

(c) MRC failed to identify that the coping stones were substantially defective to the extent that without remedying such defects, the lead work would be almost if not completely pointless.

48 In their letter of the 9th July, the Applicants' Solicitors emphasise Mr Ball's comment that the works are "innovative" but "not considered defective". They acknowledge that further works are required but "do not see that this should be the subject of consideration by the Tribunal at this time". In their letter of the 28th July, they comment that the terms in the Agreement were specific, namely that if Mr Ball stated that the MRC work was "defective" remedial work would be undertaken and the cost of this would be borne by the Applicants. They submit that Mr and Mrs Fairclough and the Rev and Mrs Kettle are bound by this finding. They also refer to the estimate from Camilleri Roofing dated 20th August 2012 (p 403) in which there is no mention made of lateral displacement of the coping stones. They suggest that it is possible that the movement occurred after the MRC works were carried out. There was, they point out, "exceptionally heavy rainfall" (see page 333) and no problem was raised until some four months after the MRC work had been completed. The rainfall, they speculate, could have had an effect upon the coping stones. They repeat the same points in their submissions dated 1st September (paragraphs 3 to 11) pointing out that it was not until an e-mail dated 29th January 2013, four months after the work had been completed, that Mr Fairclough complained about the ingress of damp in the flat (p 319) and enclosed an e-mail from his letting agent (pp 320-322). They accept that Mr Ball had no experience of the practice of applying a plastic strip, but again point out Mr Ball's comment that the work was innovative but not defective.

49 The Applicants' Solicitors also submit that it is clear from Mr Ball's photographs that the lead work is still in place. The works undertaken were to supply and fit a cover strip over the lead work which has been done. They refer us to a letter from MRC dated 6th August 2013 (p 343) written for the original hearing. In it Mr Martin explains that he could see a problem with the defective lead work to both sides of the front parapet wall and recommended that they "take out old and damaged lead to abutment of parapet wall and renew to make a watertight seal" and then to provide a "cover strip over lead work fixed with plugs and capped screws as it provides a more suitable repair". Photographs taken by Mr Martin (p 377) show that this has been done.

50 With regard to Mr Fletcher's third point that MRC had failed to identify that the coping stones were substantially defective, the Applicants' Solicitors argue that Mr Ball inspected the Building 15 months after the MRC work had been carried out. As a competent contractor, MRC would have identified the defective coping stones and there is nothing to suggest that the coping stones were defective at that time (ie in September 2012). The Applicants' Solicitors also state that when Mr Roger North FRICS of RNL issued the first consultation notice relating to substantial works proposed to be carried out to the Building, RNL makes no reference to the parapet at number 97, although it does make reference to the parapet at number 95. They also comment that when Mr Fairclough obtained the estimate from Camilleri Roofing (pp 402-403), there was no reference to displaced coping stones, a point mentioned by Mr Ball in his report (paragraph 7.03; p 376).

51 in oral evidence, Mr Fletcher stated that he was unhappy that the work to the parapet at number 97 had not been carried out at the same time as the work to the chimney of number 95. The principle cost of scaffolding is the labour cost of transporting and erecting the scaffolding. If the two jobs had been combined there would have been a saving. As far as the quality of the work was concerned, it was clearly not effective to prevent the ingress of water into flat 8. Mr Ball agreed that this was the case. Although Mr Ball says that the MRC work was not defective, he concedes that the MRC has not used lead and that the work was pointless and needs to be re-done. It is confusing to a layman to suggest that such work is not defective. At paragraph 6.05 (p 372), Mr Ball refers to the plastic being "distorted and cracked" and photograph no 7 shows, in Mr Ball's words, "defective fixing". The MRC work has therefore already failed and is not satisfactory. Mrs Kettle agreed. Her priority was the need to get the building put right.

52 Mr Fairclough told us that there was still the ingress of water. If, as the Applicants suggest, the MRC works were successful for a time, they failed within a year and the Respondents have therefore had no value from them. It was some time after he had paid the service charge invoice for the 2012 costs that he received the photographs on pages 223 to 228 from MRC. That was the first he was aware of the fact that a plastic cover strip had been used. The invoice (p 45) refers to replacing "lead work…to match existing". The lead work has not been replaced to match existing. Some of it has been replaced with a plastic strip and silicone. As Mr Ball points out it will all have to be redone. The photograph at page 228 shows a lump of silicone filler on the kitchen side of the slope. The photograph at page 224 shows that the kneeler block was already displaced when MRC carried out the work. The coping stones had already moved as shown in Mr Ball's photographs (p 371).

Mr Fairclough also drew our attention to the exchange of correspondence at pages 84 - 88 and the discussion which he had with Mr Martin referred to in them. In his letter dated 19th April 2013 (p 84), Mr Fairclough explains that he had spoken to Mr Martin about the MRC work "and was advised they did not want to disc cut into the back of the parapet wall to install a lead cover piece. I expressed my concern with this detail given that it is not only what we expected and paid for, but appears not to have resolved the leak issue as the internal wall is still wet to touch. Martin Roofing again accepted this, and agreed a better detail would have been to take the flashing piece over the parapet and down over the face of the lead [sic, presumably, parapet] (similar to some other properties in Cathedral Road). Martin Roofing said this could be done, but they had not allowed for it and it would incur additional costs."

53 Mr Morgan's response to this issue is at page 85. He says: "There is clearly an issue with the abutment wall given its condition. It is not possible nor is it practical to cut into the wall given its condition If flashing [sic] were to have been taken over the parapet, then there would have been significant additional cost and this was not something which was covered or included in the specification. The condition of the stone work is such that attention is required from stonemasons and this, with respect, is not the job for which the roofers were retained." At page 88, Mr Fairclough comments that "if they (Martin Roofing) considered at the time the parapet was causing the problem and not the flashing, you have to ask the question why replace the lead flashing? And why did they not advise you at the time of the repairs that works to the parapet should have been undertaken to prevent water ingress whilst the scaffolding was erected?" MRC was clearly aware of what was required to prevent the ingress of water into flat 8. Mr Morgan manages the Building and the Respondents had expected him to resolve the problem. He should have dealt with it.

54 Mr Fairclough explained that whilst Mr Martin used a ladder to go onto the roof of number 97, the representative from Camilleri Roofing did not want to climb a ladder to inspect the roof on health and safety grounds and had prepared his estimate on the basis of his inspection from ground level. Their method had been to fit plywood to the back of the parapet wall and then to have run the lead up the side and then over the top of the coping stones.

55 Mr Fairclough also commented that Mr Ball did not inspect the both sides of the slope. This was something which he had expected the surveyor to do in order to determine whether the work was "defective". Further, notwithstanding the statement that the MRC "works themselves are not considered defective", it is evident from the report that they are in fact defective (see page 372). They are unsatisfactory and "almost if not completely pointless". The Agreement (p 362) states that the Applicants will pay for the cost of the remedial work, the MRC invoice and the removal of the MRC work if that work is considered "defective". It does not say that the Respondents agree to pay if the works are not considered to be "defective". If the costs of the MRC invoice are reduced or disallowed, there must be a corresponding reduction in the management fee.

Determination

56 Having been notified by the Applicants' Solicitors that, for reasons of cost, they would not be attending the hearing, on the 5th September the Tribunal sought confirmation that Mr Morgan, on behalf of the Applicants, and his experts would be attending. The Applicants' Solicitors replied that Mr Morgan would not be attending and that he intended to rely on the written submissions dated 1st September to which we have already referred. The inevitable result is that the ability to amplify and test the Applicants' case is limited whilst the Respondents' evidence is in effect unchallenged. Further whilst a novel point of law or a diversion from the issues already raised must be referred to the absent party, it would not be fair to those who have taken the trouble to prepare their case, call evidence and, to the extent that the Tribunal is able to do so, have that evidence and their arguments scrutinised by the Tribunal, to have that evidence and those arguments commented upon, challenged and rebutted by the absent party in its own time, with the benefit of hindsight and with the ability to employ its resources and lawyers if necessary. Whilst we must therefore guard against the possibility of "mission creep", we propose to determine the issues, to the extent that we are able to do so, upon the basis of the oral evidence of the Respondents, the 400 pages of documents provided (including the Applicants' Response (p 134)), the Respondents' arguments as well as the Applicants' written observations and submissions as set out in paragraph 11. We did not have the benefit of hearing the Applicants' experts and whilst Mr Fairclough is a qualified engineer, we will not treat his evidence in quite the same way as we would an independent expert as he has an interest in the outcome of the case. We will however apply our own knowledge and experience to assess the written and oral evidence and the arguments of both parties in coming to our decision.

57 We are satisfied on the basis of the evidence that the condition of the parapet was substantially the same in August 2012 as it was when Mr Ball examined it in December 2013 and January 2014. The photographs taken by Mr Martin include one at page 224 which shows that the kneeler block has already been displaced. Mr Ball's photograph at page 370, although viewed from the other side, shows the kneeler block in the same position. The coping stone next to the kneeler block in both photographs is close up against it from which it must be case that there was a gap or more likely there were gaps between the coping stones higher up the parapet of the kind shown on page 371. It may well be the case that following the wet weather in the Autumn of 2013 that the gaps worsened, but we have no doubt that the condition of the parapet and the coping stones was such that, as Mr Ball comments (paragraph 7.02 on page 376) "a competent contractor [would] have identified that the coping stones to the gable end were substantially defective". The Applicants' Solicitors state that this means that there was "nothing to suggest that the coping stones were defective" when Mr Martin carried out the MRC work (paragraph 10). The clear implication of this is that Mr Martin had no knowledge of such a problem. However, he is well aware of the condition of the parapet in his subsequent conversation with Mr Fairclough, whose evidence we accept on this issue. His evidence is supported by his letter of the 19th April to Mr Morgan (at p 84). Mr Morgan's reply dated the 2nd May 2013 (p 85) refers to the "condition" of the abutment wall as the reason for applying the "silicone" by which we assume he meant the plastic strip. Again, "the condition of the stonework" would have required the Applicants to employ "stonemasons". His justification for the application of the

plastic strip was cost. Taking the flashing over the parapet "was not something which was covered or included in the specification". The specification was not disclosed, but the fact that there was one indicates that Mr Morgan knew what work was going to be carried out.

58 The Applicants' Solicitors argue (paragraph 10) that the consultation notice did not refer to work to the parapet of number 97 whereas it mentions the parapet of number 95 (p 245). However, the notice was sent out on the 9th October 2012 (see p 244) shortly after the work had been done to the parapet of number 97. It was not an issue for the notice. They also point out that Camilleri Roofing (at p 403) does not mention displaced coping stones. Again we accept Mr Fairclough's evidence that the representative from Camilleri Roofing did not go up onto the roof and inspect the parapet closely. We cannot say the extent to which the displacement of the coping stones would have been apparent from the ground at the angle of vision. The ply, to which the Applicants' Solicitors refer, is placed on the inside of the parapet wall to support the lead which would have gone up the side and over the top. We cannot speculate what if anything Camilleri would have done if it had been awarded the contract. We have considered the Applicants' point, but we are not persuaded that it has merit. Nor do we consider that the fact that Mr Fairclough only complained in January 2013 after 3 months of heavier than normal rainfall indicates that the MRC work was initially satisfactory. Mr Fairclough did not reside at the flat. It was tenanted. It was not the tenant who had complained. It was the managing agent who raised the issue on a routine inspection in January 2013 (p 320). The photographs indicating the extent of the damp (pp 321-322) are not particularly clear.

59 We are also satisfied that the MRC work did not comply with the recommendations of the Lead Sheet Association (see Mr Ball's report paragraph 6.07 at page 373) and that "without ensuring that the defects in the coping were remedied the works to the lead were almost if not completely pointless" (paragraph 7.02 at page 376). Mr Ball concludes (paragraph 7.05 at p 376) that "remedial works will necessitate the removal of the coping stones including the resetting of the kneeler block, possibly with anchors. Remedial works to the upper section of masonry; rebedding of the coping stones with dpc material under; installation of lead flashing to the back face in accordance with the requirements of the Lead Development Agency [sic] and with what is considered good lead working practice." We accept the Respondents' argument that, on the basis of Mr Ball's conclusion, the MRC work was a wasted exercise for which the Respondents received no value. To attempt to cure the problem of the damp in flat 8 using an "innovative" method without taking proper expert advice is a high risk strategy. That strategy has clearly failed. It is not reasonable to expect the Respondents to pay for it. We therefore determine that the cost of the MRC work was not reasonably incurred and that the Participating Respondents are entitled (subject to paragraph 60 below) to a credit in respect of their share.

60 We note that the invoice for £1,440 includes an element relating to replacement of roof slates. The credit referred to in paragraph 59 does not relate to this. Such work could have been carried out at the same time as effective remedial work to the parapet so the costs of the scaffolding should not be included. This issue has not been dealt with by the parties at the hearing and therefore WE DIRECT that both parties shall seek to agree the "slates" element of the MRC

invoice and in the event that they are unable to agree, no later than the 30th January 2015 shall make written submissions to enable the Tribunal to determine the amount.

INTERPRETATION OF THE LEASES

Insurance

61 We have been given copies of the leases for flat 3 (Mr Fletcher), flat 6 (Rev and Mrs Kettle) and flat 8 (Mr and Mrs Fairclough). We do not have copies of the other leases and so cannot make a determination in respect of this item as far as the other Respondents are concerned. The Fletcher Lease is the oldest of the three and differs significantly in its format from the other two. The Kettle Lease and the Fairclough Lease differ only in respect of the insurance clause (see paragraph 5 above). Mr Fletcher and Rev and Mrs Kettle concede that their leases require them to contribute their defined proportions of the cost of the Building Insurance. Mr Fairclough submits that the wording of paragraph 4 of Schedule 4 of his lease relates only to third party risks and public liability. In their letter of the 28th July 2014, the Applicants' Solicitors accept that "there is no specific requirement that the cost of the Landlord covenants in respect of insurance are specifically included". They argue that the cost is "properly an outgoing or charge in respect of the premises to which the leaseholder should contribute." The reimbursement of the premium is therefore covered in the Fairclough Lease by clause 4(i)(b) which they refer to as a sweeper clause. They make the same point in paragraph 13 of their submissions dated 1st September 2014. There is no issue as to the amounts claimed. According to Mr Fairclough, there is no separate premium allocated for third party risks or public liability. These risks are included in the Building's insurance policy and the premium is not apportioned between different aspects of cover. He argues that clause 4(i)(b) is not a sweeper clause. It cannot be used to cover something which has been left out - either in error or deliberately. There was a sweeper clause in the Fletcher Lease. It is not included in the later leases. Mr Fairclough suggests that the later lessees were not expected to contribute to the other expenses. The lease was after all drawn up by a Solicitor. At best, the clause is ambiguous. In that event it should be construed against the interest of the Applicants as lessors (the so called contra proferentem rule). If he is required to contribute, he is not bound by the service charge percentage of 1/6th. A reasonable proportion would then become payable, a point with which the Applicants agree. In Mr Fairclough's view this should be based on floor area.

Determination

62 In a letter to the Applicants' Solicitors dated the 21st August 2014, Mr Fairclough gives notice that he proposes to refer to a number of cases. One of these cases, Sadd -v- Brown [2012] UKUT 438 (LC) (HH Judge Alice Robinson)(Sadd), concerns precisely the same issue as in this case. In Sadd, the Leasehold Valuation Tribunal had held that the insurance premiums paid by the lessor were not recoverable under the terms of the lease. At the original hearing and on appeal, the lessor argued that the insurance premium was recoverable under the following clause:

"to pay and discharge and indemnify the Lessors against all rates duties charges assessments impositions and outgoings whatsoever (whether Parliamentary Parochial Local or of any other description) which are now or may at any time hereafter be assessed charged or imposed upon or payable in respect of the demised premises by the owner or occupier thereof."
Apart from the inclusion of the expression "whether Parliamentary Parochial Local or of any other description", the word "duties" instead of "taxes" and the addition of "payable in respect of" the words are virtually identical to the words in the Fairclough Lease. The latter, of course, continues on the basis that the lessee pays a proportion attributable to "the demised premises" where the rates, taxes etc are "assessed charged or imposed in respect of premises of which the demised premises form part

63 The Applicants' Solicitors refer to this clause 4(i)(b) as a sweeper clause drafted to "sweep up" all the other costs and expenses which have been omitted from earlier clauses to ensure that nothing is overlooked. Such a clause is drafted in broad and general terms. Being too particular as to what is included would defeat the whole purpose of the clause. Paragraph 11 of the Third Schedule of the Fletcher Lease is a good example of such a clause. It comes at the end of the Schedule and refers to "any costs and expenses incurred by the Lessor in exercising his rights or carrying out his obligation hereunder or in doing works…or in providing services…" In contrast, clause 4(i)(b) appears at the beginning of the clauses for the sole benefit of the Lessors immediately following the obligation to pay the rent. It is specific in its content. The language used is more associated with the imposition of a charge by some authority. It does not specify "Parliamentary Parochial Local or of any other description" as in the Sadd lease, but the use of the words "rates taxes assessments charges impositions" makes it clear that it is referring to payments required to be made to some official authority, some obligation arising from the ownership or occupation of the flat. The word "outgoings", whilst more general, must be construed in that same context - ie a payment of a kind similar to "rates taxes assessments charges impositions". The words "assessed charged or imposed upon the demised premises or the owner or occupier…" also indicate that the payments are determined by and payable to some outside authority. Even when the charges are imposed on premises of which the flat is a part, the obligation is to pay the proportion attributable to the flat. However, the charges still have to be "assessed charged or imposed". As Judge Alice Robinson says (at paragraph 18): "The highest it could be put is that it might be an obligation to 'indemnify' the lessor against an 'outgoing' which is 'assessed upon' or 'payable' in respect of the Flat by the owner". The Fairclough Lease does not extend to indemnifying the lessor against an outgoing. The obligation is to pay the "rates taxes" etc which have been "assessed charged or imposed" on the flat, not to reimburse or indemnify the lessor for the amount which the lessor has paid to insure "the Building". As Judge Alice Robinson says: "such wording does not naturally extend to payment of a sum due under an insurance contract voluntarily entered into by the lessor."

64 It is not as though there is no reference to the payment of any insurance premium. Paragraph 4 of the Fourth Schedule of the Fairclough Lease specifically requires the lessee to pay his/her proportion of "the cost of insurance against third party risks and public liability in respect of the building if such insurance shall in fact be taken out by the Lessors". The equivalent clause in the Kettle lease reads: "the

cost of insurance in carrying out their obligations under clause 6(d) and against third party risks and public liability" (our underlining). The underlined phrase is not included in the Fairclough Lease. The reimbursement of the insurance premium is such a fundamental issue that its omission cannot be a mistake. The lessors are obliged to insure. This is virtually a universal obligation in leases of flats and in the Fairclough Lease and in the Kettle Lease it is contained in clause 6(d). If the original parties to the Fairclough Lease had intended the lessee to reimburse the cost of insuring the Building, the requirement would have appeared in paragraph 4 of the Fourth Schedule. Also the fact that the clause refers to some forms of insurance and not insurance of the Building suggests that the omission was deliberate. No lessor, properly advised, would have left such an important requirement to chance. After all, as Mr Fairclough says, third party risks and public liability are included in buildings insurance policies. The Applicants have not taken out a special policy to cover these risks. The Fairclough Lease was prepared by a Solicitor. It is inconceivable that such an omission could have slipped through without being spotted by the Solicitor and the client - a client who was developing two substantial semi-detached houses as a business project. It is not as if it is the odd word that is missing. It is a critical phrase. Its omission does not affect the business efficacy of the lease. It may make it commercially less rewarding, but it is still effective. The wording is unambiguous. The Applicants are required to insure the Building. Mr and Mrs Fairclough are not required to reimburse the Applicants a proportion of the premium. Clause 4(i)(b) was never designed as a sweeper clause. It is specific in its content. It is intended to cover payments imposed by statutory and other similar bodies. It is a clause typically found in virtually all leases with slight differences in the wording but with the same intent. It is also intended to be a direct obligation - to pay the rates etc, or a proper proportion if they are assessed on more than one set of premises. It is not an expense to be reimbursed or an obligation to indemnify the lessor. It follows the obligation to pay "the rents", a term which includes the lessees' defined proportion of the "costs expenses outgoings and matters" in the Fourth Schedule which are referred to as "the service expenses". It makes no sense for the lessees to have to pay to have a defined proportion of all the service expenses except for the insurance. There are of course occasions where leases are anticipating an enlargement of a development and the defined proportion is a "reasonable" proportion determined by the lessor or its agent, usually "acting reasonably". But that relates to all the service expenses, not just a single expense. We regret we cannot accept the argument put forward by the Applicants' Solicitors. To do so would be to use a clause designed to impose a particular obligation upon a lessee for a purpose for which it was never intended.

65 Accordingly we determine that the Applicants are not able to recover any part of the cost of the Building insurance from Mr and Mrs Fairclough under the terms of their lease.

Electricity (SWALEC)

66 The invoices refer to the cost of electricity which is used for lighting the common parts within the Building, namely, the hall stairs and landings which lead to the various apartments. There is no issue as to the amounts involved. There is no dispute that neither the Kettle Lease nor the Fairclough Lease contains any specific provision for the cost of the electricity to be recouped Mr Fairclough's and

Mrs Kettle's argument is the same as that advanced by Mr Fairclough in respect of the insurance premium.

67 The Applicants Response (at p 144) is to refer once again to clause 4(i)(b) of the Fairclough Lease. In their letter of the 28th July 2014, the Applicants' Solicitors state that the Fairclough Lease "is perhaps typical of leases of that era (being over 20 years old) and for that reason, the Landlord must rely upon the 'sweeper clause' ie 4(i)(b)". As before, they adopt the same argument in their submissions dated 1st September 2014 (paragraph 13).

Determination

68 The essential question is the same as that considered above in respect of the insurance premium. It is common ground that there is no specific provision in the Kettle Lease or the Fairclough Lease for recovery of a proportion of the electricity costs. Again, we respectfully adopt the reasoning of Judge Alice Robinson in Sadd. In the case of the electricity charges, there is the additional point that these costs are not "assessed charged or imposed upon" the flat; they are charges in respect of the common parts. Further, whilst it might possibly be argued that the flats and the common parts are all part of the Building, the charges are not attributable to the individual flats, they are attributable to the common parts. Applying the expression employed by Judge Robinson, the language does not naturally fit with the idea of an electricity supply voluntarily negotiated with one of any number of electricity supply companies.

69 We therefore determine that, except where such costs have been agreed or admitted, the electricity costs are not chargeable under the terms of the Kettle Lease or the Fairclough Lease. There is no issue that they are chargeable under the Fletcher Lease. We are unable to determine whether they are chargeable under the terms of the other leases.

Fire Extinguisher Service
Fire Alarm/Lights Service

70 We were also asked by Mr Fairclough to determine whether the fire extinguisher service costs and the fire alarm/lights service costs (which together we shall refer to as "the fire safety costs") were chargeable under the terms of his lease. As with the insurance and the electricity charges, the argument centred on the interpretation of the lease rather than the actual costs. There was no issue that the amounts requested are reasonable. Whilst Mr Fletcher accepted that he was liable under the terms of his lease to contribute towards the fire safety costs, Mr Fairclough argued that he was not required to do so as there was no specific provision in his lease, nor in the Kettle Lease, for the costs incurred to be recovered from the lessees. His argument was in effect the same as that he put forward in connection with the electricity and the insurance costs. If there is no mechanism under the lease for the Applicants to recover the costs involved, there is no obligation upon him, or upon those with similarly worded leases, to reimburse the Applicants. As well as the decision of HH Judge Alice Robinson in Sadd, we were also referred to a Leasehold Valuation Tribunal decision in Brooks and Hickman -v- Rees (CHI/21UG/LSC/2011/0083)(Brooks)(Chairman Mr Mark Loveday BA MCIArb). This

case had been notified to the Applicants' Solicitors albeit under the title Brooks -v- Hickman but with the correct reference. It related to the costs of a fire risk assessment and fire alarm inspections which the Tribunal determined were not payable under the terms of the leases involved. The respondent landlords in that case argued that as the fire safety costs were a statutory obligation imposed upon the lessor under the 2005 Fire Safety Order, it was an imposition imposed on the premises of which the demised flat was a part. If the lessor could not recover the cost, the fire safety work would not be carried out and the premises would become unusable. However, the Tribunal pointed out, amongst other things, that the lessors' obligation under the Order related to the common parts and not the flat.

71 The Applicants' case is at paragraph 53 of Mr Morgan's statement (p 148). He refers to the arguments already mentioned ie the assertion that the costs are recoverable under clause 4(i)(b) of the Fairclough Lease and the Kettle Lease. At paragraph 15 of the submissions dated 1st September 2104, the Applicants' Solicitors when referring to the 2012 fire safety costs repeat the observations they make in the preceding two paragraphs relating to lighting to the common areas. In their e-mail dated the 11th September 2014, they again argue that the expenses are payable under clause 4(i)(b) of the Fairclough and Kettle Leases. A further argument is raised in point 5 of the e-mail: Mr and Mrs Fairclough have not adequately explained (if at all) why in their view clause 4(i)(b) does not apply.

Determination

72 The question which we have to consider is the same as that relating to the insurance premium and the electricity costs. As before, it is common ground that there is no specific provision in the Fairclough or Kettle Leases for recovery of a proportion of the fire safety costs. Again, we respectfully adopt the reasoning of Judge Alice Robinson in Sadd and further the reasoning of the Leasehold Valuation Tribunal in Brooks to the extent they apply in this case. The fire safety costs are not "assessed charged or imposed upon" the flat; they are charges in respect of the common parts. Again, whilst it might possibly be argued that the flats and the common parts are all part of the Building, the charges are not attributable to the individual flats, they are attributable to the common parts. As before, the language does not naturally fit with the idea of fire safety costs being voluntarily negotiated with one of any number of fire safety companies, even though there is a statutory requirement for the task to be performed.

73 We therefore determine that the fire safety costs are not chargeable under the terms of the Kettle Lease or the Fairclough Lease. There is no issue that they are chargeable under the Fletcher Lease. We are again unable to determine whether they are chargeable under the terms of the other leases.

2012 COSTS

Martin Roofing Contractors - £1,440
Insurance -£1,965.26
Electricity (SWALEC) - £366.76
Fire Extinguisher Service - £144.00
Fire Alarm/Lights Service - £280.00

74 Applying our findings to the 2012 Costs, we determine:
(a) Except to the extent that the MRC costs relate to the replacement of roof slates, the MRC costs were not reasonably incurred. Mr Fletcher, the Rev and Mrs Kettle an Mr and Mrs Fairclough are therefore entitled to a credit in respect of the proportions charged to them;
(b) Mr and Mrs Fairclough are not required under their lease to contribute to the Building insurance nor to the electricity costs and are therefore entitled to a further credit in respect of the proportion of these costs charged to them;
(c) The Participating Respondents are also entitled to credits in respect of the proportion of the 15% management charge charged to them relating to these items.

75 Mr Fairclough sought a determination that the fire safety costs for 2012 were not payable. The Applicants raised an argument that the question of the fire safety costs for 2012 had not been raised at the pre-trial review (which they had not attended). The issue was certainly not recorded as having been raised by the Respondents at that hearing. In the letter dated the 28th July 2014, the Applicants' Solicitors had set out their case in respect of the insurance and electricity issues. In an e-mail in response dated the 3rd August, Mr Fairclough wrote that he assumed that the same arguments applied to the fire safety costs both in respect of the 2012 costs and the 2014 costs. At paragraph 15 of their submissions of the 1st September, the Applicants' Solicitors state: "We would repeat the observations made above [concerning the electricity and insurance] in relation to these save that the Order made no reference to these items. We would submit that it is appropriate that these items should not now be introduced at this late stage." By e-mail on the 10th September, we referred the Applicants' Solicitors to the original Answer filed by Mr and Mrs Fairclough (p 39) which related to the 2014 costs and the Applicants' own Response at paragraph 53 on page 148. The Applicants' Solicitors replied by e-mail on the 11th September explaining that at no point in the Directions did it say that Mr and Mrs Fairclough wished to challenge the fire safety issues in the 2012 costs. Their "challenges" should be limited to MRC invoice and the electricity and insurance. They also pointed out that Mr and Mrs Fairclough had paid their share of the 2012 costs. These costs had therefore been agreed. Mr and Mrs Fairclough were estopped from disputing them. They had not reserved their position. The Applicants' Solicitors re-stated their argument that the charges are covered under Clause 4(i)(b) of the Fairclough Lease and that the Tribunal should determine the "proper proportion" payable by Mr and Mrs Fairclough as promulgated in Windermere Marina Village Ltd -v- Wild and Barton [2014] UKUT 0163 (LC) as opposed to the defined proportion.

76 We concluded at the hearing that whilst the issue of interpretation of the Fairclough Lease in relation to the 2012 costs is the same as that for the 2014 costs, there was no reference made in the Order at the pre-trial review to Mr and Mrs Fairclough's wanting to raise this issue in connection with the 2012 costs. If the omission was an error either in the failure to refer to it during the discussions or in recording the nature of Mr and Mrs Fairclough's objection to the 2012 costs, the Respondents should have drawn the Tribunal's attention to that omission. As it was, the Applicants were not aware until Mr Fairclough's e-mail of the 3rd August that the topic was being raised. As we mentioned in paragraph 56, we need to guard against "mission creep" as the parties have to be aware of the issues that are being raised

and that includes ensuring that parties who have decided not to attend are not prejudiced by the introduction without their consent of additional matters at a late stage in the proceedings. Indeed, there are arguments which the Applicants have raised which will need to be explored - whether the costs have been agreed or admitted (see s 27A(4)(a) of the Act) or whether Mr and Mrs Fairclough are estopped from challenging them. We therefore determined that it was not appropriate for the question of the fire safety costs to be included as part of the 2012 costs being considered at this hearing. We did not consider the other arguments raised by the Applicants' Solicitors so as not to prejudice consideration of the issue by this or a differently constituted Tribunal at some future date. We therefore make no determination with regard to the 2012 fire safety costs.

77 The Kettle Lease contains similar provisions to those contained in the Fairclough Lease. Although this was referred to during the hearing, it was not an issue raised in answer to the Application by Rev and Mrs Kettle nor was it referred to in the Directions made at the pre-trial review. We therefore make no determination in respect of the fire safety costs for 2012 costs so far as Rev and Mrs Kettle are concerned. No issue was raised by any other Respondent relating to these costs. We do not know what the provisions are in their leases. Again we make no determination in respect of these.

2013 COST

78 We have determined above that the 2013 costs have been agreed by the Respondents and we have therefore no jurisdiction to determine whether these costs were reasonably incurred.

2014 COSTS

Section 20 Works - Crean Construction Ltd (Crean) - £51,769.61

79 Clause 2(iii) of the Fletcher Lease requires the lessee to pay on account "such proper sum as shall reasonably be specified" The Fairclough and Kettle Leases require the lessees to pay "the service rent" which comprises "the service expenses" which shall be "estimated by the Lessors from time to time" (Clause 2(ii)). Section 19(2) of the Act states that "where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable". There is no issue between the parties that a substantial amount of work needs doing to the Building. There is also no issue that due to the age, size and nature of the Building, such work is going to prove expensive. The Applicants had in 2009 engaged RNL to prepare a schedule of work (pp 89-111). In 2012, RNL prepared a schedule of work which was to form the basis of the tenders which were sought from a number of builders. The original schedule of work (pp 254- 261) set out the usual preliminaries and described the work under 6 separate headings:

- Roofs
- Walls
- Decorations
- Windows/Glazing
- External hard Standings /Car park
- Drainage.

Apart from a minor matter (item no 1), the only issue between the parties related to the Car Park.

80 As has been mentioned earlier, following observations from the Respondents, the schedule was amended (pp 262-268). The winning tender was submitted by Crean in the sum of £43,141.34 plus VAT (pp 66-73). However, in their letter dated the 9th July 2014, the Applicants' Solicitors informed the Tribunal the Applicants no longer intended to proceed with the works to the car park at this time thereby reducing the cost by approximately £20,000 plus VAT. That decision was confirmed in the letter of the 28th July from the Applicants' Solicitors. Crean was invited to revise its tender. It did so omitting item 1 (£916.00 - p 67), item 9.1 (£1856.74 - p 72), item 9.02 (£171.99) and item 9.03 (£18,002.88 - p 72). The revised total was £22,193.13 (p 411). Following an exchange of e-mails between Mr Morgan and Crean, the latter suggests that the preliminaries could be reduced by a further "£500 each" although Crean suggests that that would be "extremely tight" (p 404).

81 As recorded in the Directions, the issues were:
(a) as regards the car park that the specification and the cost was too high;
(b) as regards the Building that the cost was too high.
Since the car park cost has been removed from the revised tender, the only issue relating to the car park is the effect that had on the preliminaries. Mr Fairclough is an engineer by profession, a Director of Austin Partnership, Cardiff, and is therefore able to talk knowledgeably on the subject. As the Applicants were not present, his evidence was unchallenged. We shall deal with the items as they appear in the revised schedule.

Supplemental Preliminaries	2.07 - £3,500.00; 2.12 - £3,202.50

82 Mr Fairclough referred us to the entries for the car park involving items 9.01, 9.02 and 9.03 (p 72). He explained that the work required to be carried out by the contractor would involve the creation and removal of a considerable amount of waste material. He pointed out that under 9.01 there was 32 m^2 of surface to be excavated to a depth of 250mm, under 9.02 there was 5m^2 to the same depth and under 9.03 there was 285 m^2 to a depth of 350 mm. He considered that this would produce at least 100 m^3 of waste. Due to the narrowness of the lane leading to the Building, access would be difficult for large vehicles and so smaller skips would need to be employed to collect and remove the waste. Item 2.05 in the preliminaries refers to the contractor "carting away all debris unless stated". Item 2.16 indicates that "the contractor is to allow for the provision of all skips necessary following the removal of waste" Item 9 does not refer to the cost of waste removal so it is reasonable to assume that the cost is incorporated as part of the two entries in the preliminaries. In Mr Fairclough's view, there is not a great deal of value in the preliminaries other than the disposal of waste. He submitted that therefore the "lion's share" of the £6,702.50 (p 68) is related to items 9.01, 9.02 and 9.03. Whilst Crean has agreed that a reduction of £500 in the preliminaries might be possible (p 404), this would only account for the reduced contract period and not the reduction in the work involved. In his view, the preliminaries total of £6,702.50 should be removed.

83 Mr Fairclough accepted that item 2.12 included the provision of scaffolding, but explained that he had provided at pages 350 to 353 pages of Spons illustrating the prices for measured works. Looking at the prices for removing slate roof coverings, the amount was £8.62 per m² (p 350); the cost for replacing the natural slates was £37.43 per m²; the cost of removing the defective slates and replacing them would therefore work out at £46.05 per m²; the quotation for item 5 (p 409) was for 50 m² which would total £2,302.50. The price quoted (p 409) was £4,161.50. Therefore the difference of approximately £1,800 must be for the scaffolding. The cost of the scaffolding was therefore included in the quoted price of £4,161.50 and was not included as part of the preliminaries.

Roofs - 5.01 - £4161.50

84 Adopting his reasoning as set out in paragraph 83 above, Mr Fairclough calculated the cost of the scaffolding as included in the quotation to be £1,856.30. In his view this was expensive. MRC had only charged £600 for scaffolding for the front and side of the Building when work was done to the front elevation. He considered that £1,000 was a reasonable sum to pay for the scaffolding and therefore there should be a credit of £856.30 against this item (plus VAT).

Walls - 6.02 - £2,884.93

85 Using the Spons table shown at page 352, Mr Fairclough calculated the cost of the actual rendering to be 67m² @ £17.51 per m², ie £1,173.17. That meant the cost of the scaffolding was approximately £1,700 (£1,711.76) which he considered to be a lot. Applying the same reasoning as in paragraph 84, he argued a reasonable cost for the scaffolding was again £1,000 and that there should be a credit of £711.76 against this item (plus VAT).

Decorations - 7.01 - £3,007.20
Windows/Glazing - 8.01 - £813.78

86 Mr Fairclough considered that he should not have to pay for the decoration of the window frames as there was no provision for him to contribute to them in his lease. The window frames comprised part of his demise and therefore he had the responsibility to pay for his own windows. He told us that Ms Jarrett had had to pay for the cost of replacing her windows. The timber units were to the front of the Building. The majority of the cost would be related to these. He should only have to contribute to the cost of decorating the communal window. He considered an amount of £400 was a reasonable amount.

87 Applying the same argument as in Paragraph 86, Mr Fairclough stated that he was only responsible for the communal window. In his view, the condition of the window was such that it would be cheaper to replace it at an approximate cost of £100.

Drainage - 10.02 - £173.25

88 In Mr Fairclough's view, there was no point in carrying out this work and so it should be omitted. The drain appeared to be functioning satisfactorily at present.

Determination

89 We are being asked to determine an amount which it would be reasonable for the Respondents to pay on account of the roofs, walls, decoration, windows/glazing and drainage. In the revised tender, item 1 (the Works) and item 9 (External Hard Standings/Rear Car Park) have been removed and the revised tender totals £22,193.13 plus VAT. Crean has indicated that it might be possible to reduce item 2 (Supplementary Preliminaries) by £500. The Respondents have raised a number of issues detailed above suggesting that further amounts should be deducted from the revised estimate in order to reach a reasonable figure for the Respondent to pay on account. We must bear in mind that the amount is not the final figure. It is a sum on account. We can, however, well understand that due to the troubled history of the relationship between the parties, the Applicants may be a little nervous about spending the cost of carrying out the work before the Respondents have paid their contributions. On the other hand, it is not reasonable to expect the Respondents to pay more than an amount which in our view should in some way bear a relationship to the estimated cost of the works.

90 The important thing to note is that the Crean tender was the lowest of three tenders received. None of the three tenders (from Crean (£43,141.34), Pinit Building and Civil Engineering Ltd (Pinit)(£44,993.00) and A & N Lewis Ltd (£48,922.00)) was so far out that one could surmise that the builder was not making a serious effort to secure the contract. During his evidence,Mr Fairclough raised doubts about the Pinit tender as no hard copy had been available when he met RNL on the 28th February 2013. However, we cannot see that a professional organisation such as RNL would involve itself in inappropriate conduct relating to the tender process although it would appear that it accepted an electronic version of the Pinit tender (see exchange of e-mails on p 355). The Crean and Pinit tenders were only £1,851.66 apart (4%). That should give the parties some reassurance that the successful tender was both competitive and commercially viable. Of course, different contractors arrange their pricing in different ways. The issue of the scaffolding is a case in point. The tender document placed the scaffolding in the preliminaries. However, we accept Mr Fairclough's argument that the pricing of the roof work and the work to the walls was at a higher rate per m² than we would have expected which leads us to the conclusion that the prices quoted for roofs and walls each included an element for scaffolding. Mr Fairclough's argument was not the subject of a challenge, but it seemed to us to account for the prices quoted in the tenders.

91 What we find difficulty in accepting is the argument that the cost of the roof work and the wall work was being overcharged on the basis of the figures drawn from Spons. Spons is a guide to costings and a tool to assist surveyors to check contractors' prices. However, competitive tendering is the best guide to the market and as long as that process is carried out fairly and effectively it cannot be said that the lowest costs tendered are outside the broad band of reasonableness. it may of course be that the final cost of a particular item is more or less than that tendered, but that will be an issue for the Applicants to deal with when the work has been completed. At this stage, all we can say is that we do not accept Mr Fairclough's argument that the scaffold costs in connection with items 5.01 (Roofs) and item 6.02 (Walls) as set out in paragraphs 84 and 85 above are more than are reasonable. We would not propose to make any reduction in relation to these items.

92 However, what Mr Fairclough's argument does highlight is the issue of the preliminaries. Once the car park element has been removed from the contract, the work is substantially reduced. The tendered cost is reduced by nearly half - from £43,141.34 (p 73) to £22,193.13 (p 411). This does not necessarily mean that the preliminaries can be reduced by half. Crean is not strictly correct in saying (at p 404) that the preliminaries have not been reduced. A shorter contract will require less supervision. It may well be that a reduction of £500 could be justified on that basis. However, as Mr Fairclough states, and we accept his evidence on this point, the waste produced by the car park excavation, particularly bearing in mind the increased depth of excavation as tendered for in the enhanced specification, would be such that the items relating to provision of skips and removal of debris will form a substantial proportion of the cost of the preliminaries. We do not accept Mr Fairclough's suggestion that all £6,702.50 should be removed. However, bearing in mind that this is an on account figure, and taking account of the omission of an expensive element (skips and removal of debris) and the reduced length of the contract we consider it reasonable to include only the figure of £3,202.50 as the cost of preliminaries.

93 We were somewhat taken by surprise by Mr Fairclough's argument that he should not be required to contribute to the cost of the windows other than the communal window. Looking first at the Fletcher Lease, the First Schedule clearly states that the flat "includes the window frames of the said flat…" Clause 3(d) of the lease includes a covenant "to repair cleanse and keep in good and substantial repair and condition the window frames." However, under clause 2(ii) of his lease he is required "to pay one eighth of the Service Charge…relating to the matters specified in the Third Schedule". This Schedule, which is headed "obligations of the Lessor and matters in respect of which the Service Charge is made," includes at paragraph 4 the provision "to paint from time to time all the outside wood and metal work" Mr Fletcher may own his own window frames but he is still obligated to contribute to the painting of the wooden window frames.

94 The Kettle Lease and the Fairclough Lease are somewhat different, but the effect is the same. Clause 8(iii) declares that "a flat on the first or second floor includes…the internal and external walls of the flat…" Clause 5(ii) of these leases requires the lessees to decorate "all the inside parts of the Flat..." However, in clause 4(i)(a) the lessees covenant to pay "the rents" which includes the "service rent" as defined in clause 2. The service rent comprises the lessee's defined proportion of "the costs expenses outgoings and matters mentioned in Part I of the Fourth Schedule hereto" Those costs include at paragraph 2 of the Fourth Schedule "the expenses of decorating the exterior of the building…heretofore or usually painted". Further clause 6(e) of both leases places the responsibility on the lessors to "decorate the exterior of the building heretofore or usually painted". The conclusion is inescapable and for this reason we have not referred this issue to the Applicants for further argument. Whilst the individual lessees may own the window frames and in some cases may be responsible for repairing and replacing the windows of their own flats, the Applicants have the obligation to decorate the window frames and the Participating Respondents must pay their respective proportions of the cost through the service charge.

95 As far as the drain is concerned, we agree with Mr Fairclough. If the drain is working satisfactorily, there seems little point in doing work to it at the present time. It would seem to us to be more sensible to carry out this task when work is being done to the car park. We therefore conclude that it is reasonable to adjust the Crean tender to take into account the reduction in the preliminaries (£3,500) and the drainage (£173.25). The sum of £3,673.25 is therefore to be deducted from the revised tender price of £22,193.13 ie £18,519.88 plus VAT (£22,223.86).

RNL Fees - 2013 Costs - £5,176.96

96 The amount of £5,176.96 for the contract management represents 10% of the contract price. Although Mr Fairclough had asked for a copy of the terms of RNL's retainer, he had not been sent a copy. However, it appeared to be accepted at the original hearing that this was the basic fee arrangement subject to certain additional amounts which were payable. Mr Fairclough told us that he considered RNL's fees to be too high. RNL had already received a fee for the preparation of the schedule of works, the issuing of the tenders and the tender report as well as the consultation issues and the revision of the Schedule of Works. He produced an e-mail from Banks Wood Cardiff, Quantity Surveyors (p 357). They would charge £1,320 plus VAT representing 8 weekly site visits of 3 hours each at £55 per hour. He believed that the contractor would be self-supervising. With the reduced specification, the contract period would now be down to 6 weeks. £75 per hour was £20 per hour more than Banks Wood's charge. Mr North was a senior surveyor. Richard Bond was not as senior but just as capable and should therefore charge less. Mr Fairclough considered a fee of £1,000 plus VAT would be reasonable. It was put to Mr airclough by the Surveyor member of the Tribunal that in his experience 8% to 10% of the final contract figure for contract management would be a broadly acceptable range of charges, but Mr Fairclough considered that a Surveyor would charge 5%.

Determination

97 Whilst we accept that it is for the Applicants who have brought the application to establish that the charges it seeks to make are reasonably incurred, it is well established that the lessees must give some indication to the lessor or manager as to the nature of his/her objection to particular costs even if that objection is expressed in general terms. At the pre-trial review, the objection was to "the cost of the works proposed". There was no reference at that stage to the RNL fees for supervision as there had been to the RNL fees in the 2013 costs dealt with above. It is arguable that the presence of the e-mail from Banks Wood should have alerted the Applicants to the issue, but on balance if the Applicants were not aware that the topic was going to be raised, it would not have registered as significant. Whilst we accept that there may be Surveyors who would be willing to charge 5% of the contract price, it is not our role to penalise a lessor for failing to find the cheapest price (see Regent Management Ltd -v- Jones [2010] UKUT 369 (LC)). It is to determine whether the particular costs are reasonable. The costs have, therefore, to be within the broad band of reasonableness. We are of the opinion that the fee of 10% is on the high side, but even allowing for the extra charges for particular aspects of the work, and

applying our knowledge and experience to the evidence, we cannot say that the charge of 10% of the contract price is unreasonable. It follows from our decision above relating to the reduced specification that the RNL fee of 10% must be recalculated on the basis of the adjusted price (£1,851.99 plus VAT, ie £2,222.39). To that extent we determine that such costs are reasonable. It is unlikely that there will be further variations in the wording of the leases of those Respondents not represented at the hearing. However, we give leave to the Applicants and any such Respondent to refer the matter to us no later than the 30th January 2015 for further determination.

Insurance - £2,000
Electricity - £450

98 For the reasons stated in paragraphs 61 to 69 above, Mr and Mrs Fairclough are entitled to a credit in respect of the amounts charged to them by the Applicants as a proportion of the 2014 Building insurance and electricity costs. It also follows that the Applicants cannot charge Mr and Mrs Fairclough the 15% management percentage in respect of these items. Rev and Mrs Kettle and Mr letcher did not challenge the payability of the insurance premium. We determine that the proportions of the payment on account of the Building insurance premium requested in the 2014 costs for Flats 3 and 6 are reasonable. Mr Fletcher did not challenge the payability of the 2014 electricity costs and so we determine that the payment on account of such costs is reasonable for flat 3. The Rev and Mrs Kettle did not raise the issue of the 2014 electricity costs, even though their lease follows the Fairclough Lease on this point. Again, as the Applicants have not had the opportunity to comment upon this aspect we make no determination in respect the Rev and Mrs Kettle at this stage. We are also unable to make any determination in respect of the other flats as we do not have the copies of the leases concerned. Again, we invite the Applicants and the Rev and Mrs Kettle and the other Respondents to liaise in an attempt to agree the liability of those Respondents in the light of this decision. If agreement is not reached by the 30th January 2015, this application shall be relisted at the request of any party and the issue determined.

Fire Extinguisher Service - £150;
Fire Alarm Lights Service - £300

99 With regard to the 2014 fire safety costs, Mr Fairclough raised the issue of whether they were chargeable under his lease in his Answer to the Application (p 39). Mr Morgan dealt with it briefly at paragraph 53 of his statement (p 148). Whilst they were not referred to in the Order of the 15th July, they were mentioned in Mr Fairclough's e-mail of the 3rd August. Paragraph 15 of the submissions of the Applicants' Solicitors is under the section relating to the 2012 costs- specifically arguing that the costs for that period "should not now be introduced at this late stage". The Applicants' Solicitors do not repeat the objection in respect of the 2014 fire safety costs. The e-mail from the Applicants' Solicitors dated the 11th September again specifies that the comments relate to the 2012 fire safety costs. As the objection has been specifically restricted to the 2012 fire safety costs, and as Mr Fairclough had raised the issue of the 2014 fire safety costs in his Answer to the Application and Mr Morgan had dealt with them in his statement, we determined that it was in order for the issue to be dealt with at the hearing. We also considered that

even though they were not referred to in the Directions at the pre-trial review, the fact that Mr Fairclough mentioned them in his e-mail and the Applicants' Solicitors raised no objection, the Applicants were not prejudiced by their omission from the Directions. The Application was after all brought by the Applicants for us to determine the reasonableness of the service costs, including the fire safety costs, and Mr Fairclough had indicated at an early stage his desire to query the 2014 fire safety costs and furthermore had indicated that same intention to the Applicants some 6 weeks before the hearing, it would have been clear to the Applicant that the issue was still live and would be raised at the hearing.
The issues of payment and estoppel to which reference was made in respect of the 2012 costs do not apply to the 2014 costs. No issue was raised as to the amounts involved.

100 With regard to the 2014 fire safety costs:
(a) Mr Fletcher has accepted his liability to pay his proportion of the costs and so we determine that in his case they are reasonable.
(b) For the reasons stated in paragraph 72 above, Mr and Mrs Fairclough are not required to contribute to the fire safety costs of £150.00 and £300.00. They are again entitled to a credit in respect of the proportion charged to them. It also follows that they are also entitled to a credit in respect of the 15% management fee attributable to their proportion.
(c) As with the electricity charges, the Applicants have sought a determination as to the amount of service charge payable by Rev and Mrs Kettle and by the non-attending Respondents. The Kettle Lease contains similar provisions to those in the Fairclough Lease. They were not referred to as an issue for Rev and Mrs Kettle in the Directions made at the pre-trial review although they were referred to at the hearing. They were not raised by the non-attending Respondents (although Mrs Jarrett refers to them in her letter of the 18th April 2013 (pp 293-294)). As with the electricity charges, because the Applicants did not attend the hearing they have not had an opportunity to comment upon this aspect either. We therefore invite the Applicants and the Rev and Mrs Kettle and the other Respondents to liaise in an attempt to agree the liability of those Respondents in the light of this decision. If agreement is not reached by the 30th January 2015, this application shall be relisted at the request of any party and the issue determined.

101 2014 Costs - Conclusions

	The Fletcher Lease	The Kitchen Lease	The Fairclough Lease
S 20 Works	£22,223.86	£22,223.86	£22,223.86
RNL	£2,222.39	£2,222.39	£2,222.39
Building insurance	£2,000.00	£2,000.00	Nil
Redecoration	£1,500.00	£1,500.00	£1,500.00
SWALEC	£450.00	no determination	Nil
Fire safety	£450.00	no determination	Nil

SECTION 20ZA

102 The Applicants have made an application under section 20ZA of the Act for a determination to dispense with all or any of the consultation requirements in relation to those works for which consultation was required for periods covered by the 2012 costs and the 2013 costs as well as the works proposed in what the Respondents considered to be the flawed consultation process. The Applicants' principal ground was that works carried out and accounted for in the 2012 costs pre-dated the High Court decision in Philips -v- Francis (now overturned on Appeal). The Applicants could not have anticipated the effect of that decision relating to the aggregation of costs when calculating the statutory threshold of £250 per lessee. The Respondents had not been prejudiced and therefore the consultation could reasonably be dispensed with. Although there had been some issue that work had been split deliberately into a number of contracts each less than £1,500, the figure at which those paying the highest proportion of she service costs, namely 1/6th, would be required to pay more than £250, the Participating Respondents had agreed at the original hearing and In the Agreement that they would not object to the application. They indicated that this was still their position subject to one issue raised by Mr Fairclough. As far as the works for which amounts on account were demanded in the 2014 costs, again subject to the same matter, the Participating Respondents raised no objection and were anxious that work should be carried out without delay. The other Respondents raised no objection to the Application.

103 The issue which Mr Fairclough asked us to consider is one which was referred to in the decision of the Supreme Court in Daejan Investments Ltd -v- Benson [2013] UKSC 14 (Daejan). The Supreme Court had indicated that it would be proper for a tribunal to "require the landlord to pay the tenants' costs on the grounds that it would not consider it "reasonable" to dispense with the [consultation] Requirements unless such a term was imposed" (per Lord Neuberger, paragraph 61). Mr Fairclough told us he had been transparent throughout. He had lost time. He and Mr Fletcher had taken days off. Mr Fairclough, a qualified engineer, had applied his own expertise. He had been to RNL's office. He had taken time off work. He had prepared a schedule of costs which totalled £3,950. He had charged £50 per hour which was 25% of the rate charged by the Applicants' Solicitors. We pointed out that the costs seemed to encompass all the proceedings and that the s 20ZA application was only a part. We therefore invited Mr Fairclough to resubmit his costs schedule dealing only with the s 20ZA application. He subsequently did so reducing the amount claimed to £2,300.

104 As the Applicants were not present and therefore could not immediately respond to the request that we apply a condition to the grant of the dispensation, we invited the Applicants to send their written submissions in order that we could consider them when determining the issue. The Applicants' Solicitors wrote on the 26th September and made the following points:

(a) The items of repair in the 2012 costs represented separate and discrete items of work.

Whilst dispensation was required, the amounts involved were marginal. There was no potential aggregation in the 2013 costs. As the contentious items had been removed from the 2014 costs and the Respondents had no issue with the remaining items, the Applicants had complied with their obligations to consult. The issues

relating to the consultation by RNL did not materially affect the process. If the Applicants were in breach, the Respondents had suffered no prejudice.
(b) When the s 20ZA application was made at the original hearing, the Respondents did not object nor did they indicate that they would be seeking their costs as a condition of the grant of dispensation.
(c) It was not raised as an issue at the pre-trial review.
(d) It was not mentioned in the Agreement.
(e) Such a condition is not mandatory.
(f) The question is whether it is reasonable to do so. The Respondents have suffered no prejudice in relation to the application. The main arguments have concerned the amount and liability of expenses, not whether the correct process had been undertaken. That was why the Respondents had consented to the application in the Agreement. The Applicants have been accommodating and reasonable. They agreed to waive their right to claim costs so it would be unreasonable if they had to pay the Respondents' costs.
(g) The costs claimed must relate solely to the s 20ZA application and not to the rest of the proceedings. Mr Fairclough's costs are not reasonable. They are excessive and do not relate solely to the s 20ZA application. The amount claimed should be limited to £18 per hour, the rate allowed in Civil Proceedings under CPR 48 -52.4 of the Costs Practice Directions. The maximum should be 4 hours at £18 per hour totalling £72.

Determination

105 The Participating Respondents did not object to the s 20ZA application at the original hearing. In the Agreement, they also agreed not to object to an application under section 20ZA in respect of the 2012 costs and the 2013 costs. They told us that that was still their position. They also had no objection in principle to the grant of dispensation in respect of the 2014 costs subject to the payment of Mr Fairclough's costs. No objection has been raised by any other Respondent. The only issue for us to determine is whether we do not consider it reasonable to dispense with the consultation requirements unless provision is made for payment of Mr Fairclough's costs. We acknowledge that Mr Fairclough in particular has put a lot of time into this application. He has corresponded with the Applicants, their Solicitors and with RNL. He has attended meetings. He has considered in great detail the schedules of works and their various costings. He has prepared for and spoken with great conviction at the hearings. However, it cannot be overlooked that Mr Fairclough is an interested party. He may be a qualified engineer and has undoubtedly brought his personal expertise to bear on the manner in which the Respondents' case was presented. We are not for one moment suggesting that his evidence or his submissions were in any way affected by his personal involvement. We certainly do not believe this to be the case. But the importance of an expert is that he/she is independent of the parties. He/she has a higher duty to the Tribunal. He/she must be capable of taking a detached view of the issues and if necessary be prepared to accept and deal with points which may not necessarily be in the interests of his/her clients. However honest and transparent Mr Fairclough has been during the course of these proceedings, it could never be said that he was impartial. He had a vested interest in the outcome of the proceedings. As such we do not consider it appropriate that he

should be remunerated for the time he has spent in dealing with the section 20ZA aspect of these proceedings.

106 We also accept the Applicants' argument. The request that we impose a condition on the grant of the dispensation has come very late in the course of the proceedings. There was no mention of such a request when the matter was first raised at the original hearing. There was no mention of it in the Agreement. There was no mention of it at the pre-trail review. It was first introduced at this hearing. We have given the Applicants the opportunity to respond to this request and they have done so, but in fairness to them this was an entirely new aspect, one which they would have had no indication that it was going to be raised even if they had attended.

107 We are also not satisfied that the allocation of the time spent fairly represents the proper proportion relating to the section 20ZA application. Lord Neuberger refers to payment of "the costs incurred by the tenants in resisting the landlord's application for dispensation". The Respondents have not resisted the application. They have challenged the consultation process, not the application for dispensation. Mr Fairclough has undoubtedly spent a considerable amount of time involved in that challenge and in many of the other issues, but the Respondents have never resisted the section 20ZA applications. Even the issue of the car park was really a dispute as to the "quality" of the work. The argument over consultation was an argument over the specification not whether repairs should be carried out. Further by the time of this hearing the Applicants had given notice that they were not pursuing the issue of the car park at the present time. The only real issue was whether we should attach a condition to the dispensation, not the dispensation itself.

108 As with any other discretion, we must exercise it judiciously, not capriciously. On balance we are not satisfied that the Respondents have made out a case that the Applicants pay or contribute to the Respondents' costs as a condition of the grant of dispensation. We therefore determine that

(a) the consultation requirements in respect of the works undertaken and comprised in the schedule of actual expenses for the period 29.9.11-28.9.12 be dispensed with;

(b) insofar as the works and expenses incurred and comprised in the schedule of actual expenses for the period 29.9.12 - 24.3.13 required consultation, such consultation be dispensed with;

(c) further or additional consultation in respect of the works to be undertaken and comprised in Crean's revised tender (pp 406-410) be dispensed with.

The parties will please note that this determination only relates to the question of dispensing with the consultation requirements. It does not address the question as to whether the cost of the works when completed will have been reasonably incurred. Further, whilst we have commented above that there appears to be little point at the present time to carry out work to the drains, if the Applicants choose do so, no further consultation will be required. For the avoidance of doubt, as and when the Applicants decide to carry out works to the car park, a further consultation process will be required or a further application under s 20ZA of the Act.

SECTION 20C

109 In the Agreement, the Applicants agreed that they would not put through the costs of this application as part of the service charge. In paragraph 39 of their submissions dated 1st September the Applicants' Solicitors question whether the Agreement still subsists "particularly in relation to the Applicants' agreement not to seek costs. The Applicants' position is that in so far as it is possible to follow that agreement, they would wish to do so." They restate their position that as the Applicants do not intend to pass their costs of this application through the service charge, no Order under section 20C is required. Paragraph 17 of the Agreement specifically refers to proceedings numbered LVT/0021/05/13. The application is also referred to as LVT/0021/05/14, but the submissions clearly indicate that the Applicants' intention not to pass on their costs of the application through the service charge relates to those incurred in connection with the second hearing as well as the original hearing.

110 We do not doubt the genuineness of the Applicants' assertion that they will not seek to recover their costs through the service charge but it is nonetheless good practice and for the sake of completeness for an Order to be made. We therefore order that none of the Applicants' costs incurred in connection with these proceedings (including those incurred in connection with the original hearing) are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Respondents.

CONCLUSION

111 In response to the questions we posed at the beginning of this decision (paragraph 3),

(a) Mr Fletcher (flat 3), the Rev and Mrs Kettle (flat 6) and Mr and Mrs Fairclough (flat 8) are not required to contribute to the cost of work carried out to the parapet of the roof of number 97 Cathedral Road by Martin Roofing Contractors. They are however required to contribute to the cost of the replacement of some damaged slates in an amount to be determined or agreed.

(b) Mr and Mrs Fairclough are not required to contribute to the cost of insuring the Building under the terms of their lease.

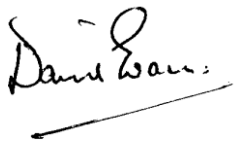
(c) Mr and Mrs Fairclough and the Rev and Mrs Kettle are not required to contribute to the cost of the communal electricity, fire extinguisher service and fire alarm/lights service under terms of their respective leases. Reference must be made above to the implementation of this finding as we have determined that the 2013 costs have been agreed.

(d) The Respondents are required to contribute their respective proportions of the sum of £695 inclusive of VAT charged by Roger North Long and Partners, Chartered Surveyors, as the 2013 costs have been agreed by the Respondents.

(e) The amount to which the Respondents are required to contribute their respective proportions on account of the building works is £22,223.86 and in respect of RNL's supervision fee is £2,222.39.

112 The parties must now seek to agree the outstanding liabilities based upon the principles established in this decision. If any of the parties are unable to agree the amounts payable by the 30th January 2015, they may refer the matter to this Tribunal for further determination. A copy of the relevant leases must in such circumstances be provided. A determination will then be made on the written submissions of the parties without further hearing unless any of the parties or the Tribunal requires one.

DATED this 15th day of January 2015.



CHAIRMAN