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Residential
Property
TRIBUNAL SERVICE

**LEASEHOLD VALUATION TRIBUNAL**
**FOR THE LONDON RENT ASSESSMENT PANEL**

**LANDLORD AND TENANT ACT 1985, AS AMENDED**
**SECTIONS 27A AND 20C**

**REF: LON/00AW/LSC/2009/0418**

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| **Property:** | Flats at Trellick Tower<br>Golborne Road<br>London<br>W10 5UX |
| **Applicants:** | Various Lessees of Trellick Tower |
| **Respondent:** | Royal Borough of Kensington and Chelsea |
| **Appearances:** | Mr P Letman of Counsel<br>Mr R W C Horner FRICS of Congreve Horner<br>Mr R Samuel (Flat 197)<br>Mr T Gildon (Flat 50)<br>Mr S Goodchild (Flat 149)<br>Mr R Silva (Flat 149)<br>Ms E Peterson (Flat 167)<br>Mrs A Mozler (Flat 192)<br>Mr S O'Neil (Flat 209) |
| | For the Applicants |
| | Mr R Bhose of Counsel<br>Ms C Vachino, Solicitor, Royal Borough of Kensington and Chelsea<br>Mr P W Bennett FRICS } John Shreeves &<br>Mrs S Taylor MRICS } Partners<br>Mr G Wisbey }<br>Mr C Whyte, Reef Associates<br>Mrs S Everson QS, the CBE Partnership<br>Mr D Williams, Ark Housing Consultancy |

Mr P. McWalter, Project Manager
Mr M Cannatta – Hok International
For the Respondent

**Dates of Hearing:** 24, 25, 26 and 27 November 2009 and 4, 5, 6 and 20 January 2010

**Members of the Tribunal:** Mrs J S L Goulden JP
Mr C White FRICS
Mrs J Clark JP

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## Background

1. The Tribunal was dealing with the following applications dated 1 July 2009 (and received by the Tribunal on 2 July 2009):-

   (a) an application under S.27A of the Landlord and Tenant Act 1985, as amended ("the Act") for a determination whether a service charge is payable and, if it is, as to:

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

   (b) an application for limitation of landlord's costs of proceedings before the Tribunal under S.20C of the Act.

2. The Applicants are various lessees at the property.

3. The application relates to Trellick Tower, Golborne Road, London W10 5UX ("the property"). The Tribunal was advised that the property comprises 217 flats of which 34 are subject to long leases originally purchased under the Right to Buy Scheme. Of those 34 lessees, 24 are Applicants. The remaining flats are rented by secured tenants of the Respondent.

4. The Respondent is Royal Borough of Kensington and Chelsea.

## The Property

5. The property was described in a project brief to consultants on Trellick Tower dated November 2001 as follows:-

   *"The building has been listed as being of special architectural and historical interest by the Secretary of State, Department for culture, Media and Sport. It was designed by Ernö Goldfinger and built between 1968 and 1972. It is considered as the ultimate expression of Goldfinger's philosophy of high rise planning and embodies the best ideas of the time on high rise housing. It was Grade II* listed in 1998 and listed building consent is required for any external alterations and many internal alterations".*

## The Objectives

6. The objectives as set out in the November 2001 project brief were as follows:-

> *"The objective is to carry out repair and restoration works to the building, as follows:-*
>
> *(1) To ensure the tower is safe, wind and water tight and to prevent further deterioration of the exterior of the building.*
>
> *(2) To carry out internal works to maintain satisfactory levels of health and safety, security, community and amenity.*
>
> *(3) To restore the special architectural and historic interest of the building.*
>
> *The works shall be carried out with residents, businesses and organisations remaining in occupation and must be arranged so as to minimise the disruption.*
>
> *The aim is to have a design life span of 20 years for all works.*
>
> *The works must be designed for ease of future maintenance and have a low maintenance cost where possible.*
>
> *The consultant must demonstrate that elements have been designed and specified such that an economic price is obtainable and that they represent value for money. The Council seeks to achieve value-for-money in its capital projects".*

7. The project brief also gave advice on alterations to the building as follows:-

> *"History*
>
> *Trellick Tower comprises 217 flats, six shops an office and a crèche. 1968-72 by Erno Goldfinger. Built of in-situ reinforced concrete, some pre-cast pebble-finished panels and timber cladding.*
>
> *Why was Trellick Tower Listed?*
>
> *Listing ensures that the architectural and historic interest of the building is carefully considered before alterations, either outside or inside, are agreed.*

*It was listed II* (22 September 1998) by the Secretary of State as being "particularly important building of more than special interest."*

*Why was Trellick Tower chosen?*

*Historic buildings are a precious and finite asset, and powerful reminders to us of the work and way of life of earlier generations. This building is included as the ultimate expression of Goldfinger's philosophy of high rise panning, and ideas at the time on high rise housing.*

*What listing means for the occupier*

*Planning Permission and Listed Building Consent is required for any* ***EXTERNAL*** *alterations. Type of alterations include: addition of trellis and satellite dishes, re-cladding, painting and replacement of windows and doors."*

8. It was also noted that certain internal alterations would also require Listed Building Consent.

**Major Works**

9. This case concerns major works carried out or to be carried out to Trellick Tower in four phases as follows:

Phase 1: Structural strengthening works. Completed in October 2007. No charge to lessees.

Phase 2: Replacement of windows and wall panels to east elevation of Block A, window panels and balcony doors on south elevation of Block B, concrete repairs to Block A east elevation and Block B south elevation, interior concrete repairs to the other façades; replacement of roof covering; installation of façade access system; replacement of internal refuse chutes and installation of lighting protection system. Works completed in March 2009. Charged to lessees where appropriate.

Phase 3: Internal works to tenanted flats, upgrading of fire protection, risers, refurbishment of fire doors and communal parts. Commenced April 2009 due for completion in spring 2010. No charge in respect of internal works to tenanted flats. A *"small charge"* to lessees for remainder.

Phase 4. Works to the external façade and refurbishment of common parts. No funding instructions as yet. Will be charged to lessees where appropriate.

10. The service charge year runs from 1 April to 31 March in each year. The service charge years in dispute are for the years 2008 and 2009. The dispute in this case relates to the major works carried out by the Respondents under Phase 2 only and the issues between the parties are in this case limited to the replacement of all the windows on the north-east elevation of Block A and the south west elevation of Block B and replacement of the refuse chute, together with professional fees and re-arrangement fees. The overall cost was said to be approximately £1.55m. Works commenced in January 2008. Practical completion of the works was 12 March 2009. The defects period is due to expire on 11 March 2010. The final accounts have not yet been completed and are in dispute. The costs could increase.

11. A brief history of the Phase 2 works was contained in the witness statement of Mr P Bennett, Project Manager, for the Respondent. He set out the key events culminating in the installation of the windows /wall panels in the east elevation of Block A and the south elevation of Block B, which also had its adjacent balcony doors replaced, and the other works included in Phase 2. The list was compiled from documents and correspondence received by John Shreeves & Partners ("Shreeves") in the course of the project:

| | |
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| 1972 | Construction of Trellick Tower completed. |
| December 1998 | Listed Grade II*. |
| March 2002 | Shreeves appointed as lead consultant and building surveyors. |
| April 2002 | Residents advised of plans for building. |
| May 2002 | John McAslan & Partners appointed architects. |
| December 2002 | Shreeves start their internal surveys. |
| February 2003 | First resident questionnaire. |
| February 2003 | Abseil survey of elevations. |
| April 2003 | Newsletter with results of questionnaire. |
| April 2003 | Meetings commence with Royal Borough of Kensington and Chelsea's Planning and Conservation officers ("RBKC P&C") about the reports being prepared for presentation to Tenant |

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| | Management Organisation ("TMO"). |
| May 2003 | RBKC P&C bring in English Heritage to review proposals. |
| May 2003 | Ark Consultancy appointed project manager. |
| September 2003 | Second resident questionnaire. |
| October 2003 | Meeting with Trellick Tower Residents Association ("TTRA") representatives to discuss progress and the results of the questionnaire. |
| November 2003 | Feasibility report issued to RBKC/TMO and to TTRA. |
| November 2003 | TTRA issue a revised statement of position on the replacement of the windows. |
| January 2004 | TMO advises TTRA that it is having a further report done. |
| January 2004 | Shreeves start approaching companies to test market for those able to do repairs/replacement windows and doors. |
| March 2004 | English Heritage accept that windows and balcony doors will have to be replaced and suggest possible manufacturers. |
| April 2004 | Inspection of Flat 197's replacement acoustic double glazed windows. |
| June 2004 | Meetings with RBKC P&C and English Heritage to review window samples and draft of Supplementary Report. |
| June 2004 | Supplementary Report issued to RBKC/TMO and TTRA. |
| August 2004 | TTRA issue a response to that report. |
| January 2005 | Listed Building Consent and Planning Applications submitted for proposed works including flats' window and balcony doors replacement. |
| March 2005 | TTRA issue summary of objection to the TMO Listed |

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| | Building Consent Application. |
| April 2005 | RBKC P&C receive petition from residents about proposed scaffolding and that they want double glazing, and other points. |
| August 2005 | Revised Submission Document sent to RBKC P&C addressing points in TTRA's Summary of Objection. |
| February 2006 | At the request of RBKC P&C, Listed Building Consent and Planning Applications re-submitted with the updated drawings and details. |
| March 2006 | English Heritage recommends Applications be approved. |
| April 2006 | Government Office for London ("GOL") calls in Applications. |
| April 2006 | Planning Services Committee Meeting on 4 April resolves consents will be granted if GOL decides RBKC can determine them. |
| April 2006 | Consents granted on 28 April after GOL letter on 25 April saying no reason to withhold consent. |
| September 2006 | TMO letter to residents explaining revised Phase 2 works with just east elevation Block A and south Block B having window/doors replaced. |
| October 2006 | Trial windows and door fitted in Flat 37 and public viewing. |
| November 2006 | RBKC P&C approve them. |
| March 2007 | Bieber Windows appointed to supply and install windows. |
| September 2007 | Breyer Group PLC appointed contractor for Phase 2 works. |
| November 2007 | Shreeves carry out further internal surveys. |
| January 2008 | Start on site. |
| July 2008 | Shreeves carry out further window surveys on Block |

| | |
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| | A, east elevation. |
| July 2008 | Mr Horner undertakes his external window survey from the scaffold. |
| March 2009 | Phase 2 completed. |

**Inspection**

12. The property, which forms part of the Cheltenham Estate, was inspected by the Tribunal on 24 November 2009 in the presence of Mr P Letman and Mr R Bhose, both of Counsel, Mr P Bennett and Mrs S Taylor, both of John Shreeves & Partners, Mr R Horner FRICS of Congreve Horner, Mr R Samuels (Flat 197) and Ms H Hafsah, pupil to Mr Letman.

13. The property is a Grade 2* listed building built between 1968 and 1971 consisting of principally a 31 storey concrete tower block (Block A) aligned in a northeast/northwest direction with a 7 storey low level block (Block B) perpendicular to Block A. There were commercial/social premises in parts of the ground and lower ground storeys. Blocks A and B meet on the northern corner connected by a service tower. The service tower contains lifts, stairs, service ducts and plant rooms.

14. At the entrance to the tower was a manned reception desk. The common parts were sparse. There were three lifts.

15. The members of the Tribunal were invited to inspect the interiors of Flat 201 on the 30th (top) floor and Flat 197 (Mr Samuel's flat) on the 27th floor. In both flats, the Tribunal inspected original and new windows and, in Flat 197, the exterior of the sliding doors to the balcony.

16. The Tribunal also inspected a rubbish chute storeroom on the 30th floor. A note on the door stated. *"The chute is blocked. Please can you take your rubbish down to the bin rooms. We are working to have the chute unblocked as soon as possible. Sorry for any inconvenience caused".*

**Hearing**

17. At the hearing the Applicants were represented by Mr P Letman of Counsel. Expert evidence for the Applicants was given by Mr R W C Horner FRICS of Congreve Horner. Oral evidence was also provided by Mr R Samuel, the lessee of Flat 197. Also in attendance on some or all of the hearing dates were Ms H Hafsah, Pupil to Mr Letman, Mr T Gildon (Flat 50), Mrs A Mozler (Flat 192), Mr S O'Neil (Flat 209), Mr S Goodchild and Mr S Silva (Flat 149) and Ms E Peterson (Flat 167).

18. The Respondent was represented by Mr R Bhose of Counsel and Ms C Vachino, Solicitor, Royal Borough of Kensington and Chelsea. Expert evidence was provided by Mr P Bennett FRICS and Mrs S Taylor MRICS, both of John Shreeves & Partners, Mr C Whyte, Reef Associates and Mr M Cannatta, Hok International. Evidence as to fact was provided by Mr D William, Ark Housing Consultancy, and Mr D McWalter, Project Manager. Also in attendance on some of the hearing dates was Mr G Wisbey of John Shreeves & Partners.

19. No evidence was given at the hearing on 24 November 2009, but Mr Letman made an application to adjourn, which was resisted by Mr Bhose.

**Application to adjourn**

20. The Applicants had requested an adjournment of the hearing on 16 November 2009 which had been refused. A fresh oral application to adjourn was made by Mr P Letman on behalf of the Applicants at the start of the hearing on 24 November 2009.

21. Mr Letman, for the Applicant, argued that although the Directions and timetable had been agreed in substance, the timetable had been imposed by the Tribunal. The documentation, some 2,000 pages in total had not been served in hard copy until 29 October 2009. Up until that time the Respondent had been seeking an adjournment. Mr Horner, the Applicants' expert had tried to do the best that he could but a joint meeting of experts which was held on 30 October 2009 had not been productive. Mr Horner had only had a limited opportunity to consider the considerable amount of documentation. In addition, Mr Horner had been unwell and a medical certificate was handed to the Tribunal. Mr Horner had prepared a further brief report but this did not contain much detail. Mr Letman indicated examples of the difficulties faced by Mr Horner. He contended that an adjournment should be permitted.

22. Mr Bhose, for the Respondent, opposed the application. He said that there was nothing in the Directions which permitted another expert report to be served on behalf of the Applicants. He accepted that the Respondent had wanted to make an application to adjourn, but this had been at the beginning of October 2009. The present application was made very late. Mr Bhose accepted that some of the Respondent's evidence had been served late by some days, but the Applicants had not objected and/or said that they could not proceed. Mr Bhose handed to the Tribunal a bundle of correspondence between the parties in support.

23. Regulation 15(2) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 states:-

**"Where a postponement or adjournment has been requested the Tribunal shall not postpone or adjourn the hearing except where it considers it is reasonable to do so having regard to:**

**(a) the grounds for the request**
**(b) the time at which the request is made; and**
**(c) the convenience of the parties"**

24. The basic premise is that the Tribunal should not permit adjournments unless it is reasonable to do so. In this case, the Tribunal was of the view that:

(a) Whilst it is understood that the Applicants' expert, Mr Horner had a considerable amount of work to undertake, this was a matter for the Applicants and/or their legal team. It is noted that the hard copies of the Respondent's evidence was received in its entirety on 28 October 2009 and a joint meeting of the experts was held on 30 October 2009 which was stated to be *"not very productive"*. However, grounds for the request were only made to the Tribunal on 16 November 2009.

(b) The application for the request for an adjournment was not made until 16 November 2009 i.e. a week before the hearing was listed to commence. The Pre-trial Review had taken place on 12 August 2009 and Directions were issued on 13 August 2009 i.e. over three months before the agreed hearing date. The Directions were drafted by the parties and agreed, with amendments, by Counsel for both sides and the Procedural Chairman.

It is noted that as stated above, no application for an adjournment had been made after the joint experts had met on 30 October 2009 (which was the last date by which Mr Horner must have known that he was in some difficulty). Further, it is clear from the correspondence provided on behalf of the Respondent that the Applicants' solicitors, as late as 10 November 2009, had not been instructed to make an application for an adjournment.

(c) The Respondent was now objecting to the adjournment and it was contended on behalf of the Respondent that it was ready to proceed.

25. The application to adjourn was carefully considered by the Tribunal. It is incumbent on the Tribunal to consider proportionality and the interests of justice. The case had been listed for four days. Each case should be dealt with expeditiously and fairly and the Tribunal is aware of the constraints on the public purse.

26. The application to adjourn was refused. The parties were so advised at the hearing on 24 November 2009, after which the Tribunal inspected the property (see above).

**Issues for determination**

27. The Tribunal was advised that the Applicants did not challenge the works to the roof. The issues which required determination of the Tribunal were limited to Phase 2 of the major works carried out at the property and related to:-

    (a) Replacement of windows on the north east elevation of Block A and the south west elevation of Block B.

    (b) Replacement of refuse chutes.

    (c) Professional fees.

    (d) Management fees.

28. On 27 November 2009, Counsel for the Respondent said that it was not intended to place costs of the proceedings before the Tribunal on the service charge account since it was not considered that the terms of the lease permitted it to do so, and accordingly no determination is required of the Tribunal under S.20C of the Act.

29. Evidence was given over the seven days of hearing. The salient points of the evidence are set out below.

**Replacement of windows in north east elevations of Block A and south west elevation of Block B**

30. The cost of the replacement of the windows on Blocks A and B was £914,379 including preliminary but excluding management and professional fees. However, it is understood that these sums are the subject of a dispute between the Respondent and contractors which is still unresolved.

31. The Applicants' case is that the condition of the timber windows to the east elevation of Block A and the timber windows and integral balcony doors in

the south elevation of Block B did not justify the complete replacement of the window panels/units in those elevations and any disrepair could reasonably have been remedied by more limited repairs.

32. Expert evidence was provided for the Applicants by Mr R W C Horner FRICS of Congreve Horner who said that his instructions had been received orally.

33. Mr Horner had inspected the property in August and October 2007, July 2008 and August 2009. Prior to his main inspection, the windows on the south elevation of Block B had been replaced and it was therefore only possible to inspect windows that had not been replaced in Block A. He had been able to inspect all the windows from the scaffolding which was in situ and he had also inspected the interiors of Flats 149, 197 and 216.

34. Of the 30 sets of windows inspected by Mr Horner, he said that five had already been or were in the process of being replaced. He had inspected 26 original windows which represented more than 86% of the windows on the east elevation. The windows of Flat 216 had required replacement since the frame was badly decayed. However, in his view the remainder were all capable of economic repair. He said *"in my opinion the main defect that renders a timber window incapable of economic repair and warrants replacement of the whole window is serious and extensive decay of the main frame and, to a lesser extent the opening sections... the hinges, glass and furniture are all capable of being replaced piecemeal if necessary. I therefore concentrated on the state of the timber".*

35. In Mr Horner's supplementary report dated 23 November 2009, and under the heading 'Scope of Respondent's Consultant's Instructions' it states:-

*"My original instructions were to examine the main areas of work intended under Phase 2 of the major works programme. I was asked to give my opinion on whether and to what extent the proposed works were necessary to enable the Respondent to comply with its covenants under the lease having regard to the feasibility reports prepared by the consultants and the actual condition of the elements that the Respondent was intending to renew or replace. The obligations of the Respondent under the terms of the lease are to repair and maintain the structure including the windows and external doors to balconies and the refuse chutes in good and substantial repair and condition.*

*The Respondent has two roles, viz the freeholder and owner of the tenanted flats and the freeholder of the leasehold flats. The Respondent is at liberty and may well have an obligation to improve its housing stock comprising all the tenanted flats. As I understand it there is a financial incentive to do this.*

*I have now seen the brief to the Respondent's consultants for the first time. It is clear that the parameters set for the purposes of defining the work to be done are not limited to its lease obligations. Instead the Respondent's instructions to the consultants were more to prepare a feasibility report on the viability of the various ways of complying with its desire to maintain and improve its housing stock in this building than to maintain those parts of the leasehold flats, including the common parts, which it has an obligation to maintain under the terms of the lease, e.g. restoration of the special architectural and historic interest of the building including the pergola beam; 20 year design life spans; ease and low cost of future maintenance; energy efficiency strategy.*

*In my first report I restricted myself to consideration of the need to repair. I still consider that the Respondent was exceeding its obligations under the terms of the lease and that this is explained by the non-lease considerations in the consultants brief and instructions".*

With regard to ironmongery he said that having looked *"briefly"* at the Respondent's inspections carried out in 2007 and 2008 *"in none of these is there actually any evidence of broken or irrepairable hinges and locking mechanisms. There is only one mention of a faulty hinge which is not specific about the fault or the need to repair or renew. It is evident from my own inspections that a lot of the locking mechanisms do not function properly due to the inappropriate use of weather stripping which is preventing the locks from engaging properly".*

36. Mr Horner accepted that the existing hinges were no longer made but had not had time to establish whether an alternative hinge would be suitable.

37. Mr Horner was of the opinion that the draught strips set into the sides of the opening casements could easily be replaced. He said he was able to find a suitable replacement from USA which would require an enlargement of the groove in the sides of the opening casements.

38. Mr Horner had been unable to find a glazing firm to replicate the existing glass. He doubted that any window required deglazing but enquiries of a firm in Somerset showed that a similar product could be made albeit 2mm thicker than the existing glass.

39. As to sashes Mr Horner said he had had extensive discussions with a firm in Donnington who were of the opinion that the originals could be replicated and who did not see why individual opening sashes could not have been made to fit existing openings nor why frames and sashes could not have been adapted to suit a modern hinge alternative. He had not had time to find a firm who could make replacement opening sashes for a repair programme *"but I would not anticipate any real difficulty".*

40. Evidence was given by Mr R Samuel, who had lived at Flat 197, since 1999 and had been chairman and Vice Chairman of the Trellick Tower Residents' Association for some 10 years. In his view there was always an assumption on the part of the Respondent that the windows would be replaced, rather than repaired. He said *"I remember being surprised and somewhat alarmed by this"*. Mr Samuel said that he had discussed with Mr D Williams of Ark Housing Consultancy as to this aspect for a period of 5 years but, in the view of Mr Samuel, *"the only real discussion between the consultants was exactly what the windows should be replaced with and by whom"*. This view was held by other lessees in the block. The best data available had been the Martech survey which had not supported replacement. Mr Samuel accused Mr Williams of stone walling and using various arguments (e.g. the lifespan of the windows and the non-negotiable requirement of a 10 year guarantee) in support of replacement which Mr Samuel considered *"an irrational decision"*. He was also unhappy about a questionnaire sent to all the residents in October 2003 which he considered had been *"deliberately slanted to achieve replacement"*. Mr Samuel said that he thought that any such requirement arose out of the Decent Homes Standard objectives rather than a need to replace the windows and this was the Respondent's *"clear objective"*.

41. Mr Samuel said that he had felt confident that, being a listed building, English Heritage would reject the Respondent's proposals and he therefore concentrated on efforts to objecting to the Respondent's application on the grounds of loss of amenity (the glazed area would be smaller) and cost (the money would be *"wasted"* since other areas of the building required works). However, Mr Samuel was given to understand by Mr Bennett, the Project Manager, that if the Respondent agreed to replace (at great cost) the pergola beam at the top of the building, which Mr Samuel said was considered by English Heritage to be *"a defining architectural feature of the building"*, then English Heritage would agree to the window replacement. English Heritage had given permission. Mr Samuel said *"As a matter of inference, I know a deal was done. English Heritage had an objective. They wanted the pergola beam restored. It was No.1 on their list of priorities...Mr Williams was swayed by English Heritage's insistence of poured concrete at the top of the building costing £750,000. That was the non-negotiable element. English Heritage had an agenda and they got what they wanted"*.

42. Mr Samuel said *"the decision to replace the windows was clearly taken right at the outset of the project in the absence of proper evidence about their condition. The justifications, like the cost in use and benefit analysis, were produced months, indeed years after the decision was taken in an attempt to justify the decision when the Residents' Association challenged. On the one hand the council fought very hard indeed against planning/listing considerations for replacement of the windows. On the*

*other hand the council immediately raised listing/planning/building regulations considerations as a trump card to defeat any argument for refurbishment."*

43. In cross examination, Mr Samuel confirmed that he had no technical qualifications but said that he had used his common sense and experience over the years of dealing with the residents and representatives from the council. He accepted that some windows had required replacement but not wholesale replacement. When shown an e-mail sent by Mr Samuel confirming his acceptance of the 2003 questionnaire, he said that at that time *"I did not doubt their good faith at that point but now, six years later, I do doubt their good faith".*

44. Expert evidence for the Respondent was provided by Mrs S Taylor MRICS of John Shreeves & Partners. She said that she had been instructed verbally. Her witness statement was dated 21 October 2009.

45. Mrs Taylor said that she had started the preparation of the feasibility report but it had been completed by Mr P Bennett when Mrs Taylor went on maternity leave in 2003. She had taken over as Project Manager in December 2006. The work had been split into phases due to the large financial commitment required. Her report was limited to some aspects of the window replacements only and to the chutes replacement.

46. In respect of the windows, it had been decided that a full external survey of the windows in conjunction with a concrete inspection had been required and that the most economical solution for the inspection would be to carry out an abseil survey. In relation to the windows, Mrs Taylor referred to paragraph 8.9 of the brief which stated:-

*"The window surveys will be carried out to Block A, Block B and the service tower. Windows not accessible from the private balconies to these elevations* ***should*** *be included within the survey. A detailed and thorough window survey is required to be carried out to the timber, metal and upvc windows and panels, to all elevations including the windows to the link way access bridges, boiler room and community room. Excluding the windows and doors to the private balconies only to the south elevation of Block A and west elevation to Block B".*

47. Mrs Taylor stated that in order to gauge the condition of the windows, the different window types were required to be identified, graded and referenced with the measurements provided. Windows were required to be graded as follows:-

| | | |
|---|---|---|
| A | Good | performing as intended |
| B | Satisfactory | performing as intended but showing minor deterioration |
| C | Poor | showing major defect/not operating as intended |
| D | Bad | life expired/serious risk of imminent failure |

48. Tender documents had been sent to six specialist contractors. Martech had submitted the lowest tender price of £41,374.66 and their report had been submitted on 19 May 2003 (and had been dealt with by Mr Bennett since by that time Mrs Taylor was on maternity leave).

49. Expert evidence for the Respondent was provided by Mr P W Bennett FRICS of John Shreeves & Partners. Mr Bennett was the Project Manager and his report, dated 21 October 2009, was limited to the issue relating to the windows.

50. Mr Bennett had been employed since 1994 by John Shreeves & Partners as a Project Manager, although that employment ceased as at December 2009. Mr Bennett had become involved in Trellick Tower from about April 2003 when his colleague, Mrs Taylor, left for maternity leave (by which date she had commended the 2003 Shreeves Feasibility Report for the Respondent's TMO. Mr Bennett's involvement had ended in about December 2006. He described his duties as *"lead consultant with direct contact with the client and charged with liaising with the other consultants in the team to pull together their input for the Feasibility Report and to complete those parts* (Mrs Taylor had) *been able to do before she left".* This brief had been expanded in late 2003 when Shreeves had been asked to prepare a supplementary report specifically regarding the technical issues with the design and condition of the windows and balcony door, after which Shreeves brief was widened further to include John McAslan & Partners' involvement in obtaining listed building consent and planning approval for the replacement of the windows and balcony doors.

51. In his witness statement, Mr Bennett said *"in parallel we were to source window manufacturers as their specialist input would be required to advise on the detailed design and ironmongery details required by the conservation bodies. It should be explained that references to replacing windows involves replacement of the whole wall panel, as the windows are an integral part of the wall panel and cannot be removed individually".*

52. Mr Bennett referred to the Martech report which he described as *"a large detailed document"* which covered concrete and window surveys and which he said showed that 48 of the 60 windows (i.e. 80%) on the eastern elevation of Block A and all 18 on the south elevation of block B were designated Grade C meaning that the windows condition was *"poor and showing major defect and/or not operating as intended".* There was no access to any of the flats and their survey was external only and they were

unable therefore to assess whether the windows operated satisfactorily. Mr Bennett expressed the opinion that if the windows had not been able to operate satisfactorily, this *"would have compounded their problems and could have moved their grading into a worse category".* Mr Bennett said that the survey results vindicated problems made by residents in respect of their windows but stressed that this was not the only survey carried out on the windows and doors. There had been an overview of the results of all surveys and inspections, which had included those carried out by building surveyors within Shreeves on all the elevations. He considered these, compared with the Horner's limited inspection, were more representative of the condition of the building.

53. Mr Bennett rejected the Applicants' contention that the Martech report could not be relied on and that the windows were in a better condition than the report indicated and his view was *"..one needs not only to also examine the interior side but also open and check each openable door and window element. A window that has been defined as bad from an external survey of its condition cannot get better after further investigations internally. At best it will stay the same grade."*

54. Inter alia, Mr Bennett rejected Mr Horner's criticisms as *"conjecture",* the quotations he referred to were actually estimates, the figures in those estimates bore no relationship to what the client would eventually pay and he thought Mr Horner had misunderstood how the wall panels were built up. He disputed Mr Horner's suggestion of life expectancy of softwood as 25-20 years, the use of Window Care systems and their guarantees and also disputed Mr Horner's suggestion that certain damage to Flat 216 had been caused by leaks to the roof. He referred to photographs which he had taken on the visit to a top floor flat, Flat 216, which he said showed the defects present. He also referred to the condition of Flats 127 and 201. He said that all of these flats had been given a B grade by Martech and *"were conclusive evidence that* (Martech's) *assessments in 2003 were over optimistic as to the actual condition of the windows and that had the means existed for building surveyors to examine the exterior of all the windows in Block A, they would have found them far worse than the Martech survey indicated".* In support, he compared the results of internal surveys carried out by his firm's building surveyors in late 2002/early 2003; November/December 2007 and mid 2008 with the results of the Martech February 2003 surveys.

55. Shreeves had the responsibility for conducting consultations with the residents as part of their research. An exhibition was held on 7 October 2003 and a detailed questionnaire, prepared in consultation with the Residents Association, distributed. This was described as *"a lay person's view from the front line as to whether they considered, from their first hand experiences, that the windows could be renovated".* He said that Mr

Samuels, the chairman of the Association had emailed him confirming satisfaction with the questionnaire on 22 September 2003. Mr Samuels together with Dr M Brady (the previous chairman of the Residents Association) had gone through the questionnaire results with Mr Bennett on 24 October 2003 (although Dr Brady had moved out of Trellick Tower in August 2003) and which he said were considered *"fair"*.

56. The June 2004 supplementary report had been prepared because the TMO considered that although replacement was the most economic option, the cost was high and Shreeves had been asked to consider other options, namely partial replacement and repairs rather than wholesale replacement. The 2004 report carried more technical details.

57. In cross examination, Mr Bennett said that Shreeves had been asked to carry out a 20% random survey, about 42 surveys in all. Of these, 9 related to the matters before the Tribunal.

58. Mr Bennett accepted that with regard to the Martech survey, which was by way of visual inspection, *"Martech could have done it better....they could have spent more time on the window part rather than the concrete part"* but Shreeves had also relied on the random surveys carried out and their overall assessment of the building. Mr Bennett said that the windows had problems which had not been immediately apparent e.g. rot. Martech had been instructed both on the windows and also on the condition of the concrete although the nature of their work was principally in respect of concrete. Although Martech was sent back to carry out more work Mr Bennett said *"it was the best we had and I feel we reached the right conclusion"*.

59. Mr Bennett rejected the contention that Shreeves had started on the premise that they wanted to replace the windows and said *"conservationists wouldn't have let us even if we had wanted to"*. He accepted that Shreeves had been instructed to look again at repair and replacement options and they had done so. He said some windows had to be replaced regardless and denied that repair had not been considered. He also denied that the supplementary report did not present a balance view and/or was biased or that the views were presented in such a way that English Heritage would accept replacement.

60. In closing submissions Mr Letman contended that *"Mr Bennett was neither independent nor possessed of the relevant expertise"*. Mr Letman said that the only objective appraisal was that provided by Mr Horner who had given evidence in the measured way. Mr Letman's view was that Mr Bennett's evidence had been embellished and he had *"got carried away seeking to support the advice he had been given."*

61. For the Respondent, Mr D Williams of Ark Housing Consultancy LLP said that he was employed in 2003 as a member of the Respondent's Capital Programme Team as Project Manager for the major works. Ark's consultancy was with particular expertise *"in the areas of development, regeneration, asset management and organisational change"*. Their clients included local authorities, registered social landlords and some voluntary and private sector organisations. Mr Williams' role involved overall control of the work of the Project Team including design consultants appointed by the Respondent, Tenant Management Organisation ("TMO"), contractors and other officers of the TMO. The cost of Ark's consultancy was borne by TMO under the management charge.

62. He said that a preliminary feasibility study had been carried out in 2000 and a report issued in October 2000. A more comprehensive feasibility study was required and Shreeves had been appointed in March 2002. That report had been issued in October 2003 (after residents had completed a questionnaire) and was presented to the TMO's Board on 18 December 2003. The Board had raised concerns as to issues raised and conclusions reached in the feasibility report and a more detailed appraisal was required of, amongst other matters, the window elements due to the substantial costs involved. A supplementary report, prepared by Shreeves, was dated June 2004 and this report had been considered by the TMO's Property Management Committee on 18 October 2004 and subsequently by the TMO Board on 11 November 2004 when the recommendation to replace the existing steel and timber windows rather than adopting a mixed programme of repair and replacement was chosen as *"the most cost effective overall solution"*.

63. Expert evidence for the Respondent as to access was provided by Mr C Whyte of Reef Associates Ltd and his witness statement was dated 20 October 2009. Mr Whyte confirmed that he had received written instructions to appear as an expert and, at the request of the Tribunal, a letter confirming those instructions dated 24 September 2009 was produced. Mr Whyte confirmed that this was the first time he had appeared as an expert witness.

64. Mr Whyte said that Reef Associates Ltd had been employed as façade access consultants during the development stage of the 2004 contract for works and his report stated *"we were tasked with evaluating access to all of the building façades for both replacement of the window panels and concrete repair works"*. The options considered were scaffolding, temporary suspended platforms and Beech (mast climber) platform system. It was decided that scaffolding offered a safer and more flexible means of access and at less cost than temporary suspended platforms or the Beech platform system. In addition, the temporary suspended platforms allowed the possibility of working on a maximum of two levels at

any one time and the Beech system allowed the possibility of working on a maximum of three levels at any one time. In both cases it was considered that this would have had a significant impact on productivity and increased the contract period.

65. In respect of the window replacement, it was stated:-

*"The original window panels to the eastern elevation were an integral part of the wall panel's construction, the main frame of which ran the full width of the panel with each metal panel or window constructed into it when it was assembled. It was not possible to remove any individual "panel" to replace it. Trying to do so would destroy the integrity of the whole panel.*

*The whole wall panel would have to be removed, taken apart and the damaged timbers replaced. This would have been practically impossible, even from scaffolding, due to the size of the panel (about 5.7m x 2.1m on the east elevation) and because the panel tucks behind the concrete frame, making it only possible to remove the panel inwards, and that is blocked by the internal partition walls.*

*The design of the replacement panels used on the eastern elevation allowed them to be reinstalled in sections. The listed status of the building would not allow a change in design for a single panel."*

66. Mr Whyte was also asked to consider access in the case of window repair had replacement not been considered necessary. He said that his conclusion would have been the same. In his report it was also stated:-

*"In addition some of the window repairs would have required the use of a small hand held electric router to remove the decayed wood. This is similar to a straight drill which instead of having its cutting edge at the end to make a round hole, has two on the side of the rod, so you remove the wood by pressing the side of the rod, or router bit as it's called, against the wood. Some cutters have spherical cutting ends to remove bulk material inside the piece of timber. The cutter turns far faster than a normal wood or metal drill. Using such a tool can be extremely dangerous if the operator slips, or is distracted and cuts out more wood than necessary, or even goes straight through a piece. It should be appreciated that doing this work from a cradle compounds the risks of an accident or doing damage to sound woodwork".*

67. Mr Whyte rejected Mr Horner's contention that cradles had been used in the contract for the concrete repairs and said that they had only been used for investigatory works. He said *"the temporary repair work differed significantly from the permanent concrete repairs"*. He also rejected Mr Horner's contention that a single cradle only would be required and said

that this would not have allowed access across the eastern elevation. Multiple cradles would have been required and in any event a single cradle would have extended the contract period substantially (which Mr Horner had not addressed). In the view of Mr Whyte, a suspended platform system would not have provided a practical safe solution, especially considering that the building remained occupied during the works. Scaffolding offered the least amount of risk to operatives and occupants. Mr Whyte considered Mr Horner's estimated cost of access by one cradle and operative at £22,500 to be unrealistic and Mr Whyte's own estimate of cradle costs in the region of £42,000 was more accurate.

68. In cross examination, Mr Whyte confirmed that Reef Associates had been part of the design team in 2004 as consultants for the major works and that they had been part of the decision making process. He said that Reef Associates worked impartially on all projects. He said *"I am not here to support decisions the* (the Respondent) *has made"*. Mr Whyte accepted that he had no expertise in window construction and denied that he was defending his own recommendation and/or his employers. Mr Whyte maintained that there was always a risk of using cradles on façades and scaffolding was safer for the works which had been carried out.

69. In closing submissions, Mr Letman contended *"in the light of Mr Whyte's involvement in the decision to use a full scaffold and resulting lack of impartiality the Applicants submit his more recent evidence should be rejected and Mr Horner's evidence, consistent as it is with Mr Whyte's initial report, preferred..."*

70. Expert evidence for the Respondent was given by Mr Mark Cannatta, Senior Associate and Head of Historic Buildings Unit at John McAslan & Partners at the relevant time but now at Hok International. Mr Cannatta, an Architect, had been responsible for conservation advice on the Trellick Tower refurbishment project since 2005. In his witness statement of 21 October 2009, he set out his role. In evidence Mr Cannatta said that he had not been involved in the project specifically but had been part of the design team. He had left John McAslan & Partners in 2008 and has had no ongoing professional relationship with the Respondent since that date.

71. Mr Cannatta said that he had not provided expert evidence previously but understood his role in this respect. He had a professional duty of care. He had provided impartial advice on what was best for the listed building and there was no incompatibility with that and providing expert evidence.

72. Mr Cannatta explained that as a Grade II* listed building, proposals for change were the subject of an application for Listed Building Consent, proposed alterations were assessed against national and local policies and the Local Authority's planning offices were legally bound to consult

English Heritage and usually the Twentieth Century Society (for buildings erected after 1914). Relying on English Heritage's advice, building approval would be given from the Government Office for London.

73. Mr Cannatta said *"the legislation mentioned imposes the requirement for consent for alterations that might affect the listed building's special character. This implies that the basic measure of whether the proposals are capable of being authorised is whether the effect of the proposals on the special architectural and historic interest is acceptable or not. During the course of the design process it was therefore necessary to establish the nature of the special interest of Trellick Tower, the impact of the proposals upon it and whether that impact is acceptable. The Act also makes clear that any unauthorised alteration that affects the character of a listed structure is a criminal offence".*

74. After a considerable number of meetings held with statutory authorities and others it had been decided that *"for the various technical and conservation reasons, the only sensible course of action was for approval to be sought to replace all the timber windows in both the blocks that form Trellick Tower".* He said that the proposals at the time envisaged replacement of all the windows to address serious problems with water and air infiltration *"and improve conditions for residents in line with the Decent Homes requirements".* An application to replace a portion only of the windows had not been considered and would have been unlikely to gain the support of English Heritage due to the adverse impact on the character of the building by mixing existing and new windows. A Conservation Report was prepared which was normal practice when dealing with change on significant historic buildings to ensure that proposals were properly informed and any change to a historic building was justified.

75. The application for consent had been submitted on 26 January 2005.

76. In Mr Cannatta's opinion, when dealing with works to listed buildings of the size and type of the property, the sum of alterations, the incremental change to the listed building, *"is likely to have a profound and deleterious effect on its appearance and consequently its historic character".* The incremental changes between existing and proposed windows would affect the historic and architectural character of the property.

77. Mr Cannatta explained the modifications and revisions to the proposed window design addressing the elements that compose the windows and the consultation process was completed in autumn of 2005. A fresh application for planning and listed building consent was made in February 2006. Government Office for London was granted in April 2006. He said that repair had been considered and analysed in detail, but had been

discounted as not viable. He said that the extent of access would not have differed substantially from that to install new windows and would have been likely to remain in place for much longer; alternative not like for like repair methods could have introduced further complications; replacement of the unique and long discounted double glazing would have required modification to the window frames and timber beads; the extent of repair and repair methods would have required listed building consent.

78. Mr Cannatta said that the process had taken an unusual length of time because Trellick Tower was one of a small number of 20th Century Grade II* listed buildings and if it had not been so significant, the refurbishment would have been considerably more straightforward. However, the property was *"protected by carefully drafted legislation made to ensure that alterations do not adversely affect its architectural and historic significance"*. He said that it was necessary to properly analyse and understand the special architectural and historic character of the building and also the importance of judgement and compromise in assessing proposals for change.

79. Mr Cannatta in cross examination accepted that the TMO was the firm's Client and he was part of the decision making process, but rejected the suggestion that he was not independent or objective. He said *"I provided my professional experience in trying to advise the clients of the best thing for the building and conservation"*. He accepted that the Decent Homes Initiative was important *"but it was not the only thing"*. He understood the aim was to Decent Homes Standard, but the conservation issue was already an issue. The windows had been considered in isolation.

80. Mr Cannatta confirmed that he had collected and presented the arguments for conservation purposes and in that connection he considered that repair was always preferable.

81. He accepted that the *"pepper potting"* of new windows was contentious. They would be less conspicuous the higher up the building they were installed. He had thought it would be reasonable to do so but English Heritage and the Royal Borough of Kensington conservation department had not. As far as he was aware there were no identical replacements for any of the ironmongery used originally. English Heritage had been concerned with issues such as the alignment of the transoms and had wanted to work on the whole elevation carried out at the same time.

82. Mr Cannatta said that in conservation terms, all issues were part of one argument, namely the integrity of the building.

83. In closing submissions Mr Letman contended that the Respondent's case was to some extent *"unclear"*.

84. Evidence for the Respondent as to costings was provided by Mr S Everson MRICS of The CBE Partnership Ltd. Mr Everson, a quantity surveyor, referred to his witness statement dated 25 October 2009.

85. Mr Everson's report, which was based on the contract sums, was stated to deal specifically with the items addressed in Mr Horner's report, namely the cost of replacement windows, the estimated cost of window repairs, the life cycle cost comparison between replacement as against repairs and the cost comparison between refuse chute replacement as against the estimated cost of repairs. Mr Everson had assumed for these purposes that repairs would have been practicable.

86. As to window costs, Mr Everson said that Mr Horner had double counted the cost of preliminaries, provisional sums and contingencies which had the effect of reducing Mr Horner's total window cost from £1,520,488 to £1,317,467. In addition he commented that the cost of the windows to Phase 2 was *"distorted by the inclusion of an element of Phase 4 works".*

87. If the windows/wall panels had been repaired, rather than replaced, Mr Horner's cost of £1,500 per unit was considered by Mr Everson to have been *"wholly insufficient".* He said that Mr Horner had not taken into account the other works which would be needed to undertake a conservation repair and he listed other works which he thought should be undertaken. In his view, the estimated cost of window repairs (if practicable) would be £535,000.

88. Mr Everson also calculated the cost of replacement as against the cost of repairs over the next 50 years and criticised Mr Horner's comments n this respect. He also criticised Mr Horner's cost benefit analysis which he said were costs in use analyses as they took no account of any benefits from the works. He thought that Mr Horner's suggestion that the existing windows would be in a satisfactory condition when they were 90 years old was wholly untenable.

89. Mr Everson's costs in use analyses, one of which was not discounted and the other was discounted at 3.5% allowed for a 40 year window life span. From his costs in use analyses, Mr Everson maintained that over the next 50 years, the cost of repairs and subsequent replacement as against initial replacement would be higher by approximately 16.8% without discounting and 6.5% higher when discounting at 3.5%. He stated *"this would indicate that the replacement option is the more economic option, even when the benefits are excluded, over a 50 year investment appraisal".*

90. Mr Everson maintained that the initial cost of replacement windows to the two elevations in the Phase 2 works would be £845,967 and the initial cost of estimated repairs would be £410,772. Both amounts would be

exclusive of 1% surcharge, professional fees and TMO management fees. Future costs would depend on the cost of the maintenance regime.

91. In closing submissions Mr Letman contended that the methods used by Mr Everson were only a tool and if say 4 - 5% had been used it would reverse the result. He argued that this was so sensitive that it could not be determinative. He also said that the Applicants maintained that the windows could be repaired indefinitely. Since the replacement costs were £400,000 more than the repair costs, the Tribunal had to find a justification for the more expensive works being carried out. The Respondent's arguments were not sustainable and *"the repair option was perfectly feasible"* and *"their technical explanations had been developed on improvement criteria"*. The Tribunal had to decide what was necessary to meet the lease obligations.

92. Mr Letman criticised the independence of the Respondent's witness who, he said were all involved in the broad assessment based on a brief to improve and who were all drawn into the decision making process and were trying to justify decisions which they had made. He maintained that the only objective expert was Mr Horner.

**Replacement of refuse chutes**

93. The two refuse chutes (one in each of Block A and B) are both located in the tower by way of a vertical tube running vertically internally from top to bottom with Block A having 10 access points and Block B having a secondary shorter chute with two access points. The chutes have hopper heads on every third floor in chute rooms off the main lift/stair lobbies. There is a bin/paladin room at the bottom. A cut off plate in the basement allows the operative to close the chute and temporarily stem the fall of waste whilst a full paladin is exchanged for an empty one.

94. The chutes were rebuilt with a new larger diameter replacement rather than repair the existing chutes. The cost of the new chutes would be in the region of £248,000 (final demands still outstanding). The Applicants maintain there was no need to replace the chutes and that the cost of repair would be in the region of £84,000.

95. The Shreeves' Feasibility Report dated October 2003 had stated:-

*"4.34.1 there are large holes at low level with hoppers missing which they suspect are the result of attempts to clear the chutes of blockages,*

*4.34.2 the hoppers are extremely small resulting in larger rubbish bags not fitting in the chutes,*

*4.34.3 due to the position of the hoppers and the fact that they can be left open they pose a hazard to small children,*

*4.34.4 some hoppers are missing leaving large holes in the side of the chute,*

*4.34.5 rubbish bags that will not fit are left beside the chutes and pose a hygiene risk and extra work for the cleaning staff who remove the rubbish daily,*

*4.34.6 the manual cut off shutters in the bin room are in extremely poor conditions with consequential risks of fire and injury,*

*4.34.7 consequently the chutes are a health and safety hazard and do not comply with current fire, Building and BS Regulations."*

96. Mr Horner, for the Applicants, said that he had no reason to doubt the Shreeves report on the overall condition of the existing chutes but said:-

*"I would have thought it was desirable to have small hoppers since it prevents the chutes becoming blocked by larger objects that will not fit. The hazard to small children is in my opinion remote and no worse than they encounter in every day life. With bin clearances in many local authority areas occurring every fortnight I cannot see that there is any hygiene risk if excess rubbish is removed daily. The local authority could encourage the occupants to use smaller bags by providing bags. I do not profess to be an expert in time and motion but I find it difficult to believe that the additional work in removing excess rubbish is significant.*

*However, it seems to me that all the criticisms are capable of remedy without replacing the whole chute. Shreeves have not considered the practicality or cost of addressing their criticisms and rectifying the damage.*

*They have suggested three options. Two are replacements with larger diameter chutes, one in concrete (Option 1) and the other in steel (Option 2). The third option is to dispense with the chutes altogether and to use the resulting rooms as a temporary store for the rubbish".*

97. In Mr Horner's view the arguments for replacing rather than repairing the chutes were inadequate *"and the intention was probably always to improve them in order to overcome the difficulties arising out of their use and abuse".*

98. Mr Samuel said that the old chutes had holes in them which had led to a pest problem at the third floor level (although this had been exacerbated by people dumping rubbish on the floor) but he thought that the chutes were in better condition on the upper floors.

99. However, *"since being expanded, and since larger hoppers have been installed, the bin chutes have been blocked for about two-thirds of the time. The council have taken to locking the bin chute rooms pending the unblocking of the chutes, so that all the rubbish piles up in the lift lobby".*

100. Mr Samuel produced photographs in support. In his view *"the widening of the bin chutes and the installation of larger hoppers was a waste of time and money".*

101. Mrs Taylor for the Respondent said that with regard to the refuse chutes, a survey had been carried out during the feasibility stage in respect of the refuse chutes. The chutes were said to have been in a very poor condition internally and externally with large holes to the chutes on several floors (due in all probability in attempts to clear blockages), unsatisfactory repairs to repair and make good the holes and poor condition of the hoppers with many not working or missing. In addition the operation of the hoppers was dangerous since the doors could be left in an open position;

102. It was also said that problems included thick build up of residue which attracted vermin; inability of cleaning the existing chutes due to the number and extent of apertures located within; small size of existing hoppers; shutters to the bin store room at service yard area was poor; doors to the chute rooms were dilapidated with damage to some frames; potential fire risk since some of the original door closers remained in an open position. Mrs Taylor provided photographs which she had taken at about the end of 2002/beginning of 2003 in support of her assessment of the state of repair of the chutes. In her view *"repair was not a viable option".*

103. Mrs Taylor disagreed with Mr Horner's view that there was no hygiene risk and considered that the number of bags left was *"significant"* and she thought that Mr Horner had underestimated the additional work involved in removing the rubbish and cleaning the rooms thereafter. She said that at present there were 12 paladin bins which were emptied three times a week. She also rejected Mr Horner's opinion that there was no safety risk to children and said *"an open hopper not only provides a risk to young children at head height but provides the opportunity for them to climb in if minded to do so".* She accepted that there had been problems with the replacement chutes which she felt was caused by the residents' misuse in forcing inappropriate items down the chutes. She maintained that there was nothing wrong with the design. It would have been *"silly"* to put in

chutes with the same diameter as previously bearing in mind the increase in refuse. The Respondent was going to install rodding points, the cost of which would be borne by the Respondent alone.

104. In cross examination, Mrs Taylor denied that she was not independent. She said that her views given in her report remained the same. The aim had not been to improve the property but to ensure that the property was maintained to a reasonable standard. Mrs Taylor denied the suggestion that in meeting the terms of her brief the Respondent would have to replace rather than repair. She also denied that it would be feasible to repair the chutes. She had considered repair, but any repairs would have had to be bespoke. It was not ideal to have an access point below the hopper.

105. Evidence of fact was provided by the Respondent's Project Manager, Mr P McWalter, who referred to his witness statement dated 27 October 2009.

106. Mr McWalter said that at the relevant time he had been employed by Kensington and Chelsea TMO, although he had left his employment in July 2008 and had no present links with the Respondent.

107. Mr McWalter referred in his statement to the layout of the chutes and described their condition as poor, with a number of cracks and holes. This had prevented proper cleaning for a number of years. He said that extensive damage had been caused by previous attempts to unblock the chutes where, for example, inappropriate items had jammed the chutes and *"on occasion it would appear that the chute had had to be broken to release the jam. This work had to be undertaken by contractors, if caretakers or cleaners efforts proved fruitless".* In addition, he thought the chute wall must have been broken by the weight of further waste being dropped on top of an existing obstruction. He said that there had been *"abuse"* by residents. The failure by some residents to wrap their refuse properly had cause waste to line the interior of the chute and a *"significant"* rodent infestation which was due to not only the waste lining the chute interior but also, due to the holes and cracks, as a conduit for vermin to travel around the building. He said that the residents had made complaints about the problems. Numerous patch repairs had been carried out *"but it was obvious that some were not completely sealing the chute tube and most repairs were repeatedly damaged from blockages, falling waste or repeated removal to effect further unblocking."*

108. In cross examination, Mr McWalter rejected Mr Horner's contention that repairs could be made to the chutes. He said this would not assist since the internal integrity of the chute would still be comprised and waste would still be caught on the jagged edge to the hole. The objective had been to maintain a hygienic approach. He said that everyone was producing more

waste and there had been a demand from the residents. The decision to replace, which he thought was correct, had been made on the basis of previous use.

109. With regard to costings in respect of the refuse chutes, Mr Everson considered that Mr Horner's alternative repair cost would not be unreasonable (if repairs were practicable) but the intermediate levels between floors would also require the same provision. He suggested that the cost alternatives were between a replacement at a cost of £250,480 as against a repair cost of £163,337.

110. In closing submissions, Mr Letman contended that from the Respondent's evidence *"it appears to be common ground that it was possible to repair the chutes (with the damage holes as access panels) but they were replaced instead in order to provide a greater chute diameter better suited to the larger refuse bags now in use."* He said that this was an improvement and therefore the Applicants were not liable under the lease terms.

**Professional fees**

111. Originally the Applicants had contended that the professional fees at 14.61% of the total cost of the works is inappropriate and unreasonable and the percentage should be in the region of 5%.

112. However, further to a breakdown of fees provided, the fees of the construction design and management co-ordinator, access consultants, clerk of works and structural engineers were no longer challenged and the fees of John Shreeves & Partners were accepted at 5% of the contract sum.

113. The fees of John McAslan & Partners were challenged on the basis that if the repair option had, or should have been, adopted, the listed building issues would have been reduced and/or simplified and would have been covered by Shreeves' 5% of the contract sum.

114. Mr D Williams of Ark Consultancy LLP gave evidence for the Respondent under this head. He said that the fees of John McAslan & Partners had been £32,965. He said that he had never been requested for a breakdown of costs.

115. Mr Williams said that a relatively large team of consultants had been required for this project *"due to its relative complexity and important conservation aspects of the building...there was also a need for the services of a conservation architect....although it may be argued that a multi disciplinary practice could have offered several of the professional*

*skills required, and thereby a fee reduction due to economies of scale, I consider it very unlikely that a single practice could be found that would offer all, or even a majority of these skills".*

116. Mr Williams said that professional fees remain estimated costs and are subject to adjustment when the final account is agreed and related final accounts can then also be agreed with the various consultants, which will in turn affect the rechargeable costs to the lessees. In his view the Respondent's costs had probably increased.

117. In closing submissions, Mr Bhose contended that the question was not whether another landlord could have incurred less fees but whether the approach of the Respondent was a reasonable one and, *"in the context of a Grade 2* building, which gave rise to a multiplicity of issues, there is no sound basis for impugning the appointment of consultants from the different disciplines; all were necessary".*

**Management fees**

118. The Applicants contend that the management fees of 12.5% of the cost the works is excessive and there is no proper justification for lessees to meet the costs of the Respondents' *"cumbersome and expensive organisation".* A reasonable level would be 4%.

119. Mr Horner, in his report of 2 September 2009, accepted that it was reasonable for managing agents to charge a separate fee for major works in addition to their fee for managing the property but the percentage claim of 12.5% was excessive. He based his suggested 4% on previous LVT decisions and on his firms' typical level of fees when bidding for work in the market. One LVT decision had reduced the percentage to 10%.

120. Mr Horner rejected the contention that local authorities had to account for costs incurred to a much greater degree than managing agents of private properties. Statute applied equally to private and public landlords. He argued that private individuals are much more likely to take their agents to task if they spend monies carelessly or unnecessarily than tenants who had no financial concern. He said *"the social function provided by the local authority is undertaken on behalf of rate and tax payers. The TMO's job in respect of tenants as opposed to lessees is different and grater than lessees. In respect of the latter they have no social responsibility. In my opinion it cannot be reasonable for the lessees to meet any of the TMO's additional costs in this respect".*

121. Mr D Williams of Ark Consultancy LLP gave evidence for the Respondent under this head. He said that the management fee was a *"contribution towards the Council's direct and indirect costs"* and that the percentage of 12.5% of the cost of the works included professional fees.

122. Mr Williams said that the evidence provided by Mr Horner was similar to that advanced by him before another Tribunal in respect of properties in the Cremorne Estate in 2006. The Tribunal in that case had determined a percentage of 10%.

123. Mr Williams attached three witness statements provided to the Tribunal in the Cremorne Estate case which explained the method of determining the Respondent's management fee and that the management fee was generally less that the actual costs incurred. Mr Williams said that the position set out by the Respondent in the earlier case had not materially changed and in his view, *"a reduction in cost would effectively necessitate a reduction in the TMO's personnel....and I cannot identify where such reductions could be achieved without adversely impacting on service delivery"*.

124. In closing submissions, Mr Letman contended, inter alia, that the evidence on behalf of the Respondent was unreliable. The Cremorne Estate case was now out of date and there was nothing to substantiate the Respondent's claim that costs had increased. He argued that the level of costs incurred by the Respondent catered not just for the lessees but for the social needs and welfare of its tenants and was no guide to the reasonable market rate for which lessees could properly be liable under their lease terms.

125. In closing submissions Mr Bhose said that the percentage of 12.5% had been applied to major works schedules since 1987 and if anything the percentage should be increased since there was no evidence that direct management costs (in essence salaries) had reduced. Mr Horner's suggested 4% was *"opportunist"*.

## The Tribunal's Determinations

## The role of an expert witness

126. In law, an expert witness is in a special category and carries a special responsibility. An expert's duty is to the Tribunal and not to those who pay for his or her services. An expert provides expertise established through evidence and provides honest and unbiased opinions. The Tribunal must consider whether it is safe to rely on the expert and the questions asked of him or her must test the quality and validity of opinions. The Tribunal must assess whether a witness is a true expert in the field of which he speaks,

for example, whether he or she is truly independent, whether he has been unduly influenced so that his or her views can be fairly described as subjective, whether he or she is authoritative, whether he or she assumes the role of an advocate rather than a witness and whether the opinions expressed are based on sound judgement.

127. Although the statements of expert witnesses carry the necessary confirmation as to compliance with the requirements as to acting as an expert, maintaining that an expert is a witness is not the same as being an expert witness. An expert witness must be fully aware of the requirements of being an expert witness and/or their roles must not be such so as to be entwined with those who met their fees so that they cannot be considered as truly independent. Further reference is made as to this in the body of this decision.

128. In the view of this Tribunal, although there is no bar to an expert witness being called by, as in this case, an employer, the Tribunal must show caution.

**Evidence**

129. The burden is on the Applicant to prove its case with such relevant evidence as is sufficient to persuade the Tribunal of the merits of its arguments. The Tribunal is not permitted to take into account the personal circumstances of the parties when making its decision.

130. The salient points of the evidence and the Tribunal's determination is given under each head but the Tribunal considers that it might be helpful to the parties if it sets out the basis on which its considerations are made.

131. The Tribunal has to decide not whether the cost of any particular service charge item is necessarily the cheapest available or the most reasonable, but whether the charge that was made was **"reasonably incurred"** by the landlord i.e. was the action taken in incurring the costs and also the amount of those costs both reasonable.

132. The difference in the words "reasonable" and "reasonably incurred" was set out in the Lands Tribunal case of **Forcelux Ltd -v- Sweetman and Parker (8 May 2001)** in which it was stated inter alia:-

*"....there are, in my judgement, two distinctly separate matters I have to consider. Firstly the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be*

*considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market. It has to be a question of degree...."*

**Replacement of windows in north-east elevations of Block A and south-west elevation of Block B**

133. The Tribunal is critical of the Applicants in that the Applicants' sole expert, Mr Horner, maintained that he had had insufficient time to make necessary enquiries due to the amount of documentation provided on behalf of the Respondent and also for personal reasons. This had the effect of his being unable to answer certain questions raised. Whilst it is understood that documentation provided on behalf of the Respondent had been considerable, the amounts in issue are also considerable and this should have been expected by the Applicants, particularly since the lead Applicant, Mr Samuel is, it is understood a practising Barrister. The Applicants brought this case before the Tribunal and the onus is on them to prove the same.

134. The views of Mr Horner have caused concern to the Tribunal. In his November 2009 supplementary report he says that he considers that *"the Respondent was exceeding its obligations under the terms of the lease".* This appears to be outside his remit and, since he is not an expert on lease construction, it cannot be considered within his expertise. From this, and other comments, to which reference is given below, it leads the Tribunal to the view that it is possible that Mr Horner has been influenced by the strong views held by the lead Applicant.

135. Mr Horner, the expert for the Applicants, conceded that he had only been able to inspect the windows to be replaced on Block A, those on Block B having already been replaced. The scope of his expert report was therefore, due to no fault of his own, reduced.

136. It is also clear, from his supplementary report of 23 November 2009 that he had only just seen the Respondent's brief to Shreeves of November 2001 for the first time and notes *"it is clear that the parameters set for the purposes of defining the work to be done are not limited to its lease obligations. Instead the Respondent's instructions to the consultants were more to prepare a feasibility report on the viability of the various ways of complying with its desire to maintain and improve its housing stock in this building..."*

137. Whilst this may well be the Applicants' case, Mr Horner is an expert witness and these comments appear to be beyond his remit.

138. Mr Horner's enquiries in respect of replacement ironmongery consisted of desultory enquiries of various manufacturers by telephone or e-mail, none of which had been properly pursued. That he had insufficient time to do so and/or for his own personal reasons will not suffice.

139. Mr Samuels had accepted some windows had required replacement but not wholesale replacement. Although he said that he had been unhappy with the 2003 questionnaire which he said had been deliberately slanted to achieve replacement, this did not appear to be the case by his e-mail of 22 September 2003 which stated *"your questionnaire looks fine to me".* Further in an e-mail dated 24 September 2003 from the then Chairman of the Residents' Association to Mr Bennett and others it was stated *"the news letter is fine and the questionnaire thorough, although perhaps a little daunting and complex to be completely user-friendly! Still, it does cover a lot, and those who care will work through it".*

140. Mr Samuels said in evidence *"I know a deal was done".* Whether or not this was correct, Mr Samuels, as a practising Barrister, is well aware that the Tribunal's decision is based on the evidence before it and Mr Samuels has no such evidence. His opinion is based on *"a matter of inference."*

141. Mr Samuels also said in evidence *"the decision to replace the windows was clearly taken right at the outset of the project in the absence of proper evidence about their condition."* This is the nub of the Applicants' case and it is this aspect which has been considered with great care by the Tribunal.

142. The Tribunal is critical of the lack of a proper survey carried out on the windows. The Respondent's chosen contractor, Martech, were specialists in concrete not windows. Mr Bennett conceded *"Martech could have done it better."* Martech's original report on the windows was inadequate and they had to return. It is unsurprising therefore that as a result of the Martech survey results (which had denoted the condition of the windows into broad bands of good, satisfactory , poor and bad) the Applicants considered that those results failed to indicate that the windows needed replacing in their entirety. It was suggested in evidence on behalf of the Respondent that the bands did not necessary indicate that the condition of the windows fall into only one band, but this contention is not good enough.

143. However, added to the mix in respect of the windows is a potent combination of an iconic Grade II* listed building by an eminent 20th century architect, Erno Goldfinger, conservationists at Royal Borough of Kensington and Chelsea and English Heritage.

144. Mr Cannatta, an architect who was head of the Historic Building Unit at John McAslan & Partners at the relevant time and who was responsible for conservation advice to the Respondent said that in view of the status of the building repair would always be the preferred option. Mr Cannatta said that of approximately 700,000 listed buildings there were only 2,000 to 3,000 20th Century Grade II* listed buildings.

145. The Tribunal accepts that this special listing places the building in a special category. As Mr Cannatta opined the listing of Trellick Tower is distinguished not by what the owner can do but by the building's architectural or historical significance.

146. These were, quite properly, a challenge to each of the Respondent's experts' independence.

147. Mr Whyte's statement was stated to be made *"in support of the Respondent's case"*. He confirmed he was party to, and part of the Respondent's decision making process. His statement contained comments as to repairs which could not have been within his remit.

148. Whilst it is understood that this was the first time that evidence was given at a Tribunal by Mr Whyte as an expert witness it may be that he has not fully appreciated his role. However, this is not to say that his evidence is to be discounted. His views as to access were authoritative and of assistance to the Tribunal. In addition, the Tribunal requested sight of a copy of this letter of instruction dated 24 September 2009 and although it was stated that Mr Whyte's expert report would be sent to Counsel for the Respondent for review and comments, *"any comments our Barrister may make to your report are, of course, entirely for you to reject or accept or modify, in accordance with your independence as an expert"*.

149. The October 2003 Shreeves report stated inter alia:-

*"The existing condition of the windows appears to vary between the elevations of each of the two blocks A and B. This is to be expected and is probably related to weather exposure as the decorative condition of the windows will be affected by action of wind, rain and sum.*

*However, there is also consistency throughout all the windows in respect of some noted defects.....*

150. *However, the inspection has also identified that the extent of damage and repair to two elevations is to such an extent that it is considered that the whole of these windows are probably beyond economic repair and must be totally replaced....*

151. *Also, it has been identified (for the two elevations), that these should be renewed totally. It is considered that to undertake repair techniques to these elevations, the cost would be prohibitive due to the overall poor condition. Such windows would therefore need to be manufactured so as to faithfully replicate (so far as it practicable) the fenestration of the existing arrangements".*

152. The Shreeves' report had been based on the Martech Survey and limited visual internal inspection of nine flats only within the two elevations.

153. In the view of this Tribunal, the advice given by Shreeves at that stage to the Respondent is considered suspect on the evidence available.

154. On the instructions of the TMO a further survey was carried out by Shreeves. The explanation for this was given to the residents in a letter from the TMO of 13 January 2004 in which it was stated.

*"The report explained that a number of options had been considered for part replacement of windows but that the most economic option, in the long term, over 30 years, was considered to be to replace all windows now. The cost of these works was estimated at £7.7m and the timetable for the construction phase was to start on site January 2005 completion May 2006.*

*The TMO Board decided that as the cost of the works proposed was so high another report should be presented to explain in more detail all the other possible options for refurbishment Board will then have further discussion and decide on the best course of action. The Board will consider this report in a few months time".*

155. Shreeves supplementary report was dated 22 June 2004 and its purpose was *"to provide to the TMO a balanced view so that they can make a valued judgement considering all the inter-related factors".*

156. The 2004 report stated that the earlier report contained commentary on three scenarios as follows:-

(1) *Replacement of all existing steel windows to common area walkways/staircases and the like.*

(2) *The replacement of existing timber windows to the east elevation of the Tower and south elevation of the medium rise block. The remaining windows being overhauled.*

(3) *An option to replace all the windows with new timber windows."*

157. It appears from this wording that replacement rather than repair was the preferred option.

158. In the condition overview it was stated *"the existing condition of the windows appears to vary between the elevations of each of the two blocks A and B. This is to be expected and is probably related to weather exposure, as the decorative condition of the windows will have been affected by the action of wind, rain and sum. The worst are in the east elevation of Block A and in the non-balcony areas of south elevation of Block B. It is considered that these windows are beyond renovation and must be replaced; that involves the whole of those wall units."*

159. Under renovation options it was stated *"it is considered this option is impossible for the two elevations referred to above and could only apply to the other elevations".*

160. The Tribunal considers from the wording of the supplementary report Shreeves views in respect of repair options were in respect of elevations other than those the subject of the present application.

161. Their conclusions within the report were that the problems of repair to other elevations would have been insurmountable in the case of the elevations which are the subject of the present applications.

162. The summary and conclusion acknowledges the complexity of the issues relating to the windows *"and the considerable work which has been undertaken in reviewing this element of the proposed major repair works".*

163. In the executive summary to the TMO Board it was stated that it had been established that the *"condition of the windows to the flats themselves varies, with those to certain elevations (i.e. east elevation and south elevation of Block B) clearly in need of immediate replacement".*

164. The Tribunal considered with care the technical issues raised in relation to repair of the windows and in particular the process of double glazing, draught proofing, defective window furniture and asbestos.

165. The 2004 report had been prepared for the TMO Board and not in answer to the application which had only been lodged in 2009.

166. Although Mr Horner addressed the issue of repair, the Tribunal was not persuaded of the practicality of his solutions.

167. The Tribunal considers that a repair option would not provide a long term solution and therefore there would be an additional cost implication within a fairly short period of time.

168. The Tribunal determines that the cost of replacement windows in the north east elevations of Block A and south-west elevation of Block B is relevant and reasonably incurred and properly chargeable to the service charge account.

**Replacement of refuse chutes**

169. From the evidence and photographs provided, the refuse chutes had clearly been in a poor state of repair, having served a large number of residents over a considerable length of time. There was no challenge in respect of their overall condition.

170. The Tribunal rejects Mr Horner's contention that the chutes were capable of repair. His view that the Respondent's *"intention was probably always to improve them in order to overcome the difficulties arising out of their use"* is not usually an opinion given by a witness who is giving expert evidence.

171. The Tribunal finds the evidence of Mrs Taylor and Mr McWalter to be more persuasive. It accepts that repair had been considered but due to the irregularity of size, form and location of the damaged chute apertures, together with past repairs which had failed and the size and use of the chutes, repair was not an appropriate option.

172. The replacement of chutes with similar chutes albeit of a wider diameter is not considered to be an improvement. The new chutes were doing the same job as originally intended. It had been reasonable to install larger chutes with a bigger hopper as had occurred on other blocks. The Tribunal is of the view that the chutes were past their useful life and uneconomical to repair. In any event it is not considered that repair could properly address the problem of extensive damage, cracks and breaks in the chute wall as described in Mr McWalter's witness statement.

173. It is unfortunate that the new chutes are still presenting problems in use and are still blocked (as the Tribunal noted on its inspection). However, the Tribunal considers that this is due to abuse by residents in the block rather than poor design. It is noted that this is being addressed by the Respondent at no cost to the service charge account.

174. Final accounts have not yet been agreed since the property is still within the snagging period and there are some outstanding disputes in respect of fees.

175. The Tribunal determines that the provisional cost of £248,000 including preliminaries management and professional fees in respect of replacement refuse chutes is relevant and reasonably incurred and

properly chargeable to the service charge account. From the Everson's additional information supplied after the close of the hearing and at the request of the Tribunal, it is noted that the tendered cost of the refuse chute replacement has changed from £192,344 to £194,092.

**Professional fees**

176. The only fees challenged under this head were those of John McAslan & Partners in the sum of £32,965.

177. Mr Letman's contention that if repair had, or should have been, adopted, the listed building issues could have been covered by Shreeves' 5% of the contract sum is rejected. All the consultants were employed by the Respondent and it is not fully understood why it is suggested that the fees of John McAslan & Partners should be included in Shreeves' fees.

178. Shreeves are building surveyors there were, however, often aspects to these works (which have not been disputed by the Applicants) which required the input of specialist conservation architects e.g. to liaise with English Heritage and to obtaining relevant planning consent as appropriate as explained by Mr Cannatta in his evidence.

179. Part of the brief, as set out in Mr Williams' statement was *"restoration of the special architectural and historic interest in the building".*

180. Mr Williams also said *"there has been an opportunity taken to negotiate a reduction in fees, notably on the part of John McAslan & Partners in respect of their post contract service, by rationalising team roles".*

181. It is considered that it was not unreasonable to instruct John McAslan & Partners. There is no evidence that any work carried out was duplicated by any other contractors.

182. The Tribunal determines that the professional fees of John McAslan & partners in the sum of £32,965 are relevant and reasonably incurred and properly chargeable to the service charge account.

**Management fees**

183. In support of the contention that a management fee of 12.5% was appropriate, Mr Williams had attached three witness statements all dated September 2006 from Mark Agnew, Redmond Lee and Anthony Hutt, all of whom were members of Kensington & Chelsea TMO. These witness statements were in support of the Respondent's case relating to properties on the Cremorne Estate SW10.

184. In the view of this Tribunal, the layers of bureaucracy within the Respondent are many and possibly difficult to comprehend to a lay person. The work is possibly duplicated and the staffing level generous. Although the 2006 witness statements were appended to Mr Williams' witness statement for the present case, none of those witnesses were in attendance and therefore not subject to cross examination.

185. In the Tribunal's Decision of 6 March 2007 it was stated:-

*"The management duties and functions of a local authority are generally more onerous than in private sector. Local authorities, such as the Respondent, had a very large housing stock to manage. It places greater obligation on them to be transparent, accountable and inclusive. These duties and obligations necessarily require the involvement of a greater number of staff. Consequently, its management costs would be greater than perhaps found in the private sector."*

186. The Tribunal rejects Mr Horner's suggested 4% is rejected as unrealistic.

187. The Tribunal determines the management fee at 10%.

**The Tribunal's determinations as to service charges are binding on the parties and may be enforced through the County Courts if service charges determined as payable remain unpaid.**

**CHAIRMAN:** .....

**DATE:** .....23 March 2010.....