10430

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MS/LSC/2014/0044
Property	:	Wyndham Court, Commercial Road, Southampton, SO15 1GS
Applicant	:	Julie Fortescue (First Applicant) Anthony Putnam (Second Applicant)
Representative	:	
Respondent	:	Southampton City Council
Representative	:	Carl Brewin, Counsel
Type of Application	:	Liability to pay service charges and dispensation with requirement to consult lessees about major works/long term agreement.
Tribunal Member	:	Judge N Jutton and Mr D Lintott FRICS
Date	:	6 November 2014 Room 2, Barrack Block, 83-85 London Road, Southampton, SO15 2XQ
Date of Decision	:	20 November 2014

DECISION

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1 **INTRODUCTION**

2 Wyndham Court is a Grade II Listed purpose built block of residential flats, with commercial use at ground floor level, believed to have been constructed in the 1960s. It is in the centre of Southampton close to the central railway station.

3 The property has 4 lifts which serve the residential parts. Each of the lifts serves every residential floor. Lifts 1 and 3 stop at the ground floor while lifts 2 and 4 go down to the basement.

4 There are 184 residential flats at the property. Of these, 101 are owned by leaseholders. 83 are owned by Southampton City Council (the Council).

5 On 31 March 2010, the Council entered into a qualifying long term agreement (within the meaning of Section 20 of the Landlord and Tenant Act 1985) for lift maintenance with Axis Elevators Ltd (the Contract). The Contract provided for the maintenance and repair of lifts in all of the Council's properties including Wyndham Court.

6 In 2013 the Council carried out major repairs to all 4 lifts (the Works). The Council seeks to recover part of the cost of those works (the Council being responsible for a proportionate part in respect of the 83 flats owned by it) from the leaseholders as part of the service charge. The Council seek to recover from each leaseholder for the service charge year ending 31 March 2014 the sum of £964.52 inclusive of administration charges of 15% for the Works carried out to lifts 1 and 2, and the sum of £1019.10 inclusive of administration charges for the Works carried out to lifts 3 and 4.

7 Miss Julie Fortescue of Flat 19 acting on her own behalf and as a representative of the Residents Association, Wyndham Court Leasehold Association, made an application to the Tribunal to seek a determination under section 27A of the Landlord & Tenant Act 1985 (the 1985 Act) as to whether or not service charges claimed in respect of the Works were payable and if so, the amount payable.

8 The matter came before the Tribunal for a Case Management Hearing on 18 June 2014. At that hearing Mr Anthony Putman of Flat 7 applied to be named as an additional applicant and he was added as the second applicant.

9 In September 2014, the Council made an application to the Tribunal pursuant to section 20ZA of the 1985 Act for dispensation in respect of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of the Works. The Tribunal Directed on 23 September 2014 that that application be heard together with the Applicant's application under section 27A.

10 On 13 October 2014 the Council made a further section 20ZA application for dispensation in respect of all or any of the consultation requirements provided for by section 20 of the 1985 Act in respect of the Contract.

11 The said applications came for hearing before the Tribunal on 6 November 2014.

12 **Documents**

13 The documents before the Tribunal were a bundle of some 750 pages comprising copy leases, statements of case, witness statements, the Contract, documents in respect of consultation, the Works, lift service documents and documents in support of the application for dispensation. The Tribunal was handed (copies having been supplied to the Applicants) a skeleton argument on behalf of the Council.

14 References to page numbers in this Decision are references to pages in the said bundle.

15 **The Inspection**

16 The Tribunal attended at the property on the morning of 6 November. The Tribunal was shown lift 4 and ascended to the top floor. Because of the nature of the works carried out to the lift, for health and safety reasons it was not possible to inspect the Works carried out.

17 **The Law**

18 The statutory provisions relevant to the Applicants' application are to be found in sections 18, 19, 20C and 27A of the 1985 Act. They provide as follows:

> *18 (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent –*
>
> *(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and*
> *(b) the whole or part of which varies or may vary according to the relevant costs.*
>
> *(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*
>
> *(3) For this purpose –*
>
> *(a) "costs" includes overheads, and*
> *(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.*
>
> *19 (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –*
>
> *(a) only to the extent that they are reasonably incurred, and*
> *(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*
>
> *and the amount payable shall be limited accordingly.*

(2) *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise*

27A (1) *An application may be made to the appropriate tribunal 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*

(2) *Subsection (1) applies whether or not any payment has been made.*

(3) *An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –*

(a) *the person by whom it would be payable,*
(b) *the person to whom it would be payable,*
(c) *the amount which would be payable,*
(d) *the date at or by which it would be payable, and*
(e) *the manner in which it would be payable.*

(4) *No application under subsection (1) or (3) may be made in respect of a matter which –*

(a) *has been agreed or admitted by the tenant,*
(b) *has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party,*
(c) *has been the subject of determination by a court, or*
(d) *has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.*

5 *But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.*

20C (1) *A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the First-Tier Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*

(2) *The application shall be made –.....*

(b)(a) *in the case of proceedings before the First-Tier Tribunal, to the Tribunal.*

(3) *The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

Section 20 of the 1985 Act provides as follows:

"20 *Limitation of service charges: consultation requirements*

(1) *Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with either sub-section (6) or (7) (or both) unless the consultation requirements have been either –*

(a) *complied with in relation to the works or agreement, or*

(b) *dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.*

(2) *In this section 'relevant contribution', in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.*

(3) *This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount .....*

(5) *an appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount –*

(a) *an amount prescribed by, or determined in accordance with, the regulations, and*

(b) *an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.*

(6) *Where an appropriate amount is set by virtue of paragraph (a) of sub-section (5) the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.*

(7) *Where an appropriate amount is set by virtue of paragraph (b) of that sub-section, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contributions would otherwise exceed the amount prescribed by, or determined in accordance with the regulations, is limited to the amount so prescribed or determined.*

Section 20ZA of the 1985 Act provides:

"(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements".

19 The Leases

20 There are two types of lease at the property. They appear in the bundle at pages 1-31 (lease A) and pages 31A to 31Y (lease B).

21 The relevant provisions in lease A are as follows:

- By clause 2, the lessee covenants to *"pay such proportion of the Service Charge as defined in Part 5 of the Particulars in the manner set out in the Third Schedule for items (shown for guidance) that may be charged in the Fourth Schedule.*
- The proportion of service charge payable is defined in the Particulars as a one equal 184th part.
- The Third Schedule provides for what are described as "*Routine Annual Service Charges*" to be estimated and paid in advance by 12 equal monthly instalments commencing on 1 April in each year. At the end of the service charge year that is after 31 March, once the actual cost has

been ascertained, then there is provision either for the lessee to pay any further balance due or to be credited with any amount of overpayment.

- Major Repairs (as defined in the Fourth Schedule) including any administration charge are charged to the lessee at the time the work is carried out. The Fourth Schedule provides for the Council to recover an administration charge of 15% of the cost of such works.

22 Lease B provides as follows:

- By clause 4 the lessee covenants to contribute and pay one equal 184th part of the costs, expenses, outgoings and matters mentioned in the Fourth Schedule. It provides for payments to be made in advance by equal monthly instalments commencing 1 April in each year and as with lease A, there is provision for a balancing payment to be made or as the case may be a credit given once the actual amount of expenses are known following the end of the financial year ie 31 March.
- At clause 5 the Council covenants inter alia to keep in reasonable repair, decorate and renew *"the passenger lift so far as the same with reasonable care can be so kept repaired and useable"*.
- The expenses listed in the Fourth Schedule include the cost of repairing and renewing *"any passenger lift"*. In addition, there is provision at clause 7 of the Fourth Schedule for the Council to recover an administration charge.

23 It was not disputed before the Tribunal that the costs of maintenance, repairs and renewals incurred by the Council in respect of lifts at the Property, together with administration charges were recoverable in the normal course of events by the Council as part of the service charge payable by the leaseholders.

24 **The Issues**

25 At the start of the hearing the Tribunal identified the following issues to be determined by it, which issues were agreed by all parties:

1. Were the Works carried out within the scope of the Contract?

2. Were the Works necessary and reasonable?

3. Did the Council fail in part or in whole to consult with the lessees as required by section 20 of the 1985 Act in respect of the Contract?

4. Did the Council fail to consult with the lessees as required by section 20 of the 1985 Act in respect of the Works?

5. Should the Council be granted dispensation in respect of any failure to consult in respect of the Contract?

6. Should the Council be granted dispensation in respect of any failure to consult in respect of the Works?

7. Should an order be made pursuant to section 20C of the 1985 Act that all or any of the costs incurred by the Council in connection with these proceedings were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants?

26 **The Hearing**

27 There is attached to this Decision a list of all of those who attended the hearing.

28 For ease of reference Southampton City Council is throughout this Decision referred to as 'the Council'.

29 At the start of the hearing the Tribunal indicated that it proposed to proceed upon the basis that the first and second Applicants would first present their cases pursuant to section 27A of the 1985 Act. The Council would then respond. The Council would then present its application for dispensation (both applications) following which the Applicants would respond. Finally, the Tribunal would address any submissions made in respect of the section 20C application.

30 **The First Applicants' Application pursuant to section 27A**

31 It is the First Applicants' case that the Works do not fall within the scope of the Contract. That the Contract covers work relating to the servicing of lifts and to what are described as 'reactive maintenance' of lifts. They contend that the Works go beyond lift servicing and maintenance.

32 That the Contract does not they say cover works which may be described as refurbishment. That the Works amounted to a major refurbishment of the lifts. That as such, the Works were not within the scope of the Contract.

33 The First Applicants make reference to a letter from Southampton City Council to the lessees dated 27 September 2012 (section C page 444) which refers to the proposed works to lifts 1 and 2, and describes the Works as including *"the introduction of gearless motors, new controls, new safety equipment, replacement of existing governors, and new ropes"*. The Works they say are as such *de facto* works which constitute refurbishment of the lifts.

34 The Works they say do not fall within the definition of '*Emergency Repairs*' as defined in the Contract because the statutory 'lift inspection' reports had failed to identify any health and safety or operational issues which required anything other than routine works.

35 That the cost of the Works were in the region of £320,000. That does not the First Applicants say sit comfortably with the annual value of the Contract of £300,000, (which figure was subsequently increased to £400,000). That the reference made by the Council to the provisions in the Contract which allow for orders to be raised between a minimum value of £1 to a maximum of £100,000 is misleading.

37 The First Applicants accept that the Council commenced the section 20 consultation process in relation to the Contract. However, that it failed to properly complete or to comply with that process because it signed the contract on 31 March 2010 notwithstanding the fact that the consultation process on its own case did not end until 7 April 2010. That is described by the Applicants as a serious breach of the requirements of section 20. That the reason in any event why there was no response to or observations made by leaseholders either by 31 March 2010 or 7 April 2010 in relation to the Contract, was because the leaseholders had understood that the Contract was a maintenance contract and not a contract for major works. Had they understood that it was a contract which included major works, then there would have been a response.

38 The First Applicants make reference to a letter dated 24 March 2010 sent by Christina Ward, a leasehold sales supervisor at the Council, to a lessee of another property known as River View House. The letter, (see Miss Fortescue's statement page 35 section B) was headed '*Lift refurbishment and lift maintenance*' and states that *"the lifts require general refurbishment. There are no costs available yet but we will inform you as soon as the tenders are received"*. That, the First Applicants say, is consistent with the stated aims of the Contract to the extent that lift refurbishment was regarded by the Council as a contractually separate matter from lift servicing and maintenance.

39 That as such, the Council deliberately misled the lessees by incorrectly describing the Works as major repairs when in fact they amounted to a refurbishment, and not a repair.

40 Miss Fortescue in her statement criticises the Council for treating the works to all 4 lifts in the same way. She says that although the lifts have different usage rates (some service the property's car park, others street level and pedestrian access) and therefore different rates of wear and tear, the specification prepared for the works to lift 1 was adopted for all 4 lifts. That as such, not only did the Works amount to works of refurbishment but may well have been to a greater or lesser extent unnecessary.

41 The First Applicants say that they had wanted their own independent lift engineer to inspect the lifts before the Works were carried out to establish whether or not the Works were necessary, but that access to the lift areas was denied to them by the Council. Further, that a meeting called by the Council to discuss the Works on 12 September 2012 was not a proper consultation and was called at very short notice. Mr Wright suggested that several leaseholders did not receive notice of the meeting. Further, that at the meeting there had been no reference to works to be carried out to lifts 3 and 4. That this simply was not a consultation meeting. Indeed only 9 people had attended the meeting and of those 9, only one, Mr Putnam, was a leaseholder. Mr Wright questioned how such a small attendance could constitute a sufficient mandate to make a decision as to which options presented by the Council at the meeting should be chosen. Mr Wright also wondered why it was the case if lift

1 had failed due to its poor condition that had not been picked up previously as part of the monthly condition/inspection reports.

42 Further, the First Applicants say that the leaseholders were misled because they were told that spare parts from work to be carried out to lifts 1 and 2 could be used to carry out repairs to lifts 3 and 4 when in fact, the Council had already decided to carry out a complete refurbishment of lifts 3 and 4. That the leaseholders had also been misled by the Council when they had been told that following the failure of lift 1 in 2011, that the parts to repair the lift could not be sourced. Mr Wright said that he had spoken to another lift company, Otis, who had told him that such parts were commonly available. He did not have a statement from Otis to that effect. Further, Mr Wright said that the Council's statement of case was misleading to suggest that it was not until January 2013 that lifts 3 and 4 began to show signs of failure because it appears that a decision had been made already by the Council to refurbish those lifts in October 2012.

43 The First Applicants say that there was a failure by the Council in any event to consult with the leaseholders or to properly consult with the leaseholders in relation to the Works themselves. That the Council had failed to explain why the Works were necessary. That the Council had failed to invite the leaseholders to nominate their own contractor(s). That it had failed to provide 2 estimates for the Works. That the Council did not put itself at any stage in a position which would have allowed it to consider observations from the leaseholders.

44 Mr Wright suggested that as the Council had not submitted the Works to tender, they were not in a position to establish whether the Works were necessary or reasonable. That it was the leaseholder's belief that not all of the Works were necessary, for example the Works to replace the emergency telephones.

45 The Council, Mr Wright said, had a track record of failing to consult; something which he said had been addressed previously by the Leasehold Valuation Tribunal (as it then was) in both 2005 and 2013. He reiterated that the reason why there was no objection made to the Contract was because it had been understood that it did not include major works.

46 Mr Wright disputed that the Works were necessary. That the Works he said went beyond pure maintenance. Further, that some parts of the Works were not connected up some 9 months after they were meant to have been completed. It followed he contended that such elements of the Works could not have been necessary. He referred to a lift report dated 23 October 2013 (page 569 section C) that observed that *"A new electrical isolator had been fitted in the motor room. This is not wired up to the new controller"*. The same point he said was repeated in a report dated 24 April 2014 (page 577 section C). That if the electrical isolator he said had still not been connected up at that time, then such work could not be regarded as necessary. Further, that the emergency telephones in the lifts had been functional and that it had not been necessary, to replace those.

47 Mr Wright said that the letter sent out by the Council to leaseholders on 3 September 2012 (page 435 section C) did not disclose the nature of the proposed Works.

48 That as to the Council's contention that the sum charged for the Works was reasonable, he said that through no fault of the leaseholders, they were not in a position to dispute that.

49 In summary the First Applicants contend that the Council awarded the Contract to Axis Elevators Ltd without proper consultation as required by section 20 of the 1985 Act. That the Works were not within the scope of the Contract. That because the Council refused to allow the leaseholders' lift engineer access to the lifts, it was impossible in any event for them to obtain an alternative quotation for the cost of the Works. That there was a failure by the Council to consult with the leaseholders in respect of the Works themselves as required by section 20. That in all the circumstances, the Applicants say that the contribution to the Works should be limited to a maximum of £250 for each leaseholder.

50 **The Second Applicant's Case**

51 In 2012/2013 Mr Putnam said that it became clear that the lifts needed major work. Work that went far beyond the scope of routine maintenance as provided for in the Contract. Works that would require consultation pursuant to section 20 of the 1985 Act.

52 As regards the Works, the Council had failed to follow a section 20 consultation process. That all it had done was to arrange a meeting on 12 September 2012 at a time and place that meant that only a small number of leaseholders would be able to attend. That in fact, in the event only 9 people attended. At the meeting, two options were given to those attending and the cheaper of the 2 was indicated as the preferred option. It was not understood that the Council would treat the meeting as a form of authority to proceed with the Works.

53 In Mr Putnam's statement of case he makes reference to lift 1 *"irretrievably"* breaking down in January 2012 (paragraph 2.3) and lift 2 *"irretrievably"* breaking down in July 2012 (paragraph 2.4).

54 The letter sent by the Council on 3 September 2012 referred to at paragraph 23 of the Council's statement of case, which Mr Putnam described as an *"important document"* was, he said, misleading. The letter was addressed to all users of the lifts in the property, Council tenants, and leaseholders and was sent to all flats including those sub-let to private tenants. The letter was, he said, hand delivered to each flat. The letter however had nothing to do with a section 20 consultation. It was no more than an informative letter. That the meeting that arose from the letter on 12 September 2012 was not a section 20 consultation meeting. It was no more than a general update.

55 The fact he said that only 9 people turned up to the meeting suggested that many leaseholders had not received the letter. Those leaseholders who lived

away from the Property would not have been able to travel to Southampton in time for the meeting. In his view the meeting had been deliberately arranged at short notice at an inconvenient time. At the meeting he said that two options were given to those attending. The first option was chosen purely because it was the cheaper. The first option in round terms was for works which would cost £80,000 per lift as opposed to the second option where works would cost £180,000 per lift. He said that neither option was particularly acceptable but if one had to be chosen, those attending preferred to go for the cheaper.

56 Mr Putnam made reference to paragraph 25 of the Respondent's statement of case. Lift 1 he said had been out of action since January 2012. Lift 2 had stopped in July 2012. That because the cost of the proposed works to lift 1 were in excess of £16,000, then under the terms of the Contract there should have been a consultation with the leaseholders and the Works sent out to tender. The reality was that as lift 1 had broken down in January 2012, the Council had had time to put the Works out to tender. That it was he said negligent for them not to have done so.

57 As to paragraph 34 of the Respondent's statement of case, Mr Putnam said that a gross error was made by the Council. He had never tried to contact Otis or indeed any other lift company in his life. That he has been mixed up with another lessee Mr Peter Bampton.

58 The Council he said were wrong to suggest that lift 2 was taken out of service in November 2012. That it was out of service in July 2012.

59 Mr Putnam referred to a meeting which he said he had with Mr Geoffrey Miller, the Council's Housing Investment Manager at Mr Miller's office on 21 September 2012. At their meeting, Mr Putnam said Mr Miller had agreed that the Council would not charge for routine maintenance costs of the lifts for a period of 15 months starting from January 2012. That upon the basis that the estimated completion of the Works would be March 2013. That offer, Mr Putnam says, he regarded as a form of compensation for the inconvenience the leaseholders would suffer. However, he later found out that the leaseholders had been charged for maintenance during that period. The amount he said was £33,000. It was only after he complained that a credit note was issued and a new invoice sent out. (The credit note appears at page 458 of section C and the revised invoice at page 459 of the same section. There is a letter at page 455 from the Council to the lessees explaining the amendment.)

60 Although Mr Putnam said that there was no evidence that an alternative contractor could have carried out the works at a lower cost, nor was there evidence to the contrary.

61 Mr Putnam said that throughout he was never given nor had any real understanding of what the problems with the lifts were. He could not find out what was wrong with the lifts. He said that the Council's own policy provided for major works to be carried out to the lifts every 25 years. In fact the lifts at the Property had been in service without any major works for at least 42 years.

He was not, he said, at any time in a position to judge what works were needed to be done. That it was not necessarily the case that all of the lifts in any event would have the same fault(s). It was questionable in is view that all would need work carried out at a cost of £80,000 each. It was he said astounding that the actual cost of the Works was just £16 different to that which had been estimated by the contractor.

62 The reason why he said it was not possible for the lessees to send out their own engineer to inspect the lifts was that access had been denied by the Council for health and safety reasons. He did not think that the Council would carry out unnecessary work but nonetheless he did not know what work had been carried out.

63 **The Council's Case**

64 It was Mr Brewin said the Council's case that the Works were covered by the terms of the Contract.

65 He made reference to the Contract. The Contract he said covered *"servicing and reactive maintenance ... servicing, inspections, breakdowns and call out"* (page 16 section C). As such the Contract did he said not just cover maintenance but also 'reactive maintenance'. Reactive maintenance might arise when known issues with the lifts became more frequent. Section A13 of the Contract (page 16 section C) provided that the pricing was considered by reference to 2 elements. Element 1 was fixed costs which included monthly servicing and minor works. Element 2 was variable pricing based upon a schedule of rates and contract prices.

66 He made reference to document 2 section 3 of the Contract (page 106 of section C) and in particular to clause 3.89. That makes references to major repairs. That as such he contended the Contract contemplated work which was other than maintenance work. That the reference to the application of a schedule of rates was clearly contemplative of the possibility of major repair work. That the clause provided for the contractor to in effect tender for major works to include a mark-up for profit at the percentage rate provided for in the Contract. That in this case the Council asked the contractor to produce an estimate for the Work which it had done in terms consistent with the Contract.

67 Further, that the Contract provided that orders could be placed under - section A20 (page 18 of section C) - ranging from a minimum value of £1 to a maximum of £100,000. Consistent with that the order in respect for lift 1 (page 356 of section C) dated 28 September 2012 and was for the estimated sum of £77,831.80.

68 That as such, it was the Council's case that the Works clearly fell within the scope of the Contract, albeit they were works outside of normal monthly maintenance.

69 As to the section 20 consultation, it was conceded by the Council that there had been a failure to consult. There had not however been, Mr Brewin said, a wholesale disregard of the need to consult. The allegation that had been

made, that the Council's policy was to disregard the consultation requirements, was simply not true. It was not the case that the Council had simply *"marched on"* without regard to the leaseholders.

70 The Council accepted that if the Works were covered by the terms of the Contract, then there should have been consultation.

71 That as regards the consultation for the Contract, the process undertaken was addressed in paragraphs 13-15 of the witness statement of Christina Ward (pages 111-125). That on 1 May 2009 the leaseholders of flats in all of the Council's tower blocks were issued with a notice of the Council's intention to enter into a qualifying long term agreement (the Contract) (page 430 of section C). Observations were invited, but none were received.

72 On 8 March 2010, the Council sent a further letter stating that it had prepared a proposal based on tenders received. That the proposal was to enter into an agreement with Axis Elevators Limited. The letter invited observations in relation to any of the tenders (page 432 of section C). That in the event, there was no response. There were no observations made either by the date that the Contract was entered into, 31 March 2010, or indeed by 7 April 2010, the date when the consultation period ended.

73 Therefore he contended as regards the consultation process in relation to the Contract that although it was accepted that wrongly the Council had entered into the Contract before the end of the consultation process, there had in effect been a full consultation process. Four tenders had been received and all had been properly considered by the Council. He referred to a form of matrix prepared by the Council as part of the selection process (page 595) which he said showed that the tender from Axis was the lowest.

74 The Council accepted that it had made a mistake. When it agreed to undertake the Works, it had mistakenly believed that it was not necessary to follow a form of consultation process prior to starting the Works because of the previous consultation that had been carried out prior to entering into the Contract. That nonetheless, the Council had engaged with the lessees at Wyndham Court. In the event, of the 2 options put to the lessees at the meeting on 12 September 2012, those attending chose the first option. Thereafter the lessees were given regular updates as the Works were carried out.

75 Mr Putnam the Council says rightly concedes that the Works were necessary. That in his statement, Mr Putnam had referred to the lifts beginning to *"fail irretrievably"*.

76 Mr Brewin said the difficulty for the Tribunal was that it could not go back retrospectively and put itself into the Council's position at the time the decision to carry out the Works was made. That no evidence had been put forward by the leaseholders to address the reasonableness of the cost of the Works. That the leaseholders knew what works had been carried out. That they had during the course of these proceedings been given a copy of the Contract and the specification for the Works and that it had always been open

to them to obtain alternative costings. That although the leaseholders were understood to have approached another lift company, it seems that they just did so by telephone without providing details of the Property. That details of the Property were relevant because the Works had to be considered in that context. For example, the context of the Property being a Grade II Listed building and constraints in relation to the weight of the equipment to be used, access, road closures etc. That all such items would no doubt add to the cost of the Works.

77 The Council was in effect at one with the leaseholders. It was responsible for 83 flats in the Property and therefore had an interest itself in keeping costs down.

78 That there was no guarantee that the Works would last long term but it was envisaged they would provide greater reliability for some 20 years.

79 Mr Geoffrey Miller, the Council's Housing Investment Manager, gave evidence. (His witness statement appears at pages 76-90 of section B.) Mr Miller referred to the tragic accident at Shirley Towers in 2001. He said that following that accident, the Health & Safety Executive had investigated and given specific guidance to the Council as to how to address future maintenance of lifts. Those instructions had been taken on board by the Council and had been added to their specification for lift contracts. For example, that meant that higher grade materials were used for the doors, higher than hotel doors.

80 The Council, Mr Miller said had at the time that lift 1 had been taken out of operation, carried out a full risk assessment of the whole building. That as to lift 1, they had commissioned their partner Capita to locate parts. That he said takes time. The Council had looked worldwide but could not locate the parts. It would have been possible he said to try and manufacture the parts but the insurers would not approve parts unless they were subject to all the appropriate tests. In the event the parts could not be found. A decision had to be made whether to entirely refurbish the lifts or carry out a major repair. It was felt that the appropriate vehicle for the works was the Contract.

81 The letter of 3 September 2012 (page 435 of section C) inviting leaseholders to a meeting he understood had been sent to all residents and to the private home addresses of absent leaseholders. It was unfortunate that only a few had attended. He had received a phone call from one lessee prior to the meeting to say he could not attend and asking if Mr Miller could provide an update following the meeting. The lessee said he would phone back later but in the event failed to do so. At the meeting the Council had gone through a power point presentation and had expanded on and explained the problems with the lifts. At the meeting he said the problems in sourcing parts had been explained. That the Council had put forward two alternatives; a total refurbishment or a major repair. That having spoken to Axis the guide price for the major repair was £80,000 per lift. The guide price for the total refurbishment was £180,000 per lift.

82 The Council were he said aware at the time in 2012 that times were hard. The Council were concerned to consider everybody's financial situation which is

why they did not impose the more expensive option of refurbishment. It was felt prudent to carry out works to all 4 lifts because it would no doubt be the case whatever the current condition of lifts 3 and 4 that they would in time require major works; works which the Council as landlord was obliged to carry out. Further, in the event, the parts could not be obtained just to carry out a temporary repair.

83 As to allowing access to the lifts by an engineer on behalf of the lessees, Mr Miller said that was not a problem. However, it would be necessary for the lift engineer to produce a method statement, a risk assessment and the necessary insurance certificates. That in order to comply with health and safety provisions. Something that he said he had raised at the Case Management Hearing in June.

84 Mr Miller explained the process of the appointment of a lift contractor. The Council he said would assess what works would be needed over a period of time. It would then put out a form of invitation advertised in trade journals inviting expressions of interest. The Council would then send to each contractor expressing an interest, a pre-qualifying questionnaire. Those returned would be evaluated and financial checks carried out. Those contractors which were then approved would be sent the full specification to allow them to tender for the work. The Council did not he said maintain an approved list of contractors.

85 Mr Miller was asked about 2 specific lift companies – Otis and Jackson. He confirmed that the Council had used Jackson in the past but Otis were subject to a dispute with the Council so at the moment were not held in high esteem.

86 Mr Miller was asked about the 2 specific items of repair to the lifts which had been suggested by the First Applicants as unnecessary. The first was the electrical isolator. He said this was not part of the Works. It did not appear in the schedule of works. It had been found in the course of the Works being carried out that a cable that supplied the lift motor was not compliant with current regulations. Those regulations were not retrospective. That a separate order had been raised to address that. That was ongoing work.

87 As to the emergency telephones, the old systems in the lifts did not allow the Council to monitor faults as and when they occurred. It was felt that whilst carrying out the Works it would be prudent to update the emergency telephones. That in accordance with modern practice. That to allow the Council to properly monitor any problem or fault with the lifts.

88 Mr Miller explained that when lifts 1 and 2 had shown signs of catastrophic failure, it had been anticipated that parts could be removed from those lifts to replace parts in lifts 3 and 4. However, it transpired that was not possible because the parts included asbestos. That asbestos could remain in situ provided it was not disturbed during routine maintenance. That it only needed replacing when disturbed. The works would involve disturbing the asbestos and thus the parts could not be used in lifts 3 and 4.

89 In answer to a question from Mr Putnam as to why the major works to the lifts had not been carried out previously, Mr Miller said that the Council had a number of lifts to refurbish across its property portfolio. That risk assessments were regularly carried out and reviewed. Such an assessment had concluded that the lifts at the Property could be managed in the short to medium term. However in the event, because of the catastrophic failures of the lifts the need for the Works had been brought forward.

90 Mr Putnam made the point that only one leaseholder had attended the meeting on 12 September 2012. Mr Miller said that nonetheless a letter had been sent out to all leaseholders inviting them to the meeting and the decision made at the meeting had been made in effect in response thereto. It was he said quite common to have poor attendance at such meetings.

91 Mr Miller explained in answer to questions from Mr Putnam that the Council was required to have a lift maintenance contract to cover all of its properties in order to comply with Government guidance and legislation.

92 Mr Wright of Flat 143 asked Mr Miller why if the Council had only been aware of the need to carry out major repairs to lifts 3 and 4 in January 2013 had a contract been entered into in October 2012 for those works. That Mr Miller said was a matter for the Council's partner Capita. Capita act as the Council's Contract Administrators. He felt that what had happened here was that the Council and Capita had been trying to be proactive.

93 Mr Wright referred Mr Miller to a letter that Mr Miller had written on 27 February 2013 to Mr Bampton (pages 46-47 of section B). In particular the words in the third paragraph on the second page *"You also asked that your contractor be allowed to visit the lift site at Wyndham Court so that they could provide you with an accurate cost for the same work. I explained the reasons why this is not possible and that the Council has stringent health and safety requirements, insurance restrictions as well as safe working procedures"*. Mr Miller did not accept that the effect of those words was such that the leaseholders would be given to understand that they simply could not instruct their own expert to inspect the lifts. He reiterated that it was simply a question of the leaseholders notifying who the proposed expert was and confirming that they had sufficient insurance cover so as to comply with HSE requirements. That for the purpose of inspection, a lift would need to be shut down and there would be a need to give residents notice of that. He did not believe that the Council had been obstructive. Indeed he had always attended meetings at the request of the leaseholders, even late at night.

94 Christina Ward, the Council's Leasehold Sales Supervisor, gave evidence. Her statement appears at pages 111-125 of section B of the bundle. Ms Ward addressed the letter of 3 September 2012 (page 435 section C). She said that to the best of her recollection, the letter had been hand delivered to each flat at the Property. The letter had been written by Helen Prophett the District Housing Manager. It had been sent to her by Ms Prophett who had asked Ms Ward to organise its distribution. That she had downloaded from the Council's computer system addresses for absent leaseholders. The list was sent to the typing pool and they organised for the letter to be sent out.

95 In answer to a question from Mr Putnam, Ms Ward said that the Council planned maintenance programmes over a period of 3-5 years. That the intention had been at some stage for lifts in all blocks to be refurbished. There were not any such works planned in 2012/2013 to Wyndham Court. However, the failure of the lifts had brought the work forward.

96 As to the Contract, she had not been aware that the Contract had been signed on 31 March 2010. She had kept in effect the consultation process open to 7 April 2010.

97 In answer to a question from the Tribunal, Ms Ward confirmed that the Council only appoint contractors who respond to invitations and express an interest as outlined by Mr Miller. They do not appoint other contractors.

98 Mr Paul Middleton a Lift Design Engineer employed by Capita then gave evidence. (His statement appears at pages 91-110 of section B of the bundle.) He explained that when lift 1 came out of service, he had hoped to use parts from it to keep lifts 3 and 4 going. This was a relatively old building which had asbestos. That asbestos could remain in situ if it was not disturbed. Before the work was carried out to lift 1, he had commissioned a full refurbishment and demonstration service. That had included updating the asbestos register for the Property. That had found asbestos in the lift control system, motor hatch and electrical gear. That had been removed by a specialist company. As such, such parts were unusable and had to be disposed of. There was therefore no choice in the event but to include lifts 3 and 4 in the overall major repair programme. The aim was to get each of the 4 lifts back in service in good time. Indeed even if the parts from lifts 1 and 2 could have been used for 3 and 4, there would have been no guarantee that they would have lasted very long. That is why it was felt prudent to include lifts 3 and 4 in the programme.

99 In answer to a question from Mr Putnam, Mr Middleton said that the Works were never categorised as an emergency or in particular as emergency repairs in accordance with the terms of the Contract. That emergency repairs were defined in the Contract as small repairs that came under £350 in value or under 4 hours of labour. That such repairs could be carried out by the contractor without reference to the Council or Capita.

100 He said there appeared to be some confusion as regards the condition reports. That Capita do a monthly maintenance visit. Condition reports are produced 6 monthly by an independent organisation. He likened it to an MOT. That condition reports do no more than say whether as at the date of the report a lift is fit to be used. There is no guarantee that the lift might not break down the next day.

101 Mr Middleton addressed the question as to whether or not the Works fell outside of the scope of the Contract. He explained that the figure in the Contract of £300,000 was the figure for the cost of maintenance work; the cost of maintaining the Council's lifts during a period of the Contract. That figure did not factor in the costs of major repairs which were within the scope of the Contract.

102 He explained that the Council had placed 4 separate orders, one for each lift. He explained that the reason was that each lift had its own number and costings. That the Council had started with lifts 1 and 2 but once they had realised that they could not use the parts from 1 and 2 for 3 and 4, they had no option but to include 3 and 4 in the major repair works. That there was an advantage in carrying out all the works close together to keep disruption and costs down to a minimum.

103 Mr Middleton was referred to the estimate for the cost of the works to lift 1 (page 462 section C of the bundle). He agreed that the estimate must be in line with the terms of the Contract. He said that it was. It correctly showed a mark-up for materials for example of 25% in accordance with the terms of the Contract. The reason why he said that the labour rates shown were higher than those shown in the Contract was that the Contract provided for an annual adjustment of the rates. The Tribunal was referred to section A.20 paragraphs 10.4-11.2 of the Contract (page 19 of section C of the bundle).

104 **The Dispensation Application**

105 **The Council's Case**

106 There are 2 applications. One for dispensation in relation to the Contract by reason of the Contract being signed prior to the end of the consultation period. Secondly, in relation to the Works and the failure to comply with the requirements of schedule 3 of the Service Charges (Consultation Requirements) (England) Regulations 2003.

107 Mr Brewin referred to the Supreme Court decision in the matter of **Daejan Investments Ltd v Benson** (2013) UK SC14.

108 Daejan, Mr Brewin said, changed the previous law. That prior to Daejan it was very difficult for a landlord to obtain dispensation. The Supreme Court however had made it clear that the focus now was on the question of prejudice to leaseholders; prejudice occasioned by the failure of the landlord to comply with the consultation requirements. That meant in reality he said, prejudice in financial terms. Most leaseholders would argue that had they been consulted, they would have been able to have the work done at a lower cost. However, the burden to establish that was on the leaseholders. In this case the leaseholders' position appeared to focus on the failure to consult rather than what they would have done had they been consulted and as such what prejudice they had suffered as a consequence of the lack of consultation. In Mr Brewin's submission, even had there been consultation, the position would have been the same in any event. The leaseholders were in reality in the same position that they would have been had the legislation been followed.

109 He accepted that it can be very difficult in practice for leaseholders to challenge each and every item of expense. Nonetheless it remained for them to show some factual prejudice. The leaseholders argued that they could not establish the necessary facts upon which to present a case. Unfortunately Mr

Brewin said that was not good enough. It was for the leaseholders to show prima facie that the Works could have been carried out for a lower sum.

110 Further, even if consultation had been carried out and the leaseholders had been consulted and produced lower figures for the cost of the Works, the Council would have been entitled to disregard their observations. The Consultation Regulations provide that the Council must have regard to observations. It is not sufficient for the leaseholders simply to complain that there was a failure to consult. They must go further and show that the costs that had been incurred were unreasonable.

111 The specification for the Works had been made available to the leaseholders. Had they wished to arrange for their own engineer to inspect, then access would have been given. It was understood that the leaseholders had approached an alternative contractor. At the Case Management Hearing, the Council had repeated that access would be allowed. Nonetheless, in reality nothing had been done by the leaseholders since that hearing. It was for them to have shown that they had used their best endeavours to obtain the information they required. In the absence of any such information, there was insufficient evidence for the Tribunal to attack the actual cost of the Works. In the absence of such evidence, the only evidence for the cost of the Works before the Tribunal was that shown on the face of the documents before it.

112 The Contract had been bolstered by a full tender process through the Council's procurement rules. There had been a fair evaluation in the form of a matrix of the tenders received. The matrix showed, although he accepted this was disputed, that the cheapest contractor had been selected.

113 If the leaseholders were to argue for example that the Works could have been done for say £40,000, they would have to demonstrate that they had taken into account the particular parameters in relation to this building. Parameters which might affect that figure such as the type of building, access to it, the existence of asbestos etc. Factors which would cause the price to creep upwards.

114 Further, as the owner of 83 of the flats in the property, the Council had its own interest to keep costs down. In September 2012 the Council could have chosen the more expensive of the 2 options offered. It did not do so, not least due to its own financial constraints. The reality was that it needed to locate money to where it was needed most. It may have had more pressing projects elsewhere. That however changed following the near catastrophic failure of the lifts at the Property.

115 The leaseholders had not shown he said that the Works could have been carried out at a cheaper rate. That they could have obtained figures retrospectively. They had failed to do so.

116 The Works were carried out by Axis. They were the main contractor under the terms of the Contract. If another contractor had been selected, that would presumably Mr Brewin contended have been at an additional cost as a different contractor would not have the same intimate knowledge of the

building as Axis. There was an attraction of certainty in using Axis to carry out the Works, the Council knew what they would be getting.

117 There was he said no evidence that the leaseholders took no interest in the Contract; no evidence that had they known that it included major repairs, they would have made observations. Such allegations were made by them in hindsight. No evidence had been adduced by them to address what difference it would have made had the Contract not been signed until after the end of the consultation process. In the event, Ms Ward had confirmed in evidence that the consultation period had remained open throughout. The Tribunal he said should bear in mind the correspondence sent out and the updates made during the Works. No responses had been received during the Works criticising the decision to go ahead.

118 It was, he said, for the leaseholders to show what they would have done differently had they been consulted. What they would have done differently to their financial advantage. They could not show that the decision to carry out the Works by the Council was unreasonable. There was in his submission no real prejudice to the leaseholders by reason of the failure to consult in respect of either the Contract or the Works. There was no documentary evidence to support an allegation of prejudice; not even an alternative price for the Works or even the name of an alternative contractor. The leaseholders he said could have instructed a contractor to go through the specification of works. There were only 2 items which the leaseholders had identified as being unnecessary, the electrical isolator and the emergency telephones. Both had been addressed and explained. That the telephones had been upgraded, but upgraded to make them fit for purpose. That was he said sensible, reasonable and necessary.

119 As to the costs of labour for the Works, those were consistent with the terms of the Contract because the Contract provided for the rates to be uplifted annually.

120 **The First and Second Applicant's Case**

121 Mr Wright on behalf of the First Applicant referred to a letter from Ms Ward to the leaseholders dated 31 January 2013 (page 447 section C of the bundle) which he says was the first time that the leaseholders had become aware that works were required to lifts 3 and 4. That following that letter, they had sought a meeting with Mr Miller. They had made it clear that as a result they wanted their own engineer to inspect for the purpose of obtaining an alternative quote. That was not possible without a full inspection of the lifts. That meeting had led to the letter from Mr Miller dated 27 February 2013 (pages 46 and 47 in section B of the bundle) which made it clear that access would be refused. Accordingly he said, as access was refused prejudice had been suffered by the leaseholders.

122 Further, Mr Wright said that although the leaseholders could not prove that the Works could be done more cheaply, the Council could not prove otherwise.

123 He accepted that at the Case Management Hearing the Council had offered access. However, the problem was that by that time the Works had been

completed. It would have been impossible for an engineer to provide a realistic quote for the Works even if he had a copy of the specification. That is why an alternative quote/report was not obtained.

124 Mr Putnam said that the purpose of the Consultation Regulations was to protect leaseholders from paying for inappropriate work. That was made clear in Daejan. That at the meeting on 12 September 2012, the lessees had been put in a position where it was impossible for them to say whether or not the Works were reasonable. They were deprived of that opportunity.

125 Miss Fortescue sought to distinguish Daejan from the present case upon the basis that the Council had failed to obtain alternative quotes. Mr Brewin disagreed; that Daejan he said highlighted the need for leaseholders to obtain their own figures.

126 **Section 20C**

127 Upon being questioned by the Tribunal, the Council confirmed that it did not seek to recover its costs of these proceedings from the leaseholders as part of the service charge. That as such, the section 20C application was no longer, it suggested, in issue.

128 **The Tribunal's Decision**

129 **The First Issue**

130 **Were the Works carried out within the scope of the Contract?**

131 The Applicants' case is that they had understood that the Contract was a contract limited to the servicing and maintenance of the lifts. That the Works amounted to refurbishment and as such were outside of the scope of the Contract.

132 The Council say that the Contract covers more than just servicing and maintenance. It also covers major repairs. The cost of the major repairs is covered by either the schedule of rates in the Contract or upon the application of what is known as the 'open book technique'.

133 Consistent with the Council's case, section A20 of the Contract makes reference to the placing of orders which may be between a minimum value of £1 and a maximum value of £100,000.

134 In the view of the Tribunal, the Contract clearly contemplates the possibility of single orders being placed of up to £100,000. That it allows for orders to be placed for works that go beyond the regular maintenance and servicing of the lifts.

135 The Tribunal is satisfied that upon the basis of the evidence before it, that the Works were carried out within the scope of the Contract.

136 **The Second Issue**

137 **Were the Works necessary and reasonable?**

138 It is clear to the Tribunal that there had been for a considerable time prior to the Works being carried out, problems with the lifts. That there was a history of the lifts increasingly breaking down (a form of breakdown history appears at pages 479-489 of section C). It is not disputed that there appeared to be, as described by Mr Miller, a catastrophic failure of lift 1 and later of lift 2. Mr Putnam made the point that it was the Council's policy to carry out major works to its lifts every 25 years. The lifts at the property had not been subject to any major works for at least 42 years. Indeed Mr Putnam says in his statement (page 50 of section B) that *"It was clear that the Wyndham Court lifts needed major work carried out to them ..."* He refers to lift 1 *"irretrievably"* breaking down in January 2012 and lift 2 *"irretrievably"* breaking down in July 2012.

139 Mr Wright quite fairly said that as the Council had not submitted the Works to tender, that the first Applicants were not in a position to establish whether the Works were necessary or reasonable. He had a belief that not all of the Works were reasonable and reference was made to the emergency telephones and the electrical isolator.

140 The Tribunal accepts, in the absence of any evidence to the contrary, Mr Miller's evidence that the replacement of the electrical isolator was not part of the Works. Further, that it was prudent to take the opportunity to replace the emergency telephones with up to date telephones that comply with modern practice.

141 The Tribunal also accepts the Council's case that it had at first hoped to use parts from lifts 1 and 2 to maintain lifts 3 and 4. But because of the discovery of asbestos associated with those parts that was not possible.

142 There was no evidence before the Tribunal to suggest that the Works, as regards all 4 lifts, was not necessary. That the Works were not reasonably incurred. The Tribunal bears in mind that the Council would be responsible for paying for a large proportion of the cost of the Works by reason of its ownership of 83 flats in the property. That as such, it would be unlikely to undertake works which were unnecessary.

143 Upon the basis of the evidence before it, the Tribunal determines that the Works were necessary and were reasonably incurred. Accordingly the Tribunal determines that the amount payable by the Applicants by way of service charge payments in respect of the Works is for each leaseholder £964.52 for lifts 1 and 2, and £1019.10 for lifts 3 and 4.

144 **The Third Issue**

145 **Did the Council fail in part or in whole to consult with the lessees as required by section 20 of the 1985 Act in respect of the Contract?**

146 It is the Applicants' case that the Council failed to comply properly with the consultation requirements because it signed the Contract on 31 Mach 2010 notwithstanding the fact that the consultation period did not end until 7 April 2010. The Council accepts that error. It is not disputed. As such, the Tribunal determines that the Council did not properly comply with the consultation process that it should have undertaken pursuant to section 20 of the 1985 Act in respect of the Contract.

147 **Did the Council fail to consult with the lessees as required by section 20 of the 1985 Act in respect of the Works?**

148 Schedule 3 of the Service Charges (Consultation etc) (England) Regulations 2003 sets out the consultation requirements for qualifying works under a qualifying long term agreement. The Works, as the Tribunal has determined, were carried out under the terms of a qualifying long term agreement (the Contract). It is not disputed that the Works were qualifying works for the purposes of section 20 of the 1985 Act and the said Regulations.

149 It is the Applicants' case that the Council failed to consult in respect of the Works. The Council accepts that. It is not disputed. The Council had wrongly believed that it was not necessary to consult because of the consultation that had previously been carried out in respect of the Contract. As such, it is not disputed that there was a failure by the Council to comply with schedule 3 of the Regulations. As such, the Tribunal determines that the Council failed to consult with the lessees as required by section 20 of the 1985 Act in respect of the Works.

150 **The Fifth Issue**

151 **Should the Council be granted dispensation in respect of the failure to consult in respect of the Contract?**

152 The Tribunal is bound by the decision in the Supreme Court in the case of **Daejan Investments Ltd v Benson** (2013) UK SC14.

153 As Mr Putnam quite rightly pointed out, as the Supreme Court said in Daejan, that the purpose of the consultation requirements are to ensure that tenants are protected from paying for inappropriate works or paying more than would be appropriate.

154 The Council accept that there was a failure to properly complete the consultation process in respect of the Contract. In particular, by signing the Contract on 31 March 2010 albeit the consultation period did not expire until 7 April 2010.

155 The question for the Tribunal is the extent to which, if any, the Applicants were prejudiced by that failure on the part of the Council. That if, notwithstanding the failure by the Council to properly complete the consultation process, the Applicants find themselves in the same position that they would have been had the process been properly completed, then there would be no prejudice suffered by them and dispensation should be granted.

156 Daejan made it clear, that notwithstanding the burden this may place upon leaseholders, that the factual burden of identifying some relevant prejudice rested with the leaseholders.

157 The Tribunal accepts Ms Ward's evidence that she had not been aware that the Contract had been signed on 31 March 2010 and had kept in effect the consultation process open in any event to 7 April 2010. That that notwithstanding, it appears that no objections or proposals were made by the leaseholders. No evidence has been put forward by the Applicants of relevant prejudice suffered by them as a consequence of the Council signing the Contract before the expiry of the consultation period. No evidence of what proposals or observations they would have put forward had the Contract not been signed until after the end of the consultation period. Indeed the Tribunal suspect that the Applicants did not become aware that the Contract had been signed prior to the end of the consultation period and thus had they wished to submit proposals or observations to the Council between 31 March 2010 and 7 April 2010 they would have done so.

158 In all the circumstances the Tribunal determines that the Applicants have failed to establish that they suffered relevant prejudice as a consequence of the Council's failure to properly complete the consultation process in relation to the Contract. It follows that the Tribunal grants the Council's application for dispensation.

159 **The Sixth Issue**

160 **Should the Council be granted dispensation in respect of any failure to consult in respect of the Works?**

161 The question for the Tribunal is whether the Applicants have suffered any relevant prejudice and if so, what relevant prejudice, by reason of the Council's failure to consult.

162 The Tribunal is wholly unimpressed with the contention on the part of the Council that the meeting that was held on 12 September 2012 amounted to a form of consultation. Letters inviting leaseholders to the meeting were sent out just 9 days before the meeting. In the event, only 1 leaseholder, Mr Putnam, out of a total of 101 leaseholders, attended the meeting. The Council nonetheless felt it appropriate to make a decision as to what works would be carried out to the lifts upon the basis of that meeting.

163 Further, the letter dated 27 February 2013 that Mr Miller wrote to Mr Bampton (pages 46-47 of section B) was unhelpful. The Tribunal was referred to the third paragraph on the second page of the letter (page 47). The paragraph referred to a request by the leaseholders for their own contractor to inspect the lifts. The clear impression given by the Council in the letter was that would not be possible. As Mr Miller put it in the letter *"I explained the reasons why this is not possible ..."* Mr Miller said in evidence that he did not accept that the effect of those works was that the leaseholders would be given

to understand that they could not instruct their own expert. The Tribunal does not agree with Mr Miller.

164 Nonetheless, the burden in accordance with Daejan rests on the Applicants to identify some relevant prejudice that they say they suffered by reason of the failure on the Council's part to consult.

165 The Applicants' contend that by the time of the Case Management Hearing in June 2014, the Works had been completed and therefore it was too late to instruct an engineer to advise and to produce a quotation for the cost of the Works, that notwithstanding the fact that the specification for the Works was available to the Applicants. The Tribunal does not agree.

166 It remained open for the Applicants, following the Case Management Hearing, or at any time before that, to instruct their own expert to consider the specification for the Works, to consider the charges for the Works made by Axis, to inspect the lifts and to produce a report addressing, on that basis, whether in the experts opinion the cost of the Works was reasonable and reasonably incurred. Given the wholesale failure by the Council to consult or to properly consult with the leaseholders, the Council could not reasonably have complained if on the production of such a report/evidence the Tribunal had viewed the leaseholders' arguments in relation to prejudice sympathetically. In such circumstances, if the Tribunal were, having considered such a report, to have granted dispensation then it would have been open to the Tribunal to grant dispensation on terms. Those may have included terms providing for the Council to reimburse the Applicants the costs of obtaining such a report and/or by reducing the amount of service charge contribution for the Works in line with such a report.

167 However, the Applicants have failed to adduce any evidence that they suffered relevant prejudice by reason of the Council's failure to consult. The factual burden of identifying relevant prejudice rested with the Applicants and they have failed to satisfy that burden.

168 The Tribunal has not found this an easy decision. It appreciates that the effect of Daejan can be to place a difficult and heavy evidential burden on leaseholders. However, as Daejan made clear, that is not necessarily an unfair burden or an insurmountable burden.

169 It is the determination of the Tribunal that the Applicants have failed to satisfy the factual evidential burden placed upon them. They have failed to demonstrate that they have suffered relevant prejudice by reason of the Council's failure to consult.

170 In the circumstances, the Tribunal grants the Council's application for dispensation.

171 **The Seventh Issue**

172 **Should an order be made pursuant to section 20C of the 1985 Act that all or any of the costs incurred by the Council in connection**

with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants?

173 The Council does not seek to recover its costs incurred in these proceedings from the leaseholders as part of the service charge. Had the Council sought to do so, the Tribunal would have been sympathetic to the Applicants' application pursuant to section 20C. In all the circumstances, the Tribunal feels it appropriate to make an Order under section 20C.

174 Accordingly the Tribunal determines that all or any costs incurred by the Council in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

175 **Summary of Tribunal's Decision**

176 The Works fell within the scope of the Contract.

177 The Works were necessary and reasonably incurred. The amount payable by the Applicants by way of service charge payments in respect of the Works per leaseholder is £964.52 for lifts 1 and 2, and £1019.10 for lifts 3 and 4.

178 The Council failed in whole or in part to comply with the consultation requirements required by section 20 of the 1985 Act in respect of both the Contract and the Works.

179 The Council's applications pursuant to section 20ZA of the 1985 Act for dispensation in respect of both the Contract and the Works are granted.

180 That all or any costs incurred by the Council in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Dated this 20th day of November 2014

Judge N Jutton (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.