UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Service charges – application for determination of liability for payment of service charges – Framework Agreements – Qualifying Long Term Agreements – [s.20] – Landlord & Tenant Act 1985 section 27A(3) – Application refused

IN THE MATTER OF AN APPLICATION

By

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

Applicant

and

(1) LESSEES OF 1-124 POND HOUSE, POND PLACE, LONDON SW23
(2) NICHOLAS HOEXTER
(3) BRIAN LANAGHAN
(4) MARILYN ACONS
(5) NORMAN DUNNE
(6) THOMAS BEAUMONT
(7) ELIZABETH EDEMA
(8) MR HAMILL

Respondents

Re: Pond House, Pond Place, London SW3

Before: Siobhan McGrath, Chamber President – FtT (Property Chamber) sitting as a Judge of the Upper Tribunal (Lands Chamber)
and Mr P R Francis FRICS
Sitting at: 10 Alfred Place, London WC1E 7LR
on
29 June 2015

Ranjit Bhose QC, of counsel, instructed by Miss C Vachino RBKC Legal Services for the applicant
Lessees of 1-124 Pond House did not appear and were not represented
Mr Nicholas Hoexter in person
Mr Brian Lanaghan in person
Mr Norman Dunne in person
Miss Elizabeth Edema in person

The following cases are referred to in this decision:

Daejan Investments v Benson [2014] UKSC 14
London Borough of Southwark v Leaseholder of the London Borough of Southwark [2011] UKUT 438
London Area Procurement Network v All Right to Buy Lessees (LON/00BF/LDC/2006/0078 & others
Auger, Associaton of Camden Council Leaseholders v London Borough of Camden LRX/81/2007

Decision

Introduction

1. This is an application under section 27A(3) of the Landlord and Tenant Act 1985 for a determination in respect of the liability to pay residential service charge costs to be incurred on behalf of the Royal Borough of Kensington & Chelsea ("RBKC") in respect of leasehold properties at 1-124 Pond House, Pond Place, London SW3 ("Pond House").

2. The Tribunal is asked to determine a number of issues about service charges for proposed works of maintenance and repair to the properties. In particular it is asked to decide whether the applicant has complied with its obligation to consult the Pond House lessees under the provisions of section 20 of the Landlord and Tenant Act 1985 and the associated Service Charges (Consultation Requirements)(England) Regulations 2003. The applicant proposes to enter into a number of Framework Agreements with contractors, the effect of which is described further below. Briefly, the applicant seeks a determination that the Framework Agreements are Qualifying Long Term Agreements (referred to heareafter as "QLTAs") for the purposes of the consultation requirements and that therefore they are entitled to follow a restricted form of consultation with lessees before embarking on specified works of repair.

3. The consultation issue is important. In this case the value of the contracts for the works may reach £130 million over the next four to six years. Also, since procurement through Framework Agreements is a practice already adopted by a number of local authorities, clear guidance on what consultation is required is much needed. For the applicant it is said that the works of repair will be carried out under QLTAs and that therefore the consultation requirements are limited. However, the respondents contend that the Framework Agreements are not QLTAs and therefore the applicant's consultation has been and will be inadequate.

4. The application was made to the First-tier Tribunal on 15 January 2015 and on 27 February 2015 I directed that the case be transferred for determination by the Upper Tribunal in accordance with rule 25 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

5. The case was heard on 29 June 2015. At the hearing the applicant was represented by Ranjit Bhose QC. Although the respondents to the application were named as the leaseholders of Pond House, notice of the application was also given by the applicant at the direction of the Tribunal, to a number of leaseholders of other properties within the Borough, each of whom had made observations in response either to a statutory notice of intention dated 3 September 2013 or to the notifications of proposals dated 18 December 2014 (both notices are dealt with further below). As a result, a number of leaseholders of other properties within the applicant's ownership, were also joined as respondents. Although none of the lessees of Pond House itself responded to the application or made written representations, a number of the other leaseholders did so and four of their number attended the hearing and were able to make submissions. They were: Nicholas Hoexter, a leaseholder and the chairman of the Tregunter East Tenants Association;

Brian Lanaghan, a leaseholder of two flats and secretary of the Chelsea Manor Court Tenants Association; Norman Dunne, a leaseholder and chairman of the Talbot House Residents Association and Elizabeth Edema, who is a leaseholder at Colville Road. Mr Lanaghan's submissions were made on behalf of himself and Marilyn Acons, a lessee and chairman of the Chelsea Manor Court Tenants Association.

Background

6. Pond House is an estate comprising six blocks of residential apartments located in South Kensington and it is bounded by predominantly residential apartment buildings. Altogether there are 124 flats. The block containing flats 1 to 32 was constructed in about 1906 and is "H" shaped in plan with a pitched roof. The remaining five blocks are matching in style but were constructed in the 1950s and have flat roofs. There is a community centre and other utility buildings.

7. The applicant is the freehold owner of the whole of Pond House. The blocks are of mixed tenure with thirty nine of the units held on long leases and the remainder being held on weekly secure tenancies. RBKC's total housing stock, which is managed on its behalf by a Tenant Management Organisation ("TMO"), is made up of 9,467 units, 2,550 of which are held on long leases.

8. As part of its management responsibilities, the TMO deals with the maintenance and repair of the stock. So far as the lessees of Pond House are concerned, we were given a sample lease in which the repairing covenants are as follows:

> "4(ii)(b) The Lessors will at all times during the said term keep and maintain the external main walls foundations and the structural divisions between the flats and the structural parts of the balconies and any services areas or housings at the building and roof of the Building and the pipes … the main entrance passages landings staircases access balconies and lifts --- enjoyed or used by the Lessees in common with the lessees tenants or other occupiers of the other flats in the Building … and the boundary fences and walls of the Estate in good and substantial repair and condition…"
>
> ….
>
> (d) The Lessors will so often as reasonably required decorate the common main entrances staircases passages and balconies of and in the Building and the exterior wood iron stucco and cement work of the Building in the manner in which the same are at the time of this demise decorated or a near thereto as circumstances permit"

By clause 3(ii) of the lease there is a complementary covenant requiring the payment of a service charge which includes a percentage of the landlord's costs under clause 4.

9. The application to the Tribunal includes a schedule of proposed works to Pond House. This gives a general description of works said to be required to each of the six blocks in respect of chimney stack repairs, asphalt walkways, re-pointing, concrete repairs, painting and decorating, windows and scaffolding. In an estimate for the works produced in December 2014, the total cost of the works to the block with the pitched

roof was put at roughly £170,000 and the share of those costs to the lessee of flat 3 was just over £6,000. This is dealt with in more detail below.

The Consultation Requirements

10. Sections 18 to 30 of the Landlord and Tenant Act 1985 include provisions which regulate the recovery of service charge costs by a landlord from a lessee. Section 20 of the Act provides that:

> "(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (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 an appeal from) the appropriate tribunal."

11. Qualifying works and qualifying long term agreements are defined in section 20ZA as follows:

> "(2) "*qualifying works"* means works on a building or any other premises, and *"qualifying long term agreement"* means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months."

12. Section 20 imposes a limit on the amount of service charges recoverable where the requirements have been neither complied with nor dispensed with, by reference to an appropriate amount which is defined in section 20(3) and (4)as follows:

> "(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
>
> (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement –
>
> (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
>
> (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount."

13. Regulation 4 of the Service Charges (Consultation Requirements)(England) Regulations 2003 applies section 20 to qualifying long term agreements (QLTAs) if:

> "(1) …… relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100."

And regulation 6 of the Regulations applies section 20 to qualifying works where the relevant contribution of any tenant is more than £250.

14. The consultation requirements themselves are set out in four schedules to the regulations. The application of each schedule is governed by regulations 5 (qualifying long term agreements) and 7 (qualifying works). So far as relevant regulation 5 provides:

> "5(1) Subject to paragraphs (2) and (3), in relation to qualifying long term agreements to which section 20 applies, the consultation requirements for the purposes of that section 20 and section 20ZA are the requirements specified in Schedule 1.
>
> (2) Where public notice is required to be given of the relevant matters to which a qualifying long term agreement relates, the consultation requirements for the purposes of section 20 and 20ZA as regards the agreement, are the requirements specified in schedule 2."

So far as relevant regulation 7 provides:

> "(1) Subject to paragraph (5), where qualifying works are the subject (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works, are the requirements specified in Schedule 3.
>
> (2) Subject to paragraph (5), in a case to which paragraph (3) applies the consultation requirements for the purposes of sections 20 and 20 ZA, as regards qualifying works referred to in that paragraph are those specified in Schedule 3.
>
> (3) This paragraph applies where –
>
> (a) ……
>
> (b) under an agreement for a term of more than twelve months entered into, by or on behalf of the landlord or a superior landlord, qualifying works for which public notice has been given before the date on which these Regulations come into force are carried out at any time on or after the date.
>
> (4) Except in a case to which paragraph (3) applies, and subject to paragraph (5), where qualifying works are not the subject of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works-
>
> (a) in a case where public notice of those works is required to be given, are those specified in Part 1 of Schedule 4;
>
> (b) in any other case, are those specified in Part 2 of that Schedule"

15. Hence the consultation to be carried out either for qualifying works or for a QLTA is more restricted if those works or agreement were required to be dealt with under a public notice. A public notice means a notice published by the Publications Office of the European Union and must be given wherever a public authority enters into an agreement

including a framework agreement, where its value exceeds a specified limit, currently set at £4,322,012.

16. Furthermore the consultation to be carried out for qualifying works under schedule 4 is more extensive than the consultation under schedule 3. A landlord may conduct the more restricted consultation under schedule 3 where the qualifying works are the subject of a QLTA.

17. In summary therefore consultation for qualifying works is either under Schedule 4 (Part 1) where public notice is required or Schedule 4 (Part 2) where no such notice is required. However, if qualifying works are the subject of a QLTA then the requirements are those specified in Schedule 3. Furthermore even if the QLTA was entered into before the commencement of the Act (31st October 2003) then consultation on qualifying works is also under Schedule 3, if the QLTA was subject to a public notice before that date and the works were carried out afterwards.

Framework Agreements

18. By 2013 the TMO had resolved to enter into framework agreements to support the delivery of repairs, maintenance and improvement works within the applicant's housing stock over the next four to six years. About £50 million of those costs are to be referable to external and communal works to buildings which include both tenanted and leasehold flats.

19. At the hearing and in the documents provided to the Tribunal a detailed explanation was given about the nature of Framework Agreements generally and these Framework Agreements specifically. The following is a summary of that evidence. As mentioned above where specified thresholds are reached for procurement purposes, contracting authorities (which include local authorities and TMOs) are required to comply with the Public Contracts Regulations 2006[1](the PC regulations) which regulate competition within the EU. The regulations implement Directive 2004/18/EC.

20. Framework Agreements are specifically recognised in the PC Regulations and are defined in regulation 2 as follows:

> "framework agreement" means an agreement or other arrangement between one or more contracting authorities and one or more economic operators *(ie contractors)* which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator might enter into one or more contracts with a contracting authority in the period during which the framework agreement applies."

21. Where an authority intends to enter into a Framework Agreement it must comply with PC regulation 19 which provides that:

[1] Now replaced by the Public Contracts Regulations 2015

"(a) The contracting authority must follow one of the procedures prescribed in regulations 15-18. These include the restricted procedure (regulation 16) which is commenced by the publication of notice in the Official Journal inviting requests to be selected to tender and containing specified information;

(b) The contracting authority must select an economic operator to be party to the framework agreement by applying award criteria set in accordance with regulation 30 which provides for the award to be made on the basis of an offer which is either "the most economically advantageous from the point of view of the contracting authority" ("MEAT") or offers the lowest price.

(c) Where the contracting authority awards a "specific contract" under the terms of a framework agreement, it must comply with the procedures in regulation 19 and apply those procedures only to the economic operators who are party to the framework agreement. Neither the contracting authority nor the economic operator may include terms in the contract that are substantially amended from the terms in the framework agreement itself."

22. Therefore, what a Framework Agreement achieves is the identification by competition, of suitable operators who might be offered the opportunity of contracting with a public authority to carry out, in this case, works to buildings. Where a framework agreement is concluded with more than one economic operator (and there must generally be a minimum of 3) a specific contract may only be awarded by application of the terms laid down in the framework agreement or by re-opening the competition between the same economic operators. Importantly the contracts concluded with the economic operators must not be substantially different from the terms within the framework agreement itself.

23. The only notices required to be published in the Office Journal when a contracting authority seeks to conclude a framework agreement is the notice which is given to invite tenders from those who wish to be a party to the framework agreement, and the later Contract Award Notice. There is no additional requirement to publish public notice prior to the award of specific contracts based on the terms of the Framework Agreement. So far as European law is concerned, the requirement for public competition had already been satisfied.

24. As will be seen later in this decision, the TMO gave the leaseholders notice of its intention to enter into Framework Agreements in September 2013. It had decided to follow the restricted procedure under regulation 16 of the PC regulations and the Contract notice was published on 6th February 2014

The Evidence

25. At the hearing, evidence was given by four witnesses on behalf of the applicant, They were: Shane Hughes of Savills who in May 2013 were appointed by the TMO as their procurement advisors; Peter Maddison who since January 2013 has been employed by the TMO as Director of Assets and Regeneration; Daniel Wood who since July 2001 has been employed by the TMO in a number of roles but who is now the Home Ownership Assistant Director, and by Alex Gould BSc (Hons) MRICS. For the respondents, oral submissions were made by Mr Hoexter, Mr Lanaghan, Mr Dunne and

Miss Edema who had additionally provided a witness statement. From the evidence and from the supporting documentation the Tribunal was satisfied as follows.

26. On 2nd September 2013, the TMO gave all of the lessees in the Borough, notice of intention to enter into QLTAs under schedule 2 of the Service Charges (Consultation Regulations). The notice asserted that the Framework Agreements would be QTLAs and that it was the TMO's intention to enter into up to four individual agreements for works with building contractors. The notice gave a description of the type of works that the contractors might be instructed to undertake and the intended duration of the agreements. Notice was also given of an intention to enter Framework Agreements for consultancy purposes. The notice asserted that the reasons that the TMO had decided to enter into Framework Agreement included considerations of value for money, partnership working to improve quality standards for end products and the delivery process.

27. In February 2014 the TMO followed the restricted procedure under regulation 16 of the PC Regulations and a Contract Notice was published. This informed economic operators that:

> "The Authority intends to enter into Framework Agreements with each of the successful service providers for a period of 48 months, although call offs may extend beyond that period. The form of delivery contract under the Framework Agreements will be a bespoke form of TPC2005 Term Partnering Contract (as amended). Details of the contracts will be set out in the tender documents.
>
> It is anticipated that the Authority shall instruct the works for the first two years of the Programme via a direct award equally between the top two-ranked Services Providers on the Framework. However, the Authority reserves the right to award works via a mini-competition between eligible Service Providers. Any work awarded by the Authority or any other contracting authorities shall be in accordance with the rules of the Framework Agreement".
>
> The notice also specified that the anticipated value of each work stream was: £40 million for internal works; £50 million for external works and £40 million for the council's Hidden homes initiative."

28. Forty-seven economic operators expressed an interest in bidding for the Framework Agreements and 17 subsequently returned the required Pre-Qualification Questionnaire. The responses were evaluated by a panel of TMO officers and following the evaluation exercise, eight companies were invited to submit tenders. The contractors were required to include detailed pricing with their tenders. In the Invitation to Tender TMO explained that it was their intention to appoint one contractor to undertake works in the North Area of the programme for the first two years and one contractor for the South Area, also for the first two years. A further two contractors would be appointed in a "reserve" capacity for the first two years. For the third and fourth year, works would be awarded via mini-competitions run between all of the eligible contractors.

29. In a further evaluation by a tender panel the submissions were evaluated in accordance with Price and Quality criteria set out in the invitation to tender documents. The ratio of Price to Quality scores was stated as 60%/40%. In the event four tenders

were identified as successful, subject to the second stage of leasehold consultation. They were: Wates Living Space Ltd; Keepmoat Regeneration Ltd; MITIE Property Services (UK) Ltd and Mulally & Company Limited. The lowest acceptable Tender for the North Area was that of Wates Living Space Ltd and for the South Area the lowest acceptable Tender was that of Keepmoat Regeneration Ltd.

30. On 15th December 2014, Savills issued letters to the successful Tenderers that details of their submitted tenders and prices were required to be disclosed to the leaseholders as a party of the second stage of statutory consultation. It was also stated that the letters were not intended to be formal contract award letters.

31. In his statement Mr Hughes gave a detailed explanation of the pricing requirements imposed on those tendering for the work. In broad terms the Price Framework was designed to identify the anticipated scope of works for each area in the first year of the programme against which the tenderer was required to price. It is not necessary to consider all aspects of that pricing save to note the following: The Price Framework is divided into North Area and South Area and PVC Windows (all areas) and is based on specific blocks that had been the subject of pre-tender surveys carried out within the last two years together with asset intelligence already known to the TMO. The tenders are detailed and extensive and include total costs broken down within schedules including unit costs for individual categories of works. Overheads (preliminaries) and profits were required to be shown separately. Tenderers were also invited to price "extra over" schedules of rates for exceptional items that might occur from time to time and not included in the basket rates. The pricing schedules also included scaffolding where required to access works at height. Additionally schedules of rates were required for typical elements of works that might be needed to blocks over the course of the programme but at pre-tender stage no firm quantities or volumes were known.

32. On 18th December 2014, the TMO served the lessees with notification of its proposal to enter into the Framework Agreements. The notification included an appendix headed "Observations made to the Notice of Intention and the TMO/Landlord's Response." This summarised the observations that had been made and was followed by a response to those observations. The notification of proposals invited observations by the end of 31st January 2015. In total 31 observations were received. Three lessees took up the invitation to inspect the Proposals themselves. Pond House leaseholders were sent additional letters on 19th December 2014, containing estimates of the works proposed to be carried out by Keepmoat in the first year of the Framework Agreements.

33. The schedule of works proposed to be carried out on Pond House and the estimates of costs were based on pre-tender surveys together with asset intelligence rather than a specific detailed survey of the properties themselves. The expert report prepared by Alex Gould was written on instructions by the applicant to inspect Pond House and to summarise the existing condition of the property in order to give his expert opinion on the need for the works to each block. He had been informed (and this was confirmed at the hearing) that the precise extent of the necessary works will be the subject of a final survey by the appointed contractor and other consultants. Mr Gould confirmed that he did not carry out an internal inspection of the property. It is not proposed to examine Mr Gould's report in detail but it will suffice to say that in a

number of respects it did not support the schedule of works annexed to the application to the Tribunal. Most significantly, it was conceded by Mr Bhose that the proposed window replacement could not be justified without a detailed survey of each unit internally. Additionally, the extent of some of the other works, for example to the brickwork was put into question by Mr Gould who additionally identified other areas of concern that had not yet been addressed.

The Framework Agreements

34. The Framework Agreement included in the Tribunal's documents is the agreement to be executed with Keepmoat. It consists of the body of the agreement and a series of 9 schedules. Most of the documentation in the schedules was not included in the bundle and the Tribunal was told that these run to thousands of pages. Our attention was drawn to: Schedule 1 containing the mini-competition procedure, rules and model-form mini-tender; Schedule 2 which is the framework brief; Schedule 3 which are the framework proposals, Schedule 4 which are the framework price schedules (copies of those parts as they apply to the South Area were included) and Schedule 5 which comprises the form of ACA Term Partnering Contract TPC2005.

35. Following the execution of the four Framework Agreements, the TMO intends to enter into a Partnering Contract with Keepmoat for the South Area. Orders for external works (contributions towards the costs of which lessees may be liable to contribute) will not be issued until the outcome of this application. The process will begin with a "Task Pre-Commencement Order" which will include setting dates for formal and informal consultation with leaseholders and residents, mobilisation of labour, materials and site compounds, agreement project delivery protocols and conducting joint surveys to confirm the properties to be included in the programme and the scope of work. Following the satisfactory completion of the pre-construction activities, Keepmoat are to submit their Task Price for the works for approval by the TMO calculated from their tendered unit rates. Upon approval and subject to satisfactory consultation under schedule 3 of the consultation regulations, a task commencement order will be issued to start works. This process will apply to both the first and second year.

36. For later years the award of any works will be dependent on the outcomes of annual call offs and mini-competitions. Under the agreement contracts may be awarded either through Direct Selection or Mini-competition. It is important to note that the TMO is not obliged under the terms of the agreement to award the contract to any of the four selected contractors. Furthermore if works are carried out which go beyond the scope of the Framework Agreements, or if a different contractor is appointed, the usual rules for consultation under the regulations will apply.

37. Mr Bhose referred to a number of the terms of the framework agreement including:

(a) Clause 1.1 which includes the following definitions:

"Works" means the refurbishment and capital investment forming part of the Framework Programme to be carried out by the Service Provider as part of any Project pursuant to any Partnering Contract as more widely described in thee Framework Brief and as amended in any Partnering Contract"

"Project" shall mean any works instructed by the client pursuant to this framework agreement and to be carried out by one or more service providers pursuant to any partnering contract.

(b) Clause 5 provides that:

"5.2 Where the client considers that it may require the carrying out of certain works comprising any project it shall select a service provider to carry out such project on the basis of direct selection or mini-competition"

"5.4 As part of the selection process….the client shall specify:

5.4.1 the scope of the works required for the project, in accordance with the Framework Brief and the Framework Proposals;

…….

5.4.5 the sum payable for the project, which shall be based on the Framework Price Schedule

……

5.7 This agreement and each partnering contract shall be treated as complementary…"

38. In accordance with regulation 19(4) of the PC regulations when awarding a specific contract on the basis of a Framework Agreement neither the contracting authority nor the economic operator may include terms that are substantially amended from the terms laid down in the framework agreement.

The Applicant's Submissions

39. Although this application is for the determination by the Tribunal of the liability to pay future service charge costs, the main focus of the submissions by both the applicant and the respondents was on the section 20 consultation issues.

Framework Agreements

40. On behalf of the applicant, Mr Bhose said that the use of Framework Agreements in the public sector has been well established for a number of years. For example, he said, they were referred to in the 1998 report of the Construction Task Force to the Deputy Prime Minister, *Rethinking Construction*, chaired by Sir John Egan as one of the tools available to tackle fragmentation which may arise from more traditional contract based procurement and project management. Within the Executive Summary, Sir John recommended that "The industry must replace competitive tendering with *"long term relationships based on clear measurement of performance and sustained improvements in quality and efficiency…"* Mr Bhose said that the ongoing use of Framework Agreements was also recorded by Peter Gershon in his *Review of Civil Procurement in Central Government* (April 1999).

41. It was Mr Bhose's submission that at the time the Commonhold and Leasehold Reform Act 2002 received royal assent, Framework Agreements were firmly in the

contemplation of the legislature. This is of importance because of the changes to the structure of section 20 introduced by that Act and associated secondary legislation. In particular he drew our attention to the Office of Government Commerce guidance issued in 2003. The OGC was established in April 2000 to work with government departments to improve their procurement capability and to secure better value for money. The guidance entitled *Framework Agreements and EC Developments* was issued when draft Directive 2004/18/EC was issued having been agreed politically at the Internal Market Council on 21st May 2002. Our attention was drawn specifically to the following passages:

> *"Introduction*
>
> *The proposed new consolidated public sector Directive, which will replace the existing Directives covering public procurement of services, supplies and works, will include a provision on framework agreements for the first time….*
> *The current EC public sector Directives do not refer to framework agreements although their use is well established and has been recognised by the Commission….Much of the guidance below reflects the explicit provision for each framework agreements in the proposed new consolidated EC public sector Directive….These processes will take some time…..However, as the new Directive is, in this instance, simply making explicit what is already considered to be permissible under the existing EC rules, departments do not have to await adoption or implementation of the new Directive before making use of this guidance note.*
> *…….*
>
> *The UK has always taken the view that the only sensible approach to such framework agreements is to treat them as if they are contracts in their own right for the purposes of the application of the EC rules. As such, the practice has been to advertise the framework itself in the Official Journal of the European Union (OJEU, formerly OJEC) and follow the EC rules for selection and award of the framework. This provides transparency for the whole requirement across the Community and it removes the need to advertise and apply to award procedures to each call-off under the agreement, on the basis that the framework establishes the fundamental terms on which subsequent contracts will be awarded.*
>
> *The European Commission has, during recent years, expressed some concerns about the approach. The main concern has been that, in making call-offs under a framework agreement, there should be no scope for substantive amendments, through negotiation to the terms established by the framework agreement itself.*
> *……..*
>
> *Most importantly, the proposed new EC public sector Directive referred to above…….includes an explicit provision (Article 32) on the application of the EC rules to these agreements. That provision……meets the UK;s need for greater clarify in this area compatible with current practice."*

Article 32 of Directive 2004/18/E sets out the requirements for Framework Agreements set out in paragraph 19 above.

42. Mr Bhose explained that:

> (1) Whilst a Framework Agreement is not an agreement where goods will be sold or supplied, services rendered or works undertaken, it exists so that specific contracts may be awarded under and in accordance with its terms, within which goods will be sold or supplied, services rendered or works undertaken;
>
> (2) The award of specific contracts under the Framework is limited to one or more of the economic operators with whom the authority has concluded a framework agreement. The Framework Agreement is, he said, a necessary legal prerequisite for the award of any specific contract.
>
> (3) Neither the award nor the terms of a specific contract is at large. Both the award and the terms of the contract are limited by the terms laid down in, or based upon, the Framework Agreement.

Accordingly, he said, one cannot view a Framework Agreement completed under regulation 19, and a specific contract awarded under the terms of that same Framework Agreement, together with the requirements of regulation 19, in isolation to one another, Together, they form a contractual whole.

Section 20 consultation

43. Turning then to the regulation of service charges under the Landlord and Tenant Act 1985, Mr Bhose said that section 19 of the 1985 Act limits the payability of relevant costs to costs that have been reasonably incurred and where services are provided or works are carried out to the extent that they are of a reasonable standard. Section 20 and 20ZA impose an additional obligation to consult. However, he said that in the decision of the Supreme Court in *Daejan Investments v Benson* [2014] UKSC 14, Lord Neuberger had made it clear that section 20 requirements are not "an end in themselves". In *Benson* the Supreme Court was considering the proper approach to retrospective dispensation under section 20ZA(1) of the 1985 Act. Mr Bhose drew our specific attention to paragraph 43:

> "43. So I turn to consider section 20ZA(1) in its statutory context. It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The former purpose is encapsulated in section 19(1)(b) and the latter in section 19(1)(a). The following two sections, namely sections 20 and 20ZA appear to me to be intended to reinforce, and to give practical effect, to those two purposes……..
>
> 46…….The requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges to the extent identified above. After all, the requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them."

44. Mr Bhose reminded the Tribunal that the current sections 20 and 20ZA were included in the 1985 Act following amendments made by section 151 of the Commonhold and Leasehold Reform Act 2002 which came into force on 31st October 2003. The concept of the "qualifying long term agreement" was new in 2002. In particular the scheme of the previous section 20 did not accommodate arrangements where qualifying works would be carried out by an identified contractor or contractors under the auspices of an agreement which was "long term". For example, local authorities were entering into PFI contracts for refurbishment or maintenance works and were unable to comply with the old section 20 which allowed residents associations to nominate contractors from whom the landlord was required to seek an estimate for the works.

45. As to the structure of the consultation provisions Mr Bhose submitted that the element of competition is provided either by the giving of public notice or the obtaining of estimates but not both. For schedule 1(QLTA) and schedule 4 part 2 (qualifying works), where public notice is *not* required, the element of competition is provided by the requirement that the landlord obtain an estimate from someone nominated by the tenants and the requirement to provide at least 2 estimates. For schedule 2 and schedule 4 part 1, the element of competition flows from the giving of public notice which advertises the matter Europe-wide. Since tenants are told in the notice of intention that public notice is to be given, they could even draw this to a contractor's attention.

46. Mr Bhose submitted that Schedules 1 and 2 of the regulations envisage a situation under a qualifying long term agreement where a landlord is unable to estimate, as at the date of the proposal, what each tenant's relevant contribution attributable to the relevant matters will be. Paragraph 5(7)-(9) of schedule 1 and paragraph 4(4)-(7) of Schedule 2 make provision for a number of alternative steps to compliance in cascading sequence, based upon what is or is not reasonably practicable. In *London Borough of Southwark v Leaseholder of the London Borough of Southwark* [2011] UKUT 438, the President was considering an application by the council for dispensation of the consultation regulations contained in paragraph 4 of schedule 2. The council's concern being that as they did not have specific information to provide an estimate, cost or rates for proposed works, they would require section 20ZA dispensation. In the event, the President found that dispensation was not required because compliance had actually been achieved. He described the provisions as follows:

> "(a) The requirements in sub-paragraph (4), (5), (6) and (7) form a cascading sequence. If it is not reasonably practicable to make the estimate required by sub-paragraph (4), (5) must be complied with; if it is not reasonably practicable to make the estimates required by sub-paragraph (4) or (5)(b), (6) must be complied with; and if it is not reasonably practicable to make the estimate required by sub-paragraph (6)(b), (7) must be complied with.
>
> (b) If it is reasonably practicable to make an estimate of part of the tenant's contribution but not all of it, the proposal does not have to state any estimate. The same goes for the estimate of expenditure under (5) and the ascertainment of the unit cost or hourly or daily rate under (6). It follows that if it is not reasonably practicable to provide what is required by (4), (5) or (6) the Notice of Proposal need only say why it is not and state the date when the landlord expects to be able to provide an estimate, cost or rate (see (7)).

(c) No question of reasonable practicability arises under (7). The requirements are absolute.

(d) When in due course the landlord does have information enabling him to provide an estimate, cost or rate, paragraph 8 requires him to give notice in writing of this within 21 days. ……The paragraph 8 notice creates no new opportunity to make observations nor any duty on the part of the landlord to take any observations into account or respond to them."

This demonstrates, said Mr Bhose, that QLTAs may have considerable degrees of complexity and recognises that works or services do not need to be determined when the QLTA is entered into; that a QLTA does not have to include "set" costs or prices for the works or services; that it is for the landlord to order or require works or services as it needs them and that there will, or may be, order or instructions or call-offs.

47. Mr Bhose submitted that:

(a) Firstly, it is clear that section 20 might apply to a QLTA such as this in one accounting period and not another because the costs under the agreement may fluctuate. A prudent landlord will consult with leaseholders if there is a possibility that one or more of them will be required to pay more than £100 for works to their property in any one period. Accordingly if a QLTA might result in more than £100 being payable in any period then it should be treated as an agreement which is subject to the consultation requirements;

(b) Secondly, there is no requirement that the terms of the QLTA must *oblige* the landlord to place or carry out works or services. Otherwise it would always have to be shown in advance that the landlord was obliged under the agreement to spend an amount which would trigger consultation. Accordingly, he said, there is no difference between a QLTA under which the landlord is obliged to let works or services and one under which he is not so obliged but may do so. In either case the crucial question is whether section 20 applies at the point at which costs under the QLTA are incurred.

(c) Thirdly, the statutory provisions are not prescriptive as to the terms of the QLTA. Rather they recognise that it is a broad and flexible concept: the QLTA may be concerned with all or any of the works or services a landlord may provide; it may be for any length beyond a year; it may extend across the breadth of a landlord's stock without limitation on numbers or geography; it may be for values or works or services into the millions of pounds; there is no requirement that the works or services must be known or agreed when the QLTA is made nor is there any time limit within the duration of the QLTA when they must become known or agreed; and there is no requirement that a landlord must place works or services under the QLTA either at all or at any particular time during it. The statutory provisions do not, he said, prescribe the precise manner or mechanism by which an order or instruction or call-off is to be made. The provisions eschew technicality in keeping with the recognised breadth and flexibility of the QLTA.

(d) Fourthly, this Framework Agreement is a QLTA agreement made by the TMO on behalf of the applicant for a period of four years and is directly concerned with the performance of a core landlord function - namely repair and maintenance;

(e) Fifthly, this is a QLTA to which section 20 applies. When works are carried out, the costs will be incurred "under" the Framework Agreement. Mr Bhose contended that it is manifest that the Framework Agreement regulates the relationship of the TMO and Keepmoat. It creates a bundle of rights and obligations and when works are carried out they will have to be carried out and paid for in accordance with the provisions of the Framework Agreements. To hold otherwise would be to introduce a technicality that the statutory provisions neither require nor envisage. The fact that the works could also be said to be carried out in accordance with the Partnering Contract is, he said, legally insignificant since this contract is itself provided for by the Framework Agreement and could not lawfully be entered into save by direct reference to it. The applicant should succeed, he said on a simple "plain meaning" construction.

(f) Finally, he argued, it is highly unlikely that Parliament would have enacted amendments to the section 20 provisions which did not accommodate public sector landlords from entering into Framework Agreements when their existence and use was by that time, well established.

Proposed works

48. Mr Bhose submitted that the works proposed and set out in the schedule to the application to the Tribunal, fell squarely within the applicant's repairing covenants set out at paragraph 8 above. However, this was subject to a full survey being carried out in advance of further consultation with leaseholders. In particular there was some doubt about whether the condition of the windows was such that they required replacement.

Respondents' Submissions

49. All four of the leaseholders who attended the Tribunal submitted written statements of case and made oral submissions. To some extent, the submissions overlapped with each other and where that is the case, we have summarised the common points below without attribution.

The London Area Procurement Network case

50. A main part of the lessees' case relies upon a first instance decision by the (then) Leasehold Valuation Tribunal dated 5th March 2007, namely *London Area Procurement Network v All Right to Buy lessees* (LON/00BF/LDC/2006/0078 & others). In that case eight London local authorities, including the applicant in this case, applied under section 20ZA for dispensation from some of the consultation requirements of the 1985 Act. Together the applicant authorities had formed the London Area Procurement Network (LAPN). The application related to all of the leasehold properties within the network area estimated at about 33,000 units out of a total housing stock of 125,000 units.

51. The alliance known as LAPN had been formed to facilitate collaboration between the participating boroughs with a view to promoting efficiencies in the procurement of services and goods. It was resolved that the Network would enter into a series of Framework Agreements to which individual contractors would be appointed for a four

year term. Call-off contracts would then be entered into by the individual local authorities. The Network was concerned that the nature of the scheme was such that it would not be possible to comply with the provisions of schedule 2 of the consultation requirements. In particular, since the framework agreements were in draft, it was not possible to identify the scope of works, the value of the works or the properties to which particular works and costs would relate. It was therefore decided to make an application to the Tribunal for dispensation from the requirements of the consultation regulations. The basis of the application was that the proposed Framework Agreements would be QLTAs, that they would be QLTAs subject to public notice and therefore within Schedule 2 of the regulations and that dispensation from paragraphs 4(4)-(7) was required. It should be noted that the application was decided several years before the *Southwark* decision mentioned in paragraph 46.

52. The Tribunal rejected the application and decided that the proposed Framework Agreements were not QLTAs to which section 20 applied for the following reasons:

(a) The Framework Agreements were in draft and the Tribunal considered that it was unable to make a determination on agreements that had not been finalised;

(b) Under the proposed Framework Agreements no relevant costs were to be incurred by any of the parties; relevant costs were instead incurred under the individual call-off contracts;

(c) The Public Contract Regulations relied upon by the LAPN had been superseded;

(d) For the Framework Agreements, the relevant parties were LAPN and the contractors whereas the parties to the call-off contracts were intended to be the individual local authorities (or their management organisation on their behalf) and the contractors. The Tribunal therefore did not consider that there was sufficient nexus in these contracts for it to be satisfied that the relevant costs were "incurred under the agreement".

(e) The agency relationship between LAPN and the individual local authorities was such that the Tribunal did not consider that if costs were incurred "under" the agreement, that they would in any event have been incurred by a relevant landlord under the agreement.

53. Furthermore, the Tribunal decided that even if it was wrong and that the Framework Agreements were QLTAs within section 20, it would not have granted dispensation. In particular it did not accept the evidence given on behalf of LAPN that it was not reasonably practicable to comply with paragraph 4(7) of the regulations. The Tribunal considered that the LAPN ought to have had good information on planned works, budgets and schedules of rates and, in the absence of this, dispensation would effectively give a blank cheque to LAPN. Also, the Tribunal was concerned that if dispensation was given then the limited consultation specified in Schedule 3 to the regulations would "remove many of the rights and security of the leaseholders with regard to the sums to be spent by the landlord". The Tribunal continued:

> "It is in effect not a consultation exercise but the provision of information to which the leaseholders have no right to object. They may raise observations to

which the landlord must have regard but in real terms the contract has already been entered into, and the only recourse of the leaseholders is then to make an application to the Tribunal for a determination of their liability to pay under section 27A after the works have been carried out."

54. In this case the respondents rely on the reasoning of the LAPN Tribunal and in particular the finding that the proposed Framework Agreements were not QLTAs within the meaning of section 20 of the 1985 Act. The argument is summarised in paragraph 7 of Ms Edema's statement as follows:

> "7. The Respondent's reply is that an overarching FA is *not* a QLTA to which section 20 of the 1985 Act applies because the "relevant cost" will *not* be "incurred under" each of the 4 overarching FA Agreements: regulation 4(1) to the Consultation Regulations. The Notice of Intention and Notice of Proposal to award FA Agreements in compliance with Schedule 2 to the Consultation Regulations simply set out the terms and pricing framework for the work called off from these overarching FA Agreements but do not by definition commit either party to these Agreements to the carrying out of works. It is if and when an FA contractor is appointed to carry out Proposed Works that a contract is formed and the "relevant costs" will be "incurred under" the proposed call-offs: The Office of Government Commerce Guidance on framework Agreements in the Procurement Regulations 2008 ("OGC Guidance"). OGC Guidance 2.2 explains:
>
> > "Such agreements (FAs) set out the terms and conditions for subsequent call-offs but place no obligations, in themselves, on the procurers to buy anything. With this approach, contracts are formed under the Regulations only when goods, works and services are called off under the agreement."

55. The Respondents also place reliance on the LAPN Tribunal's observations on how consultation may have been curtailed had dispensation been given in that case. As Mr Hoexter put it at paragraph 10 of his statement "Should the Applicant succeed in an 'in principle' determination by the Upper Tribunal favourable to them, this will allow them to drive a Trojan Horse, with its accompanying cart of obfuscation, straight through the protections for lessees for which section 20 was intended."

56. All of the lessees described historic incidents of poor management and excessive costs in the execution of works by the applicant. In his statement Mr Langahan gives a detailed account of the manner in which repairs were carried out to Chelsea Manor Court over a number of years. One example was the supply and fit of replacement windows and doors in 2003/4 which he said were 2 and 3 times more expensive than the prices of competitors and of such a poor quality that they failed within a couple of years. He also said that the lessees had started an action in the Leasehold Valuation Tribunal in 2009 against the applicant which was settled on the basis that significant sums of money were repaid to the lessees. He also maintained that the applicant is now in breach of its duty to maintain the decoration of Chelsea Manor Court and despite this being an urgent matter, could not understand why it was not prioritised in the proposals for the South Area.

57. Mr Lanagahan also referred the Tribunal to the case of *Auger, Association of Camden Council Leaseholders v London Borough of Camden* LRX81/2007. That case concerned an application for dispensation under section 20ZA of paragraphs 4(4) to (7) of Schedule 2 to the consultation regulations. The subject matter of the QLTA in that case was a partnering agreement rather than a Framework Agreement. At the time of the application for dispensation the partnering agreement had not been entered into by the local authority. His Honour Judge Huskinson decided that although there was jurisdiction to dispense in these circumstances, dispensation should not in fact be given. In particular he considered that if it was reasonably practicable for Camden to provide the information required in paragraph 4 of the regulations then it should not be excused, through a dispensation order, from doing so. In his view the application for dispensation was premature.

58. In this case Mr Lanagahan disputed the Applicant's submission that the matter was urgent and he said, by reference to the failure to carry out works at Chelsea Manor Court, that this was illustrated by the failure to carry out maintenance works in accordance with the relevant leases. He also argued that the price to quality ratio (explained in paragraph 29) was inappropriate and that greater weighting should have been given to price.

59. A further point made by Mr Lanaghan at the hearing was that the applicant had rolled together works so that it was inevitable that the financial limits imposed in European law would be exceeded. He questioned the applicant's motives in this respect and argued that the works should have been parcelled up into smaller units.

60. Mr Hoexter made similar points to Mr Lanaghan and said that the TMO had a very poor record of procuring and supervising works and applying due diligence when signing off payments to contractors both for major capital investment works and for maintenance. He also considered that the TMO had inadequate experience and manpower to oversee a capital investment works programme of up to £130 million. Mr Hoexter pointed out that by entering into agreements with a very limited number of providers for very large individual amounts of work, the chance of insolvency for any of them compounds the risks, including to the value of warranties for work signed off. Mr Hoexter also drew the Tribunal's attention to the fact that the TMO had been "somewhat naïve" in its dealings with past contractors several of whom were fined substantial amounts by the OFT in 2009 for improper tendering, including Apollo which was fined £2.15 million and which now forms the public contracting arm of Keepmoat.

61. Mr Hoexter cited a specific example of major capital works that were carried out on the Tregunter East properties in 2009/10 where, he said, the works proposed to be charged to lessees in the section 20 notice were excessive both in cost and scope and despite the provision of a detailed independent survey, they were proceeded with. Final accounts were not produced until four years after completion and the total came to significantly less than the estimate largely because of the reclassification of works as improvements and not chargeable to the lessees.

62. Mr Hoexter was concerned to highlight the fact that the "in principle" decision about QTLAs sought by the applicant would be applied to all such agreements of any

scope and of any nature. He agreed that Framework Agreements can provide demonstrable benefits both to landlords and lessees. However, in this particular case he said that the Key Performance Indicators were inadequate to support proper supervision of such an extensive programme of works. He also pointed out that another London Borough had decided to adopt a different model of Framework Agreement where works were parcelled into six strands and five contractors were appointed for each strand. This, he said was a much more effective way of dealing with its housing stock maintenance. In common with the other leaseholders, Mr Hoexter considered that the applicant had failed to demonstrate that the Framework Agreement would provide quantifiable benefits to lessees and that instead they hope to "close the door" through a legalistic side route. He also contended that there was an insufficient nexus between the works to be carried out and the Framework Agreement for them to be considered to have been carried out "under" it. His experience was, he said, that the Framework Agreements would give the providers the dominant role in any partnership to the detriment of lessees' interests.

63. Mr Dunne reiterated the points made by the other lessees and also gave an example of poor management in the case of Talbot House which underwent cyclical redecoration. There was a failure, he said, to comply with section 20 procedures and the standard of work was so poor that the lessees made successful applications both to the County Court and to the Leasehold Valuation Tribunal in respect of the costs and consequential losses. Mr Dunne echoed the concerns about the competence of the TMOs and submitted that the framework agreement would be prejudicial to the interests of the leaseholders.

64. Finally Ms Edema submitted that the intention of the Secretary of State in enacting the consultation provisions was to safeguard the statutory rights of leaseholders and to limit a landlord's ability to recover if he does not comply with the consultation regulations. She too questioned the competence of the TMO and made the point, as did the other lessees, that it would be unreasonable that leaseholders as a last resort would have to face years of distress and the financial burden of applications to the First-tier Tribunal. She also gave an example of a previous failure to successfully undertake works to Colville Road in 2009.

65. The leaseholders also raised a number of issues about the actual conduct of the consultation process adopted so far. We deal with these below and as part of the discussion.

Discussion

66. It is important first to consider the scope of this application and the extent of the jurisdiction of the Tribunal. The application is made under section 27A(3) of the Landlord and Tenant Act 1985. This provides for an application to be made to the Tribunal for a determination of the liability to pay costs "if costs" were to be incurred. It is therefore not an examination of whether costs have been reasonably incurred or whether works and services are of a reasonable standard. It may however, include a consideration of whether, at a particular point in time, the correct consultation has been carried out in accordance with the consultation regulations

67. In *London Borough of Southwark v Leaseholders of the London Borough of Southwark*, the question of how a landlord might seek a determination that it has complied with the regulations could be achieved. As mentioned above, that case decided that dispensation from the regulations was not required under Schedule 2 where, for the time being, a landlord is unable to provide the information set out in regulation 4. At paragraph 53 of that decision the President noted that the council made its application for dispensation "in an attempt to achieve assurance that it would not be visited with the ruinous consequences of failing to comply with the Regulations." There is no power for the First-tier Tribunal or indeed this Tribunal to give declaratory relief. A suggestion was made in that case that the most convenient course would be for the landlord to apply under section 27A(3) for a prospective determination of compliance. In the *Southwark* case itself, the President doubted whether the procedure would be appropriate in a case where no specific description of the works to be carried out to each of the many properties was available. In this case the applicant seeks a section 27A(3) determination on the basis that it has provided sufficient information on the works to be carried out.

68. The questions that this Tribunal has to consider were identified by Mr Bhose as follows:

> (1) What works of repairs, decoration and maintenance are proposed to each block;
>
> (2) Is the Applicant required (or permitted) by the leases of the individual Pond House lessees, to undertake these proposed repairs and maintenance;
>
> (3) Has the Applicant complied, thus far, with its obligation to consult the Pond House lessees under the Act and the Service Charges (Consultation Requirements)(England) Regulations 2003 ("the Consultation Regulations");
>
> (4) Would the estimated contribution of each Pond House lessee towards these proposed works be a reasonable sum to demand from them, on account?

69. The Tribunal will consider each of these issues but not in the same order. There is no doubt, in our view, that although this is a section 27A(3) application, the main purpose was to obtain a determination on the consultation issue. However, we are satisfied that the application under section 27A(3) was an appropriate way to secure such a determination and we consider that issue first.

70. In 2003, as described by Mr Bhose, substantial amendments were made to section 20 of the Landlord and Tenant Act 1985 by the Commonhold and Leasehold Reform Act 2002. One of the changes was the introduction of the duty for landlords to consult about certain QLTAs. As we have seen, the definition of QLTA is contained in sections 20 and 20ZA of the 1985 Act and regulation 4 of the consultation regulations. Taken together a QLTA is an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months where relevant costs incurred under the agreement for any tenant, exceed £100 in any accounting period.

71. In this case we are satisfied that the Framework Agreements are long term, since they will be for a period of four years and that relevant costs may well exceed £100 for a tenant in any one accounting period. We accept Mr Bhose's submission that if a QLTA *might* result in more than £100 being payable in any period then it may be treated, for that purpose, as an agreement which is subject to the consultation requirements. It is not necessary for a landlord to establish that costs in excess of £100 will definitely be incurred nor is it necessary for a landlord to demonstrate which accounting period such costs might fall within.

72. The most difficult question here is whether the costs under the Framework Agreement can be said to be incurred under the agreement. Mr Bhose submits that the word "under" should be given a simple "plain meaning" construction and that to approach the matter in any other way would be to introduce an unnecessary artificiality. For the following reasons we agree and consider that the costs in this case will be incurred under the Framework Agreements.

73. Firstly, we acknowledge that in order for costs to be incurred under an agreement there must be a sufficient factual nexus between the subject matter of the agreement and the works themselves. However, we do not consider that this means that the only agreements contemplated by section 20 are contracts for works to be carried out whether subject to public notice or not. In this case we have ample evidence to be satisfied that where works are carried out by one of the contractors identified under the terms of the Framework Agreement that such a nexus exists. That evidence can be found in particular in paragraphs 27 to 38 above. The fact that the applicant is not obliged to use any of the identified contractors does not detract from this conclusion. If the applicant used another contractor then they could not rely upon the Schedule 2 consultation already commenced. If the applicant carries out works which go beyond the works contemplated by the Framework Agreements, then again, they could not rely upon the Schedule 2 consultation already commenced.

74. In our view the Framework Agreements in this case identify the works to be carried out with sufficient particularity to satisfy the test that the relevant costs are incurred in carrying out those works "under" the agreement. We are reinforced in this view by the terms of the agreement itself, set out at paragraph 36 of this decision and by the requirement of regulation 19(4) of the Public Contracts Regulations 2006 which provide that when awarding a specific contract on the basis of a Framework Agreement neither the contracting authority nor the economic operator may include terms that are substantially amended from the terms laid down in the Framework Agreement. In that respect we accept Mr Bhose's contention that together, the Framework Agreement and the specific contract cannot be regarded in isolation from each other.

75. If further confirmation from the statutory provisions for this conclusion were required, we have also had regard to regulation 7 of the consultation regulations which provides that : "…….where qualifying works are *the subject* (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements……..as regards those works, are the requirements specified in Schedule 3." We consider the word "subject" to be even more open textured than "under" and an indication that a broad construction is appropriate. There can be no

question but that the proposed works in this case are "the subject" of the Framework Agreements.

76. In reaching this conclusion we have had regard to the LAPN decision but consider that this is a very different case. In particular the agreements in the LAPN were very much in draft and the agency relationship between the Network and each individual authority threw into doubt whether or not there was a sufficient nexus between the Framework Agreements and the call-off contracts under which the works were to be carried out. We find that the Framework Agreements in this case are QLTAs for the purposes of section 20 of the Landlord and Tenant Act 1985.

77. It is also significant that the basis of the LAPN application was the authorities' belief that they needed to obtain dispensation before they could proceed on a schedule 2 basis. As noted in paragraph 46 above, the *Southwark* decision displaces that assumption. The fact that the information required by paragraph 4 of schedule 2 to the consultation regulations is not available to be provided to the leaseholders does not mean that dispensation is required. All that is necessary is for the authority to provide the information when it is able to do so.

78. The consequence of that finding must also be considered. The Framework agreements relate to works whose total cost may be as much as £130 million. The works for which lessees in the Borough might have to contribute amount to some £50 million of that total sum. That figure far exceeds the financial limit for public notice. Although we acknowledge the lessees' argument that the works could have been divided into smaller parcels and public notice might not then have been necessary, we do not consider that to be a matter for this Tribunal. It is for the applicant to decide how to manage and carry out works to their housing stock. If, as a result of their action, charges are excessive or works of a poor standard then the costs will not be reasonable and will not be recoverable. We acknowledge the evidence given by the lessees of the previous failures by the TMO in the management of maintenance and repair contracts. However that cannot affect our decision on the issue of whether or not the Framework Agreements are QLTAs or not.

79. Although the Tribunal in the LAPN case were concerned that the rights of the lessees to be consulted would be abrogated if dispensation were to be given, we do not consider that this is relevant here. In particular the LAPN Tribunal was considering whether or not to exercise its discretion to dispense. Because of the *Southwark* determination there is now no issue of discretion. Either the QLTA is one to which the regulations apply or it is not. We have decided that the regulations do apply. The consequence therefore is that if works are carried out under a contract falling under the auspices of the Framework Agreements in this case, then consultation will be limited to that required by schedule 3 of the regulations. We acknowledge the lessees' real concerns in this respect. However, we are mindful of the fact that the vehicle contained in the amended section 20 and the process set out in Schedules 2 and 3 of the regulations was introduced at a time when public procurement both by partnering and by using Framework Agreements was well established. The introduction of Schedules 2 and 3 meant that public bodies, which previously were unable to comply with section 20 when they had entered into large scale arrangements for works, were now able to do so. Furthermore we consider that although Schedule 3 consultation is less extensive than

consultation under Schedule 4, it is still consultation, albeit more limited in scope. Looking back, the Tribunal also speculated that when the right to buy was introduced for secure tenants in 1985, insufficient regard may have been given to the interaction between public procurement and the old section 20 and that the amendments made by the Commonhold and Leasehold Reform Act 2002 were intended to address that deficiency.

80. Finally, we think it important to consider the ambit of the Supreme Court's decision in *Daejan v Benson*. Mr Bhose properly drew our attention to Lord Neuberger's analysis of the relationship between section 19 and section 20 of the 1985 Act and his conclusion that section 20 requirements are not an end in themselves. However, Mr Bhose also acknowledged that *Benson* was concerned with an application for retrospective dispensation and must be read in that context. What *Benson* does not do is to change the requirements to consult. It remains the case that section 20 consultation must be complied with or dispensed with if a landlord wishes to recoup relevant costs.

81. As mentioned above, a number of points were also made by the leaseholders about the conduct of the section 20 consultation carried out so far. For the following reasons, we do not find any of the complaints to be substantiated:

(a) We are satisfied that the Notice of Intention dated 2nd September 2013 was served on every recognised tenants' association. The Tregunter East Residents' Association is not "recognised" for the purposes of section 29 of the 1985 Act. We are also satisfied that provision of the statutory consultation notices to the Chair of the Chelsea Manor Court Tenants' Association was sufficient compliance with the consultation regulations;

(b) We are satisfied that the Appendix included with the Notification of Proposals dated 18th December 2014 complied with paragraph 4(10) of schedule 2 to the consultation regulations;

(c) We do not find that the Framework Agreement had already been signed and Partnering Contracts issued to Keepmoat. We are satisfied on the evidence that the agreements were executed by Keepmoat on 22nd May 2015 and that as at the date of the hearing they had not been executed by the TMO;

(d) The place specified at which the Proposals could be inspected and the hours specified for inspection, were reasonable, within the meaning of paragraph 2 of schedule 2 to the consultation regulations.

82. Having found for the applicant on the section 20 issue, the Tribunal is nonetheless unable to find for it on the substantive application. In particular, although a schedule of proposed works was provided with the application, this has been significantly undermined in the evidence of Mr Gould. Section 27A(3) requires a Tribunal to make a specific determination of payability. Since a determination under section 27A(3) is made *before* works are carried out it cannot be determinative of the standard of the work when finally completed. However, precision as to the extent of the works, the duration of the works and the terms of the lease which support the obligation to carry out the work is still required to support a section 27A(3) determination. On the information before it, the

Tribunal cannot be satisfied of any of those matters. Mr Bhose conceded that there was insufficient evidence to support the estimate in respect of window repairs. In our view Mr Gould's evidence put into doubt the detail of most of the proposed works. As a result it is impossible to say whether any of works fall under the terms of the lease and we certainly cannot be satisfied that the estimated costs are reasonable. Also, although the evidence of the leaseholders about the manner in which historic works had been carried out cannot be determinative about the conduct of future works, we think that the information is sufficient to give us pause and we would require very persuasive evidence before we could feel able to make a determination of payability. Evidence of that quality is simply not available in this case. Accordingly the application fails and the Tribunal declines to make the determination sought under section 27A(3)

83. No application by the lessees was made under section 20C of the Landlord and Tenant Act 1985. This is because of the clear undertaking by the applicant that it would not seek to recover the costs of this application from any of the leaseholders in the borough. That undertaking was recorded in the directions order made by the Deputy President on 31st March 2015.

84. The application is dismissed.

Dated 21 July 2015

Siobhan McGrath – President, First-tier Tribunal (Property Chamber)

Paul Francis FRICS