UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – disputed on-costs and management fee under PFI contract – whether costs reasonably incurred – whether preliminaries should be reduced by ratio of leasehold to tenanted dwellings – whether allowance for contractor's profit reasonable – whether duplication of management charge – whether 10% reasonable management fee – whether management fee should be charged on on-costs – appeal allowed in part

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN	**LONDON BOROUGH OF LEWISHAM**	**Appellant**
	and	
	LUIS REY-ORDIERES AND OTHERS	**Respondents**

Re: Various properties in Brockley
Lewisham
London SE4

Before: George Bartlett QC and A J Trott FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on 28-29 November and 5 and 10 December 2012

Christopher Heather, instructed by Greenwoods Solicitors LLP, for the appellant
Mr Steven Mills and Mr Richard Carey for themselves and the other respondents

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The following cases are referred to in this decision:

Auger v London Borough of Camden (2008) LRX/81/2007 (unreported)
Veena SA v Cheong [2003] 1 EGLR 175

The following further cases were referred to in argument:

Birmingham City Council v Keddie [2012] UKUT 323 (LC)
Regent Management Ltd v Jones [2010] UKUT 369 (LC)
Arrowdell Ltd v Coniston Court (North) Hove Ltd [2007] RVR 39
Country Trade Ltd v Noakes [2011] UKUT 407 (LC)
Schilling v Canary Riverside Development PTD Ltd LRX/26/2005 (unreported)
Yorkbrook Investments Ltd v Batten [1985] 2 EGLR 100
Daejan Investments Ltd v Benson and others [2011] 1 WLR 2330

DECISION

Introduction

1. This is an appeal by the London Borough of Lewisham ("LBL" or "the appellant") against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 7 February 2011, as amended by a correction certificate dated 10 March 2011, on an application made under Section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) on 16 December 2009.

2. The applicants (who are the respondents in this appeal) were 24 leaseholders of various properties on the Brockley Estate in Lewisham, all of whom held long leasehold interests granted by LBL pursuant to the right to buy legislation under the Housing Act 1985. A list of the respondents and their addresses is attached as Appendix 1. The application to the LVT was for a determination of the amount of service charge payable in respect of the years 2007-2009. The applicants also questioned whether the landlord had complied with the consultation requirements under Section 20 of the 1985 Act.

3. On 4 June 2007 LBL had entered into a management agreement under the Private Finance Initiative ("the project agreement") with Regenter B3 Limited ("Regenter") to refurbish, manage and maintain the appellant's housing stock in Brockley which comprised approximately 500 properties held on long leases, including those held by the respondents, and some 1,300 tenanted properties.

4. At a directions hearing on 13 October 2010 the LVT recorded that the applicants were no longer challenging the consultation procedure and ordered that three matters should be heard as preliminary issues:

- (i) The reasonableness of the "professional fees" charged under the PFI contract (26%);
- (ii) The reasonableness of the management fees charged in relation to the works (10%); and
- (iii) Whether the costs of scaffolding were reasonable.

5. The LVT heard these preliminary issues on 19 January 2011 and determined as follows:

- (i) The "professional fees" (or "on-costs") of 26% could be broken down into "fees" of 3.48%; "preliminaries" of 10.52% and "refurbishment sub-contractors" of 12%. The fees were considered reasonable; the preliminaries were reduced to 3.5% "to take account of the fact that the majority of the preliminary costs related to the rented properties and not leaseholders"; and overheads (5%) and profit (7%), which together made up the refurbishment sub-contractors' costs of 12%, were

reduced to a total of 10%. In respect of the applicant's leasehold properties the amount of professional fees was therefore reduced by the LVT from 26% to 16.98%.

(ii) The management fee of 10% was disallowed because the LVT considered that management charges were already included in the (amended) figure for on-costs.

(iii) The overall costs of the scaffolding were held to be reasonable.

6. LBL sought permission to appeal against the LVT's decision regarding preliminaries, the refurbishment sub-contractor's costs and the management fee. The LVT refused permission to appeal on 10 March 2011. Upon application to the Upper Tribunal (Lands Chamber) the President granted permission to appeal on 24 June 2011. The appeal was to be by way of review with an immediate rehearing if successful.

7. The principal hearing of the leaseholders' application was held before an LVT in July 2011, and in its decision of 20 September 2011 the LVT made determinations on whether particular works, including window replacement, general roof repairs and other external works, electrical works and redecoration, were reasonably necessary and carried out to a reasonable standard and whether the costs of them were reasonable. There was no appeal against this decision.

8. The matters in dispute, both at the preliminary issues hearing and the principal hearing, related to works carried out under the project agreement. Although, therefore, the agreement extended to matters, in particular the management of the properties, that were not exclusively related to the carrying out of these works, it was only the cost of these works, including the associated management costs, that were in dispute.

9. At the hearing before us Mr Christopher Heather of counsel appeared for the appellant and called Mr Steven Bonvini, the Operations Director of Regenter and Mr Adrian Kelly, the Surveying Team Leader of Higgins Construction Plc, the refurbishment sub-contractor under the PFI contract, as witnesses of fact; and Mr Duncan Grimshaw BSc MRICS, a Chartered Quantity Surveyor of Gardiner & Theobald (and formally of Davis Langdon LLP), as an expert witness.

10. Mr Steven Mills, Chair of the Brockley Leaseholders Association and a respondent; and Mr Richard Carey, Vice-President of the Brockley Leaseholders Association and a respondent, appeared on behalf of the respondents. They called Mr Zac Crawley and Mr Luis Rey-Ordieres as witnesses of fact.

Facts

(i) The Leases

11. The respondents' leases are in substantially the same form having been granted under the right to buy provisions of Part V of the Housing Act 1985. A specimen lease (relating to 8 Aldham House) was provided. Under clause 5(1) of the lease the lessee covenants to pay to the lessor such sum or sums in respect of the matters described in Parts I and II of the Tenth Schedule as are demanded in writing from the lessor. Part I of the schedule deals with service charges and provides for the estimation of the proportion of the lessor's costs and payments made, expended or incurred in complying with or performing its covenants as may be properly attributable to the lessee (the lessee's contribution). The lessee's contribution is calculated by summating the expenditure incurred on a number of elements of works and services that are set out in paragraph 5 of the schedule. Paragraph 5(xvi) deals with the element of management costs which are defined as:

> "The costs of managing the Building or Estate including the costs of managing agents if appointed."

12. The lessor covenants under clause 6 of the lease to perform, observe and carry out the obligations set out in the Ninth Schedule to the lease. Paragraph 8 of that schedule provides that the lessor shall:

> "manage and conduct the management of the Estate and Building in a proper manner."

13. Part II of the Ninth Schedule provides for an "improvement contribution" (as is properly attributable to the lessee) to the paid by the lessee to the lessor in respect of the lessor's expenditure on any works subject to certain excepted items as set out in paragraph 2 of the Ninth Schedule.

14. Clause 8 of the lease provides that:

> "(1) The Lessor shall be entitled
>
> (a) To appoint if the Lessor so desires competent and reputable managing agents for the purpose of fulfilling the obligations of the Lessor under [clause] 6 hereof and of managing and conducting the management of the Estate and Building and to remunerate them for their services.
>
> (b) To employ competent and reputable architects, surveyors, solicitors, accountants, contractors, builders, gardeners and any other person, firm… properly required to be employed in connection with or for the purpose [or in] relation to the Estate or the Building or any part thereof and pay them…proper fees charges salaries wages costs expenses and outgoings."

(ii) The project agreement

Introduction

15. On 5 December 2012, following discussion in the course of the hearing, we ordered that the appellant should disclose, for the purposes only of this appeal: the project agreement (including relevant annexes and schedules); the agreement between Regenter and Higgins Construction Plc ("the refurbishment contract"); and Schedule 4 to the refurbishment contract.

16. LBL advertised in the Official Journal of the European Communities on 16 March 2002, in accordance with the Government's Private Finance Initiative (PFI), seeking bids from appropriately qualified contractors for the refurbishment, management and maintenance of LBL's housing in the area of Brockley. Following a competitive tender Regenter was approved by the Secretary of State under section 27 of the Housing Act 1985 and was appointed as the contractor for a 20 year term under the project agreement on 4 June 2007. The project agreement provides for Regenter to undertake and perform (i) a major refurbishment works programme (the works), and (ii) housing management services (the services) in accordance with the output specification contained in Schedule 1.

17. Regenter was authorised to appoint sub-contractors to exercise the functions exercisable by the contractor under the project agreement. Regenter entered into three such sub-contracts. Firstly, it entered into the refurbishment contract with Higgins Construction Plc (Higgins) on 4 June 2007 for the provision of the works. Secondly, it entered into a housing management agreement with Pinnacle Housing Limited (Pinnacle) to provide estate management services (a copy of this agreement was not disclosed). Thirdly, it entered into a sub-contract with Equipe Regeneration Limited (Equipe) for responsive repairs and cyclical maintenance and renewals. This sub-contract, which was not disclosed, did not affect the issues in this appeal (other than the management fee). Together the sub-contracts with Pinnacle and Equipe provided for all of the services.

Major works

18. The work undertaken by Higgins under the refurbishment contract was concerned with major works of refurbishment on both tenanted and leasehold properties. In relation to tenanted properties the works were part of the Government's Decent Homes Programme. The contract sum under the refurbishment contract (for works to both tenanted and leasehold properties) was £73.6m. In undertaking the refurbishment works Higgins were required to comply with and meet defined availability (physical) standards, the achievement of which was certified by an independent certifier. These availability standards were set out in Annex 1 to Schedule 1 to the project agreement. The contractor was required to maintain the structure and fabric of leasehold dwellings to ensure compliance with (i) the leases, and (ii) the initial availability standards and, when the relevant refurbishment works were completed, the full availability standards.

19. Rented dwellings, unlike leasehold dwellings, had availability standards in respect of their internal parts, such as the heating system, water supply system, kitchen and bathroom facilities, electrical and gas installations, ventilation and energy efficiency. Consequently, whereas a total of 73 availability standards applied to rented dwellings only 32 of them applied to leasehold dwellings.

20. Part 5 of and Schedule 4 to the refurbishment contract contained the payment provisions. These comprised an initial mobilisation payment to Higgins of some £1.3m paid at the commencement of the contract and thereafter a series of monthly interim payments ending on 31 December 2010. The monthly payments included an amount for the "Existing Leasehold Works Cost" (ELWC). A proportion of the total ELWC of some £7.9m was allocated to each leasehold dwelling (484 in total) shown in Table B of Schedule 4 to the refurbishment contract (which mirrored similar provisions in Table A of Part X of Schedule 4 to the project agreement). This amount could be claimed by Higgins in respect of each leasehold dwelling in the contract month following certification of the relevant works to that dwelling.

21. In addition to the ELWC the refurbishment contract provided for an additional payment in respect of provisional sums (details of which were not disclosed) and in respect of specified changes to the works. Regenter could deduct a retention of 5%.

22. Payment was directly linked to the achievement of the availability standards and the general performance requirements set out in the output specification. Schedule 4 contained provisions for financial deductions where the contractor failed to meet these standards and requirements.

Leasehold management

23. Part 4 of the project agreement deals with the provision of the services in respect of LBL's housing management functions as set out in Schedule 16. Paragraph 7 of the output specification in Schedule 1 to the project agreement deals with the repairs and maintenance for which Equipe is responsible. Paragraph 9 contains details of a comprehensive range of services that Pinnacle is to provide to leaseholders under its sub-contract with Regenter. The required outputs include: ensuring that LBL complies with its landlord's covenants under the leases and dealing with any breaches; setting and recording charges to allow for day-to-day and major works service charge recovery; compliance with legislation; establishing and maintaining records to generate timely service charge estimates and final invoices; recovering service charges; assisting LBL in dealing with landlord's consent and approvals; and encouraging leaseholder comment and involvement on management issues.

24. The contractor is not to exercise LBL's rent or service charge setting policies which are reserved to LBL. Pinnacle shall seek to maximise the recovery of service charges from leaseholders but leaseholders must pay those service charges directly to LBL (paragraph 4 of Schedule 17 to the project agreement).

25. Schedule 4 to the project agreement specifies the mechanism for the monthly payment due to the contractor for the scheduled services undertaken in respect of the existing leasehold dwellings ("Existing Leasehold Services Costs" or ELSC). The ELSC forms one part of a complex formula to determine the "Net Monthly Unitary Payment for each Contract Month". The ELSC for the previous contract month is determined by reference to the sum shown in the fourth column of the Table at Part XI to Schedule 4. That column shows the ELSC per leasehold dwelling per annum for each year of the contract (subject to indexation), starting in the year ending 31 March 2008 and ending in the year ending 31 March 2028. The total ELSC per leasehold dwelling over the 20 year contract period (subject to indexation) is £17,234.

(iii) Consultation and notices of intention

26. Regulation 7(3) of the Service Charges (Consultation Requirements) (England) Regulations 2003 provides that the consultation requirements for the purposes of section 20 of the 1985 Act shall be those specified in Schedule 3 to those regulations where under a qualifying long term agreement (QLTA) qualifying works for which public notice has been given before 31 October 2003 are carried out at any time on or after that date. Public notice of the proposed PFI (project agreement) was given in OJEC on 16 March 2002 (see paragraph 16 above) and the qualifying works under that agreement were carried out after 31 October 2003. Therefore the relevant consultation requirements in this appeal were those specified in Schedule 3 to the consultation regulations. The consultation requirements under Schedule 3 are abbreviated given that once a QLTA has been entered into the contractor, as in this case, will usually have the exclusive right to carry out the proposed works.

27. Notices of intention were served on the lessees during 2007 and 2008. Copies of the notices served on the respondents (and three other lessees) were included in the evidence. Four of the respondents received notices of intention dated 23 July 2007 which only gave a single figure for their proportion of the estimated cost of the works. In each case this figure was the same as that shown in respect of that property in Schedule 4 to the refurbishment contract. The remainder of the respondents received notices of intention dated between July 2007 and June 2008 which gave a breakdown of the estimated costs both at "block" and "lessee" level. Only one of the four lessees (Miss Goulbourne at 10 Alban House) who had received the earlier form of notice appears to have received the second, more detailed, form of notice.

28. With one exception (10 Alban House) the figure for the estimated proportion of the cost for each lessee shown in the detailed notices of intention did not coincide with the corresponding figure shown in Schedule 4 to the refurbishment contract. In some cases the differences were very significant, e.g. at 8 Hazel House the detailed notice estimated a contribution of £7,374.00 or 43% of the Schedule 4 figure, while at 10 Columba House the detailed notice estimate of £23,074.00 was 87% higher than the Schedule 4 figure.

29. Apart from the details of the cost of the works that were specific to each block/lessee, the detailed form of notice also gave figures in respect of "variations, increase[d] scope of works and miscellaneous costs" and "professional fees". No separate figure was shown for

management fees. The estimate for professional fees, expressed as a percentage of the base costs, varied from 24.6% to 49.4%. No details were given of how the professional fees were estimated.

(iv) Actual costs

30. Details of the actual costs incurred in respect of each respondent were provided in the evidence. With two exceptions (Flat 3, 158B Lewisham Way and 30B Tressillian Road) the actual cost was less than the corresponding figure shown in Schedule 4 to the refurbishment contract. The actual costs (excluding the 10% management fee) were less than the estimated costs shown in the notices of intention in the case of 20 respondents with the remaining 4 respondents having actual costs that were higher than the estimated costs. Four of the properties had a variance of over 10% including 30B Tressillian Road where the actual cost was double the estimated cost.

31. For each respondent the actual cost of professional fees (also known as "on-costs") represented 26.1% of the base costs, including variations. A management fee of 10% was then charged on the total costs, including professional fees.

32. The 26.1% allowance for professional fees (on-costs) was made up as follows:

(i) Fees		%	
	Planning	1.005	
	Building control	0.037	
	Waste management	0.445	
	Building surveyors	0.270	
	M & E Engineers	0.610	
	Energy ratings	0.319	
	Planning supervisors	0.098	
	Insurances	0.704	
			3.488
(ii) Preliminaries		%	
	Site set up at 6 Mantle Road including satellite site set ups (temporary welfare facilities for works)	3.982	
	Resident liaison officers	0.737	
	Site management	2.970	
	Quantity surveyors	1.029	
	Administrators	0.328	
	Attendant labour and transport	1.498	

PPE and small tools/consumables	0.073	
		10.617

(iii) Refurbishment sub-contractors

	%	
Overheads	5.000	
Profit	7.000	
		12.000
		26.105%

Although the actual on-costs charged to the respondents was 26.1% the appellant is only claiming the rounded amount of 26%; comprising fees of 3.48%, preliminaries of 10.52% and overheads and profit of 12%.

Issues

33. There are four issues in this appeal:

(i) Whether any reduction in professional fees (on-costs) or management fees is permissible under section 19(1)(a) of the 1985 Act;

(ii) Whether the LVT was wrong to reduce the "preliminaries" element of professional fees from 10.52% to 3.5%;

(iii) Whether the LVT was wrong to reduce the "refurbishment sub-contractors" element of professional fees from 12% to 10%; and

(iv) Whether the LVT was wrong to disallow management fees of 10%.

There is no appeal against the LVT's decision to adopt the "fees" element of professional fees at 3.48%.

Procedure

34. On the first day of the hearing we said that we were satisfied that the appeal should proceed by way of re-hearing, and we proceeded to hear evidence on behalf of the parties. We consider below, so far as it is appropriate to do so, the reasons of the LVT for reaching the conclusions that it did.

Issue (i): whether any reduction in costs is permissible under section 19(1)(a) of the 1985 Act

35. Section 19(1) of the 1985 Act states:

> "19 Limitation of service charges: reasonableness
>
> (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 are works of a reasonable standard;
>
> and the amount payable shall be limited accordingly."

36. Mr Heather submitted that neither the LVT nor this Tribunal was entitled under section 19(1)(a) to go behind the contractual sums which had been agreed between LBL and Regenter and were incorporated into Schedule 4 to the project agreement (and mirrored in the refurbishment contract). He argued that the decision of the Lands Tribunal in *Auger v London Borough of Camden* (2008) LRX/81/2007 (unreported) stood clearly in point and was binding. In that appeal His Honour Judge Huskinson said at [47]:

> "If works which are reasonably necessary and are done to a reasonable standard are carried out under a Partnering Agreement Camden will be able to meet criticism regarding the level of expense by pointing out that Camden is already contractually bound to the Partner and had to place the works with the Partner at the contract rate provided for in the Partnering Agreement, and therefore the costs were indeed reasonably incurred because, even if the works could reasonably have been expected to have been done significantly cheaper by other competent contractors, Camden would be in breach of contract by giving the works to anyone other than the Partner."

37. Mr Heather said that the questions of whether the works were reasonably necessary or were carried out to a reasonable standard had been considered by the LVT at a separate hearing in July 2011 and in its decision dated 20 September 2011. The issue in this appeal was whether the costs of the works were reasonably incurred and the decision in *Auger* showed that they were. The LVT had therefore been wrong to embark upon a process of analysing the individual elements of the on-costs (professional fees) and the Lands Chamber should not repeat the mistake.

38. This conclusion made sense because the appointment of Regenter as the contractor was based on criteria that were fixed by legislation giving effect to EU public procurement procedures. This procurement process ensured (or was deemed to ensure) the appropriate market-testing of prices.

39. Mr Heather said that he advanced this argument as a principle of law not derived from the words of any statute but from the contractual relationship that had been created between LBL and Regenter under the project agreement. A 20 year agreement had been properly entered into under which LBL were bound to give the work to Regenter at rates that were incorporated into the contract; it was not open to the respondents then to argue that the individual cost elements that were behind the total price had been unreasonably incurred.

40. The respondents rejected Mr Heather's submissions on this point. They said that if the PFI contract had dealt solely with the major (leaseholder) works that were the subject of the appeal "then the claim may have some grounds", but in fact the contract described a much larger project of which those major works only comprised a (minority) part. The LVT had properly recognised that the on-costs should be reduced to reflect the appellant's failure to distinguish the costs legitimately to be charged to leaseholders from those associated with the more extensive internal works done to tenanted homes as part of the Decent Homes Programme. Tenanted properties formed the majority of dwellings subject to the PFI and the work done to them was more labour intensive and required greater project management, survey and sign off (e.g. for replacement boilers and electric cables) than the works done to the leaseholders' dwellings. The LVT were entitled to distinguish between the types of property subject to the PFI and had fairly determined that the on-costs were too high in respect of the leaseholders' dwellings.

41. There was no breakdown of the 26% on-costs in the project agreement or in the refurbishment contract and it was not clear when or by whom the level of such costs to be charged to the leaseholders had been determined.

Issue (i): conclusions

42. The meaning of "reasonably incurred" in section 19(1)(a) of the 1985 Act was considered by the Lands Tribunal in *Veena SA v Cheong* [2003] 1 EGLR 175 in which the member, Mr P H Clarke FRICS, said at [103]:

> "The question is not solely whether the costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

43. In our opinion, when considering LBL's action in incurring the disputed costs, there are two criteria that must be satisfied before the relevant costs can be said to have been reasonably incurred:

(i) the works to which the costs relate must have been reasonably necessary; and

(ii) the costs incurred in carrying out the works must have been reasonable in amount.

44. Mr Heather submitted that the question whether the works were reasonably necessary (as well as the question whether they were carried out to a reasonable standard) was concluded by the LVT's decision of 20 September 2011. We accept this. We do not, however, accept Mr Heather's submission that the reasonableness of the amount of the costs that are in dispute in this appeal was established as a matter of law by the provisions of the project agreement, and we do not think that such a proposition is to be derived from what Judge Huskinson said in *Auger*. We respectfully agree with the view expressed by Judge Huskinson in the passage relied on by Mr Heather, but the terms of an agreement such as the one relied on here can only be strongly persuasive as to reasonableness. They are not conclusive for the purposes of the application of section 19(1)(a).

45. In any event, however, the provisions of the project agreement do not prescribe or establish the items that are in dispute in this appeal. These are expressed as percentages, being on-costs that are added to the base costs. The total of these on-costs is 26% (including the "fees" element, which is not in dispute). This is not a figure that is identified either in the project agreement or the refurbishment contract. The figures included in those contracts were expressed as a total lump sum which comprised amounts fixed for individual properties (as per Schedule 4 to the refurbishment contract). The figure for professional fees that appeared on the actual service charge invoices was consistently applied at the rate of 26% (actually 26.1%) of base costs in respect of the respondent leaseholders' properties, although the notices of intention gave varying percentages for these on-costs. LBL were obliged to pay Regenter the total sums set out in the project agreement for each leasehold property, subject to the satisfactory achievement of performance standards by the contractor. They were apparently not obliged to pay any separately identified sum for on-costs; such costs being subsumed within the total amounts shown in the relevant schedule of the contract. There is nothing to show that if the amount that has been charged as the on-costs were to be reduced the amount payable in respect of each leasehold property would be less that that which LBL are liable to pay under the project agreement. The on-costs were levied against the leaseholders by LBL via Pinnacle and it is therefore for LBL to show that they were reasonably incurred, which in this context means that they were identified as a reasonable percentage of the base costs. The point is significant because LBL then charge a 10% management fee on top of the sum of the base costs and the 26% on-costs. If the 26% has not been fairly and reasonably quantified then the management costs will be too high. We do not accept that the pre-existence of an OJEC public notice prevents, as a matter of law, the respondents from challenging these on-costs and their constituent parts.

46. The management fee of 10% can be distinguished from the other on-costs. The level of the management fee was not fixed by the project agreement and the contractor exercised no control over the amount invoiced to the leaseholders as part of the service charge. The right to set the management fee was reserved by LBL under clause 22.1.1(a) of the project agreement. Pinnacle was instructed by LBL as to what management fee to include as part of the service charge invoice. It cannot therefore be argued that this management fee must have been reasonably incurred by LBL on the grounds that it was a contractual payment that they were obliged to pay Regenter under the project agreement to which EU procurement legislation applied. LBL was obliged to make payments to Regenter in respect of ELSC under Part XI of Schedule 4 to the project agreement (see paragraph 25 above), but those payments do not (or

do not necessarily) correspond to the 10% that LBL charged on the total costs, including the 26% on-costs, to the leaseholders.

Issue (ii): preliminaries

47. The LVT reduced the service charge in respect of the preliminaries by two thirds, from 10.52% to 3.5% of the base costs. The largest item under the heading "preliminaries" (3.89%) was in respect of the site set up at 6 Mantle Road. In his evidence to the LVT Mr Bonvini is reported by the LVT to have said that:

> "the customer liaison set up costs were apportioned on the basis of the occupational area of each part of the consortium in the property at 6 Mantle Road, which had been purchased specifically to enable better liaison with residents. We are of the view that as the leasehold properties comprise 1/3rd of the stock affected by the Decent Homes work that it would be fair for the leaseholders to pay the same proportion of the overheads for this office. Our view is influenced by the fact that much of the works involved internal refitting works for rental tenants, new kitchens etc., that did not affect leaseholders."

The LVT extended this reasoning to all of the items under the heading of preliminaries and apparently assumed that all such costs related to expenditure which should be apportioned in approximately the same ratio as the number of leasehold dwellings bore to the number of tenanted dwellings.

48. For the appellant Mr Kelly explained that Higgins took the view that it would be impractical on a project of this scale, where leaseholders might have different types and amount of work done, to try and apportion the on-costs specifically or to try and calculate a fixed charge per property. Instead Higgins considered that the fairest approach was to calculate what percentage the on-costs represented of the total contract price and to apply that percentage to any charges made to individual leaseholders. The 26% for on-costs was "part and parcel" of the costs of undertaking the major works and would have been reflected in the costs of any contractor undertaking those works; it was not an arbitrary amount.

49. Mr Kelly said that there was no distinction in the on-costs between works done on the Decent Homes Programme (on tenanted properties) and that done as major works on the leasehold properties. If anything the works to the leasehold properties required more management since it necessitated compliance with the section 20 consultation requirements. This involved considering and responding to the leaseholders' observations, a process that was not required in connection with the work to the tenanted properties. The internal works that were carried out as part of the Decent Homes Programme were straightforward, usually requiring the involvement of only two trades. There were many more trades involved with the external works. It generally needed more people to deal with the leasehold works and works to the communal areas required more supervision.

50. Mr Grimshaw considered that the allowance for preliminaries of 10.52% was reasonable. He had undertaken a benchmarking exercise that suggested an appropriate allowance might be

between 11.53% and 13.5%. He agreed with Mr Kelly that it would be impractical to calculate individual on-costs for each leaseholder and that the application of a percentage uplift was a fair method of apportioning such costs.

51. Mr Grimshaw was unable to base his benchmarking exercise on other PFI projects because of the complexity of their financial arrangements, the commercial sensitivity and confidentiality of such contracts and the tendency for fees and other on-costs to be expressed as lump sums within the overall bid. Instead he relied upon Spons Architects and Builders Price Book, data provided by Davis Langdon's Cost Research Department, and analyses taken from the RICS Building Cost Information Service (BCIS). Mr Grimshaw analysed data from 14 live projects for which Davis Langdon (by whom he was then employed) were providing cost or project management services. These projects reflected three types of procurement: design and build; construction management; and traditional. The average percentage on-cost was 11.53%, having been adjusted to exclude mechanical plant and insurance items that did not feature in the Brockley PFI, and which, if included, would have artificially inflated the figures. He supported this analysis by reference to six estate housing projects contained in the BCIS data for the period October 2004 to March 2005. The projects varied in type and scale but were all very much smaller than the Brockley PFI. Mr Grimshaw nevertheless considered that they provided useful information because the Brockley PFI was implemented at the level of individual blocks and dwellings and it could reasonably be considered as a series of small discrete projects. The BCIS data showed a range of preliminaries from 4% to 26% with a mean of 13.5%. The average figure for preliminaries, taken from Mr Grimshaw's two analyses was 12.52%.

52. Mr Grimshaw said that there should not be any significant difference between the amount of management and administrative work required for leasehold and tenanted dwellings. The Decent Homes Programme required more extensive (internal) work but works to leasehold properties required the section 20 consultation requirements to be met and for on-going liaison with the leaseholders.

53. Mr Heather submitted that the respondents' contention that they had been charged for Decent Homes work was fundamentally misconceived. The evidence showed that there was no distinction to be made between the on-costs for tenanted properties and those for leasehold properties. The on-costs of 26% (of which preliminaries comprised 10.52%) could not sensibly be divided between the two types of work according to the ratio of the number of properties to which each type of work applied. On-costs applied equally to all types of work. Those on-costs were, as with any building contract, factored into the total price charged for the work. Although the relative amount of the on-costs was the same as between the two types of work, their absolute amount would differ depending upon the base cost of the work involved. If Decent Homes work was more expensive because of the greater amount of (internal) work done on each property and the larger number of properties affected, then the total amount of the on-costs would be higher. But that did not justify the LVT's decision to reduce the percentage charged for preliminaries on work done on leasehold properties by two thirds, or at all.

54. For the respondents both Mr Crawley and Mr Rey-Ordieres said that their leasehold properties had not been individually inspected or surveyed. Mr Crawley said that the notice of

intention was very vague and that the allowance for on-costs was quite high. He had telephoned Pinnacle several times and requested more details of the proposed works but they were never provided. Mr Rey-Ordieres had raised several concerns about the notice of intention. He knew the problems with his own property and considered that works such as window replacement were not necessary. He said the fees (on-costs) were "incredibly high". Both Mr Crawley and Mr Rey-Ordieres said that the contractor had suggested that the proposed works were necessary under the Decent Homes standard, but that standard did not apply to leasehold properties. The contractor did not listen to Mr Rey-Ordieres' concerns and, said Mr Rey-Ordieres, the process was unfair to him, both economically and personally.

55. In their closing submissions the respondents emphasised that the most important document was not the PFI contract but the lease. Only those costs which related to the leasehold properties and the common parts could be properly charged to the leaseholders and not any cost that related to the tenanted properties. The LVT had fairly determined that the costs attributable to leaseholders and those attributable to tenants had not been properly separated by the appellant. The LVT was correct to decide that the Decent Homes work to tenanted properties formed the majority of the work and that by its nature it was more labour intensive and required greater project management. In the light of this conclusion the LVT's reduction in the allowance for preliminaries from 10.52% to 3.5% was reasonable.

Issue (ii): conclusions

56. In our opinion the LVT were wrong to reduce the allowance for preliminaries from 10.52% to 3.5%.

57. Mr Bonvini explained that the office costs associated with the property at 6 Mantle Road were identifiable as rent, rates and utilities. These costs were allocated to each sub-contractor (Higgins, Pinnacle and Equipe) according to usage and were reflected in the charges for their work. All three sub-contractors worked on both tenanted and leasehold dwellings. In our opinion there is no justification for allocating such costs according to the ratio of the number of tenanted to the number of leasehold properties and then to extend that process across all of the items under the heading of preliminaries. The expert evidence from Mr Kelly and Mr Grimshaw explained that although there were differences between the type of work undertaken in respect of these two types of property it was not possible when considering the on-costs to draw a meaningful distinction between them.

58. The effect of the LVT's decision is to reduce arbitrarily the preliminaries recoverable on major leasehold works by two thirds and there is, in our opinion, no evidence to support such a reduction. The on-costs arose in connection with both types of work and the evidence shows that there was no reason to distinguish between them. Preliminaries are a recognised cost for any building project such as that covered by the Brockley PFI and, based upon the evidence of Mr Kelly and Mr Grimshaw, the rate of 10.52% is reasonable in respect of both Decent Homes and leasehold work. Having said this we do not accept the results of Mr Grimshaw's analysis of the data from BCIS. There were only 6 pieces of data and we do not think that it is a valid

exercise to take the average of such few data points (i) where there is a very large variance in the results (between 4% and 26%) and (ii) where it is assumed that the PFI project is a series of minor works rather than a single major project (a point to which we return below in relation to profit). Nevertheless we are satisfied that the evidence of 14 current (large) projects taken from Davis Langdon's own database does support an allowance for preliminaries of 10.52%.

59. The relevant costs incurred by LBL in respect of preliminaries are contained (but not separately identified) in the figure of ELWC for each leasehold dwelling as set out in Part X of Schedule 4 to the project agreement. In the case of 22 out of the 24 respondents the actual cost of the leasehold works, and consequently the amount charged for preliminaries, is less than the amount shown for the corresponding property in Schedule 4. This is because Higgins sub-contracted the leasehold work and benefitted from any difference between the fixed lump sum it received for each property from LBL and the (generally lower) price that it paid to its sub-contractors. Those benefits were passed on to the leaseholder in the majority of cases. The opposite applies in the case of the two respondents where the actual costs were higher than the corresponding contract figure for ELWC (Flat 3, 158B Lewisham Way and 30B Tressillian Road). In those cases, and subject to the LVT's reduction in the service charge payable by those two leaseholders in its subsequent decision dated 20 September 2011, it appears that the charge for preliminaries is greater than the cost incurred by LBL under the project agreement. In our opinion the amount that was reasonably incurred by LBL as landlord for preliminaries cannot exceed the amount, based upon the relevant ELWC contained in Schedule 4 to the project agreement, that was paid by LBL to Regenter. The amount charged in respect of those two respondents should therefore not exceed 9.52% (ie 1- (1/1.1052) x 100%) of the ELWC.

Issue (iii): refurbishment sub-contractor's overheads and profit

60. In its decision the LVT stated:

> "16. With respect to the profit and overhead fees, these would be normal in any building contract, but we consider that 12% would be excessive given that other fees are being charged and consider that 10% would be a more reasonable sum for the risk to the contractor under this type of scheme."

61. Mr Bonvini said that overheads and profit were on-costs that would be included in any quotation provided by a contractor bidding on a one-off basis and reflected the actual costs that LBL incurred by appointing a contractor to undertake the project.

62. Mr Grimshaw relied upon extracts from Spons 2005 and the BCIS Building Maintenance Price Book 2008 when considering the issue of overheads and profit. The former contained the following comment:

> "The general overheads of the Contractor's business, the head office overheads and any profit sought on capital and turnover employed, is usually covered under a general item of overheads and profit which is applied either to all measured rates as a percentage, or alternatively added to the tender summary or included within Preliminaries (site specific

> overhead costs). At the present time, we are including an allowance of 2% for profit and 5.5% for overheads on Major Works measured rates and 7.5% for profit and 5% for overheads on Minor Works measured rates to reflect the current market."

Mr Grimshaw said that that he thought the percentages for "Minor Works" were the correct ones to apply:

> "since from Higgins' perspective each property would effectively have constituted an individual project of less than £100,000 in value, which is the criterion used by Spons to define a Minor Works scheme."

63. In cross-examination Mr Grimshaw said that he was not aware that before the LVT the appellant's case was that scaffold contractors had been asked to price for the works on a "whole contract basis". He accepted that, if considered at the block level (rather than the level of individual leasehold dwellings) much of the work to leaseholder's property should be classified as "major works" by his definition of more than £100,000 in value.

64. The BCIS Building Price Book said the following about overheads and profit:

> "Additions of 20% on labour all-in hourly rates and 10% on material prices have been made for overheads and profit. These amounts are thought to be reasonable rates that a prudent contractor would allow to cover the actual overhead costs involved and to allow for a reasonable profit."

Mr Grimshaw considered that these percentages probably represented the peak of any additions before the impact of any downward pressure on prices after 2008. But he thought that the 12% allowance for overheads and profit applied by LBL was reasonable in this context.

65. Mr Grimshaw took an allowance of 13.75% for overheads and profit, being the average of the figures from Spons (12.5%) and BCIS (taken at 15%).

66. Mr Heather submitted that it was not the function of the LVT under section 19(1)(a) of the 1985 Act to retrospectively analyse the invisible elements of the contract price and to reduce the allowance for overheads and profit when the same had not been the subject of evidence. He noted that the various sub-contractors appointed by Higgins charged them a price that itself included overheads and profit (and preliminaries) to which Higgins would not be privy. The sub-contractors' prices formed the base costs to which on-costs of 26.1% was added to produce the leaseholders' invoices. But it had not been suggested by the respondents (or by the LVT) that each sub-contractor price should have similarly been analysed in terms of on-costs.

67. Mr Grimshaw's acceptance that *some* of the works under the project agreement would not qualify as minor works under the Spons definition (£100,000) meant that the first part of his averaging process would need to be modified to the extent that there was a major works element. But even if all of the works were major works then the appropriate figure for overheads and profits according to Spons would be 7.5% and the average between that and the

equivalent figure of 15% taken from BCIS would be 11.25%. But it was not the case that all the works were major works so defined and therefore the average must be *at least* 11.25%.

68. The respondents submitted that it was appropriate for the LVT to have considered the level of risk to the contractor under the PFI arrangement. Mr Grimshaw had drawn attention to the lower profit percentage expected in the case of major works. It was incorrect to argue that the leasehold works were a series of minor works to which a higher profit level should apply. This was not the approach that the appellants had taken before the LVT in respect of scaffolding costs and nor should it be adopted in respect of on-costs. Mr Grimshaw had emphasised the benefit of the economies of scale that were inherent in the PFI and yet sought to deny those same economies when considering the overheads and profit. That was a contradiction. The LVT's reduction of the profit percentage from 7% to 5% was therefore reasonable.

Issue (iii): conclusions

69. It is not clear from their decision whether the LVT reduced this item from 12% to 10% in respect of overheads, profit or both. Their decision refers to "other fees…being charged", which suggests a reference to overheads, and also refers to the "risk to the contractors" which suggests a reference to profit. We assume that the LVT considered this item in the round and made a general and unspecified deduction of 2% in the figure adopted by the appellant.

70. We do not consider that there is any evidence of duplication of overheads between the item for preliminaries and that contained in this item. The former relates to site specific expenses and the latter to general overheads such as head office expenses. We are satisfied on the evidence that a 5% allowance for general overheads is reasonable.

71. Mr Grimshaw's evidence about the appropriate level of profit was predicated upon the assumption that in making their bid Higgins would have treated the works as a series of minor projects. We do not accept that argument. The respondents correctly pointed out, and Mr Grimshaw accepted, that in many of the breakdowns of actual cost (21 out of a total of 27 that were adduced in evidence) the works were analysed at block level and the cost of the works exceeded the £100,000 cut off point for minor works. In our opinion Higgins would have approached the PFI as a single project rather than a series of individual projects. The refurbishment sub-contract was awarded for all of the works and there was no evidence to support Mr Grimshaw's assumption that when making their bid Higgins increased their profit allowance as though they were taking on a multiplicity of minor works. That assumption does not reflect the reality of a competitive tender on a major PFI project. There were some 1,800 dwellings subject to the PFI and whereas at an individual level the contractor may have had to accept a high level of uncertainty on costs, the number of properties involved would have assisted in diversifying any risk. We acknowledge the possibility that Higgins, knowing that they intended to sub-contract the works, would have assumed that their sub-contractors would treat the sub-contracts as minor works and allow for profit accordingly. Higgins might therefore have allowed a higher profit rate in their bid to reflect what their sub-contractors were likely to charge them. But there was no evidence about Higgins' sub-contracting strategy and,

as Mr Heather pointed out (see paragraph 66 above), Higgins were not privy to the breakdown of their sub-contractors' bids. In the event it would appear that in the significant majority of cases (22 out of 24 respondents) the actual cost of the works (as sub-contracted by Higgins) was significantly less than the amount payable to Higgins by LBL (via Regenter) under the PFI.

72. In our opinion the appropriate allowance for overheads and profit should be that applicable to major works. According to the 2005 edition of Spons on which Mr Grimshaw relies the profit on major works should be taken at 2% (but with a slightly higher allowance for overheads compared with minor works of 5.5%). The total for overheads and profit is 7.5%. Mr Grimshaw also relies upon the 2008 edition of the BCIS Building Maintenance Price Book. This distinguishes differences in overheads and profit on measured rates between labour (20%) and materials (10%). It does not breakdown these figures between the component parts of overheads and profit or, apparently, between major and minor works. Mr Heather in his closing submissions argues that even if one takes the lower Spons rate of profit appropriate to major works on all of the works the subject of this appeal the average, taken with the BCIS figures, will be 11.25%. This analysis depends upon the assumption that it is correct to take the average of the overheads and profit allowance for labour and materials at 15%, but there is no reason to suppose that the labour and materials costs will be the same in the case of the work done to each of the respondents' leasehold properties. It is only if those costs are the same that it is appropriate to use the average of the two rates. If the cost of labour exceeds that of materials then the average will be weighted towards labour (a higher percentage) and if the cost of materials exceeds that of labour then the average will be weighted towards materials (a lower percentage).

73. Mr Grimshaw did not explain why he used the 2005 edition of Spons but the 2008 edition of the BCIS book. He said that he had adopted Quarter 1 of 2005 as being the mid-point of the period March 2002 (the date of the OJEC) advertisement to June 2007 (the date the project agreement was signed), but it is not clear to us why he used a later edition of the BCIS book.

74. We place more weight on Spons than we do on BCIS. Spons gives a more precise breakdown of the component parts of the figure for overheads and profit as between major and minor works and the use of the 2005 edition is explained. Furthermore Spons was edited by Davis Langdon, Mr Grimshaw's employer at the time he wrote his expert report. Mr Grimshaw also acknowledges that the BCIS 2008 figures "probably reflect the peak of any additions before the impact of any downward pressure on prices".

75. In our opinion the profit rate of 7% is too high and, given the evidence before us (adduced by the appellant), we consider that the reduction of 2% that was made, but not fully explained, by the LVT is justified. We are satisfied that a profit rate of 5% recognises the major nature of the refurbishment contract as a whole while allowing for the possibility of sub-contractors seeking a higher profit on the works awarded to them. We determine that a reasonable allowance for overheads and profit should be 10%.

Issue (iv): management fee

76. The LVT said that:

> "With respect to the additional 10% management fee levied by the respondents, we determine that it would not be reasonable for the respondent to add 10% onto the PFI contract charges to account for the landlord's management of the contract, as this function is undertaken by the liaison officers in 6 Mantle Road, the costs of which are covered in the 16.98% above [3.48% professional fees plus 10% overheads and profit plus 3.5% preliminaries]"

77. Mr Bonvini said the work for which a management fee was charged included the preparation and service of the requisite notices under the 1985 Act, the administration of bills and payments, queries and complaints and matters of general liaison; all of which were matters that LBL were obliged to undertake and for which a service charge was payable under the leases. Under the PFI this work was sub-contracted to Pinnacle who employed directly a team responsible only for the leaseholders. Lewisham Homes, the arms length management organisation (ALMO) that was responsible for the management of other leasehold properties in the borough, charged a flat 10% management fee for providing this one to one service. The fees charged to leaseholders under the PFI were therefore the same as those charged to other leaseholders outside of the PFI. There was no double-counting of fees as suggested by the LVT; 10% was the standard charge made by LBL for this type of management work and it did not represent "profit on profit" as suggested by the respondents. The LVT had previously accepted this management fee in its consideration of another application at 3 Cherry Tree House, Shardeloes Road, New Cross, Lewisham.

78. Mr Bonvini said that Pinnacle prepared the costs invoices having been given the data by Higgins. Pinnacle scrutinised this before sending out the service charge demand. All monies were paid directly by the leaseholders to LBL. No money was paid to Pinnacle.

79. Mr Grimshaw said that the 10% management fee represented the costs of management that, in the absence of the PFI, would have been incurred by LBL. In other parts of the borough leaseholders were charged a 10% management fee by Lewisham Homes. The management fee in this appeal was separate and distinct from any of the component parts of the 26% on-costs charged by Higgins and there was no duplication between them.

80. Mr Heather submitted that the right to charge a management fee was derived from the lease and extended to the use of a managing agent. The lease envisaged a management contract on commercial terms including a profit element for the managing agent.

81. Mr Heather reviewed the terms of the project agreement as they applied to the provision of management services (which we have outlined at paragraphs 23 to 25 above). In short, he submitted that LBL paid Regenter an indexed total of £17,234 per leasehold property over the course of the contract (20 years) which is directly referable to the management of that property. That sum included charges for both day to day and major works services. Mr Heather referred to the table of annual ELSC that is contained in Part XI of Schedule 4 (from which the total of

£17,234 was obtained) and argued that the amounts of ELSC per annum shown there were too high to be related solely to day to day service charges. He referred to an example of such day to day charges (in respect of 158B Lewisham Way for the year 2010/2011) the total of which was £319.92 before a management fee of £67.23. He concluded that the said table was:

> "a payment plan for the cost of management of the properties, including major works, spread over the full term of the contracts."

82. Mr Heather said that LBL were contractually obliged to pay Regenter the amounts shown in Part XI of Schedule 4; an obligation that arose after an EU procurement exercise. A management fee would have been payable to someone even if LBL had directly placed the contract and employed a managing agent. The lease provided for a management fee to be charged for this work. The fee incurred under the project agreement was reasonably incurred for the purposes of section 19(1)(a) of the 1985 Act.

83. The work referable to the management fee was set out in the output specification in the project agreement and there was no duplication in charges between that fee and the on-costs of 26%. The charges in respect of Higgins and Pinnacle in respect of the property at 6 Mantle Road were separate and distinct and Higgins' site costs did not include those of Pinnacle. The fact that on occasion Higgins' staff responded to leaseholder correspondence did not establish duplication of effort; Pinnacle passed such correspondence to Higgins as being the appropriate party to deal with the particular issues.

84. The respondents submitted that the management fee was unreasonably incurred on top of the fee charged by Higgins and that there was evidence of Higgins having duplicated some of the work for which the management fee was raised. Mr Bonvini had been unable to explain in detail the role played by Pinnacle and Ms Jones, who had given evidence on behalf of Pinnacle before the LVT, did not give evidence to this Tribunal. The LVT correctly understood Ms Jones' evidence as indicating duplication in costs between Higgins and Pinnacle.

Issue (iv): conclusions

85. It appears to us that the LVT disallowed the management fee of 10% because it considered that LBL's management function was undertaken by the liaison officers based in 6 Mantle Road. We believe they were wrong to do so. The position became clear once the PFI documents had been disclosed: Higgins were responsible for the major works and Decent Homes Programme while Pinnacle were (and are) responsible for the leasehold management function, the numerous outputs of which are described in section 9 of Schedule 1 to the project agreement. Higgins compiled cost figures based upon the amounts charged for the leaseholder works by their sub-contractors. They passed these figures on to Pinnacle who were responsible, inter alia, for preparing section 20 notices and service charge invoices. On occasion Higgins, where it was more appropriate for them to answer, were asked to respond to leaseholder correspondence. But there is no justification, in our opinion, for the LVT to disallow the whole of the management fee on the effective grounds that the entirety of Pinnacle's work was

duplicated by Higgins, for which they were already reimbursed under the heading of preliminaries. That is manifestly incorrect. Pinnacle's responsibilities under its sub-contract with Regenter are distinguishable from those of Higgins under its refurbishment sub-contract; the two are not duplicated and it was reasonable for LBL to incur costs on both. But that does not mean that the amount of the management fee charged to the leaseholders was reasonably incurred.

86. Although the lease provides that LBL may charge for the cost of management it does not specify an amount. Nor does the project agreement refer to a percentage management fee; the amount charged in respect of leasehold management is given in the project agreement as a fixed amount per annum per leasehold property and covers management of major works and day to day repair and maintenance. The latter work is the responsibility of Equipe under a sub-contract that was neither disclosed nor referred to at the hearing. LBL reserved to itself the policy for setting the level of service charge. It appears that LBL set the level of management fee at 10% as this is apparently the figure adopted by Lewisham Homes in relation to the management of other leasehold properties owned by LBL outside the Brockley PFI.

87. We understand that the service charges which are in dispute in this appeal relate solely to the major works undertaken by Higgins and not to day to day management work undertaken by Equipe. The evidence before us related to Higgins' costs and not Equipe's. Paragraph 4.3 of Schedule 17 ("Leaseholder Service Charges") to the project agreement refers to separate invoices for day to day works and major works.

88. It appears that in the case of 21 out of 24 respondents the amount of management fee raised in the service charge for major works exceeds the amount of the ELSC for the relevant year, which we assume in each case is one of the years ending 31 March 2008 to 2010 (the copy service charge invoices in the bundles do not state the year that the actual expenditure was incurred; the evidence only gives the date of the section 20 notice). The costs incurred by LBL were those which they were liable to pay under Schedule 4 of the project agreement. As a matter of fact those costs were not the same as the amounts LBL demanded from the leaseholders.

89. Furthermore the 10% management fee in dispute is in respect of major works only whereas the ELSC figures shown in Part XI of Schedule 4 are in respect of both major works and day to day works. Any comparison is further complicated by the fact that LBL appears to have retained management responsibility for banking all of the service charge payments itself. Pinnacle do not receive any of the monies for which they send out service charge invoices. The 10% management fee will therefore reflect this retained responsibility.

90. However we do not consider that the ELSC can be taken as the appropriate allowance for the management fee that is chargeable under the lease. ELSC represents an average cost per leasehold dwelling per annum and is spread over the life of the PFI. The ELSC do not reflect the particular circumstances of individual properties. The service charge invoices take account of the nature and condition of each leasehold dwelling and the actual cost of the major works

(subject to the decision of the LVT on 20 September 2011 as to whether the expenditure shown on those invoices was reasonably incurred). There is a significant variation in the cost of the major works as between the respondents' properties.

91. In our opinion an allowance of 10% of total costs for management is a fair reflection of the costs reasonably incurred by LBL. It is consistent with the management fee charged by the ALMO that is responsible for other leasehold properties in the borough and is the amount that was accepted by the LVT in the 3 Cherry Tree House case. (We were surprised to note that in the one example of actual day to day service charges in evidence, referred to in closing by Mr Heather, the management fee – Mr Heather's expression – for leasehold management was 21% of the base cost. But that is not an invoice that is in dispute in this appeal.)

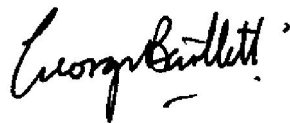
92. We consider that the 10% management fee should be charged on the total of the base costs plus the on-costs. Such on-costs form a normal part of any quotation for building works, albeit that they are not usually separately identified, and we would not expect the management fee to be limited to the base costs.

Determination

93. The appeal is allowed in part and we determine that the on-costs should be taken as 24% of the base costs. This figure comprises 3.48% fees, 10.52% preliminaries and 10% overheads and profit. The management fee is determined at 10% of total costs including on-costs.

94. In reaching our decision we also took account of the respondent's reference to benchmarking the on-costs against a similar PFI in Islington; the expert evidence of Mr Steven Way before the LVT; and Mr Carey's analysis of the financial implications to the landlord once allowance was made for the cap of £10,000 on each leaseholder's contribution (due to PFI funding). In our opinion none of these points justified any departure from our determination.

Dated 28 January 2013



George Bartlett QC

A J Trott FRICS

APPENDIX 1

LIST OF RESPONDENTS

ESTATE/BLOCK HOUSEHOLDS:

ASAPH HOUSE

1. Natasha Figaro:
   10 Asaph House, Brindley Street, Brockley, London SE14 6PJ

BEDE HOUSE

2. Isabelle Jean Gilles
   23 Bede House, Clare Road, Brockley, London SE1 6PW

ALBAN HOUSE

3. Yvonne Goulbourne
   10 Alban House, 19 Shardeloes Road, Brockley, London SE14 6PH

4. Thomas Johnson
   3 Alban House, 19 Shardeloes Road, Brockley, London SE14 6PH

5. Julie Ball
   9 Alban House, 19 Shardeloes Road, Brockley, London SE14 6PH

LILAC HOUSE

6. Anna Irvin/Kate Davies
   7 Lilac House, Breakspears Road, Brockley, London SE4 1TU

ACACIA HOUSE

7. Wolfgang Konstabel
   7 Acacia House, Brockley, London SE4 1TZ

8. Richard Carey
   8 Acacia House, Brockley, London SE4 1TZ

9. Zac Crawley
   9 Acacia House, Brockley, London SE4 1TZ

HAZEL HOUSE

10. Anastasia Maximova
8 Hazel House, Wickham House, Brockley, London SE4 1NA

DUNSTAN HOUSE

11. Kathleen O'Brien
2 Dunstan House, St Donatts Road, London SE4 1DW

12. Rita Hunte
10 Dunstan House, St Donatts Road, London SE4 1DW

ALDHAM HOUSE

13. Anna Addington
17 Aldham House, 79 Malpas Road, London SE4 1DP

14. Greta Washington-Levy
18 Aldham House, 79 Malpas Road, London SE4 1DP

15. Bukky Garnett
9 Aldham House, 79 Malpas Road, London SE4 1DP

16. Uriah Cousins and Esket Cousins
2 Aldham House, 79 Malpas Road, London SE4 1DP

17. Luis Rey-Ordieres and Carmen Naranjo-Marquez
8 Aldham House, 79 Malpas Road, London SE4 1DP

COLUMBA HOUSE

18. Jaya Patel
10 Columba House, 23 Shardeloes Road, Brockley, London SE14 6PG

FOSTER HOUSE

19. Veronica Oluwatope
16 Foster House, Brockley, London SE14 6NX

STREET PROPERTIES/OTHER

20. Steven David Mills
Flat 3, 158B Lewisham Way, London SE4 1UU

21. Dawn Bennet
64 Lewisham Way, Brockley, London SE14 6NY

22. Patrick McGinley
65B Breakspears Road, Brockley, London SE4 1TS

23. Nigel Coleman
154B Algernon Road, Brockley, London SE13 7BU

24. Kraig Donald
30B Tressillian Road, London SE4 1YB