Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0047/10/13

In the Matter of Flats at Monmouth House, Cwmbran, Gwent

In the matter of an Application under Section 27A of the Landlord and Tenant Act 1985
And in the matter of an Application under Section 20C of the Landlord and Tenant Act 1985

TRIBUNAL David Evans LLB LLM
Roger Baynham FRICS
Kerry Watkins FRICS

APPLICANTS Keith William James & Shirley Mary James and others

RESPONDENT Bron Afon Community Housing Ltd

DECISION

BACKGROUND

1 Monmouth House is a substantial block of 56 flats located in the commercial centre of Cwmbran. It is part of mixed complex of commercial and residential units constructed as part of the "new town" of Cwmbran, the residential units intending to provide convenient accommodation for the staff and managers of the shops and other business which were encouraged to locate themselves in Cwmbran and provide employment for those whose jobs were jeopardised as a result of the decline in the coal industry.

2 The ground floor and first floor of Monmouth House are taken up by the commercial units whilst the flats are situated on the second, third, fourth, fifth and sixth floors. Many of the flats are what are generally called maisonettes and have accommodation on two floors whilst the smallest units are in effect bedsits. We shall refer to the residential part of the building as "the Property" and the combined residential and commercial parts as "the Building".

3 The Property is constructed using reinforced concrete panels cladding a structural frame. There is no insulation in the cavity between the external wall and the internal wall of the flats.

4 The freehold of the Building is now owned by the Prudential. The Property (i.e. the residential floors) was originally let to the Cwmbran Development Corporation (CDC) by the then freeholder, Cwmbran Town Centre Ltd. CDC let the flats on periodic tenancies and from 1986 onwards a number of tenants availed themselves of the Right to Buy scheme and purchased leases of their flats at a premium. At the time of the hearing there were 20 flats in private ownership. The leases of those flats are for 125 years from the 29th September 1985 at a ground rent of £10 pa. Whilst the lessees are obliged to maintain the interior of their flats, the Respondent has the responsibility for maintaining and repairing the structure and exterior of the Property. Under the terms of the leases, the lessees covenanted to refund to the landlord a proportion of the cost of such maintenance and repair

5 At some point, CDC transferred the Property to Torfaen Borough Council, later Torfaen County Borough Council (we shall refer to both using the generic term "Torfaen"). During Torfaen's ownership of the Property, financial constraints dictated that repairs to the structure were carried

out on a sporadic basis, according to the evidence about every three years, and the Authority's collection of service charges from lessees was not well organised. No substantial works of repair, renovation or improvement were carried out during this period. In 2007, Torfaen commissioned the international firm of Surveyors, Savills, to prepare a Condition Survey, Risk Assessment and Structural Survey of the Property and two other high rise buildings, Fairview Court and the Tower. Savills in turn instructed Curtins Consulting Ltd (Curtins) to carry out a specialist structural survey (the 2007 Report).

6 In 2008, Torfaen transferred its leasehold interest in the Property to the Respondent, an organisation which had been specifically created for the purposes of managing Torfaen's housing stock and providing additional social housing. As a housing association, the Respondent had access to funds and loans which it was able to utilise on works of repair, renovation and improvement. In 2009, it commissioned a second report from Curtins (the 2009 Report) which was intended "to provide a robust appraisal of the high-rise stock with a view to establishing what structural, remedial or improvement works will be needed to prolong its life". In respect of Monmouth House, Curtins set out two sets of costings for budget purposes: £470,400 for "general maintenance/remedial works" to the elevations with other specified works to be carried out between years 1 and 5 with similar work being undertaken between years 21 and 25; £735,000 for some remedial works, applying insulated cladding to the exterior and other specified works to be carried out between years 6 and 10. Following receipt of the 2009 Report, the Respondent concluded that it was more economical to clad the exterior and embarked upon a programme involving the substantial works which are the subject of this application.

7 In 2010, the Respondent invited tenders from contractors to carry out the following:

- Replace the windows in the Property
- Re-roof the Property
- Clad the exterior walls of the Property

There is no issue concerning the first two items. A number of tenders were received. The tender from Seddon Construction Ltd (Seddon) was accepted in the sum of £759,193.31(exclusive of VAT) which superseded an earlier tender of £516,613.33. The Seddon tender was not in fact the cheapest, but the cheapest tender would have caused unacceptable disruption to the shops below and was therefore not acceptable. There was no issue raised concerning this.

8 The Respondent started the statutory consultation process on the 10th February 2011. A substantial number of objections to the Respondent's proposals were received. However, the Respondent subsequently commissioned a further report from Curtins (the 2011 Report) who in turn commissioned an inspection by CAN Structures Ltd (CAN). CAN closely examined the external elevations for visible defects, recording the type, size and location of the defects identified. It tested the depth of carbonation and the concrete cover to the reinforcement, drilled concrete dust samples and carried out a borescope investigation to the panel fixings. It submitted its report (the CAN Report) to Curtins in October 2011 and Curtins reported to the Respondent the following month. The 2011 Report revealed:

- 21 instances of cracking in concrete with a maximum width crack of 4mm
- 8 instances of missing or spalled concrete
- 24 instances of cracks in render with a maximum width of 3mm
- Numerous occurrences of hollow/missing render particularly to floor slab edges below windows
- Sealant joints between slabs degraded and in poor condition
- Poor sealant joints between glazing panels of the large windows to the West elevation of the tower section
- Concrete panels appeared to be in good condition
- Low to medium levels of chloride ions
- Carbonation depths minimal
- Concrete cover to the reinforcement satisfactory.

The report concluded that provided any concrete repairs that may be necessary in the future were carried out fully in accordance with the manufacturer's instructions Curtins would not expect to see a premature breakdown of the repairs. Nonetheless, Curtins recommended the installation of an overcladding system to provide 30 years life which would enhance and protect the life of the structure from further deterioration, increase thermal performance of the Property, improve habitability of the dwellings (i.e. reduce damp) and would obviate the need for cyclical maintenance.

9 Due to an error in calculating the lessees' contributions, the Respondent restarted the consultation process on the 21st June 2012. The Applicants have raised no issue with regard to this process. The works have now been completed at a total cost of £1,048,648.24. Certain of those costs have been discounted for the purposes of calculating the service charge – e.g. the cost of abortive work, variations and extensions of time. The Applicants are also not being charged for the VAT element of the invoice. The total value of the works for which the Respondent is claiming a contribution from the lessees is £801,218.73. The Respondent has issued invoices dated 7th April 2014 for each lessee's contribution to that cost. The invoices vary between £10,433.88 and £27,823.67. The parties have agreed that in the event of a finding that the Applicants are not obliged to contribute to the cost of the cladding the amount of service costs recoverable is reduced to £515,844.33 with each Applicant being required to pay its due proportion as set out in his/her lease.

10 The parties agreed that the only issues requiring determination were:

(a) Did the cladding constitute works of repair for the purposes of the Applicants' leases?
If no, it was accepted by the Respondent that the Applicants were not obliged to contribute to the cost.
If yes, were the costs of the cladding reasonably incurred for the purposes of the Landlord and Tenant Act 1985 (the Act)?
Additionally,

(b) Were the administration and management costs of 8% charged by the Respondent for managing the works properly chargeable under the terms of the lease and, if so, were they reasonably incurred?
And

(c) Is the Respondent entitled to recover its costs relating to this application from the lessees as part of the service charge?

THE LEASES

11 The Applicants' leases are in a common form. The Respondent as lessor covenants to:

7(f)(i) "maintain repair decorate renew rebuild and reconstruct (a) the main structure including without prejudice to the generality of the foregoing the exterior walls…of the Property"

7(f)(ii) "ensure that the main structure including without prejudice to the generality of the foregoing the exterior walls…are maintained repaired redecorated renewed rebuilt and reconstructed throughout the term by the Head Landlord or in default by the Lessors."

7(i) "to decorate the exterior of the Property",

and

7(k) "to provide such other services and facilities as the Lessors may in their absolute discretion think fit".

12 Under clause 6(a)(iii)(a), each lessee is required "to contribute and pay by way of service charge

(i) 1/56th part of the costs expenses outgoings and matters set out in Clauses 7(g)(h)(i)(k) hereof

(ii) [his/her /their defined contribution to] the costs expenses and outgoings incurred by the Lessors set out in Clause 7 (b)(f) hereof

(iii) such reasonable administrative and management charges as the Lessors may wish such charge to be limited to a maximum of 10% of the total cost of the matters set out above"

The amount of each lessee's defined contribution is proportionate to the square footage of each lessee's flat.

THE HEARING

13 On the 27th September 2013, the Applicants, 13 lessees as owners of 14 of the flats (Mr N A Mears owns 2 flats), began proceedings before this Tribunal seeking a determination as to whether they were liable to contribute towards the cost of the overcladding or external wall insulation (EWI) which at the time was underway at the Property. A pre-trial review was held on the 15th November 2013 when directions were given relating to experts, witnesses, documents and a hearing bundle. The hearing was by agreement postponed until April 2014 to enable the works to be completed, Seddon's final invoice to be agreed and the contributions of the various Applicants to be calculated. In fact the individual invoices were produced at the hearing.

14 The application was listed for hearing on the 7th, 8th and 9th April 2014 with an additional day scheduled in May should it be required. Prior to the hearing, we inspected the Property externally from ground level using binoculars and from varying points within the common parts of the Property. We also inspected three flats: one large two storey maisonette, a smaller two storey maisonette and a small bedsit on the top floor. The roof has been repaired, the external facing windows have been replaced, including the floor to ceiling window units, and the elevations are now rendered in two tones giving a much enhanced look to the Building when compared with the dull aggregate still visible on the first floor and on the building opposite. It was not clear whether the edges of the cladding panels exactly abutted the adjoining aggregate panels. We noted at the time that there were occasional blemishes in the render where panels joined. We were told that some marks left by the scaffolding were to be removed.

15 Both parties were represented by Counsel at the hearing - Mr John Sharples for the Applicants and Mr Byron Britton for the Respondent. Both parties had exchanged witness statements and oral evidence was given by Dr Keith William James and Mrs Anne Loveland for the Applicants and Mr David Sharman and Mr Lee Phillips for the Respondent. Expert evidence was given by Mr Robert Pratt of Rhomco Consulting Ltd for the Applicants and Mr John Conway of Curtins for the Respondent. Each expert had provided a report which was contained in the hearing bundles. We shall deal with the experts' evidence together after that of the lay witnesses.

16 The parties had prepared hearing bundles. They comprised 4 lever arch files, the first three of which were numbered 1-3. A supplemental bundle was referred to as bundle 4. A further supplemental bundle was introduced which we shall refer to as bundle 5. Each of the first four bundles was tabbed and the numbering from each tab began with a page 1. Bundle 5 is not tabbed, When identifying a document, we shall refer to the bundles as B1 to B5 followed by the tab number (except in the case of Bundle 5) identified by the letter "T" and the number of the tab and then the page number signified by the letter "P" followed by the number of the page. For example, Mr Conway's expert report is at B1 T4 P64. Additional documents were introduced during the hearing. We shall refer to such a document as and when necessary by its generic description and date.

17 Both Counsel had prepared skeleton arguments, Mr Sharples' dated the 2nd April and Mr Britton's the 4th April. As well as making their closing speeches, both Counsel prepared closing submissions. We were also referred to a considerable number of authorities.

THE APPLICANTS' CASE

18 The works were relatively minor. In the past, repairs had been carried out piecemeal. However, the Welsh Government's 2008 Welsh Housing Quality Standards (WHQS) required social housing landlords to maintain and improve their stock requiring accommodation to be fuel efficient, well insulated, free from damp, avoiding condensation and heat loss, (in each case) for 30 years. The Respondent adopted the EWI programme in order to fulfil its obligation under WHQS.

19 EWI constitutes an improvement and the Applicants' leases do not require the Applicants to pay for improvements. Almost all the damp penetration is due to cracked render around the windows and installation of the new windows would have resolved that. Early documents refer to the works achieving at least 30 years' life, EWI was not necessarily a structural requirement but would "enhance the dwellings and improve their habitability". The focus of the language was on the improvement aspect of the works - energy efficiency, damp penetration, thermal efficiency, condensation. The Applicants were told that they would not have to pay for the "EWI improvement work". Subsequently, the emphasis changed. The principal objective became repair.

20 The extent of the works was more than was reasonably required. There were no significant defects. By repairing the cracks and resealing the joints, the Property would last more than 30 years. It is unlikely that the cost of repairing the defects would be more than the EWI. The costings were confusing. Even the EWI would need replacing at some point. At that point, EWI would become more expensive even based on the Respondent's figures. Even if EWI constitutes repair, it is not work which a "sensible, practical man" would do.

21 Whilst repair has to be reasonably necessary to remedy the defect, it can include ancillary work rendered necessary by carrying out those repairs, but not generally work that is desirable if it is not necessary. EWI was not reasonably necessary, nor is it ancillary to the works of repair. EWI is not justified by the condition of the panels. Further, the walls are now different in character from what was there before. Repair must only restore the Property to its original condition, i.e. filling cracks, replacing the small areas of concrete and replacing the silicon sealant. Whilst "repair" can sometimes require the elimination of the cause of the disrepair, in this case, the exterior was able to be repaired by filling the cracks, repairing the concrete and resealing where necessary. There is no evidence of damage to the structure as a result of a design defect. Installing EWI cannot amount to "renewal" of the walls because that would have required the Respondent to remove the original concrete panels.

22 Even though the effect of EWI is to repair the original defects, it is so extensive as to fall outside the repair covenant. It is a question of fact and degree as to whether it does so. There is no obligation to improve the Property. EWI renders a substantial part of the Property "different in kind" in that the external walls were pre-cast concrete with no insulation. Now they have insulation and look completely different. Further, the cost of EWI is a substantial proportion of the total cost of all the works undertaken.

23 The decision to install EWI was not reasonable because the scheme was chosen principally to comply with WHQS, not simply to remedy the defects. The 30 year time frame is arbitrary. If one uses other time frames, other options are cheaper. The Applicants, as individuals, have much shorter interests in their flats. There is no suggestion that any prospective purchaser would pay more because the external walls are now clad. The claim that EWI is the cheaper option is flawed for reasons expressed earlier. The Respondent's mathematics are wrong because it has increased prices by the BMPI and made allowances for general inflation. Not all flats needed insulation to comply with WHQS. There is no reliable evidence as to what savings can be made by lessees. In any event, any savings estimate will become obsolete as the Respondent intends to replace the boilers.

24 The cost of EWI was not reasonably incurred because:

- it was not necessary to cure the defects;
- it was much more extensive than was required;
- it cost more than the lessees could reasonably afford.

25 Overall, the smaller flats would be required to pay £11,129.47; the medium sized flats would be required to pay £18,085.39; and the larger flats would have to pay £27,823.67. The effect of these costs will put some of the Applicants into negative equity. Some of the Applicants are old and some are in ill health. They do not have the money. If they pay by instalments of £50 per month, as offered by the Respondent, the Respondent will require a charge on their homes. They will not be able to move. If they cannot afford the instalments, they may lose their homes. There will be little left for their families.

THE RESPONDENT'S CASE

26 The various reports had indicated a requirement for the external walls to be repaired. The responsibility for carrying out that repair was on the Respondent under the terms of the Applicants' leases. The Respondent therefore had the choice as to the manner in which the work was to be done. After considering the reports, and the costings set out in those reports, the Respondent decided that it was economically more efficient to undertake EWI at the Property. To do so would remedy the defects, but it would have the added benefit of prolonging the life of the Property and it would provide insulation for the flats. There was no necessity for work to comply with WHQS as Monmouth House already complied.

27 The cost of EWI was in fact less than the projected costs of carrying out repairs to the external walls as and when required over a 30 year period. 30 years is the industry standard for social housing. The interest of the Applicants as lessees is virtually the same as that of the Respondent. The head lease is for 130 years and the Applicants' underleases are for 125 years. The value of the leases will depend on the unexpired term of the lease. It is therefore reasonable to assess repairs over a longer term period of at least 30 years.

28 The distinction between repair and improvement can often be very fine. For repair, there has to be a lack of repair/disrepair. The exterior was suffering from lack of repair. The cost of patch repairs to the existing panels was hundreds of thousands of pounds. The work to the walls consisted of applying a protective coating with added insulation. There is no change to the structure. The layout and interior are the same as they were. The building may appear more aesthetic, but essentially it is the same. It is not a building of a wholly different character. The term "repair" can include either patching up or replacing damaged or deteriorated parts. Alternatively, the installation of EWI constituted "rebuilding" or "reconstruction".

29 If repair was necessary, it was reasonable if the work was done in accordance with good building practice. That may involve a degree of updating. Whilst such work may include an element of improvement, it would still be considered to be a repair. In this case, EWI represents only a small proportion of the cost of the total works carried out. The statute requires the Tribunal to determine whether the EWI was reasonably undertaken and reasonable in cost. It is not a question of which of the options available was most reasonable. Taking all the factors as a whole, the Tribunal had to consider whether the repairs undertaken were reasonable in the circumstances. According to Mr Conway of Curtins, they were.

THE EVIDENCE

Dr K W James (B1 T2 PP1-12)

30 Dr James and his wife had purchased Flat 9 in 2002. In 2006/7 Torfaen proposed to dispose of its housing stock to the Respondent. He understood that the reason was because Torfaen had insufficient resources to enable it to bring its housing stock up to the standards required by the WHQS. In 2007, the social housing tenants were balloted and approved the transfer of their housing units to the Respondent. The Applicants were not balloted. In his statement, Dr James refers to a document sent to all tenants/lessees in 2006 in which Torfaen stated that "both [the Respondent]

and leaseholders will want to ensure that costs are only incurred where necessary and that work is done as economically as possible" (B3 T6 P3). The Respondent promised consultation under the Act and agreed to remove the cost of VAT on any major work carried out within the first 10 years. Having written to Torfaen in May 2006, Dr James received a reassuring response from the Council dated 31st May 2006 as to the condition of the Property (B3 T7 PP1-3).

31 On the 27th September 2010, the Respondent gave the lessees notice of its intention to carry out the roof works, replace the windows and install EWI. In response to a query from Mr and Mrs Shorthouse, Mr Lee Keegans, the Monmouth House Property Manager, replied on the 15th October 2010 that the works would help prolong the life of the Property, reduce heat loss and save energy. The Respondent was obliged to meet WHQS. Dr James also enquired about thermal savings and questioned the necessity of EWI when the building was warm in winter and hot in summer. Mr Keegan's response (at B3 T7 P42) was to the effect that the EWI improvement was not chargeable under the terms of Dr James' lease. Following a further notice (July 2011) and additional correspondence, in October 2011 the Respondent issued a summary of the responses it had received during the consultation process and its answers to the comments made by the lessees. According to Dr James there were 88 queries, some of which he referred to in his written statement. The document explained why the lowest tender had not been accepted, a point not challenged by the Applicants. It also explained that all the works were repairs and that EWI was the most appropriate and cost effective way to repair the Property. The reference to "improvements" in the past had been due to a misunderstanding as to the legal distinction between "repair" and "improvement" on the part of the project manager. There were some references to the energy savings which would result from the cladding. Dr James concluded that on average it would take 30 years to recoup the capital cost.

32 Seddon's estimate, referred to in a letter from the Respondent dated 4th July 2011, was £759,193.31. Together with the Respondent's administration charge of 8% the estimated cost of the works totalled £820,000. Following receipt of Seddon's revised estimate dated 23rd August 2011 that figure increased to £980,000 including the 8% administration charge. The current estimate of Dr James' bill was £31,511 and the average estimated bill was £17,499. In January 2013, Flat 10 was offered for sale. The asking price was £50,000. Potential buyers had lost interest when they learned the cost of the works and the flat eventually was sold to the Respondent for £32,000. Flat 10 is a mirror image of Flat 19 where the lessee's contribution was £22,500 or at least 70% of the equity. Including the administration charge, the total represented approximately 83% of the equity. Lessees have been very worried about the amounts for three years. The elderly may not be able to borrow the money to pay. This has caused "untold distress and possibly even illness" (see B1 T2 P9). Further costs are anticipated for internal works. The Respondent has a number of payment schemes but has now added financial means testing and residential criteria.

33 In Dr James view, EWI is an improvement and not a repair. It does not replace any pre-existing structure. It is an addition to be suspended from the walls that, unclad, have withstood the elements for almost half a century. EWI is not a sensible investment as it would take 30 years to recoup the cost. The Respondent has access to substantial loans to pay for the cost of improvements; the lessees do not. According to the Respondent, "everyone gets some improvements" when tenants' homes are improved to WHQS. The lessees merely want the Property kept in good repair as envisaged by the leases. The Respondent has a contractual commitment to put the Property into a condition which meets WHQS and an obligation to the lessees to keep the Property in repair. In Dr James' view, the lessees should only pay for the repairs envisaged by the leases and not for improvements required by the Welsh Government.

34 Questioned by Mr Britton, Dr James confirmed that he had purchased the Flat as a second home when he was living in Canada to allow him to visit his sister. It has never been rented out. He has a 125 year lease. He confirmed that there was no issue with the consultation process although that process had had to be repeated due to an error by the Respondent as to the proportion payable by each lessee. There was an issue with the kitchen window but this now worked satisfactorily.

There had been no improvement in the temperature of the flat. He did not hear the wind so much. He did not accept that patch repairs cost more than the cladding. There followed some discussion as to the figures involved, but in view of a subsequent agreement between the experts, we need not detail that here.

Mrs Anne Loveland (B1 T2 PP17-20)

35 Mrs Loveland and her husband moved into Flat 20 in October 1971. The Property was originally marketed as 56 luxury apartments which she had understood to be for business owners and managers of the shops and businesses during the week. They purchased their lease in 1985 from CDC (although according to a Schedule prepared by the Respondent it was, in fact, in 1986). Subsequently, Torfaen acquired the Property which eventually passed to the Respondent. Since then the character of the Property had changed for the worse and three or four years ago, the Respondent created more stress by announcing a major works programme which would cost her £28,000. She accepted that some repairs needed doing - to the roof, the resealing of the concrete panels and some windows - and she accepted that she was required to contribute to those. However, she considered that the proposed works went beyond repair. The EWI was not a repair and was not needed. In her view, the cladding would hide any repair work needed. It had made no difference to the heat in her flat which was still cold - her flat was on a corner and directly above the store rooms of the shops beneath. The insulation had been placed on the outer balcony wall which was of different construction from the outside wall of the kitchen. The metal framed door to the balcony had not been replaced. The kitchen was now freezing. Mrs Loveland had replaced the kitchen and study bedroom windows 10 years ago, with permission. However, the Respondent insisted on replacing them. Not all the windows in the Property had needed replacing.

36 Mrs Loveland confirmed that she resided at the Property. In 1985 she had paid £11,000 under the Right to Buy scheme, although the flat had been valued at £28,000. Some repairs had been needed then. The gaps between the panels had needed resealing. This had been done in the 1980s. Torfaen had resealed the panels and repaired the roof. That was what needed doing now. The insulation had not made her flat warmer. The kitchen was now much colder; the curtains moved even when the windows were shut. The repairs to the walls could have been done by abseiling as had happened previously. The Building now stood out and was a focal point for drug dealers.

Mr David Sharman (B1 T3 PP1-4)

37 Mr Sharman is the Respondent's Director of Property. He is a Chartered Building Surveyor and a Chartered Builder with 16 years' post qualification experience and 25 years' experience managing building maintenance and refurbishment. Before his appointment with the Respondent, he was Head of Housing Maintenance for Torfaen. He had managed the team which had maintained Monmouth House since 2001. In 2007 Torfaen had received the 2007 Report which set out two options. He understood that other options had been considered but rejected on the grounds of efficacy or cost. Option 1 was planned annual maintenance over a thirty year period which had been costed at £470,400. No allowance had been made for inflation. Assuming a low Building Maintenance Price Inflation (BMPI) of 2.5% pa this would equate to £531,761 in 2012. The annual cost would increase year on year throughout the 30 year period. The cost would be significantly higher if BMPI was higher. The tender cost for EWI was £368,140.29. In Mr Sharman's view, this was lower than the planned maintenance cost, compared with both the 2007 and 2009 figures and adjusting for future inflation. As at the date of his written statement, Mr Sharman indicated that the actual cost was forecast to be £384,912.00. Lessees were pleased with the high standard of the work to date. The EWI would have a 25 year insurance backed guarantee, but in his and Curtin's

judgment EWI would have a life expectancy in the region of 40 years or more, although there was no evidence to support that claim.

38 As well as being the cheaper option in the long term, Mr Sharman was aware that EWI had additional benefits: protecting the structure, reducing maintenance, significantly improving thermal comfort for residents. The building had suffered from lack of insulation which had resulted in cold bridging. This had led to increased condensation, dampness and mould growth. EWI would probably reduce heating costs. According to Linnells, the Respondent's independent chartered surveyors, EWI will have increased the overall value of the building and improved the marketability of the individual flats. In Mr Sharman's view, EWI was the lowest cost option and provided additional benefits at no extra cost. He had considered that the cheapest and easiest option short term was not always the most cost effective in the long run.

39 Mr Sharman told us that the 25 year guarantee covered materials, but not labour. However, the following day, he accepted that he had made a mistake. The guarantee was not his area. Apparently, the guarantee did in fact include both labour and materials, but only if the material itself proved to be defective, not the installation or fixing. Latent defects would be covered under the contract for 12 years as the contract was under seal. The stock survey reports had been prepared for the benefit of the mortgagees - the European Investment Bank, the Principality Building Society and the Royal Bank of Scotland - as the stock was to be the security for the Respondent's borrowings. The stock was transferred for no consideration. The 2007 structural report had to be read in conjunction with Savills' non-structural report which included the roof.

40 Mr Sharman was asked why the roof costs had increased from £45,900.12 in Seddon's original priced specification (1/9/10)(see B3 T6 P100) to £127,209.37 (23/8/11). He did not know why there had been a variation - probably a better roof, compliance with Building Regulations. As far as the Property was concerned, WHQS were not an issue. The principal reason for the work was to put the Property into repair and to keep it in repair for 30 years. Insulation was not the primary consideration. There had been no need to increase thermal insulation, although it had been at the back of his mind. He had looked at the cost of long term repairs and the cost of EWI. In his experience, patch repairs cost more. In his judgment, EWI was for the benefit of the Respondent and the lessees. The lessees would pay less in the long term.

41 He was referred to the Notice of Proposal dated the 21st June 2012 (B1 T3 PP14, 15 and 16) from Mr Mark Gumm, the Respondent's Leasehold Officer. At page 14, Mr Gumm refers to the purpose of the works being "to repair and protect the structure and fabric of the building in the future and to increase the thermal efficiency of the building." At page 15, the letter comments that "the thermal efficiency of your external walls is extremely poor". At page 16, it is stated that "the key issue is the deterioration of the concrete structure and the effect of this on the steel reinforcement within it which will begin to rust." Mr Sharples put to Mr Sharman that there was nothing in the reports which suggested that to be the case. On the same page Mr Gumm explains that some flats have a SAP (standard assessment procedure) thermal efficiency rating of 58 "which fails the standard of 65". Mr Sharman stated that it was his role to take the information from the experts and make a decision. The primary concern was protection of the structure. Thermal efficiency was secondary. In his view EWI was cost effective. Tender prices came back very low. There was an over-supply of EWI contractors. The Respondent had hit the market at the right time. EWI would serve as a better remedy than repairs. It could be done for less than the cost of patch repairs. Patch repairs always cost more in the long term.

42 Mr Sharman was also referred to Mr Keegan's (Project Manager) letter of the 10th February 2011 (B1 T3 PP50 and 51) where at page 50, he refers to the works as "improvement of the building" and, at page 51, the insulated render being necessary "as an improvement to prevent damp penetration, reduce internal condensation issues in some flats and to improve thermal efficiency of the building." Whilst not disputing what the letter says, he maintained that EWI would reduce leaseholder liability in the long term. Whilst he accepted that the Respondent had to comply with WHQS, each Housing Association could negotiate its own deadlines. In his view,

the Property as a whole complied with WHQS, although a number of individual flats may have SAP ratings below 65.

43 We were shown a schedule of SAP ratings projections compiled by Stacey Surveys Ltd detailing the SAP ratings for each flat as existing, plus window and wall upgrade and plus roof insulation. On the second to fifth floors only one flat had a SAP rating below 65 whilst several on the top floor failed to achieve this mark. With the window and wall upgrade, there was an improvement in the score of between 6 and 10 marks for the top floor flats. The roof insulation increased the score of these flats (but not the flats on the other floors) by 9 points. However, in Mr Sharman's opinion the SAP ratings did not equate to the tenants' experiences as far as thermal comfort was concerned - even those flats with a SAP rating of 65 or more. In his view, the SAP ratings were not showing the true picture. He therefore sat down with the energy assessor who explained why there was a difference and gave guidance. There was no minute of this meeting. He arranged for Mr Lewis, the assessor, to go into all the Respondent's tenanted flats. This exercise produced a different figure from the figure contained in the Energy Performance Certificate (EPC) for, for example, Flat 39 for which we were shown the EPC. Mr Sharman had wanted to know the reality of the situation as he was making decisions on an investment. He questioned everything which came across his desk. He did not regard himself as an expert, but as a generalist.

44 Mr Sharples referred Mr Sharman to the Leaseholder Observations at B1 T3 PP26 -27 where the response to question 4 - relating to maintenance savings using EWI - states that the cost of EWI in October 2011 would be £815,000 whereas the regular maintenance option would cost £1,489,000 over the next 30 years. Mr Sharman said that he had applied an inflation factor of 3.5% to the total amount of £470,400 - even though half of that would be paid out in the short term and the other half over the 30 year period - and worked out what he considered to be the cash flow over 30 years. He had used Excel, but had no written record of his calculation. Mr Sharman accepted that that approach was not correct and as a comparable figure, £1,489,000 was badly wrong. He had had the Seddon tender in October 2010 and knew the actual figures.

45 He was aware that when Curtins had provided the figure of £470,400, there was "a little bit of fat" built in. He had asked a Quantity Surveyor to check it. The surveyor had looked at the figures and agreed that they were in the right ball park. He felt they were reliable enough. It was not a written assessment. He had had a discussion with Mr Peter Howells (the Respondent's Head of Asset Management and Investment). The figures looked correct. There was no report, no minutes and no calculations.

46 Mr Sharman confirmed that the Property had been looked after by Torfaen, but he recalled that the concrete was less satisfactory at a lower level, although he could not indicate how he had come to that conclusion. Torfaen had done what it could within its budgets, but Torfaen did not have the money. Although he could not recall precisely, he believed that there would have been an inspection and maintenance about every three years. There was no consistency in Torfaen's management; there was no system for service charges. He was aware that later leases had an obligation to pay for repairs and improvements. He had always expected that the Applicants would have to pay for the works. He could not explain, however, why Mr Keegans (Project Manager) had written to Mr Shorthouse on the 7th February 2011 stating that "the EWI improvement work is not chargeable under the terms of your lease" (B3 T7 P42). The Respondent's staff were working as individuals and not as a specialist team at that time, even though the Respondent had owned and had by then been managing the Property for virtually three years. Mr Sharman was aware that the cost to the lessees would be high which was why the Respondent offered the lessees preferential payment terms.

47 There was no grant for the work. Grants were based on geographical area and the Property was outside the grant area. Mr Sharman did not know whether a nearby block known as the Tower had benefited from a grant. The Tower had had similar work done. The residents there are not all social housing tenants. As Director of Property he had authority to authorise expenditure of up to £1,000,000 without reference to the Board. He reported cash flow. There was no written options

appraisal. He did not commission one. He had simply taken Curtins figure and increased it by 3.5% a year and then made a simple cost comparison. He had just looked at the patch and mend option and the EWI option. Curtins had discounted the others. Rain screen cladding was similar in cost but was beset by problems. Internal wall insulation was not considered as it did not protect the Property.

Mr Lee Phillips (B4 T8 PP32-34)

48 Mr Phillips is the Respondent's Contracted Project Manager for its three high rise blocks - Fairview, the Tower and the Property. He took over from Mr Keegans in February 2011 by which time the procurement process had been completed and Seddon had been appointed as the main contractor. Mr Phillips' evidence as to the accounts and as to the apportionment of the costs was to a large extent superseded by the agreement of the final account and the agreement between the experts as to the amount to be apportioned for the EWI. He confirmed that the 25 year guarantee covered labour and materials where the materials proved defective. Any installation issues were Seddon's responsibility. At no time was a grant available. The project had been funded through loans.

The experts: Mr Robert Pratt BSc MRICS (B1 T4 PP33-63)
Mr John Conway BSc (B1 T4 PP64-76)

49 At B1 T4 P77, both experts had helpfully agreed that the only issue between them was with regard to the EWI. Mr Pratt for the Applicants considered that Mr Conway's minimum recommended works would have been sufficient to maintain the structural integrity of the Property over the next thirty year period in lieu of Mr Conway's more expensive enhanced scheme implemented by the Respondent. Mr Conway confirmed that progressing with either the minimum or the enhanced recommendations would ensure the structural integrity of the Property over the thirty year period. It was also confirmed that the costs referred to in Mr Conway's reports were budget figures based on professional opinion and had not been subject to tender or contractor pricing. The experts also agreed that the sum of £521,100.81 was reasonably incurred in connection with the contracted works other than the EWI. This figure was subsequently revised to £515,844.33 in the further agreed statement - "Experts Joint Agreed Apportionment of Works between EWI and Non-EWI".

50 In his report (B1 T4 P43), Mr Pratt accepted that Seddon's costs were reasonable as they had been the subject of a competitive tender. He agreed with Mr Conway's report that the structure of the Property was in good condition. He could not, however, accept Mr Conway's recommended enhanced solution was justified because it was not possible to quantify accurately the extent of the ongoing repairs.

51 In evidence, cross-examined by Mr Britton, Mr Pratt confirmed that he was a building surveyor and not an engineer. His firm might in certain circumstances employ a structural engineer, but he had not considered it necessary in this case. He had not dealt with a high rise building of this type before. He accepted that providing a budget for a 30 year period was not unreasonable though on the long side. Generally advice would cover a 10 year period because of the unpredictable nature of the elements. He has previously given advice covering a 25 year period. Certain repairs were needed to the structure of the Property which the Respondent would need to do in the next 5 years. If the projected costs of "ad hoc" repairs and improvement were more or less the same, there would be a benefit in having the improvement. The decision would be finely balanced. He had not been asked to carry out a costing exercise.

52 Re-examined, Mr Pratt confirmed that the Property was in good order. Routine repairs could be carried out using a cradle - not abseiling. Even though the EWI has a 25 year guarantee, the Property will require cleaning. There are joints visible in the render finish. There should be sealant

between the EWI panels. Sealant will degrade. The render is exposed to the elements, although it is not by the coast. There is the possibility of failure but impact damage is unlikely. He did not know the details of the guarantee.

53 In evidence Mr Conway confirmed his report. He also provided us with a supplemental report (B4 T9 PP301-305) in which he explained that the regular maintenance option was costed on the basis that £235,200 would be spent in year 5 (2010) and £235,200 in years 20-25 (2026-2031). Applying an inflation factor of 2½% a year, the figure would be: in 2010 - £259,617; and in 2026-2031 - £385,403-£425,412. He used the rate of £80 per m² in 2007 and that is still the same rate used today. If there are more specific issues, then the rate will reflect those issues. The top figure is up to £120 per m². There is not much below £80 per m². He had assessed the access cost to be £34,000. However, the costs he put into the report were not necessarily the costs the Respondent was going to incur. They were budget figures. If Curtins had under-priced the works, they could have been in difficulty. He erred on the side of caution. Contractors come up with all sorts of figures. The prices are influenced by competition and the requirement for contractors to get work. However, the estimates for the works on the Property were about the same. The figure of £735,000 was on the high side and the figure £470,400 might also be in excess of what was achievable. The inflation adjusted figure of £235,200 was for illustrative purposes only. The inflation figure had been compounded annually. When comparing costs one would not normally do this. His figure of £235,200 was based on a limited over view not on a survey. At B3 T6 P60, the 2007 Report refers to "an impressionistic and limited intrusive sample survey". At P69, he refers to access difficulties. The reports were done on a general limited basis.

54 He is a qualified engineer with 27 years' experience. He has dealt with 70 to 100 non-traditional high rise units. He carried out the original survey for Torfaen before the housing stock was transferred to the Respondent. The initial instructions were to Savills and the purpose of the survey was to provide a general value of the stock. Savills had instructed Curtins to carry out a structural survey. The costs it identified would be added into the Respondent's business plan. Mr Conway had been personally involved in all three reports.

55 Although the Building is multi-storey, it is traditionally constructed with a concrete frame, floors and panels which are fixed to the frame. An abseil survey concluded that the panels were in good condition internally. All panels appeared to be securely fixed. There was a void behind the cladding panels. The cavity was not filled. Where there were columns, however, there was a cold bridge which caused condensation. The deficiencies set out in the HHSRS V2 Dwelling Assessment Report for Flat 47 Monmouth House (B4 T9 P284) were typical of the problems. Condensation is caused by a lack of ventilation and lack of insulation. Patch repairs would not cure condensation. In reports such as those written in respect of the Property, it is customary to provide 3 sets of costs: the minimum recommended works to achieve 30 years - works of a repetitive/cyclical nature in line with general maintenance regimes which would aim to keep the structure of the Property in a serviceable manner (£470,400); the enhanced 30 years option - for additional works to protect the structure from further deterioration and improved habitability of the dwellings by increasing and improving thermal properties in conjunction with upgrading the aesthetics of the units (£735,000); and the recommended option - in this case the enhanced option. The enhanced option was in Mr Conway's view more holistic and designed to bring the Property up to a mortgageable standard. It gives the best overall benefit to the building. Not every client accepts Curtins' recommendations. 30 years is standard practice with housing authorities. He is not involved with private housing. He would never recommend something simply because it looked pretty.

56 Mr Conway had calculated the figure of £470,400 by first working out the surface area of the external walls and then applying a rate per square metre, labour, scaffolding and a small amount for materials. There are a number of different cladding systems on the market. Rain screen cladding is at the high end of the market. EWI is commonly used. It has a life of 25 - 30 years. He has personally been involved in 80 to 90 such schemes which are performing adequately. It is not a novel system in Europe where it has been used a lot. The better option is mineral fibre with render.

The phenolic type may have problems in the future. He considered over-cladding to be a reasonable option. Patch repairs were reasonable to a point, but they did not address everything. There would still be damp problems. The outside would be unprotected. It was paramount that there should be no moisture behind the cladding and the sealant had to be good.

57 Questioned by Mr Sharples, Mr Conway confirmed that he had not inspected the Property since the work had been done. He understood that the cladding was mineral fibre. He proceeded to describe the constituent elements of the cladding. A sectional drawing appears at B3 T6 P154. Structural cracks would have to be dealt with first, but sealant might not need to be done. If a concrete panel was out of alignment, it might not be necessary to realign it. The surface has to be even. A fungicidal wash is applied to the wall. A bonding agent and possibly a bedding adhesive (if required) is then applied. The insulation is then stuck to the wall and held in place by mechanical fixing, 4 or 5 to a panel. A scrim adhesive coat (4-6mm)is applied with alkali resistant glass fibre reinforcing mesh and a scrim adhesive levelling coat (2-3mm). A silicone primer and the silicone finish coat complete the process. Panels are generally abutted up against each other. If the edges of the EWI panels were contiguous with the edges of the concrete panels, sealant would have been necessary. Some manufacturers do not consider it necessary to have expansion joints. Mr Conway conceded that EWI represented something different from what was there before.

58 He accepted that the majority of the damp within the flats was caused by condensation. This arises where the hot air meets the cold air from outside. There can be a number of different causes. The amount of condensation will depend on the insulation and the lifestyle of the occupants and ventilation. Condensation is due to the type of building and the way it is used. The presence of condensation does not mean that the building is in disrepair. Penetrating damp could cause disrepair. There was never any insulation on the external walls and the deterioration in the concrete structure did not cause the condensation. There were problems with the windows. However, ingress was minor. Most problems were due to condensation. In his 2011 report, Mr Conway referred (at B4 T9 P165) to “minor mould growth”.

59 Mr Conway was not aware of the lease terms. He had not been asked to devise a scheme in the light of the lease terms. He was aware that there were some lessees, but he was not aware of their lease terms. In his view the reason for the survey was housing policy. He was not specifically referred to WHQS but when writing his report, he was aware that it had to comply with WHQS which required housing stock to be improved. If the Property does not have adequate insulation, then insulation must be provided. The purpose of EWI is to improve insulation values, negate condensation and add a protective layer. Its purpose is not to repair cracks. Mr Conway agreed that some of the cracks identified were irrelevant, although EWI will prevent further carbonation. He accepted that contamination levels were very low and that concrete repairs would be good for a considerable number of years. If EWI had not been carried out, the building would not fall down. EWI is an improvement and a benefit to the building and all residents. His reports provided an overall view to the Respondent. EWI stops defects arising in the future. In his view cold bridging was a defect, not a disrepair. Some joints needed sealing, some concrete needed repair, however large sections of the walls were in satisfactory order.

60 He was not sure if his remit was to consider a 30 year period or whether it was based on his practice. He did not know if the same period was used in the private sector. There is no industry standard. Sealant should be renewed every 15 years although he was confident that it would last 20 years. If a 10 year time scale were adopted, the patch repairs would only be required to be done once. If a 35 year time scale were adopted, both patch repairs and EWI would need to be done twice. The cost comparison depends upon the time scale used.

61 He had estimated the cost of the patch repairs before the CAN Report. He had not recalculated the cost following receipt of that report. Most of the cost is labour and access. He had not been asked to review the figure. Mr Conway explained that CAN’s report was an overview, not definitive (see B4 P80). Whilst detailed, it was not definitive. Certain gaps needed to be addressed.

He did not know if they went through the entire concrete panel. Some defects were very minor. He accepted that there was a relatively small number of defects.

62 Dealing with the SAP ratings, Mr Conway agreed that the minimum acceptable SAP rating was 65. Of the 35 flats mentioned in the Schedule, 25 were already compliant. Apart from Flat 28 which had a SAP rating of 62, all the other non-compliant flats were on the top floor. Most of those fail by only 1 or 2 marks. The SAP ratings were compiled before the works were carried out. As far as the top floor flats were concerned, it would have been enough to insulate the roof. According to Seddon's invoice (B4 T8 P35), insulation was provided to the roof. However, in Mr Conway's view, WHQS were an issue. SAP ratings do not tell the whole story; condensation was a problem. He had not calculated a u-value. It would probably have been 0.7. He confirmed that patch repairs would have lasted 30 years although anti-carbonation would have been required every 20 years. He could not say how much this would cost. He does not always recommend EWI for buildings.

63 Re-examined by Mr Britton, Mr Conway confirmed his original figures for a requirement for the Respondent to spend £235,200 immediately for patch repairs (if that were the option taken) and a further £235,200 to repair further deterioration. He had split the sum of £470,400 equally. He stated that the figure was still a little high, even now. It would not have increased that greatly since it was first calculated. A more accurate figure would be somewhere between £100,000 and £200,000 with the same cost to be expended in 20 years' time. Anti-carbonation would also be required. EWI would not be required to be redone in 20 years' time.

64 Questioned by the Tribunal, Mr Conway told us that internal wall insulation (IWI) would mean that space would be lost within the flats. It might give greater flexibility but there might not be cost savings due to the necessity for dealing with central heating and kitchen units. His brief had not included a requirement to upgrade the Property.

CONSIDERATION OF THE EVIDENCE

65 Mr Britton invited us when considering the expert evidence to prefer the evidence of Mr Conway over that of Mr Pratt. His reasons for doing so were that Mr Conway is a highly qualified and experienced engineer with particular expertise when dealing with high rise properties. In our view, both experts dealt with the issues in a proper, professional manner, answered the questions from both Counsel in a frank and reasoned way, agreed what could fairly be agreed and acknowledged that their only real difference of opinion was which of the two options - periodic maintenance or EWI - was preferable. Mr Pratt conceded that if the costs were finely balanced it would make sense to use EWI. Mr Conway considered that notwithstanding EWI was the more expensive option, it made more sense to use EWI because future maintenance would be negligible and EWI provided other benefits not least of which was compliance with WHQS.

66 There was no issue that the concrete structure of the Building was basically sound. It had been maintained to date in a satisfactory manner. The experts agreed that there were minor issues which needed to be attended to. There were also problems relating to the original design and construction which needed to be addressed if WHQS were to be complied with: cold bridging, metal window frames and panels. In some flats there was ingress of water through the structure adjacent to the windows which would be resolved by the replacement of the windows.

67 Various figures have been put forward as to the projected costs of both schemes. It is important in our view to ensure that when figures are compared the exercise is carried out on a like for like basis. It is not helpful to compare actual figures with budget figures, especially budget figures with a margin for error built in. Nor is it right to compare today's prices with an inflation adjusted price for the same job in 30 years' time. After all, as Mr Sharples submits, whilst the cost may increase, so the value of money decreases; the cost of the job in 30 years' time will reflect the value of money at that time Mr Conway adopted this approach when he split his budgeted cost of £470,400: £235,200 now and £235,200 in 20 years' time. Whilst it was proper for Mr Conway to contrast the maintenance option with the enhanced option on the basis of £470,400: £735,000, it

was not right for the Respondent to suggest to the lessees that the future costs were likely to be £968,000 (B3 T6 P34) so that the corresponding figures applying an inflation increase are shown as £1,439,000: £815,000 (B3 T6 P34).

68 The parties have agreed that the EWI cost £285,374.40. It is not appropriate to compare that figure with Mr Conway's revised cost for the maintenance option of between £100,000 and £200,000 for maintenance now and again in 20 years' time, as Mr Britton does in his closing submissions. Using a median figure of £150,000 he argues that the total cost would be £300,000 over a 30 year period which is virtually the same as the actual cost of EWI without the added benefits. However, the actual cost is not £150,000 or anything like that. Mr Conway said that the external wall would still need repairs apart from some minor cracks and replacing the sealant between the concrete panels. The Respondent would also require anti-carbonation to be applied (see Mr Conway's evidence). The summary of costs shows the repairs as costing £3,700 whilst the anti-carbonation was £3,947.44 (total £7,647.44). It was unfortunate that Mr Conway was put on the spot in re-examination and asked to reconsider the cost of the maintenance option without taking time to consider the figures and to be able to justify his opinion. His estimate of the costs of £100,000 to £200.000 was vague and so broad that we do not feel able to rely upon it. Even allowing for access and preliminaries (for which the total cost for the whole project was approximately £80,000) and for any additional minor repairs and sealant and the realignment of one of the panels (for which no figures were provided) it is extremely doubtful that the total cost could have reached £100,000. The fact that Torfaen with its limited budget was able to repair the Property to a satisfactory standard by carrying out an ad hoc maintenance regime every three years (according to Mr Sharman) must call those figures into question. Indeed, it is remarkable that having identified maintenance as one option and having established that the estimated costs of EWI were coming in at a price substantially less than that suggested by Mr Conway's estimated figures, Mr Sharman did not even consider pricing the maintenance option to enable him to give valid consideration to the objections received from the lessees.

69 We did not regard Mr Sharman as a reliable witness. We appreciate that he was unused to giving evidence and being asked to explain a decision he had taken a few years ago, but he is and was after all the Director of Property and had overseen the management of the Property since 2001. He could not, however, say with any certainty what Torfaen's maintenance regime had been for the Property. He had authority to spend up to £1,000,000 on a single project without reference to the Board, yet he appears not to have recognised that the figures provided by Mr Conway were for budget purposes and cash flow predictions, and not intended to be accurate assessments by which to measure the reasonableness of contractors' estimates. He was, he said, a questioning person. He acknowledged that there would be "some fat" in the figures. However, his only questioning of Mr Conway's figures was to ask his quantity surveyor informally if those figures were all right. There was no official request. The surveyor did not research the costings. He did not put his name to any record that the figures had been approved. There were no minutes of that meeting. It was little more than a casual chat confirming that the figures were in the right ball park. Knowing that the quotations for the EWI option had come in well below Mr Conway's figures, he did not seek estimates for the maintenance option or even carry out a costing exercise.

70 Mr Sharman told us very clearly on the second day that the insurance backed 25 year guarantee for the EWI was for materials only. On the third day, he admitted that he was wrong about that as it was not his area of expertise. He did not know if the Tower had received grant funding for insulation. He considered that the Property had not done so because it was outside the geographical area where grants were available. Certainly, one of the Respondent's tower blocks received Arbed funding (see the letter from Jocelyn Davies AC/AM to Lynne Neagle AM at B2 T7 P44). Mr Sharman accepted that his calculation of the cost of the maintenance option (B1 T3 P27) was badly wrong - and yet the figure of £1,489,000 was the one used to explain to the lessees why EWI was the preferred option. Even if we were to accept the principle of applying an inflation factor to the cost (which we do not), the factor is only applied to the unused portion and not to the whole

of the cost. Mr Sharman also suggested that the concrete at the lower level was "less satisfactory" but could not explain his reason for his stating this.

71 As the Director in charge, Mr Sharman seems to have had little knowledge of what lessees were being told. In evidence, he stated on several occasions that the primary reason for the EWI was to repair the Property. The insulation benefits were only incidental. The Property complied with WHQS, even though there were some individual flats which did not. However, he authorised a further investigation into SAP ratings. His explanation that the reason for this was his concern for the tenant experience was unconvincing. He also told us that he always understood that lessees would be contributing to the cost of EWI. Mr Sharman's evidence is not supported by the contemporaneous correspondence. On the 27th September 2010, the Respondent wrote to Mr and Mrs Shorthouse (B3 T7 P29) stating that it was proposing to provide "insulated render to the external walls, this is required to prevent damp penetration, protect the structure of the building and improve thermal efficiency". There follows (at P31) a document headed "Why are we planning to carry out the proposed works". It begins: "in August 2008, the Welsh Assembly Government issued The WHQS which we as social landlords have to follow". It then enlarges upon what the Respondent has to do in order to comply with the Standard. On page 32 is a section headed "Insulation Programme Monmouth House" in which the Respondent explains why insulation is necessary. On the 15th October 2010 Mr Keegans, the Project Manager, invited Mr Shorthouse to a meeting explaining that the Respondent "is proposing to carry out work to the exterior of Monmouth House with the installation of external wall insulation, new double glazed uPVC windows and roof coverings. This will help to prolong the life of your home and reduce the amount of heat lost through the external walls windows and roof meaning you will use less energy to heat your home" (B3 T7 P33). On the 7th February 2011, Mr Keegans wrote to Mr James (B3 T7 P42) "I feel it is worth noting that the EWI improvement work is not chargeable under the terms of your lease." On 10th February 2011, Mr Keegans wrote again to Mr James (B3 T7 P56a-c) that the Respondent planned "improvement of the building by provision of insulated render to the external walls of the building". The insulated render was "necessary as an improvement to prevent damp penetration, reduce internal condensation issues in some flats and to improve thermal efficiency of the building". The letter also explains that "these works are also needed to meet the WHQS in line with our contractual obligation to the Welsh Assembly Government." There is the first page of a similar letter to Mr and Mrs Shorthouse on page 56. On the 15th February 2011, Mr Phillips, who had become Project Manager, confirmed to Mr and Mrs Shorthouse that "the EWI improvement work is not chargeable under the terms of your lease". In a letter dated the 4th July 2011, Mr Gwyn Jones, Residential Housing Officer, deals with a number of questions including: (question) how does the building currently stand regarding WHQS in relation to thermal efficiency - (answer) some flats have a SAP rating…of 58 which falls below the standard; (question) will the proposal meet the standard - *(answer) yes.*

72 These letters are significant because they clearly show that the prevailing view of the Respondent's staff was;

- that the EWI was an improvement;
- that one of the reasons for EWI was compliance with WHQS;
- that the Respondent did not expect the lessees to pay for the EWI.

During the course of 2011, that view changed. The Respondent is, of course, correct when it suggests that all repairs have the effect of improving a property and the staff writing the letters were not using the word "improvement" in a legal sense. However, if ordinary people using ordinary language consistently describe the works as "improvement", it must surely give some indication as to where in the scale with repair at one end and improvement at the other these works lie. "The roof works are repairs", "the windows need repair" but "the insulated render is necessary as an improvement" (B3 T7 P56b). We have noted Mr Sharman's response that the letters were written without his knowledge and that the views expressed that the lessees would not be required to pay for the EWI did not reflect the Respondent's view. His justification for this disparity of view was

because the Project Managers were acting as individuals as the Respondent had not put together a specialist leasehold team. It was pointed out that the Respondent had been responsible for the Property for three years. With due respect to Mr Sharman, the fact that two Project Managers write within a month of each other saying exactly the same thing to different lessees without that being departmental policy is simply not credible.

73 Nor do we accept that WHQS were incidental and that the principle reason for EWI was repair. The whole emphasis is on preventing damp penetration, reducing condensation and thermal efficiency (see B3 T7 P56b and P67). Where repairs are mentioned it is generally in relation to "future years" (B3 T7 P66), reducing "future maintenance" (B3 T7 P67) and deterioration of the concrete structure "over time" (ibid) although at P70d, EWI is necessary "to repair and protect the structure and fabric of the building".

74 Much has been made of the 30 year period over which the costs are assessed. It is not our place to regulate how any landlord (social or private) decides how to run its business and in particular how it budgets its finances. Our role is to determine whether particular service costs have been reasonably incurred. The fact that the Respondent may have imported Curtins' figures into its budget and cash flow forecasts is irrelevant. Similarly, the period over which it makes its expenditure plans is of no concern. Mr Conway appears to have assumed that this was the appropriate period. This may have something to do with the Welsh Government's requirements for Housing Association to report financial forecasts, but no reason was given. This has no relevance, as far as our determination is concerned, except to the extent that any resulting costs are subject to the statutory requirement that any costs chargeable to the lessees have to be reasonably incurred. The point which Mr Sharples makes is that the figure of 30 years is arbitrary. It is, but that very arbitrariness is at the root of the Respondent's calculations. The problem is that if the period used requires two maintenance contracts and only one EWI contract, then adopting Mr Britton's argument and using Mr Conway's estimated median figure of £150,000 per contract for maintenance and the known figure for EWI, there is virtually no difference in the cost of the two schemes. In such circumstances, as acknowledged by Mr Pratt, it clearly makes sense to use the EWI scheme because of the advantages which flow from doing so. However, as Mr Sharples points out, this operates only in and around that 30 year window as once the EWI requires renewing for a second time, the balance shifts dramatically in favour of the maintenance option. It is not every case, as Mr Sharman suggested, that renewal is always more cost effective than repair. It can depend over what period you are considering the expenditure. In this case, bearing in mind the known concerns of the lessees, it is, in our view, only right and proper for any landlord to cost the options before deciding which to adopt. The landlord can then weigh up the options from various viewpoints. If he/she chooses the more expensive option, he/she can justify that option. In this case, the Respondent never really considered maintenance as an option. We have no doubt that in the light of the correspondence adduced in evidence, the requirement to comply with WHQS was a motivating factor in deciding upon the EWI option and that combined with the availability of funding and the prospect of reduced maintenance costs will have had a substantial bearing upon the decision.

75 On the basis of the evidence, we therefore conclude:

(a) the Property was in a generally satisfactory condition and, despite the constraints on Torfaen's budgets, it had been maintained to a satisfactory standard;

(b) there were a relatively small number of minor repairs requiring attention comprising small cracks, a few areas of missing and spalled concrete, deteriorating sealant and a concrete section requiring re-alignment;

(c) the cost of carbonation and effecting some of the repairs as a necessary preliminary to EWI was £7,647.44; it is not known how much a stand alone contract for maintenance would have cost, but in our judgment it would have been less than Mr Conway's lower estimate of £100,000;

(d) further repairs would have been required in 20 -25 years' time and would have cost (at today's prices) a similar amount;

(e) the repairs would have had the effect of keeping the Property in a satisfactory condition for 30 years;

(f) as of today, EWI cost £285,374.40 as against an estimated stand alone maintenance cost of £100,000, allowing the lowest of Mr Conway's amended figures ;

(g) EWI had a guaranteed life of 25 years and was estimated to last at least 30 years;

(h) with EWI, the general cost of maintenance would have been minimal but the system would have required renewing from a point 30 years onwards. We had no evidence as to the cost of this, but presume that the cost would include the removal of the existing cladding, attending to the underlying concrete structure and applying a new cladding system;

(i) over a 30 year period, again allowing the lowest of Mr Conway's amended figures, the maintenance cost would be £200,000 (2 X £100,000) against a known cost for EWI of £285,374.40;

(j) over a 35 year period, the maintenance cost would be £200,000 and the EWI would cost in the region of £570,748.80.

REPAIR OR IMPROVEMENT

76 The principal issue for us to decide is whether the EWI is chargeable under the terms of the Applicants' leases. The lessees have to reimburse the Respondent for the costs incurred in maintaining repairing decorating renewing rebuilding and reconstructing the Property. During the hearing, the issue centred on the word "repair". It is clear from the authorities to which both Counsel referred that distinguishing between "repair" and something which goes beyond repair - which we shall call "improvement", as that was the term used by the witnesses during the hearing - is not always easy. Both Counsel agreed, however, that the decision was in every case one of fact and degree. The various learned judges and authors who have decided cases and written on the subject may have used different language, but the principle is the same.

77 Before there can be a repair, there has to be an element of disrepair (see Post Office -v- Aquarius (1987) 54 P & CR 61). We also need to consider what it is that is in disrepair. In this case we are concerned with the external walls of the Property. Unfortunately the word "disrepair" in common parlance can sometimes be synonymous with dilapidation. There is no suggestion that the Property was in such a state. Far from it, apart from those issues referred to in paragraph 8 above, the structural walls of the Property were generally in a satisfactory condition. However, there were elements of disrepair which the Applicants accepted needed attention (see paragraph 8 above). Some repair was required. The responsibility for carrying out that repair was the Respondent's and the lessees are obliged under the terms of their respective leases to contribute their defined proportions of the cost. Mr Britton rightly reminded us that it is the Respondent as the paying party which is entitled to choose which method to adopt. As Scott J stated in Plough Investments Ltd -v- Manchester City Council [1989] 1 EGLR 244: "if reasonable remedial works are proposed by the landlord in order to remedy a state of disrepair for the purposes of its…obligation, the tenants are not, in my judgment entitled to insist that cheaper remedial works be undertaken." (See also Fluor Daniel Properties Ltd -v- Shortlands Investments Ltd [2001] EWHC 705 (Ch)). However, the choice must be between methods of repair and not between repair and something which goes beyond repair.

78 How does one differentiate between repair and improvement? The authorities are many and varied and we have considered all those referred to us. "The true test is, as the cases show, that it is always a question of degree whether that which [in that case] the tenant is being asked to do can properly be described as repair or whether on the contrary, it would involve giving back to the landlord a wholly different thing from that which he demised" (per Forbes J in Ravenseft Ltd -v- Davstone Ltd [1980] 1QB 12 at p21C). In other words, "the landlord is obliged only to restore the house to its previous good condition. He does not have to make it a better house than it originally was" (per Lord Hoffman in Southwark LBC -v- Tanner [1999] 1 AC 1 at p8C). However, repair "may

include what a sensible practical man could do to eliminate the cause of disrepair" (see Stent -v- Monmouth DC (1987) 19 HLR 269 per Sir John Arnold). It will also include complying with modern building practice (see Ravenseft Ltd -v- Davstone Ltd [1980] 1QB 12 - insertion of expansion joints), and using modern equivalents such as double glazing (see Reston -v- Hudson [1990] 37 EG 86 and Minja Properties Ltd -v- Cussins Property Group plc [1998]2 EGLR 52 in contrast to Mullaney -v- Maybourne Grange (Croydon) Management Ltd [1986] 1 EGLR 70 where double glazing was found to cost twice as much). Replacing the existing door with a better more effective door was still regarded as a repair (Stent -v- Monmouth DC (1987) 19 HLR 269) and in Creska Ltd -v- Hammersmith and Fulham LBC [1998] 3EGLR 35 it was held that repairs could incorporate some improvement, but still constitute a repair. Again, "provided there is damage to the subject matter of the covenant so that repair is needed, it may be the case that sensible repair work will include putting right a design defect that has led to the damage", (per Mr T Mowschenson QC in Janet Reger International Ltd -v- Tiree Ltd [2006] EWHC 1743 Ch). Work to roofs has generally been regarded as repair even though substantial areas of the roof covering may be replaced. In Postel Properties -v- Boots the Chemist[1996] 41 EG 164 the landlord's surveyor had concluded that, looking 5 years ahead, a phased replacement of the roof covering was more economic than continuing with patch repairs. Ian Kennedy J commented: "sensible work of repair to preserve the fabric in a realistic way is entirely consistent with the duty to perform the landlord's obligations efficiently and economically…" namely "to keep the… roofs…in good and substantial repair and condition" (see also Manor House Drive Ltd -v- Shahbazian (1965) 195 EG 283 and Scottish Mutual Assurance plc -v- Jardine Public Relations Ltd (March 1999)). Replacing floors may, however, not be regarded as repair (Proudfoot -v- Hart (1890) 25 QBD 42 and Wates -v- Rowland [1952] 1 AER 470), nor will the insertion of a damp proof course where there was none previously - Janet Reger International Ltd -v- Tiree Ltd [2006] EWHC 1743 Ch, Pembery -v- Lamdin [1940] 2 AER 434, Eyre -v- McCracken (Court of Appeal - 10.3.2000) - although this may depend upon the wording of the lease as in Elmcroft Developments Ltd-v- Tankersley-Sawyer [1984] 1 EGLR 47 where silicone injection was the only practical method of keeping house in tenantable repair as the existing damp proof course was ineffective. It may of course depend on the wording of the covenant. In Lee -v- Leeds City Council [2002]1 EGLR 103 a covenant to maintain the structure and exterior did not require landlord to cure a damp and condensation problem, whereas in Welsh -v- Greenwich LBC (2001) 33HLR 40, an obligation to keep the demised premises in good condition required more than repair. Further, in Credit Suisse -v- Beegas Nominees Ltd (1995) 69 P & CR 177 an obligation to "maintain repair amend renew...and otherwise keep (i.e. to put and keep) the demised premises in good and tenantable repair" meant not only repairing what needed repairing but included total replacement of the cladding, the subject matter of the dispute.

79 In Holding and Management Ltd -v- Property Holding plc [1990] 1EGLR 65, Nicholls LJ sets out a number of factors which Courts and Tribunals may wish to take into account when determining whether certain works are repairs. It is not a comprehensive list and the learned Lord Justice makes it clear that the weight to be attached to the circumstances outlined will vary from case to case. Those which we believe to be relevant to this case, we consider below. In the oft quoted passage of Hoffman J at first instance in Post Office -v- Aquarius Properties Ltd [1985]2 EGLR 105 at p 107C, "in the end…the question is whether the ordinary speaker of English would consider that the word 'repair' as used in the covenant was appropriate to describe the work which has to be done. The cases do no more than illustrate specific contexts in which judges, as ordinary speakers of English, have thought it was or was not appropriate to do so". As mentioned earlier in this decision, the most commonly used description of the works was "improvement" until the Respondent realized the potential consequences of its use of that term. That is not of course conclusive, but it is indicative.

80 In our view, we must first consider the nature of the work, what was done and what its effect was upon the building. Before the application of the EWI, the external walls had to be in a suitable condition to receive it. Some repair work to the walls was therefore necessary. Then an anti-carbonation solution had to be applied. As can be seen from the diagram at B3 T6 P159, the

application of EWI then involved the preparation of the walls by the application of a bonding agent. The insulation board panels were stuck to the surface of the wall using adhesive and these were then held in place by dowels which passed through the EWI panels and into the concrete panels which hitherto had constituted the outside limit of the wall. On top of this there was further primer and adhesive, fibre glass mesh and a silicone finish coat. It is in our view important to note that EWI does not repair the wall: it does not fill in cracks; it does not replace deteriorating sealant; it does not re-align a concrete panel; it does not restore spalled concrete. Some of those repair jobs had to be done before the application of the EWI. The others were rendered unnecessary. To that extent, therefore, the EWI is something in addition to what was there before.

81 We must consider the building as it was when the leases were granted. As Mr Sharples points out, it was an uninsulated building with concrete clad walls. It is now something very different. It looks completely different. It has a render finish. The concrete panels no longer form the external envelope. The Property's thermal qualities have vastly improved. At the end of the lease, the lessor will have returned to it something substantially different from what was leased. It is also important to consider that the primary purpose of EWI is, as its name suggests, to insulate the Property, not to repair it. Repairs could be carried out without applying EWI. EWI could not be carried out without doing some repairs.

82 The number of the repairs to the external wall was, as we have found, small and those repairs were minor relative to the Property as a whole. On the basis of the CAN Report, most of the concrete panels needed no repair. The sealant may have needed renewing, but the panels were sound. However, the EWI surrounds the whole building - other than the decorative concrete - every flat on every floor irrespective of whether repair was required to the concrete panels forming the external wall. The cost of EWI, £285,374.40, represents a substantially higher proportion of the value of the building than the cost of the repairs whether one considers the actual amount spent on the repairs of £7,647.44 or a stand-alone figure closer to £100,000. Comparing the figures over a ten year or fifteen year period, EWI is almost treble the cost of the maintenance option. Even if one doubles the figure to take account of the fact that the maintenance option will require expenditure earlier than the EWI option, EWI is still 43% higher. We appreciate that the leases have still a considerable period left to run and that the Respondent's own tenure is only 5 years longer than that of the lessees, but we cannot accept Mr Britton's somewhat ingenious argument that the interests of Respondent and the lessees are virtually the same. They may extend over a similar period, but the Respondent's obligations to the Applicants are bound to be different from those to its own tenants. We have not seen the tenancy agreements for the periodic tenants, but the responsibilities of landlords are generally higher towards their periodic tenants in terms of habitability of the dwellings than those of a landlord towards lessees with long leases (see the effects of the Housing Act 2004). Of course, both the Respondent and the lessees have a long term interest in their respective leasehold terms, but the lessees will view repair costs and benefits in a totally different way with a close eye on the cost, possibly opting for the bare minimum repair and taking into account that they may well move in, say, 5 years.

83 We have considered the evidence and the arguments, oral and written, of both Mr Sharples for the Applicants and Mr Britton on behalf of the Respondent and have concluded as a matter of fact and degree that EWI goes beyond the terms of the repair covenant in the Applicants' leases and that the cost of EWI is not chargeable as part of the service charge.

WAS THE COST OF EWI REASONABLY INCURRED?

84 We have, in addition to our finding above, considered whether the costs of the EWI were reasonably incurred. We have concluded that they were not for the following reasons:

(a) Before embarking upon such an extensive programme of works, a reasonable landlord would have looked at and properly costed the alternatives and carried out a costed options appraisal.

(b) With the benefit of new windows and an insulated roof, the SAP readings would have been above WHQS and the damp and condensation issues would have been resolved without the necessity of EWI.

(c) A reasonable landlord would have taken the repair option as the EWI would not have added significantly to the rental value of the flats, nor would it have added any significant value to the capital value of the Property. Funding the cost of EWI could have been a problem for a private landlord as a result.

(d) The savings in heating costs - "the manufacturers of the product say that a traditional house would save £140 a year on their fuel bill" (B1 T3 P27) - would take 28 years for the smallest flats to recover the outlay, (ignoring interest on the capital sum), 46 years for the middle range flat and 70 years in respect of the largest of the flats (applying Mr Sharples figures taken from his closing submissions). It is difficult to contemplate any owner occupier justifying the expense on the basis of the savings to be made.

(e) If the whole of the Property were let on long leases, faced with the extent of the opposition from the lessees, it is hard to see that a reasonable managing agent would carry out EWI. Whilst we appreciate that the Respondent as a social landlord has a greater responsibility to its periodic tenants than a managing agent has in respect of private lessees, the Respondent should have considered and costed alternatives for its periodic tenants such as internal wall insulation in the living rooms and bedrooms, omitting the kitchens and bathrooms if necessary to keep the costs in check.

85 In our view, the whole decision process was flawed. Reliance was placed upon budget and cash flow forecasts and not upon costed options. Inadequate advice was sought, given and received. An informal conversation with a quantity surveyor is not a sound basis for any organisation to be spending hundreds of thousands of pounds. There are no minutes of any meetings at which reports were received and considered from which we conclude that no such formal meetings in fact took place - certainly there was no evidence that they had. The costing calculations, such as they were, were wrong. Applying the inflation factor to the figures and, in particular, applying it to the wrong amount was misleading. Using incorrect figures to justify the decision was careless as was the Respondent's methodology of comparing figures otherwise than on a like for like basis. Informing the lessees that they would not be required to pay for the EWI and then telling them they would be charged is unreasonable.

86 Section 19(1)(a) of the Act states that service costs are recoverable through the charge "only to the extent that they are reasonably incurred". This is more than the costs themselves being reasonable. It involves the whole costing process. In Forcelux -v- Sweetman [2001] 2 EGLR 173 Mr P R Francis in the Lands Tribunal stated: "the question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge was that was made was reasonably incurred". He added that there were two distinctly separate matters to consider. "Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence". In Veena SA -v- Cheong [2003] 1 EGLR 175 Mr P H Clarke FRICS in the Lands Tribunal enlarged upon that adding: "that is to say whether the action taken in incurring the costs and the amount of those costs is reasonable". Both these decisions were cited with approval by HHJ Alice Robinson in the Upper Tribunal in Garside -v- RFYC Ltd [2011] UKUT 367 (LC) (Garside), a case which specifically involved the financial implications of a decision to carry out certain repairs where "many of the lessees could not afford to pay and some would have to sell their flats in order to be able to do so".

87 We invited both Counsel to consider the following question: is a tenant's ability to pay his/her proportion of any relevant costs an issue which the Tribunal can properly take into account in determining whether such costs are reasonably incurred? For the Applicants, Mr Sharples gave a qualified "yes". He submitted that whilst the Tribunal cannot take into account individual tenant's

means, it can take into account generally how high the costs are and therefore (a) whether they are costs tenants would incur if they were doing the works themselves and (b) whether the average tenant would struggle/be unable to pay them. We could also consider how much EWI cost relative to the value of the flats. He also submitted that we could take into account the fact that the Applicants are also liable to pay towards the roof and windows in deciding whether the EWI was reasonable. Mr Sharples referred us to a decision of the Chiltern Thames and Eastern Rent Assessment Panel in Stapleton -v- Bedford Pilgrims Housing Association (CAM/96/UT/SC/011)(Chair Mr Geraint Jones MA LLM). Mr Britton, in his supplemental submissions given in reply to those of Mr Sharples, agreed that we are not allowed to take into account the individual means of the tenants but makes no further comment concerning the cumulative effect of the costs of the roof and windows as well as EWI.

88 HHJ Robinson considered the issue in Garside. She concluded that "giving the expression "reasonable" in a broad common sense meaning in accordance with Ashworth Frazer (Ashworth Frazer -v- Gloucester City Council [2001] 1 WLR 2180) the financial impact of major works on lessees through service charges and whether as a consequence works should be phased is capable of being a material consideration when considering whether the costs are reasonably incurred…" She makes a number of useful points:

- the financial impact could no doubt be considered in broad terms by reference to the amount of service charges being demanded having regard to the nature and location of the property and as compared with the amount of service charge demanded in previous years;

- reasonable people can be expected to make provision for some fluctuations in service charges but at the same time would not ordinarily be expected to plan for substantial increases at short notice;

- where the lessees do not all agree, and some wish the works to be carried out in one contract as soon as possible, that should be taken into account;

- the degree of disrepair and the urgency of the work or the extent to which it can wait are likely to be relevant, e.g. a history of neglect, some work urgently required, improvement (and other) notices, insurance cover reduced;

- the extent of any increase in the total cost of the works if carried out in phases;

- the liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme.

HHJ Robinson concludes that "all are factual issues and matters for the LVT to weigh up against the hardship of substantial increased costs when deciding on the evidence before it whether the service charge costs are reasonably incurred."

89 In addition to the points referred to in paragraph 88, we are satisfied that the Respondent failed to give fair and proper consideration to the financial impact of EWI on the Applicants in coming to its decision. The effect of the cost of the roof and the windows was to increase the service charge for the Applicants to a much higher level than they had been used to paying. A reasonable landlord - even a social landlord with additional responsibilities towards its periodic tenants - would have recognised the significant impact upon the service charge of the additional cost of EWI (an additional £2,384 for the smallest units; £3,874 for the medium sized units; and £5,961 for the larger units) compared with the repairing option. The Property did not need EWI for the Respondent to fulfil its responsibilities to the Welsh Government or to its periodic tenants. There was no urgency for this work. The life of the building was not going to be extended as a result of EWI as opposed to the maintenance option. The maintenance option was always going to be the cheaper option (as we have found). We appreciate that the Respondent offered payment "terms" to the lessees, but these were certainly perceived by the Applicants as being on a commercial basis. The lessees were nonetheless going to be paying for works to the Property which we have concluded were unnecessary. We take no account of any evidence of individual hardship which the lessees may suffer as a result of the increase in the service charge. The Applicants must appreciate that as there is no ability in the lease to accumulate a sinking fund or reserve fund, it is for individual lessees to

make their own arrangements to put money aside for those years when major expenditure is required.

PROPORTION OF ESTIMATED REPAIR COSTS

90 We were asked to consider whether the Applicants should be required to pay the full estimated cost of the maintenance option even if we were to find, as we have done, that they are not required to pay for the EWI. In the Joint Agreed Apportionment of Works, the experts have included the repairs and anti-carbonation costs in the "non-EWI" scheme costs. These are in effect the only "repair" costs involved. In his closing submissions, Mr Britton suggests that the Applicants should be required to pay a sum of not less than £300,000, ie the total cost of the maintenance option, applying Mr Conway's median figure, both for the immediate repairs and those likely in the future. Mr Sharples submits that the Respondent is not entitled to charge for work it would or should have done, but did not. He refers us to Crane Road Properties LLP -v- Hundalani [2006] EWHC 2066 (Ch) where the work done went beyond "repair" for the purposes of the lease and a claim for half the cost of the actual work done was rejected on the basis that none of it was chargeable under the lease. That is the case here. We consider that the Respondent is not entitled to be paid an additional contribution to cover an estimated cost of the maintenance option. This work has not been done. The costs have not been and will not be incurred. The amount suggested by Mr Britton has not been tested in the open market. We certainly cannot see any justification for the Applicants to be required to pay for 25 years' estimated maintenance which is what Mr Britton appears to be suggesting. Those elements of "repair" which are properly chargeable are included in the agreed apportionment. We determine that the Respondent is not entitled to any further amount.

MANAGEMENT CHARGE

91 Under clause 6(a)(iii)(a)(iii) of the Applicants' leases, the Respondent is entitled to charge "such reasonable administrative and management charges as the [Respondent] may wish such charge to be limited to a maximum of ten per cent of the total cost of the matters set out above". Those matters include the "expenses and outgoings incurred by the [Respondent] set out in clause 7(b)(f) hereof". Clause 7(f) is the clause imposing on the Respondent the responsibility to maintain repair decorate renew rebuild and reconstruct (a) the main structure".

92 The total cost of the works which the Respondent is seeking to recover through the service charge is £801,218.73. It has charged in addition a management fee of 8% (£64,097.50). In his skeleton argument dated the 2nd April 2014, Mr Sharples accepts that the Respondent is entitled to recover management charges if and to the extent that the amount reflects the actual costs incurred. He argues that it is for the Respondent to justify the amount and proposed to make further submissions once it had. Mr Britton did not deal with this aspect in his skeleton argument dated the 4th April. He may not of course have had sight of Mr Sharples' skeleton argument, or if he had, he may not have had time to consider it fully. No evidence was given by either party with regard to the management charges. In his closing written submissions, Mr Britton objected to our considering the management charges on the grounds that the Applicant's case was not contained in its original application, nor was it "foreshadowed" until Mr Sharples mentioned it in his skeleton argument. He points out that the Applicants have submitted no evidence as to the practice or amount of such charges. He refers us to the documentation which indicates the significant time and costs necessarily incurred by the Respondent in progressing the matter from the initial survey through consultation to completion of the works including project management and clerk of works. He adds that only a proportion of the management costs relates to the "disputed works". Conscious of the fact that the parties had provided nothing in the way of evidence and very little in the way of argument either to justify or to challenge the charge, we therefore invited them to make further

submissions and provide evidence. In his response, Mr Sharples argues that the amount of the management charge is part of the question of reasonableness of the costs generally and that the reference in paragraph 6.4 of the Details of Claim (B1 T1 P13) quoting the clause in the lease which refers to the management charge constitutes an indication that the subject matter of that clause was an issue. Further, the statement of Dr James dated 13th February 2014 and directed to be exchanged by the 14th February 2014 at paragraph 20, (B1 T2 P6) and paragraphs 24, 25 and 28 (B1 T2 P8) refers to the administration charge being added to the contract price which could indicate that the Applicants regarded both the building cost and the management cost as being in issue. Mr Sharples had also raised it in his skeleton argument. The Respondent had had the opportunity to ask its own witnesses about it and yet the first objection to the matter being raised was made a week or more after the close of the oral hearing. Mr Britton made no further comment in his further submissions.

93 We accept Mr Sharples' argument that the management charge had been flagged up as an issue. We also feel that on the balance of prejudice, it would not be in the interests of justice to shut the Applicants out from making their case. Clarification could have been sought during the three day hearing. The Respondent's objection could have been made at the time of the closing speeches. Both parties were given the opportunity to present their respective arguments and if necessary to adduce further evidence. It is surprising that despite the amount of money involved, neither party pursued this particular element of the service charge with more vigour, although we accept that there were issues of the time available and the costs involved.

94 The management charge in the original breakdown totals £64,097.50. That is the sum used in the calculation of the individual service charges. However, there is nothing in the Applicants' evidence, submissions or arguments which indicates to us whether the challenge relates to the management charges in general or specifically those management costs relating to the "Disputed Works". The Details of Claim (at B1 T1 P18) twice refer to the Applicants' contributions "by way of service charge towards the cost of the Disputed Works". The Disputed Works are in effect the EWI. Mr Sharples uses regularly uses the word "works" to mean EWI in his skeleton argument and at paragraph 46 he refers to "8% of the cost of the works". In paragraph 78 of his written submissions which relates to the management charge of 8%, Mr Sharples specifically states that "Curtins advised on the works…" Curtins only dealt with the issue of the walls of the Property and the EWI. It was not concerned with the roof or the windows. Mr Britton has evidently taken the application to relate to the management charge associated with the EWI. At paragraph 37 of his submissions he refers to the sum of £22,829.95 which is shown in the joint experts agreed apportionment as being related to the EWI only. At paragraph 40, he adds that "only a proportion [of the time and costs progressing the contract works] will relate to the 'disputed works'". Mr Sharples did not contradict this in his closing submissions.

95 In our view, the Applicants are entitled to raise the question of the management charge, but only in respect of the Disputed Works, ie the EWI. If the Applicants had intended the application to extend to the management charge relating to the windows or the roof, it was not clear to us, nor was it clear to the Respondent. It is a matter of natural justice that a respondent is entitled to know the nature and extent of the case being made against him/her. When parties are unrepresented, we are often faced with applications and responses where cases are "pleaded" in general terms only, but in this case, the Applicants are represented by experienced and reputable Solicitors and Counsel and the case was pleaded in considerable detail. If the issue had been intended to extend to the management fee charged for the supervision of the windows and roof, it could have said so in the Details of Claim the skeleton argument or the submissions. It did not.

96 The obligation to pay the administrative and management charges is governed by the lease. As referred to in paragraph 91 above, the charges must relate to the cost of the works the Respondent is required to do under the terms of the lease. We have found that the EWI was not chargeable for the reasons set out above. It must therefore follow that the management fee is also not chargeable. If it were to be found that the costs of EWI were chargeable under the terms of the

lease, but, as we have also determined, not reasonably incurred, we would also determine that the administrative and management charges were likewise not reasonably incurred. After all, if it is not reasonable for the Respondent to have incurred the cost of the EWI, it cannot be reasonable for it to pass on the costs of managing the contract giving rise to those unreasonably incurred costs.

SECTION 20C

97 The Applicants have applied for an order under section 20C of the Act that the Respondent's costs incurred in connection with these proceedings are not to be charged to them through their service charges. Mr Britton accepted that if the Applicants were successful in their contention that the costs of EWI were either not chargeable under their leases or otherwise not reasonably incurred, it would be reasonable for such an order to be made. Given our determination above, we therefore order that all the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants.

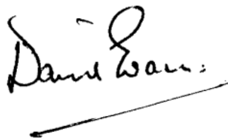
SUMMARY

98 (a) We have determined:

- that the costs in the sum of £285,374.40 being the costs of EWI were not costs recoverable through the service charge provisions of the Applicants' leases;
- that such costs were not reasonably incurred;
- that the costs in the sum of £22,829 being the Respondent's administrative and management fees in relation to the EWI were not costs recoverable through the service charge provisions of the Applicants' leases;
- that such costs were not reasonably incurred.

(b) We have made an order under Section 20C of the Act.

DATED this 11th day of July 2014



CADEIRYDD/CHAIRMAN